

Of all the stated goals in the Executive Order, it is critical that the Federal Agencies provide regulatory certainty regarding the definition of “waters of the United States” in the most expeditious timeframe possible. Regulatory certainty is vital, not only to those of us that are tasked with enforcing environmental regulations, but also to the regulated community that must have the ability to plan for environmental compliance while seeking to remain competitive in the current economy and provide jobs across the state. To that end, the State of Illinois recommends that the Federal Agencies withdraw the Clean Water Rule due to its potentially expansive nature and uncertain interpretation. The Clean Water Rule admirably attempts to provide regulatory certainty with its definition of “waters of the United States”; however, the Rule is mired in litigation and opposed by a wide variety of industry groups. To protect waters within our State’s borders, the State of Illinois can effectively apply currently existing rules through the application of USEPA’s 2003 and 2008 guidance, as well as the U.S. Supreme Court decisions in *SWANNC* and *Rapanos*.

If the decision is made to revise the definition of “waters of the United States,” it is recommended that the Federal Agencies develop their own independent interpretation by conducting a thorough review of congressional intent and judicial interpretation, including Justice Scalia’s opinion in *Rapanos*, rather than relying strictly on one judge’s view. Additionally, the State of Illinois requests that the following comments be taken under consideration.

First, the State of Illinois acknowledges that federal jurisdiction extends somewhat beyond navigable waters to certain non-navigable waterbodies and wetlands. In defining those non-navigable waterbodies or wetlands that are “waters of the United States,” the Federal Agencies should focus on water features that are identifiable based on clear, objective characteristics, to provide clarity and certainty to regulators and the public.

Second, it is critically important that any new rule provide states with clear guidelines that will allow for the effective implementation of the terms “relatively permanent” and “continuous surface connection.” Recognition should be given to the fact that each state has its own specific topography, hydrologic conditions and water quality concerns. Strict definitions, such as those used in the Clean Water Rule, will be difficult to apply on a uniform basis across the country because of state-specific conditions. Rather, the Federal Agencies should explore the creation of criteria and guiding principles for defining “waters of the United States” that would allow states much needed flexibility in determining whether a particular body of water is “relatively permanent” or has a “continuous surface connection.” This type of definition, which would be based on objectively identifiable characteristics and state-specific conditions, will go a long way towards avoiding litigation and other costs that divert scarce resources from protecting state and federal waters.

Third, any revised definition of “waters of the United States” should retain the existing, long-standing codified exclusions, including the exclusion for pits and quarries and waste water

treatment systems, which are heavily relied upon by mining and other industries to manage on-site waters in a manner consistent with all applicable state water quality standards.

Finally, because of the challenges that may exist in utilizing a Justice Scalia approach to defining “waters of the United States,” as well as the need to take into account state-specific hydrologic and water quality issues, the State of Illinois encourages the Federal Agencies to work closely with states in the development of a replacement for the Clean Water Rule. A close working relationship between state and federal governments would respect the fundamental principle of cooperative federalism that is at the heart of recognizing the vital role of states in implementing the Clean Water Act. Further coordination and consultation with the regulated community would lead to a greater understanding of the specific issues affecting states, and lend further credibility to the rulemaking process, both of which would ultimately strengthen any replacement to the Clean Water Rule.

Thank you again for the opportunity to comment on the Executive Order’s proposed approach to revising the definition of “waters of the United States” and the State of Illinois looks forward to further consultation with the Federal Agencies as this process continues.

Cordially,

A handwritten signature in black ink that reads "Alec Messina". The signature is written in a cursive style and extends to the right with a long horizontal stroke.

Alec Messina
Director