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The Ohio Chamber of Commerce submits these comments to the U.S. Environmental Protection Agency and Army Corps of Engineers (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).¹

The Agencies' proposed revisions to the definition of WOTUS will provide Ohio businesses with much-needed regulatory certainty by accurately reflecting the jurisdictional limits that Congress, as clarified by the Supreme Court, envisioned under the CWA. The proposed revisions provide Ohio businesses with the "bright lines" needed to identify jurisdictional waters, give meaning to the term "navigable," and preserve Ohio's authority over land and water use. The proposed revision will allow businesses to continue to invest in the state and protect water resources without the threat of endless regulatory and litigation risk.

The 2015 WOTUS Rule dramatically expanded the definition of "navigable waters" under the CWA, and in doing so asserted federal authority over vast new areas, including backyard ditches and intermittent streams that only flow after storms. The scope of such authority was immense, affecting a wide range of businesses, from construction and real estate to mining, manufacturing, agriculture, energy, and even homeowners.

The 2015 WOTUS Rule ultimately resulted in a great deal of regulatory uncertainty for stakeholders, including in Ohio, where the Ohio Chamber of Commerce called for U.S. EPA to institute reforms.

The scope of federal jurisdiction under the CWA has long been uncertain and subject to much

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).

debate, leading to uncertain and inconsistent enforcement. The Supreme Court has addressed the issue of what constitutes WOTUS in three seminal decisions: *United States v. Riverside Bayview Homes, Inc.*; *SWANCC v. U.S. Army Corps of Engineers*; and *Rapanos v. United States*. Each has limited the scope of federal authority in order to bring the definition of WOTUS more in line with the CWA's objectives.

Unfortunately, the 2015 WOTUS Rule asserted sweeping jurisdiction over waters that have little or no relationship to navigable waters. It exacerbated uncertainty by relying on case-by-case subjective assessments, blindly leading to jurisdictional determinations that were inconsistent and unpredictable. The Agencies' proposal addresses these shortcomings by providing the regulated community with the "bright lines" needed to make jurisdictional and non-jurisdictional determinations. Further, the proposal clearly and transparently categorizes features subject to those determinations.

The Clean Water Act is a statute grounded in the principles of cooperative federalism and Congress explicitly intended 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."² The CWA also 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."³

Congress never intended that *all* water features in the United States could be potentially subject to federal jurisdiction as WOTUS, or that the CWA could be the exclusive vehicle for addressing such features. Rather, Congress intended that some water features be addressed by the States or other federal, state, or local measures. For example, provisions included in the Safe Drinking Water Act (SDWA) and Resource Conservation and Recovery Act (RCRA) also address water features at the federal level. Several state and local laws and regulations addressing such features also exist.

During the rulemaking process for the 2015 WOTUS rule, multiple stakeholders recognized that the Agencies only considered the implications of the definition of WOTUS as it pertained to the section 404 dredge-and-fill program. The Agencies' proposal recognizes that the definition of WOTUS applies to many other programs included in the CWA, as well as state and local programs. For example, the definition of WOTUS is also found in the Act's provisions covering the discharge of oil and hazardous substances and the administration of the National Pollutant Discharge Elimination System (NPDES) permitting program.

The programmatic assessment included in the proposal addresses these programs further and enhances transparency by allowing all regulated parties to understand the scope of the proposal and the implications that revising the definition of WOTUS would have on all CWA regulatory programs.

² 33 U.S.C. §§ 1251(b).

³ *Id.* at § 1251(g).

The Ohio Chamber of Commerce appreciates that opportunity to comment on the Agencies' proposal.

Sincerely,

A handwritten signature in black ink that reads "Zachary L. Frymier". The signature is written in a cursive, flowing style.

Zachary L. Frymier
Director, Energy and Environmental Policy