

Poultry Industry Comments
U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers'
Definition of "Waters of the United States"—Addition of an Applicability Date to
2015 Clean Water Rule

December 13, 2017

VIA ELECTRONIC MAIL

U.S. Environmental Protection Agency
EPA Docket Center
"Waters of the United States"—Addition of an
Applicability Date to 2015 Clean Water Rule
Mail Code 4504-T
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Attention: Docket ID No. EPA-HQ-OW-2017-0644,

**RE: Attention: Docket ID No. EPA-HQ-OW-2017-0644,
Comments on the U.S. Environmental Protection Agency's and U.S.
Army Corps of Engineers' Definition of "Waters of the United
States"— Addition of an Applicability Date to 2015 Clean Water Rule**

Dear Sir or Madam:

In response to the November 22, 2017 publication of U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) Proposed Rule - *Definition of "Waters of the United States"— Addition of an Applicability Date to 2015 Clean Water Rule* in the Federal register, the undersigned organizations appreciate the opportunity to submit comments that support the addition of an applicability date to *the "Clean Water Rule: Definition of "Waters of the United States" (the "2015 Rule") to two years from the date of final action on this proposal.*

I. Background.

On July 27, 2017, in response to Executive Order 13778, *"Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule,"* EPA proposed a rule to re-codify the rule which defined "Waters of the United States" before the 2015 Rule was promulgated. This proposed rule, *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules.* 82 Fed. Reg. 34899, published by EPA and the Corps was the first step in a comprehensive, two-step process intended to review and revise the definition of "Waters of the United States."

This first step proposed to rescind the definition of “Waters of the United States” detailed in the 2015 Rule and re-codify the definition of “Waters of the United States,” that previously existed. The deadline to submit comments for the rule to re-codify the pre-existing rules was September 27, 2017. The U.S. Poultry & Egg Association (USPOULTRY), National Chicken Council (NCC), National Turkey Federation and numerous other agricultural organizations, filed comments that supported restoring the definition of “Waters of the United States” as they existed prior to the 2015 Rule.

Prior to EPA proposing the July 27, 2017 rule to re-codify the pre-existing rules, a number of organizations and states challenged the 2015 Rule in multiple Federal district courts and Circuit Courts of Appeals. As a result, of one lawsuit filed by 13 States, the U.S. District Court for the District of North Dakota issued an order granting a motion for a stay of the 2015 Rule in those states that were a party of the lawsuit.

In the meantime, after hearing arguments from the federal government and a coalition of 14 organizations that included USPOULTRY, the Sixth Circuit Court of Appeals, in a fractured decision, claimed jurisdiction over challenges to the 2015 Rule. The Sixth Circuit Court of Appeals followed this decision by issuing a nationwide stay of the 2015 Rule. Generally the stay was issued because the 2015 Rule was not “the product of reasoned decision-making and is vulnerable to attack as impermissibly ‘arbitrary or capricious’ under the Administrative Procedures Act.”

In January of 2017, the 14-member coalition, which included USPOULTRY, that were plaintiffs in the Sixth Circuit Court of Appeals jurisdictional case, petitioned the Supreme Court for *certiorari*. The Supreme Court granted this petition and heard oral arguments in October 2017. Further, the Sixth Circuit subsequently granted a motion to hold the ongoing litigation challenging the 2015 Rule in abeyance while the Supreme Court made its decision.

II. The addition of an applicability date will provide poultry and egg producers with certainty.

A review of the background related to the 2015 Rule that redefined “Waters of the United States.” and the subsequent legal challenges that ensued is confusing at the very least. While lawsuits have been filed that challenge the EPA and Corp’s authority to assign jurisdictional authority broadly, the substantive issues surrounding these arguments have not yet been addressed. As referenced above, before these arguments can proceed, the question of jurisdiction must be finalized. Although the Sixth Circuit Court has issued a nationwide stay of the 2015 Rule, a future decision by the Supreme Court that assigns legal challenges of the 2015 Rule to Federal District Courts, will invalidate the stay and put the 2015 Rule into effect immediately. The addition of an applicability date to the 2015 Rule to two years from the date of final action on this proposal will ensure that jurisdictional determinations will follow the protocol that has been in effect for more than a decade. This will provide poultry and egg producers with clarity and certainty on how they will be regulated while the EPA and Corp proceeds with proposing rules to respond to Executive Order 13778, *“Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”* Maintaining the status quo will additionally provide certainty to the States, EPA staff.

III. The addition of an applicability date will provide the agencies with adequate time to implement a legal rule making process.

As required by the Administrative Procedures Act, when a governmental agency proposes a rule it must provide the public with a meaningful opportunity to comment. A review of the docket “Proposed Rule - Definition of ‘Waters of the United States’—Recodification of Pre-Existing Rules” after it closed, indicated that more than 684,000 comments had been submitted. A full and legal rulemaking requires agencies to review and address these comments before they take final action. As addressed above, the proposed rule to re-codify the Pre-Existing Rules is step one of the process to address President Trump’s Executive Order. Step two of the process outlined in the Executive Order directs the agencies to consider interpreting the term "navigable waters," as

defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006). U.S. 715 (2006). It is reasonable to assume the regulated public's engagement in step two of the process will meet or exceed the response the agencies received in step one. Therefore, EPA will have much to review and consider as they follow through with the rulemaking process. An addition of an applicability date to the '2015 Rule to two years from the date of final action on this proposal will give EPA and the Corps time to adhere to the legal requirements of the Administrative Procedures Act.

IV. The addition of an applicability date will provide the agencies with adequate time get meaningful input from the regulated community.

It has been widely documented that the process to finalize the 2015 Rule was expedited. The haste at which the agencies developed the 2015 Rule kept them from including a mandatory analysis of small business impacts and consideration of less burdensome alternatives. In promulgating the 2015 Rule, the agencies failed to provide poultry and egg farmers with an opportunity to challenge the scientific rationale of data and a report that established "significant nexus" to virtually every geographic feature that exists on the landscape.

An addition of an applicability date to the 2015 Rule to two years from the date of final action on this proposal will ensure sufficient time to provide poultry and egg producers with an opportunity to engage in an open and real dialogue with the regulatory agencies.

VIII. Conclusion.

Adding an applicability date to the 2015 Rule to two years from the date of final action on this proposal will give the agencies the necessary time to redraft a rule consistent with federal statutory authority, state rights, and local land use provisions. In addition, this time would allow the agencies to develop a rule that is protective of human health

and the environment, does not impose unnecessary burdens on law-abiding landowners, and that is clear and understandable.

We appreciate the opportunity to submit these comments and appreciate the agencies sensible proposal to add an applicability date to the 2015 Rule to two years from the date of final action on this proposal. If you have any questions regarding these comments or have need for additional information, please contact Paul Bredwell at pbredwell@uspoultry.org.

Respectfully submitted,

U. S. Poultry & Egg Association
National Turkey Federation
National Chicken Council
United Egg Producers
Hain Pure Poultry Corporation
Indiana State Poultry Association
Mississippi Poultry Association
Sanderson Farms
Texas Poultry Federation
The Poultry Federation
Woodruff & Howe Environmental Engineering