



April 15, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Revised Definition of "Waters of the United States", Docket ID No. EPA-HQ-OW-2018-0149

Dear Administrator Wheeler:

Western Energy Alliance, American Exploration & Production Council (AXPC), Domestic Energy Producers Alliance (DEPA) and the Independent Petroleum Association of America (IPAA) appreciate the opportunity to provide comments on the Environmental Protection Agency (EPA) and the Department of the Army (Army) (collectively "the agencies") proposed revisions to the definition of Waters of the U.S. (WOTUS). We think the agencies are headed in the right direction and the revised definition of WOTUS (proposed rule) will provide greater clarity, predictability, certainty, and consistency for federal agencies, states, tribes, the regulated community, landowners, and the general public.

However, we provide specific recommendations below that would further clarify the revised rule to make it more practical and implementable. In addition, we request that the agencies move quickly to finalize the proposed rule which clearly provides a "bright line" of jurisdiction that follows the Clean Water Act (CWA) and case law as over 40 percent of the states are currently required to follow the overreaching 2015 Clean Water Rule (2015 WOTUS rule).

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fifteen employees.

The Independent Petroleum Association of America (IPAA) is a national upstream trade association representing thousands of independent oil and natural gas producers and service companies across the United States. Independent producers develop 90 percent of the nation's oil and natural gas wells. These companies account for 83 percent of America's oil production, 90 percent of its natural gas and natural gas liquids (NGL) production, and support over 4.5 million American jobs.

AXPC is a national trade association representing 33 of America's largest and most active independent natural gas and crude oil exploration and production companies. The AXPC's members are "independent" in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts, which operate in different segments of the energy industry, such as refining and marketing.

DEPA is a distinctive organization with a unique approach to domestic onshore energy advocacy and education. We are an alliance of producers, royalty owners, and oilfield service companies as well as state and national independent oil and gas associations representing the small business men and women of the energy industry, devoted to the survival of U.S. domestic crude oil and natural gas exploration and production.

Our industry has great interest and supports the proposed rule to narrow and clarify WOTUS, because it can impact our industry regarding several sections of the CWA, including Section 404 permitting, Spill Prevention, Control, and Countermeasure (SPCC) planning, stormwater permitting, and oil spill reporting. The definition of WOTUS also impacts the surface owners we work with to develop oil and natural gas, including family farmers and ranchers.

Our associations agree with the agencies' thorough explanation of the deficiencies of the 2015 WOTUS rule. As finalized, the 2015 WOTUS rule failed to follow the CWA and related case law, was overreaching in its scope, failed to follow the Administrative Procedures Act (APA), and was fraught with technical shortcomings. Even the U.S. Court of Appeals for the Sixth Circuit, the District of North Dakota, and the Southern District of Georgia found it likely to be overturned on its merits.

The 2015 WOTUS rule is an unreasonably broad interpretation by the agencies of their regulatory authority. The agencies clearly stated in the preamble to the 2015 WOTUS rule that its interpretation of the scope of WOTUS was based on the information and conclusions detailed in the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Connectivity Report) even though the Connectivity Report clearly states, "...it neither considers nor sets forth legal standards for CWA jurisdiction, nor does it establish EPA policy."¹ We submit that the agencies misused the Connectivity Report to supersede the CWA and affiliated case law.

The 2015 WOTUS rule contained interpretations of "significant nexus" to navigable waters, "adjacent waters" and tributaries that are clearly at odds with the Supreme Court's rulings in *Rapanos v. United States* and *SWANCC v. U.S. EPA*. These decisions show the implementation of the 1986 rule expanded beyond its original intent even before the promulgation of the 2015 WOTUS rule. In practice, the Army's use of preliminary jurisdictional determinations has ignored the narrowing demanded by the decisions in *Rapanos* and *SWANCC*. As others have noted, "It is difficult to imagine that Justice Scalia could have envisioned that six years after the *Rapanos* decision the Corps would have developed an administrative process that not only completely negated both the Scalia and Kennedy Opinions but actually resulted in

¹[Connectivity of Streams & Wetlands to Downstream Waters](#), EPA, Jan. 2015

expanding its jurisdiction.”² The agencies have been disregarding the law and court rulings for some time, and the 2015 WOTUS rule went beyond legal and statutory foundation.

In addition to the substance of the 2015 WOTUS rule itself, the rulemaking process followed by the agencies was procedurally deficient. The agencies failed to provide an opportunity for public comment on distance limitations for terminology like “adjacent waters” and “significant nexus.” By circumventing the public process, the agencies promulgated a final rule that significantly overstepped their authority and violated the APA requirements for proper notice and comment rulemaking. This deficiency alone is a valid reason to repeal and/or replace the 2015 WOTUS rule.

While we are sure the agencies are reviewing the more than 100,000 comments received from the “Step 1 – Repeal” public comment period, it has been eight months since the comment period ended.³ We urge the quick adoption of the proposed recodification of the preexisting WOTUS rule since it would end the untenable situation of having different definitions of WOTUS in effect in different states across the nation.

We support the direction the agencies are headed concerning the concepts provided for in the proposed rule. The improved jurisdictional clarity not only benefits regulated entities, it improves protection of water resources and regulators’ ability to ensure programs are effectively implemented. Indeed, the CWA’s water quality objectives are best met through clear jurisdictional boundaries that can be administered in a way that promotes accountability and preserves resources for actual environmental protection. These important water quality objectives are certainly not met by ignoring the CWA’s mandated approach to cooperative federalism. Thus, we support the agencies narrowing of WOTUS to account for the role of states and tribes in the management and protection of water.

In general, we support the comments filed by the Waters Advocacy Coalition concerning this matter, however, have chosen to offer substantive comments on a limited amount of issues within the proposed rule.

I. General Areas of Support

We strongly support the changes to the proposed rule and appreciate the agencies working toward a definition of WOTUS that improves jurisdictional certainty and clarity. The proposal follows the legal underpinnings of the CWA and implements the overall objective of the CWA to restore and maintain the integrity of the nation’s waters while providing a clear definition of WOTUS. The proposed rule:

- Strikes a balance between state and federal jurisdiction of waters, acknowledging the important role of the states in managing and protecting their land and water resources

² Gale, Barry, “Six Years After RAPANOS – What’s Changed? (Answer: Not Much)”, *Federal Regulation of Cultural Resources, Wildlife, and Waters of the U.S.*, Paper No. 13, Pg. 16-17 (Rocky Mt. Min. L. Fdn. 2012)

³ [EPA Docket # EPA-HQ-OW-2017-0203-15104](#), Regulations.gov, 2018

- Is consistent with Executive Order 13778⁴
- Is easier to implement for the regulated community, landowners, and the agencies with the removal of ephemeral features along with the other exemptions
- Clarifies which waters are and are not WOTUS by relying upon direct hydrologic surface connections
- Removes subjective interpretations by eliminating vague concepts such as significant nexus and ecological considerations as criteria used in case-by-case analyses of jurisdiction.

II. Suggestions for Improvement

While the proposed revisions to the definition of WOTUS are a huge step toward creating clear and discernable criteria for determining federal jurisdiction, there are still some opportunities to improve clarity of the proposed rule. Specifically, we recommend the agencies:

- Use the USGS Topographic Maps as a more practical approach and a primary reference tool to determine the maximum extent of federal jurisdiction. Such an approach will provide the regulated community, landowners, and general public with a clearer and more certain understanding of potential WOTUS jurisdictional extent unless site specific situations suggest otherwise.
- Maintain the need for direct hydrologic surface connections, while excluding groundwater connections from consideration, when determining adjacency between wetlands and jurisdictional waters.
- Remove bed, bank, and ordinary high-water mark (OHWM) from the criteria used to determine jurisdictional tributaries.
- Include all three wetland criteria (hydrology, hydrophytic vegetation, hydric soil) in the regulatory text. These are clear indicators of consistent, non-episodic, water.

III. Specific Comments on Categories of Water

Traditional Navigable Waters (TNW's)

While this category has not seen much change in this redefinition, we appreciate the focus on ensuring that TNW's are actually involved in interstate commerce. The preamble clearly states that a water qualifies as a TNW based on its navigability, which in turn is directly tied to its transport ability in interstate commerce. The preamble roots TNWs in the concept of navigability and we would

⁴ [Restoring the Rule of Law...by Reviewing the WOTUS Rule](#), 82 FR 12497, February 2017

recommend that the agencies clarify that recreational use alone would not be enough to establish jurisdiction.

Making the distinction that real commerce takes place on permanent waters is needed to constitutionally authorize federal regulation of the water. Such a stance avoids many of the issues associated with the *SWANCC* decision. Using migratory birds or aquatic birds (per the 2015 WOTUS rule) as the nexus to bring more waters under federal jurisdiction was an overreach that caused much of the legal troubles that precipitated this redefinition. Establishing an appropriate, consistent with Congressional intent, definition for this category is of tremendous importance as the other categories of water in the proposed rule are jurisdictional due to their physical connection to TNW's.

Tributaries to TNWs

We strongly support the proposed changes to the tributary category which would eliminate the most confusing and legally problematic sections of the overreaching 2015 WOTUS rule.

Ephemeral Features

The exclusion of all ephemeral features (e.g. surface flow only in direct response to a precipitation event) is a particularly welcome change that requires a complete removal of past guidance coming from the *SWANCC* and *Rapanos* decisions. Including ephemeral features would have been especially acute in the West, where arid conditions and seasonally fluctuating rainfall are commonplace. Many ephemeral water features would have been subject to the 2015 WOTUS rule despite being dry for much of the year or even for many years.

Bed, Bank, and Ordinary High-Water Mark

The removal of beds, banks, and ordinary high-water marks as defining features of a tributary is key in making the revised definition of WOTUS clearer and more consistent as well as providing predictability in the implementation.

Typical, Certain Times of a Typical Year, and Rolling Thirty-year Period

The agencies propose to use "typical" and "certain times of a typical year" in the definition of perennial and intermittent. The agencies also propose to define "typical year" to mean within the normal range of precipitation over a rolling thirty-year period for a particular geographic area. Under this proposed definition, a typical year would generally not include times of drought or extreme flooding. The use of these terms and the determination of a rolling thirty-year average is too complicated for the regulated community and is unnecessary. As described in the *Suggested Improvements* above and in the *Geospatial Datasets for WOTUS* below, we recommend the use of the USGS Topographic Maps as a more practical and implementable approach to determine and document the maximum extent of jurisdiction, with field work to conclude the presence (or absence) of a WOTUS tributary.⁵ However, if the agencies ultimately decide not to use these maps as a more practical and implementable approach, terms such as "typical year," "geographic area,

⁵ [Revised Definition of WOTUS](#), 84 FR 4177, February 2019

“certain times of the year,” “intermittent,” and “perennial” must be clarified to ensure the consistency the agencies have been espousing.

Ditches

We support maintaining the separate category for ditches. It provides much needed clarity that only those ditches built in tributaries or wetlands already determined to be WOTUS will also be WOTUS. While we agree with the agency’s preamble language that the burden of proof in determining jurisdiction in respect to the ditches category rests with the agencies, we submit that agencies should clarify what the expectations are for the permittee, what are the evidentiary thresholds, and establish a time period for making such determinations.

Lake/Pond

We recommend keeping lakes and ponds as a separate category. Keeping these features as their own category once again provides the clarity that they are only WOTUS if they are directly connected via intermittent or perennial surface hydrology to other WOTUS.

Impoundments

We support maintaining a separate category for impoundments or combining it with lakes and ponds. What is important is that only those impoundments that are directly connected via intermittent or perennial surface hydrology to other WOTUS would be considered WOTUS as well.

Adjacent Wetlands

We support the concept of adjacent wetlands needing a direct hydrologic surface connection that abuts or is physically adjacent via intermittent or perennial surface hydrology to other WOTUS. The removal of ecological considerations or groundwater connection as defining criteria is a positive decision which greatly clarifies the definition of WOTUS for the regulated community and is a more practical and implementable approach. We also recommend the agencies include the wetland criteria of hydrology, hydrophytic vegetation, and hydric soil in the regulatory text. For enhanced clarity, we recommend that the agencies clarify the phrase, “direct hydrologic surface connection,” by further delineating the concept of inundation.

Interstate Waters

We support the removal of Interstate waters as a separate category. As mentioned with other categories, water features should only be considered WOTUS if they meet the criterion of at least an intermittent direct hydrologic surface connection to other WOTUS.

IV. Specific Recommendations

Categorical Exemptions

The agencies propose eleven exclusions from the definition of WOTUS. This provides additional clarity to the regulated community, landowners, and the general public and is more straightforward for the agency staff to implement. We support these exemptions and provide the following comments.

Groundwater

The agencies state that they have never interpreted WOTUS to include groundwater and would continue that practice through this proposed rule by explicitly excluding groundwater. We strongly agree with this position.

Ephemeral Features

We support the exclusion of ephemeral features and diffuse stormwater run-off. The harm caused by the overreaching 2015 WOTUS rule is especially acute in the West, where arid conditions and seasonally fluctuating rainfall are commonplace. Many ephemeral water features would be subject to the 2015 WOTUS rule despite being dry for much of the year or even for many years. Also, as discussed above regarding tributaries, we support removing the presence of bed/banks/OHWM as a criterion to identify a WOTUS tributary. But if these features are absent it indicates that it is an ephemeral feature and not a WOTUS tributary.

Artificial Lakes and Pond

The agencies propose to exclude artificial lakes and ponds constructed in uplands, including water storage reservoirs, farm and stock watering ponds, settling basins, and log cleaning ponds, as long as they are not jurisdictional impoundments. The agencies recognize that artificial lakes and ponds are often used for more than one purpose and can have a variety of beneficial purposes. We agree with this proposed exemption.

Wastewater Recycling Structures

The agencies propose to exclude wastewater recycling structures constructed in uplands such as detention, retention and infiltration basins and ponds, and groundwater recharge basins. We strongly agree with this exemption, as it encourages the recycling of produced water that is such a challenge in our industry. It promotes innovation and provides greater clarity on which waters are and are not federally regulated under the CWA.

Geospatial Datasets for WOTUS

The agencies solicit comment as to how they could establish an approach to authorize states, tribes, and federal agencies to develop geospatial data tools to help identify WOTUS. The development of new geospatial data tools will be extremely costly, take a significant amount of time and effort to develop, lead to inconsistencies across the nation, and would likely introduce interpretations that stray far from the CWA and case law. The regulated community needs tools that are available immediately to make informed decisions on what waters are/are not WOTUS.

Because tools already exist, there is no need to create new ones that will take years to develop. We recommend the widely used USGS Topographic Maps be used as a primary reference tool to determine and document the maximum potential extent of federal jurisdiction.⁶ As discussed previously, the rule should allow supporting information (e.g., air photos, historical knowledge) and field work to subsequently be utilized to determine whether the water is WOTUS or not. Such an approach would provide the regulated community, landowners, and the general public with a practical tool and a more certain understanding of WOTUS jurisdictional extent along with a regulatory pathway to demonstrate a reduced jurisdictional extent if site conditions suggest otherwise.

State and Federal Lands Protection

We anticipate there will be many comments attempting to show that the narrowing of the definition of WOTUS will leave certain waters unprotected. We work with state agencies on a continual basis and know that waters of the state can still be protected under state jurisdiction. The proposed rule simply designates which waters are regulated by the federal agencies, and which are left to the states to manage. We support this approach as it comports with the intent of the CWA – specifically the idea of cooperative federalism – whereby states, tribes and the federal government work in partnership.

Burden of Proof Concept

We also submit that for consistency in interpretation the agencies clarify in the final rule that the burden of proof for jurisdictional determinations rests with the agencies across all jurisdictional categories of water.

Placement in the Code of Federal Regulations (CFR)

The agencies propose to locate the proposed definition of WOTUS in eleven different locations within the CFR. We support this effort and think it would be more straightforward approach for the regulated community.

Rapanos Guidance

Finally, the agencies solicit comment on whether they should revoke their 2008 *Rapanos* Guidance, should the agencies finalize the proposed rule, because existence of the final rule may mean that guidance on *Rapanos* may no longer be needed. The 2008 guidance has presented implementation challenges to oil and natural gas development.

CWA jurisdiction has been an inconsistent concept in agency interpretations for years. It is often addressed in a case-by-case manner with individual interpretations of guidance documents and the term WOTUS. Often, agencies' case-by-case determinations skew towards an overly broad interpretation of authority. We agree with analysis that finds that, "The irony in the preliminary jurisdictional

⁶ [USGS Topographical Maps](#), USGS, 2019

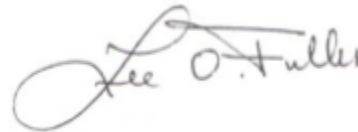
determination process is that by assuming that all water bodies on a site are jurisdictional, the Corps is actually extending its jurisdictional reach *beyond* what it was regulating prior to the *Rapanos* decision.”⁷ Ultimately, that overreach was codified in the 2015 WOTUS rule. We recommend this guidance be revised consistent with the finalized revisions to the definition of WOTUS or be revoked.

Thank you for the opportunity to comment. We support the agencies expeditiously finalizing the revisions to the definition of WOTUS that clearly provides a bright line of jurisdiction that follows the CWA and associated case law.

Sincerely,



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⁷ Gale, Barry, “Six Years After RAPANOS – What’s Changed? (Answer: Not Much)” *Federal Regulation of Cultural Resources, Wildlife, and Waters of the U.S.*, Paper No. 13, Pg. 16 (Rocky Mt. Min. L. Fdn. 2012)