

# MAYER • BROWN

Mayer Brown LLP  
71 South Wacker Drive  
Chicago, Illinois 60606-4637

Main Tel +1 312 782 0600  
Main Fax +1 312 701 7711  
www.mayerbrown.com

**Timothy S. Bishop**  
Direct Tel +1 312 701 7829  
Direct Fax +1 312 706 8607  
tbishop@mayerbrown.com

November 17, 2017

## VIA OVERNIGHT DELIVERY

Scott S. Harris  
Clerk of the Court  
Supreme Court of the United States  
One First Street, N.E.  
Washington, DC 20543

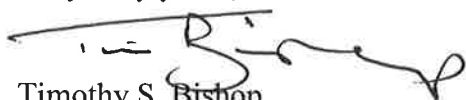
Re: *National Association of Manufacturers v.  
Department of Defense, et al.*  
No. 16-299 (argued Oct. 11, 2017)

Dear Mr. Harris:

The respondent agencies in the above-captioned case on November 16, 2017 proposed the enclosed rule, entitled "Definition of 'Waters of the United States' – Amendment of Effective Date of 2015 Clean Water Rule." The rule proposes to delay the effective date of the 2015 WOTUS Rule to two years from the date of final action on this proposal.

The proposed rule has a 21-day comment period from the date of publication of the proposed rule in the Federal Register. The preliminary internet version of the rule (enclosed) appears at [https://www.epa.gov/sites/production/files/2017-11/documents/wotus\\_2040-af80\\_nprm\\_fm\\_20171115\\_final\\_prepub.pdf](https://www.epa.gov/sites/production/files/2017-11/documents/wotus_2040-af80_nprm_fm_20171115_final_prepub.pdf).

Very truly yours,



Timothy S. Bishop  
Counsel of Record for Petitioner

cc: All Counsel of Record

The EPA Administrator, Scott Pruitt, along with Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, signed the following proposed rule on 11/16/2017, and 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 (<http://fdsys.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-9970-57-OW]**

**RIN 2040-AF80**

### **Definition of “Waters of the United States” – Amendment of Effective Date of 2015 Clean Water Rule**

**AGENCIES:** 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 proposing to amend the effective date of the “Clean Water Rule: Definition of ‘Waters of the United States’” (80 FR 37054, June 29, 2015) (the “2015 Rule”) to two years from the date of final action on this proposal. On October 9, 2015, the Sixth Circuit stayed the 2015 Rule nationwide pending further action of the court, but the Supreme Court is currently

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, along with Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, on 11/16/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

reviewing the question of whether the court of appeals has original jurisdiction to review challenges to the 2015 Rule. On February 28, 2017, the President signed an Executive Order, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” With this proposed rule, the agencies intend to maintain the *status quo* by proposing to amend the effective date of the 2015 Rule and thus provide continuity and regulatory certainty for regulated entities, the States and Tribes, agency staff, and the public while the agencies continue to work to consider possible revisions to the 2015 Rule.

**DATES:** Comments must be received on or before **[insert date 21 days after date of publication in the Federal Register]**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OW-2017-0644, 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

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, along with Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, on 11/16/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

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; e-mail address: [CWAwotus@epa.gov](mailto: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; e-mail address: [USACE\\_CWA\\_Rule@usace.army.mil](mailto:USACE_CWA_Rule@usace.army.mil).

#### **SUPPLEMENTARY INFORMATION:**

The Environmental Protection Agency and the Department of the Army (“the agencies”) are proposing to amend the effective date of the 2015 Clean Water Rule to two years from the date of final action on this proposal. 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” under with Executive Order 13778 signed on February 28, 2017, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” The first step in the process (the “Step One rule”) proposed to rescind the definition of “waters of the United States” promulgated by the agencies in 2015 in the Code of Federal Regulations and to re-codify the previous definition of “waters of the United States,” which defines the scope of the Clean Water Act. The previous definition is currently in effect pursuant to a decision issued by the U.S. Court of Appeals for the

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, along with Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, on 11/16/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Sixth Circuit staying the 2015 definition of “waters of the United States.” In a second step (the “Step Two rule”), 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.” With this proposed rule to amend the effective date of the 2015 Rule, the agencies intend to provide, for an interim period, greater regulatory certainty about the definition of “waters of the United States” in effect while they continue to work on the two-step rulemaking process.

The amendment of the effective date of the 2015 Rule to two years after the date of a final rule under this proposed rulemaking effort would ensure that the regulatory definition of “waters of the United States” that existed prior to promulgation of the rule in 2015 and that has been in effect nationwide since the 2015 Rule was stayed on October 9, 2015, would remain in effect during the ongoing actions undertaken in response to the Executive Order. This proposed rule to extend the effective date of the 2015 Rule would maintain the legal *status quo* and thus provide continuity and certainty for regulated entities, the States and Tribes, agency staff, and the public. The agencies would 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 this proposed rule. This proposed rule would not establish any new regulatory requirements. Rather, this rule would simply amend the effective date of the 2015 Rule leaving in place the current legal *status quo* while the agencies continue to engage in substantive rulemaking to reconsider the definition of “waters of the United States.”

## **I. Background and Discussion of Amendment of Effective Date**

### *A. What this proposed rule does*

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 2015 Rule had an effective date of August 28, 2015. The agencies propose to amend that effective date to two years from the date of final action on this proposal. The effective date of the 2015 Rule was established by a notice published by the agencies in the *Federal Register* (80 FR 37054, June 29, 2015). The Code of Federal regulations text does not include an effective date; therefore, the agencies are proposing to amend the text of the Code of Federal Regulations to add a new effective date. Until the new effective date, the agencies would 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, order.

### *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 in effect 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).

In 2015, following public notice and comment on a proposed rule, the agencies published a final rule defining the “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 of 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 thirteen plaintiff States in that case, *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), 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. and U.S. Env’tl. Protection Agency Final Rule: Clean Water Rule*, No. 15-3751 (lead), slip op. at 6. Pursuant to 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 on the question of whether the court of appeals has original

jurisdiction to review challenges to the 2015 Rule. The Supreme Court could issue a decision resolving the question at any time.

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.” 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 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 a rule to rescind the 2015 Rule and replace it with a recodification of the regulatory text that governed the legal regime prior to the 2015 Rule (82 FR 34899), and that the agencies are currently implementing under the court stay, informed by applicable guidance documents (*e.g.*, 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with Supreme Court decisions and longstanding agency practice. The agencies received many comments on the Step One proposed recodification and it remains under active consideration.

### *C. Today’s proposed rule*

In this proposed rule, the agencies would amend the effective date of the 2015 Rule such that it is not effective until two years from the date of a final action on this proposal. During that



This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, along with Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, on 11/16/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

time, the agencies will continue to implement nationwide the previous regulatory definition of “waters of the United States” as they are currently doing under the Sixth Circuit’s stay, informed by applicable guidance documents (e.g., 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with Supreme Court decisions and longstanding agency practice.

The scope of CWA jurisdiction is an issue of great national importance and therefore the agencies will provide for robust deliberations to re-evaluate the definition of “waters of the United States.”. While engaging in such deliberations, however, the agencies recognize the need to provide an interim step for regulatory continuity and clarity for the many stakeholders affected by the definition of “waters of the United States.” The pre-2015 Rule 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 possible inconsistencies, uncertainty, and confusion as to the regulatory regime that could 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 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 – could be reactivated if the Supreme Court were to determine that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 Rule.

In addition, if the Supreme Court were to decide that the courts of appeal do have original jurisdiction over challenges to the 2015 Rule, the litigation in the Sixth Circuit could resume and therefore control over which regulatory definition of “waters of the United States” is in effect while the agencies engage in deliberations on the ultimate regulation could remain outside of the agencies. The proposed interim rule would establish a clear regulatory framework that could avoid the possible inconsistencies, uncertainty and confusion that could result from a Supreme Court ruling 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 has been for many years prior to the promulgation of the 2015 Rule.

The agencies are proposing a two-year extension of the effective date in order to ensure that there is sufficient time for the regulatory process for reconsidering the definition of “waters of the United States” to be fully completed. The agencies are undertaking an extensive outreach effort to gather information and recommendations from States and tribes, regulated entities, academia, and the public. The geographic scope of the Clean Water Act is of great national interest and there were more than 680,000 public comments on the Step One proposed rule. The

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, along with Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, on 11/16/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

agencies continue to work as expeditiously as possible to complete the two-step rulemaking process. However, in light of the great interest in this rulemaking, the agencies are proposing a two-year extension of the effective date of the 2015 Rule to ensure that there is sufficient time for a consideration of the results of the outreach process, robust discussion with other federal agencies, an appropriate public comment period, and consideration of the resulting comments during the Step Two rulemaking.

The agencies recognize that there may be some confusion because there is an existing proposal to rescind the 2015 Rule and replace it with the previous definition of “waters of the United States,” as well as ongoing pre-proposal stakeholder outreach and engagement about the scope of the Step Two rulemaking that would substantively reconsider the definition of “waters of the United States.” The comment period for the July Step One proposed rule is now closed and the agencies are considering those comments and developing the Step Two proposal. In light of the public interest in these rules and the length of time involved in these rulemakings, the agencies today are proposing this more narrowly targeted and focused interim rule to ensure the consistency of implementation of the definition of “waters of the United States” during this interim period. Because the request for comment is on such a narrow topic, and because a Supreme Court ruling could come at any time, the agencies believe that a short comment period is reasonable.

## **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

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, along with Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, on 11/16/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

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?*

The agencies have determined that there are no economic costs or benefits associated with this action. In light of the ongoing, complex litigation over the 2015 Rule, the agencies believe it is reasonable and appropriate for purposes of considering economic impacts for this proposal to presume that the legal *status quo* is likely to remain the same. This proposal, if finalized, would have the effect of providing the public with regulatory certainty while the

agencies pursue a substantive rulemaking process. This proposal would eliminate one source of uncertainty for the regulated community as they consider investments. While the agencies recognize that there could be benefits associated with greater regulatory certainty, we are unable to quantify those benefits. 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.

### **III. Public Comments**

The agencies solicit comment as to whether it is desirable and appropriate to amend the effective date of the 2015 Rule. The agencies are proposing to establish an effective date of two years after a final rule and seek comment on whether the time period should be shorter or longer, and whether delaying the effective date contributes to regulatory certainty. The agencies have prepared a memorandum to the record to provide the public with information about the activities envisioned in support of a comprehensive rulemaking process. A copy of the memorandum is available in the docket for this action.

Because the agencies propose to simply amend the effective date and ensure continuance of the legal *status quo* and because it is a temporary, interim measure pending substantive rulemaking, the agencies believe that a short comment period is reasonable. In addition, please note that this proposed 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 Step Two rule in this process, as the agencies will address those issues as appropriate, including those related to the 2015 Rule, in the notice and comment rulemaking to consider adopting 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 re-evaluation of the definition of “waters of the United States” until the Step Two 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 because policy issues with respect to the definition of “waters of the United States” are novel for purposes of Executive Order 12866 and it was submitted to the Office of Management and Budget (OMB) for review. It is not an economically significant action. Any changes made in response to OMB recommendations 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 or benefits associated with this action. This action would simply extend the effective date of the 2015 Rule which is 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 expected to be subject to Executive Order 13771 because this proposed rule is expected to result in no additional costs.

##### *C. Paperwork Reduction Act (PRA)*

This proposed 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 would simply extend the effective date of the 2015 Rule which is stayed nationwide and the legal *status quo* continues to remain in place. We have therefore concluded that this action will not have a significant impact on small entities. This 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. 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.

*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 would simply extend the effective date of the 2015 Rule which is 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*

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 would simply extend the effective date of the 2015 Rule which is 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



This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, along with Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, on 11/16/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

standard. This is a proposal to extend the effective date of the 2015 Rule. The agencies believe it is more appropriate to consider the impact on minority and low-income populations in the context of possible substantive changes as part of any reconsideration of the 2015 Rule.

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, along with Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, on 11/16/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

**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, along with Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, on 11/16/2017. 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 proposed to be 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) *Effective date.* This rule is effective [INSERT 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 proposed to be 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, along with Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, on 11/16/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

(4) *Effective date.* This rule is effective [INSERT 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.**

\* \* \* \* \*

(4) *Effective date.* This rule is effective [INSERT 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.**

\* \* \* \* \*

(4) *Effective date.* This rule is effective [INSERT DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

\* \* \* \* \*

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, along with Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, on 11/16/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

## **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) *Effective date.* This rule is effective [INSERT 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.**

\* \* \* \* \*

(4) *Effective date.* This rule is effective [INSERT DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

\* \* \* \* \*

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, along with Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, on 11/16/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

**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) *Effective date.* This rule is effective [INSERT DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

\* \* \* \* \*

**PART 232—404 PROGRAMS 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:

**§232.2 Definitions.**

\* \* \* \* \*

(4) *Effective date.* This rule is effective [INSERT DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

\* \* \* \* \*

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, along with Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, on 11/16/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

## **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.**

\* \* \* \* \*

(4) *Effective date.* This rule is effective [INSERT 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**

\* \* \* \* \*

(4) *Effective date.* This rule is effective [INSERT 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.*

This document is a prepublication version, signed by EPA Administrator, Scott Pruitt, along with Mr. Ryan A. Fisher, Acting Assistant Secretary of the Army for Civil Works, on 11/16/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.

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

**§302.3 Definitions.**

\* \* \* \* \*

(4) *Effective date.* This rule is effective [INSERT 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.**

\* \* \* \* \*

(1) \* \* \*

(4) *Effective date.* This rule is effective [INSERT DATE TWO YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

\* \* \* \* \*