CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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November 26, 2013

Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB Room 10202
725 17th Street NW
Washington, DC 20503
Attn: Mabel Echols

Re: EPA's Draft Rule "Definition of 'Waters of the United States' Under the Clean Water Act"

Dear Sir/Madam:

The U.S. Chamber of Commerce, 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 urges the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) to return the U.S. Environmental Protection Agency's (EPA) draft rule, "Definition of 'Waters of the United States' Under the Clean Water Act," which is currently under review at OIRA. Under the draft rule's definition of "waters of the United States," EPA's Clean Water Act regulatory authority would be vastly expanded. Extending the Clean Water Act to so-called "ephemeral" streams and other non-jurisdictional areas would impose strict new requirements on regulated entities across the country. Small businesses and small communities are likely to be among the hardest hit by the definition change. Therefore, OIRA must not allow EPA to publish the draft rule as a proposal in the Federal Register without first satisfying the requirements of the Regulatory Flexibility Act,[1] specifically the requirement that EPA convene a Small Business Advocacy Review (SBAR) Panel.[2]

Background

EPA's draft rule is intended to clarify the jurisdiction of EPA and the U.S. Army Corps of Engineers (COE) over areas covered by the Clean Water Act (CWA)

[1] 5 U.S.C. §§ 601-612.
[2] 5 U.S.C. § 603(b),(c)(2).

as "waters of the U.S." The current "waters of the U.S." definition was established in 1985 by the Supreme Court to include waters and wetlands adjacent to navigable waters, interstate waters, or their connected tributaries.

In recent years, the Supreme Court has twice overruled EPA attempts to assert expanded CWA authority by enlarging its interpretation of "waters of the U.S." In 2001, the Court held in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* that EPA and the COE lacked authority to assert jurisdiction over "isolated waters" that are not adjacent to navigable waters, interstate waters, or their connected tributaries. Subsequently, in *Rapanos v. United States*, decided in 2006, a plurality of the Court found "waters of the United States" to be "relatively permanent, standing or continuously flowing bodies of water" that are connected to traditional navigable waters, as well as wetlands with a continuous surface connection to such water bodies. In both the *SWANCC* and *Rapanos* decisions, the Court called for the definition of "waters of the U.S." to be clarified, thereby avoiding ambiguity for regulated entities. Congress has not changed the definition of "waters of the U.S." or granted any other new jurisdictional authority to EPA or the COE.

Although EPA announced in 2012 that it would issue a guidance document containing its interpretation of the scope of the "waters of the U.S." definition, the agency subsequently announced it would go through a rulemaking to change the definition. EPA submitted the draft rule with the revised definition to OIRA for review on September 17, 2013.

Chamber Concerns with EPA's Rulemaking Process

The Chamber's primary concern with the draft rule is EPA's failure to follow the requirements of the Regulatory Flexibility Act (RFA)[3] in its rule development. The RFA was enacted in 1980 to reduce the disproportionately larger burden on small businesses when complying with new federal regulations. It requires federal agencies to analyze the impacts on small entities[4] of proposed rules that are expected to have a "significant economic impact on a substantial number of small entities" (SISNOSE).[5] The agency must consider how the rule will affect small entities, and whether less burdensome alternatives are available.

Moreover, since 1996, the RFA has required EPA to conduct a Small Business Advocacy Review (SBAR) panel before submitting a draft rule with a SISNOSE to

[3] 5 U.S.C. §§ 601-612.
[4] Small entities covered by the RFA include small businesses, small governmental jurisdictions, and small organizations (such as a nonprofit hospital). 5 U.S.C. § 601(3)-(6).
[5] Id at § 605.

OIRA for review. The SBAR panel process is intended to gather comments, information and feedback from representatives of the kinds of small entities that will be regulated, so that the federal agency can identify regulatory alternatives that reduce burdens on them while still achieving the goal of Congress and the agency.

EPA may lawfully propose a new rule only after it either conducts the SBAR panel or makes a fact-based certification that the rule in question will **not** have a SISNOSE. EPA failed, however, to either conduct an SBAR panel or certify that the revised definition would not have a significant economic impact on a substantial number of small entities.

It is clear, moreover, that EPA cannot factually certify that the draft rule would not impose a major economic impact on a large number of small entities. Expanding the current definition of "waters of the U.S." to include "ephemeral" streams, isolated wetlands, and non-connected waters will subject vast areas across the country to regulation under the Clean Water Act for the first time. Expanding CWA jurisdiction would subject property owners, businesses, and communities to stringent new permitting requirements and use restrictions. The process of obtaining permits and use approvals under the Clean Water Act can be very costly and time-consuming. Historically, obtaining a permit to develop in jurisdictional wetlands can take longer than 12 months and cost hundreds of thousands of dollars.

OIRA Should Return the Draft Rule to EPA Immediately

EPA should not be permitted to continue developing the draft rule until it has fully complied with the requirements of the RFA. Accordingly, the U.S. Chamber respectfully requests that OIRA immediately return the draft rule so that EPA can meet its RFA responsibilities.

Thank you for the opportunity to share our perspective on this important issue. If you have any questions, I can be reached at (202) 463-5457 or wkovacs@uschamber.com.

Sincerely,

William L. Kovacs

Cc: EPA Administrator Gina McCarthy