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November 28, 2017

Via regulations.gov

Ms. Damaris Christensen
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Ms. Stacey Jensen
Regulatory Community of Practice (CECW-CO-R)
U.S. Army Corps of Engineers
441 G Street, NW
Washington, DC 20314

Re: Comments of the Waters Advocacy Coalition in Response to the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Request for Written Recommendations Regarding the Definition of "Waters of the United States" Under the Clean Water Act, EPA-HQ-OW-2017-0480; FRL-9966-99-OW

Dear Ms. Christensen and Ms. Jensen:

The Waters Advocacy Coalition ("WAC") submits the attached comments in response to the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' request for written recommendations regarding the definition of "Waters of the United States" under the Clean Water Act.

WAC appreciates the opportunity to comment on this important issue.

Sincerely,

Deidre G. Duncan

Deidre G. Duncan

Attachment

WAC Comments in Response to
The U.S. Environmental Protection Agency's and the U.S. Army Corps of Engineers'
Request for Written Recommendations to Revise the Definition of
"Waters of the United States" Under the Clean Water Act,
EPA-HQ-OW-2017-0480; FRL-9966-99-OW

November 28, 2017

The Waters Advocacy Coalition ("WAC" or "Coalition") provides the following recommendations in response to the U.S. Environmental Protection Agency's ("EPA's") and U.S. Army Corps of Engineers' ("Corps'") (together, "the Agencies'") *Federal Register* notice seeking input from stakeholders and the public on how to revise the definition of "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA" or "Act"). 82 Fed. Reg. 40,742 (Aug. 28, 2017).

In addition to soliciting feedback through the *Federal Register* notice and during listening sessions and public meetings with stakeholders, the Agencies have sought recommendations in response to a list of industry-specific questions. *See* Listening Session Presentation, The Definition of "Waters of the U.S." Stakeholder Recommendations, Industry Stakeholders (Energy, Chemical, Oil/Gas) at 17 (Oct. 24, 2017). Because the Coalition represents a large cross-section of the nation's construction, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation and public health and safety sectors, this letter does not provide industry-specific responses to those questions. Instead, the Coalition provides high-level recommendations on principles to which the Agencies should adhere in developing a revised definition of WOTUS. Some individual members of the Coalition have filed comments that directly respond to the Agencies' industry-specific questions, and WAC encourages the Agencies to consider such comments.

The Coalition's members are committed to the protection and restoration of America's wetlands and waters, and possess a wealth of expertise directly relevant to the rulemaking process. The Coalition has a long history of involvement on the critical issues concerning the scope of federal jurisdiction under the CWA. We submitted robust comments on the Agencies' proposed repeal of the 2015 Clean Water Rule ("2015 Rule") and recodification of pre-existing rules,[1] and WAC and/or subsets of WAC members have submitted comments on the Agencies' previous rulemakings and guidance documents relating to the WOTUS definition, including: the proposed 2015 Rule;[2] the 2011 Draft Guidance on Identifying Waters Protected by the Clean

[1] Waters Advocacy Coalition, Comments on the Agencies' Proposed Rule to Repeal the 2015 Clean Water Rule and Recodify the Pre-Existing Rules, (Sept. 27, 2017), Docket ID No. EPA-HQ-OW-2017-0203.

[2] Waters Advocacy Coalition, Comments on the Agencies' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (Nov. 13, 2014, corrected Nov. 14, 2014), Docket ID No. EPA-HQ-OW-2011-0880-17921.

Water Act;[3] the 2008 Guidance Regarding Clean Water Act Jurisdiction After *Rapanos*;[4] and the 2003 Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States."[5] Many individual members of the Coalition have also submitted comments on these rulemakings and guidance documents on the definition of WOTUS. In all of these comments, we have consistently raised concerns with expansive theories of CWA jurisdiction that fail to preserve the States' traditional and primary authority over land and water use and ignore the limits set by Congress and recognized by the Supreme Court.

As we explained in WAC's comments on the proposed repeal, although WAC supports the Agencies' rulemaking to rescind the 2015 Rule and the corresponding recodification of the pre-existing regulations, which is necessary in the near term for clarity and regulatory certainty, there are many issues with the current regulations and guidance documents that must be addressed through a new rulemaking.

As detailed below, the Coalition recommends that the Agencies adhere to the following principles as they develop a new WOTUS definition. A new WOTUS definition must:

1. Preserve the States' primary authority over land and water use;

2. Provide clarity sufficient to put regulated entities on notice, meet administrative due process requirements, and allow States and the regulated community to positively and easily identify which waters are subject to federal CWA regulation;

3. Account for the full history of the Supreme Court's review of the scope of WOTUS, including but not limited to Justice Scalia's plurality opinion;

4. Give effect to the operative term "navigable"; and

5. Draw reasonable and narrow bright lines for federal jurisdiction based on legal and policy considerations, informed but not dictated by the science developed during the 2015 rulemaking.

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[3] Waters Advocacy Coalition, et al., Comments in Response to the Agencies' Draft Guidance on Identifying Waters Protected by the Clean Water Act (July 29, 2011), Docket ID No. EPA-HQ-OW-2011-0409-3514 (July 29, 2011).

[4] American Farm Bureau Federation, et al., Comments in Response to the Agencies' Guidance Pertaining to Clean Water Act Jurisdiction After the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*, (Jan. 22, 2008), Docket ID No. EPA-HQ-OW-2007-0282-0204.

[5] Foundation for Environmental and Economic Progress, et al., Comments in Response to the Agencies' Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," (Apr. 16, 2003), Docket ID Nos. EPA-HQ-OW-2002-0050-1816 (comments), -1829 (Exhibits), -1835 (Appendix I, corrected), -1832 (Appendix II).

1. A New WOTUS Definition Must Preserve the States' Primary Authority Over Land and Water Use.

The CWA was founded in federalism. With CWA section 101(b), Congress recognized and sought to preserve the States' traditional and primary authority over land and water use. 33 U.S.C. § 1251(b); *see also Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality) (The regulation of land and water use within a State's borders is a "quintessential" State and local function.). Consistent with Congress's objectives, any WOTUS definition should preserve the States' traditional and primary authority over land. Indeed, many States and local governments have robust programs in place to protect water quality. The Agencies do not need to treat all waters and features on a landscape as federal "waters of the United States" to protect them. Accordingly, the Agencies must develop a WOTUS definition that preserves these traditional State powers.

2. A New WOTUS Definition Should Provide Sufficient Clarity for States and Regulated Entities to Efficiently and Easily Determine the Scope of Federal CWA Jurisdiction.

To allow States to effectively regulate land and water use within their borders, the Agencies must provide clear boundaries between State and federal jurisdiction. Providing clarity sufficient to allow States to identify which waters are and are not subject to federal CWA regulation would also facilitate State assumption of CWA section 404 permitting authority under section 404(g).

Providing clarity is also important to entities subject to potential regulation under the CWA. The Act's reach is notoriously unclear, and the consequences to landowners and other regulated entities even for inadvertent violations can be crushing.[6] Because the CWA is a strict liability statute that includes an absolute prohibition on unauthorized discharges into WOTUS, the new WOTUS definition must provide clear lines to put regulated entities on notice and meet administrative due process requirements. Absent sufficient clarity, the definition has the potential to result in inconsistent and arbitrary application or enforcement. Therefore, as the Agencies develop a new definition, they should strive to articulate a reasonably narrow definition that provides certainty for the regulated community and allows for the consistent administration of the CWA's regulatory programs.

3. A New WOTUS Definition Should Account for the Full History of Supreme Court Precedent on the Scope of WOTUS.

The Supreme Court has recognized important limits on CWA geographic jurisdiction. A new WOTUS definition should account for the full history of the Supreme Court's review of the scope of WOTUS, including but not limited to Justice Scalia's plurality opinion. Each of the three seminal Supreme Court cases addressing the scope of "navigable waters" subject to federal CWA jurisdiction – *Riverside Bayview Homes*, *SWANCC*, and *Rapanos* – provides important

[6] *See Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring). The CWA imposes civil penalties of up to $51,570 per day for unauthorized discharges to WOTUS. 82 Fed. Reg. 3633, 3636 (Jan. 12, 2017).

guideposts for the Agencies and the courts. Therefore, the revised definition should incorporate important principles from *Riverside Bayview*, *SWANCC*, and *both* Justice Scalia's plurality and Justice Kennedy's concurring *Rapanos* opinions.

Over the years, the Agencies have misinterpreted and twisted the meaning of these Supreme Court decisions to allow for sweeping assertions of WOTUS jurisdiction that simply find no support in the cases. Thus, in relying on these key cases to inform a new WOTUS definition, it is critical that the Agencies return to the true meaning of these decisions and heed the limits recognized by the Courts.

In *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985), the Supreme Court considered whether CWA jurisdiction extends beyond the waters traditionally regulated by the federal government to include wetlands abutting navigable waters. Based on its finding that the Act's definition of "navigable waters" as "the waters of the United States" indicated an intent to regulate "at least some waters" that were not navigable in the traditional sense, the Court upheld Corps jurisdiction over wetlands that "actually abut[] … a navigable waterway." 474 U.S. at 133, 135. In reaching its decision, the Court concluded that Congress, in adopting the 1977 amendments to the 1972 Act, had acquiesced to the Corps' assertion of jurisdiction over such wetlands. *Id.* at 136-38; *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170-71 (2001) ("S*WANCC*").

Later, in *SWANCC*, the Supreme Court noted that its *Riverside Bayview* holding was based in large measure on Congress's unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters – *i.e.*, "wetlands inseparably bound up with the waters of the United States." *SWANCC*, 531 U.S. at 167 (citing *Riverside Bayview*, 474 U.S. at 134) (internal quotations omitted). By contrast, the *SWANCC* Court held that isolated gravel ponds (even though used as habitat by migratory birds) were "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.* at 173. The Court concluded that "the text of the statute will not allow" regulation of ponds that "are *not* adjacent to open water," *id.* at 168 (original emphasis), noting that it was the "significant nexus between the wetlands and 'navigable waters'" to which those wetlands actually abutted that supported CWA jurisdiction in *Riverside Bayview*. *Id.* at 167.

Finally, in *Rapanos*, the Supreme Court considered the Agencies' attempt to assert jurisdiction over four sites which contained "54 acres of land with sometimes-saturated soil conditions" located twenty miles from "[t]he nearest body of navigable water." *Rapanos*, 547 U.S. at 720 (plurality). The Agencies asserted jurisdiction based on the theory that CWA jurisdiction extends to any waters with "any connection" to navigable waters. Under this "any connection" theory, ditches, largely excluded from jurisdiction previously, became the Agencies' preferred method of showing a "connection." Certain farm ditches, roadside ditches, flood control ditches – all common and abundant across the landscape – were at times deemed "tributaries," providing a "connection" to regulate areas previously considered isolated.

The *Rapanos* plurality (authored by Justice Scalia and joined by Chief Justice Roberts and Justices Thomas and Alito) determined that the Agencies lacked authority to assert jurisdiction over the four sites at issue based on the Agencies' expansive "any hydrological

connection" theory. *Id.* at 742 (plurality). Justice Kennedy concurred, criticizing the Agencies for leaving "wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," and for asserting jurisdiction over wetlands "little more related to navigable-in-fact waters" than the isolated ponds at issue in *SWANCC*. *Id.* at 781-82 (Kennedy, J., concurring).

Although the plurality and Justice Kennedy agreed on what was *not* jurisdictional, they came up with different formulations for defining WOTUS. The plurality held that the CWA confers jurisdiction over only "relatively permanent bodies of water," and "only those wetlands with a continuous surface connection" to traditional navigable waters. *Id.* at 734, 742. Justice Kennedy, on the other hand, held that the Agencies' CWA jurisdiction extends only to wetlands with a "significant nexus" to traditional navigable waters. *Id.* at 767. Importantly, the concurring and plurality opinions agreed on a number of critical points:

- The term "navigable waters" must be given some importance and effect, *id.* at 779;
- Congress intended to regulate at least some waters that are not navigable in the traditional sense, *id.* at 767;
- Nonnavigable waters must have a substantial relationship with traditional navigable waters if they are to be considered WOTUS, *id.* at 784-85;
- The Corps' standard for defining tributaries went too far, *id.* at 781-82;
- "Mere adjacency to a tributary" is insufficient, *id.* at 786;
- Regulatory jurisdiction does not reach all wetlands, or even "all 'non-isolated wetlands,'" *id.* at 779-80; and
- The presence of a hydrologic connection to navigable-in-fact waters is not enough, standing alone, to support jurisdiction, *id.* at 784-85.

WAC encourages the Agencies to adopt a new definition of WOTUS that draws from and is consistent with the holdings of all governing Supreme Court jurisprudence, including these areas of agreement between the plurality opinion and Justice Kennedy's concurring opinion in *Rapanos*. Using the Court's full history of its review of WOTUS will provide important guideposts to support an appropriate definition that is consistent with the statute, Commerce Clause, case law, and Congressional intent.

4. A New WOTUS Definition Must Give Effect to the Term "Navigable."

The definition of "navigable waters," defined as the "waters of the United States," must give effect to the operative term "navigable." When Congress enacted the CWA, it intended to exercise its traditional "commerce power over navigation," *SWANCC*, 531 U.S. at 168 n.3, and "to regulate *at least some* waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133 (emphasis added); *SWANCC*, 531 U.S. at 171-72. But the Supreme Court emphasized that Congress's use of the term "navigable waters" reflects a fundamental limit on the Agencies' permitting authority. *SWANCC,* 531 U.S. at 171 (citing *Riverside Bayview*, 474 U.S. at 138). The term "navigable" has at least some import and must be given effect. *SWANCC*, 531 U.S. at 172. Therefore, in crafting a revised definition of WOTUS, the Agencies must operate within the constitutional limits of federal jurisdiction under the Commerce Clause and, consistent with Congress's intent,

regulate only *navigable* waters, which includes some waters (*e.g.*, adjacent wetlands) that are not navigable in the traditional sense.

5. The Agencies Should Draw Bright Lines for Jurisdiction Based on Legal and Policy Considerations, Informed But Not Dictated by the Science Developed During the 2015 Rulemaking.

To promulgate a revised definition of WOTUS, the Agencies do not have to rebut or abandon the record that was created for the 2015 Rule. That record did not dictate a particular definition of WOTUS. For example, the EPA report on the connectivity of waters[7] essentially concluded that all waters are connected and that connectivity exists on a gradient, but the report does not draw lines or address the legal question of what should be jurisdictional under the statute. As the government argued in its Sixth Circuit brief, "[i]t is well within the Agencies' rulemaking authority to identify a point on the continuum" at which waters are considered jurisdictional.[8] The Agencies also noted in the 2015 Rule and supporting documents that "science does not provide bright lines," and thus "the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, *but not dictated by them*."[9]

Therefore, the Agencies' new, separate analysis of the appropriate scope of CWA jurisdiction should be informed by the objectives and requirements of the CWA, including the primary role of States in regulating land and water resources, the relevant Supreme Court decisions, available scientific information (including the 2015 Rule's administrative record), and the Agencies' technical expertise and experience.

WAC encourages EPA and the Corps to adhere to these key principles in developing a new WOTUS definition and looks forward to commenting on the Agencies' Step 2 proposal.

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[7] Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence, EPA/600/R-14/475F, (Jan. 2015), https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414 ("Science Report").

[8] Br. for Resp'ts at 95, *In re EPA*, 803 F.3d 804 (6th Cir. 2015) (No. 15-3799).

[9] 80 Fed. Reg. at 37,060 (emphasis added); EPA & U.S. Dep't of the Army, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States at 93 (May 27, 2015), Docket ID No. EPA-HQ-OW-2011-0880-20869.