Midstream's Greatest Resource

November 14, 2014

Water Docket
U.S. Environmental Protection Agency
Attention: Docket ID No. EPA-HQ-OW-2011-0880
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Re: Comments on "Definition of 'Waters of the United States' Under the Clean Water Act," Docket ID No. EPA-HQ-OW-2011-0880

Dear Docket Clerk:

The Gas Processors Association (GPA) respectfully requests that the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) (collectively, the agencies) withdraw the proposed rulemaking "Definition of 'Waters of the United States' Under the Clean Water Act."[1] GPA disagrees with EPA and the Corps' repeated assertion that the draft rule provides more clarity, certainty, and predictability to regulated entities as to what waters are and are not covered by the Clean Water Act. The proposed rule expands EPA's and the Corps' jurisdiction over waters beyond what the Clean Water Act and U.S. Supreme Court precedent allows. If the proposed rule becomes final, then the midstream sector of the oil and gas industry and private landowners across the United States will be substantially harmed.

GPA has served the United States energy industry since 1921 as an incorporated non-profit trade association. GPA is composed of 130 corporate members 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 members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. GPA members own facilities that would be subject to increased regulatory burdens under the proposed revisions.

[1] 79 Fed. Reg. 22188 (Apr. 21, 2014).

A February 2012 study prepared by Black & Veatch for the INGAA Foundation found that $229 billion in U.S. midstream investments would provide more than 125,000 jobs and over half a trillion dollars in economic output through 2035. *See* Black and Veatch, *Jobs & Economic Benefits of Midstream Infrastructure Development: U.S. Economic Impacts through 2035*, prepared for the INGAA Foundation, Inc., February 15, 2012 at ES-3. The study also determined that federal, state, and local governments will collect nearly $57 billion dollars in taxes during the period. *Id*. Thus, any unnecessary delay of the permitting process will be detrimental to local, state, and federal economies.

EPA and the Corps' Expansive Interpretation of the Phrase "Waters of the United States" is Inconsistent with Prior Supreme Court Precedence

EPA and the Corps have proposed the rule in response to two U.S. Supreme Court decisions, where the Court held that the Corps applied the term "waters of the United States" too expansively. *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 US. 159 (2001) (*SWANCC*); *Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos v. United States*, the most recent of the decisions, at issue was whether the Corps could interpret "waters of the United States" broadly enough to exercise jurisdiction over a private landowner's "sometimes saturated" parcel of land located eleven to twenty miles from the nearest body of navigable water. The Corps deemed this proximity sufficiently "adjacent" to constitute it part of "the waters of the United States." The Sixth Circuit deferred to the Corps' interpretation, but the Supreme Court reversed, stating that "the Corps has stretched the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this 'Land is Waters' approach to federal jurisdiction." *Rapanos*, 547 U.S. at 734.

Although the majority of the justices of the Supreme Court agreed that the wetlands at issue in *Rapanos* were not "waters of the United States," the Court did not agree as to why that was the case. The plurality opinion, authored by Justice Scalia, concluded that "waters of the United States" means only those waters that contain a "relatively permanent" flow, not an "occasional," "intermittent," or "ephemeral" flow and that wetlands must possess a "continuous surface connection" to these waters; a mere "hydrological connection" is insufficient. *Id*. at 742, 757. Justice Kennedy, in his lone concurring opinion, argued for a broader "significant nexus" test to include waters that are not relatively permanent or do not have a continuous surface connection to a traditionally navigable water. *See Id*. at 780 (Kennedy, J., concurring). Justice Kennedy defined a significant nexus as a water that "either alone or in combination with similarly situated [waters] in the region, significantly affects the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." *Id*.

The proposed rule relies heavily upon Justice Kennedy's judicially-created significant nexus concept. The proposed rule essentially makes Justice Kennedy's opinion the cornerstone for categorically asserting jurisdiction over many different types of hydrologic features (ephemeral drainages, or otherwise) that have only a tenuous hydrologic connection with traditionally navigable waters, interstate waters, or territorial seas. On a case-by-case basis, the proposed rule would apply the same significant nexus test to assert jurisdiction over features in the nebulous "other waters" category. The emphasis that EPA and the Corps place on the phrase "significant nexus" in formulating their proposed definition for waters of the United States imparts meaning to this phrase that is without consensus in the courts or the regulated community.

Of the nine Justices deciding *Rapanos*, only Justice Kennedy used the "significant nexus" test for defining waters of the United States. While his opinion is an important voice in establishing the

scope of agency authority under the Clean Water Act, no other Justice joined his opinion–eight other justices saw the matter differently. In his dissent, Justice Stevens wrote, "I do not share [Justice Kennedy's] view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule distilled from the term 'significant nexus' as used in *SWANCC*." *Id*. at 807 (Stevens, J., dissenting). Justice Breyer also took issue with Justice Kennedy's approach to have the Supreme Court legislate from the bench by adding "a 'nexus' requirement into the statute." *See Id*. at 811 (Breyer, J., dissenting). Justice Scalia was so unimpressed with Kennedy's significant nexus test that he disparaged the whole matter with a cutting "turtles all the way down" critique of the test's endless chain of logical inconsistencies. *See Id*. at 754. GPA agrees that the agencies need to revisit the regulatory definition of waters so that it conforms to *SWANCC* and *Rapanos*. EPA's and the Corps' approach in defining the waters of the United States, however, is inherently problematic. The agencies' emphatic reliance on the significant nexus test, which only one Justice chose to endorse, runs the risk of having the entire Clean Water Act framework for all wetlands and all tributaries fall apart during the inevitable siege of future court challenges. This entire effort will be in vain.

The Proposed Rule's Expansion of the Concept of "Adjacent" Waters is an Impermissible Construction of the Clean Water Act

The definition of "adjacent," meaning waters that are "bordering, contiguous, or neighboring," remains unchanged. 79 Fed. Reg. at 22199. EPA and the Corps, however, propose for the first time a definition of "neighboring" to mean "waters located within a riparian area or floodplain of a [jurisdictional water]… or waters with shallow subsurface hydrologic connection or confined surface hydrologic connection to such jurisdictional water." *Id*. This expanded definition fails to place predictable limits on the agencies' lawful jurisdiction over "adjacent waters."

EPA and the Corps rely on the agencies' "best professional judgment" in determining whether a particular wetland is "adjacent" under the existing definition. EPA and the Corps acknowledge that the best professional judgment standard may result in uncertainty as to whether a particular water connected through confined surface or shallow subsurface hydrology is an "adjacent" water. The agencies then request comments on whether there are other reasonable options for providing jurisdiction over waters with these types of connections.

One of the options EPA and the Corps provide is "asserting jurisdiction over all waters connected through a shallow subsurface hydrologic connection or confined surface hydrologic connection *regardless of distance*." *Id*. at 22208 (emphasis added). This option is untenable because it would extend EPA's and the Corps' jurisdiction over waters of the United States "beyond parody" like in *Rapanos*. A mere hydrological connection is not sufficient because the plain meaning of "adjacent" refers solely to physical proximity.

In the context of the Clean Air Act, EPA's prior attempt to define "adjacent" in terms other than distance failed in the courts. In April 2012, the United States Court of Appeals for the Sixth Circuit held that EPA interpreted the term "adjacent" too expansively when the agency aggregated a natural gas company's facilities that were separated by several miles as a single source under the Clean Air Act. *See Summit Petroleum Corp. v. U.S. Envtl. Prot. Agency*, 690 F .3d 733 (6th Cir. 2012). The EPA relied on prior agency guidance in making its source determination. *Id*. at 740. At issue was whether Summit Petroleum's facilities were "adjacent" to one another, turning them into a stationary source that requires EPA to regulate the facilities as a major source under Title V of the Clean Air Act. *Id*. at 741. EPA argued that the term "adjacent" was ambiguous and added that the court should look at the "functional relatedness" of the facilities to see whether they are adjacent. *Id*.

at 741-42. The court disagreed, holding that the term "adjacent" unambiguously refers only to physical proximity and that EPA's unlawful interpretation defied the plain and ordinary meaning of the Clean Air Act regulations. *Id*. at 744. Therefore, the agencies cannot expand the concept of "adjacent" to mean anything other than physical proximity or else the interpretation will be invalidated by the courts similar to the *Summit Petroleum* case.

The Proposed Rule will Hinder Clean Water Act Permitting and Undermine the Efficiency of the Nationwide Permit Program

GPA is highly concerned that the permitting process for GPA member projects will be significantly affected if this rule is finalized as proposed. According to the Executive Summary of the proposed rule: "The purposes of the proposed rule are to ensure protection of our nation's aquatic resources and make the process of identifying 'water of the United States' *less complicated and more efficient."* 79 Fed. Reg. at 22190 (emphasis added). EPA and the Corps add that, "this rule will result *in more effective and efficient CWA permit evaluations and increased certainty and less litigation*." *Id*. (emphasis added). Even if the proposed rule makes the process of identifying jurisdictional waters more effective and efficient, the rule will make the process of obtaining permits less so. The agencies' categorical inclusion of all tributaries and adjacent wetlands as jurisdictional will dramatically increase the caseload of the regulatory agencies charged with administering permitting programs for point source discharges (§402) and dredging/filling (§404). This "simplified definition" will lock up the permitting process by slowing down the turnaround time for needed permits which will put a financial burden on the midstream sector.

Additionally, GPA is concerned that the expanded definition of "waters of the United States" will jeopardize the agencies' general and nationwide permit programs. Under Section 404(e) of the Clean Water Act, the Corps may issue general permits to authorize activities that have minimal individual and cumulative adverse environmental effects. *See* 33 U.S.C. § 1344. Currently, many of the activities conducted in the oil and gas industry, particularly in the midstream sector, have many available permitting options when it comes to projects that may impact waters of the United States. For projects deemed to have "minimal impact(s)," there are many specific project-type Regional, General, and Nationwide permits that companies can obtain to seek approval for an activity. Many times, oil and gas companies will re-route, re-design, or change the "footprint" of a project in order to minimize impacts and allow the work to be performed under a much less onerous permitting process. The Nationwide permitting program was developed as a way to more efficiently process permits with minimal impacts to the aquatic environment. In fact, roughly 90% of the permits processed by the Corps are either General or Nationwide permits. Even with 90% of the permits being streamlined in this manner, the Corps and other agencies (such as wildlife agencies and historic preservation offices) are apparently still very stretched, resource-wise, to process these permits in a timely fashion as evidenced by GPA members' experiences in recent permitting activities.

We are concerned that the proposed rule expands the universe of waters that are considered waters of the United States, which will result in an increased number of projects that will no longer be deemed to be "minimal impact" and therefore would not qualify for approval under one of the General or Nationwide permits. This proposed rule appears to be necessitating more usage of an Individual permit type of review, which takes significantly longer and requires more resources, both financially and in personnel time (for both the agency and the project proponents). With the federal agencies already significantly burdened with project reviews, this scenario will further increase their burden and degrade an efficient and proven permit process. As with many other industries, the midstream sector of the oil and gas industry relies greatly on regulatory certainty and the

predictability of permitting costs and timeframes to evaluate and justify the economics of projects and the hiring of employees. Implementation of the proposed rule changes will impact thousands of direct and indirect jobs throughout the United States in our sector of the industry alone and greatly impede natural gas infrastructure development.

Furthermore, if many projects are no longer deemed "minimal impact," the entire premise of the Nationwide and General permitting process is undermined. GPA questions how EPA can justify such a harsh and overreaching rule change, when a favorable National Environmental Policy Act (NEPA) analysis must be achieved each time the Nationwide Permits are approved for use. If the most recent NEPA review of the Nationwide Permits determined that there was no impact, then there should be no reason to make such sweeping and significant changes.

The Proposed Rule Would Significantly Expand the Scope of the Spill Prevention, Control, and Countermeasure Rule

The Spill Prevention, Control, and Countermeasure (SPCC) Rule, 40 C.F.R. § 112, provides requirements for oil spill prevention, preparedness, and response to prevent oil discharges to navigable waters and adjoining shorelines. The SPCC Rule is part the EPA's oil spill prevention program and was published under the authority of Section 311(j)(1)(C) of the Clean Water Act. The SPCC Rule requires specific facilities to prepare, amend, and implement SPCC Plans. The midstream sector of the oil and gas industry is heavily regulated under the SPCC Rule since the rule applies to most types of facilities with an aboveground oil storage capacity greater than 1,320 U.S. gallons or an underground storage capacity greater than 42,000 U.S. gallons that "*could reasonably be expected* to discharge oil in quantities that may be harmful… into or upon the *navigable waters* of the United States or adjoining shorelines…." 40 C.F.R § 112.1(b) (emphasis added).

The proposed rule adds to the list of "waters of the United States" a broad definition of tributaries of these waters. EPA and the Corps define "tributary" as any water that is "physically characterized by the presence of a bed and banks and ordinary high water mark" or any wetland, lake, or pond regardless of its physical characteristics—that "contributes flow, either directly or through another water" to a traditionally navigable water, interstate water, or the territorial sea. 79 Fed. Reg. at 22199. Many features, like dry arroyos and mountain channels, have bed and bank even though they only flow when it rains or the snow melts. The rule then continues, adding to the list of jurisdictional waters all waters that are adjacent to the initial waters and their tributaries. *Id*. Further, as stated above, EPA and the Corps have significantly expanded the concept of "adjacent" by giving new definitions to the meaning of the term.

Because the jurisdictional trigger for the SPCC Rule is whether oil "could reasonably be expected" to discharge to navigable water, any rule that changes the meaning of "waters of the United States" will expand the scope of the SPCC jurisdiction significantly. Since GPA members operate facilities without SPCC plans based on previous conclusions that a release could not reasonably impact "waters of the United States" at those locations, the proposed rule expanding the scope of these waters would warrant a review of those prior conclusions. The proposed changes could require numerous facilities that have never been subject to SPCC requirements to prepare SPCC Plans or Facility Response Plans (FRPs) and comply with new regulatory requirements even though no physical changes have occurred to the facility or the environment. This will create an unnecessary financial and compliance burden on industry as well as substantially increasing the workload of EPA SPCC and FRP inspectors nationwide. GPA strongly suggests that EPA conduct a review of the impacts the proposed rule changes will have on EPA's SPCC and FRP programs and

the personnel and financial resources allocated to oversee compliance and enforcement activities in those programs.

It is Premature for EPA and the Corps to Issue the Proposed Rule Before EPA Finalizes the Draft Connectivity Report

This proposed rule should not go forward and become final based on only a *draft* connectivity report by EPA. Although a group of 22 individuals reviewed the draft report prior to its issuance, we respectfully request that EPA fully consider comments received by additional reviewers (who were not selected by EPA). GPA believes that such comments on the draft report should be evaluated and fully vetted, and after that process, the report should be released as final. A proposed rule with such significant nationwide implications should be based on a scientific report that is finalized and only after the entire scientific community has had an opportunity to review and comment on the report. It is only until then that all interested parties in this proposed rule can participate in a meaningful discussion about the scientific basis of the proposed rule. GPA strongly urges that EPA and the Corps at least wait until the Draft Connectivity Report is finalized before promulgating any type of rule revising the definition of the "waters of the United States."

GPA very much appreciates your consideration of our comments on this proposed rule. We offer our assistance as EPA considers public comments.

Sincerely,

Jeff Applekamp
Vice President of Government Affairs
Gas Processors Association