September 23, 2017

Environmental Protection Agency
Attn: Donna Downing, Office of Water
1200 Pennsylvania Avenue, NW
Office of Water, 4504-T
Washington, DC 20460

Via e-filing on www.regulations.gov

Re: Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, EPA-HW-OW-2017-0203

Dear Ms. Downing,

GPA Midstream Association ("GPA Midstream") appreciates this opportunity to submit comments to the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers (collectively, "the agencies") regarding its proposed rule to initiate the first step in reviewing and revising the definition of "waters of the United States." 82 Fed. Reg. 34,889 (July 27, 2017). 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." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead, as well as the extraction for sale of natural gas liquid products ("NGLs") such as ethane, propane, butane, and natural gasoline. GPA Midstream members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. Our members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs.

Summary

GPA Midstream strongly supports the agencies' first step in the reviewing and revising the definition of "waters of the United States" by re-codifying the *status quo*, as it existed before the agencies promulgated the "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37,054 (June 29, 2015) (the "2015 Rule"), and as it was restored by the judicial stay imposed in *In re: U.S. Department of Defense*, 803 F.3d 804 (6th Cir. 2015). Re-codifying this regulatory *status quo* is a sound first, interim step, because it provides more clarity, certainty and predictability than the 2015 Rule. Moreover, assuring the *status quo* remains in place is far preferable to the uncertainty and confusion that would result if the Sixth Circuit's stay is lifted or vacated and the legality of the 2015 Rule was subject to differing and conflicting determinations by the U.S. District Courts.

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I. The *Status Quo* Provides More Clarity, Certainty, and Predictability to the Midstream Industry than the 2015 Rulemaking

The agencies have proposed a two-step approach to revise the definition of the waters of the United States. Step one is an interim step. It would codify the current legal *status quo,* by restoring the definition and related interpretations the agencies had used before the 2015 Rule. This approach would provide certainty now, while affording the agencies sufficient time to implement step two and develop a revised definition. We urge the agencies to move forward with this two-step process.

Foremost, the legal *status quo* is superior to the 2015 Rule. Although the *status quo* is itself imperfect and needs refinement, it provides far more clarity, certainty, and predictability to the midstream industry than the agencies' definition of "waters of the United States" in the 2015 Rule. In that rulemaking, the agencies required 75 pages of single-spaced, triple-column text to explain the definition of a single phrase. The phrase "waters of the United States," in turn, required the interpretation of many other nebulous phrases, such as "significant nexus," "hydrological connections," "adjacent waters," "isolated" waters, similarly situated" waters, and many others. While the agencies had sought to provide more clarity and certainty, the end result was an unintelligible, complex rule that is wholly unsuitable for use in every day applications. Hence, reverting to the pre-2015 Rule while the agencies revisit these issues is a sound and prudent approach.

Further, as the proposal recognizes, the agencies must implement step one promptly to provide needed certainty to interested parties. As explained in the proposed rulemaking's preamble, 82 Fed. Reg. 34,902-03, regulated industry currently operates in a precarious environment. If the Sixth Circuit's stay of the 2015 Rule were to expire, or if the U.S. Supreme Court finds that the Sixth Circuit lacked jurisdiction over challenges to the 2015 Rule, GPA Midstream's members would face different regulatory regimes depending upon where their operations were located. The U.S. District Court in North Dakota enjoined enforcement of the 2015 Rule in 13 States, other U.S. District Courts declined to enjoin the 2015 Rule, and still other U.S. District Court cases are pending and awaiting the Supreme Court's ruling. Absent action by the agencies, this inconsistent patchwork of different regulatory regimes would exist for years until all of the challenges and subsequent appeals were eventually resolved. Therefore, GPA Midstream strongly supports this proposal to reinstitute the pre-2015 Rule *status quo* by regulation.

II. The Agencies Must Continue to Work Towards a Clear Definition of "Waters of the United States"

At the same time, GPA Midstream would like to emphasize its support for the agencies to move forward with step two. As the proposal correctly recognizes, the U.S. Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) and *Rapanos v. United States*, 547 U.S. 715 (2006), left the *status quo* interpretation of "waters of the United States" with its own ambiguities and overreach by the agencies. *See* 82 Fed. Reg. at 34,901 ("the *SWANCC* and *Rapanos* decisions limited the way the agencies' longstanding regulatory definition of 'waters of the United States' was implemented"). Hence, although the *status quo* is far superior to the 2015 Rule, the agencies should continue

their regulatory action to craft a definition of "waters of the United States" that provides clarity and certainty to the regulated public. A future revised definition should not require the hyper-specialized knowledge and significant third-party resources that has been traditionally required to decipher questions of federal Clean Water Act jurisdiction. Those complexities impose unnecessary burdens on the public and divert limited resources from productive development efforts. This requires the agencies to work towards a clear, commonsense definition of "waters of the United States" that can be accessed, understood, and implemented by the general public.

GPA Midstream appreciates the opportunity to submit these comments on the agencies' proposal to re-codify the pre-2015 Rule regulatory definition of "waters of the United States" and is standing by to answer any questions that the agencies may have.

Respectfully submitted,

Matthew Hite
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GPA Midstream Association

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