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September 25, 2017

Water Docket
Environmental Protection Agency
Ms. Donna Downing, Office of Water (4504-T)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

ATTN: **Docket ID No. EPA-HQ-OW-2017-0203**

RE: Definition of *"Waters of the United States"* – Recodification of Pre-Existing Rules [82 Fed. Reg. 34899 (July 27, 2017)] Proposed Rule by U.S. Department of the Army, Corps of Engineers and the Environmental Protection Agency.

Dear EPA/USACE:

On behalf of the Construction Industry Round Table (CIRT),[1] we support the Trump Administration's decision to initiate a process to review and revise the definition of "waters of the United States" to be consistent with the Executive Order on restoring rule of law, federalism, and economic growth (signed 02/28/2017) and court interpretations. It is critical that federal agencies respect and honor the dictates of jurisdictional constraint and individual liberties protected by the U.S. Constitution.

This proposed recodification rule is a necessary first step to correct the previous overreach[2] of authority beyond the Clean Water Act (CWA) grant of jurisdiction and the court cases that attempted to limit or constrain federal agencies regarding the matter of defining "waters of the United States." As such, CIRT would like its views on this recodification to be included in the official record of comments regarding the above captioned proposed rule. [Hereinafter referred to as the: "recodification rulemaking" proposal].

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[1] The Construction Industry Round Table (CIRT) strives to create one voice to meet the interest and needs of the design *and* construction community. CIRT supports its members by actively representing the industry on public policy issues, by improving the image and presence of its leading members, and by providing a forum for enhancing and/or developing strong management approaches in an ever-changing environment through networking and peer interaction.

The Round Table is composed of approximately 115-120 CEOs from the leading architectural, engineering, and construction firms in the United States. Together these firms deliver on billions of dollars of public and private sector infrastructure projects that enhance the quality of life of all Americans while directly employing half-million workers.

[2] Obama-era rule (80 FR 37054, June 29, 2015), stayed by the US Court of Appeals for the Sixth Circuit (10/9/15).

Based on the experiences of the CIRT members, **the design/construction community favors clear, concise,[3] and balanced rules that achieve a specific well defined and scientific justified purpose consistent with the legislative language, court interpretations as well as the dictates of federalism and individual liberties.**

DISCUSSION

It is appropriate to review and revise the earlier 2015 rule on the "waters of the United States" starting with the above captioned agencies re-codifying pre-existing rules on the matter, until such time newly proposed and adopted definitions related to the CWA can be promulgated.

The first step envisioned by this proposal places the EPA and the Corps on a course to meet the fundamental test of *any* rulemaking: to draft concise, specific, language that reaches only those matters justified by the science and the statute's *federal* jurisdictional grant to reasonably achieve the goals of the law, without abridging or usurping state rights and individual citizen's liberties.

The member firms represented by CIRT have traditionally provided design and construction services to both private and public sector clients. These services must deal with or encompass various jurisdictional rules, regulations, and laws, as well as the federal mandates and requirements. Over the years, the A/E/C industry has become very familiar with EPA and the Corps rules regarding "waters of the U.S." as well as how and when they must be applied to their clients' projects.

Cumulating with the Obama-era rule on this subject, there was a clear unmistakable overreaching of regulatory authority as to: jurisdictional matters (federalism), scientific justification, application of words, and individual property rights (Constitutional protections), by the agencies involved.

Simply stated, in the 2015 rulemaking the federal agencies showed neither the inclination, willingness, nor restraint to limit their jurisdictional claims or to construe their mandate in a narrow least intrusive manner, but rather they "exploited" loosely defined words or phrases to manipulate and justify wider spanning results.

CONCLUSION

As noted, the decision to revisit the previous rulemaking regarding the definition of "waters of the United States" is fully warranted and necessary to redress the agencies overreaching of authority beyond the

[3] When the Obama-era rule was first "issued on April 21, 2014, the Agencies . . . continued to issue new documents, blog posts, Q&A documents, and webinars, offering new explanations of key terms in the proposed rule and new reasoning to support the proposed assertions of CWA jurisdiction. Much of this *ad hoc* information [was] inconsistent with material provided in the official rulemaking docket". [Water Advocacy Coalition Letter to EPA/Corps commenting on rulemaking, dated (09/29/2014); *See at:* www.fb.org/tmp/uploads/wacletter092914.pdf (Bracket material added)].

federal jurisdiction in the Clean Water Act and to properly apply Supreme Court cases that seek to interpret words and/or phrases in the Act in a more limited manner so as to constrain the regulatory reach of federal agencies regarding this matter.[4]

CIRT urges the EPA/Corps to move forward on implementing this recodification rule, so that the second step in the process can be initiated whereby a more narrowly focused, clear, concise, and defensible rule; that respects the state-federal balance as well as the rights of ordinary citizens is promulgated.

Sincerely,

Mark A. Casso, Esq. NAC
President
Construction Industry Round Table

[4] The previous rulemaking's failure to meet the statutory requirement to assess the economic impact on small business, dubious science to justify the steps proposed, and reliance on debatable Supreme Court direction (that suggested the opposite) as justification for the overly broad definition – leads to one conclusion: the past expansive jurisdictional reach is beyond any reasonable authority.