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Docket ID No. EPA-HQ-OW-2017-0203
Office of Water, Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Regulatory Community of Practice, U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314
(submitted via regulations.gov)

Re: Definition of "Waters of the United States" – Recodification of Pre-existing Rules

To Whom It May Concern:

The MJB&A Permitting and Infrastructure Coalition[1] appreciates the opportunity to comment on the proposed rule, *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*, by the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) (collectively, "the agencies"). As proposed, the rule would make clear that the regulations and guidance currently in effect under the Sixth Circuit's October 9, 2015 stay order would continue to be in effect as the Administration considers a new rulemaking to reevaluate the definitions of "waters of the United States."

MJB&A Permitting and Infrastructure Coalition member companies collectively engage the Administration and agencies on potential permitting modernization as well as regulatory and legislative opportunities to ensure energy infrastructure projects can proceed in a timely and cost-effective manner. Our companies design, permit, and operate fossil fuel-fired and nuclear power plants; electric and natural gas transmission and distribution systems; and solar, wind, and other renewable generation projects. Nearly all of these facilities or proposed projects are affected by the definition of waters of the United States.

Support for Re-Codification of Pre-Existing Rules

We, as well as others in the electric sector, have long advocated for the agencies to issue a rule that provides clear direction on which waters are jurisdictional under the Clean Water Act. Different interpretations by regulators and courts in different parts of the U.S. have led to inconsistent decisions that hamper long-term investment decisions and business planning. Therefore, we support the agencies' proposal to recodify the regulatory definitions as they existed prior to the 2015 Clean Water

[1] The MJB&A Permitting and Infrastructure Coalition member companies include: Dominion, Entergy, NextEra Energy, and PG&E.

Rule.[2] Making clear that the current status quo—the regulations being enforced as a result of the Sixth Circuit stay of the 2015 rule—will continue pending a new rulemaking provides states, the industry, and stakeholders clarity and regulatory certainty as investment decisions are made for infrastructure and energy projects.

Under *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502 (2009), the agencies have the authority to rescind and revise regulations provided "the new policy is permissible under the statute…, there are good reasons for it, and…the agency believes it to be better." Given the legal flaws that have been identified through litigation of the 2015 rule, confusion in how to interpret some aspects of the rule, and the agencies expressed intent to revise the rule, the agencies have a reasoned basis and the authority to rescind the rule.

If the stay were to be lifted while the agencies are developing a new rule, companies investing in infrastructure would face permitting delays and regulatory uncertainty as a result of inconsistencies, uncertainty, and confusion about the 2015 rule. For example, prior to the finalization of the 2015 rule, one MJB&A Permitting and Infrastructure Coalition member company was involved in a project that included a jurisdictional field survey and significant nexus analysis for approximately 4,000 acres of land managed by the Bureau of Land Management. The applicant conducted a thorough assessment and categorization for ephemeral washes at the project site, which contained physical characteristics including ordinary high water marks, per guidance standards provided by the Corps. This assessment included ephemeral washes discharged to two streams that were identified as waters of the United States. Based on that assessment, the Corps determined that no waters of the U.S. were present on the project site and that the project did not require a Department of Army permit. The Corps issued an approved jurisdictional determination. However, if this project were assessed under the 2015 rule, the ephemeral washes would have been considered tributaries by definition and classified as waters of the U.S. As a result, this project would have required a Section 404 authorization. If the Corps were required to enforce the 2015 rule as the agencies work to develop a revised definition, the applicant would have to bear the costs and delays associated with the Section 404 authorization despite the fact that the rule is being reevaluated to be consistent with the Clean Water Act.

In light of the case before the Supreme Court regarding whether the Court of Appeals has original jurisdiction to review the 2015 rule, we are also concerned about uncertainty that would result if the nationwide stay were to be lifted while the stay by the North Dakota District Court applying in 13 states remained. Having certainty that there would be consistent national requirements regardless of the legal developments helps to reduce some of the regulatory uncertainty for investment decisions while the agencies undertake the second step of the rulemaking process.

Further, the implementation of the 2015 rule in the states covered by the North Dakota decision would expand federal jurisdiction in an arbitrary and capricious manner beyond the authority authorized by the Clean Water Act. The uncertainty of implementing such a rule as the litigation process proceeds and as the agencies undertake a rulemaking process to revise the rule, either in response to a court

[2] Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054, 37,055 (June 29, 2015).

decision or through the intended replacement rule, creates significant uncertainty for our industry. In light of the need to make long-term investment decisions for our nation's energy infrastructure, rescinding the 2015 rule helps to mitigate some of these concerns.

Support for A Notice and Comments Rulemaking Process to Define Waters of the United States

In addition to supporting the agencies' repeal of the 2015 rule as an interim first step, we urge the agencies to continue to develop the second step of the rulemaking to adopt a revised definition of waters of the United States consistent with the Clean Water Act. We agree with the agencies that federal jurisdiction under the Clean Water Act must recognize the state and federal partnership and not expand federal jurisdiction beyond Congress' intent. We had significant concerns that the 2015 rule extended federal jurisdiction arbitrarily, adding costs, delays, and increased risk of third-party litigation for energy projects without providing environmental benefits or business certainty.[3] A rulemaking process that considers existing case law, the agencies' authority under the Clean Water Act, and seeks comment on how best to define a physical surface connection between a wetland and a traditional navigable water is a critical regulatory step that will help to ensure EPA and the Corps finalize a rule that provides industry and stakeholders business and legal certainty.

We look forward to continuing to engage with the agencies on both of these regulatory rulemakings. If you have any questions about these comments, please do not hesitate to contact me at cjenks@mjbradley.com.

Sincerely,

Carrie Jenks

MJB&A Permitting and Infrastructure Coalition

[3] Comment submitted by Michael Bradley, Director, The Clean Energy Group Waters Initiative, Docket ID: EPA-HQ-OW-2011-0880 (Nov. 14, 2014) available at: https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OW-2011-0880-14616&attachmentNumber=1&contentType=pdf.