



**COLORADO CHAMBER
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Water Docket Office
Docket ID No. EPA-HQ-OW-2018-0149
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

April 15, 2019

Re: Docket ID No. EPA-HQ-OW-2018-0149

Step two: Review & Revise the Clean Water Act; Definitions for waters of the United States

The Colorado Chamber of Commerce and its Federal Policy Council submit the following comments in support of the Environmental Protection Agency (EPA)'s Proposed Revised Definitions for Waters of the United States (WoTUS) within the Clean Water Act (CWA). The Colorado Chamber appreciates this opportunity to comment, particularly in light of steps made by the EPA and the Army Corps of Engineers (collectively Agencies) to add regulatory clarity and definitions which reflect feedback and steps to remediate concerns raised by the Colorado Chamber in 2014. Specifically, the Colorado Chamber raised substantial concerns regarding a lack of business input to the 2015 rule, a lack of understanding by the Agencies for business best practices, as well as a lack of economic analysis as to the 2015 rule's effect in terms of compliance costs, implementation costs or lost economic opportunities.

As Colorado's Chamber of Commerce and the statewide voice of business, we believe the proposed new definitions within WoTUS create a substantially more straight-forward, commonsense and approachable definition for all stakeholders – not just what are to be jurisdictional waters, but quite helpfully, those water features that are to be specifically excluded. We believe the proposed definitions provide the clarity necessary for businesses to carry out long-term planning and we will provide several ideas from member companies where definitions could potentially benefit from additional clarity.

For businesses, farmers and ranchers, for those investing in our roads and building homes, and for our state's energy developers and manufacturers, we applaud the proposed definition's intent to simplify WoTUS. We support the Agencies' goal of ensuring an average person can comprehend the rule's intent and limits, without having to devote much-needed resources to expensive legal counsel, engineers, or duplicative permits and studies for every project undertaken. Our members often share that every dollar going toward regulation compliance is a dollar not spent on employees, research, product development, maintenance or equipment.



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While the intent of the 2015 rule was to protect our nation's surface waters and to seemingly add regulatory clarity, instead it massively increased the number of water features to be federally regulated and therefore the number of projects required to get a CWA 404 permit. This permit often costs job creators \$300,000 and two-to-three years of time wasted waiting. At the same time, if a business failed to obtain a CWA permit, fines were more than \$53,000 per day and included potential jail time. Despite the past intentions of the 2015 rule, the Colorado Chamber believes the new definitions as proposed create a similarly-focused mission, but do so by providing much-needed "bright line" clarifications and regulatory certainty and – most importantly – would create one national standard.

More to the point, previous definitions put forward and enacted in 2015 inappropriately and greatly expanded the authority of the Agencies, beyond the boundaries of the CWA, and without due consideration for Colorado's and the EPA's existing water protections. We believed then, and still believe now, that the 2015 rule would have had a substantial negative impact on the ability of businesses and manufacturers to operate, maintain and develop their facilities, not to mention expanding the permitting uncertainties mentioned above. By default, the uncertainty of compliance and permitting from the 2015 rule created instability for employers and employees – without recognition of existing federal and state water protections.

In Colorado, we value our innovative business spirit, stewardship of the land and our ability to turn ideas into benefits for the economy and our state – in short, we are proud to live and work here. It is with this understanding that we say the newly-proposed WoTUS definitions provide a path to remove unnecessary and duplicative permitting delays, costs, and roadblocks for manufacturers of all sizes and in virtually all sectors of the nation's economy, not just for Colorado.

Additionally, the Colorado Chamber applauds the Agencies' efforts to acknowledge, where appropriate, sound scientific work developed for the 2015 rule, while at the same time balancing regulations with the recognition that states understand local needs better than the federal government. Specifically, it makes sense for the EPA to regulate those water features most likely to influence downstream waters (as recognized in 2015), while leaving ditches and more ephemeral features to the purview of the states. Additionally, the removal of "other waters" and "significant nexus" definitions went a long way toward removing and repairing the legal ambiguity and costs of the 2015 rule.

The Colorado Chamber of Commerce further asks the Agencies to note that the goal of the proposed rule, protecting our nation's water, is in concert with the Colorado Chamber's mission and the values of our member companies. We champion a healthy business environment and that includes best practices and good stewardship of our water resources. Our four key objectives include:



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1. **Maintaining and improving the cost of doing business;** *(The proposed WoTUS definitions remove layers of burdensome and unnecessary costs, empowering conscientious business growth)*
2. **Advocating for a pro-business state government;** *(The proposed definitions acknowledge that not all waters should be treated the same; a true stakeholder process takes into consideration those businesses that already operate in a manner to protect and most efficiently use our resources)*
3. **Increasing the quantity of educated, skilled workers;** *(By giving states back the ability to regulate ephemeral waters, businesses are more able to free up capital resources – once dedicated to attaining counsel, federal permits, etc. -- to now invest in their workforce)*
4. **Strengthening Colorado’s critical infrastructure (roads, water, telecommunications and energy)** – *(The proposed definition approaches water protection correctly, from a position that most states are working to balance growth, economic opportunities and conservation – and it is their right to do so)*

With the Colorado Chamber’s mission in mind, we want to emphasize that Colorado’s businesses not only value our environment, we value what our businesses add to the community, to the economy and to our way of life. In representing a broad range of businesses from food distributors to brewers, manufacturing to code-developers, local start-ups to companies with international footprints, we understand the importance and value of clean water, and welcome the Agencies’ goal of providing greater clarity and certainty to this complex regulatory issue.

Where the 2015 WoTUS definitions created heavy-handed federal overreach, and at times individual property oversight, the Agencies’ proposed definitions clearly demonstrate an effort to right-size water protections, reaffirm state water rights and recognize the right of states to maintain protections already in place.

Constructive Feedback:

- **Burden of Proof: We strongly support the Agencies carrying the burden of proof for jurisdictional designations.** We do however have technical and process questions for how designations would be reached by the Agencies, and members specifically raised concerns/opposition to the use of aerial photos for designation purposes. Additionally, questions were raised whether satellite images would be accurate enough to determine designation, and how often Agencies would review existing designations.



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- **Interstate Waters: We support removing “interstate waters” as automatically jurisdictional.** The proposed definition would mean an interstate water is only a jurisdictional WoTUS if it meets the “intermittent connection” criteria. An additional clarification could be that interstate waters are only jurisdictional as an (a)(1) water if it supports transportation of interstate commerce.
- **Ephemeral Features: We support excluding all ephemeral features as proposed.** We also support the exclusion of drought and extreme flooding years, as well as a 30-year rolling average for the definitions of “perennial” and “intermittent” waters. However, more clarification may be needed for “typical year,” and “intermittent” definitions to eliminate potential ambiguity and therefore address fewer case-by-case jurisdiction designations.
 - **Typical Year Standard:** Connecting “typical year” to another definition may help strengthen the definition (i.e. For the (a)(2) category, “typical year” is tied to the “intermittent” definition). Additionally, explanatory language from the Agencies’ preamble could be included in the proposed definition as the preamble outlines geographic area, range of precipitation, excludes outlier seasons and extreme drought or flooding, and describes “normal range” as between 30th to 70th percentile of three-month precipitation as measured by the National Oceanic Atmospheric Administration (NOAA).
 - **Intermittent:** The Agencies’ preamble states an intention to regulate streams that flow as a result of elevated groundwater tables, or snowpack as intermittent tributaries. We suggest using language and qualifiers from the Agencies’ preamble in proposed definitions to ensure the definition of “intermittent” cannot be taken as simply a suggestion.
- **Ordinary High Water Marks (OHWMs):** Our members support the OHWM concept, but only in the context of where jurisdiction has already been established. After a designation, OHWMs could then be used to determine lateral extent for a tributary. If a lake or pond is deemed jurisdictional, similar support of the OHWM could be inferred.
- **Potential Mapping Provision:** There are potential benefits of having such extensive mapping, but there are distinct concerns about how the maps would be maintained in the future to ensure accuracy and consistent application. We support the goal of making WoTUS approachable to all, so there are questions of whether the potential maps would be accurate enough for everyday landowners to rely on federal mapping of WoTUS designations, without seeking legal counsel, hydrology experts or other expert review.



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We look forward to continuing our work with the Agencies on this matter and would welcome the opportunity to put forward subject matter or on-the-ground experts, as needed. We urge the Agencies to continue listening to a wide audience for feedback on the proposed definitions. The Colorado Chamber of Commerce believes the rulemaking process is made stronger by stakeholders who can bring constructive, real-world and honest feedback to the table.

Thank you for your time.

Sincerely,

Leah Curtsinger
Federal Policy Director
Colorado Chamber of Commerce