CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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VIA ELECTRONIC FILING

Mr. Michael McDavit
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Ms. Stacey Jensen
Regulatory Community of Practice
U.S. Army Corps of Engineers
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RE: Definition of "Waters of the United States" – Recodification of Preexisting Rule, 83 Fed. Reg. 32,227 (July 12, 2018); Docket No. EPA-HQ-OW-2017-0203; FRL-9980-52-OW

Dear Mr. McDavit and Ms. Jensen:

The U.S. Chamber of Commerce submits these comments in support of the U.S. Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("the Corps;" collectively, "the Agencies") supplemental proposal to rescind the 2015 definition of "Waters of the United States" ("2015 Rule") and recodify the preexisting regulations and applicable guidance.[1]

I. Background and 2017 Comments

The definition of "Waters of the United States" ("WOTUS") is critical to the Chamber and its members, as many of the Chamber's members engage in activities that are subject to extensive permitting requirements under the Clean Water Act ("CWA"). The Chamber has been actively engaged in WOTUS rulemaking for an extensive period, and filed comments opposing the overly expansive 2015 Rule after the Agencies first proposed it in 2014.[2]

[1] Definition of "Waters of the United States" – Recodification of Preexisting Rule, 83 Fed. Reg. 32,227 (July 12, 2018) (to be codified at 33 C.F.R. 328, et al.).
[2] *See* U.S. Chamber of Commerce *et al.*, Comments on Proposed Rule: Definition of "Waters of the United

Last year, after the start of the new Administration, the Agencies proposed to permanently repeal the 2015 Rule and recodify the preexisting regulatory language and applicable guidance ("Initial Proposal").[3] The Chamber and its members filed comments in support of the Agencies' efforts.[4] Specifically, the Chamber stated in its comments that:

- The Agencies developed the 2015 Rule inconsistent with the limits that Congress and the Supreme Court set forth.
- The 2015 Rule violates the Constitution and several Federal statutes.
- The Agencies deceived stakeholders during the public comment period.
- The Agencies relied on misleading economic and scientific data during promulgation of the 2015 Rule.
- It is within the Agencies' authority to rescind the 2015 Rule and recodify the preexisting regulations and applicable guidance.[5]

The Agencies are currently in the process of reviewing more than 685,000 comments received from stakeholders.[6]

In the time since that comment period closed, the Agencies and the Courts have taken a number of actions related to the WOTUS rulemaking. In December 2017, the Agencies proposed and later finalized a rule that postpones the effective date of the 2015 Rule to February 6, 2020 in order to "maintain the *status quo*…and thus provide continuity and regulatory certainty for regulated entities, the States and Tribes, agency staff, and the public while the Agencies continue to work to consider possible revisions to the 2015 Rule."[7] The Chamber and its members also submitted comments to the Agencies in support of it on December 13, 2017.[8] A number of parties have subsequently challenged the Agencies' action in court, and litigation in those cases is ongoing.[9]

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

[3] Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017).

[4] *See* U.S. Chamber of Commerce, Comments on Proposed Rule: Definition of "Waters of the United States" – Recodification of Pre-Existing Rules (Sept. 25, 2017), *available at* https://www.uschamber.com/sites/default/files/9.25.17-_comments_to_epa_and_usace_on_proposed_repeal_of_2015_wotus_rule-1.pdf.

[5] *Id.* at 4.

[6] 83 Fed. Reg. at 32,230.

[7] Definition of "Waters of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542 (Nov. 22, 2017).

[8] *See* U.S. Chamber of Commerce *et al.*, Comments on Proposed Rule: Definition of "Waters of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule (Dec. 13, 2017), *available at* https://www.uschamber.com/sites/default/files/12.13.17-_comments_to_epa_and_usace_on_addition_of_applicability_date_to_2015_clean_water_rule.pdf.

[9] *See New York v. Pruitt*, No. 1:18-cv-1030 (S.D.N.Y. Feb. 6, 2018); *Nat. Res. Def. Council v. EPA*, No. 1:18-cv-1048 (S.D.N.Y. Feb. 6, 2018); *S.C. Coastal Conservation League v. Pruitt*, No. 2:18-cv-330 (D.S.C. Feb. 6, 2018).

The Supreme Court issued a unanimous decision on January 22, 2018, holding that U.S. District Courts have original jurisdiction to hear challenges to the 2015 Rule.[10] Soon thereafter, the Sixth Circuit lifted its nationwide stay of the 2015 Rule and dismissed the related petitions for review.[11] Litigation in the district courts has resumed and, in addition to the injunction that the District Court of North Dakota has issued, the U.S. District Court for the Southern District of Georgia preliminarily enjoined the 2015 Rule in an additional 11 states.[12] Litigation is ongoing in a number of other challenges.[13]

The Agencies are now soliciting additional public comments from interested parties on certain important considerations and reasons for the Agencies' Initial Proposal for the 2015 Rule. Some commenters found that the Initial Proposal did not provide them with an adequate opportunity to comment.[14]

The Chamber continues to support the Agencies' current actions, and the below comments serve to supplement those that the Chamber filed in response to the Initial Proposal.[15] Specifically, the Agencies:

- Failed to properly consider the Supreme Court's decision in *SWANCC* when developing the 2015 Rule.[16]
- Included many vague and unclear terms in the 2015 Rule.
- Should permanently repeal the 2015 Rule and recodify the preexisting regulations and applicable guidance.
- Should promulgate a reasonable new definition of WOTUS that addresses these concerns in order to increase regulatory certainty and clarity for stakeholders.

II. The 2015 Rule Contains a Number of Inherent Flaws and the Agencies Should Act Accordingly

The Agencies should permanently repeal the 2015 Rule and recodify the previous definition of "waters of the United States," and applicable agency guidance, until they can construct a rule that adequately addresses Congress' intent to protect America's water resources within the bounds set by the CWA, Constitution and Supreme Court precedent.

The 2015 Rule contains a number of defects that warrant its repeal. In addition to those cited in the Chamber's 2017 comments on the Initial Proposal, the 2015 Rule fails to properly

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[10] *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 624 (2018).
[11] *See In re Dep't of Def. & EPA Final Rule*, 713 Fed. App'x 489 (6th Cir. 2018).
[12] *See* Georgia v. Pruitt, No. 15-cv-79 (S.D. Ga.) (Those states are Georgia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin).
[13] *See Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex.); *Am. Farm Bureau Fed'n et al. v. EPA*, No. 3:15-cv-165 (S.D. Tex.); *See, e.g.*, States' Supplemental Memorandum in Support of Preliminary Injunction, *Ohio v. EPA*, No. 2:15-cv-02467 (S.D. Ohio June 20, 2018).
[14] 83 Fed. Reg. 32,227.
[15] *See supra*, note 4.
[16] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001) ("*SWANCC*").

consider the Supreme Court's decision in *SWANCC*. Additionally, a number of terms included in the 2015 Rule are vague and unclear. A notice and comment rulemaking to promulgate a new definition of WOTUS would provide stakeholders with the needed regulatory certainty and clarity that the 2015 Rule lacks.

a. The Agencies Failed to Properly Consider *SWANCC* When Promulgating the 2015 Rule

The 2015 Rule is overly broad and conflicts with the jurisdictional limits set forth by the Supreme Court. In *SWANCC*, the Supreme Court found that isolated gravel ponds occupied by migratory birds were "a far cry…from the 'navigable waters' and 'waters of the United States'" that the CWA covers.[17] 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."[18] The Court later reaffirmed this decision in *Rapanos v. United States*.[19]

As further detailed in a separate multi-association comment letter filed in response to the supplemental proposal, the Agencies must give the appropriate effect to the term "navigable" and respect the limits of federal authority that flow from Congress's explicit choice to preserve and protect the states' traditional and primary authority over land and water use.[20] Any attempt to reassert jurisdiction over the *SWANCC* ponds and comparable water features would violate the plain text of the CWA and Supreme Court precedent, would impermissibly intrude on the states' traditional and primary authority over land and water use, and would raise serious constitutional and federalism questions.

b. The 2015 Rule is Vague and Unclear

The 2015 Rule fails to provide regulators and those subject to regulations with clear jurisdictional limits and explicit terms and concepts. It leaves affected stakeholders subject to potentially extreme consequences.[21] Indeed, civil penalties under the CWA for unauthorized discharges into WOTUS can exceed $50,000 *per day*.[22]

The Agencies stated that they developed the 2015 Rule in order to provide clarity and certainty regarding the scope of WOTUS.[23] That, however, is not the case. As both petitioners and

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[17] *SWANCC*, 531 U.S. at 173.
[18] *Id.* at 172.
[19] *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*").
[20] *See* American Farm Bureau Federation, *et al.*, Comments on Proposed Rule: Definition of "Waters of the United States"—Recodification of Preexisting Rule; Supplemental Notice of Proposed Rulemaking (Aug. 13, 2018) (discussing specifically the effect given to the *SWANCC* opinion).
[21] *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016); *see also Sackett v. EPA*, 566 U.S. 120, 132-33 (2012) (Alito, J., concurring) ("[T]he combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune.").
[22] Civil Monetary Penalty Inflation Adjustment Rule, 82 Fed. Reg. 3,633, 3,636 (Jan. 12, 2017).
[23] *See* 80 Fed. Reg. at 37,055.

public commenters have discussed, the 2015 Rule relies heavily on vague and unclear key terms and definitions, which hinder the Agencies' ability to administer WOTUS, create significant confusion, and fail notify parties as to when certain conduct may violate the law.

For example, stakeholders expressed concern regarding the definition of "tributary" when the 2015 Rule was initially proposed, yet the Agencies left that definition vague and unnecessarily expansive when the Agencies finalized the 2015 Rule. There were also issues with terms such as "impoundments," "ordinary high water mark," "floodplain," and "significant nexus." Instances such as these render the 2015 Rule fatally flawed and, as such, the Agencies must act accordingly.

c. The Agencies Must Permanently Repeal the 2015 Rule and Recodify the Preexisting Regulations and Applicable Guidance

Permanently repealing the 2015 Rule and recodifying the preexisting regulations and applicable guidance is the best and most efficient option to ensure regulatory certainty and transparency. While the Agencies have acted to delay the 2015 Rule's applicability until 2020, the regulatory text of the rule remains intact in the Code of Federal Regulations (CFR).

A permanent repeal of the 2015 Rule and recodification of the preexisting regulations and applicable guidance would allow the CFR to reflect current practice and the *status quo*, which has been in place for almost two years. This would provide for increased regulatory certainty. In the 43 days between the 2015 Rule's initial effective date and the Sixth Circuit's nationwide stay, there were no enforcement actions under the 2015 Rule in the 37 states where it took effect. In the time since the Sixth Circuit's stay and the addition of a new applicability date to the 2015 Rule, over 36,000 approved jurisdictional determinations have been issued pursuant to the preexisting regulations and applicable agency guidance.[24]

To that end, leaving portions of or the entire 2015 Rule in place while the Agencies complete a second rulemaking would result in confusion and inconsistency. Neither revised implementation guidance nor the extension of the effective date would provide certainty or remove the faulty regulatory text. Implementation guidance would not cure the 2015 Rule's numerous defects, provide certainty, or satisfy the notice and comment requirements of the Administrative Procedure Act. Additionally, there has been widespread agreement between states, NGOs, and industry that a new rulemaking is the appropriate course of action necessary to ensure clarity and consistency on this issue.

d. A New Definition of "Waters of the United States" is the Best Means of Guaranteeing Regulatory Certainty and Clarity for Stakeholders

The Agencies should promulgate a new definition of WOTUS that clearly and transparently articulates the jurisdictional limits that the Supreme Court and the CWA established. The supplemental proposal states that the Agencies plan to conduct a second, separate notice and

[24] EPA, Clean Water Act Approved Jurisdictional Determinations, https://watersgeo.epa.gov/cwa/CWA-JDs/ (last visited August 7, 2018).

comment rulemaking to propose a new definition of WOTUS after they finalize the full repeal of the 2015 Rule and recodify the preexisting regulations and applicable guidance.[25]

This approach is the best course of action. While repealing the 2015 Rule and recodifying the preexisting regulations and applicable guidance will provide stakeholders with short-term clarity and regulatory certainty, it is not a sustainable ultimate response. There are many issues with the pre-existing regulations and applicable guidance that the Agencies should address through a new rulemaking. The Chamber continues to support such an effort that clearly and reasonably articulates the limits of federal and delegated state authority under the CWA.

III. Conclusion

The Chamber appreciates the Agencies' consideration of these comments and urges the Agencies to repeal the 2015 Rule because it expands authority well beyond the land and waters included in the Agencies' statutory authority, ignores important limits set forth by the Supreme Court, fails to recognize the CWA's federalism principles, and lacks sufficient clarity and certainty for both regulators and stakeholders.

The Agencies should finalize this repeal and recodify the preexisting regulations and applicable guidance in as expeditious and thorough a manner as possible. If you have questions regarding these comments, please contact me at (202) 463-5558 or at kharbert@uschamber.com.

Sincerely,

Karen A. Harbert

[25] 83 Fed. Reg. at 32,231.