



June 19, 2017

Andrew Hanson
Hanson.Andrew@epa.gov

Dear Mr. Hanson,

Thank you for the inviting the State of Wisconsin (Wisconsin) to submit comments regarding the definition of "Waters of the United States" (WOTUS) during the "E.O. 13132 Federalism Consultation Meeting" held on April 19. We also thank you for taking our past comments to heart. The Wisconsin Department of Natural Resources (WI DNR) previously submitted comments on November 14, 2014 (attached), which identified concerns that the proposed rule to amend the definition of "Waters of the United States" (WOTUS) (jointly released by the Environmental Protection Agency (EPA) and the United States Corps of Engineers (USACE) on March 25, 2014 and published for public comment in the Federal Register on April 21, 2014) was developed without sufficient consultation with the states, generally, and without Wisconsin, specifically. We view this new opportunity to submit comments regarding the definition of WOTUS as an excellent example of EPA's new commitment, through Administrator Pruitt, and by virtue of President Trump's Executive Order 13778 "Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule" to reaffirm the states' constitutional role in administering laws, solving problems, and serving people.

This an exciting time that provides us an excellent opportunity to review our regulatory climate to ensure we continue to protect the citizens of this country, while at the same time ensuring our regulatory structure is not unnecessarily burdensome. We truly appreciate both the approach and opportunity.

In response to your specific requests for feedback and input, Wisconsin has the following comments:

1) How would you like to see the concepts of "relatively permanent" and "continuous surface connection" defined and implemented? How would you like to see the agencies interpret "consistent with" Scalia? Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?

We believe that Wisconsin is the perfect example of where interpreting 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) would allow for greater common sense flexibility while continuing to provide comprehensive environmental protection of Wisconsin's waters. Wisconsin would be in favor of interpreting the concepts of "relatively permanent" and "continuous surface connection" in a manner that would allow for the greatest flexibility for Wisconsin to directly regulate waters within our jurisdiction without unnecessary and duplicative federal regulations and oversight (i.e., perennial streams only and wetlands directly touching jurisdictional waters). Wisconsin remains one of the few states that currently regulate isolated, non-federal wetlands following the decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). Also, Wisconsin more broadly defines "Waters of the State" to include "those portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction." (Wis. Stat. § 281.01(18)). As a result, even the existing controlling definitions and case law associated with *Rapanos* and its progeny are duplicative to the regulatory approach in

Wisconsin for protecting our citizen's waters. This duplication not only leads to wasted regulatory effort, but also significant delays and regulatory confusion when trying to superimpose a "one size fits all" approach to our State.

2) What opportunities and challenges exist for your state or locality with taking a Scalia approach?

As noted above, the historic opportunity we have is to eliminate duplicative and confusing regulatory approaches. A recent example of this confusion and lack of common sense, includes concerns raised by EPA Region 5 regarding Wisconsin's definition of "Waters of the State" in our Concentrated Animal Feeding Operation (CAFO) general permit, currently under review. EPA Region 5 is threatening to object to our permit for using a definition *that is more broad and protective than the definition of WOTUS*. This is just one example of where environmental protections are best when driven locally by those who are directly impacted. By removing additional duplicative, rigid "one size fits all" federal requirements, which handcuff Wisconsin from being able to be more flexible under state law, EPA can further allow for protective, common sense solutions to uniquely address local environmental and regulatory challenges. Finally, under the Scalia approach, both the EPA and Army Corps have actual jurisdiction over a waterway, including wetlands. In Wisconsin, WI DNR has jurisdiction under state law over wetlands. Federal agencies would need to work cooperatively to establish uniform definitions, criteria, and process, to avoid inconsistent application and overlapping regulation. Additionally, federal and state agencies should establish an intergovernmental agreement to allow for one agency and one process in issuing approvals related to wetlands.

3) Do you anticipate any changes to the scope of your state or local programs (e.g., statutes or emergency response scope) regarding CWA jurisdiction? In addition, how would a Scalia approach potentially affect the implementation of state programs under the CWA (e.g., 303, 311, 401, 402 and 404)? If so, what types of actions do you anticipate would be needed?

If the Scalia approach is adopted, it would allow Wisconsin to be more targeted and flexible, by allowing the use of common sense regulatory approaches, which will lead to better cooperative environmental protection under state law, as noted above. There would be little or no change to many of our state or local programs. Limiting federal jurisdiction over waters of the United States would not change the regulatory oversight, as both the DNR and DATCP have regulations addressing water quality within waters of the state. Wisconsin would need to evaluate what additional changes to state law, if any, would be necessary to identify gaps and opportunities for new approaches.

4) The agencies' economic analysis for step 2 intends to review programs under CWA 303, 311, 401, 402 and 404. Are there any other programs specific to your region, state or locality that could be affected but would not be captured in such an economic analysis?

We would need to see the programs proposed for review by EPA and the USACE) in order to adequately respond to what may not be captured, and would appreciate getting those proposed programs as soon as is practicable.

Wisconsin appreciates the opportunity to provide these comments and hopes that they will be helpful to EPA and the USACE. We would be happy to provide additional information or clarifications.

Sincerely,



Kurt Thiede

Deputy Secretary

Wisconsin Department of Natural Resources