WATERS ADVOCACY COALITION

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VIA EMAIL

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Re: Science Advisory Board's Draft Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act (October 16, 2019)

The Waters Advocacy Coalition ("WAC" or "Coalition") offers this written statement on the U.S. Environmental Protection Agency ("EPA") Science Advisory Board's ("SAB") draft commentary on the proposed revised definition of "waters of the United States," dated October 16, 2019 ("Draft Commentary").[1] After discussing the scientific and technical basis of the proposed WOTUS rule, the SAB has concluded that aspects of the proposal "conflict with the established science, the existing WOTUS rule developed based on the established science, and the objectives of the Clean Water Act." Draft Commentary at 1. Thus, the SAB voted to provide the Draft Commentary to EPA "outlining the nature of this conflict." *Id.*

The Coalition strongly disagrees with the above assertions, and this letter explains how the SAB is misses the mark. As discussed in our April 2019 comments, the Coalition supports the agencies' proposed revised definition of WOTUS. In particular, the proposed rule is grounded in and consistent with the Clean Water Act ("CWA") and judicial precedent

[1] The Draft Commentary is available on the SAB's website at https://yosemite.epa.gov/sab/sabproduct.nsf/ea5d9a9b55cc319285256cbd005a472e/5939af1252ddadfb852584e10053d472/$FILE/WOTUS%20SAB%20Draft%20Commentary_10_16_19_.pdf.

interpreting the statute and is informed by the science. Over the decades, the scope of waters federally regulated under the CWA has at times expanded well beyond the appropriate bounds of regulation under the CWA and the Constitution. Consequently, the Supreme Court has twice had to check the agencies' overreaching interpretations to ensure that they respect the limits that Congress placed on the federal government's authority. Because EPA and the U.S. Army Corps of Engineers ("Corps") are creatures of statute whose authority comes from Congress, they must act in accordance with those limits. The CWA, as well as Supreme Court opinions interpreting the Act, place real constraints on the agencies' authority. The SAB gives short shrift to this key limitation perhaps because they are a scientific/technical advisory committee that is not authorized to provide advice on questions of law and policy. *See generally* https://www.epa.gov/aboutepa/about-science-advisory-board-sab-and-sab-staff-office.

WAC represents a large cross-section of the nation's construction, transportation, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation, and public health and safety sectors—all of which are vital to a thriving national economy and provide much needed jobs. The Coalition's members are committed to the protection and restoration of America's wetlands and waters, and believe that a clear regulation that draws lines between federal and state waters will help further those goals.

I. The Draft Commentary Fails to Recognize that EPA and the Corps Have Only Those Authorities Conferred Upon Them by Congress.

The SAB seemingly faults the agencies for placing too much weight on interpreting the statute and relevant case law at the expense of science. Among other things, the Draft Commentary criticizes the proposed rule for having "no scientific justification for excluding ground water from WOTUS." This criticism is especially unwarranted because it ignores the

reality that Congress did not give the agencies authority to include groundwater in the regulatory definition of WOTUS.

EPA and the Corps "literally ha[ve] no power to act . . . unless and until Congress confers power upon [them]." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Both agencies are "creature[s] of statute, having no constitutional or common law existence or authority, but *only* those authorities conferred upon [them] by Congress." *Atlantic City Elec Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002). The agencies are bound by this basic legal principle. By defying statutory limits on their authority, the agencies would invite courts to strike down any definition of WOTUS that strays beyond the statute, which could lead to damaging and widespread regulatory uncertainty. The same is true for interpretations of a statute that would push the limits of Congressional authority, because courts will construe statutes in a way that avoids the "significant constitutional and federalism questions raised by" expansive agency interpretations unless Congress clearly intended to invoke the outer limits of its power. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001). Needless to say, the agencies' attempts to advance broad definitions of WOTUS have twice resulted in rebukes by the Supreme Court—and additional rebukes by lower courts. In the proposed rule, the agencies have wisely sought to avoid this by undertaking a thorough reexamination of the CWA's text, structure, purpose, and legislative history (as well as of the relevant Supreme Court opinions) and promulgating a revised definition of WOTUS that respects the limits Congress placed on their authority. The agencies simply cannot disregard the statute or those Supreme Court opinions, despite the well intentioned opinions of the SAB.

Groundwater provides perhaps the clearest illustration of how the agencies must respect the limits that Congress imposed on their CWA authority and why it would be foolish to include

groundwater in the definition of WOTUS, as the Draft Commentary seems to advocate. Congress plainly (and repeatedly) distinguished between "ground waters" and "navigable waters" throughout the statute. *E.g.*, 33 U.S.C. § 1252(a) ("the pollution of the navigable waters and ground waters"); § 1254(a)(5) ("the navigable waters and ground waters and the contiguous zone and the oceans"); § 1256(e)(1) ("the quality of navigable waters and to the extent practicable, ground waters"); § 1288(b)(2)(K) ("to protect ground and surface water quality"); § 1291(b) ("ground or surface water quality"); § 1314(a)(2) ("all navigable waters, ground waters, waters of the contiguous zone, and the oceans"); § 1314(f) ("any navigable waters or ground waters"). These parallel references confirm that "ground waters" are not part of the "navigable waters." To interpret the statute otherwise would render the many references to "ground waters" alongside "navigable waters" superfluous. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are thus reluctant to treat statutory terms as surplusage in any setting.").

The CWA's legislative history confirms what the text makes clear: that Congress deliberately chose to treat groundwater and navigable waters/WOTUS differently. Both chambers of Congress rejected proposals to extend federal regulatory requirements to groundwater. *E.g.*, S. Rep. No. 92-414, at 73 (1971) (explaining that the "[s]everal bills" would have "establishe[d] Federally approved standards for groundwater" but that the Senate Committee on Public Works "did not adopt" those bills, while emphasizing that "jurisdiction regarding groundwaters is so complex and varied from State to State"); 118 Cong. Rec. 10,666, 10,669 (1972) (rejecting an amendment to extend the CWA's permitting requirements to ground water). Notably, the Senate Committee on Public Works was fully aware of the "essential link between ground and surface waters" and that the distinction between them was "artificial." S. Rep. No. 92-414, at 73. Yet it purposefully left groundwater to state regulation.

In light of the foregoing, courts have had no difficulty concluding that groundwater is not WOTUS. *E.g.*, *Rice v. Harken Expl. Co.*, 250 F.3d 264, 269 (5th Cir. 2001); *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994); *Exxon Corp. v. Train*, 554 F.2d 1310, 1324 (5th Cir. 1977). Nor has either EPA or the Corps. In finalizing the 2015 WOTUS Rule, the agencies unequivocally stated that they have "never interpreted" "groundwater . . . to be a 'water of the United States' under the CWA." *See* 80 Fed. Reg. 37,054, 37,073 (June 29, 2015).

No one—not Congress, not EPA, not the Corps, not WAC members—appears to question the scientific importance of connections between groundwater and navigable waters. But that is not an excuse to ignore Congress's deliberate exclusion of groundwater from the term "navigable waters." Stated clearly, Congress's intent is not only relevant; it is controlling.

II. The Draft Commentary Ignores the Significance of Key Provisions in the Act.

According to the SAB, the proposed rule conflicts with the CWA's overall objective "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." Draft Commentary at 1 (quoting 33 U.S.C. § 1251(a)). But it is important to keep in mind that this objective does not exist in a vacuum. Immediately after laying out the objective, the Act clearly conveys Congress's policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). This policy is woven throughout the Act's federalism-preserving distinction between the Nation's waters (which includes groundwater and isolated, intrastate, nonnavigable waters) and "navigable waters" (which are a subset of the Nation's waters). *See* 84 Fed. Reg. at 4,156-57 (contrasting the CWA's many non-regulatory programs designed to protect all of the Nation's waters from the

regulatory programs designed to address pollutants in navigable waters). The policy likewise underpins the Act's paradigmatic distinction between nonpoint source and point source pollution. In accordance with the § 1251(b) policy, Congress left all forms of nonpoint source pollution control to the states. The agencies must abide by that express policy and respect these fundamental distinctions. They cannot, as the SAB seems to advocate, adopt an overly expansive definition of WOTUS under the guise of supporting the § 1251(a) objective because that would upend the careful distinctions that Congress drew.

Furthermore, it is well-established that "no law pursues its purpose at all costs." *Rapanos v. United States*, 547 U.S. 715, 752 (2006). While it is true that Congress sought to restore and maintain the integrity of all of the Nation's waters, it enacted important limitations on how that objective is to be achieved. Congress plainly did *not* enact a statute that imposed federal regulatory requirements for all forms of pollution to all of the Nation's waters. As noted above, Congress created a broad array of non-regulatory programs, to be funded by federal grant money, to address pollution broadly in all waters. Only a subset of those waters known as "navigable waters" (*i.e.,* WOTUS) are subject to additional requirements set forth in the Act's regulatory programs. *See* 84 Fed. Reg. at 4,157.

Contrary to what the Draft Commentary implies, achievement of the Act's objective of restoring and maintaining integrity of waters does not require the agencies to define WOTUS so broadly as to encompass all waters that the 2015 Connectivity Report suggests are connected. Were the agencies to do so, they would run afoul of Congress's intent, as reflected in the text and overall structure of the CWA. Even the 2015 WOTUS Rule seemed to recognize this: after reviewing scientific literature and taking into account the SAB's comments and recommendations, the agencies made it clear that its "interpretive task" in defining WOTUS

"requires scientific and policy judgment, as well as legal interpretation." *See* 80 Fed. Reg. at 37,057; *see also* 80 Fed. Reg. at 37,060 ("[T]he agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but is not dictated by them."). But as explained in the following section, the 2015 WOTUS Rule nevertheless went too far in asserting jurisdiction.

III. The SAB's Claim that the Proposed Rule Conflicts With the 2015 WOTUS Rule and the Underlying Science Misses the Mark.

The Draft Commentary criticizes the proposed rule as being "in conflict with . . . the existing [2015] WOTUS rule developed based on the established science[.]" Draft Commentary at 1. The 2015 WOTUS Rule has been repealed and is no longer in effect, but before its repeal, the 2015 WOTUS Rule was preliminarily enjoined or invalidated on the merits by numerous federal district courts and by a court of appeals as unlawfully expansive. *See Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922 (S.D. Ga. Aug. 21, 2019) (finding various aspects of the 2015 WOTUS Rule to be unlawful); *Texas v. EPA*, No. 3:15-cv-162, 2018 WL 4518230 (S.D. Tex. Sept. 12, 2018) (preliminary injunction in three states); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1364 (S.D. Ga. 2018) (preliminary injunction in 11 states); *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 807 (6th Cir. 2015) (staying the 2015 WOTUS Rule nationwide pending litigation on the merits); *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015) (preliminary injunction in 13 states).

Taking into account these court decisions, it seems quite evident that the 2015 WOTUS Rule was not based on a proper interpretation of the CWA or relevant Supreme Court precedent interpreting the Act. Given the poor track record of that rule in reviewing courts, the agencies have wisely chosen to propose a different definition of WOTUS that better adheres to the law.

Finally, it bears emphasis that the proposed rule *is* appropriately informed by science, even if it does not "full[y] incorporat[e]" the 2015 Connectivity Report. Draft Commentary at 3. The 2015 Connectivity Report essentially concluded that all waters are connected and that connectivity exists on a gradient, but the report did not draw lines or address the legal question of what should be jurisdictional under the statute. Thus, the agencies properly concluded in the preamble to the 2015 WOTUS Rule that "the science does not provide bright line boundaries" for distinguishing WOTUS from waters of the States and that "the agencies' interpretation of the CWA is informed by the [Connectivity] Report and the review and comments of the SAB, but not dictated by them." 80 Fed. Reg. at 37,060.

In fact, the agencies' current proposal aligns with the scientific principles detailed in the 2015 Connectivity Report, which explains that hydrologic connectivity occurs along a gradient and that some waters have more impact on downstream waters than others. It also reflects the agencies' legal and policy determination, informed by the science of the Connectivity Report, to extend federal protections to those waters that have the greatest influence on downstream waters, such as waters that contribute perennial and intermittent flow and wetlands that directly abut those waters. The science further establishes that ephemeral features and isolated wetlands in many cases have limited chemical, physical, and biological effects on downgradient waters. *See, e.g.*, SAB Panel Member Comments on Proposed Rule, at 42 (Sept. 2, 2014) (comments of Dr. Michael Josselyn) ("[t]hese low order features may have flow for only a few hours or days following storm events and are the most likely candidates for being on the low end of the [connectivity] gradient . . . ."); *id.* at 99 (comments of Dr. Mark Murphy) ("inclusion by rule of all ephemeral tributaries, 'regardless of size or flow duration,' is not scientifically justified"). For these reasons, the WAC believes the criticisms in the Draft Commentary are misleading and that

the proposed rule reflects a sound policy determination about the appropriate balance between state and federal regulation, and it aligns with the legal limitations on the agencies' CWA authority.

IV. Conclusion

WAC appreciates the opportunity to submit this statement on the SAB's draft commentary. The Coalition supports the agencies' proposed revised definition of WOTUS. That definition is properly grounded in science and reflects appropriate legal and policy decisions. If you have any questions, please feel free to contact the undersigned.

Sincerely,

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