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Attention: Docket ID No. EPA-HQ-OW-2017-0480
Submitted to the Federal eRulemaking Portal (www.regulations.gov)

Re: AFPM Comments on Department of the Army and EPA's Pre-Proposal Outreach Announcement, on "Definition of Waters of the United States: Public Meetings" (82 FR 40742, August 28, 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. Department of the Army's (collectively, "the Agencies") pre-proposal outreach announcement, "Definition of Waters of the United States: Public Meetings."[1] AFPM supports the Agencies' proposals to initiate a comprehensive, two-step process intended to review and revise the definition of "Waters of the United States" ("WOTUS") and recodify the regulatory definitions that existed before the 2015 Clean Water Rule.

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, 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.

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 *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)*."[2] The Agencies asserted that the proposed rule would "enhance protection of the nation's public health and aquatic

[1] *See* Docket No. EPA-HQ-OW-2017-0480, 82 *Fed. Reg.* 40742, proposed August 28, 2017, https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0480-0001.
[2] *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

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 2015 final rule was based on 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 final rule.

On February 28, 2017, President Donald Trump signed an Executive Order ("EO") on *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule*.[4] The EO directed 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 Congress and the States under the Constitution, and to publish a proposed rule rescinding or revising the current rule as appropriate.

To provide immediate certainty to the regulated community during the development of a new definition of WOTUS, the Agencies are pursuing a two-step process. First, on July 27, 2017, the Agencies published a proposed rule, "Definition of Waters of the United States – Recodification of Pre-Existing Rules,"[5] to rescind the 2015 WOTUS definition and recodify the regulations that existed prior to the 2015 Clean Water Rule. This proposal was a direct response to the February 2017 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.[6]

Second, President Trump's EO directs the Agencies to "consider interpreting the term 'navigable waters'" in a manner "consistent with Justice Scalia's opinion in *Rapanos*." According to the opinion, CWA jurisdiction includes "relatively permanent" waters and wetlands with a "continuous surface connection" to relatively permanent waters. Considering the current ambiguities associated with these terms, the Agencies have asked for stakeholder recommendations on various questions regarding the Step Two analysis. These are addressed below.

III. Response to Specific Questions

1. For the purposes of the CWA, what rivers, streams, and wetlands should be jurisdictional?

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[3] *See* 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.
[4] *See* "Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule," February 28, 2017, https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic.
[5] *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.
[6] *See In re: EPA and Dep't of Defense Final Rule; "Clean Water Rule: Definition of Waters of the United States,"* 80 *Fed. Reg.* 37,054 (June 29,2015), Nos. 15-3799/3822/3853/3887 (6th Cir., October 9, 2015).

AFPM strongly opposed the Agencies' revised definition of WOTUS in the 2015 rule. The definition as written gave federal agencies direct authority over land use decisions that Congress has intentionally reserved to the States. It intruded so far into traditional State and local land use authority that it is difficult to imagine what discretion—if any—would have been left to State, county, and municipal governments[7].

AFPM does not believe the definition of tributaries should 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, so non-navigable water that flows on the surface before it becomes groundwater also should not be considered. Similarly, a manmade ditch that develops wetland characteristics should remain outside federal jurisdiction. Manmade ditches that allow water to percolate into the ground also would not be covered under the CWA, as only a ditch that replaces a natural stream is jurisdictional.

AFPM also believes that CWA adjacency concept should not extend to non-wetland waters. It is reasonable for wetlands that actually abut navigable waters without any clear boundary to be jurisdictional because such abutting wetlands are inseparably bound up with jurisdictional waters. However, there is no rationale for extending this adjacency concept to non-wetland waters because these waters will always be non-abutting and will therefore have no significant nexus to jurisdictional waters. It also would not be necessary to separate "other waters" as potentially jurisdictional under the CWA. The Agencies cannot legally or technically justify a determination that dry land between jurisdictional water and a wetland or other water is somehow part of a continuum. Wetlands or water beyond that separation cannot be WOTUS for jurisdictional purposes.

Similarly, the concept of considering a water "in combination with other similarly situated waters…in the same region" is rife with uncertainties. In many instances, this would be a vast land area. The extraordinarily broad scope of the required evaluation inhibits the ability of a land owner to make reasonable judgments concerning the jurisdictional status of a single, local water. Moreover, by considering the jurisdiction of a water "in combination with" other waters located in such a broad region, the Agencies must examine the cumulative impacts of multiple waters—ranging from large to very small—to determine the jurisdictional status of a water. If that cumulative impact is deemed "significant," individual waters that contribute to that cumulative impact would also be jurisdictional. Under this approach, every small pond or other water feature that retains storm water, regulates the flow of floodwaters, traps sediments and other pollutants, and recharges groundwater "in combination with" other waters in a broad region would fall under the jurisdiction of WOTUS if the cumulative effects are not "speculative or insubstantial." This jurisdiction is too broad.

A larger water, or one near to a navigable-in-fact or interstate water, might represent the clear majority of the "cumulative" impact, yet a smaller or more remote water could be pulled into federal jurisdiction. This not only expands CWA jurisdiction well beyond Congress's intended definition of "navigable waters," but it also leaves land users with virtually no way to assess the status of their local water, short of undertaking a complex and costly watershed study.

[7] See Sept. 2017 AFPM comments

2. Are there particular features or implications of any such approaches that you, as part of the industrial sector, recommend the Agencies be mindful of in developing the Step Two proposed rule?

In developing the Step Two proposed rule, the Agencies should be mindful that the unusually vague and confusing definitions in the 2015 WOTUS definition creates uncertainty that could confound industries' ability to comply with applicable regulations. Terms such as "significant nexus" and "tributary" are ambiguous and guarantee many years of litigation to delineate the boundaries of federal jurisdiction.[8]

The 2015 WOTUS definition would require businesses to update and expand their Spill Prevention, Control, and Countermeasure ("SPCC") Plans under section 311 of the CWA, and to do the same for their storm water discharge permits/plans under section 402. Stormwater programs run by municipalities could be required to impose additional controls on facilities with parking lots, storage pads, or other large paved areas susceptible to water buildup.

Expanding WOTUS jurisdiction would likely result in a greater number of "impaired" federal waters under section 303 of the CWA, imposing additional burdens on States to list and evaluate these waters, and a greater likelihood that facilities with runoff will fall under Total Maximum Daily Load "budgets." This will significantly impact facility operations. Substantially expanded federal jurisdiction over land areas and activities also may trigger Clean Water Act section 404 dredge and fill requirements for the first time. These requirements would apply to far more activities than work that takes place in wetlands. In addition to the cost and delays involved in obtaining permits, firms will likely face expanded mitigation costs to offset the impact of work done in newly-defined WOTUS areas.

In addition to jurisdiction, unclear definitions could significantly increase permitting requirements for energy companies. For example, unclear scope of the term "floodplains" could create uncertainty as to whether certain stream crossings would require a Clean Water Act Nationwide Section 404 permit and, possibly, an individual permit. The costs associated with this expansion would likely result in extended permitting timelines that could render many projects uneconomical, particularly for small energy companies.

Finally, the 2015 rule's emphasis on adjacent waters and natural/manmade ditches means that additional facilities will be required to maintain a Spill Prevention, Control, and Countermeasure ("SPCC") plan for the first time. Un-diked areas require drainage systems to flow into ponds, lagoons, or catchment basins to retain oil and return such runoff to the facility. Under the 2015 WOTUS definition, if such catchment basins are within areas subject to periodic flooding, they would be adjacent to "other waters," potentially triggering a requirement to implement or renew SPCC plans, resulting in prohibitive costs.

3. Can you describe typical on-site industrial features that contain surface water, such as ditches or retaining ponds? Are any of these jurisdictional under current practice? Are there certain waters or features that you recommend the Agencies consider excluding from the proposed definition?

Virtually any business that owns or operates a facility or has property could be affected by the 2015 WOTUS definition if it has industrial ditches, retention ponds for storm water runoff, fire

[8] See Sept. 2107 AFPM comments

ponds, dust suppression, or other surface impoundments on site. AFPM supports clarifying the regulatory status of various words within the WOTUS Step Two framework. For example, "drainage ditches," with relation to manmade ditches, should not be considered a tributary. A manmade ditch that develops wetland characteristics would remain outside federal jurisdiction. Only a "drainage ditch" that replaces a natural stream should fall under WOTUS. Unlike some agricultural water features, industrial ditches and impoundments are not exempted from federal permitting requirements under section 202 or other sections of the CWA. Most industrial ditches will not be excavated wholly in uplands and have less than perennial flow. Most industrial ditches also will eventually contribute some sort of flow to larger waters. This is precisely why a facility has a ditch in the first place—to carry water away from the site to drain elsewhere. Therefore, most industrial ditches would not have been excluded or exempted from CWA permitting requirements under the 2015 WOTUS rule.

Under exclusions applied to "waste treatment systems," including treatment ponds or lagoons designed to meet the requirements of the CWA, it is unclear whether the exclusion includes multiple-use impoundments. Industrial facility impoundments frequently are utilized for treatment (*e.g.*, settling out any contaminants contained in storm water, neutralization), and other beneficial purposes (*e.g.*, water supply for dust suppression, firefighting, irrigation). AFPM strongly urges the Agency to extend the exclusion to multiple use impoundments.

The 2015 iteration excludes "ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow." Just as the Agencies have refused to define "waters," so too have they shed little light on the meaning of "uplands." On relatively flat terrain, distinguishing between areas that do and do not fit these terms is extraordinarily difficult. The Agencies' 2015 rule does not give landowners clear guidelines for timely action without retaining experts or engaging in time consuming consultations with State or federal agencies.

The AFPM believes the exclusion applicable to …. "ditches that do not contribute flow, either directly or through another water," to navigable waters, interstate waters, the territorial seas, or impoundments of those three waters or of tributaries. This exclusion is astoundingly narrow. To qualify for this exclusion, a ditch must contribute zero flow, even indirectly, to any tributary, which itself is defined to include ditches and ponds, even if they themselves contribute only occasional flows via indirect routes to downstream waters. This exclusion must be broadened to include ditches conveying very small flows indirectly to minor waters represent most of the ditches in the country, rendering this exclusion worthless.

The Agencies further proposed to exclude lakes, ponds, and pools that have been created for stock watering, irrigation, settling, rice growing, reflecting, swimming, and ornamentation. To qualify for this exclusion, these features must have been created by excavating or diking dry land. This exclusion is wholly inadequate. While it may benefit some agricultural uses, it provides no benefit for most industrial and commercial operations. Lakes, ponds, and pools are used for a wide variety of industrial purposes across the country. Examples include: storing storm water for use as a dust suppressant; storing storm water for use in industrial processes; storing storm water to fight fires; creating conditions suitable for non-swimming recreation, such as fishing and duck hunting; and restricting the flow of storm water runoff to reduce peak flows to minimize down-slope erosion and turbidity. The exclusion needs to be applied to industrial and commercial operations as well.

Lastly, the Agencies proposed to exclude "water-filled depressions created incidental to construction activity." The language of this exclusion is ambiguous; the Agencies do not clarify what is meant by "incidental to" or "construction activity." Depressions are commonly created by construction for various purposes, including burrow pits, retention basins, architectural landscaping, diversion of storm water run-off, creation of water storage features, etc. Are these and similar depressions excluded if they were created while constructing something other than a structure or facility? Does the exclusion survive beyond the period of construction activity? Left unanswered, these questions render the exclusion useless.

4. **Following Supreme Court cases restricting jurisdiction—*SWANCC* in 2001 or *Rapanos* in 2006—did you experience any changes in your costs as a result of reduced assertion of jurisdiction?**

The court cases cited above, have not typically resulted in direct costs savings, but will be significant going forward to avoid costs related to CWA permitting, interpreting ambiguous regulatory language, and project execution. AFPM suggests that EPA, at a minimum, stay within the bounds defined by prior precedents (*i.e., U.S. v. Riverside Bayview, Rapanos v. U.S., and Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers (SWANCC)*). The 2015 proposed WOTUS definition would subject ordinary commercial and industrial activities to new layers of federal requirements under the CWA. This would happen solely because low-lying or wet areas on or near their properties would fall under WOTUS jurisdiction for the first time.

5. **Many industry groups have requested better clarity regarding where the CWA applies. What would clarity look like to you?**

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 require greater clarity. We urge EPA to pursue this second step quickly to clarify compliance expectations for all stakeholders.

For the second step reevaluation, AFPM suggests that EPA, at a minimum, provide clarity regarding several critical definitions laid out in the 2015 final rule such as tributaries, adjacent waters, and drainage ditches. The purpose of the CWA is to protect navigable waters from pollution; as a result, how the agencies define certain key terms should be limited to regulating those waters that directly and significantly impact navigable waters.

The vague and confusing definitions in the 2015 rule make it virtually impossible for businesses to comprehend that they must meet federal—rather than state and local—requirements when they perform routine operations. The rule added several new definitions that, although critical to understanding the true scope of the rule, are so vague that their limits are unknown. These definitions include "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus." It will often be impossible for landowners and businesses to escape federal jurisdiction under the revised WOTUS definition if these terms are left unclarified.

"Tributary" – AFPM supports a definition of the term "tributary" that is limited to those tributaries that impact 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". EPA must develop a measurable justification to assist in deciding what would be considered

relatively permanent. In addition, the tributary must be capable of transporting pollution to navigable waters such that it could have a significant impact on that water. Defining tributaries this way would increase certainty and clarity of section 404 program applicability, basing determinations on quantitative information about flows, and greatly reducing arbitrary differences among jurisdictional determinations.

"Adjacent Waters" – AFPM also supports a definition of "adjacent waters" that is limited to those which are part of a continuum that establishes the point at which the water ends, and land begins. Wetlands would meet this definition only if they are not separated from jurisdictional water by dry land, including berms and levees.

"Drainage Ditches" – AFPM supports clarifying the regulatory status of the term "drainage ditches." In particular, 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.

"Riparian Area" – The Agencies propose to define a "riparian area" as "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." Narrow strips of land directly abutting a waterway certainly "border" the waterway, but as one moves away from the waterway, the notion of "bordering" diminishes to the point of absurdity. The Agencies provided no clarification as to how far a riparian area extends away from a water body. According to the 2015 rule, the concept of "reasonable proximity," which itself is subjective and vague, applies only when adjacency is established through a hydrologic connection for a "water" that lies "outside of the floodplain and riparian area of a tributary."[9]

Moreover, the "bordering" area is further explained as a location "where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area," but it is entirely unclear what the Agencies mean by the "area" where such influence exists. Because the Agencies rely on a functional, rather than spatial definition to describe "riparian area," the proposed rule is vague and subject to inconsistent interpretations. This is precisely the type of analysis the WOTUS rule was designed to avoid. AFPM proposes that EPA avoid defining or using the term "bordering" altogether.

"Floodplain" – The definition of "floodplain" relies on the undefined term "waters" and the concept of "bordering." While the definition employs a measurable concept – an area that has been inundated by, and was formed by sediment deposition from, actual waters – the return period for such inundation is not specified. Is this the 10-year, 50-year, 100-year, or 200-year floodplain? The Agencies cannot simply say, as they have in the 2015 final rule, that they will use their "best professional judgment" to answer this question on a case-by-case basis.[10]

"Single and Complete Project" – Another concern expressed by AFPM members is how the phrase "single and complete project" will be interpreted in riparian areas or floodplains, which the WOTUS proposal assumed are federal waters. Will the Agencies continue to consider each crossing a "single and complete project," or will all potential crossings be grouped together as a "common landscape unit?" If the latter, the disturbance of individual crossings could be combined.

[9] 79 Fed. Reg. 22,207-08
[10] 79 Fed. Reg. 22,209

The combination would likely exceed the ½-acre limit in nationwide permit 12, and the project would require a far more expensive and time-consuming individual section 404 permit.

As discussed in the preceding sections, the concept of considering a water "in combination with other similarly situated waters … in the same region" also is rife with uncertainties. The extraordinarily broad scope of the required evaluation inhibits the ability of a land owner to make reasonable judgments concerning the jurisdictional status of a single, local water.

6. Is there any information or data about costs and benefits to the industrial sector that the agencies should consider in their economic analysis?

The Agencies' 2015 WOTUS definition is neither necessary nor desirable, particularly because such a sweeping expansion of federal authority would not result in new environmental benefits or increased regulatory certainty. The Agencies have neither the resources nor the ground capability to assume control of the nation's water infrastructure and associated land uses.

In *Nat'l Assoc. of Home Builders v. Army Corps of Engineers*, the D.C. Circuit Court of Appeals found that a revised CWA definition restricted developers' eligibility for general wetland permits, forcing them to apply for more burdensome and costly individual permits in many more situations. The court found that the developers suffered a substantive injury from the definition change. The 2015 WOTUS definition would continue to have precisely the same kind of adverse effect on a wide range of business activities.

Storm water programs run by municipalities also would be required to impose more stringent controls on facilities with parking lots, storage pads, or other large paved areas. These facilities would become subject to more stringent storm water management requirements, including the requirement to obtain NPDES permits for the first time, and to treat their storm water before it leaves the property. This would impact grocery stores, shopping centers, big box stores, stadiums, schools, churches, hospitals, and many other kinds of commercial and institutional facilities. The 2015 WOTUS definition also would require businesses to update and expand their SPCC Plans under section 311, and their storm water discharge permits/plans under section 402.

At one company's facilities in the Midwest, projects such as building a loading dock and levelling a soil pile to reduce erosion were previously evaluated by the U.S. Army Corps of Engineers (the "Corps"). The Corps determined these projects were not subject to federal jurisdiction under the pre-2015 definition. Under the 2015 rule, these same areas were subject to federal permitting, increasing costs. However, it must be noted that these projects may remain subject to state jurisdiction.

Other facilities report they will face increased federal jurisdiction because of their proximity to wetlands on or near the site. Besides the cost and time required for the permit itself, companies may be required to comply with resource-intensive mitigation and restoration requirements.

7. What kinds of discharges are permitted in your facility and do they typically release to intermittent or perennial waters?

At most AFPM sites (both refineries and petrochemical plants), industrial wastewater discharges are governed by the site's National Pollution Discharges Elimination System

(NPDES) permit. AFPM members operate refineries, logistic operations (terminals) and ethanol operations that discharge to both intermittent and permanent waters.

8. **Would a narrower federal definition of 'waters of the U.S.' result in varied regulation across states or tribes that may influence your individual facilities or industry as a whole?**

Though a narrower federal definition of 'waters of the U.S.' may result in some variability across states, AFPM does not foresee broader or varied state/tribal definitional or application conflicts. To date this has not happened and just like industry, States need clarity from EPA. AFPM encourages EPA to engage the states in developing definitions and guidance that can be used by all.

IV. Conclusion

AFPM is pleased that the Agencies are engaging stakeholders in Step Two of this process to propose a new definition of WOTUS. AFPM urges EPA to propose the second step reevaluation soon to ensure that stakeholders receive clarity on what is defined under WOTUS, including exemptions. We look forward to working with the Agencies on this important matter.

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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