



November 28, 2017

Via Regulations.gov

U.S. Environmental Protection Agency
Mail Code: 4203M
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Comments in Response to Request for Written Recommendations on Step Two Rulemaking to Define “Waters of the United States,” Docket EPA-HQ-OW-2017-0480

Dear Sir or Madam,

The GPA Midstream Association (“GPA Midstream”) appreciates the opportunity to provide recommendations to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (“Corps”) (collectively, “the Agencies”) to revise the Clean Water Act regulations defining “waters of the United States.” 82 Fed. Reg. 34,899 (July 27, 2017).

To date, the Agencies have prudently proposed to rescind the Agencies’ last attempt to revise the “waters of the United States” definition and restore the 1986 version of the crucial Clean Water Act term. 82 Fed. Reg. 34,899 (July 27, 2017). Importantly, the Agencies have acknowledged that rescinding the “Clean Water Rule” is only “Step One” in defining “waters of the United States” – and that the Agencies must also complete “Step Two” by promulgating a new definition to guide landowners across the country. GPA Midstream supports the Agencies’ two step approach, including the Agencies intention to propose a new definition that conforms to the plurality opinion of the Supreme Court’s decision in Rapanos v. United States, 547 U.S. 715 (2006).

As detailed in these comments, GPA Midstream urges the Agencies to consider three key principles in formulating a new definition of “waters of the United States” under Step Two that are consistent with the Rapanos plurality opinion.

- First, the categories of “waters” should be easy to understand for those potentially subject to regulation and easier for courts to apply. This will require a more modest view of federal jurisdiction than the Agencies have historically taken.
- Second, the Agencies should recognize the dominant role of the States, assigned by the Congress and the Constitution, in regulating land and intra-state water resources.

- Third, the federal government should regulate privately owned property with a light hand, seeking to avoid unnecessary costs, delays, and the diminution of property values.

GPA Midstream believes that the Rapanos plurality opinion appropriately adheres to these key principles and guides the outer limits of how the Agencies may interpret the “waters of the United States.” If faithfully applied, the boundaries of the plurality opinion will be consistent with Congressional intent, the goals of the Clean Water Act, and a regulatory environment that embraces clear standards avoiding regulatory uncertainty, agency overreach, and unnecessary costs and delays.

The Midstream Sector

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 100 corporate members of all sizes that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as “midstream activities.” These midstream activities can be generally divided into five different functions, although many of GPA Midstream’s member companies fulfill multiple functions.

Gathering. Once a gas company drills a well and extracts natural gas, gathering lines transport that gas to a processing plant. Gathering lines, which make up a gathering system in an area of natural gas development, are a network of small-diameter, low pressure pipelines. GPA Midstream’s members operate hundreds of thousands of miles of gathering lines. Without the installation of these gathering lines, a well must be shut-in or the gas flared.

Processing. Raw natural gas from wells must be processed to meet regulations and commercial pipeline standards. This removes water, hydrogen sulfide, and other non-methane hydrocarbons to produce pipeline quality “dry gas” that can be used as fuel. Valuable natural gas liquids (“NGLs”) are among the materials removed through processing. These NGLs include natural gasoline, butane, iso-butane, propane, and ethane. GPA Midstream members account for more than 90 percent of all NGLs extracted from produced gas in the United States.

Storage. Processed natural gas may be stored in underground facilities until withdrawn during periods of peak demand, such as during the winter home heating season.

Transportation. Pipelines provide the safest method for transporting large quantities of processed natural gas significant distances. From gathering systems, to large transmission pipelines, to distribution pipeline systems, GPA Midstream’s members use these pipelines to transport gas from the well head to homes and businesses.

Marketing. Midstream companies also market the natural gas and NGLs extracted through natural gas processing, matching available supplies with buyers.

The midstream industry supports the development of new gas wells, meaning that midstream infrastructure must keep pace with that development. Drill rigs can deploy rapidly to an area or change drilling schedules in response to well test results, requiring midstream companies to quickly follow with new gathering lines, processing plants, and compression stations. Typically, these projects can be designed, constructed, and begin operations in less than a year, with modular

equipment deployed in even less time. However, Clean Water Act permitting – or even negotiations regarding the need for permits – can take far longer. Delays through slow permitting timeframes, changes to engineering and design, and regulatory uncertainty can cause excessive and unnecessary costs to project development and can even lead to the cancellation of vital infrastructure projects. This means that the midstream industry places a premium on regulatory certainty, simplicity, and speed. For these reasons, GPA Midstream believes that in defining “waters of the United States” under “Step Two,” the Agencies should largely rely upon the comparatively simple, easy to understand rules laid out by the Rapanos plurality opinion.

Background

The Clean Water Act prohibits discharges of pollutants into “navigable waters,” a term defined in the act to mean “the waters of the United States, including the territorial seas.” 33 U.S.C. §§ 1362(12), 1362(7). The Clean Water Act leaves it to the implementing agencies to define the term “waters of the United States” in regulations, which the EPA and the Corps have done several times.

Before Congress passed the Clean Water Act, the “navigable waters of the United States” was well known to mean those interstate waters “navigable in fact” or susceptible to being made navigable. The Daniel Ball, 10 Wall. 557, 563 (1871). This served as the Corps’ initial definition of “navigable waters” under the Clean Water Act. 39 Fed. Reg. 12,119 (April 3, 1974). Subsequently, a district court judge declared, without explanation in a one page order, that Congress intended the term “the waters of the United States” to assert “federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution” and invalidated the Corps’ definition. Natural Resources Defense Council, Inc. v. Callaway, 392 F.Supp. 685, 686 (D.D.C. 1975).

The Corps subsequently adopted increasingly expansive interpretations of its Clean Water Act jurisdiction. Although the U.S. Supreme Court upheld the regulation of “wetlands adjacent to other bodies of water over which the Corps has jurisdiction,” United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985), the Court pushed back the Corps’ perception of “waters of the United States” as a virtually unlimited grant of power in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (“SWANCC”) 531 U.S. 159 (2001) and Rapanos v. United States, 547 U.S. 715 (2006). Nonetheless, EPA and the Corps seized upon Justice Kennedy’s “significant nexus” rationale in the Rapanos case and expanded the scope of “waters of the United States” to an unprecedented breadth in their 2015 joint rule making. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (“2015 Rule”). As a result, the 2015 Rule was laden with vague terms, narrow and impractical exemptions, and infringed upon the States’ traditional powers over land regulation.

Thirteen States, joined by other interested parties, challenged the 2015 Rule and moved for a stay of the Rule pending review. The U.S. District Court for the District of North Dakota ruled that, under either a “substantial likelihood of success on the merits” or “fair chance of success” standard, a stay of the 2015 Rule for those 13 States was warranted. North Dakota v. U.S. EPA, 127 F. Supp. 3d 1047 (D.N.D. 2015). In a separate challenge, the Sixth Circuit, after finding “a substantial possibility of success on the merits,” granted industry and State petitioners’ request for a nationwide stay of the 2015 Rule pending review. In re: Clean Water Rule, 803 F.3d 804, 807 (6th Cir. 2015). While the Sixth Circuit challenge is now before the U.S. Supreme Court to decide

which jurisdiction should hear challenges to the 2015 Rule, the President issued Executive Order 13,778 on Feb. 28, 2017 ordering the Agencies to review the rule with an eye towards revising the definition of “waters of the United States” “in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States, 547 U.S. 715 (2006)” (hereinafter “the plurality opinion”). 82 Fed. Reg. 12,497 (Mar. 3, 2017).

Since the Executive Order, the Agencies’ proposed to repeal the 2015 Rule and reinstate the regulatory definitions of “waters of the United States” “as they existed prior to the promulgation of the stayed 2015 definition” and “informed by applicable agency guidance documents.” 82 Fed. Reg. 34,899, 34,900 (July 27, 2017). Although GPA Midstream agrees with this proposed rescission of the 2015 rulemaking, we also agree with the proposed rule’s acknowledgement that the prior regulatory regime lacked “clarity and certainty on the scope of the waters protected by the CWA.” Id. at 34,901. In other words, the Agencies’ interpretation of “waters of the United States” already involved significant uncertainties prior to the 2015 Rulemaking. Therefore, GPA Midstream supports the Agencies’ proposed “second step: A substantive review of the appropriate scope of ‘waters of the United States.’” Id. As explained below, GPA Midstream supports a definition of “waters of the United States” that is more modest in scope than the Agencies pre-2015 Rule interpretations, in order to provide added regulatory certainty, simplify the process of obtaining Clean Water Act permits for midstream infrastructure projects, and preserve State authority over land use and development.

Simplified Categories of Federally Regulated Waters that Recognize Limited Federal Authority

The importance of the Agencies’ definition of “waters of the United States” cannot be overestimated as it defines the extent of Clean Water Act regulation under several programs. These include the establishment of State water quality standards under Section 303(a); the establishment of total maximum daily loads for impaired waters under Section 303(d); the need to obtain National Pollutant Discharge Elimination System permits, including individual, general, and storm water permits, under Section 402; oil spill reporting requirements under Section 311; and wetlands dredge and fill permitting under Section 404. Thus, where the definition of “waters of the United States” lacks clarity then each of these regulatory programs lack clarity. Similarly, where ambiguities allow for inconsistent or expansive claims of jurisdiction, then each of these regulatory programs are subject to such inconsistencies and expansions in scope.

Therefore, the definition of “waters of the United States” should clearly describe the categories of “waters” subject to the Clean Water Act while both honoring the limiting principles built into the Act itself and recognizing the practical realities of carrying out the Act’s purpose. GPA Midstream believes that three key principles should inform the Agencies’ definition:

- The categories of “waters” should be easy to understand to those potentially subject to Clean Water Act regulation and avoid significant controversies regarding the limits of Congress’ intent and Constitutional authority. Given the significant economic costs of over-regulation, an expansive interpretation of “waters of the United States” should be avoided unless required by a future legislative amendment.
- The categories of “waters” should honor “the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use ... of land and water

resources....” 33 U.S.C. § 1251(b). States, and many local jurisdictions, have their own agencies to regulate waters, wetlands, and land use. The Agencies should be mindful that the lack of federal regulation does not mean that waters or wetlands are “unregulated.”

- The federal government should tread lightly in regulating the development of private property due to the substantial costs, delays, and diminution of value incurred by the federal regulation of “waters of the United States.”

With these principles in mind, GPA Midstream proposes five categories of “waters of the United States.” The first three would be the following:

1. Waters currently navigable-in-fact, or may be susceptible to use, in navigation;
2. The territorial seas; and
3. All interstate waters, including interstate wetlands.

The regulation of these classes of waters are wholly uncontroversial. The “navigable waters” and the “territorial seas” are expressly included in the Act’s definition of “navigable waters,” 33 U.S.C. § 1362(7), and the regulation of interstate waters and wetlands accords with the U.S. Supreme Court’s long-standing view of the federal authority. The Daniel Ball, 10 Wall. 557, 563 (1871). These classes of waters are also within the heart of Congress’ Commerce Clause power to regulate the channels and instrumentalities of commerce. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (Clean Water Act rests on Commerce Clause power). Further, these three categories of waters are beyond the ability of any single State to effectively regulate, making federal regulation a necessity.

The two additional categories of “waters” would be the following:

4. Tributaries of navigable-in-fact waters, the territorial seas, and interstate waters; and
5. Wetlands proximately adjacent to these waters.

These two classes of waters have been the source of significant controversy and litigation due to the Agencies’ historically expansive interpretation. Under the Rapanos plurality opinion, however, they are more strictly construed.

Tributaries

The Agencies’ interpretation of “tributaries” – ordinarily regarded as streams or creeks flowing to larger rivers or streams – has long been expanded to include features that no common person would imagine to be a “tributary,” such as dry ditches, drains, storm sewers, dry arroyos, or “virtually any feature over which rainwater or drainage passes and leaves a visible mark – even if only ‘the presence of litter and debris.’” Rapanos, 547 U.S. at 725 (quoting 33 C.F.R. § 328.3(e)); see also id. (criticizing assertion of jurisdiction over “an ‘arid development site,’ located in the middle of the desert, through which ‘water courses ... during periods of heavy rain’” as a “tributary”) (quoting Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1118 (9th Cir. 2005) (ellipsis in original)). No person potentially subject to Clean Water Act regulation could possibly

understand the extent of the Agencies' interpretation of "tributary" without the aid of sophisticated consultants and legal counsel. Even with such very expensive assistance, there is little certainty as definitions "vary somewhat from" Corps "district to district because 'the definitions used to make jurisdictional determinations' are deliberately left 'vague.'" Rapanos, 547 U.S. at 727 (quoting U.S. General Accounting Office, Report to the Chairman, House Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Government Reform, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, GAO-04-297 (Feb. 2004) at 26).

Even if the enormous breadth of the Agencies' traditional interpretation were commonly known, there is no contention that Congress intended the Clean Water Act to apply to such ditches, storm drains, arroyos, and desert "water courses" through the regulation of tributaries to navigable-in-fact waters.¹ Nor is there evidence that Congress intended businesses or individuals to be subject to such far-reaching regulation carrying the potential for criminal penalties. For instance, an expansive view of "tributaries" makes every storm drain in a residential neighborhood into a "waters of the United States," meaning that anyone who adds any "pollutant" to the storm drain (leaves, dirt, soapy water from washing cars, lawn fertilizer runoff) is shielded from criminal penalties only by the discretionary benefaction of prosecutors. Although this may sound absurd at first glance, the Rapanos plurality opinion lists several cases featuring interpretations of "tributary" that are equally absurd. 547 U.S. at 725-729.

"The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters.'" United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 243 (1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)). Here, the expansive view of "tributary," encompassing all manner of frequently dry constructs and features, bears little resemblance to the word's common meaning: "A river or stream flowing into a larger river or stream." Webster's II New Riverside University Dictionary (1984) at 1232. The Agencies have never demonstrated how interpreting "tributary" in accordance with this plain meaning would result in bizarre outcomes "demonstrably at odds with the intentions of the drafters." On the contrary, the Agencies' traditionally broad interpretation expands federal regulation of land to such a degree as to be "demonstrably at odds" with Congress' explicit policy to "recognize, preserve, and protect the primarily responsibilities and rights of States," 33 U.S.C. § 1251(b), and to push (or exceed) the constitutional limitations of Congress' Commerce Clause authority.

For these reasons, the Agencies should define "waters of the United States" as encompassing only those non-navigable "tributaries" that constitute relatively permanent natural waters aligning with the plain dictionary meaning of "tributary." See Rapanos, 547 U.S. at 732-33. This would rightly exclude ephemeral streams and intermittent washes that flow only for short periods of time, such as during or just after rainfall. See id. at 739 (Clean Water Act does not cover

¹ Congress never directly authorizes the regulation of tributaries in the Clean Water Act. "Tributary" or "tributaries" are only mentioned indirectly as regulated waters in a few specialized circumstances. See 33 U.S.C. §§ 1252(c)(3) (defining "basin" to include "rivers and their tributaries"); 1267(g)(2) (establishing grants for Chesapeake Bay "cooperative tributary basin strategies"); 1275(a)(4) (defining "Lower Columbia River Estuary" as including "tidally influenced portions of tributaries to the Columbia River in that region.").

“channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”). The plain meaning of “tributary” would also classify trenches, ditches, arroyos, culverts, desert washes, and other natural and constructed features as “lands” outside of the scope of the Clean Water Act where they would be subject to State and local jurisdiction. Further, such a definition would greatly limit the definitional morass identified by the Rapanos plurality where any “ditch, channel, tunnel, [or] conduit” is incomprehensibly regulated as both a “water of the United States” and a “point source” under 33 U.S.C. § 1362(4) that discharges to a water of the United States. See Rapanos, 547 U.S. at 735-36. Limiting the definition of “tributary” so that it means a natural water course with a direct surface connection to a navigable-in-fact waters will provide greater certainty, clarity, and faithfulness to the intent of Congress.

Lastly, one aspect of the since-rescinded 2015 Clean Water Rule that may be worth salvaging is the section of the rule that adds regulatory certainty by describing features that are categorically excluded from the definition of waters of the United States. The Agencies should retain this concept in their Step Two rulemaking and include a list of water and drainage features, such as groundwater, puddles, gullies, and swales that can never be considered tributaries or other waters of the United States. Such a list should clearly describe these water and drainage features to allow the use of these exclusions without the need for regulated parties to grapple with ambiguities, subjective interpretations, or excessively stringent conditions making their use impracticable.

Proximally adjacent wetlands

The U.S. Supreme Court countenanced the regulation of wetlands “adjacent to a navigable waterway” in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985). There, the Court stated that “it may appear unreasonable to classify ‘lands,’ wet or otherwise, as ‘waters’” but it permitted such a deviation from the clear language of the statute because identifying where “water ends and land begins ... is often no easy task” as “between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs ... a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land.” Id. at 132. In other words, the regulation of wetlands is only permissible when it is objectively difficult to draw the line where a “water” ends. See Rapanos, 547 U.S. at 740 (“The difficulty of delineating the boundary between water and land was central to our reasoning in” Riverside Bayview). The Court subsequently made this clear in SWANCC where it rejected the Corps’ attempt to assert Clean Water Act jurisdiction over “ponds that are not adjacent to open water” as such an extension of federal jurisdiction is not one “the text of the statute will ... allow.” 531 U.S. at 162-165, 168; see also Rapanos, 547 U.S. at 742 (“only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and covered by the Act.”).

The Court’s limitation of only regulating wetlands (1) “adjacent” to (2) navigable-in-fact waters has been largely ignored. Instead, the Agencies and lower courts have discarded this critical jurisdictional link by regulating wetlands adjacent to various non-navigable features, such as ditches, drains, or culverts. This rationale has been based on vague and subjective terms like “significant nexus” or “hydrologic connection” that are wholly absent from the Clean Water Act. See, e.g., Treacy v. Newdunn Assocs, LLP, 344 F.3d 407, 409-10 (4th Cir. 2003) (regulating

wetlands due to “natural hydrologic connection” to navigable-in-fact river via intermittent silt run-off to man-made ditches 2.4 miles away from the river). As a result, the Agencies have extended their regulatory reach over “wetlands that were ‘adjacent’ to remote traditional navigable waters,” Rapanos, 547 U.S. at 740, leading to illogical decisions whereby wetlands were “adjacent” to navigable-in-fact waters many miles away.

United States v. Deaton, 332 F.3d 698 (4th Cir. 2003) is just one of many examples where individuals were held civilly or criminally liable under convoluted notions of “adjacency.” There, the Corps asserted jurisdiction over a property “adjacent to” a roadside ditch that “takes a winding, thirty-two-mile path to the Chesapeake Bay.” Id. at 702; see also Rapanos, 547 U.S. at 720, 729 (defendant Rapanos’ fields were 11 to 20 miles away from the nearest navigable water but “adjacent to” man-made drains and ditches); Precon Dev. Corp., Inc. v. U.S. Army Corps of Engr’s, 633 F.3d 278, 282 (4th Cir. 2011) (jurisdiction established over wetlands through series of drains and ditches running three to four miles to a navigable-in-fact water); Stillwater of Crown Point Homeowner’s Ass’n, Inc. v. Kovich, 820 F.Supp. 2d 859, 900 (N.D. Ind. 2011) (“the wetlands at issue are not themselves adjacent to the Little Calumet River but rather are adjacent to a tributary to a tributary”). None of these cases presented the “line-drawing” quandary in Riverside Bayview, involving “the problem faced by the Corps” in “choos[ing] some point at which water ends and land begins.” 474 U.S. at 132. There, the U.S. Supreme Court acceded to the Corps “classify[ing] ‘lands,’ wet or otherwise, as ‘waters’” because, in that case, separating “open waters and dry lands” was “far from obvious.” Id. None of the cases cited above, however, involved the same continuity from open water to marshy wetlands. Instead, these cases saw the assertion of jurisdiction over largely dry lands because they were adjacent to largely dry ditches even though the two were easily separated at a glance.

To remedy this confusion, the Agencies should revise its definition of “adjacent” to account for barriers that separate “waters of the United States” from wetlands. As the term “adjacent” is currently used in the Corps’ regulations, it means “bordering, contiguous, or neighboring.” 33 C.F.R. § 328.3 (c)(1). The problematic portion of the Corps’ definition, however, continues on to include “waters separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.” 33 C.F.R. § 328.3(c)(1). This expansive definition of “adjacent” entirely disregards the rationale of Riverside Bayview, which permitted the regulation of “‘lands,’ wet or otherwise” only where identifying the end of “waters” and the beginning of “lands” was “far from obvious.” 474 U.S. at 132. The types of barriers listed in the regulatory definition of “adjacent,” such as dikes, berms, and beach dunes, make that separation obvious and leave the Agencies without any justification under Riverside Bayview for regulating separated wetlands or other waters under the Clean Water Act. As demanded by the plurality opinion in Rapanos, the definition of “adjacent” should require a continuous surface connection between a navigable water and a wetland or other water, unbroken by such barriers. See 547 U.S. at 715.

Thus, even before the confusion wrought by the fractured Rapanos decision, the Agencies and many lower courts breached the limits of Riverside Bayview, extending the Clean Water Act well beyond the intent of Congress and possibly the extent of its Constitutional authority. In reformulating the definition of “waters of the United States,” the Agencies should remedy this overreach by interpreting the term “adjacent” in a way that hews closely to Riverside Bayview’s justification for regulating wetlands adjacent to navigable waters.

The Agencies Should Reject the “Significant Nexus” Test

The Agencies’ 2008 Guidance incorporated the “significant nexus” test as a fundamental guideline for defining Agency jurisdiction. See EPA and U.S. Army Corps of Engineers, “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States (Dec. 2, 2008) at 1 (“2008 Guidance”) (“The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water”). However, over ten years of experience have demonstrated that the “significant nexus” test failed to impose any intelligible limitations on Clean Water Act jurisdiction. If anything, the “significant nexus” test often allows for an expansion of federal jurisdiction for any variety of justifications. See, e.g., Stillwater of Crown Point Homeowner’s Ass’n, 820 F.Supp. 2d at 900 (“the wetlands at issue are not themselves adjacent to the Little Calumet River but rather are adjacent to a tributary to a tributary ... [h]owever, given the reasoning of Justice Kennedy’s concurrence and the resulting ‘significant nexus’ test, the Court finds that that ... Smith Ditch and the wetlands at issue” are waters of the United States “as a matter of law”); Benjamin v. Douglas, 673 F. Supp. 2d 1210 (D. Or. 2009) (finding “significant nexus” between non-navigable tributary and wetland in part because they both flooded a rifle range); United States v. Fabian, 522 F. Supp. 2d 1078 (N.D. Ind. 2007) (finding “significant nexus” because land was adjacent to a “navigable river” containing as little as nine-inches of water despite separation by a 15-foot high and 130-foot wide levee); see also Rapanos, 547 U.S. at 728 (“And even the most insubstantial hydrologic connection may be held to constitute a ‘significant nexus.’”). In fact, experience shows that the “significant nexus” test is far more subjective than the Agencies acknowledge as experienced professionals can consider the exact same data and come to contradictory opinions.

The vagueness of the “significant nexus” test, including whether it should be applied to both wetlands and tributaries, has spawned considerable division and confusion in the lower courts. Compare Tri-Realty Co. v. Ursinus College, 124 F. Supp. 3d 418, 466 (E.D. Pa. 2015) (non-navigable creek deemed to be jurisdictional tributary due to “significant nexus” via groundwater to another non-navigable creek) with Benjamin, 673 F. Supp. 2d at 1215 n.2 (“Justice Kennedy’s significant nexus test is inapplicable to determining the jurisdictionality of tributaries to waters of the United States”); see also Resource Prot. Council v. Flambeau Min. Co., 903 F. Supp. 2d 690, 714 (W.D. Wis. 2012) (collecting cases showing conflicts in how the “significant nexus” test should be used). Other courts have merely found the “significant nexus” standard to provide no help in determining Clean Water Act jurisdiction. United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (“Because Justice Kennedy failed to elaborate on the ‘significant nexus’ required, this Court will look to the prior reasoning in this circuit”); United States v. Robison, 521 F. Supp. 2d 1247, 1248 (N.D. Ala. 2007) (re-assigning case for re-trial, in part, because “I am so perplexed by the way the law applicable to this case has developed” after the Rapanos decision “that it would be inappropriate for me to try it again”).

One consequence of the “significant nexus” test is that courts are now finding Clean Water Act jurisdiction over groundwater contamination so long as a plaintiff can assert a plausible “hydrological connection” to any navigable water or tributary. Previously, two of the three U.S. Courts of Appeals to consider the issue rejected the notion of Clean Water Act jurisdiction over “discharges” to groundwater. D.E. Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001); Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir. 1994); but

see Quivira Mining Co. v. EPA, 765 F.2d 126, 129 (10th Cir. 1985) (isolated arroyos were jurisdictional due to filtration to aquifer which eventually flowed underground towards a spring and a river). The “significant nexus” test, however, has caused some courts to tack in the opposite direction, effectively asserting Clean Water Act jurisdiction over ground water pollution. See, e.g., N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 1000-1001 (9th Cir. 2007) (finding “significant nexus” in part because waste treatment pond “drains into the aquifer” and groundwater “reaches the River” though a hydrological connection); Tri-Realty Co. v. Ursinus College, 124 F. Supp. 3d 418, 466-67 (E.D. Pa. 2015) (one non-navigable creek deemed to be a tributary of another non-navigable creek despite the absence of any surface connection between them due to potential movement of groundwater); Hawaii Wildlife Fund v. County of Maui, 24 F. Supp. 3d 980 (D. Hawaii 2014) (finding underground injection well regulated under Safe Drinking Water Act was jurisdictional due to groundwater connection to ocean); Yadkin Riverkeeper v. Duke Energy Carolinas, 141 F. Supp. 3d 428 (M.D.N.C. 2015) (finding “hydrologic connection” between waste treatment pond and navigable water via ground water).

The “significant nexus” test has not only resulted in expanded federal jurisdiction and reduced regulatory certainty, the technical nature of the test significantly limits defenses against the Agencies in litigation. Where the Corps asserts that a wetland or ditch are subject to Clean Water Act jurisdiction because they “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters,” Rapanos 547 U.S. at 780, courts will likely defer to the Corps’ allegations. See Precon Dev. Corp. v. U.S. Army Corps of Engr’s, 984 F. Supp. 2d 538, 543-44 (E.D. Va. 2013) (whenever there is a disagreement between the Corps and defendants’ experts courts must side with Corps). Where litigation over the “significant nexus” test involves Clean Water Act citizen suits, pitting the experts of private plaintiffs against the defendant’s experts, it is nearly impossible to resolve a case short of settlement or trial as the disputed slate of highly technical facts make the dismissal of claims or summary judgment for either side inappropriate. This only serves to prolong the unnecessary costs and uncertainty for those potentially regulated under the “significant nexus” standard.

Due to all of these defects, the Agencies should reject Justice Kennedy’s “significant nexus” test in favor of the Rapanos plurality opinion. As explained by the plurality, the term “significant nexus” was created by the Court itself; it does not derive from the Clean Water Act and the Agencies are not bound by law to use this test. See Rapanos, 547 U.S. at 755 (“that phrase appears nowhere in the Act, but is taken from SWANCC’s cryptic characterization of the holding in Riverside Bayview.”). The ten year old “significant nexus” test has increased costs and delays, increased uncertainty, and dramatically expanded federal jurisdiction over all manner of lands, dry concrete ditches, drains, and other features that are properly left to State and local regulation.

The Practical Case for Simplicity

It “is deeply rooted in the American legal system” that “ignorance of the law or a mistake of law is no defense....” Cheek v. United States, 498 U.S. 192, 199 (1991). A corollary maxim is that due process requires “that an enactment [be] void for vagueness if its prohibitions are not clearly defined.” Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Yet, with respect to defining the “waters of the United States” – which defines a person’s obligation to comply with the Clean Water Act – vagueness and subjectivity have been the coin of the realm since long before

the “significant nexus” test. See Rapanos, 547 U.S. at 727. The “significant nexus” test has only exacerbated this difficulty, ensuring that nearly everyone is ignorant of what the law requires until they are informed by the Corps after an expensive and time consuming inquiry.

Even on its face, the “significant nexus” test is designed to preclude regulatory certainty, as Justice Kennedy himself describes the test as requiring “the Corps” to “establish a significant nexus on a case-by-case basis....” 547 U.S. at 779. This uncertainty was only exacerbated by the 2008 Guidance which defined a “significant nexus” as involving on an open-ended list of amorphous considerations that included “flow characteristics and functions,” “hydrologic factors,” such as the “volume, duration, and frequency of flow,” “certain physical characteristics” of tributaries, proximity of features to traditional navigable waters, and “ecological factors” that included the “potential of tributaries to carry pollutants and flood waters to traditional navigable waters,” and the “potential of wetlands to trap and filter pollutants or store flood waters.” 2008 Guidance at 7.

Legal complexity has long been accepted for heavily regulated industries requiring extensive capital, but the Clean Water Act is frequently applied to a “broad range of ordinary industrial and commercial activities.” Hanousek v. United States, 528 U.S. 1102, 1103 (2000) (Thomas, J.) (dissenting from denial of certiorari). Controversies over the extent of Clean Water Act jurisdiction can ensnare the construction of virtually any project, including “lightly” regulated activities, as recently demonstrated in Sackett v. EPA, 132 S. Ct. 1367 (2012), where EPA demanded heavy civil penalties from a couple merely trying to build a home in an already developed residential neighborhood. Because small businesses and individuals, lacking the resources to deploy armies of consultants and lawyers, must understand their legal obligations under the Clean Water Act, the Agencies should pursue a straightforward definition of “waters of the United States” that can be commonly understood. This is all the more important because the Clean Water Act carries civil penalties up to \$51,750 per day and criminal penalties, including up to one year in prison and \$25,000 daily fines, for even negligent violations. 33 U.S.C. § 1319(c). Adopting a more restrained, common sense definition of “waters of the United States,” which avoids vague terms and complex exemptions, will increase regulatory certainty, allow for faster jurisdictional determinations and any necessary permitting, reduce costs to both the regulated parties and the Agencies, and make investment in development less risky.

Under the “significant nexus” test, absent an obviously navigable-in-fact waterbody, no person can determine whether or not a water of the United States is present on private property or whether that property is a jurisdictional wetland without lengthy, detailed, and expensive analyses by consultants and lawyers. See Rapanos, 547 U.S. at 780 (defining jurisdictional wetlands as those that “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”) (Kennedy, J., concurring). Significant time and money must be expended even in the case where there is no claim of federal jurisdiction. For instance, the court in Deerfield Plantation v. Army Corps of Engineers, 801 F. Supp. 2d 445, 454-55 (D. S.C. 2011) recounted that the Corps’ jurisdictional determination required a review of infrared aerial photographs, from 1994, 1999, and 2006, the Corps’ internal records, a U.S. Department of Agriculture soil survey for the county, records from the U.S. Geological Survey, a wetland inventory from the U.S. Fish and Wildlife Service, and two on-site inspections by Corps personnel.

All of this was required only for the Corps to determine that it lacked jurisdiction over most of the waterbodies on the property. Id. at 456.

Deerfield is not unusual. For instance, in United States v. Bailey, 516 F. Supp. 2d 998, 1008-1009 (D. Minn. 2007), federal jurisdiction rested upon 46 soil samples, examination of vegetation, plant species samples, tree counts, an expert ecologist's opinion on changes in vegetation, site visits, and photographs. There, the court actually scolded the defendant because "[h]e obviously lacks the expertise necessary in identifying wetlands" and "he has failed to show that any of his observations are relevant to determining to what extent the Site is a wetland...." Id. in 1009. In other words, the court held that it was foolish for the defendant to even attempt to understand whether or not he must comply with the Clean Water Act. Similarly, the court dismissed the defendant's reliance on the State environmental agency's determination that the property was not a jurisdictional wetland because it held that none of the State agency personnel had appropriate expertise. Id. at 1009-1010.

GPA Midstream believes that the Rapanos plurality opinion comes as close as possible to a simple and understandable bright-line test that engenders a common understanding of one's legal obligations. There, the plurality relied on a dictionary definition of "waters" to conclude that the Clean Water Act is limited to "relatively permanent, standing or flowing bodies of water" that people commonly understand to include streams, rivers, ponds, and lakes. 547 U.S. at 732-33. The plurality was careful to include some caveats, such as including seasonal creeks that dry up for some months, id. at 732 n.5, and those adjacent wetlands that share a surface water connection, per Riverside Bayview. But this would exclude the most contentious features, such as "ephemeral streams," "wet meadows," "storm sewers and culverts," "directional sheet flow during storm events," drain tiles, concrete drainage ditches, and dry arroyos and washes. Id. at 734. Such a definition is consistent with EPA's current views of Clean Water Act jurisdiction. See Arianna Skibell, "Rule rollbacks already making a difference – Pruitt," *E&E News* (Oct. 30, 2017) (Administrator Pruitt criticizing Clean Water Act jurisdiction over "puddles and dried creek beds"). More importantly, it would increase regulatory certainty while reducing the costs and delays necessary for elaborate studies of a potential "significant nexus."

States and the Congress are the Ultimate Backstop

Avoiding an excessively broad definition of "waters of the United States" will not leave development activities "unregulated." States and local jurisdictions have permitting requirements activities involving the development of non-jurisdictional streams and wetlands. Despite the Bailey court's summary dismissal of State agency personnel, 516 F. Supp. 2d at 1009-1010, these agencies are charged with understanding their State's waterways and their attendant ecological functions. Further, they are better suited to balancing economic development with environmental protection. The role of these agencies were explicitly recognized and preserved by Congress in the Clean Water Act: "It is the policy of Congress to recognize, preserve, and protect the primarily responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b). This is not only the express intent of Congress, it is in keeping with the limitations on federal power. As the Rapanos plurality noted, "[r]egulation of land use, as through the issuance of the development permits sought by petitioners ... is a quintessential

state and local power” and the Agencies should not act “as a de facto regulator of immense stretches of intrastate land” akin to “a local zoning board.” 547 U.S. at 738.

As the Rapanos plurality inveighed, the Agencies’ historically broad views of federal jurisdiction have crowded out State and local regulation of lands and waters in the process.

The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act – without any change in the governing statute ... In the last three decades, the Corps and the [EPA] have interpreted their jurisdiction over ‘the waters of the United States’ to cover 270-to-300 million acres of swampy lands in the United States – including half of Alaska and an area the size of California in the lower 48 States. And that was just the beginning. The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit – whether man-made or natural, broad or narrow, permanent or ephemeral – through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated ‘waters of the United States’ include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years.

547 U.S. at 722. Notably, this was written before the Agencies and lower courts expanded Clean Water Act jurisdiction even further under the “significant nexus” test.

One of the plurality’s key observations is that this expansion occurred “without any change in the governing statute.” Congress has never moved away from the Clean Water Act’s finding that States have the “primary role” in regulating lands and waters or its structure of cooperative federalism. Given the severe adverse economic impacts of a broad federal jurisdiction and the general principle that agencies should tread lightly in regulating private property, absent a clear statement from Congress, the Agencies should adopt a circumscribed view of federal jurisdiction under the Clean Water Act. Rapanos, 547 U.S. at 738 (“We ordinarily expect a ‘clear and manifest’ statement from Congress to authorize an unprecedented intrusion into traditional state authority. The phrase ‘the waters of the United States’ hardly qualifies.”) (citation omitted). If Congress requires a broader scope of federal jurisdiction than that currently encompassed in the Clean Water Act, then it may amend the statute to more clearly express the scope of that jurisdiction with all of the broad compromises and political accountability attendant to legislation.

Conclusion

GPA Midstream believes that a simplified and easier to understand definition of “waters of the United States” is more in-line with the intent of Congress and U.S. Supreme Court precedent than under current law and, therefore, legally defensible. The importance of crafting a definition that reduces regulatory uncertainty, permitting timelines, and costs to the success of energy infrastructure projects cannot be understated. GPA Midstream looks forward to working with the Agencies in moving towards this goal.

Respectfully submitted,

A handwritten signature in black ink that reads "Matthew Hite". The signature is written in a cursive style with a large initial 'M' and a stylized 'H'.

Matt Hite
Vice President of Government Affairs
GPA Midstream Association