



west virginia department of environmental protection

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Jim Justice, Governor
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June 16, 2017

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

Re: Proposal to Redefine “Waters of the United States,”

Dear Administrator Pruitt:

I am writing on behalf of the State of West Virginia regarding the Environmental Protection Agency’s (EPA) plan to redefine “waters of the United States” (WOTUS) for purposes of delineating the scope of the federal government’s jurisdiction under the Clean Water Act (CWA). I understand that EPA intends to accomplish this in two steps. First, it will rescind the current WOTUS definition. Second, it will promulgate a new rule defining this term consistent with the opinion of Justice Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006). Because of the stay of the current WOTUS rule granted by the United States Court of Appeals for the 6th Circuit, it is anticipated that there will be no effect on the current practice for CWA jurisdictional determinations until after the second step in this process has been completed.

A first response to this plan is to applaud the way EPA is going about it. The states are important partners with EPA in implementing the CWA. This rule is also important to states because it will define where federal authority to regulate ends and where exclusive state authority over waters begins. In promulgating the current rule, which was completed in 2015, EPA all but ignored states’ interests. Involving the states from the beginning, as you are doing with this rulemaking effort, is essential. We sincerely appreciate having this opportunity for input and hope that you will continue to solicit state input as you continue this process. The West Virginia Department of Environmental Protection (WVDEP) will gladly assist you in this effort in any way possible.

A second point is to express our support and agreement with the general direction of this rulemaking. Before *Rapanos* was decided, the courts, EPA and the Corps of Engineers interpreted the federal government’s CWA jurisdiction very expansively. The Supreme Court’s

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decisions in *Rapanos* and *SWANCC* recognized the legitimate limits of federal authority in this area. EPA's 2015 WOTUS rule appears to have been an attempt to overrule these Supreme Court cases through agency rulemaking and restore overbroad interpretations of "waters of the United States". We agree with this effort to constrain EPA and the Corps within the limits of their authority.

As to the substance of any new WOTUS rule, we can only offer conceptual comments at this point and, again, welcome the opportunity for further input as the rulemaking effort proceeds and proposals become more concrete:

- Above all, a new WOTUS rule must be a model of clarity. One reason for this is ease of implementation. Our citizens, the regulated public and government agencies must have a rule that can be readily understood and applied. All will benefit from a rule whose application is clear enough that federal jurisdictional determinations will rarely be needed. People must be free to use their property with a good measure of confidence as to whether their plans will require the time and expense of CWA permitting. The risk that they will need to litigate through the United States Supreme Court over the scope of the CWA, as Mr. Rapanos did, needs to be eliminated.
- Another benefit of clarity is that the constraint on federal jurisdiction that EPA now intends to provide will not be eroded as courts decide what the rule means.
- Although we recognize that some tailoring of a WOTUS rule to fit conditions that vary widely between arid and moister climates across the country, regional approaches to a WOTUS definition concern us. There should not be room in a new definition for different EPA Region 3, 4 and 5 approaches in West Virginia, Kentucky and Ohio, respectively, to on-the-ground circumstances that are identical across these three states. Neither should there be room in a new rule for different jurisdictional approaches by the two Corps district offices to which portions of West Virginia are assigned.
- We are a member of and an active participant in the Environmental Council of the States (ECOS) and have reviewed the letter ECOS intends to send to EPA regarding the WOTUS rule rewrite. We concur with its comments.

Thank you again for the opportunity to comment on this important undertaking. The WVDEP looks forward to more opportunities to assist EPA in this effort as it proceeds.

Sincerely,



Scott G. Mandirola
Deputy Secretary