August 13, 2018

Submitted via regulations.gov

The Honorable Andrew Wheeler Acting Administrator Environmental Protection Agency 1200 Pennsylvania Avenue, NW Washington, DC 20460 The Honorable R.D. James Assistant Secretary of the Army (Civil Works) U.S. Department of the Army 108 Army Pentagon Washington, DC 20310

Re: Definition of "Waters of the United States"—Recodification of Preexisting Rule; Supplemental Notice of Proposed Rulemaking, 83 Fed. Reg. 32,227 (July 12, 2018)

Dear Acting Administrator Wheeler and Assistant Secretary James:

The undersigned organizations support the Environmental Protection Agency's ("EPA") and the Army Corps of Engineers' ("Corps") proposal to repeal the 2015 Rule Defining Waters of the United States ("2015 Rule"), and many of us are submitting individual comment letters detailing our reasons for supporting the proposal. We write this letter to separately address an issue of particular importance to all of us: the effect of the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). As EPA and the Corps move forward with this rulemaking, the agencies must recognize the limitations *SWANCC* imposes on jurisdiction.

In the Supplemental Notice, EPA and the Corps request comment on:

[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 v. United States*, 547 U.S. 715, 767 (2006)) (emphasis added).

This request for comment warrants special attention because the assertion of jurisdiction over the isolated ponds at issue in *SWANCC* or other similar water features—under the 2015 Rule's theory of what constitutes a significant nexus or any other theory—is incompatible with the statutory text and Supreme Court precedent.

In *SWANCC*, the Supreme Court "read the statute as written" to hold that the Clean Water Act ("CWA") would not allow the assertion of jurisdiction over nonnavigable, isolated, intrastate

ponds located in northern Illinois. 531 U.S. at 174. The Court began its analysis by citing two key elements of the statutory text: *first*, Congress's choice to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority . . .", *id.* at 167 (quoting 33 U.S.C. § 1251(b)) and, *second*, the statute's key jurisdictional term—"navigable waters," defined to mean "the waters of the United States." 531 U.S. at 166, 167. Construing these provisions in light of its prior decision in *Riverside Bayview*, the Court held that "the text of the statute will not allow [the Court] to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water." *Id.* at 168. To hold otherwise would effectively read the term "navigable" out of the Act and strip it of any independent significance. *See id.* at 171-72.

The Court acknowledged its statements in *Riverside Bayview* that the term "navigable" was of "limited import" and that Congress intended "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *SWANCC*, 531 U.S. at 167 (citing *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985)). But "it is one thing to give a word limited effect and quite another to give it no effect whatever." *SWANCC*, 531 U.S. at 172. Its holding in *Riverside Bayview*, the Court explained, was based on "Congress's unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands inseparably bound up with the 'waters' of the United States." *SWANCC*, 531 U.S. at 167, 172 (quoting *Riverside Bayview*, 474 U.S. at 133, 135-39).

The *SWANCC* court also considered the government's arguments based on legislative history and prior regulatory interpretations but found them unavailing. Among other things, it rejected the assertion that the 1977 legislative history indicates "that Congress recognized and accepted a broad definition of 'navigable waters' that includes nonnavigable, isolated, intrastate waters." 531 U.S. at 169. Government counsel at oral argument had conceded that a ruling upholding CWA jurisdiction over the *SWANCC* ponds would "assume that 'the use of the word navigable in the statute . . . does not have any independent significance." *Id.* at 172. But this was a bridge too far. The Court explained that the term "navigable waters" and the legislative history indicate that when Congress passed the CWA it was exercising its commerce power over navigable in fact or which could reasonably be so made." *Id.* at 168 n.3, 172. Because the jurisdictional claim in *SWANCC* would "read the term 'navigable waters' out of the statute," it exceeded the Corps' CWA authority. *Id.* at 172.

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. *See* 531 U.S. at 166 (quoting from 191 F.3d 845, 850-52 (7th Cir. 1999)). Responding to the government's argument that its jurisdictional claims could be upheld based on "Congress's power to regulate intrastate activities that 'substantially affect' interstate commerce," *SWANCC*, 531 U.S. at 173, the Court noted that allowing the government to "claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use. Such an interpretation, pushing the limits of Congressional authority, could only be upheld if there were "a clear statement from Congress that it intended such a result." *Id.* at 174.

"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 statue as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject[ed] the request for administrative deference." *SWANCC*, 531 U.S. at 174.

The holding in SWANCC is not limited to the particular isolated, intrastate water features or the Migratory Bird Rule that were before the Court. Rather, it applies with equal force to any interpretation of CWA jurisdiction. In adopting a rule to define the "waters of the United States," the Agencies must give independent significance to the term "navigable" as Congress intended and respect the limits of federal authority that flow from Congress's explicit choice to preserve and protect the States' traditional and primary authority over land and water use. A core holding in SWANCC is that, absent a clear statement of Congressional intent, the CWA must be construed to avoid federal intrusion into State authority over land and water use. The assertion of jurisdiction over the very ponds at issue in SWANCC under some alternative theory would be incompatible with that holding. Thus, SWANCC does not allow for that. Neither does Justice Kennedy's concurrence in Rapanos. Reaffirming the holding in SWANCC, Justice Kennedy 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. 547 U.S. 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").

In short, 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 construing the Act, impermissibly intrude on the states' traditional and primary authority over land and water use, and raise serious constitutional and federalism questions.

* * *

The undersigned organizations urge the agencies to finalize the proposed repeal of the 2015 Rule. As part of that rulemaking process, the agencies should recognize the breadth and import of the Court's holdings and rationales in *SWANCC* and avoid asserting CWA jurisdiction in any manner that contravenes that precedent.

American Farm Bureau Federation Agri-Mark, Inc. Agricultural Retailers Association AKSARBEN Club Managers Association American Dairy Coalition American Exploration & Mining Association American Exploration & Production Council American Mosquito Control Association American Petroleum Institute

American Public Power Association American Sugar Cane League American Sugarbeet Growers Association Americans for Prosperity Aquatic Plant Management Society Arizona Cotton Growers Association Arizona Farm Bureau Federation Arizona Pork Council Associated Builders and Contractors Associated General Contractors of America Association of General Contractors - Nebraska Chapter California Citrus Quality Council California Farm Bureau Federation California Specialty Crops Council Campaign for Liberty Colorado Farm Bureau **Competitive Enterprise Institute** Council of Producers and Distributors of Agrotechnology CropLife America Dairy Producers of New Mexico Dairy Producers of Utah **Edison Electric Institute** Exotic Wildlife Association Farm Credit Services of America Florida Farm Bureau Federation FreedomWorks Global Gold Chain Alliance Golf Course Superintendents Association GROWMARK, Inc. Idaho Dairymen's Association Idaho Farm Bureau Federation Illinois Farm Bureau Independent Petroleum Association of America Independent Women's Forum Industrial Minerals Association - North America Iowa Farm Bureau Federation Iowa-Nebraska Equipment Dealers Association Kansas Farm Bureau Michigan Farm Bureau Minnesota Agricultural Water Resource Center Minnesota Farm Bureau Federation Mississippi Farm Bureau Federation Missouri Dairy Association Montana Farm Bureau Federation National Alliance of Forest Owners

National Alliance of Independent Crop Consultants National Association of Home Builders National Association of Landscape Professionals National Association of Manufacturers National Association of State Departments of Agriculture National Association of Wheat Growers National Cattlemen's Beef Association National Chicken Council National Club Association National Corn Growers Association National Cotton Council National Council of Farmer Cooperatives National Federation of Independent Businesses/Nebraska National Industrial Sand Association National Milk Producers Federation National Mining Association National Onion Association National Pork Producers Council National Ready Mixed Concrete Association National Renderers Association National Sorghum Producers National Stone, Sand & Gravel Association National Turkey Federation Nebraska Agribusiness Association Nebraska Association of County Officials Nebraska Association of Resource Districts Nebraska Bankers Association Nebraska Cattlemen Nebraska Chamber of Commerce and Industry Nebraska Cooperative Council Nebraska Corn Board Nebraska Corn Growers Association Nebraska Farm Bureau Federation Nebraska Golf Course Managers Association Nebraska Grain and Feed Association Nebraska Grain Sorghum Association Nebraska Pork Producers Association Nebraska Poultry Industries Nebraska Rural Electric Association Nebraska Soybean Association Nebraska State Dairy Association Nebraska State Home Builders Association Nebraska State Irrigation Association Nebraska Water Resources Association Nebraska Wheat Growers Association

Nemaha Natural Resources District Nevada Farm Bureau Federation New York Farm Bureau North Carolina Farm Bureau North Central Weed Science Society of America Northeast Dairy Farmers Cooperatives Northeastern Weed Science Society Ohio AgriBusiness Association Oklahoma Farm Bureau **Oregon Dairy Farmers Association** Pawnee County Rural Water District #1 Pennsylvania Farm Bureau Professional Dairy Managers of Pennsylvania Responsible Industry for a Sound Environment South Dakota Agri-Business Association Southern Weed Science Society St. Albans Cooperative Creamery **Taxpayers Protection Alliance** Texas Association of Dairymen Texas Cattle Feeders Association Texas Wildlife Association The Fertilizer Institute The Society of American Florists The Utility Water Act Group Treated Wood Council U.S. Chamber of Commerce United Dairymen of Arizona United Egg Producers United States Cattlemen's Association Upstate Niagara Cooperative, Inc. U.S. Poultry & Egg Association **USA** Rice Virginia Agribusiness Council Virginia Farm Bureau Federation Virginia Poultry Federation Washington State Dairy Federation Weed Science Society of America Western Society of Weed Science Wyoming Ag-Business Association Wyoming Farm Bureau Federation

CC: Matthew Z. Leopold, General Counsel, U.S. Environmental Protection Agency David Ross, Assistant Administrator for the Office of Water, U.S. Environmental Protection Agency