THE TRUMP ADMINISTRATION'S ATTACK ON OUR WATER

Jon Devine, Natural Resources Defense Council

NRDC

MORE COAL MINING WASTE IN STREAMS

PRESIDENT SIGNS BILL REVOKING STREAM PROTECTION RULE

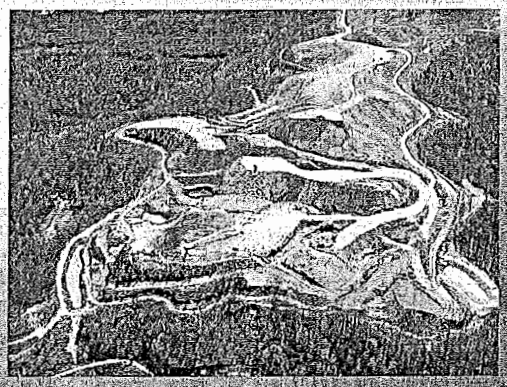


Photo: United Mountain Defense

- The 2016 Stream Protection Rule placed greater responsibility on mining companies for damage to streams from destructive mountaintop removal operations. It also required testing and monitoring of areas that could be affected by mining.
- Over the next two decades, the rule was projected to safeguard 6,000 miles of streams and 52,000 acres of forest from pollution by coal companies.
- President Trump signed a "resolution of disapproval" under the Congressional Review Act, invalidating rule & limiting substantially similar future rules.

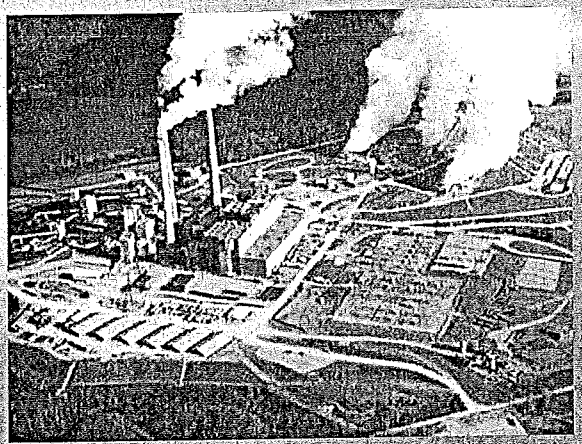
FEWER STREAMS & WETLANDS PROTECTED

ADMINISTRATION PROPOSES TO REPEAL CLEAN WATER RULE

- Headwater, seasonal & rain-dependent streams contribute to drinking water supplies of 117 million people & often serve as critical habitat for fish caught recreationally & commercially.
- Wetlands filter pollution & recharge groundwater, reducing treatment requirements before use as drinking water. They also provide significant flood protection & habitat for waterfowl.
- In 2015, the EPA & Army Corps adopted the Clean Water Rule to clarify legal protection for tens of millions of acres of wetlands and thousands of streams across the U.S.
- Trump administration proposed to repeal the Clean Water Rule, return to pre-Rule mess & develop replacement that would weaken decades-old safeguards.

MORE TOXIC WASTE FROM POWER PLANTS

ADMINISTRATION DELAYS DISCHARGE STANDARDS TO CONSIDER WEAKER ONES



- Wastewater from power plants contains numerous toxic substances, including mercury, arsenic, lead, and selenium.
- These toxins can threaten people's health by contaminating drinking water or building up in fish tissue.
- Power plant discharges impact water bodies used for fishing.
- Facilities also discharge close to almost 100 intakes for drinking water suppliers and "more than 1,500 public wells across the nation."
- EPA recently delayed compliance deadlines for first-ever limits on plants' toxic discharges, while pledging to "revisit" stringency of those standards.

FEWER CONTROLS ON COAL ASH DUMPS

ADMINISTRATION WILL "RECONSIDER" SITING, OPERATION & CLOSURE STANDARDS

- In 2015, EPA adopted modest requirements for dumps receiving coal combustion waste. The rule contained requirements for: structural integrity of impoundments; groundwater protection; operating criteria; compliance documentation; and closure.
- These standards would help guard against exposing people to many toxins in coal combustion waste, including heavy metals. These toxins can increase risk of multiple health problems.
- EPA recently granted "reconsideration" petitions from industry asking EPA to weaken rule.

MORE THREATS TO BRISTOL BAY WATERSHED

ADMINISTRATION WITHDRAWS SCIENCE-BASED PROPOSED MINING RESTRICTIONS

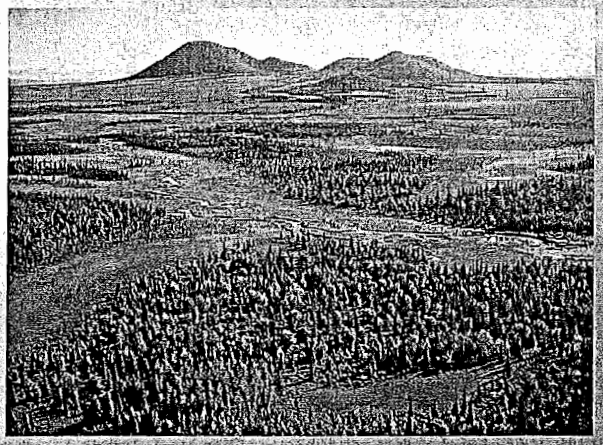


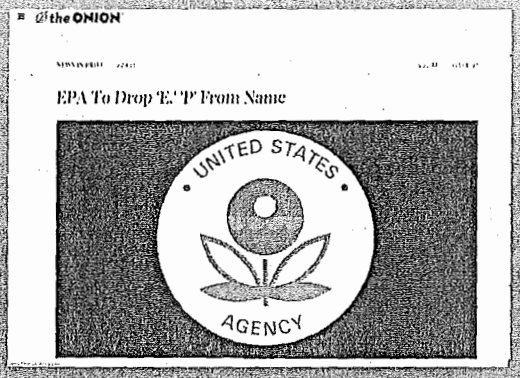
Photo: Robert Glenn Ketchum

- Bristol Bay is an extraordinary national treasure, home to the largest sockeye salmon fishery in the world.
- In 2014, the EPA proposed standards that the Pebble Mine would have to meet, after the agency conducted a 3-year, peer-reviewed scientific assessment finding Pebble Mine would pose serious threats to the fishery.
- EPA's authority to impose restrictions on dumping clear in Clean Water Act.
- Admin. Pruitt directed EPA staff to withdraw proposed restrictions within an hour of meeting with Pebble CEO and without consulting EPA's scientific staff, according to a CNN expose.

LESS FUNDING FOR WATER PROGRAMS

ADMINISTRATION PROPOSES BUDGET DECIMATING WATER POLLUTION EFFORTS

- Annual appropriations to federal agencies, especially EPA, dictate how well our water will be protected from pollution or cleaned up.
- Congress provides funding for EPA clean water & drinking water oversight, EPA grants to states for CWA & SDWA program implementation, and for infrastructure improvements.
- Trump administration's proposed budget would have been a disaster for water.
  - Kill effective protections by dumping approx. 3,200 EPA staffpeople.
  - Short-change state water programs.
  - De-fund restoration programs for iconic waters.
  - Zero out WaterSense, National Estuary Program & programs for US-Mexico border and Alaska Native villages.



Consistent with the Act, this document requests that interested persons provide proposed changes to revise or update the Manufactured Home Construction and Safety Standards, the Manufactured Home Procedural and Enforcement Regulations, the Model Manufactured Home Installation Standards, and Manufactured Home Installation Program Regulations. Specifically, recommendations are requested that further HUD's efforts to increase the quality, durability, safety and affordability of manufactured homes; facilitate the availability of affordable manufactured homes and increase homeownership for all Americans; and encourage cost-effective and innovative construction techniques for manufactured homes.

To permit the MHCC to fully consider the proposed changes, commenters are encouraged to provide at least the following information:

- The specific section of the current Manufactured Home Construction and Safety Standards, Manufactured Home Procedural and Enforcement Regulations, Model Manufactured Home Installation Standards, or Manufactured Home Installation Program Regulations that require revision or update, or whether the recommendation would require a new standard;
- Specific detail regarding the recommendation including a statement of the problem intended to be corrected or addressed by the recommendation, how the recommendation would resolve or address the problem, and the basis of the recommendation; and
- Information regarding whether the recommendation would result in increased costs to manufacturers or consumers and the value of the benefits derived from HUD's implementation of the recommendation, should be provided and discussed to the extent feasible.

The Act requires that an administering organization administer the process for the MHCC's development and interpretation of the Manufactured Home Construction and Safety Standards, Manufactured Home Procedural and Enforcement Regulations, Model Manufactured Home Installation Standards, and Manufactured Home Installation Program Regulations. The administering organization that has been selected by HUD to administer this process is Home Innovation Research Labs Inc. This document requests that proposed revisions be submitted to the MHCC for consideration through the administering organization, Home Innovation Research Labs. This organization will be responsible for ensuring delivery of all appropriately prepared proposed changes to the MHCC for its review and consideration.

Paperwork Reduction Act

The information collection requirements contained in this document have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), and assigned OMB Control Number 2535–0116. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

Dated: July 19, 2017.

Pamela Beck Danner,

Administrator, Office of Manufactured Housing Programs.

[FR Doc. 2017–15574 Filed 7–26–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

[EPA–HQ–OW–2017–0203; FRL–9962–34–OW]

RIN 2040–AF74

Definition of "Waters of the United States"—Recodification of Pre-Existing Rules

AGENCY: Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency and the Department of the Army ("the agencies") are publishing this proposed rule to initiate the first step in a comprehensive, two-step process intended to review and revise the definition of "waters of the United States" consistent with the Executive Order signed on February 28, 2017, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." This first step proposes to rescind the definition of "waters of the United States" in the Code of Federal Regulations to re-codify the definition of "waters of the United States," which currently governs administration of the Clean Water Act, pursuant to a decision issued by the U.S. Court of Appeals for the Sixth Circuit staying a definition of "waters of the United States" promulgated by the agencies in 2015. The agencies would apply the definition of "waters of the United States" as it is currently being implemented, that is informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding practice. Proposing to re-codify the regulations that existed before the 2015 Clean Water Rule will provide continuity and certainty for regulated entities, the States, agency staff, and the public. In a second step, the agencies will pursue notice-and-comment rulemaking in which the agencies will conduct a substantive re-evaluation of the definition of "waters of the United States."

DATES: Comments must be received on or before August 28, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2017–0203, at *http://www.regulations.gov*. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The agencies may publish any comment received to the public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The agencies will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets*.

FOR FURTHER INFORMATION CONTACT: Ms. Donna Downing, Office of Water (4504–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 566–2428; email address: *CWAwotus@epa.gov;* or Ms. Stacey Jensen, Regulatory Community of Practice (CECW–CO–R), U.S. Army

Corps of Engineers, 441 G Street NW., Washington, DC 20314; telephone number: (202) 761–5903; email address: *USACE_CWA_Rule@usace.army.mil.*

SUPPLEMENTARY INFORMATION: The regulatory definition of "waters of the United States" in this proposed rule is the same as the definition that existed prior to promulgation of the Clean Water Rule in 2015 and that has been in effect nationwide since the Clean Water Rule was stayed on October 9, 2015. The agencies will administer the regulations as they are currently being implemented consistent with Supreme Court decisions and longstanding practice as informed by applicable agency guidance documents.

State, tribal, and local governments have well-defined and longstanding relationships with the federal government in implementing CWA programs and these relationships are not altered by the proposed rule. This proposed rule will not establish any new regulatory requirements. Rather, the rule simply codifies the current legal *status quo* while the agencies engage in a second, substantive rulemaking to reconsider the definition of "waters of the United States."

I. Executive Summary

A. What This Proposed Rule Does

In this proposed rule, the agencies define the scope of "waters of the United States" that are protected under the Clean Water Act (CWA). In 2015, the agencies published the "Clean Water Rule: Definition of 'Waters of the United States'" (80 FR 37054, June 29, 2015), and on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the 2015 Rule nationwide pending further action of the court. The agencies propose to replace the stayed 2015 definition of "waters of the United States", and re-codify the exact same regulatory text that existed prior to the 2015 rule, which reflects the current legal regime under which the agencies are operating pursuant to the Sixth Circuit's October 9, 2015 order. The proposed regulatory text would thus replace the stayed rulemaking text, and 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 Code of Federal Regulations (CFR) as they existed prior to the promulgation of the stayed 2015 definition. If this proposed rule is finalized, the agencies would continue to implement those prior regulatory definitions), informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.

B. History and the Purpose of This Rulemaking

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Public Law 92–500, 86 Stat. 816, as amended, Public Law 95–217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.* ("Clean Water Act" or "CWA" or "Act") "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." Section 101(a). A primary tool in achieving that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, to "navigable waters" except in accordance with the Act. Section 301(a). The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." Section 502(7).

The CWA also provides that States retain their traditional role in preventing, reducing and eliminating pollution. The Act states that "[i]t 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 . . ." Section 101(b). States and Tribes voluntarily may assume responsibility for permit programs governing discharges of pollution under section 402 for any jurisdictional water bodies (section 402(b)), or of dredged or fill material discharges under section 404 (section 404(g)), with agency approval. (Section 404(g) provides that states may not assume permitting authority over certain specified waters and their adjacent wetlands.) States are also free to establish their own programs under state law to manage and protect waters and wetlands independent of the federal CWA. The statute's introductory purpose section thus commands the Environmental Protection Agency (EPA) to pursue two policy goals simultaneously: (a) To restore and maintain the nation's waters; and (b) to preserve the States' primary responsibility and right to prevent, reduce, and eliminate pollution.

The regulations defining the scope of federal CWA jurisdiction currently in effect, which this proposed rule would recodify, were established in large part in 1977 (42 FR 37122, July 19, 1977). While EPA administers most provisions in the CWA, the U.S. Army Corps of Engineers (Corps) administers the permitting program under section 404. During the 1980s, both of these agencies adopted substantially similar definitions (51 FR 41206, Nov. 13, 1986, amending 33 CFR 328.3; 53 FR 20764, June 6, 1988, amending 40 CFR 232.2).

Federal courts have reviewed the definition of "waters of the United States" and its application to a variety of factual circumstances. Three Supreme Court decisions, in particular, provide critical context and guidance in determining the appropriate scope of "waters of the United States."

In *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985) (*Riverside*), the Court, in a unanimous opinion, deferred to the Corps' ecological judgment that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." *Id.* at 134.

In *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) (*SWANCC*), the Supreme Court held that the use of "isolated" non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA. The *SWANCC* decision created uncertainty with regard to the jurisdiction of other isolated non-navigable waters and wetlands. In January 2003, EPA and the Corps issued joint guidance interpreting the Supreme Court decision in *SWANCC* ("the 2003 Guidance"). The guidance indicated that *SWANCC* focused on isolated, intrastate, non-navigable waters, and called for field staff to coordinate with their respective Corps or EPA Headquarters on jurisdictional determinations which asserted jurisdiction for waters under 33 CFR 328.3(a)(3)(i) through (iii). Waters that were jurisdictional pursuant to 33 CFR 328.3(a)(3) could no longer be determined jurisdictional based solely on their use by migratory birds.

Five years after the *SWANCC* decision, in *Rapanos* v. *United States,* 547 U.S. 715 (2006) (*Rapanos*), a four-Justice plurality opinion in *Rapanos,* authored by Justice Scalia, interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water . . . ," *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a "continuous surface connection . . ." to such water bodies, *id.* (Scalia, J., plurality opinion). The *Rapanos* plurality noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain

continuous flow during some months of the year but no flow during dry months . . ." *Id.* at 732 n.5 (emphasis in original). Justice Kennedy concurred with the plurality judgment, but concluded that the appropriate test for the scope of jurisdictional waters is whether a water or wetland possesses a " 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759. The four dissenting Justices in *Rapanos,* who would have affirmed the court of appeals' application of the agencies' regulations, also concluded that the term "waters of the United States" encompasses, *inter alia,* all tributaries and wetlands that satisfy "either the plurality's [standard] or Justice Kennedy's." *Id.* at 810 & n.14 (Stevens, J., dissenting).

While the *SWANCC* and *Rapanos* decisions limited the way the agencies' longstanding regulatory definition of "waters of the United States" was implemented, in neither case did the Court invalidate that definition.

After the *Rapanos* decision, the agencies issued joint guidance in 2007 to address the waters at issue in that decision but did not change the codified definition. The guidance indicated that "waters of the United States" included traditional navigable waters and their adjacent wetlands, relatively permanent waters and wetlands that abut them, and waters with a significant nexus to a traditional navigable water. The guidance did not address waters not at issue in *Rapanos,* such as interstate waters and the territorial seas. The guidance was reissued in 2008 with minor changes (hereinafter, the "2008 guidance").[1]

After issuance of the 2008 guidance, Members of Congress, developers, farmers, state and local governments, environmental organizations, energy companies and others asked the agencies to replace the guidance with a regulation that would provide clarity and certainty on the scope of the waters protected by the CWA.

Following public notice and comment on a proposed rule, the agencies published a final rule defining the scope of "waters of the United States" on June 29, 2015 (80 FR 37054). Thirty-one States and a number of other parties sought judicial review in multiple actions in Federal district courts and Circuit Courts of Appeal, raising concerns about the scope and legal authority of the 2015 rule. One district court issued an order granting a motion for preliminary injunction on the rule's effective date, finding that the thirteen State challengers were likely to succeed on their claims, including that the rule violated the congressional grant of authority to the agencies under the CWA and that it appeared likely the EPA failed to comply with Administrative Procedure Act (APA) requirements in promulgating the rule. *State of North Dakota et al.* v. *US EPA,* No. 15–00059, slip op. at 1–2 (D.N.D. Aug. 27, 2015, as clarified by order issued on September 4, 2015). Several weeks later, the Sixth Circuit stayed the 2015 rule nationwide to restore the "pre-Rule regime, pending judicial review." *In re U.S. Dep't. of Def. and U.S. Envtl. Protection Agency Final Rule: Clean Water Rule,* No. 15–3751 (lead), slip op. at 6. The Sixth Circuit found that the petitioners had demonstrated a substantial possibility of success on the merits, including with regard to claims that certain provisions of the rule were at odds with the *Rapanos* decision and that the distance limitations in the rule were not substantiated by scientific support. Pursuant to the court's order, the agencies have implemented the statute pursuant to the regulatory regime that preceded the 2015 rule. On January 13, 2017, the U.S. Supreme Court granted *certiorari* on the question of whether the court of appeals has original jurisdiction to review challenges to the 2015 rule. The Sixth Circuit granted petitioners' motion to hold in abeyance the briefing schedule in the litigation challenging the 2015 rule pending a Supreme Court decision on the question of the court of appeals' jurisdiction.

On February 28, 2017, the President of the United States issued an Executive Order entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." Section 1 of the Order states, "[i]t is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." It directs the EPA and the Army to review the 2015 rule for consistency with the policy outlined in section 1, and to issue a proposed rule rescinding or revising the 2015 rule as appropriate and consistent with law. Section 2. The Executive Order also directs the agencies to consider interpreting the term "navigable waters" in a manner consistent with Justice Scalia's plurality opinion in *Rapanos.* Section 3.

The agencies have the authority to rescind and revise the regulatory definition of "waters of the United States," consistent with the guidance in the Executive Order, so long as the revised definition is authorized under the law and based on a reasoned explanation. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (*"Fox"*). Importantly, such a revised decision need not be based upon a change of facts or circumstances. A revised rulemaking based "on a re-evaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal" of its regulations and programs. *Nat'l Ass'n of Home Builders* v. *EPA,* 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *Fox,* 556 U.S. at 514–15 (Rehnquist, J., concurring in part and dissenting in part)).

The Executive Order states that it is in the national interest to protect the nation's waters from pollution as well as to allow for economic growth, ensuring regulatory clarity, and providing due deference to States, as well as Congress. Executive Order section 1. These various priorities reflect, in part the CWA itself, which includes both the objective to "restore and maintain" the integrity of the nation's waters, as well as the policy to "recognize, preserve, and protect the primary responsibilities and right of States to prevent, reduce, and eliminate pollution . . ." CWA sections 101(a), 101(b). Re-evaluating the best means of balancing these statutory priorities, as called for in the Executive Order, is well within the scope of authority that Congress has delegated to the agencies under the CWA.

This rulemaking is the first step in a two-step response to the Executive Order, intended to ensure certainty as to the scope of CWA jurisdiction on an interim basis as the agencies proceed to engage in the second step: A substantive review of the appropriate scope of "waters of the United States."

C. This Proposed Rule

In this proposed rule, the agencies would rescind the 2015 Clean Water Rule and replace it with a recodification of the regulatory text that governed the legal regime prior to the 2015 Clean Water Rule and that the agencies are

[1] The guidance expressly stated that it was not intended to create any legally binding requirements, and that "interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law." 2008 guidance at 4 n. 17.

currently implementing under the court stay, informed by applicable guidance documents (*e.g.*, the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with the *SWANCC* and *Rapanos* Supreme Court decisions, applicable case law, and longstanding agency practice. The proposal retains exclusions from the definition of "waters of the United States" for prior converted cropland and waste treatment systems, both of which existed before the 2015 regulations were issued. Nothing in this proposed rule restricts the ability of States to protect waters within their boundaries by defining the scope of waters regulated under State law more broadly than the federal law definition.

D. Rationale for This Rulemaking

This rulemaking action is consistent with the February 28, 2017, Executive Order and the Clean Water Act. This action will consist of two steps. In this first step, the agencies are proposing as an interim action to repeal the 2015 definition of "waters of the United States" and codify the legal *status quo* that is being implemented now under the Sixth Circuit stay of the 2015 definition of "waters of the United States" and that was in place for decades prior to the 2015 rule. This regulatory text would, pending completion of the second step in the two-step process, continue to be informed by the 2003 and 2008 guidance documents. In the second step, the agencies will conduct a separate notice and comment rulemaking that will consider developing a new definition of "waters of the United States" taking into consideration the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.

In the 2015 rulemaking, the agencies described their task as "interpret[ing] the scope of the 'waters of the United States' for the CWA in light of the goals, objectives, and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies' technical expertise and experience." 80 FR 37054, 37060 (June 29, 2015). In so doing, the agencies properly acknowledged that a regulation defining "waters of the United States" in this area is not driven by any one type or piece of information, but rather must be the product of the evaluation and balancing of a variety of different types of information. That information includes scientific data as well as the policies articulated by Congress when it passed the Act. For example, the agencies recognized this construct in the preamble to the 2015 Rule by explaining that what constitutes a "significant nexus" to navigable waters "is not a purely scientific determination" and that "science does not provide bright line boundaries with respect to where 'water ends' for purposes of the CWA." 80 FR at 37060.[2]

The objectives, goals, and policies of the statute are detailed in sections 101(a)–(g) of the statute, and guide the agencies' interpretation and application of the Clean Water Act. Section 101(a) of the Act states that the "objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and identifies several goals and national policies Congress believed would help the Act achieve that objective. 33 U.S.C. 1251(a). When referring to the Act's objective, the 2015 rule referred specifically to Section 101(a). 80 FR at 37056.

In addition to the objective of the Act and the goals and policies identified to help achieve that objective in section 101(a), in section 101(b) Congress articulated that 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. Section 101(b) also states that it is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 402 and 404 of the Act. 33 U.S.C. 1251(b). Therefore, as part of the two-step rulemaking, the agencies will be considering the relationship of the CWA objective and policies, and in particular, the meaning and importance of section 101(b).

The 2015 rule did acknowledge the language contained in section 101(b) and the vital role states and tribes play in the implementation of the Act and the effort to meet the Act's stated objective. *See, e.g.*, 80 FR at 37059. In discussing the provision, the agencies noted that it was "[o]f particular importance[,] [that] states and tribes may be authorized by the EPA to administer the permitting programs of CWA sections 402 and 404." *Id.* The agencies also noted that "States and federally-recognized tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in *their jurisdiction*." *Id.* at 37060. However, the agencies did not include a discussion in the 2015 rule preamble of the meaning and importance of section 101(b) in guiding the choices the agencies make in setting the outer bounds of jurisdiction of the Act, despite the recognition that the rule must be drafted "in light of the goals, objectives, and policies of the statute." In the two-step rulemaking process commencing with today's notice, 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 jurisdiction.

The scope of CWA jurisdiction is an issue of great national importance and therefore the agencies will allow for robust deliberations on the ultimate regulation. While engaging in such deliberations, however, the agencies recognize the need to provide as an interim step for regulatory continuity and clarity for the many stakeholders affected by the definition of "waters of the United States." The pre-CWR regulatory regime is in effect as a result of the Sixth Circuit's stay of the 2015 rule but that regime depends upon the pendency of the Sixth Circuit's order and could be altered at any time by factors beyond the control of the agencies. The Supreme Court's resolution of the question as to which courts have original jurisdiction over challenges to the 2015 rule could impact the Sixth Circuit's exercise of jurisdiction and its stay. If, for example, the Supreme Court were to decide that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 rule, the Sixth Circuit case would be dismissed and its nationwide stay would expire, leading to inconsistencies, uncertainty, and confusion as to the regulatory regime that would be in effect pending substantive rulemaking under the Executive Order.

As noted previously, prior to the Sixth Circuit's stay order, the District Court for North Dakota had preliminarily enjoined the rule in 13 States (North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming and New Mexico). Therefore, if the Sixth Circuit's nationwide stay were to expire, the 2015

[2] This notion was at least implicitly recognized by the Chief Justice in his concurring opinion in *Rapanos*: "[T]he Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority." *Rapanos* v. *United States*, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring). Ultimately, developing "some notion of an outer bound" from the full range of relevant information is the task facing the agencies.

rule would be enjoined under the North Dakota order in States covering a large geographic area of the country, but the rule would be in effect in the rest of the country pending further judicial decision-making or substantive rulemaking under the Executive Order.

Adding to the confusion that could be caused if the Sixth Circuit's nationwide stay of the 2015 rule were to expire, there are multiple other district court cases pending on the 2015 rule, including several where challengers have filed motions for preliminary injunctions. These cases—and the pending preliminary injunction motions—would likely be reactivated if the Supreme Court were to determine that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 rule. The proposed interim rule would establish a clear regulatory framework that would avoid the inconsistencies, uncertainty and confusion that would result from a Supreme Court ruling affecting the Sixth Circuit's jurisdiction while the agencies reconsider the 2015 rule. It would ensure that, during this interim period, the scope of CWA jurisdiction will be administered exactly the way it is now, and as it was for many years prior to the promulgation of the 2015 rule. The agencies considered other approaches to providing stability while they work to finalize the revised definition, such as simply withdrawing or staying the Clean Water Rule, but did not identify any options that would do so more effectively and efficiently than this proposed rule would do. A stable regulatory foundation for the *status quo* would facilitate the agencies' considered re-evaluation, as appropriate, of the definition of "waters of the United States" that best effectuates the language, structure, and purposes of the Clean Water Act.

II. General Information

A. How can I get copies of this document and related information?

1. *Docket.* An official public docket for this action has been established under Docket Id. No. EPA–HQ–OW–2017–0203. The official public docket consists of the documents specifically referenced in this action, and other information related to this action. The official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202–566–2426. A reasonable fee will be charged for copies.

2. *Electronic Access.* You may access this **Federal Register** document electronically under the **Federal Register** listings at *http://www.regulations.gov*. An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may access EPA Dockets at *http://www.regulations.gov* to view public comments as they are submitted and posted, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility.

B. What is the agencies' authority for taking this action?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, including sections 301, 304, 311, 401, 402, 404 and 501.

C. What are the economic impacts of this action?

This proposed rule is the first step in a comprehensive, two-step process to review and revise the 2015 definition of "waters of the United States." The agencies prepared an illustrative economic analysis to provide the public with information on the potential changes to the costs and benefits of various CWA programs that could result if there were a change in the number of positive jurisdictional determinations. The economic analysis is provided pursuant to the requirements of Executive Orders 13563 and 12866 to provide information to the public. The 2015 CWR is used as a baseline in the analysis in order to provide information to the public on the estimated differential effects of restoring pre-2015 status quo in comparison to the 2015 CWR. However, as explained previously, the 2015 CWR has already been stayed by the Sixth Circuit, and this proposal would merely codify the legal status quo, not change current practice.

The proposed rule is a definitional rule that affects the scope of "waters of the United States." This rule does not establish any regulatory requirements or directly mandate actions on its own. However, by changing the definition of "waters of the United States," the proposed rule would change the waters where other regulatory requirements that affect regulated entities come into play, for example, the locations where regulated entities would be required to obtain certain types of permits. The consequence of a water being deemed non-jurisdictional is simply that CWA provisions no longer apply to that water. There are no avoided costs or forgone benefits if similar state regulations exist and continue to apply to that water. The agencies estimated that the 2015 rule would result in a small overall increase in positive jurisdictional determinations compared to those made under the prior regulation as currently implemented, and that there would be fewer waters within the scope of the CWA under the 2015 rule compared to the prior regulations. The agencies estimated the avoided costs and forgone benefits of repealing the 2015 rule. This analysis is contained in the *Economic Analysis for the Proposed Definition of "Waters of the United States"—Recodification of Pre-existing Rules* and is available in the docket for this action.

III. Public Comments

The agencies solicit comment as to whether it is desirable and appropriate to re-codify in regulation the *status quo* as an interim first step pending a substantive rulemaking to reconsider the definition of "waters of the United States" and the best way to accomplish it. Because the agencies propose to simply codify the legal *status quo* and because it is a temporary, interim measure pending substantive rulemaking, the agencies wish to make clear that this interim rulemaking does not undertake any substantive reconsideration of the pre-2015 "waters of the United States" definition nor are the agencies soliciting comment on the specific content of those longstanding regulations. *See P&V Enterprises* v. *Corps of Engineers*, 516 F.3d 1021,1023–24 (D.C. Cir. 2008). For the same reason, the agencies are not at this time soliciting comment on the scope of the definition of "waters of the United States" that the agencies should ultimately adopt in the second step of this two-step process, as the agencies will address all of those issues, including those related to the 2015 rule, in the second notice and comment rulemaking to adopt a revised definition of "waters of the United States" in light of the February 28, 2017, Executive Order. The agencies do not intend to engage in substantive reevaluation of the definition of "waters of the United States" until the second step of the rulemaking. *See P&V*, 516 F.3d at 1025–26.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket.

In addition, the agencies prepared an analysis of the potential avoided costs and forgone benefits associated with this action. This analysis is contained in the *Economic Analysis for the Proposed Definition of "Waters of the United States"—Recodification of Pre-existing Rules.* A copy of the analysis is available in the docket for this action.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2050–0021 and 2050–0135 for the CWA section 311 program and 2040–0004 for the 402 program.

For the CWA section 404 regulatory program, the current OMB approval number for information requirements is maintained by the Corps (OMB approval number 0710–0003). However, there are no new approval or application processes required as a result of this rulemaking that necessitate a new Information Collection Request (ICR).

C. Regulatory Flexibility Act

We certify that this action will not have a significant economic impact on a substantial number of small entities. Because this action would simply codify the legal *status quo,* we have concluded that this action will not have a significant impact on small entities. This analysis is contained in the *Economic Analysis for the Proposed Definition of "Waters of the United States"—Recodification of Pre-existing Rules.* A copy of the analysis is available in the docket for this action.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The definition of "waters of the United States" applies broadly to CWA programs. The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Consistent with the agencies' policy to promote communications with state and local governments, the agencies have informed states and local governments about this proposed rulemaking.

The agencies will appropriately consult with States and local governments as a subsequent rulemaking makes changes to the longstanding definition of "waters of the United States."

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This proposed rule does not have tribal implications as specified in Executive Order 13175. This proposed rule maintains the legal *status quo.* Thus, Executive Order 13175 does not apply to this action.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the agencies will appropriately consult with tribal officials during the development of a subsequent rulemaking that makes changes to the longstanding definition of "waters of the United States." In fact, the agencies have already initiated the formal consultation process with respect to the subsequent rulemaking.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 because the environmental health risks or safety risks addressed by this action do not present a disproportionate risk to children.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

This proposed rule does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

This proposed rule maintains the legal *status quo.* The agencies therefore believe that this action does not have disproportionately high and adverse human health or environmental effects on minority, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, Feb. 16, 1994).

K. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

Pursuant to Executive Order 13771 (82 FR 9339, February 3, 2017) this proposed rule is expected to be an E.O. 13771 deregulatory action.

List of Subjects

33 CFR Part 328

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Navigation, Water pollution control, Waterways.

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

Environmental protection, Water pollution control.

Dated: June 27, 2017.

E. Scott Pruitt,

Administrator, Environmental Protection Agency.

Dated: June 27, 2017.

Douglas W. Lamont,

Deputy Assistant Secretary of the Army (Project Planning and Review), performing the duties of the Assistant Secretary of the Army for Civil Works.

Title 33—Navigation and Navigable Waters

For the reasons set out in the preamble, title 33, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

■ 1. The authority citation for part 328 is revised to read as follows:

Authority: 33 U.S.C. 1344.

■ 2. Section 328.3 is amended by revising paragraphs (a) through (d) and adding paragraphs (e) and (f) to read as follows:

§ 328.3 Definitions.

* * * * *

(a) The term *waters of the United States* means

(1) All waters which are currently used, or were used in the past, or may

be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(d) The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) The term *tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

Title 40—Protection of Environment

For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 110—DISCHARGE OF OIL

■ 3. The authority citation for part 110 is revised to read as follows:

Authority: 33 U.S.C. 1321(b)(3) and (b)(4) and 1361(a); E.O. 11735, 38 FR 21243, 3 CFR parts 1971–1975 Comp., p. 793.

■ 4. Section 110.1 is amended by revising the definition of "Navigable waters" and adding the definition of "Wetlands" in alphabetical order to read as follows:

§ 110.1 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas. The term includes:

(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(b) Interstate waters, including interstate wetlands;

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(3) That are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as navigable waters under this section;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this section, including adjacent wetlands; and

(f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this section: Provided, That waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States;

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

Wetlands means those areas that are inundated or saturated by surface or ground water at a frequency or duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include playa lakes, swamps, marshes, bogs and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds.

PART 112—OIL POLLUTION PREVENTION

■ 5. The authority citation for part 112 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*; 33 U.S.C. 2720; E.O. 12777 (October 18, 1991), 3 CFR, 1991 Comp., p. 351.

■ 6. Section 112.2 is amended by revising the definition of "Navigable waters" and adding the definition of

"Wetlands" in alphabetical order to read as follows:

§ 112.2 Definitions.

* * * * *

Navigable waters of the United States means "navigable waters" as defined in section 502(7) of the FWPCA, and includes:

(1) All navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA (Pub. L. 92–500), and tributaries of such waters;

(2) Interstate waters;

(3) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and

(4) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

* * * * *

Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency or duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds.

* * * * *

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES

■ 7. The authority citation for part 116 is revised to read as follows:

Authority: Secs. 311(b)(2)(A) and 501(a), Federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*).

■ 8. Section 116.3 is amended by revising the definition of "Navigable waters" to read as follows:

§ 116.3 Definitions.

* * * * *

Navigable waters is defined in section 502(7) of the Act to mean "waters of the United States, including the territorial seas," and includes, but is not limited to:

(1) All waters which are presently used, or were used in the past, or may be susceptible to use as a means to transport interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, and including adjacent wetlands; the term *wetlands* as used in this regulation shall include those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevelance of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas; the term *adjacent* means bordering, contiguous or neighboring;

(2) Tributaries of navigable waters of the United States, including adjacent wetlands;

(3) Interstate waters, including wetlands; and

(4) All other waters of the United States such as intrastate lakes, rivers, streams, mudflats, sandflats and wetlands, the use, degradation or destruction of which affect interstate commerce including, but not limited to:

(i) Intrastate lakes, rivers, streams, and wetlands which are utilized by interstate travelers for recreational or other purposes; and

(ii) Intrastate lakes, rivers, streams, and wetlands from which fish or shellfish are or could be taken and sold in interstate commerce; and

(iii) Intrastate lakes, rivers, streams, and wetlands which are utilized for industrial purposes by industries in interstate commerce.

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

■ 9. The authority citation for part 117 is revised to read as follows:

Authority: Secs. 311 and 501(a), Federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*), ("the Act") and Executive Order 11735, superseded by Executive Order 12777, 56 FR 54757.

■ 10. Section 117.1 is amended by revising paragraph (i) to read as follows:

§ 117.1 Definitions.

* * * * *

(i) *Navigable waters* means "waters of the United States, including the territorial seas." This term includes:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this paragraph;

(5) Tributaries of waters identified in paragraphs (i)(1) through (4) of this section, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (i)(1) through (5) of this section ("Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally included playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds): *Provided,* That waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

■ 11. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 12. Section 122.2 is amended by:

■ a. Lifting the suspension of the last sentence of the definition of "Waters of the United States" published July 21, 1980 (45 FR 48620).

■ b. Revising the definition of "Waters of the United States".

■ c. Suspending the last sentence of the definition of "Waters of the United States" published July 21, 1980 (45 FR 48620).

■ d. Adding the definition of "Wetlands".

The revision and addition read as follows:

§ 122.2 Definitions.

* * * * *

Waters of the United States or *waters of the U.S.* means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Note: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning "This exclusion applies . . ." in the definition of "Waters of the United States." This revision continues that suspension.

Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

* * * * *

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

■ 13. The authority citation for part 230 is revised to read as follows:

Authority: Secs. 404(b) and 501(a) of the Clean Water Act of 1977 (33 U.S.C. 1344(b) and 1361(a)).

■ 14. Section 230.3 is amended by:

■ a. Redesignating paragraph (o) as paragraph (s).

■ b. Revising newly redesignated paragraph (s).

■ c. Redesignating paragraph (n) as paragraph (r).

■ d. Redesignating paragraph (m) as paragraph (q–1).

■ e. Redesignating paragraphs (h) through (l) as paragraphs (m) through (q).

■ f. Redesignating paragraphs (e) and (f) as paragraphs (h) and (i).

■ g. Redesignating paragraph (g) as paragraph (k).

■ h. Redesignating paragraphs (b) through (d) as paragraphs (c) through (e).

■ i. Adding reserved paragraphs (f), (g), (j), and (l).

■ j. Adding paragraphs (b) and (t).

The revision and additions read as follows:

§ 230.3 Definitions.

* * * * *

(b) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands."

* * * * *

(s) The term *waters of the United States* means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(t) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

PART 232—404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

■ 15. The authority citation for part 232 is revised to read as follows:

Authority: 33 U.S.C. 1344.

■ 16. Section 232.2 is amended by revising the definition of "Waters of the

United States" and adding the definition of "Wetlands" to read as follows:

§ 232.2 Definitions.

* * * * *

Waters of the United States means:

All waters which are currently used, were used in the past, or may be susceptible to us in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

All interstate waters including interstate wetlands.

All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce including any such waters:

Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

Which are used or could be used for industrial purposes by industries in interstate commerce.

All impoundments of waters otherwise defined as waters of the United States under this definition;

Tributaries of waters identified in paragraphs (g)(1)–(4) of this section;

The territorial sea; and

Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1)–(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

■ 17. The authority citation for part 300 is revised to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 13626, 77 FR 56749, 3 CFR, 2013 Comp., p.306; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p.351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p.193.

■ 18. Section 300.5 is amended by revising the definition of "Navigable waters" to read as follows:

§ 300.5 Definitions.

* * * * *

Navigable waters as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas. The term includes:

(1) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters;

(i) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) That are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this section;

(5) Tributaries of waters identified in paragraphs (a) through (d) of this definition, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(7) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

■ 19. In appendix E to part 300, section 1.5 is amended by revising the definition of "Navigable waters" to read as follows:

Appendix E to Part 300—Oil Spill Response

* * * * *

1.5 Definitions * * *

Navigable waters as defined by 40 CFR 110.1 means the waters of the United States, including the territorial seas. The term includes:

(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(b) Interstate waters, including interstate wetlands;

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; and

(3) That are used or could be used for industrial purposes by industries in interstate commerce.

(d) All impoundments of waters otherwise defined as navigable waters under this section;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition, including adjacent wetlands; and

(f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(g) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

■ 20. The authority citation for part 302 is revised to read as follows:

Authority: 42 U.S.C. 9602, 9603, and 9604; 33 U.S.C. 1321 and 1361.

■ 21. Section 302.3 is amended by revising the definition of "Navigable waters" to read as follows:

§ 302.3 Definitions.

* * * * *

Navigable waters or *navigable waters of the United States* means waters of the

United States, including the territorial seas;

* * * * *

PART 401—GENERAL PROVISIONS

■ 22. The authority citation for part 401 is revised to read as follows:

Authority: Secs. 301, 304 (b) and (c), 306 (b) and (c), 307 (b) and (c) and 316(b) of the Federal Water Pollution Control Act, as amended (the "Act"), 33 U.S.C. 1251, 1311, 1314 (b) and (c), 1316 (b) and (c), 1317 (b) and (c) and 1326(c); 86 Stat. 816 *et seq.;* Pub. L. 92–500.

■ 23. Section 401.11 is amended by revising paragraph (l) to read as follows:

§ 401.11 General definitions.

* * * * *

(l) The term *navigable waters* includes: All navigable waters of the United States; tributaries of navigable waters of the United States; interstate waters; intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce. Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

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[FR Doc. 2017–13997 Filed 7–26–17; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Chapter 1

46 CFR Chapters 1 and III

49 CFR Chapter IV

[Docket No. USCG–2017–0658]

Great Lakes Pilotage Advisory Committee—Input To Support Regulatory Reform of Coast Guard Regulations—New Task

AGENCY: U.S. Coast Guard, Department of Homeland Security.

ACTION: Announcement of new task assignment for the Great Lakes Pilotage Advisory Committee (GLPAC); teleconference meeting.

SUMMARY: The U.S. Coast Guard is issuing a new task to the Great Lakes Pilotage Advisory Committee (GLPAC). The U.S. Coast Guard is asking GLPAC to help the agency identify existing regulations, guidance, and collections of information (that fall within the scope of the Committee's charter) for possible repeal, replacement, or modification. This tasking is in response to the issuance of Executive Orders 13771, "Reducing Regulation and Controlling Regulatory Costs; 13777, "Enforcing the Regulatory Reform Agenda;" and 13783, "Promoting Energy Independence and Economic Growth." The full Committee is scheduled to meet by teleconference on August 23, 2017, to discuss this tasking. This teleconference will be open to the public. The U.S. Coast Guard will consider GLPAC recommendations as part of the process of identifying regulations, guidance, and collections of information to be repealed, replaced, or modified pursuant to the three Executive Orders discussed above.

DATES: The full Committee is scheduled to meet by teleconference on August 23, 2017, from 1:30 p.m. to 3 p.m. EDT. Please note that this teleconference may adjourn early if the Committee has completed its business.

ADDRESSES: To join the teleconference or to request special accommodations, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section no later than 1 p.m. on August 16, 2017. The number of teleconference lines is limited and will be available on a first-come, first-served basis.

Instructions: Submit comments on the task statement at any time, including orally at the teleconference, but if you want Committee members to review your comments before the teleconference, please submit your comments no later than August 16, 2017. You must include the words "Department of Homeland Security" and the docket number for this action. Written comments may also be submitted using the Federal e-Rulemaking Portal at *http://www.regulations.gov.* If you encounter technical difficulties with comment submission, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided. You may review *Regulations.gov*'s Privacy and Security Notice at *https://www.regulations.gov/privacyNotice.*

Docket Search: For access to the docket or to read documents or comments related to this notice, go to *http://www.regulations.gov,* insert "USCG–2017–0658" in the Search box, press Enter, and then click on the item you wish to view.

FOR FURTHER INFORMATION CONTACT: Ms. Michelle Birchfield, Alternate Designated Federal Officer of the Great Lakes Pilotage Advisory Committee, telephone (202) 372–1533, or email *michelle.r.birchfield@uscg.mil.*

SUPPLEMENTARY INFORMATION:

New Task to the Committee

The U.S. Coast Guard is issuing a new task to GLPAC to provide recommendations on whether existing regulations, guidance, and information collections (that fall within the scope of the Committee's charter) should be repealed, replaced, or modified. GLPAC will then provide advice and recommendations on the assigned task and submit a final recommendation report to the U.S. Coast Guard.

Background

On January 30, 2017, President Trump issued Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs." Under that Executive Order, for every one new regulation issued, at least two prior regulations must be identified for elimination, and the cost of planned regulations must be prudently managed and controlled through a budgeting process. On February 24, 2017, the President issued Executive Order 13777, "Enforcing the Regulatory Reform Agenda." That Executive Order directs agencies to take specific steps to identify and alleviate unnecessary regulatory burdens placed on the American people. On March 28, 2017, the President issued Executive Order 13783, "Promoting Energy Independence and Economic Growth." Executive Order 13783 promotes the clean and safe development of our Nation's vast energy resources, while at the same time avoiding agency actions that unnecessarily encumber energy production.

When implementing the regulatory offsets required by Executive Order 13771, each agency head is directed to prioritize, to the extent permitted by law, those regulations that the agency's Regulatory Reform Task Force identifies as outdated, unnecessary, or ineffective in accordance with Executive Order 13777. As part of this process to comply with all three Executive Orders, the U.S. Coast Guard is reaching out through multiple avenues to interested individuals to gather their input about

Environmental Protection in the Trump Era

Summer 2017

The Environmental Law Institute (ELI) makes law work for people, places, and the planet. Since 1969, ELI has played a pivotal role in shaping the fields of environmental law, policy, and management, domestically and abroad. Today, in our fifth decade, we are an internationally recognized, nonpartisan research and education center working to strengthen environmental protection by improving law and governance worldwide.

ELI staff contributing to this paper include Senior Attorneys Jay Austin, Tobie Bernstein, and James M. McElfish, Jr., Visiting Attorney Scott Badenoch, and Public Interest Law Fellow Benjamin Solomon-Schwartz. The authors thank Thien Chau and Madison Peticca for their assistance with research. Funding for research and drafting was provided by the Walton Family Foundation and the American Bar Association, Section of Civil Rights and Social Justice.

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Environmental Protection in the Trump Era.

CHAPTER 8:
Reversing or Weakening Existing Environmental Regulations

Most environmental regulations are detailed rules issued by agencies under their statutory authority, using a public notice-and-comment procedure. **Final agency rules cannot simply be undone by the president**, but they may be:

- delayed by the implementing agency,
- challenged in court,
- amended or reversed through a subsequent agency rulemaking process, or
- revoked by congressional act.

Many Obama Administration final rules, including the high-profile Clean Power Plan (CPP) and "Waters of the United States" (WOTUS) Rule, are vulnerable to one or more of these actions.

Process.

Legislative Authority. When enacting environmental statutes, Congress typically outlines a general regulatory structure for protecting public health and natural resources, then delegates the details to EPA or other federal agencies. These agencies fulfill Congress' intent and fill statutory gaps by issuing administrative rules that:

- spell out detailed standards,
- create permitting and approval procedures, and
- govern agency monitoring, inspection, and enforcement.

Some rules are mandated by statute, which may set out specific deadlines. Others are developed over time or in response to new information or events, allowing the agency to interpret its congressional mandate.

Agency Rulemaking. Most agency regulations go through a rulemaking procedure governed by the Administrative Procedure Act (APA), 5 U.S.C. ch. 5, which requires:

- public notice of a proposed rule,
- a period for receiving comments on the proposed rule, and
- issuance of a final rule, including responses to the comments received and explaining whether and how they were taken into account.

The record of this process includes the agency's justification for the rule and provides the basis for any subsequent judicial

Areas to Watch

- EPA proposed rule rescinding the Clean Power Plan for existing power plants;
- EPA greenhouse gas standards for new power plants;
- EPA/Army Corps of Engineers proposed rule repealing the Waters of the United States (WOTUS) Rule;
- EPA methane standards for the oil and gas industry;
- EPA rule on methane emissions from landfills;
- EPA Clean Water Act standards for toxic water discharges from power plants;
- EPA mercury air toxics standards;
- EPA 2015 ozone standard;
- EPA chemical safety rule;
- BLM rule governing hydraulic fracturing on public and tribal lands;
- Department of Interior rule governing valuation of fossil fuels on public lands;

review. **These "administrative records" can be voluminous, spanning several years and comprising thousands of pages,** from:

- initial scientific studies,
- to advisory committee deliberations and public hearings,
- to publication of the final rule.

Judicial Review. A final agency rule may be challenged in federal court on the grounds it is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). This standard sets a high bar, but does allow judges to intervene where an agency has, for example:

- failed to follow the notice-and-comment procedure,
- offered incomplete or inconsistent justifications for its action, or
- exceeded its statutory mandate.

Areas to Watch

- Federal Highway Administration rule on reporting greenhouse gas emissions from vehicles; and
- many other Obama Administration regulations in all sectors.

If the challenge is to an agency's interpretation of its governing statute, the court looks to the statutory language to determine Congress' intent; if the statute is silent or ambiguous, the court will accept any agency interpretation that is "reasonable." This so-called "***Chevron* deference"[4] has tended to favor EPA in environmental cases, where Congress often has not spoken with precision** and courts defer to the agency's scientific expertise.

Discussion.

Although they are produced by the executive branch, **agency rules cannot be undone by executive order or other presidential action.** Agencies remain governed by their statutory mandates, and must still follow the procedures established by the APA. Thus, while President Trump has directed EPA and other agencies to begin the process of reversing numerous existing regulations, they generally must go through another full rulemaking to do so; in the interim, some agencies have attempted to delay the rules' implementation.

Likewise, where an existing agency rule has been challenged in court, the Department of Justice may:

- seek to stay or delay its effect,
- decline to appeal an adverse ruling, or
- attempt to reach a settlement more favorable to industry.

Congress also may attempt to revoke specific rules or remove certain subject matter from an agency's jurisdiction. Each of these options is outlined below.

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4 *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Delaying Implementation of Final Rules. The Trump Administration has repeatedly employed the tactic of postponing implementation of Obama-era final rules, citing the need to "review" or "reconsider" them. Such delays are common at the beginning of a new administration, including blanket "freezes" of pending regulations government-wide; on Inauguration Day President Trump ordered a 60-day freeze of most agency rules "for the purpose of reviewing questions of fact, law, and policy they raise." But **repeated or indefinite delays raise legal questions about whether they constitute *de facto* suspension or repeal of a final rule in violation of the Administrative Procedure Act.**

For example, on April 20, 2017, EPA Administrator Scott Pruitt announced a 90-day delay in implementing a final rule governing methane emissions in the oil and gas industry, claiming that certain industry concerns were not taken into account during the original rulemaking process. Four days later, Department of Justice lawyers requested a stay in pending litigation challenging the rule, arguing that a new rule would be forthcoming. On July 3, a panel of the D.C. Circuit found that EPA had exceeded its authority in delaying the existing rule, and on August 1 the full court ordered the agency to begin implementing it. A similar court battle is being fought over the Bureau of Land Management's rule regulating methane from oil and gas operations on public lands, for which the Bureau announced an indefinite delay on June 15; the Bureau has also proposed a rulemaking to rescind the rule.

Reversing Rules Through Subsequent Rulemaking. In general**, final agency rules can only be amended or reversed through another rulemaking, including a notice-and-comment period** and development of a full administrative record. For the new rule to survive judicial review under the "arbitrary and capricious" standard, the record must provide a "reasoned explanation," beyond a mere change of presidential administration, of the basis for the revision.[5] **Key Obama Administration rules that relied on reams of scientific evidence and months of public procedure**, like the Clean Power Plan or WOTUS Rule (discussed below), **might require an equally laborious effort to undo**. It may prove even harder to vacate EPA's "endangerment finding," the scientific underpinning for the CPP and other climate measures, where the agency's analysis has been upheld in court.

Declining to Defend Agency Rules. **For rules facing litigation**, there is also a question of whether or **how vigorously the Department of Justice (DOJ) will defend the rules** in court. Representing federal agencies is a core part of DOJ's mission, but a change in administration presents the opportunity to:

- reevaluate litigation priorities,
- change tactics, and
- revise legal interpretations to bring them more in line with new policy goals.

For many pending challenges to Obama-era regulations—including to the Clean Power Plan and WOTUS Rule, both currently stayed—DOJ has petitioned courts to delay their briefing or decision schedules, pending agency efforts to reconsider, revise, or revoke the rules.

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5 *Encino Motorcars v. Navarro*, 136 S. Ct. 2117 (2016).

If a court reaches a decision invalidating (and vacating) all or part of an existing rule, **DOJ might decline to pursue an appeal, in which case the agency could rewrite the rule or drop it altogether**. DOJ also might opt to settle cases on terms at odds with some stakeholders' interests. To guard against these possibilities, environmental groups or state attorneys general have been seeking intervenor status in some cases, so they can participate in settlement discussions or maintain an appeal if DOJ fails to do so.

Congressional Revocation. Finally, **Congress retains the option to weigh in against an agency rule at any time.** This may take the form of legislation disapproving or revoking a specific rule (similar to the Congressional Review Act, see Chapter 3, but via regular congressional procedures); or a broader repeal of the agency's statutory authority to issue a rule. The success of such legislation may ultimately depend on the status of the Senate filibuster.

Examples.

Clean Power Plan. On March 28, 2017, the President signed Executive Order 13783 on "Promoting Energy Independence and Economic Growth." Among many other measures, Section 4 of **that Order directs EPA Administrator Pruitt to** begin proposing rules to **"suspend, revise, or rescind" the Clean Power Plan and related rules and guidance.** On April 4, EPA announced its review of the CPP, with the objective of initiating a new rulemaking proceeding "as soon as practicable and consistent with law." On June 9, it was reported that EPA had transmitted a proposed rule to the White House Office of Management and Budget for review.

EPA's proposal is not yet public, but it is widely presumed to offer either **a full repeal of the CPP on legal grounds, or a more limited replacement rule** that would confine federal regulation of greenhouse gases to improvements "inside the fence line" of existing electricity generating facilities, while rescinding the CPP's provisions encouraging development of new renewable energy capacity. In the meantime, the Administration has requested suspension of the pending litigation challenging the Clean Power Plan in the D.C. Circuit, and the court recently extended that suspension through October 8.

On the legislative front, the "Stopping EPA Overreach Act of 2017" (H.R. 637) introduced in the House of Representatives would completely **remove carbon dioxide and other greenhouse gases from EPA's Clean Air Act jurisdiction**, while expressly **disapproving the Clean Power Plan and the EPA methane standards for the oil and gas industry**. The bill also would prohibit any "regulation of climate change or global warming" under the CAA, Clean Water Act, NEPA, Endangered Species Act, or Solid Waste Disposal Act.

Waters of the United States (WOTUS) Rule. In 2015, EPA and the Army Corps of Engineers adopted a final rule defining the term "waters of the United States" for the Clean Water Act's regulatory programs governing discharge of pollutants, protection of water quality, and disposal of dredged material.

The rule was stayed by a federal district court in North Dakota and by the U.S. Court of Appeals for the Sixth Circuit, and the U.S. Supreme Court has agreed to determine what court has jurisdiction to review challenges brought by opponents of the rule.

On February 28, 2017, the President issued Executive Order 13778, directing the agencies to review the Obama-era rule and to **publish for notice and comment a proposed rule rescinding or revising it**. The Order directed the agencies in proposing a new rule to "consider interpreting the term 'navigable waters' ... in a manner consistent with" a restrictive plurality opinion of the late Justice Antonin Scalia.[6]

The Corps and EPA decided that taking on the massive re-evaluation of the record of the prior rulemaking and development of a detailed, scientifically justified replacement rule would be a lengthy process. Accordingly, they undertook a two-step approach.

On July 27, 2017, the agencies proposed a rule to repeal the Obama Administration rule and replace it with the rule and guidance that had been on the books prior to 2015. Because some rationale is needed for this action, they cited the uncertainty associated with the stays issued by the two courts, and also confusion that might result from potential action by the Supreme Court. They also argued that the 2015 rule did not give sufficient weight to the interests of states and tribes under Section 101(b) of the Clean Water Act "in guiding the choices the agencies make in setting the outer bounds of jurisdiction of the Act."

After a 60-day comment period, the agencies expect to re-adopt the old rule, which provided minimal guidance and itself had led to extensive litigation. Then they will **commence a lengthy rulemaking** in which they will consider the Scalia definition **which, if adopted, would limit the Clean Water Act's protection to continuously flowing navigable waters and immediately adjacent wetlands**. The agencies also would need to develop a detailed administrative record that includes scientific justifications for the new definitions. It is expected that litigation would ensue at each phase of the process.

Meanwhile in Congress, the "Stop WOTUS Act" (H.R. 1105) **would simply negate the 2015 WOTUS Rule and its protections for seasonal or isolated waters and wetlands**. Similarly, a proposed budget rider in the House Interior and Environment spending bill (see Chapter 10) would authorize the agencies to repeal the 2015 Rule without following the public comment or other requirements of the Administrative Procedure Act, the Clean Water Act, or other applicable laws and regulations.

Opportunities for Public Engagement.

Citizens or advocacy groups can:

- participate in public notice-and-comment procedures for replacement rules,
- bring litigation challenges to replacement rules or delays of existing rules, and
- seek to intervene in challenges to administrative rules brought by other parties.

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6 *Rapanos* v. *United States*, 547 U.S. 715 (2006).