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February 7, 2022

The Honorable Michael Regan
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

The Honorable Christine Wormuth
Secretary of the Army
101 Army Pentagon
Washington, D.C. 203100101

RE: Proposed Rule "Revised Definition of 'Waters of the United States'," Docket EPA-HQ-OW-2021-0602, 86 Fed. Reg. 69372 (December 7, 2021)

Dear Administrator Regan and Secretary Wormuth:

Please find below the comments of the National Association of Convenience Stores ("NACS") on the Environmental Protection Agency's ("EPA") and the Army Corps of Engineers' ("Corps") (together the "Agencies") December 2021 proposed rule (the "Proposed Rule" or "Proposal") to revise the definition of "Waters of the United States" ("WOTUS") under the Clean Water Act ("CWA").[1] NACS supports the Agencies' goal to protect the nation's waters and to bring clarity into the CWA regulatory sphere but, as articulated below, the Proposal as currently crafted would not achieve that goal. Instead, it would adversely impact small business fuel retailers and their customers.

Under the Proposed Rule, there will be an additional layer of regulatory complexity and cost associated with every investment and expansion decision that retailers make. These will hinder economic activity as well as work against EPA's and the Administration's goals. These goals include retailers installing new infrastructure to charge and serve electric vehicle drivers as well as investing in new equipment to facilitate the goals of the Renewable Fuel Standard program ("RFS"). If finalized as proposed, retailers would be less inclined to undertake these investments.

[1] 33 U.S.C. § 1251 *et seq.*

I. BACKGROUND

NACS is an international trade association with more than 1,500 retail and 1,600 supplier companies as members. The U.S. convenience store industry, with approximately 148,000 stores across the United States, posted $548.2 billion in total sales in 2020, representing approximately 2.6 percent of U.S. Gross Domestic Product, and including $292.6 billion in motor fuel sales alone. The industry handles approximately one of every 30 dollars spent in the United States and serves about 165 million people per day—around half of the U.S. population. The industry sells about 80 percent of the motor fuels sold at retail across the nation.

More than 60% of NACS members that sell motor fuels operate just one store. Thus, any additional regulatory burdens resulting from the Proposal will generally fall upon small businesses and their customers.

The retail fuel market is one of the most competitive in the United States. NACS members are unable to absorb incremental cost increases without passing them on to consumers due to the competitive retail market in which they operate.

It is important therefore that the final rule be clear regarding the obligations that retailers will face. Without clarity, retailers will not know whether certain conduct – such as purchasing a new retail outlet, or investing in new, state-of-the-art electric vehicle fast chargers or underground storage tanks – trigger obligations under the rule. Therefore, as proposed, those businesses will need to expend capital solely to determine whether their conduct is covered by the rule. If the conduct is covered, there will obviously be additional expenditures necessary to ensure compliance. These variables place additional hurdles in front of – and will serve to discourage – investments that would create jobs.

II. COMMENTS ON THE PROPOSAL

NACS recognizes and support the Agencies' objective to bring certainty and predictability to water jurisdiction and thus minimize the number of case-specific determinations the Agencies make. Nevertheless, the Proposed Rule's revised definition of "Waters of the United States" is both overbroad and ambiguous. If finalized, the Proposal will exacerbate jurisdictional uncertainty. Under the Proposal, questions will repeatedly arise as to which waterways in the U.S. are subject to CWA jurisdiction and this will require expensive analysis to make those determinations. This conflicts with the Agencies' objectives in writing this rule.

A. <u>The Proposal Exceeds the Agencies' Statutory Authority</u>

The Proposal exceeds the Agencies' authority to regulate under the Clean Water Act. The definition in the Proposal clearly exceeds that set forth by the U.S. Supreme Court in *Rapanos v. United States*,[2] which made clear that the agencies only have authority under the Clean Water Act to regulate "relatively permanent, standing or continuously flowing bodies of water."[3] But, the Proposal's definition of Waters of the United States includes "other waters" that are entirely intrastate including "intermittent streams," "natural ponds," "prairie potholes," and more.[4] While these waters would need to have a surface connection to other regulated waters, the Proposal would also include "impoundments of waters" and "tributaries of

[2] 547 U.S. 715 (2006).
[3] *Id*. at 739.
[4] 86 FR 69372, 69450 (Dec. 7, 2021).

waters" within its definition.[5] These broad categories of waters are not tethered to the limits of the Clean Water Act as laid out by the Supreme Court and cannot survive legal scrutiny.

B. The Proposal Burdens NACS' Small Business Members

EPA and the Corps are proposing to expand the scope of waters covered under the CWA well beyond those currently regulated – and that were subject to regulation for decades prior to the 2015 regulation. This jurisdictional expansion would impose higher costs on NACS members, through additional permitting and associated regulatory requirements.

In fact, the expansive definition in the Proposed Rule would alter the jurisdictional balance between the federal government and the states that is delineated in the Clean Water Act, ultimately impacting permitting requirements and costs. These broad categories would lead to expense and uncertainty for a wide variety of development projects across the nation.

This ambiguity and uncertainty would be expensive for fuel retailers:

- Retailers would need to expend resources to determine whether their conduct was actually covered by the rule.
- If retailers were covered, they would have to pay for the development of relevant plans and protections, permits, and other pertinent obligations.
- Retailers would have to absorb or pass along to consumers the costs inherent in the lengthy permitting process.
- Retailers would be subject to an increased litigation risk that naturally arises in ambiguous and confusing regulatory environments.

These additional expenses would not only add cost but would also discourage convenience retailers from making a variety of investments in new sites and services (including electric vehicle charging and dispensing of additional renewable fuels) that would otherwise move forward. By creating hurdles to these investments, the Proposal would reduce economic activity and cut against policy goals that the Administration has publicly touted – and that Congress has repeatedly funded including through the recently passed Infrastructure Investment and Jobs Act.[6] The Agencies should reconsider these negative impacts.

C. The Agencies Have Not Complied with the Administrative Procedure Act and did not Sufficiently Consider the Proposal's Impact on Small Businesses

The Agencies have not complied with the Administrative Procedure Act ("APA") during this rulemaking process.[7] The Agencies determination that the Proposal "will not have a significant economic impact on a substantial number of small entities" under the Regulatory Flexibility Act ("RFA") is mistaken. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), requires federal agencies to consider how a proposed rule would impact small businesses and adopt the least burdensome alternative for small businesses.[8] EPA, in particular, must assemble a SBAR panel when it

[5] *Id*.
[6] Public Law No: 117-58.
[7] 5 U.S.C § 500 *et seq*.
[8] Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104-121, 110 Stat. 857 (codified as amended in scattered sections of 5 U.S.C. §601 *et seq*.). In the event that a proposal is projected to impose a "significant economic impact on a substantial number of small entities," a federal agency must assess that impact and consider regulatory alternatives that would minimize the impact to small businesses. 5 U.S.C. § 603, 605. Furthermore, Executive Order 13563 demands that an agency

cannot certify that a rule will not pose a significant economic impact to a substantial number of small entities.[9]

Here, the Agencies improperly certified that the Proposal would not significantly affect small businesses by proclaiming that it would simply "codify a regulatory regime generally comparable to the one currently being implemented nationwide."[10] But, as noted above, that conclusion is not accurate. By exceeding the limits of their legal authority to regulate, the agencies' Proposal would clearly change the regulatory burdens that small businesses must endure and that impact requires an examination of those burdens that the agencies' did not undertake.

In addition, the comment period has been insufficient for a change of this magnitude. Determining the specific land areas and development projects impacted by the Proposal is complex and there has not been sufficient time to do that with the specificity that would be necessary to fully inform the Agencies of the range of outcomes the Proposal will effect. The Agencies should extend or reopen the comment period to allow for additional examination of the Proposal.

III. CONCLUSION

NACS appreciates the opportunity to comment on the Proposed Rule. Please do not hesitate to contact me if NACS may provide any assistance to the Agencies in this critical rulemaking.

Sincerely,

Doug Kantor
NACS General Counsel

"tailor its regulations to impose the least burden on society." Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan.18, 2011).
[9] 5 U.S.C. § 609(b).
[10] 86 FR at 69450.