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Attention: Docket ID Number EPA–HQ–OW–2017–0203
Submitted to the Federal eRulemaking Portal (www.regulations.gov)

Re: AFPM Comments on the Proposed Rule "Definition of 'Waters of the United States' – Recodification of Pre-Existing Rules" (82 FR 34899, July 27, 2017)

I. Introduction

The American Fuel & Petrochemical Manufacturers ("AFPM") appreciates the opportunity to comment on the Environmental Protection Agency's ("EPA") and the U.S. Army Corps of Engineers' (collectively, "the Agencies") proposed rule, "Definition of 'Waters of the United States' – Recodification of Pre-Existing Rules."[1] AFPM filed joint comments to the Agencies opposing the 2015 final rule,[2] and therefore supports the Agencies' proposal to initiate a comprehensive, two-step process intended to review and revise the definition of "waters of the United States" ("WOTUS"). We recognize and applaud this first step, which proposes to rescind the definition of WOTUS in the Code of Federal Regulations ("CFR"), originally promulgated by the Agencies in 2015. Likewise, AFPM strongly supports the Agencies' proposal to recodify the regulatory definitions that existed before the 2015 Clean Water Rule, as this will provide regulatory continuity and certainty for our members.

AFPM is a national trade association of approximately 400 companies, comprising virtually all U.S. refining and petrochemical manufacturing capacity. AFPM members supply consumers with a wide variety of products and services used daily in their homes and businesses. These products include gasoline, diesel fuel, and home heating oil, jet fuel, lubricants, and the chemicals that serve as "building blocks" in making diverse products, such as plastics, clothing, medicine, and computers.

[1] *See* Docket No. EPA-HQ-OW-2017-0203, 82 *Fed. Reg.* 34899, proposed July 27, 2017 https://www.regulations.gov/docket?D=EPA-HQ-OW-2017-0203.
[2] *See* https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states.

II. Background

The Agencies published a proposed rule to expand the definition of WOTUS in the *Federal Register* on April 21, 2014. The Agencies' stated purpose for issuing the proposal was to "clarify the scope of waters protected under the Clean Water Act ("CWA"), in light of the U.S. Supreme Court cases in *U.S. v. Riverside Bayview, Rapanos v. United States*, and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*." The Agencies asserted that the proposed rule would "enhance protection of the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of 'waters of the United States' protected under the Act."

The 2014 proposed rule was based upon EPA's report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* ("Report").[3] However, on the date the Agencies published the proposed rule, the Report had not been reviewed by EPA's Science Advisory Board. The Report was apparently intended to establish a scientific basis for the connectivity of isolated, rarely existing "waters" to traditional "navigable" waters under the CWA (*e.g.*, rivers, bays, estuaries, etc.). The Agencies argued that the hydrologic "connectivity" of these remote waters, which ultimately reach navigable waters, establishes federal—rather than state or local—jurisdiction over these waters. These waters, currently regulated as "waters of the state," would have become "waters of the U.S." under the May 2015 final rule.

On February 28, 2017, President Donald Trump signed an Executive Order ("EO") on *Restoring the Rule of Law, Federalism, and Economic Growthy by Review the "Waters of the United States Rule*. The EO directs EPA to review the WOTUS rule for consistency with the Administration's policy of promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution, and to publish a proposed rule rescinding or revising the current rule, as appropriate and consistent with law. The Agencies' proposal to recodify the definitions of WOTUS that existed prior to the 2015 rule was therefore a direct response to this EO, as well as to a decision in the U.S. Court of Appeals for the Sixth Circuit staying the definitions of WOTUS pending litigation.

III. First Step: Rescind the Definition of WOTUS and Recodify the Definitions that Existed Prior to the 2015 Final Rule

The first step of the Agencies' July 27, 2017, proposed rule is to re-codify the regulatory definitions (at 33 CFR part 328 and 40 CFR parts 110; 112; 116; 117; 122; 230; 232; 300; 302; and 401) in the CFR as they existed prior to the promulgation of the stayed 2015 definition.

AFPM supports re-codifying the regulatory definitions of WOTUS as they existed prior to the promulgation of the 2015 rule. Fundamentally, the 2015 rule as written represents an unjustified expansion of CWA jurisdiction far beyond the limits of federal regulation explicitly

[3] *See* U.S. EPA. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-14/475F, 2015.

established by Congress and affirmed by the courts. The May 2015 final rule would have given federal agencies direct authority over land use decisions that Congress has traditionally reserved for the States. It would have intruded so far into traditional State and local land use authority that it is difficult to imagine that any discretion would be left to state, county, and municipal governments.

IV. Second Step: Re-evaluate the Definition of WOTUS

The second step of the Agencies' July 27, 2017, proposed rule would be to pursue notice-and-comment rulemaking in which the Agencies will conduct a substantive re-evaluation of the definition of WOTUS. AFPM strongly supports this second step. While AFPM members appreciate the regulatory certainty and continuity that re-codifying the pre-2015 CWA rule would provide, there are still provisions in the rule that need greater clarity. We urge EPA to pursue this second step quickly to clarify compliance expectations for all stakeholders.

For the second step re-evaluation, AFPM suggests that EPA, at a minimum:

- Provide clarity, particularly regarding several critical definitions laid out in the 2015 final rule. Some of these definitions are addressed below.
- Ensure that EPA's jurisdiction remains narrowly tailored and does not displace states as the primary regulator of local water quality by setting clear and objective boundaries between state and federal authority. The 2015 rule stretched federal authority too far into what typically had been the states' domain.
- Stay within the bounds defined by prior court precedents (*i.e.*, *U.S. v. Riverside Bayview*, *Rapanos v. United States*, and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*).
- Critically review the Report, which underpinned much of the justification for the 2015 regulation.

The purpose of the CWA is to protect navigable waters from pollution, hence, how the Agencies define certain key terminology should be limited to those that directly and significantly impact navigable waters. Below are some suggested revisions and clarification related to how the Agencies define certain important terms, including specific definitional issues that AFPM strongly urges the Agencies to address in the second step re-evaluation rule.

Tributaries

AFPM supports a definition of the term "tributary" that limits the impact to navigable waters. Tributaries should be defined based on whether a natural channel of water maintains flow even when it is not raining such that it is "relatively permanent." In addition, the tributary must be capable of transporting pollution to navigable water such that it could have a significant impact on that water.

The legal basis for this recommendation is the fact that the purpose of the CWA is to protect navigable waters from pollution. The technical basis would be an evaluation of the permanence of the flow and whether that flow could carry pollutants to navigable water in a particular

geographic area. The definition of "tributaries" should not extend to water that goes underground, as the CWA does not apply to groundwater, shallow or not. Water that becomes groundwater loses its status under the CWA. Thus, non-navigable water that flows on the surface before it becomes groundwater should not be considered.

Defining tributaries as discussed above would increase the certainty and clarity of the CWA §404 program applicability—basing determinations on quantitative information about flows, and greatly reducing arbitrary differences among jurisdictional determinations.

Adjacent Waters

AFPM supports a definition of the term "adjacent waters" that is limited to wetlands that are part of a continuum that establishes the point at which the water ends and land begins. As with the definition for "tributary," the legal basis for this recommendation also is protection of navigable waters from pollution. Consistent with the Supreme Court case, *United States v. Riverside Bayview*,[4] wetlands would meet this definition only if they are not separated from the jurisdictional water by dry land, including berms and levees.

Accordingly, it would not be necessary to have the separate category of "other waters" as potentially jurisdictional under the CWA. Any determination that dry land between jurisdictional water and a wetland or other water is somehow part of that continuum would not be legally or technically justified, so wetlands or water beyond that separation cannot be part of the jurisdictional water.

Drainage Ditches

AFPM supports clarifying the regulatory status of the term "drainage ditches," particularly in relation to the above suggested definitions. A manmade ditch should not be considered a tributary under the above definition, obviating the need to define what it means to contribute flow and what "perennial" flow is. A manmade ditch could be excavated through a wetland that is not jurisdictional, avoiding the need to define the term "uplands." A manmade ditch that develops wetland characteristics would remain outside federal jurisdiction. A manmade ditch that allows water to percolate into the ground would also not be a covered under the CWA. Only a ditch that replaces a natural stream would be jurisdictional.

V. Conclusion

AFPM is pleased that EPA is reinstating the prior WOTUS definitions while the Agencies continue to review the data and reassess the WOTUS definition. AFPM favors the proposed two-step process and urges EPA to propose the second step re-evaluation soon to ensure that stakeholders receive clarity on what is defined under WOTUS. We look forward to working with the Agencies on this important matter.

[4] 474 U.S. 121 (1985).

If you need further information or have any questions, please contact me at jgunnulfsen@afpm.org or at 202-552-4371.

Sincerely,

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