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 navigation and had in mind its traditional jurisdiction over waters that were or had been 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 Road & Transportation Builders Association
American Soybean 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 of America
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 Potato 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. Apple Association
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