



June 19, 2017

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

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Re: Waters of the United States Consultation

The State of Montana remains committed to protecting Montana's rivers, streams, lakes and wetlands. Montana, like other western States, is the primary authority for allocating, administering, protecting and developing water resources and is primarily responsible for water supply planning within its boundaries. Additionally, Montana also administers both point and non-point source water quality programs under delegated federal authority through the Clean Water Act (CWA). It is imperative that any policies developed by Environmental Protection Agency (EPA) and the Army Corps of Engineers (USACE) affecting water resources or water quality be consistent with, and respectful of, Montana's laws governing water management, allocation, planning, and protection. Montana appreciates the agencies' objective to clarify the meaning of "Waters of the United States." The uncertainty that has resulted from lack of clarity over extent of federal regulatory authority over Waters of the United States has caused unnecessary confusion and litigation.

Unfortunately, neither EPA nor USACE seems capable of identifying or agreeing on its regulatory reach under the Clean Water Act. It doesn't matter which past iteration of rule or guidance one refers to; neither agency has clarified the full scope of jurisdiction it believes is legal. Reversion to the 2008 guidance does not move the issue forward. The 2008 guidance is difficult to understand and did not receive the full engagement rule making allows.

Also, Montana is concerned that simply jumping from one Justice's opinion to another is likely to lead to further litigation and uncertainty, not resolution. The issues are complex. Certainly there are many waters that States would agree are Waters of the United States and are jurisdictional. For example, no one argues that navigable rivers crossing state lines meet this test. The concerns and uncertainty lie with waters at the margin. Non-navigable tributary streams, dry ephemeral drainages, and wetlands with no direct connection to surface waters but adjacent to jurisdictional waters are examples of where arguments on both sides persist. Montana supports the adoption of federal rules and opposes the continued reliance on guidance documents. Further we encourage the EPA and USACE to work with their state agency counterparts in the development of the new rule. States are not just another

stakeholder or interest group. It is essential that the EPA and USACE bring the states in now as full partners before draft rules are written and engage the states in the policy debates. EPA and USACE need to go beyond past approaches where draft rules are fully developed before state partner engagement.

Further, it is important to elevate the public engagement of USACE in this round of rule development. Understandably, EPA has always taken the lead; however, it is litigation and uncertainty over the jurisdictional issues associated with the dredge and fill provisions and wetlands that are at the center of the debate. Moving forward, Montana expects the USACE to be an open and transparent partner.

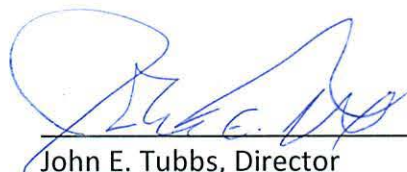
One approach to expand State engagement would be to work with the Western States Water Council and the WestFAST team. There are three federal employees that would be key -- the EPA and USACE WestFAST representative and the WestFAST liaison imbedded with the Council's staff. Engage these team members directly in the rule making process. The Council would work directly with the WestFAST members to communicate policy direction, raise questions and concerns and provide direct input into rule development. We are confident a subcommittee of Council members could be formed to support this effort and provide a strong sounding board for the many policy matters in question.

Montana recognizes the EPA and the USACE for their positive efforts in beginning a dialogue with the states in this renewed rulemaking process. Montana requests that you continue to diligently pursue future state consultation and carefully consider the comments submitted in this letter, as well as those submitted by others, recognizing states' authority and unique role in the implementation of the CWA for the protection of their water resources and water quality.

Sincerely,



Tom Livers, Director
Montana Department of Environmental Quality



John E. Tubbs, Director
Montana Department of Natural Resources
And Conservation