

June 19, 2017

Submitted Electronically Via CWAwotus@epa.gov

Scott Pruitt, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N. W.
Washington, DC 20460

Dear Administrator Pruitt:

Thank you for the opportunity to provide comment on the forthcoming proposal to revise the definition of waters of the United States (Clean Water Rule: Definition of “Waters of the United States”; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015)). In addition to my office, these comments include input from several state officials and agencies, including: the Attorney General, North Dakota Agriculture Commissioner, North Dakota State Engineer, North Dakota Department of Transportation, North Dakota Department of Health, and North Dakota Industrial Commission (collectively “North Dakota”).

North Dakota supports withdrawing the current regulations and reinstating the preexisting regulations and guidance. North Dakota also supports beginning the process to develop new rules. During this process, EPA should continue to consult with states and seek their input.

The revised regulations should respect the role of states in regulating their waters. The fact that some waters will not be defined as waters of the United States does not mean they will be left unprotected. States have historically shown the ability to appropriately regulate state-only waters.

In North Dakota, the state protects all waters, regardless of whether those waters are subject to federal jurisdiction. *See* N.D.C.C. § 61-28-01. “Waters of the state” is defined broadly and includes virtually all surface and groundwater in the state. N.D.C.C. § 61-28-02(15). Not only does North Dakota protect more water than is protected under the federal Clean Water Act, it also provides greater protection of those waters. For example, North Dakota law goes beyond prohibiting discharges into waters and makes it unlawful to place “any wastes in a location where they are likely to cause pollution of any waters of the state.” N.D.C.C. § 61-28-06. And, unlike federal law, North Dakota law includes protections for waters involved in water transfers. N.D.C.C. § 61-28-09.

Considering the important state role in protecting state waters and the language of the federal Clean Water Act, North Dakota supports developing regulations that are consistent with Justice Scalia’s plurality opinion in *Rapanos*, which defines waters of the United States as relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters. Accordingly, only streams that carry flow throughout the year, except in drought, should be considered “relatively

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permanent.” And, only wetlands that directly touch jurisdictional water should be considered to have a “continuous surface connection.”

Alternatively, should EPA decide that the Clean Water Act requires it to include more than the “Scalia waters,” North Dakota supports an approach that would give states a role in determining whether state waters should be considered under federal jurisdiction. At a minimum, EPA should be required to consult with states and provide a process for states to challenge a jurisdictional determination. States should also have the ability to request federal jurisdiction for waters they think should be under federal jurisdiction.

A jurisdictional determination for waters should be narrowly-tailored and evaluated by waterbody and not watershed. Before a waterbody can be deemed under federal jurisdiction, EPA must show that the waterbody significantly affects the chemical, physical, and biological integrity of navigable waters. If the state objects to this determination, the EPA must also show that the state has failed to take adequate measures to protect that waterbody, which has resulted in measurable harm to navigable waters.

This approach appropriately balances state and federal roles, consistent with the federal Clean Water Act. It also takes into account state-specific circumstances, including state policy and geography. What may be appropriate for North Dakota is not necessarily appropriate for New York, and vice versa.

Whether the new rules are limited to Scalia waters or includes additional waters, North Dakota remains committed to protecting all state waters. Please keep us informed as you begin to develop the new rules. We are happy to provide additional information and comment at any time.

Sincerely,

A handwritten signature in black ink, appearing to read "Doug Burgum". The signature is fluid and cursive, with the first name "Doug" being more prominent than the last name "Burgum".

Doug Burgum
Governor

cc: Andrew Hanson via Hanson.Andrew@epa.gov