August 13, 2018

The Honorable Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460


Dear Acting Administrator Wheeler:

Western Energy Alliance, American Exploration & Production Council (AXPC) and Domestic Energy Producers Alliance (DEPA) support EPA’s proposed withdrawal of the 2015 Clean Water Rule, or Waters of the United States (WOTUS) rule, and formal recodification of pre-existing regulations while it develops an updated definition of WOTUS. The final rule was overreaching in its scope and fraught with technical shortcomings, and the U.S. Court of Appeals for the Sixth Circuit, the District of North Dakota, and the Southern District of Georgia found it likely to be overturned on its merits.

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fifteen employees.

AXPC is a national trade association representing 33 of America’s largest and most active independent natural gas and crude oil exploration and production companies. The AXPC’s members are “independent” in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts, which operate in different segments of the energy industry, such as refining and marketing.

DEPA is a distinctive organization with a unique approach to domestic onshore energy advocacy and education. We are an alliance of producers, royalty owners, and oilfield service companies as well as state and national independent oil and gas associations representing the small business men and women of the energy industry, devoted to the survival of U.S. domestic crude oil and natural gas exploration and production.

Our associations agree with EPA’s thorough explanation of the deficiencies of the 2015 WOTUS rule. As originally written, the WOTUS rule would pose an enormous burden on
states, communities, and businesses without providing commensurate environmental benefit. It is also an unreasonably broad interpretation by EPA and the U.S. Army Corps of Engineers (ACE) of their regulatory authority under the Clean Water Act.

The WOTUS rule contained interpretations of “significant nexus” to navigable waters, “adjacent waters” and tributaries that are clearly at odds with the Supreme Court’s rulings in *Rapanos v. United States* and *SWANCC v. U.S. EPA*. These decisions show the implementation of the WOTUS rule expanded beyond its original intent even before the 2015 rule. In practice, ACE’s use of preliminary jurisdictional determinations has ignored the narrowing demanded by the decisions in *Rapanos* and *SWANCC*: “It is difficult to imagine that Justice Scalia could have envisioned that six years after the *Rapanos* decision the Corps would have developed an administrative process that not only completely negated both the Scalia and Kennedy Opinions but actually resulted in expanding its jurisdiction.”

The administrative agencies have been disregarding the law and court rulings for some time, and the 2015 Rule goes even further beyond legal and statutory foundation.

In addition to the substance of the rule itself, the rulemaking process followed by EPA and ACE was procedurally deficient. The agencies failed to provide an opportunity for public comment on distance limitations for terminology like “adjacent waters” and “significant nexus.” By circumventing the public process, the agencies promulgated a final rule that significantly overstepped their authority and violated the Administrative Procedures Act (APA) requirements for proper notice and comment rulemaking. This deficiency alone is a valid reason to repeal the 2015 rule.

The harm caused by the WOTUS rule would be especially acute in the West, where arid conditions and seasonally fluctuating rainfall are commonplace. Many ephemeral water features would have been subject to the WOTUS rule despite being dry for much of the year or even for many years.

In addition, EPA and ACE clearly stated in the 2015 WOTUS rule they interpreted the scope of WOTUS based on the information and conclusion in the Science Report even though the Science Report clearly states, “…it neither considers nor sets forth legal standards for CWA jurisdiction, nor does it establish EPA policy.” Science should be used to inform decisions, yet EPA and ACE have misused the Science Report to supersede the CWA and case law. Additionally, any WOTUS definition must give effect to the term “navigable” and provide clarity for States and regulated entities to easily determine the scope of Clean Water Act jurisdiction. With the above in mind, a revised WOTUS rule will ultimately recognize and preserve the States’ primary authority over land and water use.

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2 EPA, Connectivity of Streams & Wetlands to Downstream Waters, Jan. 2015
We support EPA recodifying the status quo as an interim step to revising and promulgating a new rule. As a practical matter, the 2008 guidance that preceded the 2015 WOTUS rule is in effect, meaning there will be no change to EPA’s and ACE’s ability to regulate and protect waterways. For operators and surface owners complying with the Clean Water Act, the continuity will provide much-needed certainty while EPA conducts a new rulemaking. From an environmental standpoint, preservation of the status quo poses no risk to the environment as the current guidance was developed to be protective of water quality. In addition, states will continue to have jurisdiction and protect waters of the state.

The 2008 guidance, however, has presented implementation challenges to oil and natural gas development. Clean Water Act jurisdiction has been an inconsistent concept in agency interpretations for years. It is often addressed in a case-by-case manner with individual interpretations of guidance documents and the term WOTUS. Often, agencies’ case-by-case determinations skew towards an overly broad interpretation of authority. “The irony in the preliminary JD process is that by assuming that all water bodies on a site are jurisdictional, the Corps is actually extending its jurisdictional reach beyond what it was regulating prior to the Rapanos decision.” Ultimately, that overreach was codified in the 2015 rule.

Therefore we request that EPA move quickly to clarify the definition of WOTUS by developing and promulgating a revised rule that clearly provides a “bright line” of jurisdiction that follows the CWA and case law. As EPA is well aware, APA rulemaking processes can be very time consuming. We urge EPA to move forward expeditiously with the rulemaking to replace the flawed 2008 guidance as soon as possible within the constraints of the APA. We appreciate that EPA is undergoing this full, deliberative process to ensure the reconsideration is legally defensible.

Thank you for the opportunity to comment. We support EPA swiftly recodifying the prior definition of WOTUS, and look forward to providing EPA substantive technical comments in the subsequent rulemaking.

Sincerely,

Kathleen M. Sgamma
President
Western Energy Alliance

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Supplementary Notice on Recodification of the WOTUS Rule
August 14, 2018

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President
American Exploration & Production Council

J Roger Kelley
Chairman – Regulatory Committee
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