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September 27, 2017

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

The Honorable Ryan D. McCarthy
Acting Secretary of the Army
101 Army Pentagon
Washington, D.C. 20310

**RE: Definition of “Waters of the United States” – Recodification of Pre-Existing Rules,
Docket ID No. EPA-HQ-OW-2017-0203**

Dear Administrator Pruitt and Acting Secretary McCarthy:

The National Association of Convenience Stores (“NACS”) and the Society of Independent Gasoline Marketers of America (“SIGMA”) appreciate the opportunity to provide comments on the Environmental Protection Agency’s (“EPA”) and the Army Corps of Engineers’ (“Corps”) (together the “Agencies”) July 27th proposed rule (the “Proposed Rule” or “Proposal”)¹ to return to a pre-2015 definition of “Waters of the United States” (“WOTUS”) under the Clean Water Act (“CWA”) prior to reviewing and revising the definition.² In general, NACS and SIGMA support the Agencies’ proposal to “re-codify the definition of ‘waters of the United States,’” which currently governs administration of the CWA, pursuant to a decision issued by the U.S. Court of Appeals for the Sixth Circuit.³

NACS is an international trade association with more than 2,200 retail and 1,600 supplier companies as members, while SIGMA represents a diverse membership of approximately 260 independent chain retailers and marketers of motor fuel. Together, NACS’ and SIGMA’s members represent 80 percent of the country’s retail motor fuel sales. In 2016, the fuel wholesaling and convenience industry employed more than 2.3 million workers and generated \$549.9 billion in total sales, representing approximately 3 percent of U.S. Gross Domestic Product. Fuel retailers serve about 160 million people per day—around half of the U.S. population. Nevertheless, the convenience store and fuel retail industry is truly an industry of small businesses. Significantly, the major integrated oil companies own less than five percent of the nation’s branded retail fuel outlets—so the vast majority of

¹ Environmental Protection Agency, Proposed Rule, *Definition of “Waters of the United States” – Recodification of Pre-Existing Rules*, 82 FR 34899 (July 27, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-07-27/pdf/2017-13997.pdf> [hereinafter *Proposed Rule*].

² 33 U.S.C. § 1251 et seq.

³ Proposed Rule, *supra* note 1, at 34899. “The agencies propose to replace the stayed 2015 definition of “waters of the United States”, and re-codify the exact same regulatory text that existed prior to the 2015 rule, which reflects the current legal regime under which the agencies are operating pursuant to the Sixth Circuit’s October 9, 2015 order.”

branded outlets are owned by individual entrepreneurs who may operate one to two stores. In fact, approximately 63 percent of convenience store owners operate a single store, and approximately 75 percent of NACS' membership is composed of companies that operate ten stores or fewer. It is these small businesses upon which the burden of expanded CWA requirements would fall.

As described in NACS' and SIGMA's November 2014 comment letter on the Obama Administration's proposed rule,⁴ the organizations had significant concerns with the proposed changes to the definition of Waters of the United States. The proposal was subsequently finalized with minor changes on June 29, 2015, and NACS' and SIGMA's concerns were not alleviated in the final rule.⁵

The final rule drastically expanded federal CWA jurisdiction and was excessively broad and ambiguous. Had it gone into effect, the final rule would have increased the already significant costs that NACS' and SIGMA's members incur through permitting and associated CWA regulatory requirements. Moreover, it would have undermined EPA's efforts to encourage fuel retailers to invest in equipment that is compatible with higher ethanol blends. This is because the final rule would have added a layer of regulatory complexity and cost to every investment and expansion decision that retailers make. In short, the final rule would have worked against EPA's regulations under the Renewable Fuel Standard program ("RFS"), which relies on retailers investing in new equipment that can store and dispense gasoline-ethanol blends greater than ten percent ethanol.

In addition, in finalizing the rule, NACS and SIGMA believe the Agencies did not sufficiently consider the rule's impact on small businesses, including most fuel retailers. Given these concerns, NACS and SIGMA support the Agencies' recent decision to rescind the Obama-era rule and re-codify a pre-2015 definition ahead of a rulemaking process intended to review and revise the WOTUS definition. NACS and SIGMA further urge the Agencies to fully take into account the comments of respondents to ensure that any new rule is clear, appropriate, and properly balances any impacts on small businesses.

NACS and SIGMA support protecting the nation's waters and bringing clarity into the CWA regulatory sphere, and as such, appreciate the opportunity to comment on the Proposed Rule. Please do not hesitate to contact me if NACS and SIGMA can provide any assistance to the Agencies on this matter.

Sincerely,



R. Timothy Columbus
Counsel to NACS and SIGMA

⁴ See NACS' and SIGMA's comment letter on the 2014 Proposed Rule at <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15242>.

⁵ Environmental Protection Agency, Final Rule, *Clean Water Rule: Definition of "Waters of the United States"*, 80 FR 37053 (June 29, 2015), <https://www.gpo.gov/fdsys/pkg/FR-2015-06-29/pdf/2015-13435.pdf> [hereinafter *Final Rule*].