June 13, 2017

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Mr. Gib Owen
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Dear Administrator Pruitt and Secretary Lamont,

We write to express our support for the two-step rulemaking process regarding the definition of Waters of the United States ("WOTUS") being undertaken by the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps", and collectively, "Agencies"), and to provide input on the second step of the process. As you explained in your May 8, 2017, letters to state Governors, the first step is to re-codify the WOTUS definition as it existed before March 16, 2015 when the previous administration published a new definition at 80 Fed. Reg. 37054 (the "2015 WOTUS rule"). Your Agencies solicited opinions from the states about the second step of the process, developing a new WOTUS definition.

We offer comments on behalf of two associations and their thousands of members. The H2O Coalition is a broad coalition of local government and business interests in Florida, large and small, including counties, farms, manufacturers, municipalities, and utilities. The members closely follow federal environmental regulations that may affect them including the 2015 WOTUS rulemaking. The H2O Coalition works closely with Associated Industries of Florida ("AIF"). AIF is the voice of Florida business, and is the largest association of business, trade, commercial and professional organizations in Florida, representing the interests of over 7,500 corporations, professional associations, partnerships, and proprietorships.

The H2O Coalition expressed serious concerns about the 2015 WOTUS rule, including its overly expansive view of federal jurisdiction, the cost of compliance, and its impact on competing state and local government environmental priorities. Although this letter is focused on step two of the two-step process outlined by the Agencies, we would be remiss not to applaud you for taking seriously the

concerns expressed by the H2O Coalition and groups like it across the country, as well as a majority of states, and re-codifying the legal status quo before the 2015 WOTUS rule. We wholeheartedly support this decision.

We also appreciate the solicitation of Florida's opinion on the new WOTUS rule. The State of Florida is unique in many ways. Its geology, topography, and watercourses are like no other state in the nation, dominated by vast floodplains along the coast and countless wetlands, rivers, streams and lakes inland. Virtually all of these features are connected underground by our aquifer system through sandy soils and porous limestone. Because Florida's elevation is only slightly above sea-level and relatively flat, its history is replete with, and its lifestyle is dependent upon the effective management of stormwater. As a result, Florida is crisscrossed by man-made ditches, canals and ponds for flood control, irrigation, stormwater management, and water quality improvement. All of these factors, both natural and man-made, make Florida particularly susceptible to any proposed changes to the WOTUS definition.

Florida is also a national leader in regulating water quality, and Florida's regulations often go beyond federally-regulated waters, however defined. See, e.g., Chapter 62-520, Fla. Admin. Code (regulating groundwater). Even if WOTUS were given the narrowest possible definition, water quality would be fully protected in Florida, given our expansive definition of waters of the state. See Sec. 403.031(13), Fla. Stat. (2016) (defining state waters to "include, but not [be] limited to, rivers, lakes, streams, springs, impoundments, wetlands, and all other waters or bodies of water, including fresh, brackish, saline, tidal, surface, or underground waters."). Through its federally-approved National Pollutant Discharge Elimination System ("NPDES") program, Florida was among the first states to establish numeric water quality criteria for ubiquitous nutrients such as Nitrogen. Florida's online water quality database is vast and makes up an outsized portion of EPA's national database. Florida also devotes substantial funding to improving water quality. For example, this year's budget submitted to the Florida Legislature by Governor Scott, includes $360 million to a variety of water quality programs. This includes, as examples, $40 million to connect homes using septic tanks to central sewer systems, $65 million for restoring Florida's iconic springs, $10 million in water quality improvements in the Florida Keys, and continued payments towards Florida's $880 million commitment to Everglades water quality improvements, in partnership with your Agencies. These and many other programs are funded at significant levels every year.

Despite the attention and funding devoted to protecting and restoring Florida waters, water quality needs must still be prioritized. Overly expansive federal jurisdiction undermines Florida's efforts to engage in such prioritization. The 2015 WOTUS rule, for example, appeared to require local governments to devote significant resources to cleaning stormwater ditches, rather than the St. John's River or Tampa Bay. This also underscores the obvious point that not all waters need be federal waters to be protected. As stated by the Florida Department of Environmental Protection in its comments on the 2015 WOTUS rule, expanding Clean Water Act ("CWA" or the "Act") "presents federalism concerns by interfering with the state's right to implement effective environmental protection programs."

In general, the H2O Coalition believes that the Act demonstrates a respect for state sovereignty and private property. These principles should serve as polestars for interpretation of the Act and the WOTUS definition. We therefore concur with the use of Justice Scalia's opinion from Rapanos v. United States, 547 U.S. 715 (2006) that you say will henceforth guide the Agencies' rulemaking.

The presentation accompanying your letters to the Governors solicits opinions about interpreting the phrases "relatively permanent waters" and "continuous surface connection" that were used by Justice

Scalia to describe the scope of Waters of the United States. We agree that the phrases deserve attention in the new WOTUS rule. Left undefined, they create the opportunity for future federal overreach. The new definition should integrate these concepts consistent with the traditional understanding of "navigable waters."

The interpretation we believe is most consistent with the plain language of the opinion, and the Act, treats only streams that flow all year, except in extreme drought, as relatively permanent waters. See id. at 732 (explaining that "waters" encompass streams, lakes, rivers and "geographical features" all of which connote relatively permanent bodies of water). Similarly, only wetlands that touch and connect to jurisdictional surface waters should be considered wetlands with a continuous surface connection. Including wetlands at any distance, or simply within the floodplain, of jurisdictional surface waters in the WOTUS definition appears flatly inconsistent with the language in Justice Scalia's opinion. See id. at 742 (explaining that a continuous surface connection allows "no clear demarcation between 'waters' and 'wetlands.'"). Covering only wetlands actually touching and connected to jurisdictional water is also consistent with the rejection by a majority of the Rapanos court that "adjacency" at a distance from jurisdictional water could trigger coverage as a WOTUS. See id. at 786 (Kennedy, J., concurring).

The Agencies have also expressed interest in other issues that states believe require attention in the new WOTUS rulemaking. Because of the long history of the Act and some of the controversial adjustments to its exclusions in the 2015 WOTUS rule, we also recommend a number of other clarifications to restore and protect many rights left to state regulation and private parties under the Act.

First, the rule or its supporting documentation should make it abundantly clear that a groundwater connection is not a predicate for extending the jurisdiction of the Act and cannot be a basis for regulation under any section of the Act, including Section 402. See, e.g., Sierra Club v. Virginia Electric and Power Co., 145 F.Supp.3d 601, 607 (E.D. Va. 2015) ("The Court finds that Plaintiff has pleaded with sufficient particularity to survive a motion to dismiss on the question of whether the Clean Water Act applies to discharges which reach navigable waters through groundwater."). Recent court interpretations have turned the Act's specific exclusion of groundwater on its head and exacerbated by the apparent application of the 2015 WOTUS rule to groundwater connections. See id. (collecting cases).

Second, the new WOTUS rule needs to clarify that any and all treatment ponds, municipal separate storm sewer systems, and stormwater systems designed to meet the requirements of the Act or serving as part of an existing treatment system in an NPDES permit are excluded from jurisdiction, whether or not they were constructed on dry land. Similarly, cooling ponds created to serve as part of a cooling water system with a valid state permit constructed in Waters of the United States before enactment of the CWA, or any man-made or purpose-built structures not created from jurisdictional waters should be clearly excluded. These clarifications resolve longstanding ambiguities that were aggravated by the 2015 WOTUS rule.

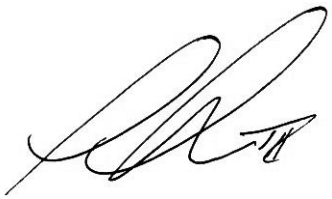
Third, the definition of tributary should make clear that not only do tributaries require bed, banks, and an ordinary high-water mark as defined at 33 C.F.R. §328.3(e), they also must contribute frequent and consistent flow, and present hydric soils, hydrophytic vegetation, or lifecycle dependent aquatic species. The additional clarity is necessary, and supported by the proper interpretation of "relatively permanent waters," addressed above.

Fourth, the new WOTUS rule should reject the assertion from the 2015 WOTUS rule that a point source, such as a ditch or stormwater conveyance could also be a Water of the United States. See 80 Fed. Reg. at 37,098 (asserting that ditches, stormwater conveyances, and the like could be treated as "both a point source and a water of the United States."). The Act clearly treats point sources and navigable waters as separate and distinct categories. See Rapanos, 547 U.S. at 735 (stating that the Act's definitions "conceive of 'point sources' and 'navigable waters' as separate and distinct categories.").

Fifth, the new WOTUS rule should clarify that the Act's "recapture" provision in 33 U.S.C. §1344(f)(2) will rarely be triggered to require permits for farming activities otherwise exempt from Section 404 permitting.

On behalf of our members' farms, industries, utilities, and businesses, thank you for soliciting Florida's views on the upcoming WOTUS rulemaking, and thank you for your attention to these comments. We would be pleased to provide any further information the Agencies would find helpful.

Sincerely,



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