STATE OF NEW HAMPSHIRE
OFFICE OF THE GOVERNOR

CHRISTOPHER T. SUNUNU
Governor

June 19, 2017

Scott Pruitt
Administrator
U.S. Environmental Protection Agency

Douglas W. Lamont, P.E.
Senior Official Performing
the Duties of the Assistant
Secretary of the Army (Civil Works)

Via Electronic Mail

RE: Proposal for the Clean Water Rule

Dear Administrator Pruitt and Mr. Lamont:

I am writing in response to your May 8, 2017 letter requesting input for the proposal to revise or repeal the definition of "the waters of the United States" under the Clean Water Rule (Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37054 (June 29, 2015)). Let me begin by expressing my appreciation for the opportunity to provide input on this important effort and to share my thoughts on potential revisions to the Clean Water Rule and how such revisions might benefit New Hampshire.

As an initial matter, I firmly believe that individual states should be given the necessary discretion to determine how to regulate development activities within their borders. Each state is unique, and the needs of a small and rural state such as New Hampshire are bound to be different from those of larger and more developed states. Federal involvement should be reserved for the relatively few projects that have the potential to impact interstate commerce. These principles are consistent with the intent of the Clean Water Act and, as further explained in this letter, should be reflected in any revisions to the Clean Water Rule.

A. The Clean Water Rule should be revised to narrow the scope of the definition of "waters of the United States."

The Clean Water Act makes it illegal to place any pollutant, including fill materials, into navigable waters. 33 U.S.C. 1251 et seq. The CWA defines "navigable waters" as "the waters of the United States." 33 U.S.C. 1362(7). Justice Antonin Scalia clarified what constitutes "the waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006). The Presidential

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Executive Order of February 28, 2017 on "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule" directs the EPA and the Department of the Army to define "the waters of the United States" consistent with Justice Scalia's opinion in *Rapanos* rather than the Clean Water Rule of 2015.

Justice Scalia defined "the waters of the United States" as relatively permanent, standing or continuously flowing bodies of water. Justice Scalia also stated that wetlands are considered "waters of the United States" only if they have a continuous surface connection to jurisdictional waters such that it would be difficult to tell where one ends and the other begins.

In order to adequately clarify "waters of the United States" consistent with the Scalia opinion, the terms "relatively permanent" and "continuous surface connection" must be defined. While Justice Scalia did not provide further insight into these terms, they can still be defined consistent with his opinion.

To remain consistent with Justice Scalia's opinion, the term "relatively permanent" should mean waters that continuously flow throughout the year. Scalia described relatively permanent waters as continuously present, fixed bodies of water, including oceans, lakes, rivers, streams and other bodies of water that form geographic features.

Footnote 5 to Justice Scalia's opinion states "[we] do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but not flow during the dry months" (emphasis omitted). Therefore, the definition of "relatively permanent" should also include any waters which occur at regular intervals and at predictable times with reasonable certainty. This places seasonal rivers, lakes, and other waters within the definition of "relatively permanent," but excludes waters that flow intermittently or only as drainage for rainfall.

The term "continuous surface connection" should be defined as the uninterrupted flow of surface water between "waters of the United States" and other waters such that it is difficult to determine the boundary between them. The opinion explains that only water where "there is no clear demarcation between 'waters [of the United States]' and wetlands are 'adjacent to' such waters and covered by the Act." To remain consistent with Justice Scalia's opinion, only wetlands which directly connect to the "waters of the United States" should be covered by the Act, as wetlands which do not directly connect would be easily delineated from jurisdictional waters. Additionally, if the wetlands are directly connected to the jurisdictional waters but are easily delineated from them, then they should not be covered under this definition as it requires "no clear demarcation between 'waters [of the United States]' and the wetlands."

B. Narrowing the scope of the definition of "waters of the United States" would benefit New Hampshire and would not adversely affect the State's environmental protection efforts.

Adopting a narrower definition of "the waters of the United States" would benefit New Hampshire. Decreased federal jurisdiction resulting from a narrow definition creates easier access to permitting for New Hampshire citizens. Currently, many New Hampshire wetlands are considered "waters of the United States" and require permitting for alterations though the Army

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Corps of Engineers. As Justice Scalia notes, general permits for minimal impact alterations cost an average of $28,915 and take 313 days, while individual permits for larger impacts cost an average of $271,596 and 788 days. (Sunding & Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 natural Resources J. 59, 74-76 (2002)) These costs place permits out of reach for the average New Hampshire citizen. With the narrower definition, citizens wanting to make alterations to land and water will more often only need to apply for state permits, saving them considerable cost and time.

Similarly, the costs of wetland alteration will be significantly reduced for New Hampshire businesses with the narrower definition. The reduction in cost and time will promote business development within the state and stimulate New Hampshire's economy.

The narrower definition would also comport with the goal of the Presidential Executive Order of February 28, 2017 to promote federalism by allowing New Hampshire to regulate the water and land contained within the state on its own. The narrower definition considers fewer waters as "waters of the United States" and therefore places those waters under state, rather than federal, jurisdiction. If these waters are not under federal jurisdiction, then New Hampshire is free to regulate them on its own.

Finally, and most importantly, adopting a narrower definition of "waters of the United States" would not adversely affect New Hampshire's environmental protection efforts. Currently, the EPA oversees the enforcement of the Clean Water Act within New Hampshire. However, New Hampshire also has its own regulations and programs that are designed to protect the State's waters (see generally NH RSA 485-A:17). These protections are robust, and New Hampshire's Department of Environmental Services does an excellent job at enforcing the protections and ensuring that individuals and businesses alike remain in compliance with applicable requirements. Thus, removing certain waters from federal jurisdiction would not leave New Hampshire's waters unprotected.

Thank you again for the opportunity to share my thoughts on this matter. If my team can be of any further assistance, please do not hesitate to contact my legal counsel, John Formella, at 603-271-2121 or john.formella@nh.gov.

Sincerely,

Christopher T. Sununu
Governor

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