# State of Oklahoma

June 19, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Douglas W. Lamont, P.E.
Senior Official performing the duties of
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Re: State of Oklahoma's response to U.S. EPA's request for input on the forthcoming proposal to revise the definition of "waters of the United States" set forth in the Clean Water Rule (Final Rule, 80 Federal Register 37,054 (June 29, 2015))

Dear Administrator Pruitt and Mr. Lamont:

The State of Oklahoma, as are all States, is charged with the primary responsibility and right to prevent, reduce, and eliminate water pollution and to plan the development and use of water resources within its boundaries. As such, the State of Oklahoma (inclusive of the State environmental agencies responsible for managing the quantity and quality of Oklahoma's streams, lakes and aquifers) appreciates the opportunity to engage with the U.S. Environmental Protection Agency ("U.S. EPA") and the U.S. Army Corps of Engineers ("U.S. ACE") in a more meaningful dialogue, and to ultimately work to develop a revised definition of "waters of the United States" that both recognizes the States' essential role in the protection and management of water resources and also actually provides clarification as to the jurisdiction of the Federal Government. The State of Oklahoma strongly supports the development of a new federal definition of "waters of the United States" consistent with the Supreme Court's plurality opinion written by Justice Scalia in *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208 (2006). In defining those non-navigable tributaries or wetlands that are to be considered waters of the United States, the U.S. EPA and the U.S. ACE should focus on water features that are likely to directly impact a traditional navigable water ("TNW"). It is essential that the new definition: (1) respect the States' primary responsibilities and rights related to the protection and use of water resources; and (2) provide certainty regarding which waters are covered under the regulatory definition.

## I. Cooperative Federalism/State-Federal Cooperation

The Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. §§ 1251 *et seq.*, has long recognized the importance of a partnership between local, State and Federal governments going back to its inception in 1948 and continuing through the various amendments that have brought us to the version of the CWA that exists today. In fact, the existence and need for a State-Federal partnership has been present in the statutory basis for this definition for over sixty years. The CWA's cooperative federalism framework was solidified in the 1972 reauthorization process, when Congress gave explicit authority for the States to act as co-regulators when implementing the CWA. Sections 101(b) and (g) provide that it is the policy of Congress to protect the rights of States in their effort to eliminate pollution and that States have the authority to allocate quantities of water within their boundaries, as well as underscoring that federal agencies *shall* cooperate with them when solutions are developed. *See* 33 U.S.C. §§ 1251(b), (g). Moreover, the Supreme Court's plurality opinion also specifically recognized "the CWA's stated 'policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use of . . . water resources." *Rapanos*, 547 U.S. at 737, 126 S.Ct. at 2223.[1] As part of its efforts to include the States in the development of the revised definition, it may be useful for the U.S. EPA and the U.S. ACE to convene a State-Federal working group or an equivalent process (which could include State subject matter experts).

Furthermore, in recognizing the States' primary role in water resource management and to achieve regulatory certainty, the U.S. EPA and the U.S. ACE should investigate the possibility of developing, through the revised definition of "waters of the United States," specific criteria to be used in determining whether a water body is considered a jurisdictional tributary to a TNW and, therefore, a jurisdictional water covered by the CWA. Importantly, in developing this new definition, the ability to develop specific criteria that could be used by the States to map and/or formally designate non-navigable tributaries that meet the revised definition within each respective State should be explored. An approach such as this would allow the U.S. EPA and the U.S. ACE to establish uniform criteria describing the waters covered under the CWA, and could possibly allow the States to make upfront jurisdictional determinations or designations based on their more intimate knowledge of the area and available stream flow data. The features of many water bodies vary significantly from state-to-state and ecosystem-to-ecosystem. Consequently, the States are ultimately in the best position to understand the connection and potential impact that local water bodies may have on a TNW.

The ability of the States to make these upfront determinations would be consistent with many other implementing authorities that the States exercise under the CWA. It is the States that assign beneficial/designated uses of regulated waters and establish water quality criteria

[1] The plurality opinion recognized "the States' traditional and primary power over . . . water use," *Rapanos*, 547 U.S. at 738, 126 S.Ct. at 2224, and specifically held that "clean water is not the *only* purpose of the [Clean Water Act]. So is the preservation of primary state responsibility for ordinary land-use decisions." *Rapanos*, 547 U.S. at 755-56, 126 S.Ct. at 2234, *citing* 33 U.S.C. § 1251(b).

necessary to protect those uses under § 303 of the CWA (33 U.S.C. § 1313), as well as work with watershed stakeholders to reduce nonpoint source impacts to water quality under § 319 (33 U.S.C. § 1329). Under § 401 of the CWA (33 U.S.C. § 1344), it is the States that review proposed federal actions and certify whether those proposed actions will meet State water quality standards. Pursuant to § 402 of the CWA (33 U.S.C. § 1342), Oklahoma and most other States implement NPDES permitting programs. It would be entirely consistent for States to also have the ability to make binding upfront determinations as to whether a non-navigable tributary constitutes a water of the United States pursuant to clear criteria established by the U.S. EPA and the U.S. ACE.

The criteria established in a revised definition would need to include sufficient detail so as to provide certainty in the meaning of all significant terms used in the revised definition and, as a backup, establish an alternative mechanism through which a State's interpretation of a disputed term would be recognized as controlling within the boundaries of the State. Instead of focusing on a more effective and efficient way to address disparate decisions by the U.S. ACE in implementing § 404 of the CWA, previous attempts to revise the definition created confusion (in some instances, where it did not previously exist) in implementing other sections of the CWA (for example, §§ 303, 319, 401, and 402). In previous proposed attempts to purportedly clarify CWA jurisdiction, undefined or poorly defined terms like tributaries, adjacent waters, floodplains, riparian areas, rills, gullies, and uplands have injected confusion. In any event, as recognized in the U.S. EPA and the U.S. ACE's request for comments, defining the terms "relatively permanent" and "continuous surface connection" will be critical as this rule revision moves forward.

Also related to certainty, a definition that established clear criteria and afforded the States an opportunity to make upfront determinations regarding the status of non-navigable tributaries could provide additional certainty if it included the concept of a regulatory shield for activities conducted in reliance upon upfront determinations. In other words, an activity conducted in good faith reliance upon a State approved list or map of upfront jurisdictional determinations should be shielded from regulatory or third-party enforcement based on subsequent jurisdictional determinations. The combination of upfront determinations and a regulatory shield could provide the much needed regulatory certainty.

## II. Rapanos

In order to pass Constitutional scrutiny and judicial review of the federal agencies' statutory authority, and to remain consistent with the Supreme Court's plurality opinion, the criteria would need to be designed to: *include only* those relatively permanent, standing or continuously flowing bodies of water forming geographic features (*i.e.*, streams, oceans, rivers, and lakes); and *purposefully exclude* channels through which water flows intermittently or ephemerally, and channels that periodically provide drainage for rainfall.[2]

[2] *See Rapanos*, 547 U.S. at 739, 126 S.Ct. at 2225 ("[T]he phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.' See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.").

### A. Relatively Permanent

It would be appropriate to define the term "relatively permanent" to include tributaries that typically flow year-round or seasonally (*e.g.*, at least three months); however, not all relatively permanent non-navigable tributaries should be included in the definition of "waters of the United States." Non-navigable tributaries with a *typical flow below a minimum threshold* should be *excluded* from the proposed definition. Conversely, interruption of the typical minimum flow due to periods of extreme drought should not automatically disqualify a non-navigable tributary from coverage under the Act if the tributary otherwise contained the minimum typical flow described above. Since smaller water bodies not satisfying the minimum threshold would have no significant or likely impact on TNWs, it is Constitutionally appropriate (and appropriate from a practical standpoint) that they be regulated by the States and not be considered as waters of the United States. In the State of Oklahoma, these smaller waters are protected by our State Water Quality Standards regardless of action by the U.S. EPA or the U.S. ACE. *See* 27A O.S. § 1-1-202(20); *see also* 82 O.S. §§ 1084.2(3)("'Waters of the state' means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, storm sewers and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion thereof, and shall include under all circumstances the waters of the United States which are contained within the boundaries of, flow through or border upon this state or any portion thereof."), 1085.2(16), 1085.30. Moreover, State programs have already proven highly successful in the protection of water quality in areas not previously subject to federal jurisdiction through State water quality standards and best management practices. As should be the case with non-jurisdictional tributaries, it will be up to the States to work together to protect and regulate portions of shared watersheds that are excluded from the definition of waters of the United States.

### B. Wetlands - Continuous Surface Connection

In regard to wetlands, the difficulty in establishing a definition for waters of the United States that includes wetlands is demonstrated by the Supreme Court's decisions in *Bayview Homes*, *SWANCC* and *Rapanos,* which were used to justify the previous attempt to revise the definition that lead to the Clean Water Rule and created even more confusion. The Supreme Court's plurality opinion in *Rapanos* provides clarity on the issue and focuses on whether the wetland has a "continuous surface connection" to a TNW or jurisdictional tributary. The State of Oklahoma supports the concept of revising the definition of waters of the United States to reflect the holding in the Supreme Court's plurality opinion. Specifically, the plurality opinion's holding that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Rapanos*, 547 U.S. at 724, 126 S.Ct. at 2226 (emphasis added). In describing the type of wetland covered by the CWA's requirements, the Supreme Court further explained "[f]irst, that the adjacent channel contains a

'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Rapanos*, 547 U.S. at 742, 126 S.Ct. at 2227.

While it may be difficult or impossible to make an upfront identification of all wetlands, much less an upfront determination related to a wetland's continuous surface connection to a TNW or a jurisdictional tributary, it is possible to reduce some of the uncertainty related to the regulation of wetlands by restricting the non-abutting wetlands included in the revised definition to only those located within a specific and reasonable proximity to a TNW or jurisdictional tributary. The Supreme Court's plurality opinion provides that "[w]etlands with only an intermittent, *physically remote* hydrological connection to 'waters of the United States' . . . lack the necessary connection to covered waters . . . ." *Rapanos*, 547 U.S. at 724, 126 S.Ct. at 2226-27 (Emphasis added). Reducing the scope of the type of wetlands included within the new definition to only those that either directly abut a TNW or jurisdictional tributary, or to those located within a specified proximity (for example, a quarter mile) of a TNW or jurisdictional tributary *and* which also have a continuous surface connection to such waters, would leave wetlands with a more intermittent or *physically remote* hydrologic connection to the regulation and protection of the States. This approach would be consistent with the plurality opinion's recognition of the limitations on the Federal Government's Constitutional authority over such wetlands. Similar to excluding non-navigable tributaries with a typical flow below the minimum threshold, it will be up to the States to work together to protect shared watersheds. As for the "significant nexus" approach described in the concurring opinion (which was previously relied upon by the U.S. EPA and the U.S. ACE), the Supreme Court's plurality opinion appears to sufficiently address the inclusion of such a standard. According to the Supreme Court's plurality opinion:

> "[The concurring opinion] misreads SWANCC's 'significant nexus' statement as mischaracterizing *Riverside Bayview* to adopt a case-by-case test of ecological significance; and then transfers that standard to a context that *Riverside Bayview* expressly declined to address (namely, wetlands nearby non-navigable tributaries); while all the time *conceding* that this standard does not apply in the context that *Riverside Bayview* did address (wetlands abutting navigable waterways). Truly, this is 'turtles all the way down.'"

*Rapanos*, 547 U.S. at 754, 126 S.Ct. at 2233. Moreover, the plurality opinion states that the "[w]etlands are 'waters of the United States' if they bear the 'significant nexus' of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States." *Rapanos*, 547 U.S. at 755, 126 S.Ct. at 2234. Based on the rationale described in the plurality opinion, the revised definition should clearly reject the "significant nexus" standard as a justification for a jurisdictional determination unless the wetland directly abuts a TNW or a jurisdictional tributary, or is within a quarter mile of either.

### C. Groundwater

Lastly, many federal courts have held that "Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow 'hydrologically connected' to navigable surface waters." *See Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014) amended, No. 7:13-CV-200-FL, 2014 WL 10991530 (E.D.N.C. Aug. 1, 2014); *see also Patterson Farm, Inc. v. City of Britton, S.D.*, 22 F. Supp. 2d 1085, 1091 (D.S.D. 1998), *and Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994), *and Kelley for & on Behalf of People of State of Mich. v. United States*, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985). However, there have been some differing opinions in the lower courts as to whether hydrologically connected groundwater is included within the definition of waters of the United States. Consequently, the revised rule should clearly state that groundwater is unequivocally excluded from the definition of waters of the United States regardless of any argument related to a direct or indirect hydrologic connection or nexus to a TNW. This clarification would not necessarily need to address the issue of whether the CWA applies to pollutants that are discharged into groundwater and subsequently migrate into a TNW; instead, the clarification would merely need to reflect the longstanding recognition that groundwater does not fall directly within the umbrella of waters of the United States, and that the States have the responsibility and regulatory authority over groundwater. Although "Congress did not intend for the CWA to extend federal regulatory authority over groundwater," groundwater is still directly protected by State law, and there are additional safeguards provided in the Safe Drinking Water Act, 42 U.S.C. §§ 300f *et seq.*, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 1906 *et seq.*

### D. Additional Specific Exclusions

The revised definition should specifically and categorically exclude the following from federal jurisdiction: farm ponds, stock ponds, irrigation ditches, canals and laterals, and the maintenance of drainage ditches, as previously excluded pursuant to the CWA's agricultural exemption; isolated man-made dugouts and ponds used for stock watering or irrigation in upland areas; dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement; and prairie potholes and playa lakes. In fact, the revised definition should retain all of the long-standing statutory and regulatory exclusions to federal jurisdiction (such as those set forth in §§ 402(l) and 404(f), *see* 33 U.S.C. §§ 1342(l), 1344(f)), and should consider the need for additional exclusions for features such as those described herein.

In summary, only TNW, tributaries to TNW above a specified minimum typical flow threshold, wetlands directly abutting a TNW or jurisdictional tributary, and wetlands located within a specified distance (*i.e.*, a quarter mile) of a TNW or jurisdictional tributary *and* which also have a demonstrable minimum hydrologic connection to such waters, should be considered waters of the United States. Furthermore, it is essential that the new definition should recognize the primary role of the States in protecting and regulating water resources within each respective State and the U.S. EPA should explore options that would provide regulatory certainty by allowing States to make upfront determinations related to which activities and waters are covered

pursuant to the clear criteria established by the U.S. EPA and the U.S. ACE. The State of Oklahoma looks forward to your consideration of these comments and to working with the U.S. EPA and the U.S. ACE on this revised definition as well as any other proposed action aimed at protecting the State of Oklahoma's water resources.

Sincerely,

Michael Teague
Oklahoma Secretary of Energy and Environment

Jim Reese
Oklahoma Secretary and Commissioner of Agriculture

Mike Patterson
Oklahoma Secretary of Transportation and
Executive Director of the Oklahoma Department of Transportation