

The EPA Administrator, Scott Pruitt, signed the following final rule on 1/31/2018, with signature by Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, on 1/30/2018. EPA is submitting it for publication in the *Federal Register* (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of public comment. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's FDsys website (<https://www.gpo.gov/fdsys/search/home.action>) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQ-OW-2017-0644. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-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-2017-0644; FRL-XXXX-XX-OW]

RIN 2040-AF80

Definition of “Waters of the United States” – Addition of an Applicability Date to 2015

Clean Water Rule

AGENCIES: Department of the Army, U.S. Army Corps of Engineers, Department of Defense; and Environmental Protection Agency (“EPA”).

ACTION: Final Rule.

SUMMARY: The Environmental Protection Agency and the Department of the Army (“the agencies”) are publishing a final rule adding an applicability date to the “Clean Water Rule: Definition of ‘Waters of the United States’” (80 FR 37054, June 29, 2015) (the “2015 Rule”) of [insert date 2 years after date of publication in the Federal Register]. On August 27, 2015,

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

the U.S. District Court for the District of North Dakota enjoined the applicability of the 2015 Rule in the 13 States challenging the 2015 Rule in that court. 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. On January 22, 2018, the Supreme Court held that the courts of appeals do not have original jurisdiction to review challenges to the 2015 Rule. With this final rule, the agencies intend to maintain the *status quo* by adding an applicability date to the 2015 Rule and thus providing continuity and regulatory certainty for regulated entities, the States and Tribes, and the public while the agencies continue to consider possible revisions to the 2015 Rule.

DATES: This rule is effective on [date of publication in the Federal Register].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OW-2017-0644. All documents in the docket are listed on the <http://www.regulations.gov> web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

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; e-mail address: *CWAwotus@epa.gov*; or Ms. Stacey Jensen, Regulatory Community of Practice (CECW-CO-R), U.S. Army Corps of Engineers, 441

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

G Street, NW, Washington, DC 20314; telephone number: (202) 761-5903; e-mail address:
USACE_CWA_Rule@usace.army.mil.

SUPPLEMENTARY INFORMATION:

The Environmental Protection Agency (“EPA”) and the Department of the Army (“Army”) (together “the agencies”) are publishing a final rule adding an applicability date to the “Clean Water Rule: Definition of ‘Waters of the United States’” (the “2015 Rule”) of [insert **date 2 years after date of publication in the Federal Register**]. The effective date of the 2015 Rule was August 28, 2015. On July 27, 2017, the agencies published a proposed rule to initiate the first step in a comprehensive, two-step process intended to review and revise, as appropriate and consistent with law, the definition of “waters of the United States,” after a review initiated in light of Executive Order 13778, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule” (Feb. 28, 2017). The first step in the process (“Step One”) proposed to rescind the definition of “waters of the United States” promulgated by the agencies in 2015 in the *Code of Federal Regulations* and revert to the previous definition of “waters of the United States” in place before the 2015 Rule, which defines the scope of the waters covered by the Clean Water Act (“CWA”). In a second step (“Step Two”), the agencies intend to pursue a public notice-and-comment rulemaking in which the agencies would conduct a substantive re-evaluation of the definition of “waters of the United States.”

The agencies have been implementing the previous definition of “waters of the United States” in place before the 2015 Rule as a result of a decision issued by the U.S. Court of Appeals for the Sixth Circuit staying the 2015 Rule nationwide and a decision by the U.S.

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

District Court for the District of North Dakota enjoining the 2015 Rule in 13 States. On January 22, 2018, the Supreme Court held that the courts of appeals do not have original jurisdiction to review challenges to the 2015 Rule. With this final rule adding an applicability date to the 2015 Rule, the agencies intend to provide clarity and certainty about the definition of “waters of the United States” for an interim period while they continue to work on the two-step rulemaking process.

The addition of the applicability date to the 2015 Rule of **[insert date 2 years after date of publication in the Federal Register]** under this final rule would provide that the scope of the CWA remains consistent nationwide and, for a defined, interim period, remains the same as it was prior to promulgation of the rule in 2015 and as it has been since the 2015 Rule was stayed nationwide on October 9, 2015. Furthermore, this rule is necessary in light of the Supreme Court’s decision that the courts of appeals do not have original jurisdiction to review challenges to the 2015 Rule and remand of the case with instructions to the Sixth Circuit to dismiss the petitions for review for lack of jurisdiction, which will directly impact the Sixth Circuit’s existing nationwide stay of the 2015 Rule. This final rule adding an applicability date to the 2015 Rule maintains the legal *status quo* and thus provides continuity and certainty for regulated entities, the States and Tribes, agency staff, and the public. Subject to further action by the agencies, until the applicability date of the 2015 Rule, the agencies will administer the regulations in place prior to the 2015 Rule, and will continue to interpret the statutory term “waters of the United States” to mean the waters covered by those regulations, as they are currently being implemented, consistent with Supreme Court decisions and practice, and as informed by applicable agency guidance documents.

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

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 this final rule. This final rule does not establish any new regulatory requirements. Rather, this rule adds an applicability date to the 2015 Rule and, as a result, leaves in place the current legal *status quo* nationwide while the agencies continue to engage in substantive rulemaking to reconsider the definition of “waters of the United States.”

I. Background and Discussion of Addition of Applicability Date

A. What this final rule does

In 2015, the agencies published the “Clean Water Rule: Definition of ‘Waters of the United States’” (80 FR 37054, June 29, 2015). The 2015 Rule had an effective date of August 28, 2015. On August 27, 2015, the U.S. District Court for the District of North Dakota enjoined the applicability of the 2015 Rule in the 13 States challenging the 2015 Rule in that court, 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. On November 22, 2017, the agencies proposed to add an applicability date of two years from the date of final action on the proposal. The effective date of the 2015 Rule was established by a document published by the agencies in the *Federal Register* (80 FR 37054, June 29, 2015). The *Code of Federal Regulations* text does not include an applicability date; therefore, after consideration of public comment, the agencies are amending the text of the *Code of Federal Regulations* to add an applicability date. Subject to further action by the agencies, until the applicability date of the 2015 Rule, the agencies will administer the regulations in place prior to the 2015 Rule, and will continue to interpret the statutory term “waters of the United States” to mean the waters covered by those regulations, as they are currently being implemented, consistent with Supreme Court decisions and practice, and

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

as informed by applicable agency guidance documents, as the agencies have been operating pursuant to the Sixth Circuit’s October 9, 2015, order. Thus, this final rule allows the current legal *status quo* to remain in place nationwide.

B. History and the purpose of this rulemaking

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 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 regulations defining the “waters of the United States” currently applicable 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 of the term “waters of the United States” (51 FR 41206, Nov. 13, 1986, amending 33 CFR 328.3; 53 FR 20764, June 6, 1988, amending 40 CFR 232.2).

In 2015, the agencies published a final rule defining “waters of the United States” (80 FR 37054). Thirty-one States and 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 for the 2015 Rule. One district court issued an order granting a motion for preliminary injunction one day prior to the rule’s effective date that applies to the 13 plaintiff States in that case, *State of*

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

North Dakota et al. v. U.S. EPA, No. 15-00059, slip op. at 1-2 (D.N.D. Aug. 27, 2015, as clarified by order issued on September 4, 2015), and 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. & U.S. Envtl. Prot. Agency Final Rule: Clean Water Rule*, No. 15-3751 (lead), slip op. at 6. Consistent with the Sixth Circuit’s order, the agencies are applying the definition of “waters of the United States” that preceded the 2015 Rule nationwide. 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 October 11, 2017, the Supreme Court held oral argument, and on January 22, 2018, the Supreme Court held that the courts of appeals lacked original jurisdiction to review challenges to the 2015 Rule.

Separate from today’s final rule, the agencies are engaged in a two-step process intended to review and revise, as appropriate and consistent with law, the definition of “waters of the United States.” This process began in response to an Executive Order issued on February 28, 2017 by the President 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.” The Executive Order directed the EPA and the Army to review the 2015 Rule for consistency with the policy outlined in section 1 of the Order, and to issue a proposed rule rescinding or revising the 2015

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Rule as appropriate and consistent with law (Section 2). The Executive Order also directed the agencies to “consider interpreting the term ‘navigable waters’ . . . in a manner consistent with” Justice Scalia’s plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) (Section 3).

On July 27, 2017, the agencies proposed the Step One rule to rescind the 2015 Rule and replace it with the regulatory text that governed prior to the promulgation of the 2015 Rule (82 FR 34899), as informed by applicable guidance documents and consistent with Supreme Court decisions and agency practice and which the agencies are currently implementing consistent with the court stay of the 2015 Rule. The agencies are reviewing and considering the large volume of public comments that they received on the Step One proposal.

C. Today’s final rule

This final rule adds an applicability date to the 2015 Rule such that it will not be implemented until [insert date 2 years after date of publication in the Federal Register]. Until the applicability date of the 2015 Rule and subject to further action by the agencies, the agencies will continue to implement nationwide the previous regulatory definition of “waters of the United States,” and will continue to interpret the statutory term “waters of the United States” to mean the waters covered by those regulations, as they are currently being implemented, consistent with Supreme Court decisions and practice, and as informed by applicable agency guidance documents (the 2003 and 2008 guidance documents¹) as the agencies have been operating pursuant to the Sixth Circuit’s October 9, 2015, order and the North Dakota district court’s injunction. The previous regulatory definitions the agencies will continue to implement,

¹ Joint Memorandum providing clarifying guidance regarding the Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (“SWANCC”), available at 68 FR 1991, 1995 (Jan. 15, 2003) and Joint Memorandum, “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*,” (signed December 2, 2008), available at https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

as informed by the 2003 and 2008 guidance documents, are the EPA and the Corps separate regulations defining the statutory term “waters of the United States,” which are interpreted identically and have remained largely unchanged since 1977 (see 42 Fed. Reg. 37,122, 37,124, 37,127 (July 19, 1977)). During the 1980s, both of these agencies adopted definitions substantially similar to those in the 1977 regulations (51 FR 41206, Nov. 13, 1986, amending 33 CFR 328.3; 53 FR 20764, June 6, 1988, amending 40 CFR 232.2).² The scope of CWA jurisdiction is an issue of national importance, and therefore, the agencies will endeavor to provide for robust deliberations and public engagement as they re-evaluate the definition of “waters of the United States.” While engaging in such deliberations, however, the agencies recognize the need to provide clarity, certainty, and consistency nationwide. The pre-2015 Rule regulatory regime is applicable today as a result of the Sixth Circuit’s stay and the District of North Dakota’s preliminary injunction of the 2015 Rule. The stay and the preliminary injunction provided some level of certainty and stability for the public while issues regarding the 2015 Rule were reviewed by the courts and are now being re-evaluated by the agencies.

The Supreme Court’s decision that the courts of appeals do not have original jurisdiction to review challenges to the 2015 Rule and remand of the case with instructions to the Sixth Circuit to dismiss the petitions for review for lack of jurisdiction will directly impact the Sixth Circuit’s stay of the 2015 Rule. As noted previously, prior to the Sixth Circuit’s stay order, the U.S. District Court for the District of North Dakota preliminarily enjoined the 2015 Rule in the States that are parties in that litigation (North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, South Dakota, and Wyoming.³)

² In 1993, the agencies added an exclusion for prior converted cropland to the definition of “waters of the United States” (58 FR 45008, August 25, 1993).

³ The agencies note that Iowa’s motion to intervene in the case was granted after issuance of the preliminary injunction.

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Therefore, when the Sixth Circuit’s nationwide stay expires, the 2015 Rule would be enjoined under the District of North Dakota’s 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 action or rulemaking by the agencies. In addition, many other district court cases on the 2015 Rule are pending, including several in which challengers have filed motions for preliminary injunctions. Litigation of these cases, which involve different parties in different courts, may lead to judicial orders affecting the applicability of the 2015 Rule. The agencies have concluded that all of these actions are likely to lead to uncertainty and confusion as to the regulatory regime applicable, and to inconsistencies between the regulatory regimes applicable in different States, pending further rulemaking by the agencies. Having different regulatory regimes in effect throughout the country would be complicated and inefficient for both the public and the agencies.

This final rule establishes a framework for an interim period of time that avoids these inconsistencies, uncertainty, and confusion, pending further rulemaking action by the agencies. The rule ensures that, during an interim period, the scope of CWA jurisdiction will be administered nationwide exactly as it is now being administered by the agencies, and as it was administered prior to the promulgation of the 2015 Rule.

In addition, the agencies are finalizing an applicability date of **[insert date 2 years after date of publication in the Federal Register]** in order to ensure the implementation of a consistent nationwide framework while the agencies continue work on the regulatory process for reconsidering the definition of “waters of the United States.” The agencies are undertaking an extensive outreach effort to gather information and recommendations from States and Tribes, regulated entities, and the public. The scope of the Clean Water Act is of great national interest, and there were more than 680,000 public comments submitted to the agencies on the Step One

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

proposal and approximately 6,400 recommendations submitted in response to the agencies' outreach efforts in 2017. The agencies continue to work as expeditiously as possible on the two-step rulemaking process. Addition of an applicability date to the 2015 Rule will result in additional clarity and predictability and will ensure the application of a consistent interpretation and definition of "waters of the United States" nationwide during the pendency of these rulemaking efforts.

The agencies recognize that this action may be confused with the Step One and Step Two rulemaking efforts. But to be clear, the agencies' Step One proposed rule and any future Step Two actions are separate from today's final rule. The comment period for the Step One proposed rule addressing the rescission of the 2015 Rule closed on September 27, 2017, and the agencies are considering those comments. In addition, the agencies are developing the Step Two proposal addressing potential substantive changes to the definition of the term "waters of the United States." The agencies today are finalizing this targeted rule to ensure regulatory certainty and consistent implementation of the CWA nationwide while the agencies work on the Step One and Step Two regulatory actions.

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-2017-0644. 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.

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

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?

The agencies have determined that there are no economic costs and unquantifiable benefits associated with this action. For purposes of considering potential economic impacts of this final rule, the agencies believe it is reasonable and appropriate in light of the ongoing, complex litigation over the 2015 Rule to use the legal *status quo* as a baseline. This final rule has the effect of providing the public with regulatory certainty while the agencies pursue a substantive rulemaking process. This final rule eliminates a source of uncertainty for the regulated community as they consider investments. While the agencies recognize that there are

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

likely to be benefits associated with the regulatory certainty provided by this final rule, we are unable to quantify those benefits for purposes of considering potential economic impacts of this final rule. The agencies have prepared a memorandum to the record to provide the public with information about this conclusion with respect to the potential economic impacts associated with this action. A copy of the memorandum is available in the docket for this action.

D. What is the effective date?

This final rule is effective immediately upon publication. Section 553(d) of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553(d), provides that final rules shall not become effective until 30 days after publication in the *Federal Register*, “except . . . as otherwise provided by the agency for good cause,” among other exceptions. The purpose of this provision is to “give affected parties a reasonable time to adjust their behavior before the final rule takes effect.” *Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996); *see also United States v. Gavrilovic*, 551 F.2d 1099, 1104 (8th Cir. 1977) (quoting legislative history). Thus, in determining whether good cause exists to waive the 30-day delay, an agency should “balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of its ruling.” *Gavrilovic*, 551 F.2d at 1105.

This final rule will not require affected persons to take action or change behavior to come into compliance, as the rule does not establish any new regulatory requirements. Rather, this rule has the effect of maintaining the legal *status quo* that has been in place since the Sixth Circuit’s nationwide stay of the 2015 Rule and before the promulgation of the 2015 Rule. In addition, the agencies find that there is an immediate need for this rule to go into effect as soon as possible to provide regulatory certainty, as the Supreme Court has ruled that the Sixth Circuit did not have

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

original jurisdiction over the 2015 Rule. *See Gavrilovic*, 551 F.2d at 1104 (recognizing “urgency of conditions” along with “demonstrated and unavoidable limitations of time” as legitimate grounds for a section 553(d)(3) good cause finding). As discussed herein, the Supreme Court’s decision will indirectly impact the existing regulatory framework and likely will result in inconsistent nationwide application of the scope of the CWA unless this final rule becomes effective upon publication. By effectuating this rule immediately, the agencies seek to avoid the nationwide inconsistencies, uncertainty, and confusion that would result from the application of different definitions of “waters of the United States” in different States at different times. *Cf. Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1486 (9th Cir. 1992) (finding good cause where the 30-day delay would “throw[] the entire regulatory program out of kilter”). For these reasons, the agencies find that good cause exists under section 553(d)(3) to make this rule effective immediately upon publication.

III. Public Comments

The agencies received approximately 4,600 public comments on the proposed rule. The agencies have carefully considered those comments.

Some commenters expressed confusion that the pre-publication version of the proposed rule was titled an amendment to the “effective date” of the 2015 Rule, while the *Federal Register* notice was titled an amendment to the “applicability date” of the 2015 Rule. Other commenters requested clarification of the use of the term “applicability date” in the rule. In accordance with the Document Drafting Handbook of the Office of the Federal Register, the term “effective date” is a term of art used exclusively to mean the date that the Office of Federal Register amends the *Code of Federal Regulations* by following the amendatory instructions in an agency’s final rule. “Document Drafting Handbook,” Office of the Federal Register (Revision 5, dated October 2,

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

2017) at 3-8. Thus the “effective date” of the 2015 Rule for purposes of the Office of the Federal Register was August 28, 2015, the date the Office of the Federal Register amended the *Code of Federal Regulations*. The agencies are not changing that “effective date.” However, with this rule, the agencies are making a targeted change to the text of the 2015 Rule in the *Code of Federal Regulations* by adding an applicability date, which establishes a new date on which the 2015 Rule would apply for purposes of implementation and enforcement of the Clean Water Act, subject to a future rulemaking action taken by the agencies. Those commenters further expressed confusion as to what the impact of the new applicability date would be, in particular on existing permits and ongoing and new requests for jurisdictional determinations. If the new applicability date is reached without further final action by the agencies, the agencies explained in the preamble to the 2015 Rule how they will proceed with respect to existing and new permits and jurisdictional determinations when a changed definition of “waters of the United States” becomes effective, in terms of both the Office of the Federal Register and legal requirements (80 FR at 37073-74).

Commenters in support of this rulemaking to establish an applicability date asserted that the agencies have the discretion to postpone implementation of regulations that have gone into effect where the agencies are in the process of revising a rule, and that the agencies have discretion to establish an applicability date that differs from an effective date. Commenters opposed to the proposed rule stated that the agencies lack statutory authority to postpone the effective date of a rule after its effective date has passed. The agencies disagree that they lack statutory authority to add an applicability date to the 2015 Rule; the agencies’ statutory authority flows from their discretionary authority under the Clean Water Act to define “waters of the United States.” Nothing in the Clean Water Act requires the agencies to promulgate a regulatory

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

definition of “waters of the United States,” and, further, nothing in the Clean Water Act requires that any such definition be in effect, or applicable, by a certain time after promulgation.

Congress is very clear in the Clean Water Act when it requires EPA to promulgate a particular rule and when it requires a rule to be in effect by a specific time after promulgation. For example, under Section 304(b) of the Act, EPA must promulgate and revise, if appropriate, effluent limitations guidelines. Once those regulations are promulgated, Section 301(b) of the Act requires compliance with those effluent limitations guidelines no later than three years after they are established. In contrast, here, the agencies could have promulgated the same rule in 2015 with an applicability date any number of years in the future. That the agencies chose not to exercise their authority to do so at that time does not divest the agencies of such authority now. Exercise of that authority must be reasonable under the APA, and here the agencies have explained that it is reasonable to change the applicability date of a rule that is currently stayed nationwide by court order, and that was in effect for a short time and only in part of the country.

Some commenters stated that the agencies lack authority under Section 705 of the Administrative Procedure Act, which provides that when an agency finds that justice requires, it may postpone the effective date of an action pending judicial review. The agencies are not utilizing Section 705 in this final rule. For purposes of this final rule, the agencies decided to use their rulemaking authority to provide the public with notice and opportunity to comment through the normal rulemaking process, if on a somewhat shortened timeframe.

Adding an applicability date does not upset the ongoing implementation of the Clean Water Act and the programs governed by the definition of “waters of the United States” because those programs will continue to be implemented as they have been under the nationwide stay and before the promulgation of the 2015 Rule—indeed as they have been for more than a decade

since the *Rapanos* decision. Further, the agencies have reasonably exercised their authority by promulgating a specific end date, rather than an open-ended suspension of the 2015 Rule.

Commenters in support of the addition of an applicability date noted that the rule will help maintain the status quo and thus provide continuity and regulatory certainty throughout the litigation over the 2015 Rule and the agencies' subsequent rulemaking. One commenter asserted that such clarity would be needed to make investment decisions regarding infrastructure and energy projects. Commenters also stated the view that the extension would preserve the *status quo* and eliminate inconsistencies in the regulatory framework. For example, one commenter suggested that this rule will allow “[f]armers, ranchers, and foresters” to “operate on a level playing field” by removing the potential for the same activities in different States to be subject to different rules. Several commenters representing industry and the regulated community also noted that the rulemaking process could take “years” and indicated that adding an applicability date to the 2015 Rule would reduce uncertainty.

Commenters opposed to the rule asserted that delaying the 2015 Rule will increase regulatory uncertainty because the pre-2015 regulatory regime was confusing and required case-by-case jurisdictional determinations. Further, commenters stated that the agencies cannot “suspend” a rule on the basis that it may be stayed in some parts of the country but not others, or because the agencies may revise the rule. After consideration of these comments, the agencies disagree that the final rule will increase regulatory uncertainty and have concluded that the final rule will increase regulatory certainty. First, the 2015 Rule noted the extensive experience of the agencies in making jurisdictional determinations. Since the *Rapanos* decision, the agencies, most often the U.S. Army Corps of Engineers, have made more than 400,000 CWA jurisdictional determinations (80 FR 37065). This experience, and the agencies' interpretation and

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

implementation of the scope of “waters of the United States” for more than a decade since the *Rapanos* decision, provides the certainty that the Sixth Circuit sought when it stayed the rule in order to maintain the *status quo*. Further, in determining whether the agencies have reasonably concluded that this rule will provide regulatory certainty across the nation, the proper comparison is not to a regulatory regime that never existed—nationwide implementation of the 2015 Rule—but rather to the uncertainty that the agencies have identified as a reasonable concern: different definitions of “waters of the United States” enjoined or stayed in various judicial districts, States, or groups of States such that the scope of the Clean Water Act varies depending upon where a discharge may occur. The final rule is designed to address that uncertainty by maintaining the *status quo* for both the public and the State and federal agencies which implement the Clean Water Act. Further, this final rule provides additional certainty because it maintains the *status quo* for a set period of time, rather than an uncertain one based on the actions by parties and judges in various cases.

Commenters also claimed that this rule establishing an applicability date would result in a regulatory gap because the prior regulatory regime was repealed in 2015 and the new regulatory regime would not apply for another two years. Upon consideration of these comments, the agencies have concluded that there will not be a regulatory gap. As a threshold matter, the text of the rule that was modified by the 2015 Rule is still being applied by the agencies today. The 2015 Rule never went into effect in Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, North Dakota, Nebraska, New Mexico, Nevada, South Dakota, and Wyoming, and was only briefly in effect in the remainder of the country until the Sixth Circuit issued its nationwide stay. That order stayed implementation of the 2015 Rule. Furthermore, the agencies clearly explained in the preamble to the proposed rule that, until the new applicability date or a

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

subsequent rulemaking action by the agencies, the agencies will continue to implement the prior regulatory definitions, informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice, as the agencies have been operating pursuant to the Sixth Circuit’s October 9, 2015 stay order.

Additionally, the statutory regime remains in place and, until the new applicability date or a subsequent rulemaking action by the agencies, the agencies will continue to interpret the statutory provision “[t]he term ‘navigable waters’ means the waters of the United States, including the territorial seas,” CWA Section 502(7), to mean the waters identified by the prior regulatory definitions, informed by applicable agency guidance documents and consistent with Supreme Court decisions and agency practice. Therefore, during this interim time period the agencies will continue to interpret and implement the Clean Water Act as they have been, informed by pre-2015 Rule definitions and applicable agency guidance documents, and consistent with Supreme Court decisions and longstanding agency practice. The hundreds of thousands of jurisdictional determinations issued primarily by the Corps and the enforcement actions taken by the agencies provide further interpretations of the geographic scope of the Clean Water Act and further basis for the agencies’ conclusion that the addition of an applicability date is a reasonable means of maintaining the *status quo*. The agencies’ longstanding interpretation and implementation of the Clean Water Act since *Rapanos* means that there will not be a gap, nor will it be unclear to the public or the regulated community as to how the agencies intend to continue to implement the Act.

Commenters opposed to the proposed rule stated that postponing the effective date of a rule is tantamount to repeal, and therefore, must proceed through proper rulemaking procedures, including examining the scientific basis of the 2015 Rule and the alternatives, costs and benefits

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

of the delay. Therefore, they claim that the agencies have failed to address certain issues, including: the scientific record supporting the 2015 Rule; the inadequacies of the pre-existing regulatory regime that the 2015 Rule discussed, including the confusion and case-by-case litigation resulting from *SWANCC* and *Rapanos*; and why a desire for certainty outweighs the CWA's objectives. Addition of a new applicability date to a rule is not tantamount to a repeal of a rule. Repeal would mean the text of the regulation would no longer exist in the *Code of Federal Regulations*, and that is not what this final rule does; instead, it adds text to the 2015 Rule. As the Supreme Court noted about the November 2017 proposed rule: "That proposed rule does not purport to rescind the WOTUS Rule; it simply delays the WOTUS Rule's effective date." *National Ass'n of Manufacturers v. Dep't of Defense, et al.*, 16-299 (2018) at n.5. Because this final rule has been promulgated through proper rulemaking procedures and simply maintains the *status quo* for an interim period, and does not repeal or replace the 2015 Rule, the agencies are under no obligation to address the merits of the 2015 Rule because the addition of an applicability date to the 2015 Rule does not implicate the merits of that rule. In addition, , the agencies believe that the certainty of continued implementation of the agencies' longstanding interpretation of the Clean Water Act for an interim period is not inconsistent with the Clean Water Act's objectives and is not the product of an improper balancing of applicable factors.

The agencies received a number of comments about the length of the comment period. Commenters claimed that a 21-day comment period was insufficient time to adequately respond to the notice of proposed rulemaking, in part because the comment period coincided with the Thanksgiving holiday. Several commenters noted that Executive Order 12866 suggests a 60-day comment period, while other commenters suggested a 30-day minimum. Additionally, some commenters contrasted the 21-day comment period with the 60-day comment period provided

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

for the Step One proposed rule and the six-month comment period provided for the proposed 2015 Rule. The agencies also received requests to extend the comment period.

The APA does not specify a minimum number of days for accepting comment. Rather, agencies must provide the public with a “meaningful opportunity” to comment on a proposed rule. *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009). Though the length of the comment period is a factor in determining whether the public was afforded a “meaningful opportunity” to comment, courts have upheld comment periods of less than 30 days where, for example, the agency was acting under exigent circumstances. *See, e.g., Omnipoint Corp. v. FCC*, 78 F.3d 620, 629–30 (D.C. Cir. 1996) (upholding 15-day comment period where there was “urgent necessity for rapid administrative action under the circumstances” and the public was not harmed).

Here, the agencies received more than 4,600 comments. Commenters provided a thoughtful analysis of issues relevant to the agencies’ proposed rule, including the agencies’ legal rationale and authority for adding an applicability date, the factors related to the economic analysis, and the timeframe for the delay. Although the agencies provided longer comment periods for the Step One proposed rule and the proposed 2015 Rule, a shorter comment period for this rule was warranted given the need to proceed expeditiously. Indeed, the Supreme Court issued a decision on the question of original jurisdiction over challenges to the 2015 Rule on January 22, 2018, demonstrating that there was an urgent need to establish a clear regulatory framework to avoid the possible inconsistencies, uncertainty, and confusion that could result from the effects of the Court’s ruling. Further, the length of the comment period was appropriate for the scope of this rulemaking, which is a narrowly tailored action adding an applicability date to the 2015 Rule.

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Several commenters suggested that the agencies have not approached this rulemaking with an open mind, thus violating the APA and the commenters' due process rights. These commenters also cited to specific examples of Administrator Pruitt's remarks and appearances, including the Administrator's involvement in litigation against the 2015 Rule, as potential evidence that the Administrator has an "unalterably closed mind" and should be disqualified from participating in this rulemaking. *See Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979).

To satisfy the APA's notice and comment requirements, agencies must provide a "meaningful opportunity" for comment and "remain sufficiently open minded." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009). An agency demonstrates the requisite open mind where it engages in a thoughtful review and consideration of comments, as the agencies have done here. *See Mortgage Inv'rs Corp. v. Gober*, 220 F.3d 1375, 1378–79 (Fed. Cir. 2000). Further, an agency's failure to revise or change a rule in response to comments is not indicative of a closed mind. *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292-93 (D.C. Cir. 1994).

Moreover, Administrator Pruitt is not disqualified from this rulemaking. An administrator is "presumed to be objective and 'capable of judging a particular controversy fairly on the basis of its own circumstances.'" *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980). This presumption is not overcome where an administrator has "taken a public position," "expressed strong views," or held "an underlying philosophy with respect to an issue." *Id.* Indeed, "[t]he legitimate functions of a policymaker . . . demand an interchange and discussion about important issues." 627 F.2d at 1168. For this reason, "discussion of policy or advocacy on a legal question . . . is not sufficient to disqualify an administrator" in the

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

rulemaking context. *Id.* at 1171; *see also id.* at 1174 (“We would eviscerate the proper evolution of policymaking were we to disqualify every administrator who has opinions on the correct course of his agency’s future action.”). Here, neither Administrator Pruitt’s statements nor his participation in earlier proceedings related to the 2015 Rule require his recusal. *See* 647 F.2d at 1208–09. Contrary to some commenters’ suggestions, Administrator Pruitt has expressed support for broad public comment to help the agencies make an informed decision.

One commenter alleged that documents released pursuant to a Freedom of Information Act request suggest that the purpose of the proposed rule is to prevent implementation of and facilitate the repeal of the 2015 Rule due to a substantive disagreement with that rule. The commenter further asserts that the agencies’ failure to solicit comment on the rule’s “true” rationale violates the APA by depriving the public of an opportunity to comment on this issue. Other commenters suggested the purpose of this rule is to avoid judicial review of the 2015 Rule.

Consistent with the APA, agencies must provide sufficient information in a notice of proposed rulemaking such that the public has the opportunity to meaningfully comment on the basis of a proposed rule. *See Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393–94 & n.67 (D.C. Cir. 1973). As discussed herein, the agencies’ rationale for this rule is to provide for regulatory certainty and to maintain the legal *status quo* nationwide. By giving the public an opportunity to comment on this rationale, the agencies have satisfied this obligation under the APA. *See also Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 143 (D.D.C. 2002) (“Judicial review of agency action should be based on an agency’s stated justifications, not the predecisional process that led up to the final, articulated decision.”). While the agencies are indeed undertaking rulemaking that could rescind and replace the 2015 Rule, those separate

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

rulemaking efforts do not change the scope and nature of this action, which is simply an effort to provide implementation certainty for a limited period of time.

With respect to the time period of this rule, the agencies proposed establishing an applicability date for the 2015 Rule of two years after a final rule and sought comment on whether the time period should be shorter or longer, and on whether adding the applicability date contributes to regulatory certainty. Relatively few commenters directly addressed whether the timeframe for extending the applicability date was the appropriate length of time.

Of those commenters opposed to the proposed addition of an applicability date, none directly addressed whether the proposed two-year timeframe was appropriate or proposed an alternate timeframe. A number of commenters opposed the extension generally, citing concerns that the delay would result in harm to the environment by not protecting certain categories of waters. One noted that “two years of compromised protection for our nation’s waters is not a ‘relatively short period of time,’” but did not suggest an alternative. Some commenters called the two-year period “arbitrary,” but did not suggest an alternative.

Of those commenters who supported the proposal to delay implementation of the 2015 Rule, most appeared to directly or indirectly support the proposed two-year timeframe. A number of commenters referred to the need for adequate time to complete rulemaking. One commenter noted that the two-year timeframe was “appropriately tailored to provide a reasonable length of time for the Agencies to undertake this rulemaking to define the geographic scope of WOTUS in a manner that is true to the Clean Water Act (“CWA”), Constitution, and Supreme Court precedent, and that shows proper deference to the States.” Another commenter noted that the two-year extension would provide sufficient time to “carefully and thoroughly” develop “workable, legally defensible regulations.” A commenter further noted that the

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

extension would provide the time for both the agencies and the regulated community to devote their limited resources to engage in the second step of the rulemaking process to develop a new definition of “waters of the United States.”

Two commenters supported the idea of a delayed applicability date but noted that two years might not be sufficient to fully complete the “regulatory process for reconsidering the definition of ‘waters of the United States.’” These two commenters recommended an applicability date delayed by three years. Another commenter also noted that two years would be insufficient and as a result recommended that the applicability date for the 2015 Rule be extended indefinitely.

The agencies prepared a memorandum to the record for the proposed rule to provide the public with information about the activities envisioned in support of a comprehensive rulemaking process. The agencies selected the two-year time period as a reasonable time period within which to finalize a rule with a new definition of “waters of the United States.” Indeed, one commenter noted, “The Memorandum for the Record details the tasks and timeline to develop a final rule and supporting documents, including critical stakeholder outreach. . . . The Proposal is narrowly tailored to this timeline.”

Based on the information in the memorandum to the record, as explained in the proposal, and as supported by most comments responding to direct questions about the appropriate timeframe, the agencies conclude that the two-year timeframe is reasonable.

Commenters also stated that the Administrator failed to undergo an ethics review in accordance with procedures set out in 5 C.F.R. 2635.502 (“the impartiality rules”). EPA clarifies that the impartiality regulations in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, Subpart E, set forth provisions to ensure that employees

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

take appropriate steps to avoid a loss of impartiality in the performance of their official duties.

To be clear, the regulation at 5 C.F.R. § 2635.502(a) applies primarily to particular matters involving specific parties. While the impartiality regulation may possibly apply to a broader category of particular matters, that occurs only in the most unusual circumstances. As set forth in a legal advisory from the Office of Government Ethics, “the impartiality rule generally focuses on particular matters involving specific parties . . . [and] rulemaking would not, except in unusual circumstances covered under section 502(a)(2), raise an issue under section 502(a).” *See* Office of Government Ethics Legal Advisory, DO-06-029, “‘Particular Matter Involving Specific Parties,’ ‘Particular Matter,’ and ‘Matter,’” (Oct. 4, 2006), n. 10. With respect to the proposed rule, EPA notes that the impartiality rules do not apply at all because the proposed rulemaking is not even a “particular matter” within the meaning of the federal ethics rules. For purposes of the ethics rules, particular matters are focused on a discrete and identifiable class of persons such as a particular industry or profession, or involve specific parties, such as a contract or grant. In contrast, this rulemaking affects a large and diverse group of persons and applies across many sectors of the economy. While the rulemaking may be classified as a “matter,” it is not a particular matter. Since this rulemaking does not fall within the definition of a particular matter, the impartiality rules do not apply.

Commenters have stated that this rule is subject to the requirements of National Environmental Policy Act (“NEPA”). It is not; generally speaking, the Clean Water Act exempts actions of the EPA Administrator from NEPA obligations. 33 U.S.C. § 1371(c)(1) (With two exceptions not relevant here, “no action of the [EPA] Administrator taken pursuant to [the CWA] shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA].”). As the Senate Conference Report advised: “If

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

the actions of the Administrator under [the CWA] were subject to the requirements of NEPA, administration of the Act would be greatly impeded.” S. Conf. Rep. No. 92-1236, as reprinted in 1972 U.S.C.C.A.N. 3776, 3827.

The statutory exemption applies here despite the fact that EPA is promulgating this rule jointly with the Army. Nothing in the CWA’s exemption from NEPA limits it to actions taken by EPA alone. *See, e.g., Murray Energy Corp. v. U.S. Dep’t of Def.*, 817 F.3d 261, 273 (6th Cir. 2016) (“That the Clean Water Rule was promulgated jointly by the EPA Administrator and the Secretary of the Army does not defeat the fact that it represents action, in substantial part, of the Administrator.”); *see also Municipality of Anchorage v. United States*, 980 F.2d 1320, 1328-29 (9th Cir. 1992) (holding that an action “does not cease to be ‘action of the Administrator’ merely because it was adopted and negotiated in conjunction with the Secretary of the Army and the Corps”). The *Municipality* court found that a Memorandum of Agreement between EPA and the Corps providing guidance for administration of the section 404 permitting program was exempt from NEPA under section 1371(c). 980 F.2d at 1329. This rule adds an applicability date to a rule that concerns the jurisdictional scope of the entire Act, implicating the many CWA programs administrated only by EPA (EPA shares its CWA authority with the Army only with respect to section 404, 33 U.S.C. § 1344). EPA has the ultimate authority to determine the scope of CWA jurisdiction, see Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Opp. Att’y Gen. 197 (1979), and the rule is an “action of the Administrator.” *In re Dep’t of Def.*, 817 F.3d at 273.

Many tribal commenters objected to EPA and the Army not consulting with Tribes pursuant to Executive Order 13175 on this rulemaking. Several Tribes commented that the trust relationship between Tribes and EPA obligates EPA to conduct meaningful government-to-

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

government consultation with Tribes on EPA actions that will directly affect Tribes, and EPA did not do so for this proposed action. Some tribal commenters characterize “meaningful government-to-government” consultation as in-person meetings between federal and tribal government leaders, and not webinars or phone calls. Tribal commenters noted potential impacts of postponing the 2015 Rule’s applicability date, including causing increased uncertainty for protections of culturally significant plants, animals, and waters.

. Because this current rule does not change the legal *status quo* that has been in effect for many years (but rather reinforces it), it has no tribal implications as described in Executive Order 13175, and the Executive Order does not apply to this final action. As noted elsewhere, the agencies have engaged in, and continue to engage in, consultation with Tribes on the consideration of substantive revisions to the “waters of the United States” definition.

A few commenters stated that the agencies should have engaged in federalism consultation with the States pursuant to Executive Order 13132. Because this rule merely reinforces the legal framework that has been in place under the statute for many years, 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. As noted elsewhere, the agencies have engaged in, and continue to engage in, consultation with States and local governments on consideration of substantive revisions to the “waters of the United States” definition.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review; and, Executive Order 13563:

Improving Regulation and Regulatory Review

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

This action is a significant regulatory action under Executive Order 12866 so it was submitted to the Office of Management and Budget (“OMB”) for review. Any changes made in response to OMB review have been documented in the docket.

In addition, the agencies prepared a memorandum to the record regarding analysis of the potential economic impacts associated with this action. The agencies have determined that there are no costs and unquantifiable benefits associated with this action. This action simply adds an applicability date to the 2015 Rule, which has been stayed nationwide, and the legal *status quo* continues to remain in place. A copy of the memorandum is available in the docket for this action.

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

This action is not an Executive Order 13771 regulatory action.

C. Paperwork Reduction Act (“PRA”)

This rule does not involve any information collection activities subject to the PRA, 44 U.S.C. §§ 3501 *et seq.*

D. Regulatory Flexibility Act (“RFA”)

We certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This action simply adds an applicability date to the 2015 Rule, which has been the subject of a nationwide stay, keeping the legal *status quo* in place. We have therefore concluded that this action will not have a significant impact on small entities. This

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

analysis is contained in a memorandum to the record, which is available in the docket for this action.

E. Unfunded Mandates Reform Act (“UMRA”)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. §§ 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any State, local or tribal governments or the private sector. The definition of “waters of the United States” applies broadly to all CWA programs.

F. Executive Order 13132: Federalism

This action does not have federalism implications, as this action is limited to adding an applicability date to the 2015 Rule. It therefore 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. This action simply adds an applicability date to the 2015 Rule, which has been stayed nationwide, and the legal *status quo* continues to remain in place. Thus, Executive Order 13132 does not apply to this action.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have Tribal implications, as specified in Executive Order 13175. This action simply adds an applicability date to the 2015 Rule, which has been stayed nationwide, and the legal *status quo* continues to remain in place. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

The agencies interpret Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the agencies have reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

I. 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. This action simply adds an applicability date to the 2015 Rule, which has been stayed nationwide, and the legal *status quo* continues to remain in place.

J. National Technology Transfer and Advancement Act (“NTTAA”)

This rulemaking does not involve technical standards.

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

The agencies believe that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. This action simply adds an applicability date to the 2015 Rule, which has been stayed nationwide, and the legal *status quo* continues to remain in place. The agencies will consider the impact on minority and low-income populations consistent with this Executive Order in the context of possible substantive changes as part of any reconsideration of the 2015 Rule.

L. Congressional Review Act (“CRA”)

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. OMB has concluded that it is not a “major rule” as defined by 5 U.S.C. 804(2).

***Definition of “Waters of the United States” – Addition of an Applicability Date to 2015 Clean
Water Rule***
Page 33 of 40

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: _____

E. Scott Pruitt,

Administrator.

Environmental Protection Agency.

Dated: _____

Ryan A. Fisher,

Acting Assistant Secretary of the Army (Civil Works).

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

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 amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

1. The authority citation for part 328 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Section 328.3 is amended by adding paragraph (e) to read as follows:

§328.3 Definitions.

* * * * *

(e) *Applicability date.* Paragraphs (a) through (c) of this section are applicable beginning on [DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

Title 40—Protection of Environment

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

PART 110—DISCHARGE OF OIL

3. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*, 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 adding paragraph (4) to the definition of “Navigable waters” to read as follows:

§110.1 Definitions.

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

* * * * *

Navigable waters * * *

(4) *Applicability date*. This definition is applicable beginning on [DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

* * * * *

PART 112—OIL POLLUTION PREVENTION

5. The authority citation for part 112 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

6. Section 112.2 is amended by adding paragraph (4) to the definition of “Navigable waters” to read as follows:

§112.2 Definitions.

* * * * *

Navigable waters * * *

(4) *Applicability date*. This definition is applicable beginning on [DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

* * * * *

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES

7. The authority citation for part 116 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

8. Section 116.3 is amended by adding paragraph (4) to the definition of “Navigable waters” to read as follows:

§116.3 Definitions.

* * * * *

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

*Navigable waters * * **

(4) *Applicability date*. This definition is applicable beginning on [DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

9. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*, and Executive Order 11735, superseded by Executive Order 12777, 56 FR 54757.

10. Section 117.1 is amended by adding paragraph (i)(4) to read as follows:

§117.1 Definitions.

* * * * *

(i) * * *

(4) *Applicability date*. This paragraph (i) is applicable beginning on [DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

* * * * *

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 adding paragraph (4) to the definition of “Waters of the United States” read as follows:

§122.2 Definitions.

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

* * * * *

Navigable waters * * *

(4) *Applicability date*. This definition is applicable beginning on [DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

* * * * *

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

13. The authority citation for part 230 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

14. Section 230.3 is amended by adding paragraph (o)(4) to read as follows:

§230.3 Definitions.

* * * * *

(o) * * *

(4) *Applicability date*. This paragraph (o) is applicable beginning on [DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

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

15. The authority citation for part 232 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

16. Section 232.2 is amended by adding paragraph (4) to the definition of “Waters of the United States” to read as follows:

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

§232.2 Definitions.

* * * * *

Waters of the United States * * *

(4) *Applicability date*. This definition is applicable beginning on [DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION

CONTINGENCY PLAN

17. The authority citation for part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(d); 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 adding paragraph (4) to the definition of “Navigable waters” to read as follows:

§300.5 Definitions.

* * * * *

Navigable waters * * *

(4) *Applicability date*. This definition is applicable beginning on [DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

* * * * *

19. In appendix E to part 300, section 1.5 Definitions is amended by adding paragraph (4) to the definition of “Navigable waters” to read as follows:

Appendix E to Part 300—Oil Spill Response

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

* * * * *

1.5 * * *

Navigable waters * * *

(4) *Applicability date*. This definition is applicable beginning on [DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

* * * * *

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

20. The authority citation for part 302 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

21. Section 302.3 is amended by adding paragraph (4) to the definition of “Navigable waters” to read as follows:

§302.3 Definitions.

* * * * *

Navigable waters * * *

(4) *Applicability date*. This definition is applicable beginning on [DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

* * * * *

PART 401—GENERAL PROVISIONS

22. The authority citation for part 401 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

23. Section 401.11 is amended by adding paragraph (1)(4) to read as follows:

§401.11 General definitions.

* * * * *

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, on 1/31/2018, and by Acting Assistant Secretary of the Army for Civil Works, Mr. Ryan A. Fisher, on 1/30/2018. We have taken steps to ensure the accuracy of this version, but it is not the official version.

(l) * * *

(4) *Applicability date.* This paragraph (l) is applicable beginning on **[DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].**

* * * * *