



C.L. "BUTCH" OTTER
GOVERNOR

June 19, 2017

Administrator Scott Pruitt
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Pruitt,

As you know, agriculture and outdoor recreation are two mainstays of Idaho's economy and way of life. That makes water our most precious natural resource.

I appreciate President Trump's efforts to more actively engage states and local governments on decisions that affect our livelihood. Issuance of the Presidential Executive Order regarding federalism and the Waters of the United States rule made a strong statement to states that this administration will not continue the practice of federal government overreach that we have experienced over the past eight years.

In accordance with Presidential Executive Order 13132, I would like to submit the following comments on behalf of the State of Idaho. I asked our State agencies affected by the Waters of the United States rule to explore the definition of "navigable waters" in a manner consistent with Justice Antonin Scalia's interpretation in *Rapanos v. United States*, 547 U.S. 715 (2006). Attached are their responses.

Thank you for your consideration. I look forward to a more collaborative partnership between the EPA and the State of Idaho. Please do not hesitate to contact my office or any of my agencies if you need more information.

As Always – Idaho, "Esto Perpetua"

A handwritten signature in black ink that reads "C.L. Butch Otter".

C.L. "Butch" Otter
Governor of Idaho

CLO/kf



STATE OF IDAHO



June 9, 2017

C. L. "BUTCH" OTTER
GOVERNOR
CELIA R. GOULD
DIRECTOR

Ms. Donna Downing
Office of Water (4502– T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Submitted via email: cwawotus@epa.gov; hanson.andrew@epa.gov

Re: WOTUS Comments

Below are comments from the Idaho State Department of Agriculture (ISDA) regarding the Environmental Protection Agency's (EPA) re-proposal of a Waters of the United States (WOTUS) rule to clarify jurisdiction under the Clean Water Act (CWA). ISDA submits these comments in response to Executive Order (EO) 13778 "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule"¹ and EPA's subsequent federalism consultation on April 19, 2017.

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?*

The Idaho State Department of Agriculture (ISDA) would like to see these terms interpreted consistent with Scalia's interpretation of the Clean Water Act (CWA). That is the term "relatively permanent" should be interpreted to include "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 v. United States*, 547 U.S. 715, 739 (2006) (alterations and quotations omitted). The phrase should "not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* This term really should only encompass streams that generally carry water throughout the year.

Likewise, consistent with Scalia's opinion the term "continuous surface connection" should be interpreted to only include "those wetlands with a continuous surface connection to bodies that are "waters of the United States in their own right . . ." *Id.* at 742 . Such waters would only include wetlands where "there is no clear demarcation between 'waters' and wetlands . . ." that are adjacent to such waters. *Id.* Thus, the term should only include wetlands that touch a jurisdictional water. Providing a clear, bright-line interpretation consistent with Scalia's interpretation would foster a clear and consistent regulatory world for Idaho agriculture.

ISDA encourages the agencies to clarify and protect normal farming exemptions and prior converted cropland in any new rule. Return flows from irrigated agriculture are statutorily exempt from the definition of a "point source" and from the NPDES permitting requirements. 33 U.S.C. §§ 1362(14), 1342(1)(1). Similarly, normal farming, silviculture and ranching activities, and construction and maintenance activities related to farm

¹ 82 FR 12497

and stock ponds and irrigation ditches as well as maintenance of drainage ditches are exempt from the requirement to obtain a dredge and fill permit. 33 U.S.C. § 1344(f). ISDA believes the CWA's current agricultural exemptions are appropriate and that the Proposed Rule should not alter and create uncertainty about such exemptions. The Proposed Rule should specifically exclude additional waters and features generally considered to be outside the scope of CWA jurisdiction, including: (1) Farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA's agricultural exemption; (2) Man-made dugouts and ponds used for stock watering or irrigation in upland areas that are not connected to surface waters; and (3) Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement.

2. *What opportunities and challenges exist for your state or locality with taking the "Scalia" approach?*

Taking the Scalia approach will benefit Idaho as the state has a large agricultural industry that would benefit from clarity and a commitment to the normal farming exemptions in the Clean Water Act. It is important that the federal agencies be mindful of continuing to consult with states and local governments throughout the two-step process of rescinding the 2015 rule and developing and issuing a new revised rule. Throughout the whole process, it is critical the agency continue to engage state and local governments in a robust manner. Any new rule should respect state authority, clearly recognize the limits of federal jurisdiction, respect private property rights, and minimize economic impact. ISDA encourages the agencies to develop their implementation plans before finalizing a new rule to ensure consistent application.

3. *Do you anticipate any changes to the scope of your state or local programs (e.g., regulations, 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 will be needed?*

In most states, the state departments of agriculture are the lead state agencies responsible for the regulation of pesticide use under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). ISDA has clear jurisdiction from EPA when dealing with pesticide issues under FIFRA, but the issues become more complicated when there is overlapping jurisdiction under the CWA. State pesticide programs and regulations will need to be reevaluated under any WOTUS rule. It is important to consider that the labeled uses of pesticide products could be jeopardized by the federalization of ephemeral conveyances and ditches. For example, when farmers, ranchers, natural resource managers, and others seek to use terrestrial pesticides with labels that state "do not apply to water" or require no-spray setbacks from jurisdictional waters to avoid potential spray drift, it is important that these applicators understand what waters are covered by the CWA. Any confusion over what are federal "waters," exposes pest-control operators to legal uncertainty under CWA and/or FIFRA, and threatens effective pest management in certain topographies. Applicators are likely to go to ISDA for advice and interpretation on pesticide questions, and ISDA then has to refer the applicators to Environmental Protection Agency. For this reason, it is important that a rule sets clear, cognizable boundaries for CWA jurisdiction.

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 by would not be captured in such economic analysis?*

Ms. Donna Downing
June 19, 2017
Page 3

It is important that such an economic analysis study the economic impacts on agriculture. Any economic analysis should carefully study agricultural industries like Concentrated Animal Feeding Operations (CAFOs), pesticide applicators, and pesticide users. Additionally, impacts on state agencies like the ISDA should be considered because agencies like the ISDA have to spend time and resources explaining what is needed for CWA compliance.

Sincerely,



Brian J. Oakey
Deputy Director



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

June 15, 2017

Katrine Franks
Office of the Governor
State Capitol
PO Box 83720
Boise ID 83720

Re: Waters of the United States

The following are comments about EPA's proposed rules regarding Waters of the United States.

The Idaho Department of Water Resources ("IDWR") does not regulate wetlands. However, Idaho State law authorizes IDWR to permit and regulate stream channel alterations. IDWR only regulates alteration of channels for continuously flowing streams, not intermittent streams.

Although physical construction or work on ditches and man-made drains is not within the state stream channel alteration authorities vested in IDWR, IDWR is concerned that EPA might determine that these man-made waterways are "waters of the US." The ability of irrigators to repair, maintain, and construct in these channels without obtaining authorization from the Corps is very important.

EPA asked about adoption of the "Scalia approach," written in the decision for *Rapanos v. United States*, 547 U.S. 715 (2006). After reading *Rapanos*, I'm not certain the Scalia decision recognizes that irrigation canals and artificial drains are not and never were waters of the U.S.

Thank you for the opportunity to provide input on the proposed rules.

Sincerely,

A handwritten signature in blue ink that reads "Gary Spackman". The signature is fluid and cursive, with a long, sweeping underline.

Gary Spackman
Director



June 15, 2017

Re: Idaho Department of Environmental Quality (DEQ) – WOTUS Comments

In response to the Environmental Protection Agency's (EPA) request for comments regarding Waters of the United States (WOTUS) and specifically the four questions posed, below are DEQ's responses.

- 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?**

Any definition of "waters of the United States" should strike an appropriate balance between certainty and flexibility. Jurisdictional rules should be clear and simple to apply in most cases. In *Rapanos*, Justice Scalia noted that "[c]ommon sense and common usage" must inform how the WOTUS definition is interpreted. These principles should likewise inform any changes to the WOTUS definition. On the other hand, the definition should be flexible enough to ensure continued progress toward the Clean Water Act's (CWA's) goal of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters.

Regarding the concept of "relatively permanent" waters, DEQ offers the following comments:

- The concept should not be limited to perennial (i.e., permanent) streams only, as such a definition would significantly alter the regulatory status quo and, in arid states like Idaho, could lead to unforeseen consequences. As Justice Scalia recognized in *Rapanos*, limiting the WOTUS definition to only perennial streams could result in intermittently flowing streams being classified as "point sources," requiring permits under the National Pollutant Discharge Elimination System (NPDES) program or a delegated state program. DEQ believes such a switch in classification would disrupt settled expectations as to what constitutes WOTUS and could greatly increase the administrative burden on permit-writing agencies.
- DEQ supports a definition of "relatively permanent" waters that includes perennial streams and intermittent streams but excludes ephemeral channels that only occasionally contribute flow to other waters. The Idaho Water Quality Standards provide the following definition of "intermittent waters" at IDAPA 58.01.02.010.54:

A stream, reach, or water body which naturally has a period of zero (0) flow for at least one (1) week during most years. Where flow records are available, a stream with a 7Q2 hydrologically-based unregulated flow of less

than one-tenth (0.1) cubic feet per second (cfs) is considered intermittent. Streams with natural perennial pools containing significant aquatic life uses are not intermittent.

The Standards, at IDAPA 58.01.02.010.36, define “ephemeral waters” as a “stream, reach, or water body that flows naturally only in direct response to precipitation in the immediate watershed and whose channel is at all times above the water table.” DEQ believes these definitions, or similar flow-based metrics, would provide sufficient and readily ascertainable guidance on which waters are “relatively permanent.” This would also fit Justice Scalia’s interpretation of WOTUS as “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.’”

Regarding the concept of a “continuous surface connection,” DEQ supports a definition that requires a surface connection to another, adjacent jurisdictional water but allows such connection to be absent for a portion of the year. For clarity and ease of application, DEQ recommends including in rule a minimum duration for the surface connection. For example, Idaho’s Individual/Subsurface Sewage Disposal Rules, at IDAPA 58.01.03.003.34.c, define “permanent surface water” as surface water features “existing continuously for a period of more than six (6) months a year.” DEQ believes this type of definition would provide significantly greater certainty than the fact-intensive “significant nexus” test.

In addition, a new WOTUS definition should expressly exclude water features that EPA and the Corps do not, as a matter of policy, treat as WOTUS. The second paragraph* of the Clean Water Rule identified a variety of excluded features, and, notwithstanding that Rule’s other shortcomings, DEQ believes these exclusions brought much-needed clarity to the WOTUS definition. (*see below)

2. What opportunities and challenges exist for your state or locality with taking the “Scalia” approach?

DEQ anticipates the “Scalia” approach would generally lead to fewer waterbodies being considered WOTUS. However, the magnitude of this expected change is unclear, as the precise scope of the existing WOTUS definition has never been conclusively established and the scope of the “Scalia” approach is presently unknown. Accordingly, DEQ’s comments on this question are necessarily general and preliminary.

Irrigated agriculture is a way of life in Idaho, particularly in the more arid portions of the State. This rulemaking presents a prime opportunity for EPA and the Corps to clarify whether or where irrigation canals and other man-made waterways are WOTUS. As indicated above, DEQ believes the exclusions* provided in the Clean Water Rule should be part of the new definition as well.

As with any change to a pre-existing jurisdictional rule, there are many potential challenges associated with implementing the “Scalia” approach. For example, there is potential for waters previously considered WOTUS to instead be considered “point sources” under the “Scalia” approach. This could result in a sudden increase in the number of sources requiring discharge permits under CWA § 402 and/or water quality certifications under CWA §401. Another potential outcome of a “Scalia” approach is that some activities previously requiring permits under CWA § 402 may instead require a wastewater land application permit under DEQ’s recycled water rules, IDAPA 58.01.17. DEQ would face significant challenges if the existing permitting or certification workload expanded, or shifted from one program to another, without concurrent expansion in resources to address that workload.

- 3. Do you anticipate any changes to the scope of your state or local programs (e.g., regulations, 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 will be needed?**

The WOTUS definition affects the scope of several programs administered by DEQ. Idaho Code § 39-3602(34) defines “waters or water body” as “navigable waters of the United States as defined in the federal clean water act.” This definition governs the scope of surface water quality programs administered by DEQ pursuant to Idaho’s water quality law, Idaho Code Title 39, Chapter 36, including the water quality standards program, the statewide water quality assessment and monitoring program, and development of total maximum daily loads. DEQ also is in the process of obtaining EPA approval of the Idaho Pollutant Discharge Elimination System. The geographic scope of each of these programs will be directly affected by any change to the WOTUS definition.

In addition, the WOTUS definition may, in some circumstances, affect the scope of Idaho’s wastewater land application permitting program under DEQ’s recycled water rules, IDAPA 58.01.17. For example, under IDAPA 58.01.17.100.02.b, a land application permit is not required for incidental use of recycled water for landscape irrigation at a municipal wastewater treatment plant if, among other things, the plant is subject to an NPDES permit and its effluent quality meets permit limits. If adopting a “Scalia” approach reduces the number of municipal wastewater treatment plants subject to NPDES permitting, DEQ would expect an increase in the number of land application permits for such facilities. DEQ would likewise expect the land application permitting burden to increase if a change in the WOTUS definition reduces the number of other municipal or industrial wastewater discharges subject to NPDES permitting.

Until the “Scalia” approach is more precisely defined, DEQ is unable to estimate how such an approach would affect the implementation of these and other State programs.

- 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 by would not be captured in such economic analysis?**

As noted above, narrowing the WOTUS definition may increase the number of facilities needing wastewater land application permits. DEQ does not charge a fee for processing such permits, as the program is funded by alternative means including a grant under CWA §106. If the wastewater land application permitting burden increases as a result of a change in the WOTUS definition, the present funding sources for the permitting program may prove insufficient.

* CWA §328.3 Definitions ...

(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) The following ditches:

(i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(iii) Artificial reflecting pools or swimming pools created in dry land;

(iv) Small ornamental waters created in dry land;

(v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(vii) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.