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Office of the Governor

June 19, 2017

Scott Pruitt, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Douglas W. Lamont, P.E.
Senior Official Performing the Duties of the
Assistant Secretary of the Army for Civil Works
108 Army Pentagon
Washington, DC 20310

Re: Request for Input on Revising the Definition of Waters of the United States (Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015))

Dear Administrator Pruitt and Mr. Lamont:

I appreciate the opportunity to respond to your request for input regarding the Presidential Executive Order 13132 on "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule" February 28, 2017. I will start by assuring you that clean water is among our highest environmental priorities and Nevada laws and regulations for water quality protection of Waters of the State are highly effective and consistently enforced.

As you reconsider the definition of Waters of the United States (WOTUS), I would like to remind you that Nevada, through the Nevada Division of Environmental Protection, submitted substantial comments to the previous national rulemaking to define WOTUS on November 14, 2014. At that time, we provided a detailed analysis of our concerns regarding the definition and its potential impacts to our citizens, businesses, and water quality protection programs. We also provided a number of suggested revisions. Unfortunately, few, if any, were addressed.

I strongly agree with President Trump that consulting with state and local government officials is an important step to be taken prior to proposing regulations that have implications on federalism. In that regard, I believe it's important for states to remain involved throughout the rulemaking process and hope that the Environmental Protection Administration (EPA) and the U.S. Army Corps of Engineers (Corps) will keep me informed of progress on a regular basis by responding to our suggestions and input in the true nature of cooperative federalism.

Your agencies plan to propose a new definition to replace the current approach in the 2015 Clean Water Rule. The new approach is to reflect the principles that Justice Scalia outlined in the Rapanos plurality opinion (*Rapanos v. United States*, 547 U.S. 715 (2006)). The EPA states that Justice Scalia's opinion indicates the Clean Water Act jurisdiction includes 'relatively permanent waters' and wetlands with a 'continuous surface connection to relatively permanent waters.' My interpretation of these parameters is one that would *not* federalize all state waters and does not impose duplicative federal regulation in addition to existing state law.

The original intent of the Clean Water Act was to protect interstate commerce through federal regulation of navigable waters. Nevada has very strong laws and regulations to preserve and protect Waters of the State, which are defined as "all waters situated wholly or partly within or bordering upon this State, including but not limited to all streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems, and drainage systems and all bodies of accumulations of water, surface and underground, natural and artificial." Nevada has the authority to protect all waters whether or not they are subject to Clean Water Act jurisdiction, and has carried out this authority effectively and efficiently for decades. In redefining WOTUS, clarity must be included that does not expand jurisdiction over waters and land that have no clear connection to interstate commerce or navigation.

Major interstate waters are easily determined and accepted as jurisdictional. Per se waters should include a continual connection with interstate waters and have 'relatively permanent flow' except in periods of extended drought or extreme precipitation. Waters that are not per se waters are Waters of the State and are managed and permitted under state regulation.

I appreciate having an open dialogue with my state and EPA and Corps as you proceed with redefining Waters of the United States. Your jurisdictional interpretations have a direct bearing on the citizens, businesses, and water quality protection programs in Nevada. Please feel free to reach out to me or my staff so that we can provide continual feedback and analysis of your yet-to-be-proposed rule. The outcome of this endeavor and the resulting clarity of jurisdictions will benefit everyone.

Attached to this letter are the comments provided by Greg Lovato, Administrator of the Nevada Division of Environmental Protection. I believe these comments will be beneficial for you both to review as decisions are made regarding the President's Executive Order.

Thank you again for the opportunity to discuss this important issue. I look forward to working with both of you.

Sincere regards,



BRIAN SANDOVAL
Governor



NEVADA DIVISION OF
**ENVIRONMENTAL
PROTECTION**

STATE OF NEVADA
Department of Conservation & Natural Resources

Brian Sandoval, Governor
Bradley Crowell, Director
Greg Lovato, Administrator

June 19, 2017

Ms. Donna Downing
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Re.: Clean Water Rule: Definition of “Waters of the United States”

Dear Ms. Downing:

The Nevada Division of Environmental Protection (NDEP) appreciates this opportunity to provide the U.S. Environmental Protection Agency (US EPA) and the U.S. Army Corps of Engineers (Corps) with input on future work related to the definition of “Waters of the United States” (WOTUS). As requested in the US EPA and the Corps’ joint letter to Governor Sandoval on May 8, 2017, and in outreach webinars held by the federal co-regulators, NDEP is providing comment on several aspects of the current issues.

Two-Step Approach:

The two-step approach outlined by the US EPA and the Corps appears to be sound. Officially reverting, in the near-term, to the pre-2015 definition as the first step is prudent. The NDEP looks forward to active engagement with federal co-regulators as drafting of a new definition begins.

Federalism:

The State of Nevada appreciates the federalism consultation efforts conducted in 2017. Initial meetings with various government associations and organizations has effectively broadcast the status of current rulemaking, and likewise opened the door for State input. As these efforts of the US EPA and the Corps continue, Nevada requests that a cross-section of States be invited to actively engage as co-regulators with the Federal partners *during drafting* the Proposed Rule.

As has proven effective through the US EPA Office of Ground Water and Drinking Water, early engagement in Rule development, well before a Rule is formally proposed as draft in the Federal Register, has allowed 3 or 4 representative States to provide valuable input on future implementation challenges. *Formation of a State-EPA-Corps Regulation Development Workgroup is requested.* The NDEP hereby volunteers to be a state partner in this process.

Effects of WOTUS Definition Change on Nevada:

The May 8, 2017 letter to Governor Sandoval stated that the federal co-regulators are “interested in understanding how your state might respond to a reduced scope of federal jurisdiction under

the Clean Water Act”. Nevada would respond favorably to a reduced scope in pursuit of decreasing the duplicative nature of government regulation, as it exists today. A reduction in the number of federally co-regulated waters will not roll back protection of such waters. Within our boundaries, Nevada is the primary protector of water quality, either through state law or through federal delegation, and future WOTUS definition and program implementation should give as much weight and deference as possible to the States while remaining protective of water quality. Nevada has a comprehensive State definition for “Waters of the State” in law¹, paired with comprehensive protection programs for all Nevada waters. No Nevada waters would be unprotected if not federally jurisdictional.

During development of the 2015 definition of WOTUS, US EPA indicated that the proposed rule was necessary as written, because certain states are unable to protect waters not under Clean Water Act (CWA) jurisdiction. While that may be true in some states, it is not the case in Nevada where there is clear authority to protect all waters. In the event that other states are so challenged, the NDEP suggests that such a state and the US EPA collaborate on delegation of oversight from the state to the US EPA, as opposed to expanding the definition of WOTUS for the entire nation where it becomes duplicative and unnecessary.

The US EPA and the Corps sought input on potential economic impacts or impacts to other CWA programs. Functionally, it is difficult to determine the full range of activities that would change under a reduced scope of federal jurisdiction. Effects on the expected cost of program implementation to the NDEP and regulated community is uncertain. The “inventory” of federally jurisdictional waters is unclear, therefore an estimation of the scope of change is elusive. In general, a reduction in the number of waters jurisdictional to federal programs would improve efficiency in state actions, such as permitting, yet still maintain water quality protection.

Equally as unclear are potential implications of a change in WOTUS definition on federal grant funding to the States. As the definition is discussed, so should be the existing federal grant funding formulas to ensure that they accurately reflect the importance of state implementation programs that protect surface waters that meet water quality standards, as well as programs that work to restore impaired waters.

WOTUS Definition and Program Implementation:

1) Definition of Waters of the State vs. Waters of the US.

Nevada believes that the future definition of Waters of the United States should be guided by the following principles:

- Initial delineation of WOTUS should be limited to include interstate waterways that are navigable-in-fact, and are easily determined and accepted as jurisdictional.
 - Waters involved in interstate or foreign commerce, may be appropriate for federal jurisdiction; however, the NDEP seeks to narrow the interpretation of this term, which has the potential to be overly broad.

- Additional waters and wetlands that have a continuous surface connection to waters identified above (i.e. a defined flow directly into), and demonstrate perennial or consistent seasonal flow (i.e. routinely flow at least 3 months of the year), should be the only waters considered per se jurisdictional as WOTUS.
 - Implementation of “consistent seasonal flow” will address issues faced with jurisdiction over dry western washes or certain seasonal channels.
 - “continuous surface connection” should be defined narrowly.
 - The Corps manual for identification of a wetland should guide discussions for inclusion of wetlands as WOTUS. Evidence of a minimum of one positive wetland indicator from each parameter (hydrology, soil and vegetation) must be found in order to make a positive wetland determination.

- Other waters should be considered Waters of the State until determined otherwise.

- Specific language should be included in the rule to ensure that groundwater, including shallow subsurface flow, is clearly exempted from CWA jurisdiction.

- Specific language should be included in the rule to preserve existing agricultural exemptions.

- The analysis of man-made ditches should be done on a case-by-case basis to determine if they have a defined surface connection between a navigable-in-fact water and/or wetland and a WOTUS, and are thus federally jurisdictional.
 - The preamble to the proposed rule (April, 2014) was contradictory in the treatment of ditches in the Executive Summary versus Section F.2. Discussion during rule development should occur in order to resolve discrepancies and increase clarity.

- The Connectivity Report should not be used as justification for determining WOTUS, since doing so would include insignificant streams and dry channels that may not see water for years at a time as WOTUS.
 - The report should not be used to conclude that all waters are connected physically, chemically or biologically no matter how speculative or insubstantial the connection may be. This would represent an unwarranted expansion of federal regulation.
 - Sweeping jurisdiction of large features such as flood plains or other features such as intermittent streams and adjacent wetlands that have no clear link to navigation or interstate commerce, is inappropriate.

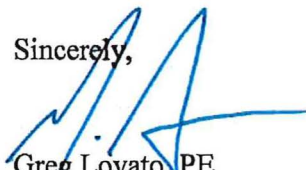
- US EPA posed a question during outreach webinars regarding state perspectives on federal jurisdiction over lakes and ponds. Consistent with other comments herein, lakes and ponds must not be per se jurisdictional as a WOTUS unless they fit the guiding principles discussed herein. Lakes and ponds must not be newly included in the definition of WOTUS merely from their existence.

2) Jurisdictional Determinations:

- The NDEP recommends the US EPA and the Corps consider pursuit of law, or establishment of regulatory provisions under existing law, that would allow states to pursue a federally approved program to delegate the action of making jurisdictional determinations (JDs) to the states.
 - As with other regulatory programs, states should have the ability to develop a program that is no less stringent than the federal program. Where demonstrated and approved, such a state would then be in the lead on JDs, with review and comment on individual actions by the federal co-regulator.
 - Delegation would permit the state to receive new non-competitive State Assistance Grant funds for implementing the program in lieu of the federal government.
- Where not delegated, JDs made by the US EPA or the Corps should be completed in a timely manner in accordance with timeframes developed with states.
- Where not delegated, the US EPA and the Corps should unify the JD process to prevent incomplete or conflicting determinations.
 - Clarification needs to be made as to whether current JDs by the Corps are only to be used for 404 programs, or if they also apply to other CWA programs.
- Where not delegated, states should be provided the opportunity to have a meaningful role in the JD process.
- Case-by-case JDs should remain in place for longer than 5 years. The expiration and extension process results in an unnecessary regulatory burden, particularly in the western states where waterbodies do not regularly change course. JDs should stand until a new application revisits the waterbody and a different determination is made.

The NDEP appreciates the open-ended offer made by the US EPA and the Corps to continue to provide thoughts and comments on these issues past June 19, 2017. The State of Nevada will continue researching various aspects of these complex issues that have been ongoing for years, and provide meaningful feedback if it appears helpful to our federal co-regulators as the process unfolds.

Sincerely,



Greg Lovato, PE
Administrator

Ms. Donna Downing, US EPA OWOW
Waters of the US – NDEP
June 19, 2017
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cc: Andrew Hanson, US EPA, Hanson.Andrew@epa.gov
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Bradley Crowell, DCNR Director
Jennifer Carr, NDEP Deputy Administrator
Sheila Anderson, Nevada Office of the Governor

¹Nevada Revised Statutes (NRS) 445A.415 “Waters of the State” means all waters situated wholly or partly within or bordering upon this State, including but not limited to: 1. All streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems and drainage systems; and 2. All bodies or accumulations of water, surface and underground, natural or artificial.