Comments of the Texas Alliance of Energy Producers
on the Environmental Protection Agency's and U.S. Army Corps of Engineers
Proposed Repeal of 2015 Clean Water Rule and Recodification of Pre-Existing Rules
EPA-HQ-OW-2017-0203

September 27, 2017

I. Introduction

The Texas Alliance of energy Producers (TAEP) writes to provide comments in support of the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (together, "the Agencies") proposed rule to rescind the 2015 Clean Water Rule ("2015 Rule" or "Rule") and recodify the definition of "waters of the United States" in place prior to the 2015 Rule, as it is currently being implemented, 82 Fed. Reg. 34,899 (July 27, 2017). The Agencies extended the comment deadline to September 27, 2017. 82 Fed. Reg. 39,712 (Aug. 22, 2017).

The Texas Alliance is a non=profit association with almost 3000 members in the independent oil and gas upstream production industry. We represent the interests of oil and gas producers on federal, state and local issues.

As detailed below, the TAEP supports rescinding the 2015 Rule because it is inconsistent with Supreme Court precedent, fails to preserve the States' authority to regulate non-navigable waters, and fails to provide needed clarity and certainty for both regulators and the regulated community. Rescission of the 2015 Rule and the corresponding recodification of the pre-existing regulations will return the Code of Federal Regulations to the regulations that existed prior to the 2015 Rule and reflect the current legal regime under which the Agencies are operating pursuant to the Sixth Circuit's October 9, 2015, nationwide stay order. *In re EPA*, 803 F.3d 804 (6th Cir. 2015). Finally, TAEP notes that, although rescinding the 2015 Rule and the corresponding recodification of the pre-existing regulations is necessary in the near term for clarity and regulatory certainty, there are many issues with the pre-existing regulations and guidance documents that should be addressed through a new rulemaking. Accordingly, the TAEP supports a second, future rulemaking to define "waters of the United States" in a manner consistent with the statute, case law, and principles of cooperative federalism.

II. The Agencies Should Rescind the 2015 Rule.

In enacting the CWA, Congress granted EPA and the Corps very specific, limited powers to regulate "navigable waters," defined as "the waters of the United States." The CWA was founded in federalism. With CWA § 101(b), Congress recognized and sought to preserve the States' traditional and primary authority over land and water use. The CWA contemplates that the goals of the Act would be addressed through a complementary array of protections and tools – *e.g.*, permits for point source discharges and planning by local agencies for nonpoint source runoff, among others. As the Agencies note in their proposal, States and local governments regulate waters that are not federally regulated through robust water quality programs and other mechanisms based on state law. Consistent with Congress's objectives, any "waters of the United States" definition should preserve the States' traditional and primary authority over land and water use, provide clarity sufficient to allow States to identify which waters are not subject to federal CWA regulation.

A. The 2015 Rule Raises Constitutional Questions and Is Inconsistent with the Supreme Court's Holdings in *Riverside Bayview*, *SWANCC*, and *Rapanos*.

The 2015 Clean Water Rule fails to recognize these key limits, and its definition of "waters of the United States" is inconsistent with the three seminal Supreme Court cases examining CWA jurisdiction – *Riverside Bayview*, *SWANCC*, and *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality).

In *Riverside Bayview*, the Supreme Court considered whether CWA jurisdiction extends beyond the waters traditionally regulated by the federal government to include wetlands abutting navigable waters. Based on its finding that the Act's definition of "navigable waters" as "the waters of the United States" indicated an intent to regulate "at least some waters" that were not navigable in the traditional sense, the Court upheld Corps jurisdiction over wetlands that "actually abut[] . . . a navigable waterway." In reaching its decision, the Court concluded that Congress, in adopting the 1977 amendments to the 1972 Act, had acquiesced to the Corps' assertion of jurisdiction over such wetlands.

Later, in *SWANCC*, the Supreme Court noted that its *Riverside Bayview* holding was based in large measure on Congress's unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters – *i.e.*, "wetlands." In contrast, the *SWANCC* Court held that isolated gravel ponds (even though used as habitat by migratory birds) were "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." The Court concluded that "the text of the statute will not allow" regulation of ponds that "are *not* adjacent to open water," noting that it was the "significant nexus between the wetlands and 'navigable waters'" to which those wetlands actually abutted that supported CWA jurisdiction.

Finally, in *Rapanos*, the Supreme Court considered the Agencies' attempt to assert jurisdiction over four sites which contained "54 acres of land with sometimes-saturated soil conditions" located twenty miles from "[t]he nearest body of navigable water." The Agencies asserted jurisdiction based on the theory that CWA jurisdiction extends to any waters with "any connection" to navigable waters. Under this "any connection" theory, ditches, largely excluded from jurisdiction previously, became the Agencies' preferred method of showing a "connection." Farm ditches, roadside ditches, flood control ditches – all common and abundant across the landscape – were deemed "tributaries," providing a "connection" to regulate areas previously considered isolated.

The *Rapanos* plurality (authored by Justice Scalia and joined by Chief Justice Roberts and Justices Thomas and Alito) determined that the Agencies lacked authority to assert jurisdiction over the four sites at issue based on the Agencies' expansive "any hydrological connection" theory. *Id.* at 742 (plurality). Justice Kennedy concurred, criticizing the Agencies for leaving "wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," and for asserting jurisdiction over wetlands "little more related to navigable-in-fact waters" than the isolated ponds at issue in *SWANCC*. *Id.* at 781-82 (Kennedy, J., concurring).

Although the plurality and Justice Kennedy agreed on what was *not* jurisdictional, their formulations of CWA jurisdiction differed. While the plurality held that the CWA confers jurisdiction over only "relatively *permanent* bodies of water," and "only those wetlands with a continuous surface connection" to traditional navigable waters. Justice Kennedy held that the Agencies' CWA jurisdiction extends only to wetlands with a "significant nexus" to traditional navigable waters.

The concurring and plurality opinions agreed, however, on a number of critical points:

1) The term "navigable waters" must be given some importance and effect, *id.* at 779 (Kennedy, J., concurring);
2) Congress intended to regulate at least some waters that are not navigable in the traditional sense, *id.* at 767 (Kennedy, J., concurring);
3) To be jurisdictional, non-navigable waters must have a substantial relationship with traditional navigable waters, *id.*;
4) The Corps' standard for defining tributaries went too far, *id.* at 781-82 (Kennedy, J., concurring);
5) "Mere adjacency to a tributary" is insufficient, *id.* at 786 (Kennedy, J., concurring);
6) Regulatory jurisdiction does not reach all wetlands, or even "all 'non-isolated wetlands,'" *id.* at 779-80 (Kennedy, J., concurring); and
7) The presence of a hydrologic connection to navigable-in-fact waters is not enough, standing alone. *Id.* at 784-85 (Kennedy, J., concurring).

Unfortunately, as discussed in more detail below, the 2015 Rule ignores these limitations, asserts sweeping jurisdiction based on connections as tenuous as the Migratory Bird Rule that was rejected in *SWANCC*, and essentially amounts to the "any connection" theory that was rejected in *Rapanos*.

B. The 2015 Rule Fails to Preserve the States' Authority to Regulate Non-Navigable Water Resources.

We strongly support the Agencies' proposal to rescind the 2015 Rule so that they can, among other things, reevaluate the best means of balancing the Act's statutory goals to "restore and maintain" the integrity of the nation's waters as well as to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 82 Fed. Reg. at 34,902. The regulation of land and water use within a State's borders is a "quintessential" State and local function. *Rapanos*, 547 U.S. at 738 (plurality). The Supreme Court has explained that when an agency takes action that infringes on traditional State powers, agencies must be able to point to a clear grant of such authority from Congress in the relevant statute. *See SWANCC*, 531 U.S. at 172 ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."). The CWA contains no such clear statement that Congress intended to alter that scheme. Nonetheless, the 2015 Rule infringes on traditional state powers without pointing to any clear grant of authority from Congress.

The 2015 Rule's sweeping assertions of jurisdiction over features with little or no relationship to navigable waters (*e.g.*, channels that infrequently host ephemeral flows, non-navigable ditches, and isolated waters) raise serious federalism concerns. As was the case with the jurisdictional theories at issue in *SWANCC* and *Rapanos*, the 2015 Rule would result in authorization for the federal government to take control of land use and planning by extending jurisdiction to essentially all wet and potentially wet areas. Indeed, under the 2015 Rule, many types of waters and features that were previously regulated as "waters of the State" or that States purposely chose not to regulate (*e.g.*, roadside ditches, channels with ephemeral flow, arroyos, industrial ponds) would be subject to federal regulation as "waters of the United States."

The Agencies failed to conduct sufficient federalism consultation with State and local entities on the 2015 Rule, which is particularly problematic in light of the Act's emphasis on federalism. Failure to seek input from State and local entities contributed to the Rule's legal flaws and lack of clarity, and resulted in a 2015 Rule that does not adequately preserve the States' authority to regulate non-navigable water resources.

The Agencies should rescind the 2015 Rule so they can adequately consider the input of State and local entities in developing any new "waters of the United States" definition.

C. Failure to Seek Input From States and Local Entities Contributed to the Rule's Numerous Legal Flaws and Lack of Clarity.

Failure to seek input from States and local entities on the 2015 Rule contributed to the Rule's numerous legal flaws and lack of clarity. Groups from all sides have raised numerous issues with the 2015 Rule in comments and in litigation. In issuing its nationally applicable stay of the 2015 Rule on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit found that petitioners had demonstrated "a substantial possibility of success on the merits of their claims."

1. The 2015 Rule's Definition of "Waters of the United States" Raises Constitutional Questions and Is Contrary to Supreme Court Case Law.

State, industry, and environmental petitioners have argued that the 2015 Rule's provisions are, in various respects, beyond the Agencies' statutory authority and inconsistent with Supreme Court precedent and the Constitution. By extending jurisdiction to isolated features and ephemeral washes, the Rule improperly reads the word "navigable" out of the statute, raises constitutional questions, and is contrary to *Riverside Bayview*, *SWANCC*, and *Rapanos*. For these reasons, the Agencies should rescind the 2015 Rule.

With its broadened concept of "tributary," the 2015 Rule would extend CWA jurisdiction to any channelized feature (*e.g.*, ditches, ephemeral drainages, and stormwater conveyances), lake, or pond that contributes flow to navigable waters, without consideration of the duration or frequency of flow or proximity to navigable waters. The Rule's definition is inconsistent with the plurality's and Justice Kennedy's *Rapanos* opinions, both of which were concerned about far-reaching jurisdiction over features far from navigable waters and carrying only minor volumes of flow. The plurality chastised the Corps for extending jurisdiction to "ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert."

In addition, the 2015 Rule's assertion of jurisdiction over "adjacent waters," which could include any wetland, water, or feature located within the floodplain of and within 1,500 feet of a jurisdictional water is inconsistent with Riverside Bayview, SWANCC, and Rapanos. The 2015 Rule's categorical determination that all waters and wetlands that fall within this distance threshold have a significant nexus is a serious departure from the plain meaning of "adjacent"[1] and is a far cry from the actually abutting wetlands found to be adjacent in Riverside Bayview. Moreover, the 2015 Rule's inclusion of non-wetlands in its "adjacent waters" category is an impermissible expansion of Agency jurisdiction. The SWANCC Court rejected assertion of jurisdiction over "adjacent" non-wetlands, and held that regulation of these isolated waters was beyond the scope of the Agencies' authority under the Act.

Moreover, contrary to Justice Kennedy's *Rapanos* opinion, the 2015 Rule's adjacent waters standard would allow for jurisdiction based on "adjacency" to features that are not "major tributaries." *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). In *Rapanos*, Justice Kennedy explicitly rejected the Corps' attempts to assert jurisdiction based on "adjacency to tributaries, however remote and

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insubstantial." *Id.* Nor does the *Rapanos* plurality allow for such an expansive assertion of jurisdiction over "navigable waters." The plurality found that "*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 (plurality) (emphasis in original). Thus, the plurality explained, "Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters . . . ." *Id.* Ignoring these limits set forth by the Supreme Court and codifying practices specifically rejected by the *Rapanos* Justices, the 2015 Rule would allow for jurisdiction over waters, including wetlands, based on location within the floodplain of and within 1,500 feet from non-navigable, remote features it would classify as tributaries.

Further, if a feature would not qualify as jurisdictional under the 2015 Rule's broad "tributary" or "adjacent waters" categories, the Rule contains a catch-all category for all waters within the 100-year floodplain of a navigable water or located within 4,000 feet of a jurisdictional water that, when aggregated with all other "similarly situated" wetlands and waters in the entire watershed, have a "more than speculative or insubstantial" effect on navigable waters. The 2015 Rule's assertion of jurisdiction over these remote features is contrary to the SWANCC Court's holding that "nonnavigable, isolated, intrastate waters" – which, unlike the wetlands at issue in Riverside Bayview, did not actually abut a navigable waterway – are not jurisdictional under the CWA. SWANCC, 531 U.S. at 169-71. The SWANCC Court found that assertion of jurisdiction over such features would raise "significant constitutional questions" and "would result in a significant impingement of the States' traditional and primary power over land and water use." With its essentially limitless jurisdictional reach, the 2015 Rule would most certainly reach features like the remote waterbodies that troubled Justice Kennedy that are "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in SWANCC." Rapanos, 547 U.S. at 781-82 (Kennedy, J., concurring). The 2015 Rule would apply the "waters of the United States" definition to a whole host of features that are remote from navigable waters and carry minor water volumes, all of which the Rapanos Court made clear are beyond the scope of federal jurisdiction.

2. The 2015 Rule Fails to Provide Needed Clarity and Certainty.

*T*he Act's reach is notoriously unclear, and the consequences to landowners even for inadvertent violations can be crushing.[2] The Agencies stated that the purpose of the 2015 Rulewas to provide clarity and certainty on the scope of the "waters of the United States." However, petitioners and thousands of public commenters have suggested that the 2015 Rule lacks clarity on key terms and definitions, hinders administrability of the "waters of the United States" definition, would create significant confusion, and failed to put parties on notice regarding when their conduct might violate the law.

Failure to seek input from States and local entities on the 2015 Rule contributed to the Rule's numerous legal flaws and lack of clarity. Groups from all sides have raised numerous issues with the 2015 Rule in comments and in litigation. In issuing its nationally applicable stay of the 2015 Rule. On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit found that petitioners had demonstrated "a substantial possibility of success on the merits of their claims.

III. The Record Established During the 2015 Rulemaking Process Does Not Restrain the

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Agencies' Authority to Rescind the 2015 Rule.

It is well established that Agencies possess unequivocal authority to change or repeal rules to reflect changes in circumstance, statutory interpretation, policy, technical analysis, or to correct and remedy prior mistakes and defective rulemaking. *See, e.g., Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739 (D.C. Cir. 1990) (per curiam) ("[A]n agency *always* retains the power to revise a final rule through additional rulemaking.") (emphasis in original); *Ctr. for Sci. in the Pub. Interest v. Dep't of the Treasury*, 797 F.2d 995, 999 (D.C. Cir. 1986) (internal quotation marks omitted) (upholding agency's repeal action that concluded simply that the prior decision "was unwise . . . [and] a different decision is preferable"); *id.* at 999 & n.1 ("[I]t is not improper for an agency to engage in new rulemaking to supersede defective rulemaking. . . . [A]n agency must be free to rectify errors by engaging in new rulemaking.") (internal quotation marks omitted); *id*. at 999 (an agency may repeal a rule if it determines that "the existing rule has no rational basis to support it") (internal quotation marks omitted).

The Supreme Court specifically has acknowledged an administration's discretion to repeal regulations promulgated by the immediate past administration. *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Agencies can rescind the 2015 Rule so long as they "examine the relevant data and articulate a satisfactory explanation" for their decision. And they can (and should) undertake a new, separate analysis of the appropriate scope of CWA jurisdiction that is informed by the objectives and requirements of the CWA, the relevant Supreme Court decisions, available scientific information, and the Agencies' technical expertise and experience.

IV. The Agencies Should Codify the Status Quo by Rescinding the 2015 Rule.

The U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the 2015 Rule, finding that petitioners had shown a "likelihood . . . of success on the merits" of their challenges to the Rule. *In re EPA*, 803 F.3d at 806, 807. The Sixth Circuit noted that the nationwide stay "temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule." *Id.* at 808. Consistent with the Sixth Circuit's order, while the 2015 Rule is stayed, the Agencies have continued to implement the regulations defining the term "waters of the United States" that were in effect immediately before the August 27, 2015, effective date of the Rule, by applying relevant case law and applicable policy. *See* 82 Fed. Reg. at 34,902.

As the Agencies note in their proposal, the Supreme Court's resolution of the question as to which courts have original jurisdiction over challenges to the 2015 Rule could impact the Sixth Circuit's exercise of jurisdiction and its nationwide stay of the 2015 Rule. *Id.* Given the uncertainty of the nationwide stay, and to avoid potential for confusion, the Agencies should codify the status quo by rescinding the 2015 Rule. Rescission of the 2015 Rule is a better course of action than alternative approaches, such as an administrative stay of the 2015 Rule, that would leave the flawed regulatory text in the Code of Federal Regulations and thus cause uncertainty over what regulatory requirements are to be met. Rescission of the 2015 Rule and the corresponding recodification of the pre-existing regulations will allow the Code of Federal Regulations to reflect the current legal regime under which the Agencies are operating pursuant to the Sixth Circuit's October 9, 2015 order. Codifying the status quo will, in the words of the Sixth Circuit, "restore uniformity of regulation under the familiar, if imperfect, pre-Rule regime." *In re EPA*, 803 F.3d at 808.

Recodifying the regulations that were in place prior to the 2015 Rule, which has been stayed for almost two years, will maintain the status quo. In fact, the 2015 Rule took effect in 37 States for only about six weeks between the Rule's August 28, 2015, effective date and the Sixth Circuit's October 9, 2015, nationally applicable stay order. During that 43-day period, there were no enforcement actions under the Rule. Since the nationwide stay has been in place, well over 19,000 approved jurisdictional determinations ("AJDs") have been issued pursuant to the "familiar" pre-Rule regime.[3] The Sixth Circuit found no indication "that the integrity of the nation's waters will suffer imminent injury if the [2015 Rule] is not immediately implemented and enforced." *In re EPA*, 803 F.3d at 808. The court was concerned, however, with the "burden—potentially visited nationwide on governmental bodies, state and federal, as well as private parties—and the impact on the public in general, implicated by the Rule's redrawing of jurisdictional lines over certain of the nation's waters." *Id.*

Moreover, the Agencies' economic analysis for the proposal shows that the annual avoided costs of recodifying the status quo would largely outweigh the annual forgone benefits of implementing the 2015 Rule.[4] Indeed, the benefits of recodifying the status quo are actually much greater here than the Agencies' economic analysis shows because their analysis relies on the economic analysis for the 2015 Rule, which grossly underestimated the costs of the 2015 Rule.[5]

For all these reasons, the Agencies should codify the status quo by rescinding the 2015 Rule.

V. Step Two (Promulgation of a New Definition of "Waters of the United States") is Critical.

The Agencies indicate in their proposal that they intend to do a separate rulemaking ("Step 2") to develop a new definition of "waters of the United States." 82 Fed. Reg. at 34,902. The TAEP agrees with this approach. Although rescinding the 2015 Rule (and the corresponding recodification of the pre-existing regulations) is necessary in the near term for clarity and regulatory certainty, there are many issues with the current regulations and guidance documents that should be addressed through a new rulemaking. The TAEP continues to support a rulemaking to reasonably and clearly articulate federal and state CWA authorities.

VI. Conclusion

For the reasons outlined above, the TAEP strongly supports the Agencies' proposal to rescind the 2015 Rule and eliminate confusion by recodifying the regulations that were in place prior to the 2015 Rule. In addition, TAEP encourages EPA and the Corps to consider any individual comments filed by TAEP member organizations, which may raise additional points or further expand on issues highlighted in this comment letter.

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[3] EPA, Clean Water Act Approved Jurisdictional Determinations, https://watersgeo.epa.gov/cwa/CWA-JDs/ (last visited Sept. 12, 2017).

[4] *See* EPA & U.S. Dep't of the Army, Economic Analysis for the Proposed Definition of "Waters of the United States"—Recodification of Pre-existing Rules, at 11 (June 2017), Doc. No. EPA-HQ-OW-2017-0203-0002.

[5] *See* WAC Comments on 2015 Rule, Exhibit 19, David Sunding, Ph.D., The Brattle Group, Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States (May 15, 2014), EPA-HQ-OW-2011-0880-17921 (select Exhibits Vol. 11 of 11).