

Kenneth E. Wagner  
Secretary of Energy & Environment



J. Kevin Stitt  
Governor

STATE OF OKLAHOMA  
OFFICE OF THE  
SECRETARY OF ENERGY & ENVIRONMENT

October 4, 2021

Casey Katims, Deputy Associate Administrator, Intergovernmental Relations  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Re: The State of Oklahoma's Comments related to the Federal Consultation Period for revising the Definition of "Waters of the United States" (WOTUS)

Dear Deputy Associate Administrator Katims:

On behalf of the State of Oklahoma, please accept the following comments related to the intent of the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineer ("USACE") to revert to the WOTUS regulations in place prior to the Clean Water Rule ("2015 WOTUS Rule"). Without weighing into the ongoing legal debate as to whether a district court can vacate a national rule, the State of Oklahoma reiterates its support of the general concepts contained in the Navigable Waters Protection Rule.

The EPA and the USACE recognized under both the Obama/Biden administration in the 2015 WOTUS Rule, 80 Fed. Reg. 37054-37127 (June 29, 2015), and the Trump/Pence administration in the Navigable Waters Protection Rule ("NWPR"), 85 Fed. Reg. 22250-22342 (April 21, 2020), that the pre-2015 definition of WOTUS, as amended by or interpreted through relevant SCOTUS decisions, does not provide sufficient clarity or certainty for proper implementation. The State of Oklahoma believes that the uncertainty in the pre-2015 WOTUS regime remains unacceptable. However, if the agencies are going to implement a pre-2015 WOTUS regime, the State of Oklahoma strongly supports an approach consistent with the Supreme Court's plurality opinion written by Justice Scalia in *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208 (2006).

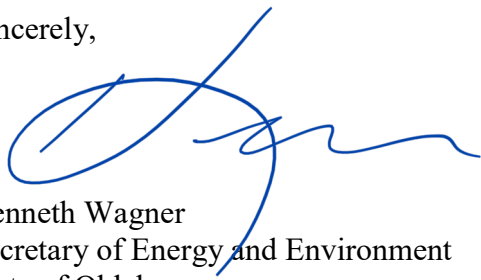
In regard to the EPA and the USACE's stated intent to develop a new definition of WOTUS to replace the definition contained in the NWPR, a definition which will once again attempt to re-delineate the boundary between Federal and State authority when it comes to the protection of water quality, it is essential to recognize that the States are charged with the primary responsibility and right to prevent, reduce, and eliminate water pollution and to plan the development and use of water resources within their boundaries. Any new rule developed must protect the resource and provide certainty to the public, regulated entities, and regulators. Moreover, any new rule must respect the States responsibility and right to protect waters within their boundaries and, consistent with the U.S. Constitution and Statutes, provide the States with flexibility to do so in a manner that ensures public health, safety, and economic prosperity. As Administrator Regan stated in his comments as the Secretary of the North Carolina DEQ

during the NWPR rulemaking process, “we need a definition of WOTUS that is clear and allows state regulators appropriate discretion.” *See* Letter from Michael S. Regan, Secretary, NCDEQ, to E. Scott Pruitt, Administrator, EPA, and Douglas W. Lamont, P.E., USACE, dated June 19, 2017. Moreover, the State of Oklahoma echoes the Administrator’s statement that the EPA and USACE should “allow states the flexibility to regulate the waters necessary to achieve the goals of the Clean Water Act and in a manner that ensures the health, safety, and economic prosperity of their citizens.” *Id.*

One common false argument repeated by those seeking to expand Federal authority over State waters is that the waters are not protected unless they are included within a Federal definition of WOTUS. However, the vast majority of States, including Oklahoma, have “waters of the State” definitions that are far more expansive than that which could legally be contained in a Federal WOTUS definition. In Oklahoma, our State statutes define “Waters of the State” to mean “all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, storm sewers and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion thereof, and shall include under all circumstances the waters of the United States which are contained within the boundaries of, flow through or border upon this state or any portion thereof.” *See* 27A O.S. § 1-1202(20); *see also* 82 O.S. § 1084.2(3). The quality of those waters is protected through a comprehensive environmental protection program implemented by various State environmental agencies established under State law. Moreover, State agencies are actually the entities entrusted by Congress and EPA to protect waters within their boundaries through the implementation of delegated Federal programs. Notwithstanding the legal arguments involved, there is no logical reason that a State should be entrusted to implement Federal Clean Water Act programs (such as issuing and enforcing discharge permits under NPDES programs or setting Water Quality Standards) in place of EPA (as is done throughout the Nation), but not be entrusted to protect waters within the State that are not specifically covered by a Federal WOTUS definition. Lastly, it is significant to point out that we are not aware of any specific situation where water quality has been negatively impacted as a result of the NWPR and in which the State involved could not have taken appropriate action to enforce State law to protect such waters.

Thank you for the opportunity to comment on this issue during the Federalism Consultation Period. The State of Oklahoma looks forward to working with the EPA and the USACE in establishing a framework that provides the necessary certainty and protects both water quality and the States’ role in the protection of such water quality within their boundaries.

Sincerely,



Kenneth Wagner  
Secretary of Energy and Environment  
State of Oklahoma