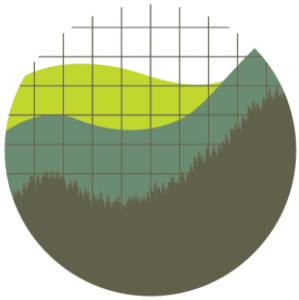

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

December 13, 2017

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Attn.: Docket ID No. EPA-HQ-OW-2017-0644

Subject: Comments on the Definition of "Waters of the United States" - Addition of Applicability Date to 2015 Clean Water Rule

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] respectfully submits the following comments to the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("the agencies") regarding the newly proposed "applicability date" for the 2015 Clean Water Rule, 82 Fed. Reg. 55,542.

Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. We write to make the following comments:

- First, adding an "applicability date" to the 2015 Clean Water Rule delays implementation of the rule and is tantamount to issuing an administrative stay. The agencies do not have statutory authority to issue an administrative stay on the 2015 Clean Water Rule and they do not have authority to circumvent that restriction in their authority by adding an "applicability date," which in practice and effect simply stays the 2015 Clean Water Rule.
- Second, even if there were an adequate statutory basis for the proposed rule, the rule would be arbitrary and capricious. Any delay in implementation of the 2015 Clean Water Rule will have substantial, negative economic consequences. The benefits of the 2015 Clean Water Rule are substantially larger than the costs, and a delay would result in tens to hundreds of millions of dollars of forgone benefits per year of delay. The agencies have not provided an adequate justification for imposing these costs on society.

I. The agencies do not have statutory authority to delay implementation of the 2015 Clean Water Rule

The agencies are required to include "reference to the legal authority under which the rule is proposed."[2] The agencies claim authority for this proposal under the entire Clean Water Act, citing "33 U.S.C. 1251, *et seq*., including sections 301, 304, 311, 401, 402, 404 and 501."[3] But none of those provisions authorizes the agencies' proposed action.

[1] This document does not purport to present New York University School of Law's views, if any.

[2] 5 U.S.C. § 553(b)(2); *see also Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017).

[3] *Clean Air Council*, 862 F.3d at 11.

In the proposed action, the agencies have proposed to add an "applicability date" in order to ensure that the regulations from before the 2015 Clean Water Rule "remain in effect."[4] The effect of this proposal is to stay the 2015 Clean Water Rule—two years after its effective date passed. Stays put off the enforceability of a regulation either for a period of time or indefinitely, effectively lifting the regulatory restrictions while still retaining the regulation on the books.[5] Here, this proposal intends to freeze any implementation of the rule, while keeping the rule on the books.[6] As such, the actual effect of the proposal is not a revision in the rule, but a stay.

The Clean Water Act does not authorize EPA to issue administrative stays. And the agencies have not pointed to any specific authority, within the long list of cited provisions, to add an "applicability" date, two years after a rule has gone into effect.

Moreover, agencies may not use their general rulemaking authority to override more specific statutory directives.[7] The D.C. Circuit has held, for instance, that the EPA cannot use the Clean Air Act's "general grant of rulemaking power" to stay regulations that could not be delayed using the agency's explicit—but tightly circumscribed—stay power under § 307 of that statute.[8] Here, only § 705 of the APA authorizes the agencies to issue a stay, but that authority contains express limitations, and the agencies have not purported to rely on § 705. The agencies may not circumvent the limits on their specific stay authority by claiming that general rulemaking authority under the Clean Water Act gives them broad, implicit power to put off enforcement of a finalized and effective rule.

Outside of these statutes, the agencies do not have authority to issue a stay of the regulation through a new applicability date. As the D.C. Circuit recently made clear when vacating a stay issued by EPA, agencies do not have "inherent authority" to stay rules.[9]

II. Even if there were an adequate statutory basis for adding the "applicability date," it would nevertheless be arbitrary and capricious.

When an agency decides to change course by delaying the applicability of a regulation, the agency must "'cogently explain'" the basis for the delay, under the same standard that applies to ordinary rulemaking.[10] Under that standard, an agency must "examine the relevant data" and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[11] An important category of "relevant data" that the agencies must account for is

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[4] 82 Fed. Reg. at 55,542.
[5] *See e.g.*, *Envt'l Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 818 (D.C. Cir. 1983); *NRDC v. EPA*, 683 F.2d 752, 763 (3rd Cir. 1982); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 27 (D.D.C. 2012).
[6] 82 Fed. Reg. at 55,542.
[7] *Nat'l Min. Ass'n v. U.S. Dep't of the Interior*, 105 F.3d 691, 694 (D.C. Cir. 1997) ("general rulemaking provisions . . . do not . . . permit [an agency] to trump Congress's specific statutory directive"); *see also Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995).
[8] *Nat. Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992).
[9] *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017); *see also Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004) (rejecting the contention that the Department of Energy had "inherent power" to suspend a duly promulgated rule where no statute conferred such authority).
[10] *Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.* ("*State Farm*"), 463 U.S. 29, 48 (1983)).
[11] *State Farm*, 463 U.S. at 43 (internal quotation marks omitted).

the costs of the proposed rule. Here, the agencies are required to account for the previously identified forgone benefits of the 2015 Clean Water Rule.[12]

A. The Agency Must Include the 2015 Clean Water Rule in the Baseline

Rather than assess the forgone benefits, the agencies have proposed that "there are no economic costs or benefits associated" with the proposal.[13] To justify this position, the agencies have claimed that the proposed rule would "maintain the *status quo*" and because of court stays, the baseline thus does not include the 2015 Clean Water Rule.[14]

But the agencies' analysis of the baseline must include the 2015 Clean Water Rule despite those legal stays.[15] EPA guidance and administrative best practice both require the agencies to use the 2015 Clean Water Rule as the baseline for this proposed rule. EPA guidance clearly states that the baseline for analysis includes "other regulations promulgated by EPA"—which should include the stayed rule.[16] As the guidelines make clear, other "finalized" rules should be included, along with any required regulations that an agency is "in the process of finalizing."[17] "The intent of the baseline is always to characterize the world in the absence of regulation being analyzed," and finalized regulations are part of that world.

Even if the legal stays were relevant to the calculation of forgone benefits, those stays do not provide any justification for failing to analyze the costs and benefits of the rule. *Circular A-4* requires agencies to "describe benefits or costs under plausible scenarios and characterize the evidence and assumptions underlying each alternative scenario."[18] Therefore, even if the agencies take the court stays into account, the agencies must consider the forgone net benefits that will occur in the event that the court stay is lifted during the period in which this proposed rule would be in effect.

The very existence of this proposed rule reveals that the agencies believe that the proposal is expected to have non-negligible costs and benefits. In other words, either the new applicability date will prolong the delay in implementation of the Clean Water Rule, resulting in substantial forgone net benefits as described below, *see* part II. B, or it will expire prior to the court stays. Assuming the new applicability date is reached before the end of this proposed rule's delay, the new applicability date would lead to substantial forgone benefits. The agencies must consider the probability of this occurring to be greater than zero, or else they would not be issuing this proposed rule.

The agencies claim that they need not include the 2015 Clean Water Rule in the baseline because that allows the agencies to "avoid[] any possibility of double counting the avoided costs of this

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[12] *Id.*; *State v. United States Bureau of Land Mgmt.*, No. 17-CV-03804-EDL, 2017 WL 4416409, at *11 (N.D. Cal. Oct. 4, 2017) ("Defendants' failure to consider the benefits of compliance with the provisions that were postponed, as evidenced by the face of the Postponement Notice, rendered their action arbitrary and capricious and in violation of the APA.").
[13] 82 Fed. Reg. at 55,544.
[14] U.S. Environmental Protection Agency & U.S. Department of the Army, Definition of "Waters of the United States" - Addition of Applicability Date to 2015 Clean Water Rule (2017) at 2.
[15] *California*, 2017 WL 4416409, at *9 (finding that agency's delay of a rule just five months after its effective date and "[a]fter years of developing the Rule and working with the public and industry stakeholders, . . . plainly did not 'maintain the status quo'").
[16] Environmental Protection Agency, Guidelines for Preparing Economic Analysis (2010) at 5-1.
[17] *Id.* at 5-11.
[18] OMB, *Circular A-4*, at 18 (2003).

proposed rule and the Step 1 proposed rule" to repeal the 2015 Clean Water Rule.[19] But counting the forgone benefits does not lead to "double counting" in the repeal. The repeal and the addition of an applicability date forgo different categories of benefits. The proposed rule forgoes the benefits of the 2015 Clean Water Rule for two years. The repeal forgoes *all* the benefits of the 2015 Clean Water Rule.

In fact, the agencies' proposed repeal demonstrates that the agencies are acting inconsistently here by not considering the 2015 Clean Water Rule as the relevant baseline for the proposed rule. Earlier this year, the agencies included the 2015 Clean Water Rule in the baseline for the proposed repeal of that rule.[20] And the agencies analyzed the forgone costs and benefits of the repeal with the 2015 Clean Water Rule in the baseline. The agencies are acting arbitrarily by not to following the same procedure for this proposed rule.

B. The Proposed Rule Will Cause Significant Forgone Benefits

With the proper baseline, it is clear that the addition of an "applicability date" to the 2015 Clean Water Rule would result in substantial forgone net benefits, beginning as soon as the delay causes loss in any wetlands. The Clean Water Rule was dramatically cost-benefit justified.[21] Delaying the "applicability" of the Clean Water Rule would result in forgone net benefits of at least $44 million per year and as much as $326 million per year, depending on the scenario considered by the agencies.[22] Importantly, these benefits would be forgone as soon as the delay caused wetland loss. Substantial wetland benefits derive from existence value, so destruction of additional wetlands due to any delay in implementing the Clean Water Rule would cause those benefits to be lost immediately.[23] Therefore, for every additional day that this proposed rule delays the implementation of the Clean Water Rule, net benefits will be forgone. As a result, the proposed rule is not justified.

Should the agencies conduct an analysis of the forgone benefits, the agencies should review our previous comments and report regarding the forgone benefits of the proposed repeal, attached and incorporated herein.[24] That analysis shows that the agencies' proposed repeal ignored important evidence of the benefits of wetland preservation, that they erroneously concluded that existing policies would reduce the costs and benefits of the Clean Water Rule, and that the agencies acted

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[19] U.S. Environmental Protection Agency & U.S. Department of the Army, Consideration of Potential Economic Impacts for the Proposed Rule: *Definition of "Waters of the United States" - Addition of Applicability Date to 2015 Clean Water Rule* (2017) at 3.

[20] U.S. Environmental Protection Agency & U.S. Department of the Army, Economic Analysis for the Proposed Definition of "Waters of the United States" - Recodification of Pre-Existing Rules 8 (2017).

[21] U.S. Environmental Protection Agency and U.S. Department of the Army, *ECONOMIC ANALYSIS OF THE EPA-ARMY CLEAN WATER RULE* at 45 (2015) ("2015 Analysis"). (The agencies found in 2015 that the Clean Water Rule was cost-benefit justified, stating at ix that "The agencies' analysis indicates that for both scenarios [analyzed], the change in benefits of [Clean Water Act] programs exceed the costs by a ratio of greater than 1:1." The annual costs of the Rule were estimated to be $158.4 to $465.0 million (2014 dollars) depending on the scenario, and the annual benefits were estimates to be $338.9 to $572.3 million.)

[22] 2015 Analysis at x-xi. All values are 2016 dollars.

[23] Klaus Moeltner & Richard Woodward, *Meta-Functional Benefit Transfer for Wetland Valuation: Making the Most of Small Samples*, 42 ENVIRON. RESOUR. ECON. 89 (2009) at 95.

[24] Jason Schwartz & Jeffrey Shrader, Mudying the Waters: How the Trump administration is obscuring the value of wetlands protection from the Clean Water Rule (2017); *and* Jeffrey Shrader & Jason Schwartz, *Comments on the Proposed Definition of "waters of the United States"—Recodification & on the Underlying Economic Analysis*, 1–11 (2017).

arbitrarily and capriciously when choosing whether to include evidence of costs or benefits of wetland preservation. Recent analysis by prominent academics echoes those conclusions, showing that the repeal of the Clean Water Rule is not cost-benefit justified.[25] All of these issues must be tackled in any attempt to address the forgone benefits of the repeal.

In sum, the agencies do not have statutory authority to finalize the proposal, and even if they did, finalizing the proposal would forgo substantial economic and environmental benefits.

Sincerely,

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Institute for Policy Integrity

Attachments

JASON SCHWARTZ & JEFFREY SHRADER, MUDDYING THE WATERS: HOW THE TRUMP ADMINISTRATION IS OBSCURING THE VALUE OF WETLANDS PROTECTION FROM THE CLEAN WATER RULE (2017).

Jeffrey Shrader & Jason Schwartz, *Comments on the Proposed Definition of "Waters of the United States"—Recodification & on the Underlying Economic Analysis*, 1–11 (2017).

[25] Kevin J. Boyle, Matthew J. Kotchen & V. Kerry Smith, *Deciphering dueling analyses of clean water regulations*, 358 SCIENCE. 49–50 (2017); *and* Mark A. Ryan, *Water policy: Science versus political realities*, 10 NAT. GEOSCI. 806–808 (2017).