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Water Docket
U.S. Environmental Protection Agency
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Washington, D.C. 20460
VIA E-MAIL: CWAwaters@epa.gov

Subject: Define Jurisdiction Under the Clean Water Act Through a Rulemaking

Attention: EPA Water Docket ID No. OW-2002-0050

The Associated General Contractors of America (AGC) is pleased to offer the following response to the U.S. Army Corps of Engineers' (Corps) and the U.S. Environmental Protection Agency's (EPA) Advance Notice of Proposed Rulemaking (ANPRM) on the Clean Water Act, and more specifically, on the definition of "Waters of the United States," 68 FR 1991 (Jan. 15, 2003). AGC urges the agencies to move forward expeditiously with a rulemaking on the critical jurisdictional terms of the Clean Water Act (CWA) so that the regulated community can determine which waters are subject to federal regulation.

AGC is the nation's largest and oldest construction trade association, founded in 1918. The association represents more than 33,000 firms, including 7,500 of America's leading general contracting firms. AGC's general contractor members have more than 25,000 industry firms associated with them through a network of 103 AGC chapters. AGC member firms are engaged in the construction of the nation's commercial buildings, factories, warehouses, highways, bridges, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation, and utilities installation for housing developments.

AGC Supports Rulemaking to Define Federal Jurisdiction Under CWA

AGC members perform a variety of activities that would be directly impacted by a change to the Corps/EPA regulations defining "waters of the United States." CWA Section 301 prohibits the discharge of pollutants by any *person* from a point source into navigable waters except in compliance with CWA Sections 402 (requiring permits for the discharge of storm water from construction sites) and 404 (requiring permits for the discharge of dredge and fill material), among other things.

CWA Section 502 defines a "person" as an individual, corporation, partnership, association, state, municipality, commission, subdivision of a state, or any interstate body. It defines "navigable waters" only as "waters of the United States," leaving it to the Corps and EPA to provide further guidance.[0]

The CWA is a strict liability statute. If a discharge occurs, civil liability attaches. Generally speaking, landowners who conduct discharge activities in waters of the United States without a permit are in violation of the Act. Many courts have also found that contractors (and even consultants) are responsible for compliance. In several cases, courts have found both the owner and the contractor to be liable where the contractor had control over or responsibility for the discharge activity, despite the contractor's reliance on the owner to obtain the necessary permits. Even where the defendant contractor (or consultant) did not directly commit the violation, he or she may still be liable, depending on his or her degree of involvement.

The Corps and EPA should revise their regulatory definitions of "waters of the United States" to clarify which waters are subject to federal regulation. Without clear definitions to guide field staff, permitting decisions will continue to be arbitrary and inconsistent. Vague and ambiguous regulatory provisions cause confusion, deny the regulated community fair notice of what is required, and waste time and money; all with little benefit to the environment. This lack of clarity is unduly burdensome for critical infrastructure and private projects.

Background

The CWA grants the Corps and EPA jurisdiction over "navigable waters," which the Act defines as the "waters of the United States." As the agencies acknowledged in the ANPRM, the United States Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), rejected the Corps' claim of CWA jurisdiction over non-navigable,

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[0] The existing CWA regulations define "waters of the United States" as follows:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to ebb and flow of the tide;
(2) All interstate waters including interstate wetlands;
(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including such waters:
    (i) which are or could be used by interstate or foreign travelers for recreational or other purposes;
    (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
    (iii) which are used or could be used for industrial purposes by industries in interstate commerce.
(4) All impoundment of waters otherwise defined as waters of the United States under the definition;
(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
(6) The territorial seas;
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.
(8) Waters of the United States do not include prior converted cropland... Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA are not waters of the United States.

Different CWA regulations contain slightly different formulations of the definition. For simplicity's sake, these comments refer to the Corps' version at 33 C.F.R. § 328.3(a). Other versions appear at, e.g., 40 CFR §§ 110.1, 112.2, 116.3, 117.1, 122.2, 230.3(s), and 232.2.

isolated, intrastate waters under the Migratory Bird Rule. In other words, those waters may no longer be regulated as waters of the United States. Of critical importance to the Court's conclusion was the plain text of the CWA, which grants jurisdiction over only "navigable waters." The Court found that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its 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. Because the Migratory Bird Rule wrongly presumed that Congress intended to reach the limit of its jurisdiction over interstate commerce, the rule exceeded the scope of the statute. As the Court observed, "this is 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.

Therefore, *SWANCC* clearly eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds. Read in its entirety, however, the opinion of the Court is broader than the immediate holding in the *SWANCC* case, and may be read to exclude from CWA jurisdiction all "isolated waters." Similarly, AGC believes that CWA jurisdiction cannot be based on other "affecting commerce" rationales in the Corps' existing regulations at 328.3(a)(3)(i)-(iii) (use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce). These factors, like the Migratory Bird Rule, are founded on an "affecting commerce" theory of jurisdiction, not on Congress' commerce power over navigation. Whether Congress could have granted broader jurisdiction to the Corps and EPA is immaterial. The fact remains that Congress *did not* grant the agencies jurisdiction over all activities affecting interstate commerce.

Comments Requested by the ANPRM

In the ANPRM, the Corps and EPA have requested comment on two specific issues:

1. Whether, and if so, under what circumstances, the factors listed in 328.3(a)(3)(i)-(iii), or any other factors, provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters. The factors involve connections to interstate commerce other than the Migratory Bird Rule, and include the use of the wetlands or other waters for recreation, the sale of fish or shellfish, and industry.
2. Whether the regulation should define "isolated waters," and if so, what factors should be considered in determining whether a water is isolated for jurisdictional purposes. This question raises the issue of how to define the key terms "tributary system" and "adjacent" wetlands.

<u>Question 1: Commerce Clause Factors</u>

In response to the agencies' first question, our answer is, "No" and "None." As stated above, AGC believes that under the Supreme Court's decision in *SWANCC*, the jurisdiction of the CWA is limited by the concept of "navigability." We believe that *SWANCC* eliminates CWA jurisdiction over

isolated waters that are intrastate and non-navigable, where the sole basis for asserting jurisdiction rests on the factors listed in the Migratory Bird Rule. In addition, implementing the *SWANCC* decision fully and fairly means that connections to interstate commerce such as those included in the "other waters" regulation (328.3(a)(3)(i)-(iii)) no longer may be used as a basis for jurisdiction under the CWA. Therefore, AGC urges the agencies in the proposed rule to expressly eliminate these other factors as a permissible basis for asserting jurisdiction under the CWA.

In this regard, AGC also urges the Corps and EPA to note that the Court in *SWANCC* warned that the commerce clause-based "other waters" regulation raises constitutional questions. According to the Court, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." The majority stated that allowing the Corps and EPA to claim jurisdiction over isolated waters such as ponds and mudflats would result in a "significant impingement of the state's traditional and primary power over land and water use." Rather than readjusting the federal-state balance under the CWA, 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" as expressed in Section 101(b) of the CWA.

AGC also believes that "underground connections" of a significant length such as storm drains (as opposed to culverts under a road), cannot—in light of *SWANCC*—create hydrological connections that support jurisdiction.

In addition, AGC recommends that the Corps' regulatory jurisdiction over surface waters (not involving underground connections) be limited to a specific, clearly defined point along the "tributary system" upstream from traditionally navigable waters. While there are several such points of demarcation that the Corps and EPA could select for defining the limits of jurisdiction over what might be called a "tributary system," AGC believes the limit best supported by the *SWANCC* decision (and the limit that would lead to the most consistent interpretation among Corps field regulators) is a jurisdictional limit that would include traditional navigable waters and their adjacent wetlands.

This point of demarcation is well grounded in language in *SWANCC* in which the Supreme Court found that Congress intended the outer limits of jurisdiction to be tied to navigability, not commerce. Under this regulatory definition of isolated waters, jurisdiction would also include, as determined in a previous Supreme Court decision, those wetlands adjacent to (abutting) navigable waters. The Court found in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and reaffirmed in *SWANCC* that these wetlands have a "significant nexus" to the navigable waters. *See Rice v. Harken*, 250 F. 3d 264, 269 (5th Cir. 2001) ("a body of water is subject to regulation under the CWA if the body of water is actually navigable or adjacent to an open body of navigable water"); *United States v. Rapanos*, 190 F. Supp. 2d 1011 (E.D. Mich. 2002) (appeal pending) (wetlands on defendant's property were not directly adjacent to navigable waters, and therefore the government cannot regulate defendant's property); *United States v. Needham*, No. 6:01-CV-01897, 2002 WL 1162790 (W.D. La. Jan. 23, 2002) (drainage ditch into which oil was discharged was found to be neither a navigable water

nor adjacent to an open body of navigable water); *United States v. Newdunn*, 195 F. Supp. 2d 751 (E.D. Va. 2002) (appeal pending) (tributaries and wetlands not contiguous or adjacent to navigable waters are outside CWA jurisdiction).

While some might argue for including non-navigable tributaries of navigable waters to the above-recommended definition, such tributaries obviously are further removed from the requisite nexus, as cited by a substantial body of case law. In addition, wetland areas adjacent to non-navigable tributaries are even further removed, and arguments supporting the inclusion of such areas within the regulatory jurisdiction of the Corps are even weaker. In other words, AGC believes that the language of the *SWANCC* decision that a "mere hydrologic connection" is not enough clearly indicates that there must be a significant nexus between wetlands and navigable waters in order for such areas to be within the jurisdiction of the Corps.

Question 2: Definition of Isolated Waters

In answering the agencies' second question, whether the term "isolated waters" should be defined, our answer is "Yes," but that other terms must be defined as well. In this regard, it is important to remember that prior to the *SWANCC* decision, the Migratory Bird Rule had allowed the Corps and EPA essentially to assert jurisdiction over any water, anywhere under the "affecting commerce" theory of jurisdiction. Under such a theory, field regulators did not have to determine whether something was a "tributary," whether something was "adjacent," or whether something qualified as an "impoundment." Now that the Migratory Bird Rule is gone, however, the meaning of these other regulatory terms is critical. In fact, the Corps' existing nationwide permit regulations already define the term "isolated waters" as something that is not a tributary and not adjacent, thus calling into question the meaning of these other terms. *See* 33 CFR. § 330.2(e).

The Army Corps of Engineers and EPA should conduct a rulemaking on not only the term "isolated" but also on the other specific terms on which the agencies are relying to establish jurisdiction: "tributary," "adjacent," "impoundment," and "ordinary high water mark." All these terms are either vague or undefined under the existing regulations.[0] In the absence of a rulemaking to define these terms, field regulators have unbridled discretion to make up meaning (and thereby jurisdiction) on an ad-hoc, arbitrary, and inconsistent basis.

Ambiguous and vague regulations are particularly troublesome as applying for a CWA §404 permit is a time-consuming and costly process. In fact, a recent study found that obtaining a nationwide general permit took on average 313 days at a cost of $28,915. Moreover, obtaining an individual permit

[0] Current Corps regulations define "isolated waters" as those intrastate, non-navigable waters, including wetlands, that are not part of or adjacent to traditionally navigable waters or their tributaries. In its definition of "adjacency," the Corps currently includes the concepts of "neighboring," which leads some field regulators to assert broad jurisdiction, well beyond the limits of the CWA as clarified by the SWANCC decision. For example, the term "neighboring" in used to assert jurisdiction over wetlands that have never been contiguous and that are in fact far removed from navigable and tributary waters. In addition, Corps regulators take a very broad interpretation of non-navigable tributaries to navigable waters, frequently not requiring a continuous surface connection in order to assert jurisdiction.

took on average 788 days at a cost of $271,000. *See* David Sunding and David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetlands Permitting Process,* 42 Nat. Resources J. 59 (Winter 2002).

Fundamental principles of due process and good government require the regulatory agencies to clearly and uniformly set forth the scope of federal jurisdiction. The regulated public must be given fair notice as to what conduct is prohibited under the CWA. Vague and ambiguous regulatory requirements lead to lengthy, costly, and often unnecessary permitting requirements for critical public infrastructure and private projects.

State and Federal Programs

No matter what position the agencies adopt as their guide for jurisdictional determinations, *SWANCC* curbs the broad federal jurisdiction under the CWA that had been expanded steadily by federal courts and federal agencies since 1975. While the decision does scale back regulation and protection of isolated waters under the CWA, other federal regulatory programs, such as the "Swampbuster" provision, remain in place. In addition, many state governments already have regulatory programs in place that regulate isolated waters. And other states are moving forward to develop such programs. AGC believes that state regulation can be an efficient means of regulating isolated wetlands because states are free to tailor their wetland programs to local conditions and preferences. AGC supports the development of responsible and balanced state wetlands regulatory programs.

Conclusion

For these reasons, AGC urges the agencies to move forward with a rulemaking to provide the regulated public with clear jurisdictional principles under the CWA. Thank you for your consideration.

Sincerely,

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