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FRL-9988-15-OW
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EPA Docket Center
Environmental Protection Agency
WJC West Building, Room 3334
1301 Constitution Avenue, N.W.
Washington, DC 20004

Mr. Andrew Wheeler
EPA Administrator
United States Environmental Protection Agency
EPA Headquarters
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RE: Comments on Proposed Revised Definition of "Waters of the United States," Docket ID No. EPA-HQ-OW-2018-0149, FRL-9988-15-OW, of the United States Environmental Protection Agency and the United States Army Corps of Engineers

Dear Administrator Wheeler:

On behalf of Orchard Hill Building Company (dba "Gallagher & Henry"), the Center for the American Future of the Texas Public Policy Foundation submits the following comments regarding the proposed rule of the United States Environmental Protection Agency and the United States Army Corps of Engineers (the "Agencies") defining the term "Waters of the United States" ("WOTUS") under the Clean Water Act ("CWA") (the "Proposed Rule"). Gallagher & Henry is a family-owned construction company in Illinois that recently won a 13-year battle with the United States Army Corps of Engineers (the "Corps") regarding whether one of Gallagher & Henry's residential developments contained jurisdictional wetlands subject to federal regulation under Justice Kennedy's significant nexus test. *See Orchard Hill Bldg. Co. v. United States Army Corps*

of Engineers, 893 F.3d 1017 (7th Cir. 2018). Given its long, difficult, and resource-intensive experience, Gallagher & Henry can provide perspective and guidance to the Agencies in connection with the Proposed Rule.

EXECUTIVE SUMMARY

On February 14, 2019, the Agencies requested comments on the Proposed Rule. Gallagher & Henry addresses the following seven issues set forth in the Agencies' Federal Register notice. First, the Agencies should read *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC"*) as a strict limitation on the scope of permissible interpretations of the CWA. As explained in *SWANCC*, the Agencies' authority under the CWA is derived from and limited by Congress' authority to regulate navigation under the Commerce Clause. Accordingly, interpretations of the CWA that would potentially exceed Congress' Commerce Clause authority should be avoided. The scope of the existing WOTUS rule is so broad and far-reaching as to be constitutionally suspect, not only under the Commerce Clause but also under the Necessary and Proper Clause. The Proposed Rule does a substantially better job in adhering to the principle that Congress may not delegate to administrative agencies any power that Congress itself does not have.

Second, the Agencies are not required to include Justice Kennedy's significant nexus standard articulated in *Rapanos* v. *United States*, 547 U.S. 715, 739 (2006) ("*Rapanos"*) as a test to determine CWA jurisdiction. Under current case law, there is a split of authority as to whether Justice Kennedy's concurring opinion or Justice Scalia's plurality opinion in *Rapanos* is controlling. Both opinions questioned the constitutional reach of the CWA. At the same time, both opinions left room for the Agencies to adopt rules specifying the boundaries of CWA jurisdiction. The fact that the prior Administration chose to write rules focusing on the significant nexus test does not bind the current Administration from revising those rules to adopt a test more in line with Scalia's plurality opinion in *Rapanos.* That is precisely what the Agencies have done here.

Third, the Agencies should wholly abandon Justice Kennedy's significant nexus test because it has created an unworkable system that caused Gallagher & Henry's residential construction project to come to a grinding halt for 13 years. The significant nexus test has adversely impacted other projects in a similar morass of administrative and judicial processes involving technical and legal questions that have left the courts hopelessly divided. The significant nexus test has generated years of costly litigation, making it nearly impossible for ordinary people to understand the actual jurisdictional boundaries of the CWA, thereby imposing a system that lacks any meaningful limiting principle to keep the Agencies within their constitutional authority. Thus, the significant nexus test raises serious due process issues. Accordingly, the Agencies' proposal to supplant the significant nexus is constitutionally appropriate, long overdue, and necessary to provide a workable mechanism under which CWA jurisdiction issues may be resolved appropriately by the Agencies and the regulated community. As part of the rejection of the significant nexus test, the Agencies should make clear that the notion of "similarly situated sites"

articulated in Kennedy's concurrence in *Rapanos* is no longer a relevant concept in determining jurisdiction for purposes of WOTUS.

Fourth, the Agencies should adopt a bright-line rule limiting the term "tributaries" to streams and rivers with perennial flow. One of the primary drawbacks of the prior rule is that it did not provide sufficient practical guidance to property owners or government officials as to what waters are jurisdictional. The Proposed Rule addresses these concerns by limiting the definition of "tributaries" to exclude most ditches and other features that flow only as a result of precipitation. However, the Proposed Rule does not go far enough to ensure a bright-line test that would make federal jurisdictional limits functionally understandable to property owners and government officials. These comments provide specific suggestions as to how to craft an appropriate bright-line test.

Fifth, for the CWA term "navigable waters" to have any discernable, rational meaning, groundwater cannot be included within the definition of WOTUS because groundwater, by its physical nature, is not and cannot readily be made to be "navigable." As the legislative history makes clear, and as the Fifth and Seventh Circuits have confirmed, CWA jurisdiction does not extend to groundwater.

Sixth, in the interests of consistency among regulatory agencies, the exclusion for "prior converted cropland" should not be subject to a five-year abandonment exception where there is a change of use of the property and wetlands characteristics inadvertently return as a collateral result of construction activity.

Seventh, the Agencies should clarify that berms, dams, or similar barriers that physically impede the flow of surface water in nonnavigable tributaries function to exclude the "upstream" portions of such tributaries from WOTUS.

The following discussion sets forth support for each of the above seven comments made by Gallagher & Henry, based upon the 13-year Odyssey to which Gallagher & Henry was subjected in dealing with CWA jurisdictional issues.

BACKGROUND

In 1995, Gallagher & Henry completed its purchase of the Warmke parcel, a 100-acre farm located in Tinley Park, Illinois. Thereafter, Gallagher & Henry received construction permits to build a two-phase residential development on the parcel. *Orchard Hill*, 893 F.3d at 1021. The first phase of construction started in 1996, and over the next seven years Orchard Hill built more than a hundred homes in connection with that first phase of development. *Id*. Construction activities inadvertently damaged a drain tile, which altered drainage on about 13 acres of the development project, resulting in the growth of cattails in that area (sometimes hereinafter referred to as the "Warmke wetlands"). Before starting the second phase and building on the 13 acres, Gallagher & Henry sought a jurisdictional determination from the Corps of Engineers in 2006. *Id*.

The Warmke wetlands, like all of the Warmke parcel, are surrounded by residential development. *Id*. The closest navigable water (as that phrase is literally understood, meaning navigable-in-fact) is the Little Calumet River, which is 11 miles away. *Id*. In between the Warmke wetlands and the Little Calumet River are man-made ditches, open-water basins, sewer pipes, and Midlothian Creek— an ephemeral stream that could flow into the little Calumet river 11 miles away. *Id*. The Corps' determined that the Warmke wetlands were adjacent to Midlothian Creek, that Midlothian Creek was a tributary of the Little Calumet River, and that, consequently, the 13 acres constituted waters of the United States. That determination rested on the fact that the Warmke wetlands drained, by way of multiple man-made conveyances through surface and groundwater means, including sewer pipes, to Midlothian Creek. *Id*.

Gallagher & Henry administratively appealed that decision pursuant to the Corps' regulations. While the administrative appeal was pending, the Supreme Court issued its decision in *Rapanos*. *Id*. In light of *Rapanos*, the Corps' appellate review officer remanded the 2006 jurisdictional determination of the Warmke wetlands for further administrative review at the staff level. Thereafter, the Corps' staff made a site visit. *Id*. at 1022. During the site visit, Corps' staff observed an "intermittent flow" of water from the Warmke wetlands to Midlothian Creek. *Id*. at 1022. The staff did not sample or test the Warmke wetlands' composition nor did they sample or test the "intermittent flow." Rather, based on a one-time eyeball observation of an intermittent flow into Midlothian Creek, the staff concluded that the Corps had jurisdiction because there was a significant nexus between the 13 acres and the Little Calumet River. *Id*. Gallagher & Henry filed another administrative appeal, which the Corps denied. Gallagher asked the Corps to reconsider. *Id*.

During that reconsideration, the Corps elaborated on its significant-nexus analysis. *Id*. at 1023. Specifically, the Corps listed 165 other wetlands purportedly "adjacent" to the Midlothian Creek, and thus, arguably, "similarly situated" to the Warmke wetlands per the then-applicable *Rapanos* Guidance. *Id*. The Corps did not show or explain the proximity of those wetlands to Midlothian Creek. Nor did the Corps even visit or conduct any observation, sampling, or testing of the 165 other wetlands. *Id*. Nevertheless, the Corps concluded that the 13 acres, when aggregated with the other 165 sites, collectively "decrease sedimentation, pollutants, and flood waters downstream while offering beneficial nutrients and habitat" to Midlothian Creek and Little Calumet River. *Id*. The Corps thus found that the Warmke "wetland[s] alone or in combination with the wetlands in the area significantly affect the chemical, physical and biological integrity of the Little Calumet River." *Id*.

Gallagher & Henry, unsuccessfully challenged this final agency action in the United States District Court for the Northern District of Illinois and then appealed to the Seventh Circuit. Finally, 13 years after this saga began, the Seventh Circuit ruled in Gallagher & Henry's favor, holding that the Corps' refusal to engage in appropriate site-specific analysis of the Warmke wetlands or the allegedly "similarly situated" sites rendered the jurisdictional determination invalid. *Id*. at 1025-26.

In particular, the Seventh Circuit held that:

1) Determining whether a wetland is jurisdictional under the CWA requires site-specific evidence that the wetland in question has a significant nexus with a navigable-in-fact water. *Id.* at 1022.

2) Mere adjacency to a tributary of a navigable water is not sufficient to establish significant nexus between a wetland and a navigable water. *Id.*

3) A significant nexus determination requires an examination of the characteristics and location of particular wetlands to determine whether they are similarly situated. The Corps may not aggregate all wetlands in the floodplain of a tributary to establish a significant nexus without at least some site-specific evidence supporting aggregation. *Id.*

Gallagher & Henry applauds these holdings. Nevertheless, they fail to address the underlying problem, which is the significant nexus test itself. Rejecting that test is the only way the Agencies can ensure that others are not subjected to the kind of roadblock that stopped the development of the 13 acres for 13 years.

DETAILED COMMENTS ON THE PROPOSED RULE

I. The Agencies should read *SWANCC* as a strict limitation on the scope of permissible interpretations of the CWA

The CWA prohibits "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12). "[P]ollutant" is defined broadly to include not only traditional contaminants but also solids such as "dredged spoil, ... rock, sand, [and] cellar dirt," § 1362(6). The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." § 1362(7). "Waters of the United States," however, is not explicitly defined by statute. Over the years, the Agencies seized upon this opportunity to test both the statutory and constitutional limits of the CWA.

In practice, the Agencies have regularly pushed the outer bounds of its authority. By the time the Supreme Court decided *Rapanos* in 2006, the Court lamented the fact that the Agencies had argued that "waters of the United States" included "virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow." *Rapanos*, 547 U.S.at 722. Indeed, the Agencies had, at various times held that its jurisdiction extended to "storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years." *Id.*

A few years before *Rapanos*, in *SWANCC*, 531 U.S. at 163, the Corps argued that it had jurisdiction over isolated gravel pits that filled with rain water because migratory birds could nest there. The Court refused to extend CWA jurisdiction to such an extent. As the Court explained,

when Congress passed the CWA it never intended "to exert anything more than its commerce power over *navigation*." *Id* at 168 (emphasis added). Interpretations of the CWA that extend beyond the Commerce Clause authority to regulate navigation should be disfavored. *Id*. at 173.

The SWANCC restriction has profound impacts on the way the Agencies must view the regulation of waters that are not, in fact, "navigable." Under existing Commerce Clause precedent, Congress may only regulate outside of the "channels or instrumentalities" of interstate commerce if that which is regulated "substantially affect[s] interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). This authority is derived from the Commerce Clause and also from the Necessary and Proper Clause. *Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring).

Under the Necessary and Proper Clause, a regulation will pass muster only if it is necessary—*i.e.*, "plainly adapted"—to the regulation of commerce. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537 (2012). To be "plainly adapted," a regulation must be (1) "narrow in scope," and (2) "incidental" to the regulation of commerce. *Id*. at 560. Further, the Necessary and Proper Clause adds an additional level of protection, by requiring that regulations must be "proper"—i.e., within the "letter and spirit of the constitution" and in accord with the traditional balance of power between the federal government and the states. *Id*. at 537.

For example, in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), the Court examined whether a federal mandate for individuals to buy insurance was a necessary and proper exercise of the commerce power. The government in that case argued that the individual mandate was necessary to maintain and regulate a functional market in health insurance and therefore permissible under the Necessary and Proper clause. The Court disagreed. As Justice Roberts explained, there was not sufficient evidence that the mandate was necessary, but even if there were, the regulation would not be "proper" because it "would work a substantial expansion of federal authority" into areas traditionally regulated by the states. *Id*. at 560.

As applied to the CWA, this reasoning has profound impact. To the extent that the Agencies wish to regulate discharges into waters that are not, in fact, traditional navigable waters, the Agencies must provide some evidence that the regulation of such discharges is "necessary"—i.e., that discharges into the waters have a substantial effect on interstate commerce. *Id*. at 560. Even if that burden is met, the Agencies must also show that the regulation is "proper"—i.e. that it would not "work a substantial expansion of federal authority" into areas traditionally regulated by the states. *Id*.

Because land-use decisions are traditionally reserved to the states, this second factor should provide a significant limiting principle on the scope of the CWA. As the Court explained in *SWAANC*, 531 U.S. at 174, in passing 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" the Court must therefore "read the statute as written to avoid the significant constitutional and federalism questions." *Id.*

Thus, both the Commerce Clause and the Necessary and Proper Clause require the Agencies to read *SWANCC* as a strict limitation on the scope of permissible interpretations of the CWA. In the proposed WOTUS rule, the Agencies have by and large properly interpreted *SWANCC* but, as set forth hereinafter, they should make certain adjustments and clarifications to the proposal with regard to tributaries, groundwater, prior converted cropland, and physical barriers.

II. The Agencies are not required to use Justice Kennedy's significant nexus test as a mandatory component of any definition of WOTUS

Writing in the aftermath of SWANCC, the *Rapanos* Court tried to construct a test that would allow the Agencies to know the outer constitutional boundaries of the CWA. In an opinion written by Justice Scalia, a plurality of the Court held that the CWA could, at most, be read to apply to waters that were navigable in fact and other waters with a continuous surface water connection to navigable in fact waters. 547 U.S. at 742. Justice Kennedy, writing a concurring opinion, would allow the regulation of waters that lacked a continuous surface water connection to navigable waters but only if such waters have a "significant nexus" to navigable-in-fact waters. *Id.* at 779. To this day, the lower courts remain split as to whether the Scalia or Kennedy test is controlling. *See*, *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006) (noting the split in authority).

One thing, however, is clear. Scalia and Kennedy each took the position that the Agencies could choose to promulgate regulations in accordance with the requirements of the Administrative Procedure Act that differ from the positions taken in each of their opinions as long as the regulations are consistent with constitutional and CWA statutory requirements. *Rapanos*, 547 U.S. at 781-82. The Agencies are therefore well within their authorities to adopt the current Proposed Rule, which appropriately threads the needle between constitutional overreach and statutory authorization.

III. The Agencies should not use Justice Kennedy's significant nexus test as a component of any future definition of WOTUS

Gallagher & Henry supports the Proposed Rule's abandonment of Justice Kennedy's "significant nexus" test. More than a decade of experience has shown the significant nexus test to be costly, unworkable, and constitutionally suspect.

A. The significant nexus test leads to costly and time-consuming disputes

Under the significant nexus test, an isolated water can still be a WOTUS if the Agencies can show that the water "either alone or in combination with similarly situated lands in the region significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. This necessarily requires analysis on a "case-by-case basis when [an agency] seeks to regulate wetlands based on adjacency to nonnavigable tributaries." *Id*. at 782. Collecting, challenging, or defending this sort of evidence requires

countless man-hours, expert analysis, and mountains of paperwork. For property owners who wish to challenge this sort of determination on their property, the cost in both financial and human capital can be enormous.

Gallagher & Henry spent seven years working through the *administrative* process of the Corps of Engineers to determine whether its property contained WOTUS. Gallagher & Henry then spent several more years litigating the Corps' final decision in federal district and appellate courts. Finally, 13 years after it first sought a jurisdictional determination from the Corps, the Seventh Circuit declared that the Corps had exceeded its authority by finding that Gallagher & Henry's property contained WOTUS.

Gallagher & Henry is not alone. Mike and Chantelle Sackett fought all the way to the United States Supreme Court just to establish the right to challenge an EPA determination that their back yard contained WOTUS. *Sackett v. E.P.A.*, 566 U.S. 120 (2012). The Court found that the Sacketts had the right to challenge the EPA's determination in 2012 and sent the issue back to the lower court. Just this month, seven years later, the district court entered its opinion as to whether the EPA's initial finding was valid.[1]

These cases are not outliers. The average applicant for a permit under the CWA "spends 788 days and $271,596 in completing the process," without "counting costs of mitigation or design changes." *Rapanos*, 547 U.S., at 721. Even more readily available "general" permits take applicants, on average, "313 days and $28,915 to complete." *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016). These are not questions of industries dumping toxic substances into a river. These are cases where private property owners sought to move soil on their properties located miles from any navigable water. *Id*. Thus, the significant nexus test imposes unreasonable burdens on property owners engaged in innocuous activities that have nothing to do with the free flow of navigation.

B. The significant nexus test likely violates the Due Process Clause

The uncertainty described above also likely violates the Due Process Clause. It is a "basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972). To avoid unconstitutionality, a law must "(1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" and (2) establish standards to permit enforcement of the law in "a non-arbitrary, non-discriminatory manner." *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir.1997).

Yet, as the Supreme Court has noted, the scope of the CWA under the significant nexus test is "notoriously unclear." *See Hawkes*, 136 S.Ct. at 1816. The significant nexus test requires that property owners hire experts and lawyers and undergo a multi-year administrative process to determine whether moving soil in a field could be a federal crime punishable by thousands of

[1] Opinion available at: https://www.eenews.net/assets/2019/04/03/document_gw_01.pdf

dollars per day in fines, or even prison. *Id.* Indeed, even Justice Kennedy came to realize that his significant nexus standard was constitutionally suspect. *See Hawkes*, 136 S.Ct. at 1816.

C. The aggregation of "similarly situated sites" under the significant nexus test exceeds Congress' authority under the Necessary and Proper Clause

As explained above, the Necessary and Proper Clause requires actual evidence that nonnavigable waters have a substantial effect on interstate commerce before they can be regulated by the Agencies. *See, Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 560. Even if this standard is met, the regulation will be invalid if it creates a substantial invasion of powers traditionally held by the states. *Id.* If the regulation would effectively create a federal police power over land-use regulations, it must fail. *Id.*

The significant nexus test violates these principles. Under the test, a wetland can be deemed a WOTUS even if it does not itself have a significant nexus with a navigable water. *See Rapanos*, 547 U.S. at 780. Gallagher & Henry's example illustrates the point. There, a 13-acre area located approximately eleven miles from the nearest navigable water was aggregated with 165 other alleged wetlands located in the general watershed to arrive at the conclusion that all 166 sites had a significant nexus with the navigable water. This aggregation was done without any on-site sampling on the 166 areas, a one-time eyeball observation of the 13 acres, and not even a single site visit to the other 165 areas. Ultimately, the Seventh Circuit held that the Corps' jurisdictional determination for Gallagher & Henry's property was improper because the Corps failed to provide any evidence that there were in fact "similarly situated" wetlands. But the Court did not strike down the aggregation principle at the heart of the significant nexus test. *See Orchard Hill*, 893 F.3d at 1025-26. This aggregation principle is therefore still a danger unless the significant nexus test is rejected in its entirety. Accordingly, either the proposed WOTUS rule itself or the preamble to the final rule should explicitly and unambiguously state that the significant nexus test is abandoned in its entirety and that "similarly situated" sites as defined in Justice Kennedy's opinion in *Rapanos* are not to be considered part of the WOTUS test under the CWA moving forward.

IV. The Agencies should adopt a bright line rule limiting "tributaries" to streams and rivers with perennial flow

One of the primary drawbacks of the prior rule is that it does not provide sufficient guidance to property owners or government officials as to what is covered by the CWA. For example, Gallagher & Henry's property was initially deemed jurisdictional because rain water could hypothetically travel from ruts on the property to a storm water retention basin, where (if rains were heavy enough) it could hypothetically travel through underground storm water pipes through several more retention basins and underground storm water pipe to an ephemeral stream that, in certain circumstances, could flow into the Little Calumet river approximately eleven miles away. *Orchard Hill*, 893 F.3d at 1021.

The Proposed Rule addresses many of these concerns by limiting the definition of "tributaries" to exclude ditches, underground floodwater systems, and other features that flow only as a result of precipitation. 84 Fed. Reg. 4173. However, the Proposed Rule does not go far enough to ensure a bright line rule that would allow the government and property owners to know the limits of federal jurisdiction under the CWA.

Under the Proposed Rule, waters with intermittent flow could still be considered "tributaries" triggering federal jurisdiction. 84 Fed. Reg. 4173. Yet the rule is silent as to how often or at what rates these water features must flow to be deemed jurisdictional. Moreover, the Proposed Rule does not limit how far a tributary can extend from a navigable water. Accordingly, under the Proposed Rule, a stream that occasionally trickles into another stream, that occasionally trickles into another stream, that occasionally trickles into a third stream, that occasionally trickles into a navigable water 100 miles away could still be deemed jurisdictional.

Property owners hundreds of miles from a navigable water should not have to wonder if an often dry stream or ditch adjacent to their property makes their property subject to federal jurisdiction. Accordingly, the Agencies should adopt a bright-line rule limiting the term "tributaries" to streams and rivers with perennial flow.

V. Groundwater should not be considered WOTUS

The CWA distinguishes between groundwater and navigable waters. The term "navigable waters" is defined as "waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). By regulation, groundwater is specifically excluded from the term "waters of the United States." *See* 40 C.F.R. 122.2. There is a reason for the exclusion.

As the Fifth Circuit stated, "the legislative history demonstrates conclusively that Congress believed it was not granting the Administrator any power to control disposals into groundwater. . .. [Rather the CWA's] pattern is one of federal information gathering and encouragement of state efforts to control groundwater pollution but not of direct federal control over groundwater pollution." *Exxon Corp. v. Train*, 554 F.2d 1310, 1322, 1329 (5th Cir. 1977). *See Rice v. Harken Expl. Co.*, 250 F. 3d 264, 271-72 (5th Cir. 2001) ("Congress was aware that there was a connection between ground and surface waters [but left] the regulation of groundwater to the States."); *see also Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 963-65 (7th Cir. 1994) (CWA jurisdiction does not extend to pollutants seeping into groundwater regardless of hydrological connection to navigable waters.).

Thus, although the Proposed Rule apparently would allow for certain groundwater migration from wetlands into navigable waters to be regulated as WOTUS, such a position is rejected by both the legislative history and case law. Accordingly, only surface water connections should be considered when determining whether wetlands may be included as WOTUS.

Moreover, for the statutory term "navigable waters" to have a permissible meaning, the "navigable" part of the term cannot be ignored. Thus, the Supreme Court has defined the term as

waters that are "navigable in fact or which could reasonably be so made." *SWANCC,* 531 U.S. at 172, *citing United States v. Appalachian Elec. Power Co.,* 311 U.S. 377, 407-08 (1940). In his plurality opinion in *Rapanos* Justice Scalia traces the long history of the term "navigable waters," making clear that no waters could be defined as "navigable" unless they were either in-fact navigable or could readily be made to be navigable. *See Rapanos,* 547 U.S. 723-24. Accordingly, because groundwater is neither navigable nor could it readily be made to be navigable, it should not be considered WOTUS.

VI. Prior converted cropland should not be considered WOTUS when the site has gone through a change of use

Under the current regulations, prior converted croplands are categorically excluded from the definition of "waters of the United States" and are therefore beyond the jurisdiction of the CWA. See 33 C.F.R. § 328.3(b)(2) (1994). The exclusion continues to apply when the prior converted cropland undergoes a change of use. *See New Hope Power Company v. U.S. Army Corps of Engineers,* 746 F.Supp.2d 1272, 1282 (S.D. FL 2010) ("if [prior converted cropland] wetland has been converted to another use... that area will no longer come under the Corps' regulatory jurisdiction"); *United States v. Hallmark Const. Co.,* 30 F.Supp.2d 1033, 1040 (N.D. Ill. 1998) (prior converted cropland switched to nonagricultural use retained exemption).

The Agencies propose to include an explicit abandonment exception that is based entirely on a Federal Register entry from 1993, which states that the Corps of Engineers would use criteria promulgated under the Food Security Act to determine on a case-by-case basis whether the exemption had been forfeited. *See* 58 Fed. Reg. at 45,0341. Although the prior converted cropland exemption itself was included in the Agencies' regulations in 1993, the abandonment exception to the exemption was not and, to this day, the regulations do not address abandonment, or for that matter any other criteria by which the prior converted cropland exemption could be forfeited. The text of the Corps' regulatory provision reads, "Waters of the United States do not include prior converted cropland." 33 C.F.R. § 328.3(a)(8) (1994) (emphasis added). There is no explicit exception to the exclusion in the regulatory text.

This omission was intentional. The original proposed rule published in 1992 contained a provision that the term "prior converted cropland" is to be defined with reference to an NRCS publication known as the "National Food Security Manual, Second Ed."("NFSAM"). 58 Fed. Reg. at 45033. That manual described prior converted cropland generally and exceptions, including abandonment. Several commenters pointed out that the NFSAM had not yet gone through rulemaking when it was adopted by the Department of Agriculture and "they argued that reference to the NFSAM in the proposed rule was not legally adequate." *Id.* In response to these comments and other concerns raised during notice and comment, the Agencies did not include a reference to the manual or the abandonment exception in the final rule. *See Id.* Thus, the Agencies deliberately promulgated the text of the regulation with a categorical exemption for prior converted wetlands without any reference to any exception to the categorical exemption. The purpose of the omissions to maintain flexibility. Now, the Agencies propose to abandon that flexibility by

inserting a categorical abandonment exception to the categorical exclusion for prior converted cropland. Based on its own experience with the Warmke parcel, which had been an operating farm subject to the prior converted cropland exemption, Gallagher & Henry believes that, where the property has gone through a change of use from agricultural purposes to nonagricultural purposes, there should not be an abandonment exception to the categorical exclusion.

Since the preamble statement of 1993, the *New Hope* and *Hallmark* cases have established that a change of use of prior converted cropland does not impact the applicability of the exclusion. Neither case applied any abandonment test to rescind the exclusion. If the abandonment exception is to be incorporated into the regulatory text of the prior converted cropland exemption, it should apply only where there has not been a change of use to nonagricultural purposes.

As indicated, Gallagher & Henry purchased 100 acres of cropland covered by the categorical exemption in order to convert the property to a residential development. During construction, a broken tile caused groundwater to gather on a 13-acre portion of the construction site, leading to growth of cattails. Such an event should not be considered an "abandonment" of agricultural use tantamount to letting the ground go fallow. Gallagher & Henry believes that applying an abandonment exception to the categorical exclusion for prior converted cropland where there has been a change of use would not only thwart the purposes of the exemption but would also leave the Agencies wide open to legal challenge.

VII. Berms, dams, and other barriers

This issue is related to but different from the foregoing comments regarding a bright-line test for nonnavigable tributaries. Although there is some ambiguity in the preamble and related text of the Proposed Rule, it appears that the Agencies are proposing that flows which are obstructed by berms, dams, and other barriers in nonnavigable tributaries could qualify as WOTUS. To the extent that such an interpretation is intended by the Agencies, Gallagher & Henry opposes it on the ground that it would push the outer constitutional boundaries of the CWA, as suggested in the *SWANCC, Rapanos, and Hawkes* cases.

Physical barriers or obstructions, such as berms or dams, break surface water flow in nonnavigable streams or rivers. If the term "navigable waters" is to be given concrete meaning, a break in the physical ability of surface water in a nonnavigable tributary to flow as surface water beyond a berm or dam should exempt the "upstream" portion of that tributary from WOTUS, thereby also exempting its adjacent wetlands. Gallagher & Henry suggests that the Agencies exempt upstream portions of nonnavigable streams and rivers, as well as their adjacent wetlands, to the extent that such upstream flows are impeded by physical barriers such as berms or dams, thereby breaking the surface water connection to navigable waters. *See Rapanos*, 547 U.S. 723-24 (plurality opinion); *see also SWANCC*, 531 U.S. at 172.

CONCLUSION

For the foregoing reasons, Gallagher & Henry suggests the Agencies abandon the significant nexus standard in favor of the approach set by Justice Scalia in the *Rapanos* plurality opinion, adopt a bright-line rule limiting the term "tributaries" to streams and rivers with perennial flow, clarify that groundwater is not included within the definition of WOTUS, establish that an abandonment exception does not apply to the categorical exclusion for prior converted cropland where the land has undergone a change of use, and clarify that berms, dams, or similar barriers that physically impede the flow of surface water in nonnavigable tributaries exclude the upstream portions of such tributaries, as well as their adjacent wetlands, from WOTUS.

Respectfully submitted,

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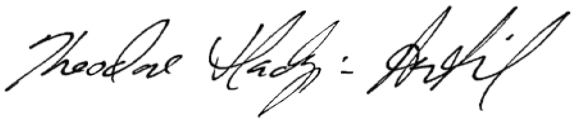
By: 
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