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VIA ELECTRONIC FILING

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RE: Revised Definition of "Waters of the United States;" 84 Fed. Reg. 4,154 (Feb. 14, 2019); Docket No. EPA-HQ-OW-2018-0149; FRL-9988-15-OW

Dear Mr. McDavit and Ms. Moyer:

The U.S. Chamber of Commerce submits these comments to the U.S. Environmental Protection Agency ("EPA") and Army Corps of Engineers ("the Corps") (collectively, "the Agencies") in support of the Agencies' proposal to revise the definition of "Waters of the United States" ("WOTUS") under the Clean Water Act ("CWA" or "Act").[1] The definition of WOTUS is critical to the Chamber and its membership, as many of the Chamber's members engage in activities subject to the CWA's extensive permitting requirements. The Chamber and its members are committed to the protection and restoration of America's wetlands and waters and have been actively engaged in WOTUS rulemaking efforts.[2]

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[1] Revised Definition of "Waters of the United States;" 84 Fed. Reg. 4,154 (Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

[2] *See, e.g.*, 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.

The Agencies' proposed revisions to the definition of WOTUS will provide stakeholders with much-needed regulatory certainty and accurately articulate the jurisdictional limits that Congress, as clarified by the Supreme Court, envisioned under the Act. Moreover, the proposed revisions provide stakeholders with the "bright lines" needed to identify jurisdictional waters, give meaning to the term "navigable," and preserve the states' authority over land and water use. The proposed revisions, once finalized, will empower citizens and businesses that represent our nation's communities to continue to protect their own water resources without the need to hire water and other subject matter experts to tell them how the CWA works.

I. Background

Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to "recognize, preserve, and protect the responsibilities and rights of *States* to prevent, reduce, and eliminate pollution, [and to] plan the development and use…of land and water resources…"[3] 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.[4] These cooperative federalism principles serve as the fundamental basis of the Act.

The definition of WOTUS is a pivotal aspect of the Agencies' ability to administer and enforce the CWA, as multiple sections of the Act depend on this key term to function correctly. For example, the definition of WOTUS can be found in CWA provisions covering the discharge of oil and hazardous substances, the administration of the national pollutant discharge elimination system (NPDES) permit program, and permitting for the discharges of dredge and fill material.[5]

To that end, uncertainty has long surrounded the scope of federal jurisdiction over WOTUS. The Agencies first issued separate definitions of WOTUS – EPA's definition was quite broad, while the Corps' definition was very narrow.[6] By the end of the 1980s, however, the Agencies had adopted the same definition of WOTUS, 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.[7]

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[3] 33 U.S.C. §§ 1251(a)-(b).

[4] *Id.* at § 1251(g).

[5] *See* 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401.

[6] *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).

[7] *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).

Federal courts have since examined the scope of federal jurisdiction under the Act in a variety of circumstances. Three seminal decisions – *United States v. Riverside Bayview Homes, Inc.*, *SWANCC v. U.S. Army Corps of Engineers*, and *Rapanos v. United States* – have limited the scope of federal authority in order to bring the definition of WOTUS in line with the CWA's objectives, and provide the necessary context for determining the appropriate jurisdictional limits under the Act.[8]

In *Riverside Bayview*, the Supreme Court addressed whether wetlands should be subject to federal regulation under the Act as WOTUS. 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.[9] The Court limited the Corps' jurisdiction over wetlands to those that "actually abut a navigable waterway."[10]

In *SWANCC*, the Supreme 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 Act.[11] 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 made."[12]

Lastly, in *Rapanos*, the Supreme Court considered whether wetlands that are not adjacent to traditional "navigable waters" are "waters of the United States" under the 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 uncertainty as to what truly constitutes WOTUS.

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."[13] Further, he noted that "waters of the United States" do not include ephemeral streams and drainage ditches.[14]

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[8] *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*").

[9] 474 U.S. at 121.

[10] *Id.* at 132.

[11] 531 U.S. at 173.

[12] *Id.* at 172.

[13] 547 U.S. at 716.

[14] *Id.*

Justice Kennedy concurred, citing *SWANCC*, stating that a wetland or non-navigable waterbody falls within the scope of the CWA only if it has a "significant nexus" to a traditional navigable waterway.[15] 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.'"[16]

Following the *Rapanos* ruling, the Agencies released guidance in 2008 and 2011 to help quell continued regulatory confusion and further delineate the meaning of WOTUS.[17] After the second guidance document was released, 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.

On June 29, 2015, the Agencies issued a revised definition of WOTUS that purported 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" (2015 Rule).[18] The 2015 Rule, however, strayed far from that goal and created a substantial amount of regulatory confusion for affected stakeholders.

Multiple states and stakeholder groups challenged the 2015 Rule in federal courts. Soon after it was finalized, the United States District Court for North Dakota issued a preliminary injunction on the 2015 Rule in 13 states.[19] The U.S. Court of Appeals for the Sixth Circuit subsequently issued a stay of the 2015 Rule nationwide.[20]

In the interim, the question of whether original jurisdiction over challenges to the 2015 Rule belongs in federal district courts or circuit courts arose. This issue made its way to the Supreme Court, and in *National Association of Manufacturers v. Department of Defense*, the Court ruled unanimously

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[15] *Id.* at 767.

[16] *Id.* at 780.

[17] *See* 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); 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).

[18] Definition of "Waters of the United States" Under the Clean Water Act, 80 Fed. Reg. 37,054 (June 29, 2015).

[19] *States Dakota v. U.S. Envtl. Prot. Agency*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

[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).

that original jurisdiction over challenges to the definition of WOTUS belong in federal district courts.[21]

The nationwide stay to the 2015 Rule was lifted as a result of this ruling, and challenges to the 2015 Rule continued in forums across the country. The 2015 WOTUS rule is now being implemented in 22 states, the District of Columbia, and U.S. territories, while the regulations defining WOTUS that pre-dated the 2015 WOTUS rule are in effect in the 28 other states.[22] This split in enforcement across the country clearly illustrates the need for a definition of WOTUS that truly reflects the scope of federal authority under the CWA.

The current Administration has taken steps to address the regulatory uncertainty surrounding the scope of federal authority under the CWA. In March 2017, President Trump issued Executive Order 13778, which directed the Agencies to review and rescind or revise the Final Rule.[23] The Agencies subsequently announced that they would do so.[24] Then, over the course of 2017 and 2018, the Agencies issued a notice of proposed rulemaking, as well as a supplemental notice of proposed rulemaking, that would rescind the revised definition of WOTUS promulgated by the Agencies in 2015 and recodify the preexisting definition.[25] That rulemaking is ongoing.

The Agencies also began outreach to stakeholders in anticipation of revising the definition of WOTUS. The Agencies held a number of industry-specific listening sessions, and engaged in a robust federalism consultation with the states.[26] Moreover, the Agencies held a public hearing on the proposal in February 2019, and plan to hold two additional hearings with small businesses before the comment period closes.[27] The Chamber is extremely encouraged by the Agencies' proactive approach to consulting all interested stakeholders.

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[21] *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299 (U.S. Jan. 22, 2018).

[22] *See* U.S. ENVTL. PROT. AGENCY, *Definition of "Waters of the United States": Rule Status and Litigation Update* (last accessed Feb. 15, 2019), *available at* https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update.

[23] 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).

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

[25] Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017); Definition of "Waters of the United States" – Recodification of Preexisting Rule, 83 Fed. Reg. 32,227 (July 12, 2018).

[26] Definition of "Waters of the United States" – Schedule of Public Meetings, 82 Fed. Reg. 40,742 (Aug. 28, 2017).

[27] Revised Definition of "Waters of the United States," 84 Fed. Reg. 2,483 (Feb. 7, 2019).

The proposed revisions to the definition of WOTUS will provide the regulated and agricultural communities with the certainty and clarity they need to continue operations and invest in new operations that are subject to the Act's requirements. Moreover, the Agencies' proposal maintains protections for our nation's waters while preserving the states' authority over local land and water use, enhances transparency, and reflects decisions that are appropriately informed by science. The Chamber supports these revisions, as stakeholders in all sectors of the economy across the nation rely on this regulatory certainty and clarity to ensure that projects critical to our nation are completed in a timely fashion and that their day-to-day business operations are not unduly hindered by regulatory uncertainties.

II. Proposed Changes to the Definition of "Waters of the United States"

The Agencies' proposed revisions to the definition of WOTUS offer a level of regulatory certainty and clarity to stakeholders that the Agencies failed to provide for in the 2015 Rule. The Agencies propose six categories of waters that constitute WOTUS, and also propose eleven categories of waters that *do not* constitute WOTUS. The categories and exclusions included in the Agencies' proposal sensibly align the definition of WOTUS with the CWA and Supreme Court precedent.

However, it is important to note that the Agencies recognize the need for proper oversight during the implementation of the Agencies' proposed revisions. Field staff should rely on data that are appropriate for determining WOTUS, and it is the Agencies' responsibility to ensure that field staff refrain from using improper or outdated data. Moreover, it is imperative that the Agencies ensure that they retain the burden of proof for establishing jurisdiction for *all* categories of WOTUS.

a. Definitions and Categories

The Chamber generally supports the Agencies' proposal to include six separate categories of waters within the definition of WOTUS: traditional navigable waters and territorial seas, tributaries, certain ditches, certain lakes and ponds, impoundments, and adjacent wetlands. These six categories, with certain improvements, will clearly limit WOTUS to those waters that are *physically and meaningfully* connected to traditional navigable waters.

i. Traditional Navigable Waters and Territorial Seas

The Chamber generally supports the Agencies' decision to retain the regulatory text for traditional navigable waters (TNWs), although changes to the text should be made to clarify the scope of this category of WOTUS. The Chamber also supports the Agencies' decision to incorporate territorial seas into this category of waters in order to "streamline and simplify" the definition of WOTUS. The proposed regulatory text for this category of WOTUS reads, "Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or

foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide."[28]

The appropriate interpretation of TNWs is rooted in the concept of "navigability" laid out in the Rivers and Harbors Act (RHA) of 1899.[29] The RHA was enacted by Congress with the primary intent of prohibiting obstructions to navigation. Specifically, the RHA prohibits the discharge "refuse matter" of any kind "into any navigable water of the United States" or into any tributary thereof unless it has been authorized by the Corps.[30]

The Supreme Court clarified this test for navigability under the RHA in *The Daniel Ball v. United States*.[31] In *The Daniel Ball*, the Supreme Court addressed the question of whether a vessel operating on a body of water entirely contained only in one state was engaged in interstate commerce, and held that navigable waters are those that are (1) are navigable-in-fact, or capable of being such, and (2) form waterborne highways *used to transport* commercial good in interstate or foreign commerce.[32] Justice Kennedy later referenced this test in support of his plurality opinion in *Rapanos*.[33]

The Agencies proposal would solve the issue of an expansive interpretation of TNWs, if finalized, and help align the TNW category of WOTUS with the test articulated in *The Daniel Ball*. However, in order to further align the regulatory text with Congressional intent and Supreme Court precedent, the Agencies should clarify that TNWs must be *susceptible* to the transportation of goods, rather than merely being "used," in interstate commerce. Further the Agencies should withdraw all guidance documents related to prior rulemakings, or at a minimum, Appendix D of the *Rapanos* guidance. Withdrawing such guidance documents would allow stakeholders to operate in a clearer manner in future operations.

ii. Tributaries

The Chamber generally supports the Agencies' proposed regulatory text for the category of WOTUS considered tributaries, although it could be further improved to properly delineate the distinction between federal and state waters. The Agencies define tributary as, "a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a

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[28] 84 Fed. Reg. at 4,203.

[29] *See* 33 U.S.C. § 403.

[30] *Id.* at § 407.

[31] *The Daniel Ball v. United States*, 77 U.S. 557 (1870).

[32] *Id.* at 563 (emphasis added).

[33] *Rapanos*, 547 U.S. at 742.

[TNW] in a typical year either directly or indirectly through [other jurisdictional waters] or through water features [expressly excluded] in paragraph b…so long as those water features convey perennial or intermittent flow downstream."[34] The Agencies also note those features that *would not* constitute a tributary under the proposal.[35]

The decision to limit the scope of the proposed definition of tributary to only those streams that contribute perennial or intermittent flow to a TNW reflects the CWA's cooperative federal principles and the appropriate balance of state and federal regulatory roles. Both the plurality[36] and concurring[37] opinions in *Rapanos* acknowledge that states should retain authority over features that are only periodically wet.

Further, the Agencies' Connectivity Report appropriately informs the proposed definition of tributary and would provide stakeholders with much-needed clarity and predictability for identifying tributaries, as the proposal shifts the focus of this category of WOTUS to the concepts of ephemeral,[38] intermittent,[39] and perennial flow[40] during a "typical year."[41] This Connectivity Report concludes that all waters are connected and that connectivity exists on a gradient, but did not draw the "bright lines" necessary to determine what is jurisdictional under the Act.[42] The Agencies noted that this report merely "informed" the Agencies' policy and legal decisions during the rulemaking process for the 2015 Rule, rather than dictate them.[43] As such, tributaries, under the 2015 Rule,

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[34] 84 Fed. Reg. at 4,204.

[35] These features include those that flow only in response to direct precipitation, including ephemeral flows, dry washes, arroyos, and similar features.

[36] *Rapanos*, 547 U.S. at 734 (the CWA only confers jurisdiction over "relatively permanent bodies of water").

[37] *Id.* at 781 (the definition of tributary is too broad if it "leaves wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor volumes towards it.").

[38] 84 Fed. Reg. 2,402 ("The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation").

[39] *Id.* ("The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation").

[40] *Id.* ("The term *perennial* means surface water flowing continuously year-round during a typical year").

[41] *Id.* ("The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area").

[42] *See* U.S. ENVTL. PROT. AGENCY, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE (Jan. 2015), *available at* https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414 (Final Report).

[43] 80 Fed. Reg. at 37,060.

were identified solely based on the presence of the physical indicators of a bed and banks, and an ordinary high watermark.[44] Such a determination broadly expanded the scope of WOTUS and the current proposal utilizes the Connectivity Report in a manner better suited to define the scope of federal jurisdiction under the Act.

The Agencies could better improve the definition of tributary and the scope of this category of WOTUS by taking the following actions:

1. Clarifying that "ephemeral" flows are *not* WOTUS, even if the flow could otherwise be characterized as any of the six categories of WOTUS;

2. Clarifying how the Agencies plan to and how stakeholders should evaluate and calculate a "typical year;"

3. Clarifying the difference between "ephemeral" and "intermittent" flow. The Agencies should also provide a bright line definition of "intermittent" flow to provide certainty to the definition and to avoid inadvertent expansion beyond true intermittent flows that have impacts on the TNWs. In certain instances it is difficult to distinguish between these two types of flow, and it would be inappropriate to rely on inaccurate data representations of such flows, including the National Hydrography Dataset and National Wetlands Inventory;[45] and

4. Providing stakeholders with an example of step-by-step analysis as to how the Agencies will determine if features are jurisdictional tributaries.

iii. Certain Ditches

The Chamber appreciates the Agencies' approach to address "ditches" within the scope of WOTUS. The Agencies propose to define ditch as "an artificial channel used to convey water." The Agencies' proposal identifies three situations in which a ditch would constitute a WOTUS: (1) the ditch is also a TNW; (2) the ditch is constructed in, or relocates or alters, a tributary *and* meets the tributary definition; or (3) the ditch is constructed in adjacent wetlands *and* meets the tributary definition.[46] All other ditches are expressly excluded from the definition of WOTUS.[47]

Ditches are common features and found in a variety of circumstances, so treating them as WOTUS would lead to a number of issues, including encroachment upon the cooperative federalism

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[44] *Id.* at 37,104.

[45] 84 Fed. Reg. 4,177, 4,200.

[46] *Id.* at 4,203-04.

[47] *Id.* at 4,204.

principles included the Act. If the Agencies choose to finalize this category, however, they should, at a minimum, clarify how they plan to delineate between an "artificial channel" that should be evaluated as a ditch and a "naturally occurring surface water channel" that should be evaluated as a tributary, as it may not be evident in every case.

Ditches are not traditionally "waters," so the Agencies may be better suited to address this feature in the exemptions to WOTUS, rather than the scope of categories included in the definition. If the Agencies choose to remove this category of WOTUS, they should add clarifying language excluding all ditches from WOTUS *unless* they convey perennial or intermittent flow to downstream TNWs *and* were constructed in a tributary, relocate or alter a tributary, or were constructed in an adjacent wetland. Moreover, the Agencies should also consider clarifying that ditches would be evaluated based on current, rather than historic uses, and elaborate on what information an applicant will need to provide to retain a permit.

iv. Certain Lakes and Ponds

The Chamber supports the addition of lakes and ponds to the scope of categories considered WOTUS. The Agencies' proposal includes lakes and ponds that are: (1) TNWs; (2) contribute perennial or intermittent flow to a TNW in a typical year either directly or indirectly through a WOTUS or through an excluded feature that conveys perennial or intermittent flow downstream; or (3) flooded by a jurisdictional TNW, tributary, ditch, lake/pond, or impoundment in a typical year.[48]

The Agencies could make a number of improvements for this category. Generally speaking, the Agencies should clarify that this category applies to lakes and ponds that are *naturally* flooded, considering that other factors can contribute to flooding. For category 2, the Agencies should provide additional clarity as to what it means for a lake or pond to "contribute perennial or intermittent flow" to another water feature "in a typical year." As for category 3, the Agencies should elaborate as to how they plan to determine whether a lake or pond is "flooded by" other jurisdictional waters "in a typical year."

v. Impoundments

The Chamber appreciates the Agencies decision to retain impoundments of jurisdictional waters as a category of WOTUS in the proposal. Impoundments have historically been considered WOTUS since they do not change a water body's status and the proposal reflects that.[49] To that end, the term "impoundments" remains undefined in the proposal. Should the Agencies decide to retain this category in the final rule, they should provide a clear definition of the term that focuses on the water feature, rather than the impoundment itself, so that stakeholders receive proper notice as to the categories of WOTUS and the jurisdictional status of related features. In the alternative,

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[48] *Id.*

[49] *Id.* at 4,172.

the Agencies should remove this category, given that impoundments are essentially part of other jurisdictional waters.

vi. Adjacent Wetlands

The Chamber supports the Agencies' decision to include a category of WOTUS that includes all wetlands adjacent to another category of jurisdictional waters. The proposal continues to define wetlands as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[50] Adjacent, in this proposal, means to "abut or have a direct hydrologic surface connection to other WOTUS in a typical year" and "direct hydrologic surface connection" occurs "as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and a jurisdictional water.[51]

The definition of adjacent wetlands brings the definition of WOTUS more in line with Supreme Court precedent, the CWA, and the Constitution. As clarified in *Rapanos*, a wetland may not be "adjacent to" a remote WOTUS based on a "mere hydrologic connection."[52] Rather, wetlands possess the necessary connection to TNWs when they "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable" and when wetlands' effects on water quality are speculative and insubstantial, they fall outside of the zone fairly encompassed by the statutory term "navigable waters."[53] As such, the Agencies' approach to this category is proper as any isolated wetlands with only physically remote hydrologic connections to WOTUS would be excluded.

b. Interstate Waters

While not a category of waters proposed by the Agencies, it is worth noting the Chamber's support for the proposed removal of interstate waters, including interstate wetlands, as a category of WOTUS.[54] Interstate waters without any connection to TNWs would be more appropriately regulated by the States and the Tribes, as they have no legitimate relationship to jurisdictional waters, or do not meet a flow or permanence standard. Interstate waters that *are* navigable-in-fact or are otherwise another category of WOTUS would still be jurisdictional under the proposal.

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[50] *Id.* at 4,205.

[51] *Id.*

[52] *Rapanos*, 547 U.S. at 780.

[53] *Id.*

[54] 84 Fed. Reg. at 4,171.

c. Exclusions

The Chamber supports many of the longstanding and new exemptions provided for in the Agencies' proposal. As stated, the purpose of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[55] Given that goal, the exemptions included in the Agencies' proposal aid in providing the much-needed clarity and certainty and "bright-lines" that stakeholders need to assess the reach of federal jurisdiction under the Act.

i. Features That are Not Identified as "Waters of the United States"

The Chamber supports the Agencies' addition of the exclusion that "waters or water features that are not identified in [the scope of WOTUS] are not considered WOTUS."[56] This is an important addition to the regulatory text and helps stakeholders identify jurisdictional waters much more clearly than in the past. However, language should be added to the exemption clarifying that any feature that meets the parameters of an exclusion are not WOTUS, even if they could otherwise fit into one of the categories proposed as WOTUS.

ii. Groundwater

The Chamber supports the Agencies' decision to retain the exclusion for "groundwater, including groundwater drained through subsurface drainage systems," as it reflects longstanding Agency practice informed by the Act, and case law.[57] The Agencies should, however, consider adding the language "diffuse or shallow subsurface flow" to the exclusion considering the significant confusion surround the difference between the two.

iii. Ephemeral Features and Diffuse Stormwater Run-Off

The Chamber supports the Agencies' proposal to exclude "ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland" from the scope of WOTUS.[58] In *Rapanos*, the plurality noted that the Act does not authorize a "Land is Waters" approach to federal jurisdiction and that the Corps had, at that point, "stretched the term of [WOTUS] beyond parody" by including "ephemeral streams," "wet meadows," and "directional sheet flow during storm events within the scope of WOTUS.[59] As such, it is appropriate to exclude these features in the proposal.

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[55] 33 U.S.C. § 1251(a).

[56] 84 Fed. Reg. at 4,204.

[57] *Id.*

[58] *Id.*

[59] *Rapanos*, 547 U.S. at 734.

iv. Ditches Not Identified in (a)(3)

As previously noted, ditches should be addressed in this exclusion, rather than as a category of WOTUS. This exclusion, as proposed, reads "ditches that are not identified in paragraph (a)(3) of this section."[60] This regulatory text should identify which ditches are excluded and remove the corresponding regulatory text referencing the jurisdictional ditches.

v. Prior Converted Cropland

The Chamber supports the Agencies' continued exclusion of prior converted cropland from the scope of WOTUS. The Agencies propose to define PCC as "any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible" and also recognize in the proposal designations of PCC made by the Secretary of Agriculture.[61] The Agencies also propose that a feature is no longer PCC under the Act if it is abandoned and has reverted to wetland.[62] The Agencies propose that abandonment occurs when the feature is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years.[63]

This proposed exclusion comports with the Agencies' 1993 final rule codifying the PCC exclusion and the Chamber is encouraged by the Agencies' decision to incorporate abandonment principles into the exclusion that are in line with the 1993 rule.[64] However, the regulatory text should be modified so that the PCC exclusion is lost *only* when the land is abandoned within the meaning of the PCC definition *and* the area in question reverts to wetland.

vi. Artificially Irrigated Areas

The Chamber supports the Agencies' proposal to retain the exclusion for artificially irrigated areas that would otherwise revert to upland if irrigation ceases. Specifically, the Agencies proposal identifies this exclusion as "artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease."[65] The Chamber also supports the Agencies assertion that this exclusion only applies to the specific land being *directly* artificially irrigated and that not *all* waters within the watershed where irrigation occurs

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[60] 84 Fed. Reg. at 4,204.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Clean Water Act Regulatory Programs; Final Rule*, 58 Fed. Reg. 45,008 (Aug. 25, 1993).

[65] 84 Fed. Reg. at 4,204.

would be excluded.[66] The Agencies should also consider expanding this exclusion to include other agricultural activities such as aquaculture, the production of other crops and commodities, and livestock operations, as appropriate.

vii. Artificial Lakes and Ponds Constructed in Upland

The Chamber supports the Agencies' proposal to retain the exclusion for artificial lakes and ponds, which includes "Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (a)(4) (lakes and ponds) or (5) (impoundments)."[67] This exclusion would apply to artificial lakes and ponds created as a result of impounding non-jurisdictional waters or features, as well as conveyances created in upland that are physically connected to and are a part of the proposed excluded feature.[68]

The Chamber also supports the Agencies' decision to remove references to the "use" of the ponds, as these features often have a variety of uses that have beneficial purposes. Additionally, other programs under the Act may require these features, so removal is necessary to avoid duplicative and unnecessary regulation. The Agencies should, however, remove the regulatory text referencing the "lakes and ponds" and "impoundments" categories of WOTUS for additional clarity.

viii. Water-Filled Depressions Created in Upland Incidental to Mining or Construction Activity, and Pits Excavated in Upland for the Purpose of Obtaining Fill, Sand, or Gravel

The Chamber supports the Agencies' proposal to retain the exclusion for "water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel."[69]

ix. Stormwater Control Features

The Chamber supports the continued exemption for stormwater control features, as this exemption is critical to federal, state and local infrastructure, although it could otherwise be

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[66] *Id.* at 4,194.

[67] *Id.* at 4,204.

[68] *Id.* at 4,194.

[69] *Id.* at 4,204.

improved. The Agencies propose that this exclusion would apply to "stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off."[70]

The Agencies should clarify that those features constructed in upland will be assessed based on current conditions rather than historic conditions. Additionally, the Agencies should explicitly exclude municipal separate storm sewer systems (MS4s) that are managed via state and local permits from this exclusion in order to avoid double regulation. MS4s and the component parts of these systems that channel runoff are already regulated as "point sources" under other CWA programs.[71]

x. Wastewater Recycling Structures Constructed in Uplands

The Chamber supports the Agencies' continued exclusion of wastewater recycling structures from the scope of WOTUS. This exclusion covers "wastewater recycling structures constructed in upland, such as detention, retention, and infiltration basis and ponds, and groundwater recharge basins."[72] This exclusion recognizes the importance of recycled water supplies in areas with limited water supplies, and the Chamber supports the Agencies' view that this exclusion reduces limits to water and is outside the scope of the Act. The Agencies, however, should include in this exclusion any components in WOTUS that are subject to related regulated requirements.

xi. Waste Treatment Systems

The Chamber supports the Agencies' continued exclusion of waste treatment systems (WTS) from the scope of WOTUS. The Agencies' proposal defines WTS as "all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey, store or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).[73] This exclusion codifies existing practices and reflects the Agencies' longstanding practice in identifying WTS. Otherwise including WTS as WOTUS would render their intended purpose useless and impose additional burdens and costs on stakeholders without any corresponding environmental benefit.

III. Supporting Analyses

The Agencies include two supporting documents in the proposed revisions to the definition of WOTUS that analyze the potential impact that the proposed rule will have across all programs administered under the Act: (1) *Resources and Programmatic Assessment for the Proposed Revised Definition of*

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[70] *Id.*

[71] *See* 33 U.S.C. § 1342(p)(1).

[72] 84 Fed. Reg. at 4,204.

[73] *Id.* at 4,205.

"Waters of the United States" (the RPA);[74] and (2) *Economic Analysis for the Proposed Revised Definition of "Waters of the United States"* (the EA).[75] Both documents are a vast improvement upon the documents provided during the 2015 rulemaking, thoroughly address the potential impacts of the concerns, and accurately note that the foregone costs of the proposal *far* outweigh any foregone benefits it may have.

a. Resource and Programmatic Assessment

The Agencies compare the baseline of the 2015 Rule and an alternate baseline of pre-2015 practice with the proposed revisions to the definition of WOTUS in the RPA. While there are technical limitations to the dataset used in the RPA and acknowledged by the Agencies, the RPA provides a necessary analysis based on the research of current state laws and programs that oversee waters and identify relevant datasets to determine the scope of potential jurisdictional changes. The Chamber appreciates this robust analysis as it provides a comprehensive narrative as to the potential implications that the proposal will have on all relevant CWA programs, as well as state regulations.

b. Economic Analysis

The Agencies' EA in support of the proposal incorporates a two-stage analysis to make use of limited local and national level water resources information to assess the potential implications of the proposal. In Stage 1, the Agencies assess the potential impacts of moving from the 2015 Rule to the pre-2015 practice baseline. As for Stage 2, the Agencies analyze a series of qualitative analyses, three detailed case studies of moving from the pre-2015 practice to the 2018 proposal, and a national-level analysis of the proposed changes on the section 404 program.

Stage 1 offers a number of scenarios for stakeholders to consider. In comparing the most and least conservative estimates, the Agencies estimate the proposal would produce annual avoided costs ranging between $9 million to $15 million and $98 to $164 million, and annual forgone benefits ranging from approximately $3 million to between $33 to $38 million.[76] Stage 2 merely reflects the likely direction of the effects of the proposal due to data limitations.

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[74] U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY CORPS OF ENGINEERS, RESOURCE AND PROGRAMMATIC ASSESSMENT FOR THE PROPOSED REVISED DEFINITION OF "WATERS OF THE UNITED STATES" (Dec. 14, 2018), *available at* https://www.epa.gov/sites/production/files/2018-12/documents/wotus_proposed_step_2_rpa_for_clearance_12-7-18_508c.pdf.

[75] U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY CORPS OF ENGINEERS, ECONOMIC ANALYSIS FOR THE PROPOSED REVISED DEFINITION OF "WATERS OF THE UNITED STATES" (Dec. 14, 2018), *available at* https://www.epa.gov/sites/production/files/2018-12/documents/wotusproposedrule_ea_final_2018-12-14.pdf.

[76] *Id.* at 82-3 (the most conservative scenario assumes the fewest number of States regulating newly non-jurisdictional waters and the least conservative scenario assumes the greatest number of States are already regulating newly non-jurisdictional waters).

The Chamber appreciates the complexity of assessing the economic impacts associated with the proposal, as well as the Agencies' efforts to account for the data limits. The EA offers an analysis that exceeds that of the EA supporting the 2015 Rule. The Agencies should revise the EA, however, to focus more on the foregone costs and benefits of the agencies' actions under the "no state response" scenario, instead of speculating as to what the states might do, as the foregone costs seem largely underestimated.

IV. Data Collection

Comprehensive data collection is a pivotal aspect of administering the CWA and making jurisdictional determinations. The Agencies should ensure that real-time data is metered, monitored, and collected on all water use, reuse, flow, quality, storage, and consumption. Moreover, the Agencies should develop the necessary geospatial mapping capability for the proposed categories and exclusions of WOTUS.

This data should be available in formats that are compatible with existing datasets, promote investment in water-use efficiency and water infrastructure, support innovation, and encourage the productive uses of water resources and the highest and best value uses of those resources. Data analysis, management and security of data are critical elements of any data collection program and must be prioritized in all data program developments.

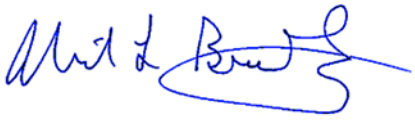
Resources, both financial and technical should be applied to develop and apply aquatic resource mapping, remote sensing technology, or satellite data collection to facilitate the implementation of this proposed definition of WOTUS and the overall management of the nation's water resources.

The Agencies should collaborate with like-minded individuals and organizations to prioritize the development of this shared data resource and to facilitate early achievement of a complete real-time data collection, analysis and management capability.

V. Conclusion

In sum, the Chamber supports the Agencies' proposed revisions to the definition of WOTUS and appreciates the opportunity to comment on this important matter. The Chamber looks forward to continue working with the Agencies on this issue.

Sincerely,



Neil L. Bradley