

**OFFICE OF THE COMMISSIONER**

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**JUN 20 2017**

Mr. E. Scott Pruitt  
Administrator  
U.S. Environmental Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Ave NW, MC 1101A  
Washington, DC

Mr. Douglas W. Lamont  
Acting Assistant Secretary of Army (Civil  
Works)  
Department of the Army  
108 Army Pentagon  
Washington, DC 20310-0108

**RE: Review of the Clean Water Rule**

Dear Administrator Pruitt and Acting Assistant Secretary Lamont:

The Department of Environmental Conservation (DEC) offers the following comments for your consideration in reference to the proposed national rulemaking regarding *Intention To Review and Rescind or Revise the Clean Water Rule* (FRL-9959-93-OW; February 28, 2017) (hereinafter, "proposed rule"). DEC appreciates the opportunity to comment on the Administration's proposal and urges you to provide the same level of commitment to the preservation and restoration of wetland areas as we have in New York. In order to continue the dialogue and assist states with understanding the possible implications of the new rule across all water programs, New York recommends that the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) prepare and share a peer reviewed analysis of the application of the Scalia Opinion in the Rapanos decision.

New York, like many other states, has its own set of clean water and water resources laws that currently mesh with, and complement, the federal programs. Like many other States, New York is primarily responsible (under federal oversight) for administering the Clean Water Act (CWA) within its boundaries. As such, consideration should be given to the clean water implications of pollutants being placed in, or flowing into, water systems and wetlands, and then moving to larger waters including drinking water supplies.

In addition, New York has experienced multiple, severe, multi-billion dollar flood damage events involving both in-state and inter-state waters. Modifying the protection of streams and wetlands – which hold back vast amounts of water during precipitation events – can dramatically and empirically increase flood damage to farms, homes, dams, main streets and businesses. Indeed, the \$20+ billion deficit in the national flood insurance program is just one of many examples of why protecting the natural hydrologic systems and networks that provide enormous flood protections, makes economic sense. The New York City drinking watershed is another prime example, one where networked waterway protections have helped avoid the need to construct a \$10



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billion drinking water filtration plant with its projected \$300 million plus annual operations and maintenance cost. New York's and the nation's state and inter-state commercial, aquaculture and recreational fisheries are fundamentally dependent on the existence of streams and wetlands that are the start-of-life nurseries for many aquatic species. And much of the urban economic revival of America's cities is premised on development along inviting, clean, waterfronts.

I recommend that EPA/USACE streamline regulations on a national basis so that expert technical judgment is brought to bear on what constitutes a productive protection or process versus what constitutes nonsensical regulatory over-reach. As previously mentioned, should EPA/USACE decide to continue to focus on the Scalia Opinion in the Rapanos decision, New York strongly recommends that the federal agencies prepare and share a peer reviewed analysis of the jurisdictional and practical impacts of that opinion to assist in stakeholder dialogue, and before proceeding down this specific path.

#### New York State Places a Priority on Its Natural Resources and Its Agricultural Industry

Almost 36,000 farms in New York State produce high quality fruits, vegetables and dairy products which are sold to markets around the world, and the State is committed to safeguarding and enhancing their economic and environmental viability. In addition, New York has long been renowned as a national leader with respect to environmental quality and natural resource protection. Water systems under the jurisdiction of the proposed rule, including wetlands, are valued in New York for their myriad environmental and other benefits. Given the high value which New York places upon the agricultural industry, water systems, and natural resources, effective federal initiatives which compliment New York's environmental resource protection measures are a priority for New York.

#### Need for any Revised Waters of the US Rulemaking

New York is concerned with the issue of clarity over the definition of "Waters of the US." Since the SWANCC and Rapanos U.S. Supreme Court decisions, there have been many attempts to clarify the definition of "waters of the United States." One possible solution is to focus on what actions with respect to waters or the landscape are appropriately regulated, and what processes can be streamlined, rather than entering the seeming morass of attempting to exclude whole classes of waters from protection.

In authoring any new rule, careful consideration must be taken to diminish the ambiguity that arises from a rule that creates conflicts with existing common sense "ditch exclusions" and "normal agricultural practices." Generic terms such as "uplands", "drylands" and what constitutes a "tributary" will tend to benefit from the application of the technical judgment that has been well developed by state and federal agencies and the consulting community, over the 40 year history of implementing the CWA.

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Moreover, it is important for EPA and USACE, when promulgating any jurisdictional rule concerning wetlands, to bear in mind the critical role that wetlands play. They provide essential benefits such as flood and storm water control, pollution treatment, erosion control, protection of subsurface resources, recreation, open space, fish nursery and spawning, and wildlife habitat. While the benefits of individual wetlands can vary, all wetlands provide one or more of these benefits. Thus, protecting all wetlands that exhibit wetland characteristics is an important part of fulfilling the purpose of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

With that perspective in mind, and as it pertains to surface waters, we believe that the Administration should avoid getting tangled in the language of Footnote 5 of the Scalia Opinion in *Rapanos*:

5. By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by Justice STEVENS' dissent (hereinafter the dissent), post, at 2259–2260. Common sense and common usage distinguish between a wash and seasonal river. Though scientifically precise distinctions between "perennial" and "intermittent" flows are no doubt available, see, e.g., Dept. of Interior, U.S. Geological Survey, E. Hedman & W. Osterkamp, *Streamflow Characteristics Related to Channel Geometry of Streams in Western United States* 15 (1982) (Water-Supply Paper 2193), we have no occasion in this litigation to decide exactly when the drying up of a streambed is continuous and frequent enough to disqualify the channel as a "wate[r] of the United States." It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's "intermittent" and "ephemeral" streams, post, at 2260—that is, streams whose flow is "[c]oming and going at intervals ... [b]roken, fitful," Webster's Second 1296, or "existing only, or no longer than, a day; diurnal ... short-lived," *id.*, at 857—are not."

While the two paragraphs contained in Footnote 5 are not entirely clear, the EPA/USACE focus on them should balance assessing which activities cause harm to our waters (and need to be effectively regulated) and those which provide economic benefits and do not likely cause harm (with associated, appropriate, regulatory relief or streamlining).

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Ensure a Level Playing Field for All States

New York supports national rules to protect waters, including wetlands, which establish a consistent and strong national regulatory floor. For states like New York, with strong existing programs, a sound national rule and inventory of federally protected "waters of the United States" is necessary to ensure a level playing field between states. A national floor of protections is needed to assure equitable resolutions concerning the quality of the many interstate waters, such as the Great Lakes, the Chesapeake Bay Basin, Lake Champlain, the Arkansas River and Long Island Sound. I encourage EPA and USACE to work with New York in recognition of New York's sound water quality programs and provide the level national playing field that is desired by our constituents.

Conclusion

I appreciate your effort at outreach with the States, and encourage you to continue this dialogue with the States as you develop a revised rule or pursue an alternative approach. Along with my staff, I am available for further discussions with you as you work forward on this critical environmental and economic matter.

Sincerely,

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

Basil Seggos  
Commissioner