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VIA ELECTRONIC FILING

The Honorable E. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Mr. Douglas W. Lamont
Senior Official Performing Duties of the Assistant Secretary of the Army
Department of the Army, Civil Works
108 Army Pentagon
Washington, D.C. 20310

RE: Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017); Docket No. EPA-HQ-OW-2017-0203

Dear Administrator Pruitt and Mr. Lamont:

The U.S. Chamber of Commerce ("the Chamber"), the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system, strongly supports the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers' (the "Corps") (collectively, "the Agencies") proposal to rescind the revised definition of "waters of the United States," promulgated by the Agencies in 2015.[1]

The definition of "waters of the United States" is extremely important to our membership. The Agencies proposed the "waters of the United States" rule in April 2014 ("2014 Proposal")[2] in order to clarify the scope of waters subject to federal protection under the Clean Water Act.[3] The

[1] Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (proposed July 27, 2017).
[2] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014) ("2014 Proposal").
[3] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251 *et seq.* (2012)).

Chamber and its membership reviewed the 2014 Proposal and filed a comment letter in opposition to it,[4] yet the Agencies finalized and published the "waters of the United States" rule (the "Final Rule") in 2015[5] without correcting a number of defects that seriously and adversely impact the business community.

As such, the Chamber believes that the Agencies should rescind the Final Rule and recodify the previous definition of "waters of the United States" until they can craft one that adequately addresses Congress' intent to protect America's water resources.

I. Background

Congress enacted the Clean Water Act in 1972 in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[6] Under the authority of the Commerce Clause,[7] Congress used this statute to expand federal jurisdiction beyond traditionally "navigable waters," as defined in the statutes as "waters of the United States, including its territorial seas."[8] Congress intended that, while not unlimited, "the term 'navigable waters' be given the broadest possible constitutional interpretation" under the statute.[9]

Congress has acknowledged that States and local governments retain the authority to regulate those waters not governed by the Clean Water Act. The statute is rooted in the principles of federalism, and notes that it is Congress' duty to "recognize, preserve, and protect the primary responsibilities and rights of the *States* to prevent, reduce, and eliminate pollution, [and to] plan the development and use…of land and water resources…"[10] Further, the statute provides that "Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.[11] The amount of federal jurisdiction established under the Clean Water Act, however, has been the subject of much debate.

The Clean Water Act provides that the "Administrator of the Environmental Protection Agency shall" administer the statute.[12] Section 404 of the Clean Water Act, however, grants the Secretary of the Corps the authority to issue permits for "the discharge of dredged or fill materials into *navigable waters* at specified disposal sites."[13] The issue of dual jurisdictional determinations has been a reoccurring theme throughout the statute's existence.

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[4] U.S. Chamber of Commerce, Comments on Proposed Rule: Definition of "Waters of the United States" Under the Clean Water Act (Nov. 12, 2014), *available at* https://www.uschamber.com/sites/default/files/11.12.14-_multi-organization_comments_to_epa_and_usace_on_proposed_rule_definition_of_waters_of_the_united_states.pdf.
[5] Definition of "Waters of the United States" Under the Clean Water Act, 80 Fed. Reg. 37,054 (June 29, 2015) ("Final Rule").
[6] 33 U.S.C. § 1251(a).
[7] U.S. CONST. art. I.
[8] 33 U.S.C. § 1362(a).
[9] S. Rep. No. 92-1236, at 144 (1972) (emphasis added).
[10] 33 U.S.C. § 1251(b).
[11] *Id.* at § 1251(g).
[12] *Id.* at § 1251(d).
[13] *Id.* at § 1344(a).

The Agencies originally issued diametrically opposed definitions of "waters of the United States" – EPA's definition was quite broad, while the Corps interpreted the term very narrowly.[14] By the end of the 1980s, however, the Agencies had adopted the same definition (the "1986/1988 Rule"), which included: waters used in the past or used currently for interstate commerce; all interstate waters, including interstate wetlands; each state's bodies of water — including lakes, rivers, streams, mudflats, playa lakes and ponds — that could affect interstate or foreign commerce; tributaries of waters of the United States; and the territorial sea.[15]

These regulations have since defined the scope of federal jurisdiction under the Clean Water Act, although federal courts have reviewed them in a variety of circumstances, and subsequently limited federal jurisdiction in order to bring the definition of "waters of the United States" more in line with the statute's objectives. As detailed later, three Supreme Court decisions provide the necessary context for determining the appropriate scope of federal jurisdiction over "navigable waters" - *United States v. Riverside Bayview Homes, Inc.*, *SWANCC v. U.S. Army Corps of Engineers*, and *Rapanos v. United States*.[16]

Notably, the *Rapanos* decision resulted in a split Court, which developed two separate jurisdictional tests and created quite a bit of regulatory confusion for affected groups. Thus, the Agencies released guidance in 2008 to help further delineate the meaning of "waters of the United States" ("Applicable Guidance").[17] The Agencies issued further draft guidance in 2011,[18] although after it was published, a large number of stakeholders asked the Agencies to rescind it and instead develop a rule that would better help them understand which waters are federally protected. The Agencies subsequently honored that request in 2013.

Following the notice-and-comment process for the 2014 Proposal, the Agencies issued the Final Rule on June 29, 2015, as a means to "ensure protection of our nation's aquatic resources and make the process of identifying 'waters of the United States' less complicated and more efficient."[19] Unfortunately, the Final Rule strays far from that goal and creates a substantial amount of regulatory confusion.

The Sixth Circuit Court of Appeals issued a nationwide stay of the rule soon after it took effect,[20] and since taking office, President Trump has made reviewing the Final Rule one of his

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[14] *Compare* National Pollutant Discharge Elimination System, 38 Fed. Reg 13,528 (May 22, 1973) *with* Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115 (Apr. 3, 1974).
[15] *Compare* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986) (amending 33 C.F.R. 328.3) *with* Final Rule: Clean Water Act Section 404 Program Definitions and Permit Exemptions, 53 Fed. Reg. 20,764 (June 6, 1988) (amending 40 C.F.R. 232.2).
[16] *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) ("*Riverside*"); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"); *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*").
[17] U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY CORPS OF ENGINEERS, CLEAN WATER ACT JURISDICTION FOLLOWING THE SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES* AND *CARABELL V. UNITED STATES* (Dec. 2, 2008).
[18] U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY CORPS OF ENGINEERS, DRAFT GUIDANCE ON IDENTIFYING WATERS PROTECTED BY THE CLEAN WATER ACT (Apr. 27, 2011).
[19] *See* note 5.
[20] *In re: Clean Water Rule: Definition of "Waters of the United States." State of Ohio v. U.S. Army Corps of Engineers, et al.*, 803 F.3d 804 (Oct. 9, 2015).

administration's top priorities. For example, during his confirmation hearing, EPA Administrator Scott Pruitt stated:

> …I think the role of the EPA, prospectively, is to seek to provide clarity on what the true definition, what the best definition is with respect to Waters of the United States. As you know, there is much flexibility and discretion there given to the EPA in a series of cases that lead up to the *Rapanos* decision that haven't provided a tremendous amount of clarity. The best thing the EPA can do going forward is to reestablish that clarity so that States and individuals know what is expected of them in compliance.[21]

Further, on March 3, 2017, the President issued Executive Order 13778, which directed EPA to review the Final Rule.[22] The Agencies then issued a notice on March 6, 2017, announcing their intent to review and rescind or revise the Final Rule.[23]

This proposal to rescind and recodify the 1986/1988 Rule and Applicable Guidance ("Pre-Existing Rules") is a culmination of those efforts. The Chamber finds that such action is warranted and necessary, as the Final Rule was not only developed inconsistently with Congressional intent and Supreme Court precedent, but also violates the Constitution and several federal statutes. It is wholly within the Agencies' authority to rescind the Final Rule, and the Chamber believes that after that rescission, it is necessary to recodify the Pre-Existing Rules in order to maintain the *status quo* and avoid regulatory uncertainty.

II. The Supreme Court Has Limited the Scope of Federal Jurisdiction Over "Navigable Waters"

The Supreme Court has repeatedly addressed the issue of what constitutes "navigable waters" under the Clean Water Act. The Final Rule, however, fails to adhere to Supreme Court precedent, which runs contrary to the Agencies interpretation of "waters of the United States" in the Final Rule. These decisions should be properly considered when examining the scope of federal jurisdiction over "navigable waters."

In *Riverside*, the Court addressed whether wetlands should be subject to federal regulation under the Clean Water Act as "waters of the United States." In a unanimous opinion, the Court said that Congress intended that the definition of "navigable waters" as "waters of the United States" was meant "to regulate *at least some* waters that would not be deemed 'navigable' under the classical understanding" of the term.[24] To that end, the Court limited the Corps' jurisdiction over wetlands to those that "actually abut a navigable waterway."[25]

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[21] *Hearing on the Nomination of Attorney General Scott Pruitt to be Administrator of the U.S. Environmental Protection Agency: Hearing Before the S. Comm. on Env't and Pub. Works*, 115th Cong. 63 (2017) (statement of Attorney General Scott Pruitt).
[22] Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, 82 Fed. Reg. 12,497 (Mar. 3, 2017).
[23] Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532 (Mar. 6, 2017).
[24] 474 U.S. at 121.
[25] *Id.* at 132.

Later, in *SWANCC*, the Court examined whether federal jurisdiction included isolated gravel ponds that served as habitats for migratory birds. The Court found that these ponds were "a far cry…from the 'navigable waters' and 'waters of the United States'" covered by the Clean Water Act.[26] The Court reasoned that "the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the Clean Water Act: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[27]

Lastly, in *Rapanos*, the Court considered whether wetlands that are not adjacent to traditional "navigable waters" are "waters of the United States" under the Clean Water Act. The Court failed to reach a majority opinion and instead developed two alternative tests to determine federal jurisdiction over "navigable waters." The difference between these tests has since contributed immensely to the ongoing dispute as to what truly constitute "waters of the United States."

Justice Scalia, writing for the plurality, found that "'waters of the United States' only include relatively permanent, standing, or flowing bodies of waters," as well as wetlands with a "continuous surface connection to bodies that are 'waters of the United States' in their own right."[28] Further, he noted that "waters of the United States" do not include ephemeral streams and drainage ditches.[29]

Justice Kennedy concurred, citing *SWANCC*, stating that a wetland or non-navigable waterbody fall within the scope of the Clean Water Act only if it has a "*significant nexus*" to a traditional navigable waterway.[30] He noted that "waters of the United States" exist where science shows that they "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[31]

The Final Rule ignores the jurisdictional limitations set by the Supreme Court in *SWANNC* and *Rapanos*. As discussed in more detail below, the Final Rule not only expands federal jurisdiction over "navigable waters" to waters with even the most remotely tenuous connection to "navigable waters," but also supports the "any connection" theory that was rejected by the Supreme Court. For example, as written, the Final Rule would extend federal jurisdiction to the smallest of ditches that are only slightly filled even after the most seasonal of rains. The Agencies should have taken these limitations into account when promulgating the Final Rule in order to avoid an unnecessary expansion of federal jurisdiction.

III. The Final Rule Violates the Constitution and a Number of Federal Statutes

The Final Rule violates a number of different legal authorities. The substance of the Final Rule not only infringes upon multiple parts of the Constitution, but also the Administrative Procedure Act ("APA"),[32] Regulatory Flexibility Act ("RFA"),[33] and Unfunded Mandates Reform Act ("UMRA").[34]

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[26] 531 U.S. at 173.
[27] *Id.* at 172.
[28] 547 U.S. at 716.
[29] *Id.*
[30] *Id.* at 767.
[31] *Id.* at 780.
[32] 5 U.S.C. §§ 500 *et seq.* (1947).

a. The Final Rule Violates Multiple Provisions of the U.S. Constitution

The Constitution is the ultimate law of the United States and is the ultimate source for authority for proffered laws and rules.[35] The Constitution is extremely important to the rulemaking process, in that it establishes the principles of federalism as well as provides for Congress' authority to regulate interstate commerce.

i. The Final Rule Violates the Principles of Federalism

The Final Rule violates the principles of federalism established by the Tenth Amendment of the Constitution. The Tenth Amendment provides that those powers not delegated to the United States by the Constitution "are reserved to the States respectively, or to the people"[36] in order to protect the "liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control actions."[37]

Congress intended that federalism serve as an underlying policy of the Clean Water Act.[38] The regulation of land and water use within a State's borders is a "quintessential" State power.[39] The Agencies did not adhere to this policy, however, as the Final Rule extends federal jurisdiction to those features that would otherwise not be considered "waters of the United States" under the Clean Water Act. Many of those features have been regulated as "waters of the States" or have not been regulated at all.

The Supreme Court held that when an agency takes action to infringe upon traditional State powers, that agency must be able to point to a clear grant of authority from Congress in the relevant statute.[40] The Clean Water Act does not do so, and thus the Final Rule limits state powers without any clear grant of authority from Congress.

Moreover, the Agencies did not properly consult with state and local authorities when promulgating the Final Rule. Executive Order 13132 requires federal agencies to take steps to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.[41] The Agencies did not do so, and even went so far as to certify that the Final Rule does "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."[42]

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[33] 5 U.S.C. §§ 601 *et seq*. (1980).
[34] 2 U.S.C. §§ 1501 *et seq*. (1995).
[35] U.S. CONST. art. VI, cl. 2.
[36] *Id.* at amend. X.
[37] *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).
[38] *See* note 10.
[39] *Rapanos*, 547 U.S. at 738 ("Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power.").
[40] *SWANCC*, 531 U.S. at 172.
[41] Federalism, 64 Fed. Reg. 43,255 (Aug. 10, 1993).
[42] Final Rule, 80 Fed. Reg. at 37,102.

The Chamber raised these concerns in comments on the 2014 Proposal,[43] and many State and local stakeholders raised this concern in response to the Agencies' May 2017 request for comments[44] from state and local officials and organizations on federalism issues.[45] These comments show how important State and local input is for defining "waters of the United States." The Chamber believes that the Agencies should rescind the Final Rule, and properly consult State and local stakeholders during any future related rulemaking.

ii. The Final Rule Violates the Commerce Clause

The Final Rule also violates the Commerce Clause.[46] The federal government has no general police power and can only exercise those powers expressly granted to it by the Constitution or those that are implied as reasonably "necessary and proper" to carry out the granted powers."[47] To that end, Congress should only extend federal jurisdiction under the Clean Water Act to those waters that have a substantial effect on interstate commerce.

While the definition of "waters of the United States" is meant to be expansive, the Court notes in *Riverside* that "[i]n determining the limits of its power to regulate … under the Act…the Corps must necessarily choose some point at which water ends and land begins."[48] The Final Rule would expand jurisdiction well past that point, to waters with even the most remote effect on interstate commerce. In many instances, those waters are so minute in size that they would never otherwise be regulated.[49] The Chamber believes that the Agencies should rescind the Final Rule, and properly consider Commerce Clause implications during any future rulemaking.

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[43] Chamber Comments on Proposed "Waters of the United States" Rule, *supra* note 4 at 40 (stating that "Because the Agencies have not consulted or coordinated adequately with the States, the Agencies must withdraw their proposal and not proceed to revise the WOTUS definition until they can fully comply with Executive Order 13132.").

[44] *See, e.g.,* Letter from E. Scott Pruitt, Administrator, U.S. Envtl. Prot. Agency to the Honorable Terry Branstad, Governor of Iowa (May 8, 2017), *available at* https://www.epa.gov/sites/production/files/2017-05/documents/wotus-_governors_letter_-_iowa.pdf.

[45] *See, e.g.,* Florida Department of Agriculture and Consumer Services, Comments in Response to the U.S. Environmental Protection Agency's Federalism Consultation on "The Definition of "Waters of the U.S." (June 16, 2017), *available at* https://images.magnetmail.net/documents/clients/EEI_/2017-06/kktvyhkh.q3h/FDACS_WOTUS_Comments_61617_to_USEPA.PDF; Office of the Governor of the State of Tennessee, Comments in Response to the U.S. Environmental Protection Agency's Federalism Consultation on "The Definition of "Waters of the U.S." (June 19, 2017), *available at* http://www.burr.com/wp-content/uploads/2017/06/2017-6-19-Tennessee-Definition-of-WOTUS-Comments.pdf; Office of the Governor of the State of Kansas, Comments in Response to the U.S. Environmental Protection Agency's Federalism Consultation on "The Definition of "Waters of the U.S." (June 19, 2017), *available at* https://images.magnetmail.net/documents/clients/EEI_/2017-06/hu3frjft.si0/WOTUS_Comment_Letter.pdf.

[46] *See* note 7.

[47] *Id.* at § 8, cl. 18; *id.* at amend. X; *United States v. Lopez*, 514 U.S. 549, 566 (1995).

[48] *Riverside*, 474 U.S. at 132.

[49] *See, e.g., Rapanos*, 547 U.S. at 734 (The plurality opinion in *Rapanos* rejects the idea of extending federal jurisdiction to "ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert.").

b. The Final Rule Violates the Administrative Procedure Act

The Final Rule does not follow the requirements of the APA. The APA governs the manner in which administrative agencies, such as EPA or the Corps, propose and establish regulations.[50] Two of the primary purposes of the APA are to require agencies to keep the public informed of their organization procedures and rules, and to provide for public participation in the rulemaking process through notice-and-comment.[51]

The Final Rule does not serve these purposes. Not only did the Agencies develop the Final Rule in a manner that is "arbitrary and capricious," but they also did not properly adhere to the statute's notice-and-comment provisions.

i. The Final Rule is Arbitrary and Capricious

The Agencies developed the Final Rule in an "arbitrary and capricious" manner. The APA requires that federal agencies engage in "reasoned decision-making" when promulgating rules.[52] Final rules should be made within the scope of an agency's lawful authority and the agency must use a logical and rational process to develop the substance of a rule.[53] Rules that do not meet these requirements are considered "arbitrary and capricious" and invalid.[54]

The record for the Final Rule does not provide enough evidence to support the case-by-case jurisdictional determinations for "waters of the United States" found in the Final Rule. The Final Rule relies on many definitions that are so vague and potentially expansive that they completely realign the scope of federal jurisdiction over "navigable waters." To that end, federal jurisdiction under the Final Rule depends on a "significant nexus" between waters that are separated by distance and circumstance. The record, however, does not contain the scientific data necessary to support those distances and circumstances. This creates an arbitrary standard that is ambiguous enough to occupy the courts for decades to come and clearly did not come about as a result of "reasoned decision-making."

Likewise, the expansive definition of "tributary" is one of the most enigmatic concepts in the Final Rule. The Final Rule defines tributary as "a water that contributes to flow, either directly or through another water…that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark" and states that a tributary can "be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches" that are otherwise not excluded under the Final Rule.[55]

Although the Agencies claimed that this definition was addressed in the Final Rule, it remains unclear as to whether many ditches are "waters of the United States." As defined, a

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[50] 5 U.S.C. at § 553.
[51] *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT OF 1947 (1947).
[52] *Michigan v. EPA*, 576 U.S. ___ (2015) (slip op. at 5).
[53] *Id.*
[54] 5 U.S.C. at § 706(2)(A).
[55] Final Rule, 80 Fed. Reg. at 37,115.

tributary could include almost any ditch, including those man-made ditches that are full after only the most seasonal of rains. Despite claims that the Final Rule clarified what waters are now "adjacent" or "neighboring," confusion remains. The definition of "other waters" continues to be equally problematic. Therefore, property owners will still have to rely on the judgements of consultants, lawyers, and other experts before they undertake even routine activities on their land, such as farming or grazing.

While the Agencies made much of new exclusions added to the Final Rule, these exclusions themselves raise complex questions about the circumstances in which they actually apply. Property owners, for one, have little certainty as to whether their property falls within the definition of "waters of the United States" and is subject the permitting requirements that the definition triggers.

The Final Rule clearly did not give property owners the clarity and certainty regarding the scope of federal jurisdiction that it was supposedly designed to deliver. The Agencies should rescind the Final Rule due to the fact that it is arbitrary and capricious.

ii. The Final Rule Violates the APA's Notice-and-Comment Requirements

The Final Rule also violates the APA's notice-and-comment provisions. After an agency gives the public notice of a proposed rulemaking, it requires that agency to "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments…"[56] and when a final agency action, such as the Final Rule, is challenged, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be…without observance of procedure required by law."[57]

During the public comment period for the 2014 Proposal, stakeholders repeatedly asked for clarifications of new definitions and the inclusion of illustrative examples, and included suggestion that would simplify the definition. For example, stakeholders expressed concern regarding the definition of "tributary," yet as noted, the Agencies left that definition vague and unnecessarily expansive when the definition was published in the Final Rule.[58]

A final rule must also be the "logical outgrowth" of a proposed rule, which occurs "if interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period."[59] The Final Rule

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[56] 5 U.S.C. at § 553(c).
[57] *Id.* at § 706(2)(D).
[58] U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY CORPS OF ENGINEERS, REPORT ON THE DISCRETIONARY CONSULTATION AND OUTREACH TO STATE, LOCAL, AND COUNTY GOVERNMENTS FOR THE CLEAN WATER RULE: DEFINITION OF "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT; FINAL RULE 8 – 9 (May 2015) (stating, "Some participants requested clear categories that identify which waters are considered jurisdictional, and more diagrams to define all terms included in the rule" and "Participants expressed mixed opinions on tributaries…others considered the inclusion of perennial, intermittent, ephemeral flows, and manmade ditches as an expansion of jurisdictional scope").
[59] *Chamber of Commerce of the United States v. SEC*, 443 F.3d 890, 900 (Apr. 7, 2006) (citing *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005); *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004)).

contains distance limitations for terms such as "adjacent waters" and "significant nexus" that were not included in the definition of "waters of the United States" found in the 2014 Proposal.

Stakeholders could not reasonably anticipate that the Final Rule would contain these distance limitations. On the other hand, if the proposed definition *did* contain distance limitations, stakeholders would have had the opportunity to comment on them and the Agencies could have adjusted them in response. The Sixth Circuit also noted in its stay of the Final Rule that that the record did not contain any sort of "specific scientific support" for the distance limitations.[60] As such, the Final Rule is not a "logical outgrowth" of the 2014 Proposal. For those reasons, the Agencies provided inadequate opportunity for notice and comment.

c. The Final Rule Violates the Regulatory Flexibility Act

The Agencies did not properly consider the RFA when promulgating the Final Rule. The RFA requires federal agencies to consider the impact that a federal action will have on small businesses, small governments, and small non-profit organizations.[61] Federal agencies must make an effort to quantify the number of small entities that will be affected and the magnitude of that effect.

The agency must also consider alternatives that would reduce the impact on the small entities. In order to comply with the RFA, an agency may certify that there are facts showing that a federal action will not have a "significant economic impact on a substantial number of small entities."[62] If an agency cannot certify that lack of significant impact, it must perform a detailed small entity impact analysis.[63]

Despite clear indications from the outset that the Final Rule would impose a widespread impact on small entities, the Agencies certified that it did not.[64] There is no evidence that the Agencies conducted any analysis whatsoever of the likely impacts of the rule on small entities. Rather, the certification asserts, without any supporting facts, that:

> The scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulation . . . this action will not affect small entities to a greater degree than the existing regulation . . . [t]he proposed rule contemplated here is not designed to "subject" any entities of any size to any specific regulatory burden."[65]

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[60] *In re: Clean Water Rule*, 803 F.3d at 807.
[61] 5 U.S.C. at § 602.
[62] *Id.* at § 605(b).
[63] *Id.* at § 603.
[64] Final Rule, 80 Fed. Reg. at 37,102 (stating, without supporting facts, that "After considering the economic impacts of this rule on small entities, we certify that this final rule will not have a significant economic impact on a substantial number of small entities…The scope of jurisdiction in this rule is narrower than that under the existing regulations. Because fewer waters will be subject to the Clean Water Act under the rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.").
[65] 2014 Proposal, 79 Fed. Reg. at 22,220.

In effect, the Agencies based their RFA certification on the argument that the 2014 Proposal was not a jurisdictional expansion, that the rule would impose only insignificant new economic burdens on any entity, and that the rule would not change the *status quo*. In the absence of a factual basis to make these arguments, however, the Agencies' certification is invalid – and a clear violation of the RFA.

The Agencies also ignored the Small Business Administration's ("SBA") recommendation to conduct a full RFA analysis. In a letter to the Agencies, SBA stated that the Agencies improperly certified the Final Rule and that it would impose significant new costs directly on small entities. Further, SBA concluded that the only way the Agencies could correct this defect was to withdraw the proposed rule and fully comply with the RFA before re-proposing it.[66]

The Agencies received an ample amount of evidence signifying that the Final Rule would have a significant impact on small entities. For example, on May 29, 2014, small business representatives from the ranching, homebuilding, and stone and gravel industries testified before the House Small Business Committee regarding the increased difficulty in obtaining Bureau of Land Management grazing permits for livestock, uncertainty about home construction in areas that appear to be uplands but could be "waters of the United States" under the Final Rule, and the increased difficulty in obtaining multi-year leases for sand and gravel removal from traditional extraction areas in riverine valleys.[67]

Clearly, the Agencies received a sufficient number of comments to justify abandoning the RFA certification and conducting the full impact analyses required by the statute. The Agencies did not conduct the rulemaking under any statutory or court-ordered deadline, and thus were free to start over and write a rule that was clear, transparent, and developed in accordance with the law. Rather than take advantage of that opportunity, though, the Agencies decided not to correct the RFA defect.

d. The Final Rule Violates the Unfunded Mandates Reform Act

The Agencies did not properly consider UMRA when promulgating the Final Rule. Title II of UMRA requires federal agencies to assess the effect that a federal action will have on state and local governments and the private sector before imposing mandates of $100 million or more per year, when federal funding is not provided to state and local governments to implement the mandate.[68] Congress designed UMRA to prevent federal agencies from shifting the cost of new federal programs to the states.

The Agencies certified that the Final Rule "does not contain any unfunded mandates under the regulatory provisions of Title II of [UMRA], and does not significantly or uniquely affect small

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[66] U.S. SMALL BUS. ADMIN., LETTER TO GINA MCCARTHY, ADMINISTRATOR, EPA, AND GENERAL JOHN PEABODY, DEPUTY COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS, ON DEFINITION OF "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT (Oct. 1, 2014).
[67] *Will EPA's "Waters of the United States" Rule Drown Small Businesses?: Hearing Before the H. Comm. on Small Bus.*, 113th Cong. (May 29, 2014).
[68] *See* 2 U.S.C. §§ 1501 *et seq.* (1995).

governments."[69] This certification is clearly inconsistent with the facts. For example, according to the National Association of Counties, 1,542 of the 3,069 counties in the United States have populations of less than 25,000 people,[70] and are therefore protected by both UMRA and the RFA. These counties are responsible for building and maintaining 45% of the roads and associated roadside ditches in 43 states,[71] where some of the most significant permitting and enforcement impacts of the 2015 rule would be expected to occur. Those counties are required by law to maintain the integrity of those roads and ditches, as well as many other county services. They also will be required to bear the costs of obtaining Clean Water Act section 404 permits, as required under the 2015 rule, as well as section 402 permits for application of pesticides or stormwater management.

Additionally, the states themselves will bear the considerable costs of conforming state water quality programs to satisfy the 2015 rule. States will have to bear the cost of implementing an expanded section 402 permitting program. States will have to bear the cost of establishing revised water quality standards under section 303, including the responsibility to evaluate and list "impaired" waters under an expanded Total Maximum Daily Load requirement.

Since the Final Rule does not create new federal funding for state or local governments, the rule imposes an unfunded mandate – even though the Agencies certified that it did not. The Agencies' failure to comply with UMRA constitutes a procedural defect that was never corrected when the Final Rule was developed.

IV. The Agencies Deceived Stakeholders During the Public Comment Period

Evidence shows that the Agencies engaged in a surreptitious social media campaign to generate favorable public comments in a way that would numerically offset adverse stakeholder comments. A Government Accountability Office ("GAO") audit of EPA's electronic campaign, conducted on Twitter, YouTube, and a social media tool called "Thunderclap," concluded that the campaign violated federal law against agency lobbying and propaganda campaigns.[72]

In this campaign, one would indicate online that he or she agrees with the generic sentiment that "Clean Water is Important to Me" and supports EPA. This would result in the automatic generation of an e-comment supporting the 2014 Proposal.[73] Many people receiving a message generally supporting clean water would not know it was an effort by EPA seeking support for a specific proposed rule, making it "covert propaganda," according to the GAO auditors.[74]

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[69] U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY CORPS OF ENGINEERS, ECONOMIC ANALYSIS OF THE EPA-ARMY CLEAN WATER RULE 61 (May 2015).
[70] *Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule: Hearing Before the Subcomm. on Water Res. and Env't of the H. Comm. on Transp. and Infrastructure*, 113th Cong. 2 (June 11, 2014) (Testimony of Warren Williams, General Manager, Riverside County Flood Control and Water Conservation District, submitted on behalf of the National Association of Counties).
[71] *Id.*
[72] Eric Lipton and Michael D. Shear, *E.P.A. Broke Law with Social Media Push for Water Rule, Auditor Finds*, The New York Times (Dec. 14, 2015).
[73] *Id.*
[74] *Id.*

By working to generate these comments and relying on their sheer number,[75] the Agencies deprived members of the public who submitted substantive comment meaningful attention. The total number of comment should not have been given so much weight in the Final Rule. One of the main reasons that agencies are given such great deference by the courts, as noted in *Chevron v. Natural Resources Defense Council*,[76] is that they are deemed to have better technical expertise than the courts. Placing more emphasis on the number of comments generated as opposed to their substance undermines Chevron deference principles.

In the end, the EPA worked to limit the role that stakeholders had in the design of the Final Rule. Any rulemaking in which federal agencies flatly ignore voluminous adverse and substantive comments, characterize legitimate concerns about the impacts of a proposed rule on regulated entities as "silly" and "ludicrous,"[77] and covertly labor to incubate supportive public comments in a rulemaking is outside the appropriate boundaries of the APA. The Final Rule suffers from this defect, and must be rescinded to allow the Agencies to undertake a transparent rulemaking.

V. The Agencies Relied on a Misleading Economic Analysis When Developing the Final Rule

In promulgating the Final Rule, the Agencies relied on an economic analysis that misrepresented the costs and benefits associated with implementing the Final Rule. The Agencies based their conclusion that the Final Rule would only increase the amount of federal jurisdictional waters under the Clean Water Act by 2.84% to 4.65% on a tiny sample of jurisdictional determinations made prior to the 2014 Proposal that resulted in landowners having to obtain individual section 404 dredge and fill permits.[78] These permits are more costly and involved than the more common general permits, and can easily take more than a year to obtain, at a median cost estimated at $155,000.[79]

The Agencies ignored conflicting evidence from federal and state authorities that the Final Rule could more than quadruple the amount of federal jurisdictional waters in the country.[80] The Agencies also confined their analysis to the section 404 program, and ignored likely costs to regulated parties – including state and local governments – of complying with Clean Water Act requirements under sections 303, 311, and 402 of the Act. As the SBA Office of Advocacy noted:

> [T]he economic analysis done with respect to the [Clean Water Act section] 404 program is likely not representative of the changes that may occur with [Clean Water

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[75] Final Rule, 80 Fed. Reg. at 37,057.
[76] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[77] *See* Timothy Cama, *EPA Promoting Water Rule to Farmers in Missouri*, The Hill (July 8, 2014) (Statement of EPA Administrator Gina McCarthy).
[78] ECONOMIC ANALYSIS OF THE EPA-ARMY CLEAN WATER RULE, *supra* note 69 at vii.
[79] *Id.* at 12.
[80] *See*, *e.g.*, Letter from Sam Brownback, Governor of Kansas, to Nancy Stoner, Acting Assistant Administrator for Water, U.S. Environmental Protection Agency (July 14, 2011) (the addition of up to 100,000 miles of "ephemeral" streams in Kansas would represent a 400% increase in WOTUS in Kansas); Press Release, H. Comm. on Space, Science, and Tech., Maps Show EPA Land Grab (Aug. 27, 2014) (2014 U.S. Geological Survey maps indicate potential doubling of WOTUS areas, compared to 2009 maps using pre-WOTUS definitions).

> Act sections] 402 and 311 permitting, leaving small businesses without a clear idea of the additional costs they are likely to incur for those Clean Water Act programs.[81]

Finally, the Agencies assigned inflated benefits to the Final Rule, even though it is unclear what impact the Final Rule would actually have, if any, on water quality generally or the quality of drinking water. In large part, the rationale for the Final Rule yielding any benefit whatsoever is the assumption that state and local regulation of non-federal waters are entirely ineffective and do nothing to protect human health and the environment. EPA failed to make any factual showing that this assumption is true, however. Although the Agencies' deeply flawed and misleading economic analysis was slightly revised to support the Final Rule,[82] the damage was done at the time the Agencies solicited public comments, and the problematic analysis was never properly corrected.

The Agencies include a revised economic analysis in the current proposal that details the costs and benefits of the proposed repeal of the rule. They find that the benefits of the Final Rule were vastly overstated. Instead of benefits ranging from $338.9 million to $554.9 million annually, the re-analysis for the repeal action finds that the true benefits of the Final Rule should be valued at $33.6 million to $72.8 million annually. With the actual benefits this low and the estimate of costs remaining at $158.4 million to $465 million annually, the justification for the rule based on the benefits outweighing the costs fails.[83]

The new analysis also notes that the 10 studies used to assess landowners' "willingness to pay" for wetlands mitigations efforts similar to those areas protected under the Final Rule were conducted between 1986 and 2000.[84] They are largely outdated and irrelevant and should not have been used in the first place. These numbers alone are enough to warrant that the Agencies should rescind the Final Rule and recodify the pre-existing rules.

VI. The Agencies Have the Authority to Rescind the Final Rule

The Agencies have the power to rescind the Final Rule based on these defects. Agencies have the unequivocal authority to change or repeal rules to reflect certain changes in circumstance, statutory interpretation, policy, technical analysis, or to correct and remedy prior mistakes and defective rulemaking.[85] Furthermore, an administration has the discretion to repeal any regulation developed by the immediate past administration, as "a change in administration brought about by

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[81] U.S. SMALL BUS. ADMIN. LETTER ON DEFINITION OF "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT, *supra* note 66 at 8.
[82] *See* ECONOMIC ANALYSIS OF THE EPA-ARMY CLEAN WATER RULE, *supra* note 69.
[83] U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY CORPS OF ENGINEERS, ECONOMIC ANALYSIS FOR THE PROPOSED DEFINITION OF "WATERS OF THE UNITED STATES" – RECODIFICATION OF PRE-EXISTING RULES 10 (June 2017) (Table 1).
[84] *Id.* at 8 – 9.
[85] *See, e.g., Fed. Communications Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) ("*Fox*"); *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1349 (D.C. Cir. 1985)

the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal" of its regulations and programs."[86]

An agency need only examine the relevant data and provide that there is a reasoned explanation for its actions if it chooses to change certain policy and repeal a rule.[87] The relevant data in this case does not truly define "waters of the United States" or set the "bright-line" boundaries. For example, the record includes a report issued by the Agencies that concludes that all waters are connected ("Connectivity Report").[88] This Connectivity Report, however, *informs* the bright-line boundaries, rather than *dictates* them, and the Agencies developed those limits based on legal and policy considerations, as well as their expertise and experience, rather than science.[89] As such, the Agencies are not obligated to follow the findings in the Connectivity Report and can disregard them when rescinding the Final Rule.

Moreover, in the Court's view, the reasons for a new policy do not necessarily have to be "*better* than the reasons for the old one."[90] This is a low threshold to meet, and as such the Agencies must merely acknowledge that the Administration is changing positions on the definition of "waters of the United States" and provide a reasoned explanation why.

The Agencies have met this threshold. The proposal to rescind the Final Rule and recodify the Pre-Existing Rules acknowledges that the Administration is changing positions on the matter. The proposal also provides a reasoned explanation as to why that change is needed – the Agencies failed to properly comply with the APA and consult with stakeholders and address a malady of procedural and structural defects during the rulemaking process.

For those reasons, the Agencies can and should rescind the Final Rule.

VII. The Agencies Should Recodify the Pre-Existing Rules

Following rescission of the Final Rule, the Agencies should recodify the Pre-Existing Rules in order to ensure regulatory certainty and maintain the *status quo*. The Sixth Circuit stayed the Final Rule based on the fact that the petitioners had shown "a likelihood of success on the merits" of their challenges to the Final Rule.[91] In the time since that stay, the Agencies have returned to implementing the Pre-Existing Rules that were in effect for decades.[92] That implementation has been guided by the relevant case law and applicable policy, as well as the best science and technical

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[86] *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *Fox*, 556 U.S. at 514-515 (Rehnquist, J. concurring in part and dissenting in part)).
[87] *United States Telecom Ass'n v. Fed Communications Comm'n*, 825 F.3d 674, 723 (D.C. Cir. 2016) (citing *Fox*, 556 U.S. at 513).
[88] U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY CORPS OF ENGINEERS, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE (FINAL REPORT) (Jan. 15, 2015), *available at* https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414.
[89] Final Rule, 80 Fed. Reg. at 37,059, 37,062.
[90] *United States Telecom Ass'n*, 825 F.3d at 707 (citing *Fox*, 556 U.S. at 515)).
[91] *See* note 60.
[92] *See* 82 Fed. Reg. at 34,920.

data used on a case-by-case basis in determining what waters are protected under the Clean Water Act.[93]

Notably, the Final Rule was only in effect for six weeks in 37 states prior to the Sixth Circuit's stay, and in 13 states, the Final Rule never even went into effect. Likewise, during that six week period, there were no enforcement actions under the Final Rule. The Sixth Circuit noted that there would be no imminent injury to the integrity of the nation's water if the Final Rule was not immediately implemented and enforced, and it also expressed concern regarding the Final Rule's redrawing of jurisdictional boundaries.[94]

The Chamber supports recodifying the Pre-Existing Rules so that the Code of Federal Regulations reflects the Administration's priorities and the current legal regime enforced by the Agencies. This action is quite important to avoid the chaos and confusion that accompanies regulatory uncertainty.

VIII. Conclusion

It is clear that the Final Rule suffers from an immense number of fatal flaws and fails to properly adhere to Congressional intent, the APA, and other legal regulatory requirements. It is imperative that the Agencies rescind the Final Rule and recodify the prior definition of WOTUS until the Agencies can properly develop a new rule that harmonizes those two complimentary interests and clearly articulates Congress' intent to protect America's water resources.

The Chamber appreciates the opportunity to comment on this important matter. If you have questions regarding these comments, please contact me at (202) 463-5457 or at wkovacs@uschamber.com.

Sincerely,

William L. Kovacs

[93] *Id.*
[94] *In re: Clean Water Rule*, 803 F.3d at 808.