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STATE OF MICHIGAN

DEPARTMENT OF ENVIRONMENTAL QUALITY
DEPARTMENT OF AGRICULTURE
AND RURAL DEVELOPMENT

June 16, 2017

VIA E-MAIL

Mr. Scott Pruitt, Administrator
United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Mr. Douglas W. Lamont, P.E.
Senior Official Performing the Duties of the
Assistant Secretary of the Army (Civil Works)
United States Department of the Army
108 Army Pentagon
Washington, DC 20310

Attention: CWAwotus@epa.gov

Dear Mr. Pruitt and Mr. Lamont:

Thank you for your letter of May 8, 2017, to Governor Rick Snyder regarding revising the definition of waters of the United States. Governor Snyder has referred your letter to the Michigan Department of Environmental Quality (MDEQ) and Michigan Department of Agriculture and Rural Development (MDARD) for response. As one of only two states to administer both Sections 402 and 404 of the federal Clean Water Act, the State of Michigan appreciates the opportunity to provide input. Michigan has been administering the Section 402 Program for 44 years and the Section 404 Program for 33 years.

Clean water is a critical resource to the State of Michigan and a critical element in the health of the Great Lakes. And while we wholeheartedly support states being the lead on efforts to protect and enhance water quality and our natural resources, we also recognize the need for federal engagement in these efforts as inaction by other states and countries could have significant impacts on Michigan waters and the Great Lakes. Michigan's public health, natural resources, and economy, including tourism, agriculture, and other industries, are dependent on the Great Lakes and clean water.

Michigan is blessed with abundant water resources; however, it was apparent during the recent Clean Water Rule process that other, perhaps drier, states have different concerns than states like Michigan and that the broad range of Clean Water Act Programs' needs may not have been adequately addressed. Because of this, Michigan is recommending that the United States Environmental Protection Agency (USEPA) seriously consider defining federal jurisdiction in a way that provides adequate federal protections but allows for regional variances based on climate, geology, and other factors. This definition should allow for regional differences and concerns across the broad range of Clean Water Act Programs. Continued robust involvement from the states and tribes as the USEPA and United States Army Corps of Engineers (USACE) develop the new regulation will be important for this to be successful.

In your letter, the USEPA and the USACE asked the states to provide input on certain items relating to the proposed rulemaking. The clear definitions in Michigan's laws implementing the 402 and 404 Programs are models for providing a predictable and practical jurisdictional framework that allows for timely and consistent regulatory decisions for the regulated community. Regarding potential approaches to "relatively permanent" waters, Justice Antonin Scalia's discussion in the *Rapanos v. United States* plurality decision on using geographic features to determine jurisdiction is consistent with Michigan's approach of using clear, on-the-ground indicators to determine regulatory jurisdiction in the 404 Program. Our regulatory approach generally equates to perennial streams plus streams with seasonal flow, but an allowance for regional and programmatic differences to implementing this on the ground is critical.

Regarding potential approaches to wetlands with a "continuous surface water connection," we again recommend using on-the-ground indicators and federal practice under the 1988 rule to determine a connection as opposed to metrics or distances that do not allow for regional variation. Similar to above, Michigan's 404 Program uses on-the-ground, physical evidence to determine surface water connections.

Any new rule needs to use clear and practical approaches to jurisdiction – approaches that do not require multiple site visits, extensive study, or expensive modeling. The rule should also be regionally practical, easily implementable, and generally understandable to the public. The USEPA and USACE also need to work closely together on the new rule to ensure that the rule will be implemented consistently across the country and that states and tribes who administer Clean Water Act Programs are also treated fairly.

Michigan is also an agriculturally rich and diverse state. Under current law, normal farming, siculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest product, or upland soil and water conservation practices are exempt from Section 404 permitting requirements. We urge an all-inclusive definition of normal farming and sicultural practices. Additionally, linking standards for voluntary Natural Resources Conservation Service (NRCS) conservation practices to compliance with mandatory regulatory requirements undermines the successful paradigm of utilizing voluntary, incentive-based conservation practices to improve environmental quality. This linkage serves to increase legal vulnerability for producers and can serve to dissuade producers from participating with the NRCS and state conservation programs for installing proven conservation practices

that improve water quality. It is important for our food and fiber producers to be able to determine clearly what constitutes a water of the United States. New rules should define these waters based on objectively identifiable characteristics easily observed and measurable by the producers themselves.

Thank you for initiating cooperative federalism on this issue. We believe it is critical for the USEPA and the USACE to allow adequate time to continue to work collaboratively with states and tribes on this issue throughout the proposed rule revision process and development of any regional approaches. Michigan has been a leader in water resource protection through both regulatory and non-regulatory initiatives for over 40 years, and we look forward to working together for more clear, efficient, and effective environmental protection. We strongly urge the USEPA to work closely with states like Michigan, who have successfully implemented the Clean Water Act Programs for decades, to develop a new waters of the United States rule. This initial consultation with the states and tribes should be the beginning of the cooperative federalism process, not the end; and we encourage the USEPA to share draft language with states and tribes as specific rule language is considered.

If you have any questions, please contact Ms. Teresa Seidel, Division Director, Water Resources Division, at 517-284-5470; seidelt@michigan.gov; or MDEQ, P.O. Box 30458, Lansing, Michigan 48909-7958; or you may contact us.

Sincerely,



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cc: Governor Rick Snyder
Mr. Robert Kaplan, Acting Regional Administrator, USEPA, Region 5
Mr. Andrew Hanson, USEPA
Mr. James Johnson, MDARD
Ms. Amy Epkey, Environment Deputy Director, MDEQ
Ms. Maggie Pallone, External Relations Deputy Director, MDEQ
Ms. Teresa Seidel, MDEQ
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