



Department of Environmental Protection

One Winter Street Boston, MA 02108 • 617-292-5500

Charles D. Baker
Governor

Karyn E. Polito
Lieutenant Governor

Matthew A. Beaton
Secretary

Martin Suuberg
Commissioner

June 19, 2017

Dear Ms. Downing and Mr. Hanson,

On behalf of the Massachusetts Department of Environmental Protection (MassDEP), thank you for the opportunity to comment on efforts related to President Trump's February 28, 2017 Executive Order entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." It is MassDEP's understanding that actions will be undertaken in two phases, first replacing the definition of the term "Waters of the United States" promulgated in 2015 with its predecessor, and then developing and promulgating a new definition. MassDEP respectfully submits the following comments about how the approach of the federal agencies could impact the Commonwealth's water resource protection efforts and makes suggestions for rule content going forward.

Our nation's waters, including intermittent streams and isolated wetlands perform critical functions including protection of essential drinking water quality by filtering and trapping contaminants and toxic substances, moderating stream flow temperatures needed for protecting fisheries habitat, and confining floodwaters to protect structures from storm damage. As indicated in the Commonwealth's comments submitted during EPA's rulemaking process in 2015, Massachusetts supports a final rule based in science and continues to urge EPA and the Corps to recognize the conclusions of the EPA Science Advisory Board's 2014 literature review on hydraulic connectivity. It is also important to establish a clear rule that can be implemented by states and the federal agencies which will reduce uncertainty surrounding federal jurisdictional determinations. **Consultation with the states will add important perspective to the development process.**

Massachusetts' Wetlands Protection Act¹ has a broad jurisdictional scope and is designed to protect the functions of wetland resource areas, including headwater streams, intermittent streams and isolated wetlands. In addition, the state Clean Waters Act² regulates discharges to both surface and

¹ The Massachusetts Wetlands Protection Act, M.G.L. c.131, §40 has implementing regulations at 310 CMR 10.000.

² The Massachusetts Clean Waters Act, M.G.L. c. 21 §§ 26 through 53, and its associated regulations for 401 Water Quality Certification (314 CMR 9.00), surface water discharge permitting (310 CMR 3.00), and groundwater discharge permitting (314 CMR 5.00) are all implemented in coordination with the backdrop of federal jurisdiction established by the CWA.

This information is available in alternate format. Contact Michelle Waters-Ekanem, Director of Diversity/Civil Rights at 617-292-5751.

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groundwater. A revised federal rule re-defining Waters of the United States could complicate the interrelated implementation of the Wetland Protection Act, state Clean Waters Act and federal Clean Water Act (CWA). Significant work over the years has been done to eliminate duplication of permitting requirements, and to streamline the processes for projects triggering multiple federal and state permits. Reducing the scope of jurisdiction for CWA Section 404 permits issued by the Corps could cause confusion, and may eliminate the alignment that has been developed for permitting in Massachusetts. If intermittent waters such as vernal pools (which, when certified, are designated as Outstanding Resource Waters in Massachusetts Law, with high levels of protection), isolated vegetated wetlands, ephemeral springs and intermittent streams are excluded from federal jurisdiction, confusion could arise for regulatory bodies (including local conservation commissions that implement the state Wetlands Protection Act), project proponents, and the public. Permits in Massachusetts have been negotiated between local, state, and federal entities so that they are issued utilizing a simpler and less burdensome permitting processes for project proponents. Any change to the federal approach should contemplate the permitting process. **Because of these potential impacts, a careful and thorough process of state consultation about the new rule should be undertaken at a national level.**

A reduced scope of jurisdiction for federal permitting that comes from a limited definition of Waters of the United States will also reduce the areas required to have Surface Water Quality Standards³ that identify designated uses and standards to maintain or achieve those uses. Under the CWA, Congress has compelled the states to set these standards, monitor and assess wetlands and waters, and eliminate impairments to achieve water quality standards. Massachusetts' rivers include those which flow into our state from New Hampshire and Vermont, and those that flow from Massachusetts to Rhode Island and Connecticut, ultimately flowing to Long Island Sound. The Connecticut and Merrimack Rivers are examples of important interstate waters that depend on both federal and state water quality laws for protection. States depend on the Federal CWA to establish effective standards to protect interstate Waters, and maintain the important uses of these resources.⁴ **Narrowing federal jurisdiction under the CWA could impact MassDEP's efforts to understand and protect these water resources.**

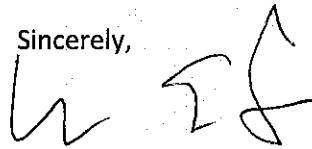
The Federal Clean Water Act (CWA) has an ambitious goal: to restore and maintain the physical, chemical and biological integrity of the nation's waters. 33 U. S. C. §1251(a). The statute defines "navigable waters" as "Waters of the United States" which are consequently subject to federal jurisdiction for regulating fill and dredging activity. The Executive Order directs EPA and the Corps to consider interpreting "navigable waters" in a manner "consistent with the opinion of Justice Antonin Scalia in United States v. Rapanos, 547 U.S. 715 (2006)." That opinion suggests that "Waters of the United States" should mean "relatively permanent" waters and wetlands with a "continuous surface connection" to relatively permanent waters. Justice Scalia noted that some waters might continue to be considered "relatively permanent" although they may be dry during drought conditions, or seasonally dry up, but declined to suggest a time period for which "continuous flow" should be required. *Id.*, at page 14, Footnote 5. **MassDEP strongly encourages EPA and the Corps to work closely with states across the country as decisions about how to define Waters of the United States in a way that offers**

³ In Massachusetts these standards are promulgated at 314 CMR 4.00.

sufficient protection to continuously connected and relatively permanent isolated, ephemeral or intermittent waters.

MassDEP would be pleased to provide specific input on proposed definitions and application approaches. These waters are critical to the protection of the physical, chemical and biological integrity of the nation's waters. We appreciate your consideration of these recommendations and look forward to the opportunity to discuss this important topic with you.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Fine', written in a cursive style.

Douglas E. Fine
Assistant Commissioner
Bureau of Water Resources

