



June 19, 2017

Mr. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
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Office of the Administrator 1101A
Washington, D.C. 20460

Mr. Douglas W. Lamont, P.E.
Senior Official Performing the Duties of the Assistant Secretary of the Army (Civil Works)
Army Corps of Engineers
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Washington, D.C. 20310-0108

Re: Comments on 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.

Submitted via email to: CWAwotus@epa.gov

Dear Mr. Pruitt and Mr. Lamont:

Thank you for requesting comments on the concepts embodied in 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 (referred to herein as “Executive Order”). The Minnesota Pollution Control Agency (MPCA) and the Minnesota Department of Natural Resources (DNR) work together to protect Minnesota’s abundant surface water, wetland, and groundwater resources. The health of these water resources underpins our economy and is critical to the health of our citizens and our extraordinary fish and wildlife resources. The ability to implement our agency missions is to a degree tied to the Clean Water Act (CWA); therefore, any change in the CWA rules is of high interest. The approach contemplated in the Executive Order is of particular interest given its potential implications across the full range of CWA provisions that underpin the federal-state partnership in protecting and managing water resources in the United States.

The U.S. Environmental Protection Agency (EPA) has described implementation of the Executive Order as a two-step process. In step one, EPA and the U.S. Army Corps of Engineers (Corps) will recodify the Waters of the United States (WOTUS) rule that was in place prior to issuance of the 2015 rule amendments, thus returning to the *status quo*. The *status quo* reverts to relying on the 1986 rule definition and 2008 Bush Administration guidance on applying that definition. In step two, the EPA and Corps would develop a new definition to replace the 2015 rule amendments.

Support for Step One, but Not Step Two

The *status quo* works; another rulemaking is not worth the time and effort. Minnesota has been conscientiously and successfully implementing the CWA using the *status quo* definition of WOTUS. The stated intent of the Obama Administration’s 2015 WOTUS rulemaking was to clarify the definition in order to make it easier for states and others to implement the CWA, in part by reducing the number of jurisdictional determinations required. The result of that effort, for a variety of reasons, did not clarify anything. Rather, Minnesota and the rest of the country is now in the position of waiting for a multitude of legal challenges to work through the system. Without repeal of

the 2015 rule amendments, that litigation could take a decade. In the meantime, because implementation of the 2015 rule amendments has been stayed by the courts, the states are continuing to effectively implement the CWA regulations with the *status quo* definition of WOTUS. For all the time and effort expended by states, federal regulators, and stakeholders during the development of the 2015 rule amendments, we are left in the same administrative position as if the rulemaking had not happened.

The value proposition of investing time and effort in developing a new rule is very low, based on the experience from the previous rulemaking effort. There is strong reason to believe that interest groups will be as engaged in a new rulemaking as in the 2015 rulemaking. There is reason to believe that multiple lawsuits will be the result of a new rulemaking. There is reason to believe the courts will stay implementation of a new rule, just as occurred with the 2015 rule. All this will again take a decade to work through the court system. That will leave states in the exact same position as we are now, implementing the *status quo*. Minnesota and its citizens do not believe it is prudent to invest in yet another effort to modify the WOTUS definition, when the likelihood of a successful resolution is so low. Under the *status quo* definition of WOTUS, we can continue our work to protect the waters on which our economy rests.

For these reasons, the MPCA and DNR support implementing step one of the Executive Order, but urge you not to pursue yet another rule change. The course of action we are recommending maintains the *status quo* for the multiple CWA authorities that the state implements, including existing delegation agreements, permitting, and funding. It also maintains the working relationship between Minnesota and federal agencies developed over four decades. We do not believe another rule amendment will dispel ambiguity. It most certainly will not stop the lawsuits. The time and effort expended for what may be limited additional clarity is not worth the investment.

If You Do Proceed to Step Two

If, however, EPA and the Corps choose to undertake step two, we offer several suggestions. Our suggestions are aimed at maximizing three characteristics that are essential to a successful rule. The rule must provide additional clarity, protect water resources, and be based on hydrological principles.

Take advantage of the “cooperative” in cooperative federalism. First, in order to ensure clarity in a new rule, we strongly encourage you to work closely and substantively with Minnesota and other states throughout the development of the new rule. The CWA is firmly grounded in a cooperative federalism structure, giving both the federal government and states direct roles and responsibilities in implementation. Based on their long-term implementation and enforcement of the CWA, states have a unique understanding of how the *status quo* definition works and how alternatives may or may not work. To develop a new rule without active involvement of such partners increases the risk of, yet again, missing the target. True cooperative federalism cannot be achieved with a few requests for written comments at the beginning and end of the process; it will only result from an equal partnership in thoroughly discussing ideas and reaching consensus. Although we prefer EPA and the Corps not undertake a new rulemaking, Minnesota will be an active partner if one is undertaken.

A regional approach in the rule language is ill-advised. Second, a new definition must protect resources across the country in an equivalent manner. Indeed, that is the very purpose of having a federal Clean Water Act. We have concerns about suggestions from EPA staff that the definition may include regional variations. As has been proven through decades spent implementing the CWA and the *status quo* WOTUS definition, it is constitutionally defensible to apply a single definition across all regions. The Rapanos v. United States, 547 U.S. 715 (2006) (Rapanos) decision expressed no concern about applying a single, non-regionalized definition to waters throughout the country. Regardless of which Rapanos test is used, there are waterbodies that fall outside the WOTUS definition. As the *status quo* rule does now, the federal rule should establish a baseline level of protection for all WOTUS sufficient to ensure that the fundamental goals of the Clean Water Act are achieved. Acting through principles of federalism, states can always adopt protections above the floor.

It is almost impossible to choose a scale at which to regionalize the definition. Waterbodies vary by region of the country, by state, by region within a single state, and ultimately waterbody-by-waterbody. We recognize there are some high-level regional water characteristics. But, even within a region, the WOTUS definition is applied to a specific water body that may have characteristics very different from a “typical” water in the region. The definition itself does not need to be regionalized. A new rule should not be circumscribed by regional definitions that fail to account for the range of conditions within a region and even within a state. Practical regionalization results from the application of a consistent definition to specific waters.

Most importantly, including regional variations would add a layer of extreme complexity to drafting the definition, increase the risk of inconsistent definitions between regions, and erode the baseline level of protection established for all waters, and thus for the people and fish and wildlife that depend on those waters. The EPA’s and Corps’ current practice is to provide regional guidance on implementing the *status quo* definition. These documents use regional terms to guide implementers on how to apply the *status quo* definition to waters that may be more or less permanent, or have more or less connectivity. A regional approach in the rule will require an entire new set of terminology to be incorporated into the rule itself, rather than just using that terminology in regional guidance. Rule language would have to describe typical water resources for each region and contrast those against water resources in other regions. A regional approach in the rule presents difficulties in drafting that risk inconsistencies in protecting water resources across regions; and it would produce no different result than we have presently with a non-regionalized rule definition coupled with implementation guidance specific to each region.

Using the Scalia test does not remove ambiguity. Third, a new rule must be based on hydrological principles. If a new rulemaking is undertaken, EPA and the Corps must recognize that Justice Scalia’s test as stated in Rapanos, while on its surface perhaps more clear than Justice Kennedy’s test, is still not clear from a hydrological perspective. Justice Scalia gave little guidance about the terms “relatively permanent” and “continuous surface connection.” How much of the year does a stream or wetland have to be wet to be “relatively permanent”? Can a “continuous surface connection” be established through a series of year-round wetlands that are in very near proximity to one another, but not quite adjacent? Replacing the *status quo* definition of WOTUS with language merely repeating Justice Scalia’s test will not remove ambiguity from the definition.

Hydrological science must be at the forefront of any new rulemaking. Water protection, by necessity, is bound to hydrological and geological realities. The EPA and the Corps should rely on the most comprehensive review of connectivity science which is contained in EPA’s “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.” We are proud to say that Minnesota scientists participated in this review. A new rule should incorporate core hydrological principles that will provide flexibility to the states in applying the rule, for example through regional and programmatic general permits and individual permits.

Recent presentations by the EPA and Corps include options for defining the terms “relatively permanent” and “continuous surface connection.” It is unclear how each of these options, presented in broad outlines, are supported by hydrological science. It is impossible for us to react to any of these options without understanding the rational scientific basis underlying the options. It is also impossible for us to conduct an evaluation of the implications of each option on Minnesota water resources given the short time frame for submitting comments.

Consider unintended consequences. Fourth, the definition of waters of the United States is a foundational jurisdictional concept that touches every single provision of the CWA and its rules. A change in the definition will affect funding to states that is based on jurisdictional waters. It could affect permitting programs and impaired waters programs. Thoughtful, comprehensive deliberation should occur before making a definitional change that could have unintended consequences. Involving potentially affected states in developing any rule change could significantly reduce the risk of any unintended consequences.

Mr. Scott Pruitt
Mr. Douglas W. Lamont
Page 4
June 19, 2017

Conclusion. The preferred course we suggest to you is the simplest one. Stop after step one and allow states to continue our good work without the burden of another rulemaking effort that we believe will require extraordinary time and effort for minimal gain. If this is not possible, then keep in front of you the essential elements for success: provide additional clarity, protect water resources equally, and incorporate hydrological principles. Success cannot be met without engaging your key federalism partners, the states. States bring unique knowledge gained from decades of implementation and enforcement of the CWA. States are liaisons to local governments, permittees, landowners, and others. To proceed without such key partners is, at best, guaranteed to make the path difficult, and, at worst, will result in a rule that cannot be implemented.

Thank you for the opportunity to submit comments on this important, far-reaching question. We look forward to partnering closely with EPA and the Corps as the Executive Order is implemented. Please contact us if you have any questions.

Sincerely,



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cc: Rebecca Flood, Assistant Commissioner, MPCA
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