

Please return any comments by COB on Tuesday, April 2nd, 2019.

Ask #1: Proposed Comments

DRAFT ---- DRAFT ---- DRAFT ---- DRAFT ---- DRAFT ---- DRAFT ---- DRAFT ----

“Water Docket Office

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

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

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 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 Corp 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 for business best practices by the Agencies, 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, while underscoring Colorado’s legacy and commitment to protecting our natural resources.

For businesses, farmers and ranchers, for those investing in our roads and building homes, and for our state’s energy developers and manufacturers, the proposed definition means the 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.

While the intent of the 2015 rule was to protect our nation’s above-ground waters and to seemingly add regulatory clarity, it instead often cost job creators two-to-three years of time wasted waiting and \$300,000 to get a CWA 404 permit. 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 a much-needed “bright line” clarification 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 creating 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 EPA's efforts to acknowledge, where appropriate, scientific work developed for the 2015 rule, while at the same time balancing regulations with the recognition that states know better than the federal government what local needs are. Specifically, it makes sense for the EPA to regulate those water features most likely to influence downstream waters (as recognized in 2015), while leaving farming 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:

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, 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 and recognize the right of states to maintain protections already in place.

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 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."

Ask #2: Detailed vs. High-Level?

The Chamber's proposed comments are intentionally high-level as a starting point. The below bullet points are possible areas for additional and/or more technical comment if there is support among members:

- **Mapping proposal:** Do you have comments (for, against or neutral) re: an idea floated by the EPA to create a map of all identified areas and bodies of water that ARE to be regulated as Waters of the U.S.? This could be a useful tool with applications for businesses to determine future expansions, needed permits, land

acquisition, etc., but there is potential risk that the same mapping tool could be used by future state or federal administrations to expand regulations.

- **Support for removing “interstate waters” from the 2015 rule’s definitions:** The 2015 rule wrongly established that waters flowing between two states (“interstate waters”), were connected to “traditionally navigable waters” *due to their interstate natures*, and therefore must automatically be regulated as a WoTUS under the Clean Water Act (CWA), despite not necessarily being navigable for commerce (as was the primary definition prior to 2015).
- **Ordinary High Water Marks (OHWMs):** Part of identifying jurisdictional waters is having definitions clarifying where “normal” and “intermittent” flows exist. It has been proposed that the Colorado Chamber provide constructive comment, such that OHWMs not be used to determine jurisdiction under the CWA, but rather retaining the OHWM concept ONLY to delineate the lateral extent for a tributary once basic jurisdiction is established. (i.e. Once a tributary meets jurisdictional definitions, we could recommend the OHWM only be used to show how far to each side of a tributary that the federal jurisdiction extends.)
- **Other areas for consideration?**

Please return any comments by COB on Tuesday, April 2nd, 2019.

