

**CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA**

NEIL L. BRADLEY
SENIOR VICE PRESIDENT &
CHIEF POLICY OFFICER

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December 13, 2017

VIA ELECTRONIC FILING

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

Mr. Ryan A. Fisher
Acting Assistant Secretary
Department of the Army, Civil Works
108 Army Pentagon
Washington, D.C. 20310

RE: Definition of “Waters of the United States” – Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542 (November 22, 2017); Docket No. EPA-HQ-OW-2017-0644

Dear Administrator Pruitt and Mr. Fisher:

The U.S. Chamber of Commerce (the Chamber), the world’s largest business federation representing the interests of more than three 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’s and U.S. Army Corps of Engineers’ (collectively, the Agencies) proposal to add an “applicability date” of two years from the final action on the proposal to the 2015 “Waters of the United States” rule (2015 Rule).¹

I. Background

The definition of “Waters of the United States” (WOTUS) is extremely important to our membership. In 2014, the Agencies proposed the 2015 Rule in order to clarify the scope of waters subject to federal protection under the Clean Water Act (CWA).² The Chamber and its membership reviewed the proposal and filed comments in opposition to it, pointing out a number of key issues

¹ 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).

² Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014).

that would seriously and adversely impact the business community, such as the expansive new definition of “tributary.”³ The Agencies, however, disregarded our comments, as well as comments from a number of other industry organizations, and finalized the 2015 Rule on June 29, 2015.⁴

After the 2015 Rule was published, a host of litigation ensued – specifically, 31 states and other parties challenged the rule in federal district courts and circuit courts of appeals, and one day prior to when the 2015 Rule went into effect, the U.S. District Court for the District of North Dakota issued an order granting a motion for a preliminary injunction on its effective date in thirteen states that challenged the rule together.⁵

Weeks later, the Sixth Circuit Court of Appeals issued a nationwide stay of the 2015 Rule.⁶ This required that the Agencies continue applying the definition of WOTUS, as informed by applicable agency guidance, that preceded the 2015 Rule. The previous definition was adopted by the Agencies in the 1980s and includes: 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 seas.⁷

Given that parties were challenging the 2015 Rule in both district and appellate federal courts, the Supreme Court granted *certiorari* on the question of which court has original jurisdiction to hear those challenges in January 2017.⁸ The Sixth Circuit subsequently granted petitioners’ motion to hold the ongoing litigation challenging the 2015 Rule in abeyance as the Supreme Court makes its decision.⁹ The Supreme Court heard oral arguments on the matter this past October and a decision is forthcoming.

President Trump has made rescinding the 2015 Rule and replacing it with a new definition one of his administration’s top priorities. On February 28, 2017, the President signed Executive Order (EO) 13778, which directed the Agencies to review the 2015 Rule and issue a proposed rule that either rescinds or revises it.¹⁰ EO 13778 specifically directed the Agencies to consider Justice Scalia’s plurality opinion in *Rapanos v. United States* in interpreting the term “navigable waters,” which interpreted the CWA’s jurisdiction narrowly to include only “relatively permanent, standing or continuously flowing” waters or wetlands with a surface connection to navigable waterways.¹¹ The

³ See 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>.

⁴ Definition of “Waters of the United States” Under the Clean Water Act, 80 Fed. Reg. 37,054 (June 29, 2015).

⁵ *State of North Dakota et al. v. US EPA*, No. 15-00059 (D.N.D. Aug. 27, 2015, as clarified by order issued on September 4, 2015) (Those thirteen states were Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming).

⁶ *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).

⁷ See 33 C.F.R. § 328.3 (1986); 40 C.F.R. § 232.2 (1988).

⁸ *Nat’l Ass’n of Mfrs. v. DOD*, U.S., No. 16-299, cert. granted Jan. 13, 2017.

⁹ *Murray Energy v. EPA*, No. 15-3751 (6th Cir. Jan. 25, 2017) (order granting motion to hold briefing in abeyance).

¹⁰ 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).

¹¹ *Rapanos v. United States*, 547 U.S. 715 (2006).

Agencies soon thereafter published a notice announcing their intent to review and rescind or revise the 2015 Rule.¹²

The Agencies are now pursuing a two-step process to implement the guidance in EO 13778.¹³ The Agencies proposed to repeal the 2015 Rule and recodify the pre-existing regulations, which are currently in effect under the Sixth Circuit stay, on July 27, 2017 (Step One). The Chamber, as well as a number of other industry organizations, filed comments in support of Step One, touching on many of the flaws associated with the 2015 Rule.¹⁴ The Agencies received over 680,000 comments on that proposal¹⁵ and must consider all of them before they take final action on the proposal and propose a new definition of WOTUS.

Given the breadth of substantive comments on this important issue, it may take well into 2018 to review every comment filed in response to Step One, finalize that action, and begin the rulemaking process on a new definition of WOTUS (Step Two). Meanwhile, the Supreme Court likely will issue a decision as to which court has original jurisdiction to hear WOTUS challenges during that time. Uncertainty surrounding the future of the 2015 Rule and the definition of WOTUS creates substantial burdens and complications for regulators and the regulated community. The Agencies should engage in an interim rulemaking to ensure continued regulatory certainty.

II. Addition of an “Applicability Date”

The Chamber believes that the Agencies’ proposed addition of an “applicability date” of two years from final action on the proposal regarding the 2015 Rule would provide for continued regulatory certainty and a clear regulatory framework. This will preserve the *status quo* under the Sixth Circuit stay, regardless of which court has original jurisdiction, until the Agencies can complete the rule making process for a new definition of WOTUS.

Agencies should seek to avoid regulatory uncertainty, especially during those rulemaking processes that have the potential to have a profound impact on a large group of affected stakeholders, as in the current situation. In the event that the Supreme Court gives courts of appeals original jurisdiction over challenges to the 2015 Rule, litigation in the Sixth Circuit could resume, forcing protracted proceedings over a rule that the Administration is revisiting. On the other hand, if the Supreme Court gives district courts original jurisdiction, the Sixth Circuit case would be dismissed and its nationwide stay would be lifted. Because the 2015 Rule also is enjoined in thirteen states by the District of North Dakota, two separate definitions of WOTUS would be enforced at

¹² Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532 (Mar. 6, 2017).

¹³ See Memorandum on Consideration of Potential Economic Impacts for the Proposed Rule: *Definition of “Waters of the United States” – Addition of an Applicability Date to 2015 Clean Water Rule* (Nov. 20, 2017), available at https://www.epa.gov/sites/production/files/2017-11/documents/wotus_2040-af80_memo_on_economic_impacts111517_final_v2.pdf.

¹⁴ See U.S. Chamber of Commerce, Comments on Proposed Rule: Definition of “Waters of the United States” – Recodification of Pre-Existing Rules (September 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.

¹⁵ Addition of an Applicability Date, 82 Fed. Reg. at 55,544.

the same time in different parts of the country, leading to inconsistencies, uncertainty, and confusion regarding compliance and enforcement.

Two years is a sufficient time frame for the “applicability date.” There is a strong stakeholder interest in developing a new definition of WOTUS that is in line with congressional intent, takes into account certain limits set by the Supreme Court on the term “navigable,” provides clear lines that put regulated entities on notice, and meets administrative due process requirements. To that end, it is necessary that the Agencies are provided with sufficient time to engage in outreach efforts with affected stakeholders, including states, tribes, regulated entities, academia, and the public, and to fully complete the regulatory process for reconsidering the definition of WOTUS. This would ensure that a new definition of WOTUS is developed in the proper manner and avoids those issues associated with the 2015 Rule.

III. Conclusion

The Chamber appreciates the addition of an “applicability date” to the 2015 Rule and the opportunity to comment on this important matter. If you have questions regarding these comments, please contact me at (202) 463-5310 or at nbradley@uschamber.com.

Sincerely,



Neil L. Bradley