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Via regulations.gov

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Re: Comments of the Utility Water Act Group in Response to the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Supplemental Notice of Proposed Rulemaking to Recodify Pre-existing "Waters of the United States" Rules, 83 Fed. Reg. 32,227 (July 12, 2018), EPA-HQ-OW-2017-0203; FRL-0062-34-OW

Dear Mr. McDavit and Ms. Jensen:

The Utility Water Act Group ("UWAG") submits the attached comments in response to the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Supplemental Notice of Proposed Rulemaking to Recodify Pre-existing "Waters of the United States" Rules, 83 Fed. Reg. 32,227 (July 12, 2018).

UWAG appreciates the opportunity to comment. Please contact me at (202) 955-1893 if you have any questions.

Sincerely,

Karma B. Brown

Karma B. Brown

Attachment

Comments of the Utility Water Act Group in Response to the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Supplemental Notice of Proposed Rulemaking to Recodify Pre-existing "Waters of the United States" Rules

83 Fed. Reg. 32,227 (July 12, 2018)

EPA-HQ-OW-2017-0203; FRL-0062-34-OW

August 13, 2018

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I. Introduction

The Utility Water Act Group ("UWAG") strongly supports the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (together, "Agencies") proposal to repeal the 2015 "Waters of the United States" Rule, 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule" or "Rule"), and recodify the regulatory text defining "waters of the United States" ("WOTUS") that was in place prior to the 2015 Rule.[1] "Definition of 'Waters of the United States' – Recodification of Pre-existing Rules," 82 Fed. Reg. 34,899 (July 27, 2017) ("Proposal"). The Agencies' supplemental notice of proposed rulemaking ("SNPRM") provides additional rationale and explanation to support the Proposal and seeks comment on a number of important issues relevant to this proposed action. 83 Fed. Reg. 32,227 (July 12, 2018). UWAG's comments on the Proposal are incorporated by reference.[2] UWAG provides these additional comments in response to the SNPRM and in light of the regulatory and litigation developments that have occurred since September 2017, which provide further support and justification for repeal of the 2015 Rule.

The geographic scope of Clean Water Act ("CWA") jurisdiction is of paramount importance to UWAG and its members, and, as such, UWAG has actively advocated for the establishment of a reasonable, appropriately limited, definition of WOTUS subject to federal

[1] UWAG is a voluntary, non-profit, unincorporated group of 146 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. UWAG's purpose is to participate on behalf of its members in EPA's rulemakings under the CWA and in litigation arising from those rulemakings.

[2] UWAG, Comments on EPA's and the Corps' Proposed Repeal 2015 Clean Water Rule and Recodification of Pre-Existing Rules (Sept. 27, 2017), Doc. No. EPA-HQ-OW- 2017-0203-13248 ("UWAG Repeal Comments").

regulation for decades. Indeed, UWAG has participated in all major regulatory actions and litigation involving the definition and reach of WOTUS since the CWA's enactment.[3]

UWAG, a wide-range of industry groups, and States have explained in prior comments and multiple court filings that the 2015 Rule reaches land and waters well beyond the Agencies' statutory authority, ignores important limits recognized by Supreme Court precedent, fails to preserve the States' authority to regulate certain waters, and, contrary to its stated goals, does little to provide much needed certainty and clarity to the regulated community, States, and the public at large regarding the scope of the Agencies' geographic authority.[4] These infirmities have been confirmed by every court to rule on the merits of the Rule to date, including two federal district courts and one appellate court, in considering motions for preliminary injunction.[5] As a result of these decisions, the 2015 Rule never went into effect in 13 States, and was enjoined nationwide shortly after its effective date. The Rule is presently enjoined in 24 States across the country.[6] In addition, since issuance of the Proposal, the Agencies finalized a rule

[3] For example, UWAG submitted comments on the 2015 Rule, focusing extensively on issues of significant importance to the electric utility industry. UWAG, Comments in Response to the U.S. EPA's and U.S. Army Corps of Engineers' Proposed Rule to Define Waters of the United States Under the Clean Water Act (Nov. 14, 2014), EPA-HQ-OW-2011-0880-15016 ("UWAG WOTUS Comments"). UWAG also submitted comments on the Draft Connectivity Report. UWAG, Comments on the U.S. EPA Draft Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Nov. 6, 2013), EPA-HQ-OA-2013-0582-0265. UWAG was a party to the joint business and municipal petitioners' brief filed before the Sixth Circuit. *See* Opening Brief for the Business & Municipal Petitioners, *In re EPA*, No. 15-3751 (6th Cir. Nov. 1, 2016), ECF No. 129-1.

[4] A stated purpose of the 2015 Rule was to "increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States' protected under the Act." 80 Fed. Reg. at 37,054.

[5] *Georgia v. Pruitt*, No. 2:15-cv-79, 2018 U.S. Dist. LEXIS 97223 (S.D. Ga. June 8, 2018) ("*Georgia*"); *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015); *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015.

[6] Motions for preliminary injunction are pending before two other district courts, raising the possibility that the Rule will be enjoined in an additional 11 States.

adding an applicability date of February 6, 2020, to the 2015 Rule, providing time for the Agencies to fully consider whether to finalize the Proposal and undertake a subsequent rulemaking to define WOTUS. 83 Fed. Reg. 5200 (Feb. 6, 2018) ("Applicability Rule"). The Applicability Rule, however, will expire in two years, or possibly sooner, if a court in one of the numerous pending lawsuits finds that the Applicability Rule is invalid. *See, e.g., Georgia*, 2018 U.S. Dist. LEXIS 97223, at *27. In the meantime, the Agencies are implementing the regulatory text defining WOTUS that was in place prior to the 2015 Rule, based on their decades of experience with the prior regulations. Though "imperfect," this decades-old program provides a measure of certainty and predictability. *See In re EPA*, 803 F.3d at 808 (describing the "familiar" pre-2015 Rule regime).

UWAG urges the Agencies to finalize the repeal of the 2015 Rule and recodify the prior regulations to ensure that the flawed 2015 Rule is not implemented and to avoid the unnecessary and costly burdens for industry, States, and the public, without commensurate benefit to the environment, which would result should the Rule go into effect in certain States (but not others), due to one or more of the ongoing legal challenges to the 2015 Rule. *See, e.g.,* 83 Fed. Reg. at 5202 (concluding that, in the absence of the Applicability Rule, there would be a patchwork of regulation, depending on the geographic extent of the courts' injunctions of the 2015 Rule). It is also possible that the Applicability Rule may be vacated by one or more district courts, creating additional regulatory uncertainty regarding the applicable jurisdictional standards across the country. The Agencies have properly concluded that "[h]aving different regulatory regimes in effect throughout the country would be complicated and inefficient for both the public and the agencies." *Id.*

A repeal of the 2015 Rule would solve these consequential problems by providing predictability and certainty until such time as the Agencies can undertake a subsequent rulemaking to propose a new definition of WOTUS. UWAG encourages the Agencies to expeditiously undertake this subsequent rulemaking on the appropriate geographic scope of WOTUS because there are many issues with the pre-existing regulations and guidance documents that need to be addressed. UWAG strongly supports a future rulemaking that is true to the CWA, the Constitution, and Supreme Court precedent and shows proper deference to the States.

II. Background

A. The Agencies' Interpretation of the Scope of Their CWA Jurisdiction Has Considerable Regulatory Consequences for the Electric Utility Industry.

The Agencies' definition of WOTUS has significant regulatory impacts for a wide range of electric utility industry activities. UWAG members operate and maintain a wide range of facilities that generate, transmit, and distribute electricity across the nation, and each is affected by the Agencies' interpretation of WOTUS in a unique and significant way. For example, UWAG members own and operate many types of generating facilities, including steam electric power plants, combustion turbines and hydroelectric facilities, as well as electric transmission and distribution lines, natural gas and oil distribution lines, railroad tracks, and an increasing array of renewable generation sites, including wind and solar facilities. UWAG members also construct new facilities, particularly in response to increasing demand for renewable energy and gas-based generation, and other types of facilities that are part of a diverse electric generation portfolio. Increased development of new generation facilities requires construction, not only of generation assets, but also of transmission and distribution power lines, transformers, and substations to connect that generating facilities to the grid. The retirement of older facilities

requires decommissioning those facilities properly to ensure they are safe and secure, and sites are available for productive re-use. A diverse electric generation portfolio is critically important to the electric energy industry, energy consumers, and the nation's energy security.

These varied types and locations of facilities owned and operated by UWAG members lead to complex and diverse CWA regulatory obligations. For example, at existing and new generating facilities, maintenance and construction is regularly performed on: stormwater conveyances; other water management features; waste management and treatment areas; raw material storage areas; building or equipment pads; roads or rail spurs; gas or oil pipelines; and Spill Prevention, Control, and Countermeasure ("SPCC") containment areas. At existing and new transmission and distribution facilities, maintenance and construction are regularly performed at: poles or pads; access roads, rights-of-way; and substations.

Since the enactment of the CWA in 1972, State agencies charged with implementing the CWA have repeatedly determined that most of these internal features on facilities are not jurisdictional. The 2015 Rule, however, would require UWAG members to obtain CWA § 404 or § 402 permits for discharges of pollutants to industrial containment basins and a wide range of other areas not previously deemed to be WOTUS. The 2015 Rule would trigger new SPCC requirements and other CWA § 311 requirements for newly identified jurisdictional areas. Accordingly, the Agencies' interpretation of the scope of their CWA geographic jurisdiction has a significant impact on UWAG member activities, and UWAG encourages the Agencies to carefully evaluate the statute, case law, and principles of cooperative federalism when undertaking a subsequent rulemaking to define WOTUS.

B. Regulatory and Litigation Developments Since Issuance of the Proposal Support and Justify Repeal of the 2015 Rule.

1. The Applicability Rule Delays Implementation of 2015 WOTUS Rule Until February 2020.

After the Agencies published the Proposal in the *Federal Register*, they finalized the Applicability Rule, which prevents the 2015 WOTUS Rule from going into effect for two years to "maintain the *status quo* … and [provide] continuity and regulatory certainty for regulated entities, the States and Tribes, and the public while the agencies continue to consider possible revisions to the 2015 Rule." 83 Fed. Reg. 5200. By adding an applicability date, the Agencies seek to ensure the scope of CWA jurisdiction remains consistent nationwide "for a defined, interim period." *Id.* In the meantime, the Agencies continue to apply the prior regulatory definition of WOTUS.

Shortly after the Agencies promulgated the Applicability Rule, multiple States and environmental groups filed challenges in the district courts, raising substantive and procedural concerns regarding the promulgation of the Applicability Rule. 83 Fed. Reg. at 32,230. No court has yet ruled on the merits of the challengers' claims. But a decision from any one of these courts finding the Applicability Rule to be unlawful, in whole or part, could result in the untenable situation where the 2015 Rule is stayed in some States by court order, and goes into effect in other States not subject to a court stay, where parties have prevailed on their challenges to the Applicability Rule. Clearly, such a patchwork of regulatory rules across the country would be unmanageable and extremely disruptive to the economy, including the critical energy and infrastructure projects undertaken by UWAG members.

2. Every Court to Review the Merits of the 2015 Rule Has Found It to Violate the Law.

Over the substantive concerns expressed by UWAG, a wide-range of industry groups, States, and the public with the 2014 Proposed Rule, including that it was inconsistent with Supreme Court precedent, exceeded Commerce Clause limits, and violated federalism principles, *see, e.g.*, UWAG WOTUS Comments at 33-37, the Agencies finalized the 2015 Rule. Immediately following promulgation of the Rule, numerous interested parties, including UWAG, filed petitions for review, which were consolidated in the Sixth Circuit.

Before the Rule's effective date, the North Dakota district court stayed the Rule in 13 States, finding the States "likely to succeed" because "it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule" and "failed to comply with [APA] requirements when promulgating the Rule." *North Dakota*, 127 F. Supp. 3d at 1051.[7] Shortly thereafter, the Sixth Circuit stayed the Rule nationwide, expressing concern with the legality of the Rule.[8] *In re EPA*, 803 F.3d at 807. The Sixth Circuit found it "far from clear that the new Rule's distance limitations are harmonious" with even an expansive reading *Rapanos*, that "the rulemaking process … is facially suspect," and that the "[States] have demonstrated a substantial possibility of success on the merits of their claims." *Id.* at 807-09.

Since the Proposal, the Sixth Circuit's nationwide stay has been lifted in response to the Supreme Court's decision that the 2015 Rule is subject to direct review in the district courts. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 624 (2018); *In re Dep't of Def. & EPA Final Rule*, 713 F. App'x 489 (6th Cir. 2018) (lifting stay and dismissing the corresponding petitions for review, including UWAG's). District court litigation regarding the 2015 Rule has

[7] Briefing on the merits of the 2015 Rule is ripe for a decision by the North Dakota district court.

[8] The Rule was in effect in 37 States for six weeks prior to the Sixth Circuit stay.

thus resumed, and the Southern District of Georgia issued a June 8, 2018 order enjoining the Rule in an additional 11 States. *Georgia*, 2018 U.S. Dist. LEXIS 97223. Accordingly, the WOTUS Rule is now stayed in 24 States across the country, and two additional district courts are considering motions for preliminary injunction. *See Texas v. EPA*; No. 3:15-cv-162 (S.D. Tex.); *Am. Farm Bureau Fed'n et al. v. EPA*, No. 3:15-cv-165 (S.D. Tex.); *Ohio v. EPA*, No. 2:15-cv-02467 (S.D. Ohio). Thus, it is possible that the Rule will be stayed across an additional 11 States.

The Georgia district court's opinion is instructive as to the procedural and substantive flaws of the 2015 Rule. *Georgia*, 2018 U.S. Dist. LEXIS 97223. The court concluded the States are likely to succeed on the merits of their claims that the 2015 Rule violates the CWA, Administrative Procedure Act (APA), as well as the Commerce Clause and the Tenth Amendment.

As to the CWA claims, the court agreed that the Rule likely fails to meet the standards set forth in *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*") and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). *Georgia*, 2018 U.S. Dist. LEXIS 97223, at *17-18. Notably, Georgia is within the Eleventh Circuit, which has found Justice Kennedy's concurrence to be the "controlling" *Rapanos* opinion. Evaluating the Rule's merits under Justice Kennedy's "significant nexus" approach, the court found that the 2015 WOTUS Rule went too far. "The WOTUS Rule allows the Agencies to regulate waters that do not bear any effect on the 'chemical physical, and biological integrity' of any navigable-in-fact water." *Id.* at *17-18. The tributary definition

> covers a trace amount of water so long as "the physical indicators of a bed and bank[] and an ordinary high water mark" can be found by "mapping information" or "remote sensing tools" where actual physical indicators are "absent in the

> field." This definition is similar to the one invalidated in *Rapanos*, and it carries with it the same concern that Justice Kennedy had there….

Id. Thus, the *Georgia* court found the WOTUS Rule "will likely fail for the same reason that the rule in *SWANCC* failed" because it "asserts that, standing alone, a significant 'biological effect' – including an effect on 'life cycle dependent aquatic habitat[s]' – would place a water within the CWA's jurisdiction." *Id.* at *18 (quoting 33 C.F.R. § 328.3(c)(5)).

The court also agreed that the States are likely to succeed on their claims that the WOTUS Rule is arbitrary and capricious under the APA because the Rule asserts jurisdiction over remote and intermittent waters without evidence that such waters have a nexus with any navigable-in-fact waters. *Id.* at *19. In addition, the court found that the 2015 Rule was not a logical outgrowth of the proposed rule "in significant ways." *Id.* at *20. For example, while the proposed rule defined adjacent waters as those within a riparian area or floodplain of an interstate water or an impoundment or tributary of an interstate water, the Rule defines waters to be *per se* adjacent when they are within certain distances of a primary water, impoundment, or tributary. *Id.* at *20-*21.

As to the second preliminary injunction factor, whether there is a substantial threat of irreparable injury, the court cited the Agencies' estimates of an increase in CWA jurisdiction of 2.84 percent to 4.65 percent annually.[9] *Id.* at *22. The States provided evidence that they would suffer a loss of sovereignty and monetary losses if the Rule was not enjoined and later determined to be unlawful. *Id.* at *23. The court recognized that there are two ways in which

[9] In fact, as the Agencies note in the SNPRM, this estimate is likely low and does not accurately reflect the significant impact the 2015 Rule would have in certain parts of the country. 83 Fed. Reg. 32,243-44. UWAG agrees that the approach the Agencies undertook in its analysis of "ORM2 other waters" was skewed and led to an underestimation of the increase in jurisdiction that would result from the 2015 Rule. *See, e.g.,* UWAG WOTUS Comments at 88-90. Due to this underestimation, the public did not have accurate notice of the impact of the 2015 Rule.

the Rule could go into effect, thus triggering immediate and irreparable harm to the States. First, as a result of the Applicability Rule, the WOTUS Rule will become effective on February 6, 2020 (absent further regulatory action by the Agencies). *Id.* at *25. Second, the WOTUS Rule will become effective if one or more of the courts considering challenges to the Applicability Rule invalidates the Applicability Rule. Such challenges are ripe for decision. Accordingly, the court was satisfied that the States demonstrated likely and sufficiently imminent irreparable harm. *Id* at *25-26.[10]

Finally, the court found that an injunction favors the public interest. *Id.* at *30. In particular, the public has no interest in enforcement of "what is very likely an unenforceable rule," and, if the Rule became effective before a final decision on the merits, "farmers, homeowners, and small businesses will need to devote time and expense to obtaining federal permits – all to comply with a rule that is likely to be invalidated." *Id*.[11]

All of the courts to review the merits of the 2015 Rule have found it likely to be unlawful for a multitude of reasons, and thus enjoined the Rule to avoid the significant concerns that would result from implementation of an illegal rule. These decisions strongly support the Agencies' proposed repeal of the 2015 Rule.

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[10] The third preliminary injunction factor requires the court to compare the harm to the States in the absence of a preliminary injunction with the harm to the government in granting a preliminary injunction. The court held that this factor weighs heavily in favor of the States due to their loss of sovereignty and unrecoverable monetary losses. The Agencies' stated harm was merely compliance with a court injunction.

[11] Briefing on the merits may proceed in the near future before the Georgia district court. The States have requested a briefing schedule that would commence as of August 31, 2018, and end by November 28, 2018. The Agencies have taken the position that it is unnecessary for the parties to brief, and for the court to decide, the merits of the 2015 Rule due, in part, to the Proposal to repeal the 2015 Rule. In the meantime, environmental intervenors have appealed the Georgia order granting a preliminary injunction to the Eleventh Circuit and briefing on the appeal will begin shortly. *Nat'l Wildlife Fed'n*, No. 18-13054 (11th Cir. Aug. 1, 2018).

III. The 2015 Rule Was Flawed From the Outset, and the Agencies Should Rescind the 2015 Rule Now.

As summarized briefly below, and in our prior comments and filings before the Sixth Circuit, among other infirmities, the 2015 Rule failed to preserve the States' traditional and primary authority over land and water use, expands the Agencies' jurisdiction well beyond the scope intended by Congress, disregards statutory checks on the Agencies' power, and distorts Supreme Court precedent. *See, e.g.*, UWAG WOTUS Comments at 33-37. UWAG supports the Agencies' Proposal to immediately rescind the 2015 Rule and recodify the prior regulations to remove the unlawful 2015 Rule from the *Code of Federal Regulations*.

A. The 2015 Rule Fails to Recognize the Breadth and Effect of the Supreme Court's Decisions Addressing the Proper Scope of the Agencies' CWA Jurisdiction.

The Supreme Court first addressed the extent of the federal government's CWA regulatory jurisdiction in *Riverside Bayview,* where the Court considered whether CWA jurisdiction extends beyond the navigable waters traditionally regulated by the federal government to include wetlands. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The Court found that the Act's definition of "navigable waters" as WOTUS indicated an intent to regulate "at least some waters" that were not navigable in the traditional sense, and upheld Corps jurisdiction over wetlands that "actually abut[] a navigable waterway." *Id.* at 132.

Thereafter, the Agencies "adopted increasingly broad interpretations of [their] own regulations under the Act," asserting jurisdiction far beyond wetlands that actually abut navigable waterways to include an ever-growing catalogue of land and water features bearing little or no relation to the traditional definition of navigable waters. *Rapanos*, 547 U.S. at 725 (plurality). In 1985, by memorandum, EPA concluded that waters could be deemed WOTUS

based on their use by migratory birds.[12] Under this theory, greater than eight million isolated wetlands smaller than half an acre in size across 41 States would be jurisdictional because they could be used by migratory birds.[13] The so-called "Migratory Bird Rule" became one of the Agencies' dominant theories supporting broad CWA jurisdiction until the Supreme Court's decision in *SWANCC.*

The 2015 Rule is flawed in the same manner as the "Migratory Bird Rule," rejected by *SWANCC*.[14] Indeed, the Rule would reach the very isolated waters the *SWANCC* Court found to be beyond the Agencies' CWA jurisdiction. The SNPRM raises several questions regarding the effect of *SWANCC* and *Rapanos.* Specifically, the Agencies request comment regarding:

> [W]hether the water features at issue in *SWANCC* or other similar water features could be deemed jurisdictional under the 2015 Rule, and whether such a determination is consistent with or otherwise well-within the agencies' statutory authority, would be unreasonable or go beyond the scope of the CWA, and is consistent with Justice Kennedy's significant nexus test expounded in *Rapanos* wherein he stated, '[b]ecause such a [significant] nexus was lacking with respect to isolated ponds, the [*SWANCC*] Court held that the plain text of the statute did not permit' the Corps to assert jurisdiction over them.

83 Fed. Reg. at 32,249 (quoting *Rapanos*, 547 U.S. at 767).

In *SWANCC*, the Supreme Court evaluated the Corps' determination of jurisdiction over small isolated ponds, created when rain filled abandoned sand and gravel pits, based on use of the ponds by migratory birds. Rejecting jurisdiction over these ponds – and the Migratory Bird Rule generally – the Court explained that the CWA's use of the term "navigable waters" demonstrates Congress' understanding that its "authority for enacting the CWA [was] its

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[12] Memorandum from Francis S. Blake, Gen. Counsel, EPA, to Richard E. Sanderson, Acting Assistant Adm'r, EPA, "Clean Water Act Jurisdiction Over Isolated Waters" (Sept. 12, 1985).

[13] Corps, 1995 Wetlands Delineation Field Evaluation Forms (June 1995).

[14] UWAG is a signatory to a separate letter, providing a wide-range of industry parties' views on the proper interpretation of *SWANCC*, which is incorporated by reference.

traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. The Court acknowledged that CWA jurisdiction extends to some degree beyond traditional navigable waters ("TNWs") but found the Corps' attempt to assert jurisdiction over isolated waters because they were used as habitat by migratory birds was "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 found that the Corps' jurisdictional claim over remote ponds "significant[ly] impinge[s] [on] the States' traditional and primary power over land and water use," contrary to the Act. *Id.* at 174. Such an interpretation could only be upheld if there were "a clear statement from Congress that it intended" such a result. *Id.* "Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources." *Id.* (quoting 33 U.S.C. § 1251(b)). Consequently, the Court "read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject[ed] the request for administrative deference." *Id.*

The *SWANCC* Court further noted that its holding in *Riverside Bayview* was based in large measure on a unique circumstance: "Congress's unequivocal acquiescence to, and approval of, 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.'" *Id.* at 167 (citing *Riverside Bayview*, 474 U.S. at 134). The Court concluded that "the text of the statute will not allow" coverage 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.[15] Because the jurisdictional claim would read the term "navigable waters" out of the statute, it exceeded the Corps' authority. *Id.* at 172.

Finally, in *Rapanos*, the Court considered the Agencies' "any connection theory," pursuant to which the Corps asserted jurisdiction over four sites containing "54 acres of land with sometimes-saturated soil conditions," located 20 miles from "[t]he nearest body of navigable water." *Rapanos*, 547 U.S. at 720 (plurality). The plurality rejected the "any hydrological connection" theory, *id.* at 742 (plurality), holding that the CWA confers jurisdiction over only "relatively *permanent* bodies of water," and "only those wetlands with a continuous surface connection" to TNWs. *Id.* at 734, 742 (plurality). Justice Kennedy held that the Agencies' CWA jurisdiction extends only to wetlands with a "significant nexus" to TNWs, *id.* at 767 (Kennedy, J., concurring), and further explained that the plain text of the CWA did not permit the Corps to assert jurisdiction over waters "that were isolated in the sense of being unconnected to other waters covered by the Act" and, hence, lacked the sort of significant nexus to navigable waters that informed the Court's reading of the Act in *Riverside Bayview*. *Id.* at 766-67; *see also id.* at 779, 781-82, 784-85 (emphasizing that the significant nexus must be to navigable waters "in the traditional sense" or "as traditionally understood").

The Agencies' approach to the 2015 Rule – like their approach to the Migratory Bird Rule rejected in *SWANCC* and the "any connection" theory rejected in *Rapanos* – is inconsistent with the law. Among other flaws, the 2015 Rule effectively reads the term navigable out of the Act, extending jurisdiction to remote features across the landscape that bear no meaningful relationship to "navigable waters." *See* UWAG Repeal Comments at 16-18. Moreover, as the Agencies acknowledge, and UWAG agrees, the 2015 Rule misconstrues Justice Kennedy's

[15] Under the 2015 Rule, these same ponds would again be considered jurisdictional.

significant nexus standard, resulting in assertions of jurisdiction beyond CWA statutory limits.[16] 83 Fed. Reg. at 32,240. In addition, by allowing a significant nexus determination based on any one of nine functions, such as provision of "life cycle dependent aquatic habitat," 80 Fed. Reg. at 37,106, the 2015 Rule effectively reinstates the Migratory Bird Rule.[17]

The holding in *SWANCC* is not limited to the particular isolated, intrastate water features before the Court or the Migratory Bird Rule. Rather, it applies with equal force to any interpretation of CWA jurisdiction. Thus, any attempt to reassert jurisdiction over the *SWANCC* ponds and comparable water features would violate the plain text of the CWA, be contrary to Supreme Court jurisprudence, impermissibly intrude on the States' traditional and primary authority over land and water use, and raise serious constitutional and federalism questions. As part of any subsequent rulemaking to define WOTUS, the Agencies must recognize the breadth and import of the Court's holding and rationale in *SWANCC* and avoid asserting CWA jurisdiction in any manner that contravenes the Court's prior precedent in *Riverside Bayview*, *SWANCC*, and *Rapanos*.

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[16] Under the 2015 Rule, the Agencies can aggregate "similarly situated" waters within a watershed to determine whether the waters, taken together, significantly affect the chemical, physical, or biological integrity of an (a)(1) through (a)(3) water. 80 Fed. Reg. at 37,106. This approach is inconsistent with the significant nexus standard. Justice Kennedy focused on use of an individual significant nexus test and examination of the distance, quantity, and regularity of flow for each wetland.

[17] The 2015 Rule would assert jurisdiction over features based on singular functional connections, including the "[p]rovision of life cycle dependent aquatic habitat." 80 Fed. Reg. at 37,108. This theory of jurisdiction mirrors the Migratory Bird Rule, which claimed isolated non-navigable ponds were jurisdictional solely "because they serve[d] as habitat for migratory birds." *SWANCC*, 531 U.S. at 171-72. For this reason, the Georgia district court found the 2015 WOTUS Rule "will likely fail," because it "asserts that, standing alone, a significant 'biological effect' – including an effect on 'life cycle dependent aquatic habitat[s]' – would place a water within the CWA's jurisdiction." *Georgia*, 2018 U.S. Dist. LEXIS 97223, at *18 (quoting 33 C.F.R. § 328.3(c)(5)).

B. The 2015 Rule Fails to Preserve the States' Traditional and Primary Authority and Expands the Agencies' Jurisdiction Beyond the Scope of the Statute.

In both the process leading to the 2015 Rule's promulgation and the substance of the Rule, the Agencies disregarded the statutory and constitutional limits on their authority. For example:

- The 2015 Rule lacks clarity on key terms and definitions: Under the 2015 Rule, definitions of key terms and concepts, such as "impoundments," "floodplain," ordinary high water mark ("OHWM"), and "significant nexus," are vague, inconsistent with case law, and/or would likely lead to more regulatory uncertainty. *See, e.g.,* UWAG WOTUS Comments at 79-80 (discussing floodplain); UWAG WOTUS Comments at 31 (discussing OHWM). This lack of clarity, if the Rule is implemented, would create significant confusion and fail to put parties on notice as to whether their conduct violates the CWA. *See* UWAG Repeal Comments at 18-19.

- The 2015 Rule would extend WOTUS jurisdiction to various industrial features on facility sites that are well beyond Congress' intent. For example, the 2015 Rule would consider man-made industrial features that are often located inside the fence line and designed to manage waste streams, which already are regulated through NPDES permitted outfalls prior to reaching jurisdictional offsite waters, as jurisdictional WOTUS.[18] *See* UWAG Repeal Comments at 16-17.

- The 2015 Rule's definition of tributary is contrary to precedent. The Rule defines "tributary" to include any feature contributing any flow to an a(1)-(3) water, "either directly or through another water," and "characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." 33 C.F.R. § 328.3(c)(3). Because flow may be "intermittent" or "ephemeral," the 2015 Rule extends jurisdiction to minor creek beds, municipal stormwater systems, ephemeral drainages, dry desert washes, and other arid erosional channels that are dry for weeks, months, years, or even decades at a time, as long as they exhibit a bed, banks, and OHWM. 80 Fed. Reg. at

[18] Waste treatment systems vary by facility, but at electric generating stations, they can include: wastewater collection features (such as bins, basins, and channels), wastewater treatment facilities (such as cooling ponds, ash ponds, physical/chemical treatment tanks, dewatering bins, coal pile runoff collection ponds, raw water clarifier ponds, sludge management ponds, low volume waste ponds, and stormwater sedimentation ponds), and wastewater and treated water conveyances (such as pipes, channels, and conduits) that convey untreated or treated wastewater to and from these features. Such features typically play an important role in waste treatment systems used at electric generating stations and related transmission and distribution facilities. They provide important environmental benefits by facilitating the proper handling and treatment of wastes produced during the process of generating, transmitting, and distributing electricity, ensuring that pollutant discharges are properly controlled *before* they discharge through a regulated point source to WOTUS.

37,076. The 2015 Rule also asserts jurisdiction over a water that otherwise qualifies as a tributary, despite intervening man-made or natural breaks of "any length." 33 C.F.R. § 328.3(c)(3). Thus, the 2015 Rule goes too far in claiming such features to be jurisdictional. *See* UWAG Repeal Comments at 13-15.

- The 2015 Rule unlawfully expands WOTUS jurisdiction over remote features with little connection to TNWs. The 2015 Rule would extend WOTUS jurisdiction to various remote water features such as ditches, ponds, and other features found on the type of rural and rangeland areas often crossed by linear projects. These are often features with little or speculative meaningful connection to TNWs. The Agencies' regulation of these types of features is unconstitutional, inconsistent with the CWA, and unnecessary; the benefits, if any, are not commensurate with the burdens such regulation would impose. *See* UWAG Repeal Comments at 17-18.

- The Rule unlawfully reaches interstate waters: In promulgating the Rule, the Agencies ignored the word "navigable" and Congress' choice to *remove* the term "interstate waters" from the Act. *See* Federal Water Pollution Control Act, Pub. L. 80-758, 62 Stat. 1155 (1948); Federal Water Pollution Control Act Amendments of 1961, Pub. L. 87-88, 75 Stat. 208 (1961). The Rule purports to assert jurisdiction over all interstate water features, even when they "are not [traditional] navigable [waters]" and "do not connect to such waters." 80 Fed. Reg. at 37,074. The 2015 Rule would extend jurisdiction over features that are not navigable, cannot be made navigable, have no nexus ("significant" or otherwise) to a navigable water, and are not adjacent to – and do not contribute flow to – a navigable water, simply because the feature "flow[s] across, or form[s] a part of, state boundaries." 80 Fed. Reg. at 37,074; *see* UWAG Repeal Comments at 13.

- The 2015 Rule categorically determines that all features that meet the "tributary" and "adjacent waters" definitions have a "significant nexus." 80 Fed. Reg. at 37,068-70. It also allows for jurisdiction over other features (*e.g.*, prairie potholes, Western vernal pools, waters within 4,000 feet of a jurisdictional water) if the Agencies find a "significant nexus." *Id.* at 37,104-05. The 2015 Rule would allow for a significant nexus determination where a feature "alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of a(1)-(3) waters, and the Preamble instructs the Agencies to find a significant nexus where one of nine ecological functions could be demonstrated to occur. *Id.* at 37,093, 37,106. As the Corps noted, the 2015 Rule "does not provide clarity for how 'similarly situated' is defined" and fails to explain how the definition's "more than speculative or insubstantial" standard will be quantified.[19] *See* UWAG Repeal Comments at 19.

- The 2015 Rule is inconsistent with the policy goals of CWA § 101(b) and fails to preserve the States' authority to regulate non-navigable water resources. The Rule infringes upon the States' traditional and primary authority over land and water, contrary to Congress' intent and the limits of the Act. The 2015 Rule would extend federal

[19] Memorandum from Jennifer A. Moyer to John W. Peabody, Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of "Waters of the United States," at 6 (May 15, 2015).

jurisdiction to many types of waters and features that were previously regulated as waters of the State, or that States purposely chose not to regulate (*e.g.*, roadside ditches, channels with ephemeral flow, arroyos, industrial ponds). *See* UWAG Repeal Comments at 11.

UWAG strongly supports the Agencies' Proposal to repeal the 2015 Rule to avoid the application of an unlawful rule to UWAG member activities and projects and to provide much needed certainty and clarity while the Agencies consider a new rulemaking to define WOTUS.

C. The Scientific Record Compiled for the 2015 Rule Does Not Constrain the Agencies' Development of a New WOTUS Rule.

As part of the 2015 rulemaking, EPA's Office of Research and Development developed a report titled *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence* ("Connectivity Report").[20] The Connectivity Report summarized certain publications regarding the presence of connections among aquatic resources. A draft of the Connectivity Report was reviewed by a panel of EPA's Science Advisory Board ("SAB"), a public advisory group tasked with providing scientific information and advice to EPA.[21] The SAB panel was charged with verifying the technical accuracy of the Report's findings that streams and most wetlands are connected to downstream waters. The SAB panel found that the draft Connectivity Report "strongly supports the conclusions that streams and 'bidirectional' floodplain wetlands are physically, chemically, and/or biologically connected to downstream navigable waters; however, these connections should be considered in terms of a connectivity

[20] U.S. EPA. *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence*, EPA/600/R-14/475F (Jan. 2015).

[21] U.S. EPA. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, External Review Draft*, EPA/600/R-11/098B (Sept. 2013).

gradient."[22] The draft Connectivity Report was also released for public comment. UWAG raised a number of concerns with the draft Connectivity Report, and cited a significant body of literature that was not considered by the Agencies in the draft Report, the majority of which was also not addressed in the final Report. *See* UWAG WOTUS Comments, Appx. A (identifying literature not cited in the preamble to the Proposed Rule or the draft Connectivity Report).

The Agencies express concern now that "they previously placed too much emphasis on information and conclusions of the Connectivity Report when setting jurisdictional lines in the 2015 Rule, relying on [the Report's] environmental conclusions in place of interpreting the statutory text and other indicia of Congressional intent…." 83 Fed. Reg. at 32,241. In the Preamble to the 2015 Rule, the Agencies concluded that the "science does not provide bright line boundaries" for distinguishing WOTUS from the waters of the States. *See* 80 Fed. Reg. at 37,060. Throughout the 2015 Rule, however, the Agencies mischaracterized the findings of the Connectivity Report and the extent to which the Report dictated a particular result. For example, the Connectivity Report did not evaluate the importance of connections between small streams, nontidal wetlands, and open waters on larger navigable waters. Rather, the Connectivity Report stated that "the research community has not reached a consensus regarding the best methods or metrics to quantify or predict hydrologic or chemical connectivity."[23] And the Agencies provided no metrics or criteria for objectively evaluating or quantifying the importance of biological, chemical, and physical relationships between water segments or bodies. Thus, the Connectivity Report did not answer the critical policy and legal questions that must be addressed

[22] Allen, D.T., et al. Letter to Gina McCarthy. October 17, 2014. SAB Review of the Draft EPA *Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, p. 1.

[23] *See* Connectivity Report at 2-49 to 2-50.

when defining the outer limits of the geographic scope of the Agencies' jurisdiction under the CWA.

Importantly, the administrative record developed for the 2015 Rule, including the Connectivity Report, does not require the Agencies to take a particular position in any rulemaking to define WOTUS. The Agencies acknowledged before the Sixth Circuit and in the Preamble to the 2015 Rule that their drawing of bright lines in the 2015 Rule (*e.g.*, the distance limitations) was based on policy judgments and expertise. *See, e.g.,* Brief for Respondents at 95, *In re Clean Water Rule*, No. 15-3751 (6th Cir. Jan. 13, 2017), ECF No. 149-1 ("It is well within the Agencies' rulemaking authority to identify a point on the continuum" at which waters are considered jurisdictional.). The Connectivity Report concluded that all waters are connected and that connectivity exists on a gradient, but the Report does not draw lines or address the limits of the Agencies' CWA jurisdiction. Accordingly, the Report does not address the critical legal question which features are jurisdictional under the Act. That remains a policy decision for the Agencies to make, in keeping with their statutory authority, the Constitution, and Supreme Court precedent.

IV. The Agencies Should Rescind the 2015 Rule and Recodify the Prior Regulations Now.

The Agencies propose to rescind the 2015 Rule, recodify the prior regulations, and subsequently conduct notice-and-comment rulemaking to substantively reevaluate the WOTUS definition. The Agencies are currently implementing the pre-2015 rules, as informed by guidance documents, and consistent with *SWANCC* and *Rapanos*, applicable case law, and longstanding agency practice. 82 Fed. Reg. at 34,902. UWAG supports the Agencies' proposed approach because it would maintain the same approach the Agencies have followed for almost a decade.

A. There Are No More Effective or Efficient Alternatives Than Rescinding the 2015 Rule.

The Agencies seek additional input on whether to rescind the 2015 Rule, or to adopt alternative approaches, such as proposing revisions to specific elements of the 2015 Rule or issue revised implementation guidance and implementation manuals. 83 Fed. Reg. at 32,249. UWAG does not believe there are any viable alternative approaches to address the deficiencies in the 2015 Rule and provide the necessary clarity and certainty to regulators and the regulated community. The Applicability Rule provides a short-term fix, ensuring that the 2015 Rule will not be applied until February 6, 2020, but it is subject to legal challenges. And the 2015 Rule is fundamentally flawed. It is, therefore, necessary for the Agencies to permanently withdraw the Rule to ensure that the unlawful provisions do not go back into effect.

Rescinding the Rule now is consistent with the determinations of the Sixth Circuit, the North Dakota District Court, and the Georgia District Court that challenges to the 2015 Rule are likely to succeed on the merits. The 2015 Rule is stayed in 24 States subject to the North Dakota and Georgia preliminary injunctions until such time as those courts issue a decision on the merits or the Agencies finalize this Proposal. Other district courts, too, might enjoin the Rule. In the meantime, briefing on the merits of the 2015 Rule and the Applicability Rule is underway, and a decision on the merits from any one of the courts reviewing the rules could lead to inconsistent application of the 2015 Rule throughout the country. For example, if one of the courts considering challenges to the Applicability Rule sets aside that rule, the Agencies might be forced to apply the 2015 Rule (or be subject to third-party suits) in some States, and in other parts of the country where the 2015 Rule is stayed, the prior regulations would remain in place. Rescinding the 2015 Rule would avoid the potential confusion regarding which regulations apply should the Applicability Rule be deemed unlawful and the 2015 Rule go back into effect in some

States (but not others), or one or more of the courts hearing argument on the merits of the 2015 Rule set aside some portions, but not others, of the Rule in some States (but not others).

Moreover, given the many substantive and procedural flaws of the 2015 Rule and the strong likelihood of success on the merits of the challenges to the 2015 Rule, the Agencies' Proposal would establish the most consistent and clear legal framework to guide the Agencies' implementation of the CWA regulatory program while the Agencies consider a future rulemaking to define WOTUS. No alternative approaches are viable to address the deficiencies in the 2015 Rule and the risk that the 2015 Rule will be implemented haphazardly across the country, should one or more of the courts hearing challenges to the 2015 Rule or the Applicability Rule reach a decision on the merits.

If the Agencies simply repeal the 2015 Rule without recodifying the prior regulations, there would be no definition of WOTUS in place, and regulated entities and the Agencies would be forced to apply the Act on a case-by-case basis, risking inconsistent treatment across the country, until a future substantive rulemaking is complete. Implementation guidance or manuals cannot address the fundamental errors in the Rule, which infect the entire Rule. There is widespread agreement from States, industry, environmental groups, the government, and the Supreme Court that a rulemaking is needed to provide certainty as to the geographic scope of the Agencies' authority. Notably, in *Rapanos*, based on concerns with the Agencies' assertion of jurisdiction without regulatory clarity, the Justices were unanimous in calling for rulemaking. *See, e.g.,* 547 U.S. at 726 (plurality opinion)*; id.* at 758 (Roberts, C.J., concurring ("Rather than refining its view of its authority" through rulemaking, "the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the

agency.”)*; id.* at 782 (Kennedy, J., concurring)*; id.* at 812 (Breyer, J., dissenting) (calling for the Agencies “to write new regulations, and speedily so”).

The Agencies’ Proposal, if finalized, would ensure there is a clear framework to guide CWA jurisdictional determinations across the country until such time as the Agencies undergo a subsequent rulemaking to define WOTUS. The Agencies’ approach, thus, provides regulatory certainty, for UWAG members, regulators, States, and the public at large, while allowing for an appropriate rulemaking on a matter of significant importance.

B. The Agencies Should Expediently Propose a New Rule to Define WOTUS.

Recodifying the prior regulations will provide clarity and regulatory certainty in the near term, but there are many issues with the pre-existing regulations and guidance documents that should be addressed through a new rulemaking. Recodification does not fully address the many problems that need to be resolved.

UWAG supports the Agencies’ intent to undertake a future rulemaking to clearly and reasonably articulate federal-State lines of CWA authority and provide clarity and certainty on the scope of WOTUS. In addition to recognizing the important role of the States under the CWA, a legally defensible WOTUS Rule should embrace the full history of the Supreme Court’s review of the scope of WOTUS. UWAG encourages the Agencies to expeditiously propose a new definition consistent with these principles.

V. Conclusion

In light of the numerous deficiencies with the 2015 Rule, UWAG urges the Agencies to repeal the 2015 Rule and recodify the prior regulations until such time as the Agencies can undertake a subsequent rulemaking to propose a new definition of WOTUS.