

September 27, 2017

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U.S. Environmental Protection Agency
EPA Docket Center
WJC West Building, Room 3334
1301 Constitution Avenue, NW
Washington, DC 20004

Attention: Docket ID No. EPA-HQ-OW-2017-0203

Re: Comments on Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017)

The undersigned agricultural organizations and their members appreciate the opportunity to comment on the U.S. Environmental Protection Agency’s (EPA) and U.S. Army Corps of Engineers’ (Corps) proposal to rescind the 2015 definition of “waters of the United States” (WOTUS) and to re-codify the pre-2015 definition of WOTUS that currently governs administration of the Clean Water Act (CWA).

The definition of WOTUS and the administration of the CWA have been a focal point of the agricultural community for decades. The undersigned groups and their members represent, own and operate facilities that produce or contribute to the production of the row crops, livestock, poultry, and forest products that provide safe and affordable food, fiber, and fuel to all Americans. These operations are water-dependent enterprises. Indeed, farmers and ranchers need water and thus, their operations typically occur on lands where there is abundant rainfall or at least adequate water available for irrigation. Many features on agricultural lands contain or carry water only as a result of precipitation events, and such wet features may be miles from the nearest “navigable” water. Other water features on agricultural lands, *e.g.*, stock watering ponds, are typically wet year round but have not historically been considered jurisdictional for purposes of the CWA. Given the broad array of water features that exist on the Nation’s farm and ranch lands, clarity and regulatory certainty is of the essence. Simply put, farmers and ranchers need to know what features on their lands are subject to federal jurisdiction and, by extension, whether their day-to-day farming and ranching operations are lawful.

As described below, the 2015 WOTUS Rule provided no such clarity or certainty. Instead, through vague and overly broad definitions of terms such as “tributary,” “adjacent,” and “significant nexus,” the 2015 Rule made it virtually impossible for a typical farmer or rancher to know whether a federal regulator would ultimately determine water features on his or her farm to be jurisdictional. By providing EPA and the Corps with seemingly unbounded authority to regulate water features at their discretion, the 2015 Rule impermissibly intruded upon state and local authority over land and water use planning and resources, thereby flouting Congress’s express “policy . . . to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.” 33 U.S.C. § 1251(b).

The undersigned organizations strongly support the Agencies' proposal to rescind the 2015 Rule and to continue administering the CWA through the pre-2015 definition of "waters of the United States." The pre-2015 definition currently governs as a result of the U.S. Court of Appeals for the Sixth Circuit's decision to stay the 2015 Rule nationwide in October 2015. Moreover, rescinding the 2015 Rule's amendments to the decades-old definition of "waters of the United States" would effectively void those amendments. Finally, the undersigned organizations also urge the agencies to follow through on their stated intent to undertake a future, substantive rulemaking to reconsider the definition of "waters of the United States."

Many of the undersigned organizations are members of the Waters Advocacy Coalition (WAC), which is preparing extensive comments on the agencies' proposal. We hereby support WAC's comments, and we offer these additional comments in support of the proposal.

I. The Agencies Have Authority to Repeal Defective Rules Through a New Rulemaking.

In the proposed rule, EPA and the Corps correctly recognize that: (i) they have authority to rescind the 2015 Rule; (ii) a decision to change course need not be based upon a change of facts or circumstances; and (iii) "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal" of regulations and programs. *See* 82 Fed. Reg. at 34,901 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012)).

Without question, the agencies have authority under both the CWA and the Administrative Procedure Act (APA) to undertake a rulemaking proceeding to repeal a prior rule. The CWA explicitly authorizes EPA to "prescribe such regulations as are necessary to carry out his functions under this chapter." 33 U.S.C. § 1361(a). That broad grant of authority undoubtedly encompasses a rulemaking proceeding to revise or rescind a prior regulation that implements the CWA. The APA likewise plainly authorizes agencies, including EPA and the Corps, to revise or rescind rules through further rulemaking. *See, e.g.*, 5 U.S.C. § 551(5) (defining "rule making" as the "agency process for formulating, amending, or repealing a rule"); *id.* § 553(e) (requiring agencies to allow interested persons to petition for repeal of a rule). The proposed rule is a permissible exercise of these Congressional grants of rulemaking authority to the agencies.

It bears emphasis here that the agencies' decision to rescind the 2015 Rule may rest on changes in statutory interpretation or policy judgments. That decision need not be based on new scientific evidence or changed circumstances. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("An agency's view of what is in the public interest may change, either with or without a change in circumstances."). Notably, even the prior administration recognized that the "science does not provide bright line boundaries with respect to where 'water ends' for purposes of the CWA." 82 Fed. Reg. at 34,902 (quoting 80 Fed. Reg. at 37,060). Therefore, although the rulemaking record that was established for the 2015 Rule purportedly "demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters," the agencies rightly concluded (in the preamble to

the 2015 Rule) that it was ultimately their “[interpretive] task to determine where along that gradient to draw lines of jurisdiction under the CWA.” 80 Fed. Reg. at 37,057. That interpretive task requires “policy judgment” and “legal interpretation.” *Id.*; *see also id.* 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 not dictated by them.”); *cf. San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700, 704 (9th Cir. 2007) (“By not defining further the meaning of ‘waters of the United States,’ Congress implicitly delegated policy-making authority to the EPA and the Corps, the agencies charged with the CWA’s administration.”).

Simply put, the agencies have ample legal authority to engage in a new rulemaking to rescind the 2015 Rule. They may appropriately base that rescission on changes in their interpretation and judgment about the scope of the Clean Water Act and whether the 2015 Rule struck the proper balance between the goals and policies articulated by Congress. Because the record developed in support of the 2015 Rule does not dictate how the agencies are to resolve ambiguities in statutory text or where the agencies are to draw the line between federal and state jurisdiction, the agencies are now free to draw different conclusions on those issues.

II. Because the 2015 Rule is Fatally Flawed, the Agencies Should Finalize Their Proposal to Rescind It.

The proposal explains how the 2015 Rule failed to include a discussion “of the meaning and importance of [CWA] section 101(b) in guiding the choices the agencies make in setting the outer bounds of jurisdiction of the Act, despite the recognition that the rule must be drafted ‘in light of the goals, objectives, and policies of the statute.’” 82 Fed. Reg. at 34,902. The agencies’ failure to fully consider and act in furtherance of Congress’s policy in section 101(b) reflects a critical flaw in the 2015 Rule that justifies rescission. And as explained below, rescission of the 2015 Rule is warranted for additional reasons.

A. Overview of the CWA and Supreme Court Precedents Interpreting “Waters of the United States”

Before discussing the 2015 Rule’s flaws, a discussion of the Clean Water Act framework and relevant Supreme Court precedents is necessary. The Act’s stated objective is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve that objective, Congress declared several national policies and goals. Congress also left the task of controlling water pollution largely to the states: section 101(b) of the Act states that it is Congress’s “policy to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and elimination pollution” and “to plan the development and use . . . of land and water resources.” 33 U.S.C. § 1251(b). The Act also bars any interpretation of its provision that would “impair [] or in any manner affect[] any right of jurisdiction of the States with respect to the waters (including boundary waters) of such States[,]” except as otherwise “expressly provided” by statute. *Id.* § 1370. Federalism is thus a foundational principle of the CWA.

Among other things, the CWA regulates discharges of pollutants “to navigable waters from any point source,” except “in compliance with” certain provision of the Act. *See id.* §§

1311(a), 1362(12)(A). Congress defined “navigable waters” to mean simply “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). The terms “navigable waters” and “waters of the United States” have generated an enormous amount of litigation over the decades, including several decisions from the Supreme Court.

First, in *United States v. Riverside Bayview Homes*, the Court considered whether non-navigable wetlands constitute “waters of the United States” because they are “adjacent to” and “inseparably bound up with” navigable-in-fact waters. 474 U.S. 121, 131-35 (1985). The Court upheld the Corps’ assertion of jurisdiction over those wetlands as a “permissible interpretation of the Act” after finding that Congress intended “to regulate at least some waters that would not be deemed ‘navigable.’” *Id.* at 133, 135.

Next, in *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs* (“*SWANCC*”), the Court considered whether the federal government has jurisdiction over “seasonally ponded, abandoned gravel mining depressions” that are not adjacent to open water but “[w]hich are or would be used as habitat” by migratory birds. 531 U.S. 159, 162-64 (2001). The Court rejected this broad assertion of jurisdiction because it impermissibly read the term “navigable” out of the statute. *See id.* at 171-72. The Court went on to clarify that, even if there was ambiguity on the question of whether the federal government has jurisdiction over nonnavigable, isolated, intrastate waters, the Court would nevertheless reject the Corps’ interpretation of the Act because it impermissibly “alters the federal-state framework by permitting federal encroachment upon a traditional state power”—namely, the “States’ traditional and primary power over land and water use.” *Id.* at 173-74.

Finally, in *Rapanos v. United States*, a majority of the Court rejected the Corps’ assertion of jurisdiction over intrastate wetlands located twenty miles from the nearest navigable water. *See* 547 U.S. 715, 720-21 (2006). A four-justice plurality of the Court held that “waters of the United States” encompasses “only relatively permanent, standing or flowing bodies of water” and “wetlands with a continuous surface connection to” those waters. *Id.* at 732, 739, 742. In reaching that holding, the plurality stressed that the regulation of “development and use” of “land and water resources” is a “quintessential state and local power.” *Id.* at 737-38. Justice Kennedy, concurring in the judgment, held that the federal government has jurisdiction over wetlands only if there is a “significant nexus between the wetlands in question and navigable waters in the traditional sense.” *Id.* at 779. In so holding, Justice Kennedy rejected the possibility that “drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it” would meet his “significant nexus” standard. *Id.* at 781, 778.

B. The 2015 Rule Impermissibly Intrudes upon State Authority in Contravention of Congress’s Stated Policy to Recognize, Preserve, and Protect States’ Responsibilities and Rights.

As thirty-one states convincingly argued in the pending (consolidated) challenge to the 2015 Rule in the Sixth Circuit, the rule unlawfully intrudes upon their sovereign interests in regulating their land and water resources. *See* Opening Brief of State Petitioners, *In re: EPA & Dep’t of Def.*, No. 15-3799, at 57-58 (6th Cir. filed Nov. 1, 2016). Federal rules that address matters that are indisputably attributes of state sovereignty or that impair a State’s ability to act

in areas of traditional state authority implicate the Tenth Amendment, which provides that “powers not delegated to the United States by Constitution . . . are reserved to the States respectively, or to the people.” *Id.* (quotations and citations omitted). State authority over land and water management and regulation “is perhaps the quintessential state activity.” *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982); *see also Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (“regulation of land use [is] a function traditionally performed by local governments”). Congress was well aware of this traditional authority when it announced its policy in the CWA to “recognize, preserve, and protect the primary responsibilities and rights of States” in section 101(b). Furthermore, as the Supreme Court explained in *SWANCC*, the CWA must be construed to avoid “significant constitutional and federalism questions.” 531 U.S. at 174. The Court has recognized repeatedly that “[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.” *Id.* at 173 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). “[N]othing approaching a clear statement from Congress” that it intended to invite “federal encroachment upon a traditional state power” appears in the CWA. *Id.* at 173-74.

Against this backdrop, the 2015 Rule defiantly interpreted the term “waters of the United States” so broadly as to impermissibly “readjust the federal-state balance” and ignore “Congress[’s] [choice] to ‘recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.’” *See SWANCC*, 531 U.S. at 174 (quoting 33 U.S.C. § 1251(b)). Under the 2015 Rule, the federal government can assert jurisdiction over intrastate land and water features that are miles away from any navigable-in-fact waters and that carry flow only after precipitation events. Indeed, the states’ Sixth Circuit brief provides several illustrative examples of the sheer breadth of the 2015 Rule’s expansion of CWA jurisdiction into areas that are historically regulated by states and local governments. *See States’ Br.* at 61-63 (describing the extension of federal jurisdiction into potentially wet areas nationwide, including prairie potholes in North Dakota, arroyos in New Mexico, ephemeral drainages in Wyoming and Arizona, coastal prairie wetlands in Texas, and wetlands that cover approximately half of Alaska).

The 2015 Rule also brazenly asserts virtually the same authority as the Migratory Bird Rule that the Supreme Court invalidated in *SWANCC*. In that case, the Corps’ argument that federal jurisdiction can be based on the presence of “approximately 121 bird species” that “depend upon aquatic environments for a significant portion of their life requirements” did not pass muster. *See* 531 U.S. at 164. Nonetheless, the 2015 Rule’s definition of “significant nexus” seeks to revive that argument. That definition refers to nine factors that may be relevant to evaluating whether a particular water feature has a significant nexus to a downstream navigable water. *See* 33 C.F.R. § 328.3(c)(5). Among the nine functions is the “provision of life cycle dependent aquatic habitat,” *id.*, which can be the sole basis for asserting jurisdiction. *See* 80 Fed. Reg. at 37,091 (emphasizing that “[a] water does not need to perform all of the functions listed in [the definition of “significant nexus”] in order to have a significant nexus” and that regulators may have a sufficient basis to make a “significant nexus” determination simply because a water “performs just one function”). *Id.* Practically speaking, the 2015 Rule impermissibly impinges upon the states’ authority in the same way as the vacated Migratory Bird Rule.

In sum, the 2015 Rule cannot stand because it unlawfully intrudes upon the states' traditional authority to regulate non-navigable water features and land use by asserting jurisdiction over a broad array of intermittent waters, ephemeral waters, and isolated intrastate water features. Because the 2015 Rule flies in the face of Congress's policy (as articulated in CWA Section 101(b)), the agencies should rescind the rule as proposed.

C. Rescission of the 2015 Rule is Appropriate for Additional Reasons.

As discussed in the proposal, two federal courts stayed the 2015 Rule after finding, among other things, that various claims challenging the rule were likely to succeed on the merits. *See* 82 Fed. Reg. at 34,901. First, on August 27, 2015, the U.S. District Court for the District of North Dakota held that thirteen states were likely to succeed on the merits of their claims that the rule exceeds the agencies' authority under the CWA, that the rule is arbitrary and capricious and unsupported by the record, and that it is procedurally flawed because the final rule is not a "logical outgrowth" of the proposed rule. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1055-58 (D.N.D. 2015). Ultimately, that court decided to preliminarily enjoin the 2015 Rule in the thirteen plaintiff states that challenged. Not long after, on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the 2015 Rule nationwide after finding, among other things, that numerous petitioners "demonstrated a substantial possibility of success on the merits of their claims" that the 2015 Rule is "at odds with" the *Rapanos* ruling, that the final rule is not a logical outgrowth of the proposal, and that the rule lacks record support and thus, is arbitrary and capricious. *In re EPA & U.S. Dep't of Def.*, 803 F.3d 804, 807-08 (6th Cir. 2015). These opinions expose several *additional* flaws in the 2015 Rule beyond those discussed above in Section II.B of these comments. The agencies should rely on these flaws to further support their proposed rescission of the 2015 Rule.

Another critical flaw in the 2015 Rule merits consideration: the rule failed to achieve the stated purpose of providing clarity or certainty about the scope of the CWA. Instead, the rule's confusing and imprecise definitions do not give fair notice to members of the public for them to differentiate between lawful and unlawful conduct. To use just a couple of examples:

100-year floodplain. The provisions in the 2015 Rule dealing with adjacency (specifically, the definition of "neighboring") and case-specific assertions of jurisdiction over waters with a "significant nexus" to jurisdictional waters both refer to the 100-year floodplain. *See* 33 C.F.R. §§ 328.3(a)(8), 328.3(c)(2). The agencies stated that they will rely on "published FEMA Flood Zone Maps to identify the location and extent of the 100-year floodplain" in implementing the 2015 Rule, even though they acknowledged that "much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and may not accurately represent existing circumstances on the ground." 80 Fed. Reg. at 37,081. The agencies further stated that they will assess accuracy "based on a number of factors" and, in the absence of an accurate FEMA map, the agencies indicate they will rely on "other available tools to identify the 100-year floodplain," including "site-specific modeling." *Id.* This approach fails to put landowners on notice of when waters on their property may be considered jurisdictional as either "adjacent" waters or as case-specific "significant nexus" waters. Even if landowners happen to be in a part of the country where FEMA has generated a floodplain map, they may not know whether regulators will deem those maps to be accurate. And if regulators do not consider

FEMA maps to be accurate, landowners face the additional task of trying to figure out what “available tools” regulators may use to determine the 100-year floodplain for purposes of asserting jurisdiction.

Ordinary high water mark. Whether a water feature is a “tributary” and hence, *per se* jurisdictional, depends in part on the presence of an “ordinary high water mark.” See 33 C.F.R. §§ 328.3(c)(3), 328.3(c)(6). And whether a water feature is “adjacent” or has a “significant nexus” (based on a case-specific determination) can depend on distance from a jurisdictional water’s “ordinary high water mark.” See *id.* §§ 328.3(c)(1), 328.3(2), 328.3(a)(8). The 2015 Rule goes on to define “ordinary high water mark” in a way that allows regulators to rely on whatever “other . . . means” they deem “appropriate.” *Id.* § 328.3(c)(6). To make matters worse, agency staff need not make field observations; rather, they can use desktop analyses and remote imagery to infer jurisdiction even when “physical characteristics” of an ordinary high water mark “are absent in the field.” 80 Fed. Reg. at 37,077. Moreover, there is no apparent limit as to how far back in time regulators may reach in looking for an ordinary high water mark using old data and “historic records.” *Id.* As a result, under the 2015 Rule, individual regulators across the country have virtually unbounded discretion as to how to implement the definition of “ordinary high water mark.”

These are just two of the examples that show how the 2015 Rule is unconstitutionally vague. That critical defect is yet another reason that the agencies should rescind the rule.

III. Following Rescission of the 2015 Rule, Recognition of the Prior Definitions Is Appropriate.

The 2015 Rule amended longstanding definitions of “waters of the United States” that were codified in 33 C.F.R. Part 328 and 40 C.F.R. Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401. Upon rescinding the 2015 Rule, those amendments to the aforementioned regulations lack any legal effect. Consequently, the pre-2015 definitions would govern the administration of the CWA. Nevertheless, the text of the Code of Federal Regulations needs to be updated so that the regulatory text correctly reflects the definitions of “waters of the United States” as they existed prior to the 2015 amendments. But that is simply a ministerial task.

Recognition of the pre-2015 definitions provides the most certainty under the circumstances because it ensures that the regulatory text reflects the definitions that currently apply nationwide. As a result of the nearly two-year stay of the 2015 Rule, the pre-2015 definitions of “waters of the United States” are the status quo and have continued to govern the agencies’ (and states’) administration of the CWA. In staying the 2015 Rule nationwide, the Sixth Circuit found that “the sheer breadth of the ripple effects caused by the [2015] Rule’s definitional changes counsels strongly in favor of maintaining the status quo for the time being.” 803 F.3d at 808. As a result of that action, we are not aware of any instances in which the agencies sought to enforce the 2015 Rule during the short period of time that it was in effect in 37 states. Moreover, the Corps has continued to issue thousands of approved jurisdictional determinations since the stay of the 2015 Rule, all based on the pre-2015 regulatory definitions. Given the current regulatory landscape, continued reliance on the pre-2015 definitions would provide the most clarity for regulators and the regulated community.

IV. The Agencies Should Reconsider the Definition of “Waters of the United States” in a Future Rulemaking.

EPA and the Corps have announced their intent to “conduct a separate notice and comment rulemaking that will consider developing a new definition of ‘waters of the United States[.]’” *E.g.*, 82 Fed. Reg. at 34,902. In that second rulemaking, the agencies plan to “more fully consider the policy in [CWA] section 101(b) when exercising their discretion to delineate the scope of waters of the U.S., including the extent to which states or tribes have protected or may protect waters that are not subject to CWA jurisdiction.” *Id.* The undersigned organizations agree that such a revised rulemaking is an important and worthwhile pursuit. A revised definition of “waters of the United States” that clearly distinguishes between jurisdictional and non-jurisdictional features and does not intrude upon traditional areas of state authority is long overdue.

Justice Roberts’s concurring opinion in *Rapanos* lamented the confusion that has long plagued the administration of the CWA. *See* 547 U.S. at 757-58 (discussing how “[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis” and “how readily the situation could have been avoided”). Given this longstanding confusion, it comes as no surprise that the undersigned agricultural organizations (and countless other stakeholders) have for years urged the Agencies to clarify the scope of the CWA rather than rely on non-binding guidance as the basis for asserting and continually expanding federal jurisdiction. Of course, the 2015 Rule bore zero resemblance to the sort of rulemaking that the regulated community had advocated for, despite the prior administration’s attempts to characterize it as such. *See* 80 Fed. Reg. at 37,056-57.

Although the undersigned organizations agree that recognition of the pre-2015 definition of “waters of the United States” is appropriate for the time being in the wake of litigation over the 2015 Rule, we do not view it as a long-term solution. The pre-2015 definitions, coupled with the Agencies’ 2008 guidance and other policies, raise a number of issues and leave the door wide open to impermissibly broad assertions of jurisdiction. Those issues can and should be addressed in a new rulemaking that actually serves the goal of providing clear and easy-to-administer definitions that allow members of the public and regulators alike to readily differentiate between jurisdictional and non-jurisdictional water features.

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We thank you for your time and consideration.

On behalf of:

Agricultural Retailers Association
American Farm Bureau Federation
American Sugarbeet Growers Association
CropLife America
GROWMARK
Illinois Corn Growers Association

Illinois Farm Bureau
Illinois Soybean Growers
Kansas Agribusiness Retailers Association
Kansas Grain and Feed Association
Mid America Croplife Association
Missouri Agribusiness Association

Missouri Corn Growers Association
Missouri Soybean Association
National Alliance of Forest Owners
National Association of State Department of
Agriculture
National Cattlemen's Beef Association
National Corn Growers Association
National Cotton Council
National Council of Farmers Cooperatives
National Milk Producers Federation
National Pork Producers Council
Ohio AgriBusiness Association
Ohio Corn and Wheat Growers Association
Public Lands Council
Renew Kansas
The Fertilizer Institute
United Egg Producers
U. S. Poultry & Egg Association
Virginia Agribusiness Council
Virginia Poultry Federation
Wyoming Ag-Business Association
Wyoming Wheat Growers Association