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Sam Brownback, Governor

June 19, 2017

Scott Pruitt
Administrator, Environmental Protection Agency

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

Administrator Pruitt and Mr. Lamont,

Thank you for the opportunity to participate in the cooperative federalism consultation on the definition of "Waters of the United States" and to share with you Kansas' experience and expertise. Over the past several years Kansas has expressed through multiple venues our concerns with the 2015 Clean Water Rule describing the significant impact on Kansas landowners and land managers in their ability to make land use decisions, in addition to the burden the Rule placed on the state's ability to manage and regulate the water resources under Kansas jurisdiction.

We offer the following comments as responses to the four discussion questions associated with your letter request dated May 8, 2017.

1. **How would you like to see the concepts of "relatively permanent" and continuous surface connection" defined and implemented. How would you like to see the agencies interpret "consistent with" Scalia? Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?**

Kansas concurs with and applauds the Presidential Executive Order which directs the agencies to consider interpreting the term "navigable waters," as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Scalia in *Rapanos v. United States*. The 2015 Clean Water Rule ignored the Scalia test of relatively permanent waters and relied heavily upon Justice Kennedy's test of "significant nexus" to equate any degree of connectivity to significant ecological function, thereby promoting a near boundless view of Federal authority.

Since the current regulation, the Clean Water Rule, is both the subject of ongoing litigation and the target of President Trump's Executive Order, we are discarding the idea of revising that troublesome language. Instead, we propose using the regulatory definition found in 33 CFR 328.3 and 40 CFR 230.3 in 1986, before the *SWANCC* and *Rapanos* decisions, as the basis for our suggestions. The following table compares that regulatory definition of "Waters of the United States" with proposed changes from Kansas' perspective. Our perspective and proposal is focused on the following:

- A definition that supports our primary goal of protecting the designated uses of waterbodies with real environmental value,
- Separates the definitions of tributaries and wetlands, for clarity in applying the Scalia tests of relatively, permanent standing or flowing bodies of water and continuous surface connections,

- Clearly excludes ephemeral streams and ditches, consistent with the Scalia opinion and Kansas law, and
- Ensures, through a regulatory definition, that the states are co-equal partners in determining jurisdiction of intrastate waters within their state boundaries, consistent with the concept of cooperative federalism and Section 101(b) of the Clean Water Act.

1986/1988 Regulatory Definition of "Waters of the United States"	Kansas Perspective and Proposed Changes	Rationale
(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate of foreign commerce, including all waters which are subject to the ebb and flow of the tide	(1) All waters which are currently used, or were used in the past, for interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide	A definition of jurisdictional waters should be limited to only the known conditions – those that have occurred in the past or are currently occurring. The phrase "or may be susceptible to use" is ambiguous, open-ended and generates uncertainty.
(2) All interstate waters including interstate wetlands	(2) All interstate waters including interstate wetlands	No proposed changes. Waters crossing state boundaries warrant federal jurisdiction
(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including such waters:	(3) Other waters, such as intrastate lakes, rivers and streams, including headwater and intermittent streams that:	Combining the definition of jurisdictional lakes, streams and rivers with wetlands and examples that are not consistent with the Scalia opinion generates confusion. These features have distinctly different hydrologic characteristics and therefore should be considered in separate definitions
(i) Which are or could be used by interstate or foreign travelers for recreational purposes, or	(i) Support uses by fish, shellfish and wildlife and recreation in and on the water; and	Focus should be on supporting the designated uses of a waterbody associated with Section 101(a) of the Clean Water Act, not speculative interstate commerce. Definition should allow for intermittent streams supported seasonally by ground water or snowpacks
(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or	(ii) Maintain at least seasonal flow through contact with the surrounding water table or snowpack	
(iii) Which are used or could be used for industrial purpose by industries in		

interstate commerce;		
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;	(4) All impoundments of waters identified in paragraphs (1) through (3)	Consistent with past jurisdiction
(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;	(5) Tributaries to the waters identified in paragraphs (1) through (4), that: (i) Contribute to the discharge of water and pollutants to those waters; and, (ii) Are identified by the appropriate State as significant factors in influencing the quality of those waters	Again the focus is on protecting the designated uses of waters that influence the quality of jurisdictional waters and clearly embraces the state's ability and expertise in determining jurisdictional waters within its borders.
(6) The territorial seas;	(6) The territorial seas;	Move to later in the definition to distinguish territorial seas from other applications of the definition that should be limited to tributaries and wetlands
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.	(7) After proper consultation with the appropriate State, wetlands that are adjacent to or maintain a continuous surface comection by waterway or constructed conveyance to the waters identified in paragraphs (1) through (4) including mudflats, sandflats, sloughs or wet meadows	Narrows the scope of federal jurisdiction consistent with the *SWANCC* decision and the Scalia opinion and clearly acknowledges the state's ability and expertise in determining jurisdictional waters. Examples include wetland types that have a definitive connection to jurisdictional waters

While identifying what should be included within the definition of Waters of the United States, it is just as important to distinctly state that which should be excluded from federal jurisdiction. The following should not be considered "Waters of the United States" and therefore, should be explicitly stated as excluded from federal jurisdiction:

- Waste treatment systems, including treatment ponds or lagoons designed to meet the requirement of the Clean Water Act.
- Prior converted cropland, ponds used for agricultural purposes, ditches that do not flow directly into a water identified paragraphs (1) through (7), artificially irrigated areas that would revert to dryland should the application of water to the area cease and conservation practices designed to improve water quantity and quality.
- Artificial reflecting pools, swimming pools, small ornamental waters, water-filled depressions incidental to rnining or construction activity, including pits excavated for obtaining fill, sand or gravel that fill with water, erosional features, including gullies and rills, puddles, ground water, stormwater control features and wastewater recycling structures, including ground water recharge basins, percolation ponds and water distribution structures.

2. **What opportunities and challenges existing for your state or locality with taking a Scalia approach?**

By interpreting the term "navigable waters" in a manner consistent with the Scalia opinion, Kansas has the opportunity to continue demonstrating our great success in managing our water resources. Regardless of any approach, it is important to note that exclusion from Federal jurisdiction does not mean that such excluded waters lack protection through State regulation and management. Kansas has a track record of progressive and innovative protection of the important waters of the state, whether under Federal jurisdiction or not. For example, Kansas law (K.S.A. 82a-2001(E)), designates any streams which have a point of discharge from a NPDES permitted facility as a classified water (Water of the U.S. in Kansas).

One challenge identified in the revised approach is clarification of the term "adjacent." The 2015 Clean Water Rule attempted to establish maximum distances, or specific boundaries from jurisdictional boundaries such as the 100-year floodplain, for purposes of defining adjacency. Fewer than 40 of Kansas' 105 counties have digitized 100-year floodplain maps available. In these counties it would have been difficult for landowners and regulators to identify relevant floodplain areas.

Other challenges may present themselves as the application of "Waters of the United States" is further implemented. For this reason it is of paramount importance that cooperative federalism consultation truly is a guiding principle and process embedded within the regulation to remain in force well after these initial discussions.

3. **Do you anticipate any changes to the scope of your state or local programs? (e.g., regulations statutes or emergency response scope) regarding CWA jurisdiction? In addition, how would a Scalia approach potentially affect the implementation of state programs under the CWA (e.g., 303, 311, 401, 402, and 404)? If so, what types of actions do you anticipate would be needed?**

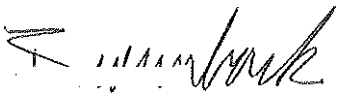
The Scalia opinion reflect the manner in which Kanas water quality programs operate. The Kennedy significant nexus test underlying the 2015 Clean Water Rule threatened to disrupt and undermine Kansas water quality management. Kansas does not anticipate any changes to the scope of our state programs under this revised approach.

4. **The agencies economic analysis for step 2 intends to review programs under CWA 303, 311, 401, 402, and 404. Are there any other programs specific to your region, state or locality that could be affected but would not be captured in such an economic analysis?**

No additional programs specific to Kansas are anticipated to be affected. However, consultation with the USDA might be prudent to ensure no unintentional consequences which could limit or dissuade participation in the Farm Bill conservation programs occur as a result of revising the definition of Waters of the U.S. and associated Federal jurisdiction determinations.

The Presidential Executive Order and these subsequent consultations appropriately restore state-level discussion and holds promise towards development of a better, more meaningful process of rulemaking under the Clean Water Act. We look forward to continuing the discussion and truly hope you remain true to keeping "the states at the forefront of your mission."

Very truly yours,



Sam Brownback
Governor of Kansas