



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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June 19, 2017

Scott Pruitt, Administrator
US Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Douglas W. Lamont, P.E.
Department of the Army
108 Army Pentagon
Washington, DC 20310-0108

Dear Administrator Pruitt and Mr. Lamont:

I am writing to express my appreciation for the opportunity to provide input on the efforts to revise the definition of waters of the United States.

When Congress passed the Clean Water Act in 1972, the Act's declared objective in Section 101(a) is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." In Section 101(b), Congress also specifically declared "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator [of EPA] in the exercise of his authority under this Act." In South Dakota, we firmly believe these two declarations can and should go hand-in-hand.

However, in recent years, this objective and policy have appeared at odds with one another. In our federalist system, the states and the federal government share responsibility for controlling water pollution. Much of the progress under the Clean Water Act has depended on the ability of state and federal regulators working together toward protecting and restoring the nation's water quality. We stand ready to resume the partnership envisioned by the original authors of the Clean Water Act.

In President Trump's February 28, 2017, Executive Order on "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule," he encourages EPA and the Corps to give consideration to Justice Antonin Scalia's plurality decision in *Rapanos v United States*, 547 U.S. 715 (2006). Justice Scalia notes that "the Act's term 'navigable waters' includes something more than traditional navigable waters." He also notes that "the transition from water to solid ground is not necessarily or even typically an abrupt one," and that "the Corps must necessarily choose some point at which waters ends and land begins."

The checks and balances within the three branches of U.S. Government hold that Congress passes all federal laws, the U.S. Supreme Court interprets the laws, and the

Executive branch ensures the laws are carried out. In Justice Scalia's opinion, he states that an expansive interpretation of the Clean Water Act would significantly impinge the states' role over land and water use. The expansive definition of waters of the United States presented in EPA's Clean Water Rule defies Justice Scalia's interpretation and represents an intrusion into traditional state authority. Thirty states, including South Dakota, sought a judicial review of the Clean Water Rule. We welcome the opportunity to step back and engage in a robust conversation about the appropriate construction of the waters of the United States definition.

Justice Scalia's opinion stated that Clean Water Act jurisdiction only applies to "relatively permanent" waters. EPA has invited states to provide input into the implementation of this approach. It will be critical for EPA and the Corps to take into account regional considerations for this definition due to wide variations in state laws, geographic and climatic differences across the United States, and widely varying regulatory constructs. States must not only be a partner in the development of this rule but in the effective implementation of the rule going forward, since 46 of the states administer federal water pollution control programs through delegated NPDES programs.

Thank you again for the opportunity to participate in this important rule.

Sincerely,



Steven M. Pirner, PE
Secretary

cc: Senator John Thune
Senator Mike Rounds
Representative Kristi Noem
Governor Dennis Daugaard
Attorney General Marty Jackley
Deb Thomas, Region 8 Acting Administrator, EPA
Western States Water Council
Association of Clean Water Agencies



May 8, 2017

DEAR NATHAN
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 HANDLE TAS NEEDED?

The Honorable Dennis Daugaard
 Governor of South Dakota
 500 East Capitol Street
 Pierre, South Dakota 57501

Dear Governor Daugaard:

We are writing to solicit your input and wisdom on a forthcoming proposal to revise the definition of waters of the United States (Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015)).

This action follows the February 28, 2017, Presidential Executive Order on "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." The Order states that it is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of Congress and the States under the Constitution. The Order also directs the Environmental Protection Agency and the Department of the Army (hereinafter "the agencies") to review the existing Clean Water Rule for consistency with these priorities and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with the law. Further, the Order directs the agencies to consider interpreting the term "navigable waters," as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

Consulting with state and local government officials, or their representative national organizations, is a priority for us and President Trump. We believe this is an important step in the process prior to proposing regulations that may have implications on federalism as defined by the agencies' policy for implementing the Order. We hope to keep the states at the forefront of our mission and your input during the federalism process will enable us to do that effectively.

The agencies are implementing the Order in two steps to provide as much certainty as possible as quickly as possible to the regulated community and the public during the development of the ultimate replacement rule. First, the agencies are taking action to establish the legal *status quo* in the Code of Federal Regulations, by re-codifying the

regulation that was in place prior to issuance of the Clean Water Rule and that is being implemented now under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule. Second, the agencies plan to propose a new definition that would replace the approach in the 2015 Clean Water Rule with one that reflects the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.

The federalism consultation for the new definition began with an initial meeting held April 19, 2017, with state and local government associations. In addition to discussions our respective staffs will have with associations and individual state environmental agencies, we are reaching out to you directly to ensure we receive the benefit of your particular state's experiences and expertise. The agencies are soliciting written comments from state and local governments until June 19, 2017. Enclosed is a PowerPoint presentation that provides brief background information on the process the agencies intend to follow, identifies some questions we are hoping states can help us answer, and includes instructions for providing us with your comments.

Cooperative federalism is a guiding principle for us. We want to clearly understand what definition will work best for your state as we develop a new federal definition of "waters of the United States" consistent with the Scalia opinion. In addition, we are interested in understanding how your state might respond to a reduced scope of federal jurisdiction under the Clean Water Act.

If you or your staff have further questions, please feel free to contact Donna Downing at (202) 566-2428 or CWAwotus@epa.gov, or Stacey Jensen at (202) 761-5856 or stacey.m.jensen@usace.army.mil.

Respectfully yours,



Scott Pruitt
Administrator
Environmental Protection Agency



Douglas W. Lamont, P.E.
Senior Official Performing
the Duties of the Assistant
Secretary of the Army
(Civil Works)