

**Pete Ricketts**  
Governor

STATE OF NEBRASKA

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September 1, 2021

Michael Regan, Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Vance F. Stewart III, Acting Principal Deputy  
Office of the Assistant Secretary of the Army for Civil Works  
Department of the Army  
108 Army Pentagon  
Washington, DC 20310-0104;

John Goodin, Director  
Office of Wetlands, Oceans and Watersheds  
Environmental Protection Agency  
Mail Code 4504-T  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

RE: EPA-HQ-OW-2021-0328; FRL-6027.4-02-OW *Notice of Public Meetings Regarding "Waters of the United States"; Establishment of a Public Docket; Request for Recommendations*

Dear Mr. Regan, Mr. Stewart and Mr. Goodin:

On behalf of the State of Nebraska, we are submitting these comments on the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (the Corps) forthcoming proposal to revise the Clean Water Rule: Definition of Waters of the United States (WOTUS), Proposed Rules, 86 Fed.Reg. 41911 (August 4, 2021).

Because "Waters of the United States" is not defined in the Clean Water Act (CWA), the WOTUS rule will determine the scope of federal agency jurisdiction under the CWA. The definition of WOTUS has a direct and meaningful impact on Nebraska farmers, ranchers, industries, developers, homebuilders, and others whose proposed projects or developments may be required to obtain permits and approval from federal agencies.

Congress intended that the CWA "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). Water quality is important to Nebraskans, making it crucial that a new rule be developed and implemented that recognizes states have the primary responsibility for decisions involving the intricacies of land use and water management. Nebraska remains concerned about an expanded definition of WOTUS similar to what was adopted in 2015, both because of its extensive reach into waters already regulated by the State as well as the increased difficulty in determining what waters might be considered WOTUS. This is why Nebraska joined several states to legally challenge that rule on both procedural and substantive fronts. We continue to be committed to preserving our authority to protect Nebraska's water resources.

Nebraska and its regulatory agencies have clear authority and are well equipped to protect waters of the state. States are best positioned to manage the water within their borders because of their on-the-ground knowledge of the unique aspects of their hydrology, geology, and legal frameworks. As such, waters of the state, such as agricultural waters, including farm ponds, stock ponds, and irrigation ditches, and man-made dugouts, pits, and ponds used for irrigation, should be subject to the exclusive regulatory authority of the State.

With those points in mind, Nebraska supports a definition of WOTUS that provides for limited federal jurisdiction by adopting a clear and predictable standard for state and federal governmental agencies. This will also benefit those impacted by subsequent regulatory decisions. In addition to the effects on agriculture, uncertainty regarding jurisdiction can delay critical infrastructure and other important projects. Nebraska favors the certainty of an approach like the 2020 WOTUS rule where the rule explicitly describes those waters that are covered, as well as those waters that are explicitly excluded. The clarity of the 2020 rules is especially important to agricultural producers who represent Nebraska's leading industry, contributing over \$21 billion to the state economy.

Nebraska supports an approach based on Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) which stated that Clean Water Act jurisdiction includes relatively permanent streams and wetlands with a direct surface connection. If properly implemented, this provides a clear, bright-line approach to jurisdictional limits that agencies can apply and the regulated public can readily understand. We support further definition of the term "relatively permanent" in this context. We expect that, at a minimum, the definition would allow for regionalized approaches. As states are best positioned to understand regional variations, we are ready to be a part of that continuing conversation.

Finally, we want to emphasize the importance of providing certainty to the regulated public with regard to whether their planned activities would be subject to requirements of the Clean Water Act. As you move forward with rulemaking, we hope you will continue in the spirit of cooperative federalism to solicit input from the states and all stakeholders in developing a limited, clear, and predictable definition of "waters of the United States" which respects the work of states to responsibly manage land and water resources. Any changes that limit or restrict agricultural exclusions or regulate bodies of water on farm and ranch land will hinder the ability of ranchers and farmers to make vital investments in land to restore waterways, conserve riparian areas, and protect wildlife habitat.

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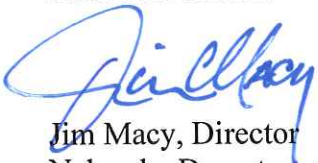
Nebraska appreciates your willingness to engage with states to balance the principles of federalism that are set forth in the United States Constitution. We will continue to expect EPA to ensure that any revisions respect private property rights of those agricultural producers who are committed to responsible water stewardship every day.

Thank you for the opportunity to comment.

Sincerely,



Pete Ricketts, Governor  
State of Nebraska



Jim Macy, Director  
Nebraska Department of Environmental and Energy



Steve Wellman, Director  
Nebraska Department of Agriculture



Thomas Riley, P.E., Director  
Department of Natural Resources