

May 15, 2017

Sarah Rees
U.S. Environmental Protection Agency
Office of Regulatory Policy and Management
1200 Pennsylvania Avenue, N.W.
Mail Code 1803A
Washington, D.C. 20460
(submitted via regulations.gov)

Re: Regulatory Reform Docket in response to Executive Order 13777 (Input on regulations that may be appropriate for repeal, replacement, or modification)

Dear Ms. Rees:

The MJB&A Permitting and Infrastructure Coalition appreciates the opportunity to comment on the regulatory reform process initiated by Executive Order 13777, seeking input on regulations that may be appropriate for repeal, replacement, or modification. MJB&A Permitting and Infrastructure Coalition member companies¹ 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.

Consistent with Executive Order 13778 and the Notice of Intention published by EPA, we agree that EPA should review the Clean Water Rule, which defined 'Waters of the United States'.² We support EPA's process to develop a new rule that can be implemented consistently for all regions of the U.S. and that is legally durable. The electric sector, including our member companies, have long advocated for EPA to issue a rule that provides clear direction on which waters are jurisdictional and which waters are not. The current regulations, guidance, and case law have led to different interpretations in different regions of the U.S.

Given the opinions in *Rapanos v. United States*, 547 U.S. 715 (2006), we urge EPA to take comment on how best to define a physical surface connection between a wetland and a traditional navigable water and explore if

¹ The MJB&A Permitting and Infrastructure Coalition member companies include: Dominion Energy, Entergy Corporation, NextEra Energy, and PG&E Corporation. While we focus primarily on the Waters of the United States rule in these comments, the member companies are submitting comments on other regulations that may be appropriate for repeal, replacement, or modification through individual letters and through additional organizations.

² Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 FR 37,054 (June 29, 2015).

there are ways to clearly define Waters of the U.S. that reflects the federal and state partnership. To supplement this letter, we have developed a white paper that frames the key areas we think a final rule should address and that proposes key definitions for consideration.³ While we think navigable waters, tributaries, and adjacent wetlands are Waters of the U.S., the final definitions for these terms and others are critical to make that clear.

Recognizing the existing case law and that some areas will need case-by-case evaluations, we propose the following key principles that could guide jurisdictional determinations:

- Any Waters of the U.S. must have a physical surface connection that has a predictable flow to a navigable water in order to demonstrate a significant nexus based on Justice Scalia’s opinion and Justice Kennedy’s opinion.
- By contrast, ephemeral streams, tributaries, and washes with low volume, infrequent, and short flow duration periods on an annual basis are not significantly connected to a navigable water. Such streams and tributaries that are absent of hydric soils, hydrophytic vegetation, or lifecycle dependent aquatic species are not significantly connected to a navigable water. Wetlands that are solely dependent on groundwater or precipitation for inundation are not jurisdictional.

As part of a new rule, there are a number of terms that we would encourage EPA to propose definitions for comment. For example, the definition of Waters of the U.S. must make clear that waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act, are not Waters of the U.S. One of our key concerns with the prior rule was that the regulatory text failed to make clear that these systems are not Waters of the U.S.

It is also important for the definition of tributary to make clear what is not jurisdictional. As an example, the definition might say:

the water must be physically characterized by the presence of a bed and banks and ordinary high water mark, which contributes frequent and consistent duration of flow, either directly or through another water, to jurisdictional waters provided that hydric soils, hydrophytic vegetation, or lifecycle dependent aquatic species are present. Man-made structures with engineered bed, banks, and top of banks that are not created from jurisdictional waters or whose construction pre-dates the Clean Water Act should not be considered a jurisdictional tributary.

If significant revisions are not accomplished through the rulemaking process and the expanded jurisdiction created under the final rule remains relatively unchanged to the rule finalized in 2015, we would continue to urge EPA and the Army Corps of Engineers to review the current nationwide permits to increase higher acreage thresholds for permanent discharges to jurisdictional waters.

In addition to these comments on the Waters of the U.S., we look forward to continued engagement with the Administration on other issues that affect the permitting process for energy projects. We continue to have concerns with the time it takes for permitting decisions to be made for energy infrastructure projects. These delays can significantly impact the economics of a project. While we recognize that not all of our concerns can be addressed through EPA’s authority, EPA’s engagement in the Administration’s process to identify opportunities for streamlining permitting will be important.

³ The MJB&A Permitting and Infrastructure White Paper on Principles for a Revised Waters of the U.S. Rulemaking is available for download from the MJB&A website at: http://www.mjbradley.com/sites/default/files/MJBAPermittingInfrastructure_WOTUSPrinciples_WhitePaper.pdf

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

cc:

Samantha Dravis, EPA

Brittany Bolen, EPA

Sarah Greenwalt, EPA

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