



**American  
Fuel & Petrochemical  
Manufacturers**

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**Attention: Docket ID No. EPA-HQ-OW-2017-0664**

*Submitted to the Federal eRulemaking Portal ([www.regulations.gov](http://www.regulations.gov))*

**Re: AFPM Comments on Department of the Army and EPA’s Proposal on  
“Definition of Waters of the United States---Addition of an Applicability Date to  
2015 Clean Water Rule” (82 FR 55542, November 22, 2017)**

## **I. Introduction**

The American Fuel & Petrochemical Manufacturers (“AFPM”) appreciates the opportunity to comment on the Environmental Protection Agency’s (“EPA”) and the U.S. Department of the Army’s (collectively, “the Agencies”) proposal, “Definition of Waters of the United States---Addition of an Applicability Date to 2015 Clean Water Rule.”<sup>1</sup> AFPM is encouraged that the Agency is proposing this compliance date now as it will provide a compliance deadline for which stakeholders will be able to plan. AFPM continues to support the Agencies’ proposals to initiate a comprehensive, two-step process to review and revise the definition of “Waters of the United States” (“WOTUS”) and recodify the regulatory definitions that existed before the 2015 Clean Water Rule, however AFPM urges the Agencies to propose the Step 2 rule for comment swiftly to ensure that stakeholders receive clarity on what is defined under WOTUS, including exemptions. AFPM strongly encourages EPA to consider extending the compliance date to two years from the date of final publication as this rule will likely be lengthy and stakeholders will need to time develop compliance strategies and possibly adjust their permits.

AFPM is a national trade association of approximately 400 companies, comprising virtually all U.S. refining and petrochemical manufacturing capacity. AFPM members supply consumers with a wide variety of products and services used daily in their homes and businesses. These products include gasoline, diesel fuel, home heating oil, jet fuel, lubricants, and the chemicals that serve as “building blocks” in making diverse products, such as plastics, clothing, medicine, and computers.

## **II. EPA’s Statutory Authority**

The Clean Water Act (CWA) gives EPA ample authority to set a new applicability date for the 2015 Rule. In addition, EPA also has the authority and discretion to stay the effective date

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<sup>1</sup> See Docket No. EPA-HQ-OW-2017-0644, 82 *Fed. Reg.* 55542, proposed Nov. 22, 2017,



of the 2015 Rule pursuant to Section 705 of the Administrative Procedure Act (APA).<sup>2</sup> Section 705 provides, “When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.”<sup>3</sup> The 2015 Rule is currently being litigated in multiple courts; therefore, if EPA finds “justice so requires,” the agency may exercise its discretion to postpone the effective date of the 2015 Rule.

EPA should find that “justice so requires” the agency to take this action to maintain a stay of the effective date to maintain the legal *status quo* and provide continuity and certainty for regulated entities, the States and Tribes, agency staff, and the public pending judicial review. The 2015 Rule would impose substantial new regulatory burdens and costs stemming from the significantly broadened definition of WOTUS, bringing countless new water bodies under CWA jurisdiction.<sup>4</sup> Therefore, it’s important to maintain the legal *status quo* to prevent the regulated community and government permitting authorities from expending limited resources to comply with the 2015 Rule while EPA is continuing to work on the two-step rulemaking process.

Additionally, the pre-2015 Rule is currently in effect as a result of the Sixth Circuit’s stay of the 2015 Rule, but that could potentially change depending upon the outcome of a pending Supreme Court case to determine the appropriate courts of jurisdiction. Therefore, it is important that the agency add an applicability date or alternatively, stay the effective date of the 2015 Rule to avoid possible inconsistencies, uncertainty, and confusion.

If the agency finds “justice so requires,” it may exercise its discretion to stay the effective date of the rule pending judicial review. According to the plain language of Section 705, that is the only prerequisite the agency must meet in order to utilize its authority under APA Section 705.

For these reasons, EPA has authority under the CWA to add an applicability date to the 2015 Rule and alternatively has authority under the APA to stay the effective date of the 2015 Rule pending judicial review.

### **III. Compliance Date**

AFPM strongly agrees with and encourages EPA to extend the compliance date to two years from the date of final publication as this rule will likely be lengthy and stakeholders will need to time develop compliance strategies and possibly adjust their permits.

### **V. Conclusion**

AFPM is pleased and encouraged that the Agencies are being proactive and proposing a compliance date for the final Step 2 WOTUS rule. AFPM strongly encourages EPA to consider extending the compliance date to two years from the date of final publication as this rule will likely be quite large and stakeholders will need to time develop compliance strategies and possibly adjust their permits. AFPM also urges the Agencies to propose the second step reevaluation soon to

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<sup>2</sup> 5 U.S.C. § 705.

<sup>3</sup> *Id.*

<sup>4</sup>



ensure that stakeholders receive clarity on what is defined under WOTUS, including exemptions. We look forward to working with the Agencies on this important matter.

If you need further information or have any questions, please contact me at [jgunnulfson@afpm.org](mailto:jgunnulfson@afpm.org) or at 202-552-4371.

Sincerely,

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