EPN Comments on Proposed Repeal of the Rule Defining the Waters of the United States

I. Introduction and Summary

- Introduction

On March 6, 2017, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (hereafter "the agencies") issued a proposed rule which seeks to repeal a rule promulgated in 2015. *See* 82 Fed. Reg. 12532 (March 6, 2017) (Notice of Proposed Rulemaking to Withdraw and Reissue Clean Water Rule). The 2015 rule that the current proposal seeks to overturn was issued in the context of a complex legal background and provided a new definition of Waters of the United States (WOTUS) in an attempt to clarify what was covered by the Clean Water Act (CWA). This proposal was further elaborated, after considering public comments on the March 2017 rulemaking, in a June 29, 2018, supplemental notice made public on the two agencies' websites. This notice purported to provide additional support for repealing the Obama-era "Clean Water Rule," which they now refer to as "the 2015 rule." The notice was published in the Federal Register at 83 Fed. Reg. 32227 (July 12, 2018).

This document sets out the comments on this proposal of the Environmental Protection Network (EPN), a bi-partisan organization of former EPA employees and others who have come together to provide an informed and rigorous defense against efforts to undermine the protection of public health and the environment. Our analysis of this proposal leads us to conclude that it incorrectly reinterprets the CWA, its legislative history and the applicable Supreme Court cases; that it has significant shortcomings; and that it should not proceed to promulgation. Because the significant legal issues that are raised by this proposal and supplementary notice will be well

covered by a variety of commenters who have been engaged with these issues for many years, EPN's comments will focus on an overview of the basic policies pursued in this proposal and the implications of reversing long-standing understandings of the purpose, intent and administration of the Clean Water Act.

- Summary

The Clean Water Act regulates discharges of pollutants to "navigable waters." Congress defined "navigable waters" as "the waters of the United States" (WOTUS) and assigned to the agencies the task of further defining the reach of the CWA. The law was well settled until 2001 when the Supreme Court limited the agencies' definition of WOTUS to those waters with a "significant nexus" to downstream navigable-in-fact waters. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). That decision raised the question of what constitutes a "significant nexus." Neither Congress nor any of the agencies had ever used that term in the context of the CWA. In 2006, the Supreme Court further confused matters with its split decision in *Rapanos v. United States,* 547 U.S. 715 (2006), leaving unanswered questions about what was now covered by the CWA. The agencies issued guidance in 2008, EPA/Corps "Clean Water Act Jurisdiction Following the United States Supreme Court's Decision in *Rapanos v. United States* and *United States v. Carabell*" ("2008 Guidance"), but the 2008 Guidance was difficult to follow. Congress failed to enact any clarifying legislation in the form of a WOTUS amendment to the CWA, so in 2015 the agencies issued a new definition of WOTUS in an attempt to clarify what was covered by the CWA.

- Discussion

As we examine the March 6, 2017 proposal and the June 28, 2018 supplemental information, which together attempt to justify the repeal, our conclusion is that the agencies are attempting to reinterpret the CWA, its legislative history and the applicable Supreme Court cases differently from any prior administration and without proper legal support or foundation.

Agencies seeking to overturn their own previous rulemakings carry a heavy legal burden. They must not only provide a clear and convincing rationale for their proposal (as in any rulemaking), but they must equally explain reversals of the records they previously created, including in this case, the legal rationale for what constitutes a significant nexus, the science used to support the decision-making, the estimates on the potential increase in jurisdictional determinations, and other foundations of the 2015 rulemaking. Reading the June 29 supplemental notice as a whole, it clearly does not convince and indeed falls short of meeting the arbitrary and capricious standard of the Administrative Procedure Act. In our experience, it is rare to see two agencies attacking their own recent prior rule this aggressively but at the same time so ineffectually. We list below some of the major errors.

First, consistent with the apparent focus of the Trump administration's emphasis on states' rights, the proposal elevates CWA section 101(b) to an even status with section 101(a). There are irrefutably good reasons why almost every court interpreting the CWA cites section 101(a) as the starting point of its analysis. Comparatively few courts have focused on section 101(b) because the CWA was intended to enact a floor for the states' roles in protecting water quality, consistent with a nation-wide interest in improving and protecting the quality of the waters on which the American public depend for their basic needs as well as for recreation and

industry. Congress recognized that improving water quality requires an approach predicated on the basic truth that water frequently crosses state boundaries. What happens upstream inevitably impacts users and consumers down the line, whether they are situated within the same state or in a neighboring or more distant one. Congress made clear in the 1972 amendments to the CWA that the states were to continue to administer most of the CWA programs, but must do so consistent with a broad federally-mandated regulatory scheme to combat nationwide water quality problems and assure a minimum level of safety and quality.

That was the big change that came with the 1972 amendments and one that cannot be reversed by this mistaken rulemaking. Prior to 1972, the states were in charge under the preexisting Federal Water Pollution Control Act. (The June 29 notice incorrectly states at page 18 that the Corps was the sole regulator under the Rivers and Harbors Act.) Congress was motivated to act because the states were doing a very poor job of protecting our nation's waters, and water quality throughout the United States was horribly degraded. Lacking minimum federal standards applicable to each of them, the states were in a well-documented race to the bottom, in part driven by competition to attract industry. By enacting minimum federal standards, the CWA eliminated that pernicious contest. Beach closures, algal blooms and fish kills were common and at least one river famously caught fire. Responding to an outcry for better water quality, Congress in the 1972 amendments set minimum federal standards and directed that the CWA apply to the "*waters of the United States."* Congress recognized the laws of gravity as they apply to water, and the basic truth that state boundaries have little to do with the way water systems work and how pollution impacts wider populations.

The agencies devote an entire section of the June 29 notice to the "potential impact on the federal-state balance," but from that peculiar point of view of elevating state's rights over the impacts of water quality on the health and safety of the American public. Thus, they question, for example, whether asserting jurisdiction over waters within the 100-year flood plain is consistent with section 101(b). *See* June 29 notice at 77. This overzealous focus on states' rights misses the basic and critical point that water pollution is a national problem that requires a national solution. The 2015 rule buffers its effect on states' right by limiting CWA jurisdiction over only those waters that affect downstream navigable-in-fact waters.

The current proposal creates havoc with a variety of currently settled matters. For example, it creates uncertainty for law that was settled in *Arkansas v. Oklahoma,* 503 U.S. 91 (1992). That court found that EPA was obligated by both the Act and its own regulations to ensure that discharges from Fayetteville, Arkansas would not violate Oklahoma's standards, as a "perfectly reasonable exercise of the Agency's statutory discretion wholly consistent with the Act's broad purpose 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Id.* at 105-106. If states' rights become the sole standard or even the most important, how do we recognize and respect shared interests in the waters that flow over state boundaries, impacting the health and safety of multiple populations? The entire purpose of the *federal* CWA is to protect the nation's waters, which are largely interconnected, and which largely flow over and between state lines.

Second, the agencies look at *Riverside Bayview Homes*, 474 U.S. 121 (1985)*, SWANCC,* and *Rapanos* in a new light. Seemingly echoing President Trump's February 28, 2017 Executive Order, "Restoring the Rule of Law, Federalism and Economic Growth by Reviewing the 'Waters

of the United States' Rule," the agencies now emphasize Justice Scalia's plurality opinion (relatively permanent waters or RPWs) from *Rapanos*. The agencies also read Justice Kennedy's concurring opinion much more narrowly than in the past, although it is not clear that they are completely abandoning the significant nexus standard. This positions the agencies contrary to every brief filed by the United States since 2006, all of which have argued that either the Kennedy significant nexus test *or* the Scalia test can be used to assert jurisdiction. The circuit courts have unanimously rejected interpretations of *Rapanos* that make the Scalia standard the sole test for jurisdiction.

The June 29 notice at page 40 states that the agencies' long-standing "interpretation of significant nexus was expansive and does not comport with and accurately implement the limits on jurisdiction reflected in the CWA and the decisions of the Supreme Court." But the 2015 rule was mindful of Justice Kennedy's language in *Rapanos*, and hued very closely to the language of his concurring opinion. The lengthy brief filed by the United States in the Sixth Circuit WOTUS litigation at the end of the previous administration reflects that careful analysis. Neither the proposal nor the supplemental filing convincingly explain how all of the prior positions of the United States are now wrong, although as a legal matter it must to prevail. There has been no intervening case law from the Supreme Court or the Circuit Courts to justify a reversal in the government's long-held interpretation of the scope of CWA jurisdiction. Nor are the documents and reasoning offered by the government in its proposal persuasive in addressing the prior record.

Third, the June 29 notice flips on its head the agencies' prior interpretation of "aggregation," which is an important part of the Kennedy opinion in *Rapanos*. Aggregation

allows smaller wetlands in the same geographic area (and arguably tributaries) to be analyzed collectively to determine whether they together have a significant nexus to downstream waters. The agencies now argue without explanation that they misinterpreted Kennedy in the 2015 rule, and that aggregation may not apply on the scale used in the 2015 rule. The agencies further argue that "certain findings and assumptions supporting adoption of the 2015 Rule were not correct," but they do not cite what findings and assumptions those are. *Id*. at 40. A baseless accusation cannot be addressed in these comments or serve as a rational basis for a rulemaking.

The agencies similarly reversed direction on the connectivity report, 80 Fed. Reg. 2100 (January 15, 2015) (EPA ORD "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence") which is the comprehensive, peer-reviewed science report which underpinned many of the findings to support the 2015 rule. *See* June 29 notice at 50-54. The 2017 brief filed in the Sixth Circuit by the Department of Justice heavily cites the report. The agencies now go to great lengths (albeit without any credible legal or scientific support) to discredit that valid and well-researched report. The report concluded that small intermittent and ephemeral headwater streams collectively have a significant impact on downstream navigable-in-fact waters. The agencies provide no science to contradict any of the conclusions in the connectivity report. Neither Section 101(b) of the CWA nor the APA allows them to ignore well-documented science.

Fourth, the agencies state that the 2015 rule, must be changed because it does not achieve its goal of regulatory certainty, yet the rule has essentially never gone into effect nor has it been tested in the real world (it was in effect for a few weeks in parts of the country before it was stayed by the courts.) After *Rapanos*, both regulated industry and the agencies themselves found

the old WOTUS definition very difficult to implement. The 2008 Guidance was drafted by the Bush administration with no input from the EPA or Corps field offices, and it layered on confusion where none previously existed. Because some of us worked on it as agency professionals, we know that EPA struggled to understand jurisdiction under that guidance document. It was (and is still) a challenge for people to understand who are not experts in the area of CWA jurisdictional analysis. Under the 2008 Guidance, it is nearly impossible for members of the general public to understand whether the stream or wetland on their property is covered by the CWA. It is simply too complex. It was to address that unnecessary complexity that the agencies promulgated the 2015 rule.

The agencies and the regulated community continue to expend excessive time and effort figuring out jurisdiction questions, especially in the arid west. It therefore is questionable that the agencies now argue that we must return to the 2008 Guidance in the interest of "regulatory certainty." In his recent American Bar Association *Trends* article entitled, "No clarity in sight for 'waters of the United States,'" leading CWA (private bar) lawyer Neal McAliley wrote that the Trump administration's efforts at repeal will result in "a return to the regulatory uncertainty that prevailed from 2001 to 2015" until the new rules are finally put into place.

It is perfectly legitimate for a new Administration to reconsider environmental policy directions, but they cannot do so without developing a proper legal justification and record and exposing that to public comment. The June 29 supplemental notice demonstrates how worried the agencies are about the strength of their proposal, and its likelihood to survive litigation; the notice is a very weak attempt to build a better record to support the repeal. In fact, it is unpersuasive because its reading of the statute is legally implausible and wholly inconsistent

with court precedent and prior agency pronouncements. It fails to respond adequately to the robust record supporting the 2015 rule and in that failure will successfully be attacked as arbitrary and capricious under the standards of the APA when the matter comes to be decided in the courts. Finally, the new reliance on section 101(b) as somehow taking precedence over the clear intent expressed in the CWA to assure nation-wide standards for water is on exceedingly shaky grounds, legally and in terms of our understandings of the science of water.

The proposed rule would administratively rewrite the CWA to limit WOTUS to RPWs, which would, in effect, exclude most of the headwaters systems and all wetlands and other waters that do not abut an RPW. If that happens, the CWA and the intent expressed by Congress in writing it, the agencies will succeed in gutting the CWA. We strongly urge the agencies to withdraw this proposal and the supplementary materials.

Respectfully Submitted,

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