



MATTHEW G. BEVIN
GOVERNOR

CHARLES G. SNAVELY
SECRETARY

ENERGY AND ENVIRONMENT CABINET

300 SOWER BOULEVARD
FRANKFORT, KENTUCKY 40601
TELEPHONE: 502-564-3350
TELEFAX: 502-564-7484

R. BRUCE SCOTT
DEPUTY SECRETARY

June 19, 2017

Mr. Scott Pruitt, Administrator
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Douglas W. Lamont, P.E.
Senior Official Performing the Duties of the
Assistant Secretary of the Army (Civil Works)
Office of the Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, D.C. 20310-0108

RE: Intention to Review and Rescind or Revise the Clean Water Rule (82 FR 12532)

Dear Administrator Pruitt and Mr. Lamont,

The Kentucky Energy and Environment Cabinet (the Cabinet) appreciates the opportunity to provide the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) with comments on the development of a new rule interpreting the term “navigable waters” as defined in 33 U.S.C. 1362(7), pursuant to Executive Order 13132. The Cabinet hopes that the following ideas are valuable in the development of a proposed rule to rescind or revise the Waters of the United States (WOTUS) rule as the Cabinet supports this effort. The Cabinet appreciates that you have made cooperative federalism a point of emphasis when discussing EPA priorities for the new administration.

The Cabinet is the delegated authority to implement and enforce the Clean Water Act in Kentucky, and, as such, has a fundamental interest in the outcome of this rulemaking effort. The Cabinet appreciates the two-step approach in reviewing and revising the rule. EPA and the Corps’ plan to “establish the legal status quo in the Code of Federal Regulation” while proposing a new definition to replace the WOTUS rule. This approach demonstrates the understanding that delegated authorities need clarity in order to successfully and efficiently implement the Clean Water Act.

The Cabinet supports EPA and the Corps moving quickly in order to bring more certainty to the regulated community and the public; however, the Cabinet encourages the agencies to ensure that a final rule is the result of thorough examination of scientific considerations, Clean Water

Act policy and program impacts, and implementation challenges. The Cabinet requests EPA and the Corps to continue effective consultation with states throughout the rulemaking process and beyond, including consultation with states after completion of a rule, in order to facilitate implementation and address the inevitable unforeseen issues that will require policy decisions and implementation guidance.

The Cabinet appreciates the agencies' desire to provide clarity to a rule with historically inconsistent application between states and regions. The Executive Order directs the agencies to consider interpreting the term "navigable waters" in a manner consistent with Justice Scalia's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). The "Scalia opinion" emphasized clarity and limitation of federal jurisdiction, and underscored the importance of limited jurisdiction to "relatively permanent" waters and wetlands with "a continuous surface connection" to "relatively permanent waters." Thus, obtaining input from stakeholders, including the states as regulatory partners, via a cooperative federalism approach is all the more important for crafting the new rule that accomplishes Justice Scalia's narrower approach.

Given that a simplistic approach is unlikely to prove of practical use, the Cabinet urges EPA and the Corps to develop an approach to making jurisdictional determinations that takes into consideration the regional and local variation in geology, geomorphology, and hydrology in conducting jurisdictional determinations. Federal jurisdiction can and should extend beyond navigable waterbodies and wetlands, but those non-navigable waters (streams, wetlands, and open waters) that are "waters of the U.S." should have clear, objective physical, chemical or biological impacts on the navigable or "relatively permanent" downstream waters.

The Cabinet encourages the agencies to develop a multiple-parameter approach that does not rely simply on flow but also considers the biological and chemical connectivity. The Cabinet recommends that including waters within a default distance from navigable waters should not be part of the rule, and that federal jurisdiction should not extend to isolated waters and waters that are ordinarily dry features, such as ephemeral streams.

The Cabinet also recommends that federal jurisdiction should not extend to isolated wetlands, and that any wetlands which result incidentally from construction or landscape alteration activities should be excluded. The agencies may also consider "tiering" jurisdictional wetlands based on their functional physical, chemical and biological value, especially in regards to mitigation.

The Cabinet recommends that the new rule should include long-standing exclusions and encourages the agencies to consider the need for additional exclusions that would further clarify what is and what is not waters of the U.S. In addition, the Cabinet recommends clarifying exclusions where the applicability of the exclusions has been uncertain. In revising a new rule, the Cabinet would encourage the agencies to recognize the importance of agriculture in states like Kentucky. Specifically, the rule should provide for clear and meaningful agriculture

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exemptions. The Cabinet has consistently argued that broad deference to agriculture practices was anticipated by the Clean Water Act, as in §404(f)(1)(a), which provides exceptions for normal farming, silviculture and ranching activities.

The Cabinet also encourages the agencies to abandon the required setbacks introduced in the 2015 rule. The newly required setbacks inappropriately expanded federal regulatory authority and increased the number of acres that would fall under EPA or Corp jurisdiction.

The Cabinet implores EPA and the Corps to conduct a thorough assessment of how a definitional change will affect every aspect of the Clean Water Act, including impacts to Clean Water Act rules, programs, and STAG funding.

The Cabinet appreciates the opportunity to provide input to your respective agencies on this important topic I am hopeful that the agencies will continue to dialogue with their state regulatory partners throughout the rulemaking process and in implementing the new rule.

Sincerely,


Charles G. Snavely
Secretary

c: Honorable Matt Bevin, Governor