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April 15, 2019

Mr. Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
Mail Code 28221T
200 Pennsylvania Avenue NW
Washington, DC 20460

**RE: Comments on the Revised Definition of the “Waters of the United States” proposed rule,
Docket Id. EPA–HQ–OW–2018–0149**

Dear Administrator Wheeler:

On behalf of the 1.3 million members of the National Association of REALTORS® (NAR), thank you for the opportunity to comment on the Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) proposed rule to revise the definition of “Waters of the United States” (“WOTUS”) under the Clean Water Act (“CWA” or “the Act”), 84 Fed. Reg. 4154 (Feb. 14, 2019).

NAR supports this proposed rule because it strikes an appropriate balance between regulatory clarity and transparency and the need for robust environmental protection of waters and wetlands. It aligns with Supreme Court precedent and seeks to preserve the states’ roles in regulating waters within their boundaries. It is based on sound science but also reflects reasonable legal interpretations on the scope of the agencies’ regulation under the CWA. NAR members are committed to the protection and restoration of America’s wetlands and waters and believe that regulations that draw clear lines between federal and state waters will help further those goals.

NAR appreciates the agencies’ efforts to increase predictability and consistency by clarifying the scope of WOTUS regulated under the CWA. For years, the agencies’ regulations and guidance documents have attempted to expand the WOTUS definition beyond its constitutional and statutory limits, and this proposed rule is an important step in re-aligning the WOTUS definition with Congress’s intent for the scope of federal jurisdiction under the Act. The proposed rule gives meaning to the term “navigable”, recognizes that a defining feature of the CWA is to preserve the states’ traditional and primary authority over land and water use and restores the balance between state and federal oversight authority.



Many of the proposed rule's critics have mischaracterized its scope and impact. In reality, the proposal:

- **Provides Much-Needed Clarity** – The scope of the agencies' jurisdiction under the Act has been marked by uncertainty, ambiguity, and inconsistency. The agencies' sweeping assertion of jurisdiction under the 2015 Rule encompassed features with little or no relationship to navigable waters, raising serious federalism concerns and creating confusion among the regulated community.

This approach relied heavily upon case-by-case subjective assessment, with little to no predictability regarding which waters are jurisdictional and which are not. If finalized, the agencies' proposed rule would address these issues by drawing clear lines between jurisdictional and non-jurisdictional features. Rather than “rolling back” the scope of WOTUS regulation, the proposed rule adds an element of clarity and transparency by setting clear categories to guide jurisdictional determinations.

- **Maintains Protections for Clean Water While Preserving States' Traditional Authority Over Local Land and Water Use** – Congress never intended for all water in the country to be subject to federal regulation, as WOTUS does. Instead, Congress recognized that some waters were to be federally regulated with the remaining water features addressed through other federal, state, and local means. Indeed, the CWA itself provides a comprehensive scheme of non-regulatory protections and programs that apply to all of the Nation's waters, coupled with federal regulation of the discharge of pollutants to a subset of waters identified as “waters of the United States.”

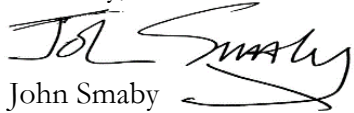
Preservation of the states' roles under the cooperative federalism regime is a hallmark of the Act. Under this regime, waters, wetlands, and related features are subject to robust protections even where they would not be designated as WOTUS. Moreover, other non-CWA regulatory programs contribute to the protection of aquatic resources, such as the federal Safe Drinking Water Act (SDWA) and the Resource Conservation and Recovery Act (RCRA), as well as the numerous state and local laws and programs that protect waters. The agencies' proposal to refine and clarify the WOTUS definition is only one component of a robust regulatory framework for the protection of aquatic resources that currently exists under federal, state, and local laws.

- **Enhances Transparency** – The 2015 Rule failed to evaluate the implications of redefining WOTUS for CWA programs beyond the section 404 program. By contrast, the proposed rule and its supporting analyses for the first time reflect consideration of the implications of the WOTUS definition for other CWA programs, as well as for state and local programs. This greatly enhances transparency by allowing regulated entities and states to understand the scope of the proposed federal regulation and the implications for all CWA regulatory programs under a revised WOTUS.
- **Reflects Legal and Policy Decisions Informed by Science** – As part of the rulemaking effort leading up to the 2015 Rule, the EPA developed a report entitled “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” (the “Connectivity Report”). Rather than abandoning this previous work, the agencies relied upon the Connectivity Report to inform the jurisdictional categories set forth in the proposed rule. Specifically, the agencies recognized one of the fundamental scientific principles detailed in the Connectivity Report—that hydrologic connectivity occurs along a gradient. Informed by the Connectivity Report's analysis of the connectivity gradient, the agencies determined that federal regulatory jurisdiction should be extended to those features on the gradient that have the strongest influence on downstream waters.

The proposed rule stands in stark contrast to the 2015 Waters of the U.S. Clean Water Rule. That WOTUS Rule would have swept many more waters under authority of the federal government, would have made it more difficult to determine what level of government had jurisdiction over specific waters and would have increased regulatory uncertainty, costs and burdens.

I write on behalf of REALTORS® across the country who care deeply about clear rules, clean water, and property rights. This proposal makes strides in correcting past agency practices, guidance, and interpretations that have improperly expanded the scope of federal water regulation beyond the appropriate bounds of regulation under the CWA and the Constitution.

Sincerely,

A handwritten signature in black ink, appearing to read "John Smaby". The signature is stylized with a large, sweeping initial "J" and a long, horizontal flourish extending to the right.

John Smaby
2019 President, National Association of REALTORS®