



September 22, 2017

Submitted via electronic mail

Mr. Douglas W. Lamont
Deputy Assistant Secretary of the Army
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

Mr. E. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Proposal to Recodify Pre-Existing Rules concerning the Definition of *Waters of the United States*
U.S. Army Corps of Engineers
U.S. Environmental Protection Agency

Dear Deputy Assistant Secretary Lamont and Administrator Pruitt:

The American Exploration & Production Council (“AXPC”) is pleased to submit the following comments supporting the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency (collectively, “the agencies”) proposal, *Definition of “Waters of the United States” – Recodification of Pre-Existing Rules* (“Proposal”) published in the federal register on July 27, 2017 (Volume 82, Number 143). AXPC asserts that the agencies’ proposal is desirable and agrees that a recodification of the *status quo* – regulatory text that existed in the Code of Federal Regulations prior to the promulgation of the 2015 Clean Water Rule¹ (“2015 Rule”) along with applicable agency guidance documents² – as an interim first step is appropriate.

The Clean Water Act is intended to, “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters;” thus, requiring the federal government to properly apply the principles of federalism to ensure that the spirit of the act is upheld as Congress intended when it declared, “It 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 (including restoration, preservation, and enhancement) of land and water resources and to consult with the Administrator in the exercise of his or her authority.”³ Consequently, AXPC supports the rescission of the 2015 Rule as it is AXPC’s view that, as promulgated, the 2015 Rule exercised an unreasonably broad interpretation of

¹ Recodification of regulatory text at 33 CFR §328; 40 CFR §110; 112; 116; 117; 122; 230; 232; 300; 302; and 401.

² Governing guidance documents include 2003 Solid Waste Agency of Northern Cook County and 2008 Rapanos

³ 33 U.S.C. §1251 et seq.[Federal Water Pollution Control Act as amended by the Clean Water Act of 1977]

the agencies' authority while simultaneously failing to preserve the States' traditional authority over land and water use. Rescinding the 2015 Rule would allow the agencies an opportunity to meaningfully review its jurisdiction to ultimately clarify its authority and align with the priorities stated in the February 28, 2017, *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule* Executive Order. Consultation with States will be imperative to ensure legal and jurisdictional clarity and AXPC is encouraged by the agencies' willingness to engage, publicly, with targeted stakeholders through an upcoming series of listening sessions.

AXPC asserts that the agencies' policy arguments in the proposal are sufficient and do not constrain its ability to rescind the 2015 Rule. Further, AXPC agrees with the agencies' legal theory as expressed through the proposal's citations of the Supreme Court opinions in *FCC v. Fox Television Stations, Inc.* and *National Homeowners Association v. EPA*. The agencies do not need to rebut the findings of the decision documents associated with the 2015 Rule and need only to examine the relevant data to articulate a change in position. As evidenced in the proposal, the agencies have considered the previous record and determined:

The agencies did not include a discussion in the 2015 Rule preamble of the meaning and importance of section [33 U.S.C. §1251] 101(b) in guiding the choices the agencies make in setting the outer bounds of jurisdiction of the [Clean Water] Act, despite the recognition that the rule must be drafted "in light of the goals, objectives, and policies, of the statute."...the agencies will more fully consider the policy in section 101(b) when exercising their discretion to delineate the scope of waters of the U.S., including the extent to which states or tribes have protected or may protect waters that are not subject to CWA jurisdictions⁴.

The Supreme Court has acknowledged that agencies have some discretion to change direction in response to changing circumstances⁵. The proposal clearly establishes the necessity of rebalancing, or at a minimum reevaluating, the existing federal-state partnerships, which is a policy goal often cited by newly appointed EPA Administrator, Scott Pruitt⁶. Federalism is certainly not a new concept in the context of regulation, but a change in administration, particularly one that has made cooperative federalism a stated policy goal, is a change in circumstance.

As previously stated, AXPC supports the codification of the legal status quo and agrees it is a necessary first step to ensure certainty regarding jurisdiction, on an interim basis, while the agencies consider the appropriate scope of the definition of "Waters of the United States." Further, codifying the status quo will not change the current interpretation that has been applied by the agencies since the Sixth Circuit granted its nationwide stay of the 2015 Rule in October 2015. Thus, and as noted in the proposal, such codification will offer certainty to both the agencies and the regulated community should a future decision by the Sixth Circuit result in an expiration of the nationwide stay. There will be no new threat or harm posed to the environment from such an action as the governing guidance documents, which preceded

⁴ Federal Register Volume 82, No. 143 Page 34902

⁵ *Motor Vehicle Manufacturers Association v. State Farm Mutual* 463 U.S. 29, 43

⁶ Hearing on nomination of Attorney General Scott Pruitt to be Administrator of the U.S. Environmental Protection Agency, January 18, 2017, Committee on Environment and Public Works

the 2015 Rule, have always remained in effect. As further evidence that codification will not result in any irreparable harm, in its issuance of the nationwide stay, the Sixth Circuit stated. “But neither is there any indication that the integrity of the nation’s waters will suffer imminent injury if the new scheme [2015 Rule] is not immediately implemented and enforced.”⁷

To summarize, AXPC supports the rescission of the 2015 Rule; believes that the agencies have provided reasoned explanations for the rescission; supports the codification of the legal status quo, and; will continue to support any rulemaking effort that clearly articulates the line between federal and state jurisdiction. AXPC appreciates the agencies consideration of the statements presented herein and appreciates the opportunity to participate in this public process.

AXPC is a national trade association representing 33 of America’s premier independent natural gas and oil exploration and production companies. AXPC’s members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce crude oil and natural gas, and that allow our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

Respectfully Submitted,



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⁷ *State of Ohio, et al v. U.S. Army Corps of Eng’rs, et al.* Nos. 15-3799/3822/3853/3887 Order of Stay