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Docket No. EPA-HQ-OW-2018-0149; FRL-9988-15-OW

April 15, 2019

Mr. Michael McDavit
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U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
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RE: Revised Definition of "Waters of the United States;" 84 Fed. Reg. 4,154 (Feb. 14, 2019); Docket No. EPA-HQ-OW-2018-0149; FRL-9988-15-OW

Dear Mr. McDavit and Ms. Moyer:

The American Gas Association ("AGA") submits these comments to the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (the Corps) (collectively, "Agencies") in support of the Agencies' proposal to revise the definition of "Waters of the United States" (WOTUS) under the Clean Water Act (CWA or Act).[1] The definition of WOTUS is critical to AGA and its membership, as many of AGA's members engage in activities that are subject to the CWA's extensive permitting requirements. We have consistently advocated for clear, sensible regulations that protect America's waters and wetlands, while expediting infrastructure projects that are essential to delivering natural gas to commercial and residential customers safely, reliably and affordably.

AGA is a member of the Waters Advocacy Coalition (WAC) and has joined comments filed in this docket by WAC on April 15, 2019. These comments are submitted to highlight specific areas of import of AGA and its members.

[1] Revised Definition of "Waters of the United States;" 84 Fed. Reg. 4,154 (Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

AGA has long sought a clear regulatory definition of waters that are subject to the jurisdiction of the Act.[2] Our members need to know when their projects affect WOTUS, and are therefore subject to the Act's permitting requirements, without the risk of being second-guessed in a subjective, case-by case decision process that delays completion of critical infrastructure projects. By 2015, the Agencies' past practices, guidance, and interpretations had expanded the reach of federal CWA jurisdiction beyond the bounds intended by Congress and permitted by the Constitution. AGA supports the Agencies' proposed rule because it strikes an appropriate balance between regulatory clarity, certainty and predictability for the regulated community and the need for robust protection of our waters and wetlands.

The AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 74 million residential, commercial, and industrial natural gas customers in the U.S., of which 95 percent—over 71 million customers—receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies, and industry associates. Today, natural gas meets more than one-fourth of the United States' energy needs.

AGA members are directly affected by the Agencies' regulations implementing the Act. Our members own and operate distribution and transmission infrastructure that may require significant upgrades, routine maintenance or repair-related permitting and reviews at all levels of government under CWA programs. These projects include the construction, repair, and replacement of interstate and intrastate distribution lines—linear projects that require temporary construction, fill and discharge of materials in narrow, linear areas to maintain utility service lines. These projects take place in limited, narrow rights-of-way, involve temporary trenching and limited construction footprints, and result in the complete restoration of the project area and surrounding areas without creating new impervious surfaces or other significant, lasting construction impacts. Our members also undertake renewable energy development, buildings and facilities, and other major projects while maintaining and building out their systems.

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[2] In 2011, AGA joined comments submitted by WAC, and we filed separate supporting AGA comments in response to the Agencies' Draft Guidance on Identifying Waters Protected by the Clean Water Act, 76 Fed. Reg. 24,479 (May 2, 2011) in Docket ID No. EPA-HQ-OW-2011-0409. We asked the Agencies to initiate a notice and comment rulemaking to clearly define the scope of waters subject to federal jurisdiction, rather than to attempt to address this important issue through guidance. We had hopes that the 2014 proposed rule would provide the clarity we sought, but we were disappointed. In November 2014, AGA filed joined WAC comments and filed separate supporting comments in Docket ID No. EPA-HQ-OW-2011-0880 on November 13, 2014 on the Agencies' April 21, 2014 Proposed Rule to define Waters of the United States in which AGA urged the Agencies to withdraw the proposed rule because it would cause more confusion and would increase rather than decrease regulatory uncertainty.

This includes lines to connect renewable natural gas (biogas) facilities to the distribution system, high-pressure natural gas transmission lines, LNG storage and liquefaction, natural gas compressor stations and metering stations, and upgrades to utility facilities including new operations facilities and buildings. Natural gas utilities may also undertake utility line restoration projects on properties acquired from legacy companies.

These projects require our members to consider potential or actual impacts on water regulated by the state or federal government, and as necessary, pursue consultations, permits, and approvals from various regulatory entities to proceed with their project work. Applicable water resources permitting programs include several which are impacted by the Proposed Rule, such as EPA regulations under the CWA requiring state-administered National Pollutant Discharge Elimination System (NPDES) permits for discharges of stormwater, and state-administered CWA § 401 water quality certifications, which are themselves triggered by any natural gas utility activity requiring an Army Corps permit for discharge to a WOTUS, such as the CWA § 404 permit. For these reasons, AGA has a significant interest in ensuring that the Agencies issue a clear, workable, and cost-effective rule clarifying the jurisdictional reach of the CWA.

I. Background

Congress enacted the CWA in 1972 in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and intended to "recognize, preserve, and protect the responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and to] plan the development and use…of land and water resources…"[3]

The CWA sets up a regulatory framework to address certain discharges of pollutants into a subset of the Nation's waters, those waters identified as "navigable waters," which the Act defines as "the waters of the United States, including the territorial seas."[4] These waters are protected in several ways under the CWA, including via the discharge prohibition in CWA Section 301; the oil and hazardous substance liability provisions of Section 311; the water quality certification procedures of Section 401; the National Pollutant Discharge Elimination System ("NPDES") program established under CWA Section 402; and dredge-and-fill permitting under Section 404.

As the Agencies emphasize in the preamble to the proposed rule, the CWA preserves a significant role for the States in implementing various aspects of the Act, reflecting an intent to balance the states' traditional power to regulate land and water resources within their borders with the need for a national water quality regulatory scheme.[5] In the CWA, Congress declared that "Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and

[3] 33 U.S.C. §§1251(a)-(b)
[4] *Id.* § 1362(7).
[5] 84 Fed. Reg. at 4156. *See also* 33 U.S.C. §1251(b) (articulating congressional policy to "preserve . . . 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").

eliminate pollution in concert with programs for managing water resources."[6] These cooperative federalism principles are fundamental component of the Act.

Under the authority granted it by the Commerce Clause, Congress used CWA to expand federal jurisdiction beyond traditionally "navigable waters," defined in the statute as "waters of the United States, including territorial seas," to other waters that should otherwise be subject to federal protections.[7] Congress intended that, while not unlimited, "the term 'navigable waters' be given the broadest possible constitutional interpretation" under the Act.[8]

The definition of WOTUS is a critical to how the Agencies administer, implement, and enforce the Act. However, the definition of WOTUS, and the scope of federal jurisdiction under the Act, have long been shrouded in uncertainty. When the Agencies first issued separate definitions of WOTUS, EPA's definition was quite broad, while the Corps' definition was very narrow.[9] By the end of the 1980s, however, the Agencies adopted a consistent definition of WOTUS, which included: waters used in the past or used currently for interstate commerce; all interstate waters, including interstate wetlands; each state's bodies of water — including lakes, rivers, streams, mudflats, playa lakes and ponds — that could affect interstate or foreign commerce; tributaries of waters of the United States; and the territorial sea.[10]

From the earliest rulemaking efforts following adoption of the CWA, to the most recent attempts to define WOTUS in 2015, the limited statutory definition has spurred substantial litigation seeking clarity and certainty regarding the meaning of the phrase. Hundreds of cases and dozens of courts have attempted to discern what Congress intended by "waters of the United States."[11] Three seminal decisions – *United States v. Riverside Bayview Homes, Inc.*, *SWANCC v. U.S. Army Corps of Engineers*, and *Rapanos v. United States* – have limited the scope of federal authority in order to bring the definition of WOTUS in line with the CWA's objectives and the constitutional bounds of the agencies' jurisdictional limits under the Act.[12]

In *Riverside Bayview*, the Court addressed whether wetlands should be subject to federal regulation under the Act as WOTUS. In a unanimous opinion, the Court said that Congress intended that the definition of "navigable waters" as "Waters of the United

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[6] 33 U.S.C. §1251(b).
[7] *Id.* at 1362(a).
[8] S. Rep. No. 92-1236, at 144 (1972).
[9] *Compare* National Pollutant Discharge Elimination System, 38 Fed. Reg 13,528 (May 22, 1973) *with* Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115 (Apr. 3, 1974).
[10] *Compare* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986) (amending 33 C.F.R. 328.3) *with* Final Rule: Clean Water Act Section 404 Program Definitions and Permit Exemptions, 53 Fed. Reg. 20,764 (June 6, 1988) (amending 40 C.F.R. 232.2).
[11] *See, e.g.*, *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (Scalia, J. plurality) (summarizing the history of the case).
[12] *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) ("*Riverside*"); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"); *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*").

States" was meant to "regulate *at least some* waters that would not be deemed 'navigable' under the classical understanding" of the term.[13] The Court then limited the Corps' jurisdiction over wetlands to those that "actually abut a navigable waterway."[14]

In *SWANCC*, the Court held that "non-navigable, isolated, intrastate" ponds (which, unlike the waters at issue in *Riverside Bayview*, did not abut a traditional navigable waterway) were not jurisdictional under the CWA.[15] The *SWANCC* Court concluded that assertion of jurisdiction over such features would raise "significant constitutional questions" and "would result in a significant impingement of the States' traditional and primary power over land and water use."[16] Not only did *SWANCC* emphasize the importance of the term "navigable" in the CWA's text, it explicitly reversed the lower court's holding that the CWA reaches as many waters as the Commerce Clause allows.[17] The Court reasoned that "the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the Act: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made."[18] Under this controlling precedent, in adopting a WOTUS definition, the agencies must give full effect to the term "navigable" and respect the limits of federal authority that flow from Congress's explicit choice in the Act to preserve and protect the States' traditional and primary authority over land and water use.

Most recently, the Supreme Court interpreted the term "waters of the United States" in *Rapanos*. While all members of the Court agreed that WOTUS encompass some waters that are not navigable in the traditional sense, the plurality and Justice Kennedy, in a concurring opinion, articulated various limitations on the Agencies' CWA regulatory jurisdiction. 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,[19] while Justice Kennedy held that the Agencies' CWA jurisdiction extends only to waters and wetlands with a "significant nexus" to traditional navigable waters.[20]

Since *Rapanos*, the Agencies have pushed the constitutional bounds of their regulatory authority, as evidenced by the promulgation of the 2015 Clean Water Rule.[21] In the 2015 Clean Water Rule, the Agencies adopted an overly expensive view of

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[13] 474 U.S. at 121
[14] *Id.* at 132
[15] 531 U.S. at 169.
[16] *Id.* at 174.
[17] *See id.* at 166 (quoting from 191 F.3d 845, 850-52 (7th Cir. 1999)).
[18] *Id.* at 172.
[19] 547 U.S. 734, 742 (plurality) (emphasis in original)
[20] Id. at 767 (Kennedy, J., concurring).
[21] 80 Fed. Reg. 37054 (Final Rule June 29, 2015). The 2015 rule is now being implemented in 22 states, the District of Columbia, and U.S. territories, while the regulations defining WOTUS that pre-dated the 2015 WOTUS rule are in effect in the 28 other states. This split in enforcement across the country clearly illustrates the need for a definition of WOTUS that truly reflects the scope of federal authority under the CWA.

federal CWA authority, asserting sweeping jurisdiction over features that have little or no relationship to traditional navigable waters. [22] By doing so, the Agencies ignored not only the plain language of the CWA, but key limitations articulated by the Supreme Court in *SWANCC* and *Rapanos*.

The proposed rule would correct previous attempts by the Agencies to overstep the bounds of their regulatory authority under the CWA. More importantly, the proposed revisions to the definition of WOTUS will provide much-needed clarity to the regulated community while maintaining vitally important protections that preserve our nation's waters and wetlands. AGA and its members appreciate the Agencies' return to a more sensible WOTUS definition that maintains key environmental protections while respecting the legal framework established by Congress and interpreted by the Supreme Court. The regulatory clarity, certainty and predictability provided in the proposed rule will help ensure the timely and efficient completion of infrastructure maintenance projects that are critically important to the safe, reliable, and affordable delivery of natural gas to millions of Americans.

II. AGA Recommendations to Further Improve the Proposed Rule

As discussed above, AGA and its members support the Agencies' proposed rule. To further improve the clarity and practicability of the proposed rule, AGA offers several suggestions to further clarify certain aspects of the proposed rule that are of particular import to AGA's members. These recommendations are intended to supplement the extensive and detailed comments submitted by WAC, of which AGA is a member.

- Need for Proper Oversight on Implementation. The Agencies' proposed revisions to the definition of WOTUS offer a level of regulatory certainty and clarity to stakeholders that the Agencies failed to provide in the 2015 Rule. However, it is critical that the Agencies recognize need for proper oversight field staff during implementation of the proposed rule. The Agencies must ensure that field staff do not revert to relying on inaccurate, incomplete or outdated data, like the National Hydrography Dataset (NHD) or the National Wetlands Inventory (NWI), when making jurisdictional determinations regarding ephemeral, intermittent, and perennial streams. AGA and its members strongly believe that it is the Agencies' responsibility to provide appropriate guidance to field staff – and enforce that guidance – to ensure consistent and predictable enforcement of the proposed rule. Additionally, it is imperative that the Agencies ensure that they retain the burden of proof for establishing jurisdiction for all categories of WOTUS.

- Traditional Navigable Waters (TNW). AGA supports the Agencies' approach to TNW in the proposed rule. The scope of the TNWs category is of fundamental importance in the proposal, given that numerous other categories of waters are

[22] See WAC Comments on the Agencies' Proposed Repeal of 2015 Clean Water Rule and Recodification of Pre-Existing Rules, Docket EPA-HQ-OW-2017-0203 (September 27, 2017).

deemed jurisdictional based on their relationship to TNWs. The preamble appropriately recognizes that an evaluation of whether a water qualifies as a TNW is rooted in the test for "navigability" under the Rivers and Harbors Act (RHA) articulated by the Supreme Court in *The Daniel Ball v. United States*, 77 U.S. 557 (1870), and subsequent RHA case law.[23] If finalized, the Agencies' proposed regulatory text for TNWs would appropriately limit the scope of navigability to those waters identified in *The Daniel Ball* and *Rapanos*. Following the *Rapanos* decision, the Agencies broadened their interpretation of TNWs to those waters that could be used in commerce, rather than those waters used for the transportation of goods in interstate commerce.[24] The Agencies proposed rule would rectify this overly-expansive interpretation if finalized. However, the Agencies' could provide additional clarity appropriate test for TNW by revising or withdrawing Appendix D of the *Rapanos* Guidance.

- Ephemeral v. Intermittent and Perennial Waters. The proposed rule would include tributaries as a WOTUS category and would define "tributary" as a "river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a [TNW] in a typical year either directly or indirectly through [other jurisdictional waters] or through water features [expressly excluded] in paragraph (b) . . . so long as those water features convey perennial or intermittent flow downstream."[25] As defined in the proposed rule, tributaries do not include surface features that flow only in direct response to precipitation, such as ephemeral flows, dry washes, arroyos, and similar features because they lack the required perennial or intermittent flow regimes to satisfy the tributary definition under this proposal and therefore would not be jurisdictional.[26] AGA and its members support the Agencies' proposed definition of tributary. Specifically, we strongly support the limiting the scope of the proposed definition of tributary to perennial or intermittent water features. By shifting the tributary definition to focus on the well-understood concepts of ephemeral, intermittent, and perennial flow, the proposed rule allows for far more clarity and predictability in identifying tributaries subject to CWA jurisdiction. We offer the following recommendations to further clarify the proposed tributary definition:

    - The Agencies should clarify in the regulatory text of the final rule that if a feature meets the rule's definition of "ephemeral"—flowing or pooling only in direct response to rainfall—it is not a jurisdictional WOTUS, even it could otherwise be characterized as falling into any of the rule's categories

[23] 84 Fed. Reg. at 4,170

[24] *See* U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY CORPS OF ENGINEERS, CLEAN WATER ACT JURISDICTION FOLLOWING THE SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES* AND *CARABELL V. UNITED STATES* (Dec. 2, 2008) at Appendix D (interpreting TNWs to include any water that "a Federal Court has determined…is navigable-in-fact under Federal law for any purpose, and that is "currently being used for commercial navigation, including commercial waterborne recreation).

[25] 84 Fed. Reg. at 4203; 4204.

[26] *Id.*

of WOTUS. This would provide additional clarity and reduce the potential for ephemeral waters being inaccurate characterized as intermittent waters.

- The Agencies should provide additional clarity and guidance as to how applicants and the Agencies will evaluate the "typical year." AGA agrees that the evaluation of a "typical year" should be based on the "normal range" of precipitation and generally should not include times of drought or extreme flooding. Specifically, we suggest that the agencies provide more specifics as to how to calculate the normal range of precipitation over a rolling thirty-year period. Because there can be wide variation in data—even within National Oceanic and Atmospheric Administration (NOAA) weather stations within the same geographic area—there is a risk that regulators' and stakeholders' "typical year" determination will vary depending upon the data source used or method of calculation, which could result in uncertainty, confusion, and inconsistent regulation. We strongly encourage the Agencies to identify the data sources they intend to rely on when completing the "typical year" analysis in order to increase predictability and transparency for the regulated community and other interested stakeholders.

- The Agencies could also enhance clarity by providing examples in the final rule that describe the step-by-step analysis the Agencies will undertake to evaluate features to determine if they are jurisdictional waters. Examples that include aerial photographs of the water features at issue and an explanation of how the Agencies would determine that the feature was ephemeral v. intermittent or perennial (including data sources for "typical year" calculation), would be particularly helpful to AGA's members.

- Adjacent Wetlands. The Agencies propose a category of WOTUS to include all wetlands adjacent to the other categories of jurisdictional waters listed in the definition.[27] The proposed rule maintains the longstanding regulatory definition of "wetlands" to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[28] Wetlands are "adjacent" under the proposed rule where they "abut or have a direct hydrologic surface connection to other WOTUS in a typical year."[29] A "direct hydrologic surface connection" occurs "as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and a jurisdictional water."[30] Wetlands that are "physically separated from [jurisdictional waters] by upland or

[27] *Id.*
[28] *Id* at 4205
[29] *Id*.
[30] *Id*.

by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to jurisdictional waters are not adjacent."[31]

AGA believes that by refining this category—and providing clear guideposts with respect to "adjacent wetlands"—the agencies have brought the category more in line with the fundamental tenets articulated in *Riverside Bayview*, *SWANCC*, and *Rapanos*, as well as the CWA and Constitution. We support the recommendations offered by WAC to further clarify the definition of adjacent wetlands. Additionally, we encourage the Agencies to provide additional guidance regarding the impact that temporary dikes, barriers, or similar structures would have on a jurisdictional determination. Specifically, guidance to both the regulated community and field personnel on how to assess situations where temporary structures are required in wetland in order to access a construction or maintenance site would provide additional clarity AGA members and the regulated community.

III. Exclusions to the Definition of WOTUS

AGA supports the extensive comments offered by WAC regarding exclusions from the definition of WOTUS in the proposed rule. These exclusions are critical for providing clarity and regulatory certainty with respect to the reach of the CWA. Particularly, AGA and its members strongly support the continued exemption for stormwater control features, as this exemption is critical to federal, state and local infrastructure. The Agencies propose that this exclusion would apply to "stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off."[32] AGA encourages the Agencies to further clarify that those features that are "constructed in upland" will be assessed based on current, rather than historic, conditions.

Additionally, AGA and its members support the continued exclusion of waste treatment systems (WTS) and the proposed definition of "waste treatment system," which will codify existing practices and help ensure clarity and consistency. Under the proposed rule, "waste treatment systems" would be defined, for the first time, to include "all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).[33] This exclusion is consistent with both the structure and the goals of the Act. It allows for systems to serve an important function of managing and treating waste prior to discharge. Treating these features as WOTUS would be redundant, make the features essentially useless for their intended purpose, and impose additional burdens and costs on both facilities and permitting agencies without a corresponding environmental benefit.

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[31] *Id.*
[32] *Id.* at 4204
[33] *Id.* at 4205.

IV. Conclusion

For the reasons discussed above, AGA supports the proposed rule. We appreciate the Agencies' efforts to provide a proposed rule that provides clarity and certainty to the regulated community while protecting and preserving our nation's waters and wetlands. The recommendations provided herein, as well as the recommendations provided by WAC, will help further improve the definition of WOTUS and help facilitate its implementation. AGA appreciates the opportunity to comment. If you have any questions, please contact either me or Timothy Parr, AGA Senior Counsel, at tparr@aga.org.

Respectfully Submitted,

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