September 26, 2017

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Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Army Corps of Engineers
441 G Street NW
Washington, DC 20314
Attention: Docket ID No. EPA–HQ–OW–2017–0203


Dear Reader:

American Exploration & Mining Association (“AEMA”) and Mountain States Legal Foundation (“MSLF”) respectfully submit the following comments on the 2017 Proposed Rule, which proposes to rescind the existing definition of “waters of the United States,” as promulgated in 2015, and recodify the pre-2015 definition of “waters of the United States” as the first step in a two-step process to review and revise the definition of “waters of the United
States” in the Clean Water Act (“CWA”). AEMA and MSLF appreciate the opportunity to submit the following joint comments. 

STATEMENTS OF INTEREST

I. AEMA AND ITS MEMBERS.

AEMA (f/k/a Northwest Mining Association) is a non-profit, non-partisan, national trade association incorporated under the laws of the State of Washington, with its principal place of business in Spokane, Washington. AEMA is the recognized national voice in support of exploration, the junior mining sector, and maintaining access to federal lands.

AEMA’s purpose is to advocate for and advance the mineral resource and mining related interests of its members. AEMA accomplishes its purpose by representing and informing its members on legislative, regulatory, safety, technical, and environmental issues. Moreover, AEMA is committed to principles that embody the protection of human health, the natural environment, and a prosperous economy. For instance, AEMA fosters and promotes economic opportunity and environmentally responsible mining. AEMA and its members recognize that environmental protection is an essential element of mining and advocate for a balance between protection of human health, the natural environment, and the benefits of social and economic growth.

AEMA has represented the mineral mining industry for 122 years, and currently has over 2,000 members residing in 42 states. AEMA also has members in eleven other countries. AEMA’s membership is broad-based, including small miners, exploration geologists, small and large mining companies, engineers, equipment manufacturers, technical service workers, and salespersons of equipment and supplies. Of its broad-based membership, more than 80% of AEMA’s members are small businesses or work for small businesses.

AEMA’s members engage in activities on land and in or near water that often require a jurisdictional determination, under the CWA, before proceeding. The 2015 Final Rule’s definition of “waters of the United States” would greatly expand CWA jurisdiction, if implemented. Consequently, the expanded reach of the CWA would result in increased costs and delay for AEMA’s members. Moreover, the 2015 Final Rule would have a substantial effect

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2 AEMA is a member of Waters Advocacy Coalition (“WAC”). WAC’s comments on the 2017 Proposed Rule are hereby incorporated herein by reference.
on AEMA’s small mining business members’ ability to finance and develop new projects or perform maintenance on existing infrastructure and facilities.

Because the 2015 Final Rule would directly and adversely affect AEMA’s members, especially its small mining business members, AEMA challenged the 2015 Final Rule. On November 9, 2015, AEMA filed a Petition for Review in the U.S. Court of Appeals for the District of Columbia, which was subsequently consolidated with the other petitions for review before the U.S. Court of Appeals for the Sixth Circuit. In re: Am. Exploration & Mining Ass’n v. EPA, No. 15-4305 (6th Cir.) consol. with Murray Energy Corp. v. EPA, No. 15-3751 (6th Cir.) (lead case). Additionally, on June 23, 2016, AEMA filed a Complaint for Declaratory and Injunctive Relief in the U.S. District Court for the District of Columbia. Am. Exploration & Mining Ass’n v. EPA, No. 16-cv-1279-RC (D.D.C. filed June 23, 2016). Both cases are currently stayed in light of the U.S. Supreme Court granting certiorari in National Association of Manufacturers v. Department of Defense, No. 16-299 (U.S.). In light of its legal challenges, AEMA and its members have significant interests in the 2017 Proposed Rule and step two of the process.

II. MSLF AND ITS MEMBERS.


Moreover, MSLF has members in all 50 states. MSLF’s members have tangible interests in the 2017 Proposed Rule. Many of these members’ livelihoods depend on the continued development of minerals, oil and gas, timber, livestock, agricultural products, and commercial and residential real estate. Many of these activities occur on land and in or near water that could be considered “waters of the United States” under the 2015 Final Rule. The sweeping breadth of the 2015 Final Rule means these activities could be impacted even if these activities do not directly affect federally regulated waters. MSLF and its members have significant interests in the 2017 Proposed Rule and step two of the process.

Accordingly, AEMA, MSLF, and their members respectfully submit these comments in support of recodifying the definition of “waters of United States” in existence prior to the 2015 Final Rule as informed by agency guidance and longstanding practice and, thereby, removing the
2015 Final Rule from the Code of Federal Regulations. In addition, AEMA, MSLF, and their members respectfully request that step two of this process begin forthwith.

INTRODUCTION

I. THE CLEAN WATER ACT.

In 1977, the CWA was enacted. Pub. L. No. 95-217, 91 Stat. 1566 (1977). The CWA provides, inter alia: “[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Despite the broad objective of the CWA, Congress stated that “[i]t is the policy of the Congress 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 ….” Id. § 1251(b).

To accomplish its objective, the CWA uses “navigable waters” to determine the scope of the agencies’ jurisdiction under the CWA. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985). “Navigable waters” is statutorily defined as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). This term is used in a number of CWA provisions that regulate activities, including: (a) Section 303, regarding water quality standards and total maximum daily load programs; (b) Section 311, regarding the oil spill prevention and response program; (c) Section 401, regarding state water quality certification; (d) Section 402, regarding point source discharge permits under the National Pollutant Discharge Elimination System; and (e) Section 404, regarding the discharge of dredged or fill material. See id. §§ 1313, 1321, 1341, 1342, 1344.

II. THE SUPREME COURT’S CWA PRECEDENTS.

The CWA gives the agencies regulatory authority over “the waters of the United States.” See 33 U.S.C. §§ 1311, 1341(a), 1362(7). The Supreme Court’s CWA case law articulates three rules for CWA jurisdiction: (1) wetlands adjacent to a traditional navigable water are “waters of the United States”; (2) isolated, non-navigable, intrastate ponds are not “waters of the United States” based solely on the presence of migratory birds; (3) wetlands adjacent to non-navigable tributaries can be “waters of the United States” if they have a continuous surface connection or a significant nexus with navigable waters. Riverside Bayview, 474 U.S. at 135, 139; Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 171–72, 174 (2001) (“SWANCC”); Rapanos, 547 U.S. at 742 (opinion of Scalia, J.); id. at 759 (Kennedy, J., concurring).

3 AEMA, MSLF, and their members’ support in favor of repealing the 2015 Final Rule and recodifying the pre-existing regulations defining “waters of the United States” should not be interpreted as supporting the pre-existing regulations. AEMA, MSLF, and their members support the recodification only as an interim solution and expect a new definition of “waters of the United States” to be promulgated vis-à-vis step two of the process.
In *Riverside Bayview*, the Court concluded that the Corps has CWA jurisdiction over wetlands adjacent to navigable waters. 474 U.S. at 139. In that case, the Court was confronted with a line-drawing problem because the wetlands “extended beyond the boundary of respondent’s property to ... a navigable waterway.” *Id.* at 131. Noting that “the transition from water to solid ground is not necessarily or even typically an abrupt one,” and that “the Corps must necessarily choose some point at which water ends and land begins,” *id.* at 132, the Court upheld the Corps’ interpretation of “the waters of the United States” to include wetlands that “actually abut[] on” traditional navigable waters. *Id.* at 135.

In *SWANCC*, the Court declined to extend the Corps’ jurisdiction to an abandoned sand and gravel pit used by migratory birds. 531 U.S. at 162. Observing that “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview*,” the Court held that *Riverside Bayview* did not establish “that the jurisdiction of the Corps extends to ponds that are not adjacent to open water.” 531 U.S. at 167–68. The Court concluded that “nonnavigable, isolated, intrastate waters” like those presented in *SWANCC*, where the line-drawing problem of *Riverside Bayview* was not present, could not give rise to CWA jurisdiction.4 *SWANCC*, 531 U.S. at 171–72, 174.

In *Rapanos*, the Court addressed the scope of the Corps’ statutory authority under the CWA over intrastate wetlands adjacent to non-navigable tributaries of navigable waters. 547 U.S. at 730. There was, however, no majority opinion in *Rapanos*.

Justice Scalia, writing for the *Rapanos* plurality, concluded that “‘the waters of the United States’ includes only ‘relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] ... oceans, rivers, [and] lakes.’” *Rapanos*, 547 U.S. at 739 (omission and substitutions in original). For purposes of determining CWA jurisdiction over wetlands, “only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and covered by the Act.” *Id.* at 742 (emphasis in original).

Concurring in the judgment, but rejecting the plurality’s reasoning, Justice Kennedy held that the Corps’ CWA jurisdiction extends to wetlands that “possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring). According to Justice Kennedy, the “requisite nexus” exists “if the wetlands, 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.’” *Id.* at 780. Where the wetlands in question are “adjacent to navigable-in-fact waters, [the government] may rely on adjacency to establish its jurisdiction.” *Id.* at 782. Where the wetlands are adjacent to nonnavigable tributaries, “[a]bsent more specific regulations ... [the government] must establish a significant nexus on a case-by-case basis.” *Id.*

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III. 2015 FINAL RULE.

Following *Rapanos*, the agencies issued guidance regarding the interpretation of “waters of United States” in 2007. Then, in 2008, the agencies again issued guidance regarding the interpretation of “waters of the United States” in light of *Rapanos*, which superseded the 2007 guidance.

In an effort to clarify how the agencies will identify “waters of the United States” covered by the CWA, the agencies solicited comments on draft guidance on May 2, 2011. 76 Fed. Reg. 24,479 (May 2, 2011). Instead of finalizing guidance on what “waters of the United States” means, on April 21, 2014, the agencies published the 2014 Proposed Rule to delineate the scope of jurisdiction under the CWA. 79 Fed. Reg. at 22,188. The 2014 Proposed Rule sought, *inter alia*, to expand CWA jurisdiction beyond its constitutional and statutory limitations, as well as failed to comply with the Regulatory Flexibility Act (“RFA”), 5 U.S.C. § 601 et seq. See AEMA’s Comments, at 2–14; MSLF’s Comments, at 8–15.

On June 29, 2015, the agencies published the 2015 Final Rule defining “waters of the United States” in the *Federal Register*. 80 Fed. Reg. at 37,054. The 2015 Final Rule contained changes that were not present in the 2014 Proposed Rule, such as, *inter alia*: (a) defining “bed and banks”; (b) redefining “neighboring” to include floodplain intervals and specific numerical boundaries; and (c) changing the category of “other waters.” *Id.* at 37,079–80, 37,082–83, 37, 086–87. Due to these problems and others, many States, industries, and environmental groups challenged the 2015 Final Rule.

IV. CHALLENGES TO THE 2015 FINAL RULE.

Across the country, states, industry groups, and environmental groups filed challenges to the 2015 Final Rule in both the district courts and the circuit courts of appeals. In the courts of appeals, approximately 22 petitions for review (including AEMA’s) were filed. Ultimately, all petitions for review were consolidated in the Sixth Circuit. *See Murray Energy Corp. v. EPA*, No. 15-3751 (6th Cir.) (lead case). On the other hand, approximately 18 complaints (including AEMA’s) were filed in the district courts.5 These petitions for review and complaints alleged that the 2015 Final Rule suffers from both substantive and procedural flaws, *i.e.*, violates the CWA and Supreme Court precedent, violates the notice-and-comment procedures under the Administrative Procedure Act, violates the Commerce Clause and Tenth Amendment of the U.S. Constitution, and violates the Regulatory Flexibility Act.

On October 9, 2015, the Sixth Circuit ordered the 2015 Final Rule stayed across the nation.6 *In re: EPA & Dep’t of Def. Final Rule*, 803 F.3d 804, 808–09 (6th Cir. 2015). Because

5 Most, if not all, of the district court actions are currently stayed, were voluntarily dismissed, or have appeals held in abeyance in the circuit courts of appeals.

the 2015 Final Rule is stayed, it is not being implemented. As such, the pre-existing definition of “waters of the United States,” as informed by agency guidance, i.e., 2003 Guidance, 2008 Guidance, case law, and longstanding practice, currently applies.

Additionally, the Sixth Circuit, in a fractured opinion, ruled that it has original jurisdiction over challenges to the 2015 Final Rule. In re: U.S. Dep’t of Def. & EPA Final Rule: Clean Water Rule: Definition of “Waters of the U.S.,” 817 F.3d 261, 274 (6th Cir. 2016). National Association of Manufacturers, an intervenor-respondent in the Sixth Circuit proceedings, filed a petition for writ of certiorari, which was granted by the Supreme Court. Nat’l Ass’n of Mfrs. v. Dep’t of Def., 137 S. Ct. 811 (U.S. Jan. 13, 2017) (No. 16-299). Oral argument is currently scheduled for October 11, 2017. If the Supreme Court reverses the Sixth Circuit’s decision regarding original jurisdiction, then the nationwide stay of the 2015 Final Rule may be lifted.

V. EXECUTIVE ORDER 13778.

On February 28, 2017, President Trump issued Executive Order 13778, titled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” See 82 Fed. Reg. 12,497 (Mar. 3, 2017). This Executive Order, inter alia, ordered the agencies to review the 2015 Final Rule and to “publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law.” Id. at 12,497. This Executive Order also ordered the agencies to “consider interpreting the term ‘navigable waters,’ as defined in 33 U.S.C. [§] 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos ….” 82 Fed. Reg. at 12,497.

VI. 2017 PROPOSED RULE.

On July 27, 2017, the agencies published the 2017 Proposed Rule in the Federal Register. 82 Fed. Reg. at 34,899. The 2017 Proposed Rule purports to initiate step one of a “comprehensive, two-step process” to comply with Executive Order 13778. Id. Step one of this process “proposes to rescind the definition of ‘waters of the United States’ in the Code of Federal Regulations to re-codify the definition of ‘waters of the United States,’ which currently governs administration of the [CWA], pursuant to a decision issued by the … Sixth Circuit staying a definition of ‘waters of the United States’ promulgated by the agencies in 2015.” Id. In step two, “the agencies will conduct a separate notice and comment rulemaking that will consider developing a new definition of ‘waters of the United States’ taking into consideration the principles that Justice Scalia outlined in the Rapanos plurality opinion.” Id. at 34,902.

The rationale for the 2017 Proposed Rule is three-fold. First, the agencies acknowledge that the 2015 Final Rule failed to discuss “the meaning and importance of [33 U.S.C. § 1251(b)] in guiding the choices the agencies make in setting the outer bounds of jurisdiction of the [CWA]

7 As set forth in the CWA, “[i]t is the policy of Congress 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 ….” Id.
...” 82 Fed. Reg. at 34,902. The agencies purport to consider this policy more fully in step two. Id.

Second, the agencies “recognize the need to provide as an interim step for regulatory continuity and clarity for the many stakeholders affected by the definition of ‘waters of the United States.’” Id. The 2017 Proposed Rule purports to provide that continuity and clarity by maintaining the current status quo, i.e., repeal the 2015 Final Rule and recodify the pre-existing regulations. Id.

Third, the agencies seek to avoid confusion if the Supreme Court reverses the Sixth Circuit’s ruling that it has original jurisdiction and, consequently, may lift the nationwide stay. Id. at 34,903. The 2017 Proposed Rule would prevent confusion and avoid multiple motions for preliminary injunctions that are pending, or would arise, in the district courts. Id.

Based on this three-fold rationale, the agencies decided to publish the 2017 Proposed Rule, because “[a] stable regulatory foundation for the status quo would facilitate the agencies’ considered re-evaluation, as appropriate, of the definition of ‘waters of the United States’ that best effectuates the language, structure, and purposes of the [CWA].” Id.

COMMENTS

AEMA and MSLF are in support of the 2017 Proposed Rule insofar as it is only step one of a two-step process, meaning the 2015 Final Rule must be repealed, but the recodification of the pre-existing definition of “waters of the United States” must only be interim relief. Each component of the 2017 Proposed Rule will be discussed separately.

The 2015 Final Rule must be repealed for two reasons. First, it is unlawful both procedurally and substantively, as evidenced by the many legal actions challenging it. E.g., In re: Am. Exploration & Mining Ass’n v. EPA, No. 15-4305 (6th Cir.). Second, AEMA and MSLF members are directly and adversely affected by the 2015 Final Rule. Thus, repealing the 2015 Final Rule prevents AEMA and MSLF members from injury.

Moreover, the agencies have the requisite authority to repeal the 2015 Final Rule. E.g., Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983). To do so, the agency must “provide a reasoned explanation for its action ....” FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (An agency “need not demonstrate to a court satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.” (emphasis in original)).

Although AEMA and MSLF support the repeal of the 2015 Final Rule, they do not support the recodification of the pre-existing regulations if these regulations are not replaced as soon as possible. The recodification of the pre-existing regulations does provide some interim
relief, but lacks the certainty or clarity given Supreme Court precedent, agency guidance, and longstanding practice if left in place for a long period of time.

As such, AEMA and MSLF support going forward with the 2017 Proposed Rule as the best choice in the short-term, because it is important and necessary to repeal the 2015 Final Rule. However, AEMA and MSLF recommend the recodification of the pre-existing regulations, and continued implementation of this status quo, be only interim relief. It is important to begin step two of the process forthwith. As such, AEMA and MSLF look forward to providing input on a new definition of “waters of the United States” during step two of the process.

CONCLUSION

The 2017 Proposed Rule would repeal the 2015 Final Rule and recodify the pre-existing regulations defining “waters of the United States.” AEMA and MSLF support repealing the 2015 Final Rule as an important and necessary first step. However, AEMA and MSLF strongly recommend that the recodification of the pre-existing regulations be for a short interim period. As such, a proposed rule outlining step two of the process and a new, proposed definition of “waters of the United States” should be done promptly.

Respectfully Submitted By:

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