GPA Midstream OMB 12866 Meeting – November 8, 2021
EPA/Corps Plan to Revise Definition of "Waters of the United States"

GPA Midstream has served the U.S. energy industry since 1921 and has approximately 70 corporate members that directly employ more than 75,000 employees that are engaged in a wide variety of services that gather, move, and process vital energy products such as natural gas, natural gas liquids refined products, and crude oil from production areas to markets, commonly referred to as "midstream activities," across the U.S. The work of our members indirectly creates or impacts an additional 450,000 jobs across the U.S. economy.

GPA Midstream understands the administration's present intention is to propose to revoke the EPA and the Corps' Navigable Waters Protection Rule as Step One in a yet another new process in the agencies' efforts to define the waters of the United States. As our members may need to obtain permits under the Clean Water Act to conduct midstream activities, such as installing gathering lines from production sites that can span many miles, GPA Midstream is very interested in how the federal government interprets the Act and its requirements.

In considering how to proceed, we would highlight three points:

1. The agencies have not published any information that suggests there have been any actual environmental impacts that require action because of the revised definition of "waters of the United States" under the 2020 Navigable Waters Protection Rule. The agencies should therefore pause this Step One for now and instead seek to gather data to evaluate whether the existing rule actually needs changing before moving ahead to change the rule. However, if the agencies are nonetheless intent on proceeding, we urge the agencies to ask for and evaluate actual data as part of the rulemaking process to assess whether a change is really warranted.

    - Simply deciding, as EPA determined when it issued the 2020 Navigable Water Protection Rule, that federal jurisdiction ought to be narrower does not mean that the 2020 Rule has resulted in waters or wetlands to environmental harm.

    - The two courts to vacate the definition *assumed* environmental harm without any evidence from either the plaintiffs or the agencies that the rule had resulted in or even that it was likely to result environmental harm.

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- After all, States have their own regulations of waters and wetlands. Anything withdrawn from federal jurisdiction falls under state jurisdiction.

- The 2015 "Connectivity Report" does not provide that foundation as it does not evaluate the effects of the 2020 Rule.

2. Any actions at this point in a Step One rule should adhere fully to the *County of Maui*'s warning to preserve state authority over groundwater.

    - States have extensive and effective regulations to address impacts to groundwater.

    - Exercising federal jurisdiction over non-point source discharges to groundwater would be a major deviation from the agencies' long-standing interpretation that states regulate groundwater pollution.

    - Moreover, other federal laws already address standards and potential impacts to groundwater – Safe Drinking Water Act, CERCLA and RCRA. There is no demonstrated need to try to add yet another layer of federal regulation.

3. GPA Midstream has not of course seen the Step One proposal, but to the extent it does include substantive requirements beyond merely going back to the pre-2015 regulatory framework, we urge the agencies to look at the 2020 rule and identify those practical provisions that provide a measure of certainty and common sense and retain those – and to avoid the kinds of complex and vague formulations found in the 2015 rule that required extensive resources and study for each jurisdictional determination.

    - More specifically, there are aspects of the Navigable Waters Protection Rule that the agencies should consider retaining in any Step One approach. For example, the agencies should retain or at least open for comment whether it should retain the practical approach taken in the NWP to address adjacent wetlands by requiring a surface connection between the navigable water and the wetland.

        - The Navigable Waters Protection Rule approach avoids the regulation of dry, concrete ditches miles away from any navigable water.

        - The 202 Rule also follows the legal guideposts the Supreme Court has long set – including the Supreme Court's *Riverside Bayview* decision, which marked the outer limits of Clean Water Act's authority over wetlands.

    - Similarly, there are aspects of the 2015 Clean Water Rule that the agencies should not attempt to revive.

        - For example, the 2015 Rule asserted jurisdiction over wide stretches of dry land that should not be covered by federal law.

            - Claiming federal jurisdiction over all land in a floodplain, "riparian area," or watershed with a "significant nexus" to navigable waters would give the agencies control over development and other activities

in massive areas of dry land. There was never any statutory authority for this and no indication that Congress ever intended such broad authority.

- The 2015 Rule's approach to identifying a "significant nexus" should not be repeated. The agencies virtually eliminated the qualifying term "significant" by finding that any connection that is not "speculative or insubstantial" was significant. This term interpretation is so lax that it is hard to imagine any area of water or land that could be safe from federal jurisdiction. This is not what the term meant in *Rapanos* or *Riverside Bayview*.

- Too many terms in the 2015 Rule were so vague and overbroad that it would be difficult to identify any area of water or land exempt from federal jurisdiction. "Tributary," "Riparian area," "neighboring," "significant nexus," and others are so vague that regulated entities cannot determine for themselves whether there actions are subject to the Clean Water Act and gives them virtually no ability to test jurisdictional determinations.

- The 2015 Clean Water Rule was also extremely complex and often used terminology that left each determination subject to an expansive inquiry. As a result, it required extensive private and public resources for jurisdiction determinations. The agencies should avoid returning to that model.

    - As an example, the agencies should avoid relying on multi-factored, subjective tests for the regulation of ephemeral streams, such as "watershed size," "landscape position," and "stream network density." Permit applicants need certainty to move forward.