

Office of the Governor

June 19, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (1101A)
Washington, DC 20460

The Honorable Douglas W. Lamont, P.E.
Senior Official Performing the Duties of the
Assistant Secretary of the Army
Civil Works
441 G Street, NW
Washington, D.C. 20510

Re: Response from Wyoming Governor Matt Mead to the Environmental Protection Agency's request for comments on the definition of "waters of the United States"

Dear Administrator Pruitt and Senior Official Lamont,

Thank you for your letter requesting input on the definition of "waters of the United States" under the Clean Water Act. Your outreach to individual governors, early in the rulemaking process, is a welcome change from the prior Administration's approach to this critical issue. As you know, the scope of the Clean Water Act's applicability is of great importance to state governments, businesses, and our nation's citizens. This is certainly true in Wyoming. Our state remains engaged in litigation over the prior Administration's flawed and legally infirm rule, and the promise of a fresh perspective from the current Administration is most welcome. I expect that the United States Environmental Protection Agency and United States Army Corps of Engineers (the Agencies) will continue to actively engage with Wyoming throughout the rulemaking process. I look forward to collectively developing a solution to a question that has vexed the Agencies and the judiciary for decades.

The Agencies' continued engagement with the states on this issue is essential. Accordingly, in the course of this rulemaking, I urge you to follow the direction of Congress and "recognize, preserve, and protect the primary responsibilities and rights of States [] to plan the development and use [] of land and water resources[.]" 33 U.S.C. § 1251(b).

Two issues remain paramount: eliminating federal overreach under the Clean Water Act and fully assessing the economic impacts of any future "waters of the United States" rule on businesses, home owners, and any other affected property owners across our country.

Jurisdiction

We need clarity regarding jurisdiction – that is, clear direction as to which water bodies are subject to federal jurisdiction and which are not. Increased clarity can minimize or eliminate the number of case-

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specific determinations needed by the Agencies. It will result in cost savings for the regulators and the regulated community. The prior Administration's rule failed to provide this clarity. We have an opportunity to do better.

Executive Order 13778 provides for the Administrator and the Assistant Secretary to consider an approach consistent with Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006).

There are good arguments that federal jurisdiction under the Clean Water Act should be limited solely to navigable waters. *See* 33 U.S.C. § 1362(7). Indeed, prior to the enactment of the Clean Water Act, the Supreme Court interpreted interstate waters to be those that were "'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 547 U.S. at 723 (citation omitted). Justice Scalia's plurality opinion in *Rapanos* provides for federal jurisdiction over "only those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] oceans, rivers, [and] lakes.'" *Rapanos*, 547 U.S. at 739.

This is a good starting point for discussions, and an approach that gets closer to the original interpretation of "navigable in fact" waters – highways for commerce – would be ideal.

Specifically, Wyoming urges the Agencies to adopt a definition of "waters of the United States" that begins by considering no more than traditional navigable waters, perennial tributaries to traditionally navigable waters, wetlands that are truly adjacent via surface waters to traditionally navigable waters and their perennial tributaries, and territorial seas. The Agencies must then work with States to further refine the definition and eliminate waters. For example, the primary definition should explicitly exclude isolated waters, ephemeral waters, intermittent waters, and non-adjacent wetlands. Wyoming welcomes the opportunity to work with the Agencies to determine how best to implement these core principles.

Connectivity alone is insufficient to determine jurisdiction. A regional approach is needed to determine those waters that should also be eliminated. Coordination with the states is necessary to account for these inevitable intricacies - developing a definition that will foster and allow for the appropriate division of authority between the Agencies and the states. The Agencies, with the help of each state, should then definitively map those waters, which are in fact jurisdictional.

The prior Administration erred in using their connectivity report as the sole basis justifying jurisdiction. Any channel with a bed, bank and high watermark was determined jurisdictional - regardless of flow. In arid states like Wyoming and much of the western United States, a considerable percentage of mapped ephemeral stream miles are grassy swales or erosional gullies. Based on the 1:24,000 scale National Hydrographic Dataset, approximately 80% of Wyoming's stream miles are intermittent or ephemeral. The prior Administration's attempt to extend the Agencies' jurisdiction over these areas was a significant overreach. Any attempt by the Agencies to develop a rule must not repeat these unnecessary and unproductive attempts to assert federal jurisdiction on intermittent and ephemeral streams.

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The Agencies should not attempt to regulate all channels, canals, and ditches – then seek to apply specific exemptions. In no instance should man-made conveyances, like an agricultural ditch, be treated as jurisdictional.

Economic Analysis

The Agencies should prepare a robust economic analysis in support of any new rule. Attempts to expand jurisdiction result in substantial and long-term increases in costs to states. The Agencies should seek greater input from states and consider potential impacts.

For example, any rule that expands federal jurisdiction into remote and dry ephemeral stream reaches creates serious implementation problems for Wyoming. Federal process would require the designation of presumptive uses and associated criteria for these waters. Designating a "water of the United States" creates certain presumptions. A state like Wyoming must then determine "designated uses". In most cases those presumptive uses would be non-existent and unattainable. Permit holders would need to comply with criteria that are unreasonable - at significant cost. The result would be increased cost to the State and the regulated public, and a decrease in regulatory efficiency.

Rectifying errors caused by these inaccurate presumptions is challenging and costly. It has required the development and approval of "use attainability analysis" at great cost to states. It often required amending state water quality standards. These matters are further complicated when states must await the completion of jurisdictional determinations by the Agencies. These pitfalls should be avoided.

Summary

States are co-regulators of water quality and the primary managers of water resources within their borders. Historically, despite our co-regulator status, the Agencies have treated states only as interested parties and published draft rules prior to any substantive state consultation. Wyoming and other states have better information and expertise than the federal government on the unique and complex physical, biological, and hydrological characteristics of waters within state borders. They are better situated to make decisions regarding the use, management and protection of waters that are of a local, not national, nature, such as ephemeral streams and isolated wetlands. I urge the Agencies to consult early with states and benefit from their knowledge.

Sincerely,



Matthew H. Mead
Governor

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