



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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Scott Pruitt, Administrator
US Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Douglas W. Lamont, P.E.
Department of the Army
108 Army Pentagon
Washington, DC 20310-0108

Dear Administrator Pruitt and Mr. Lamont:

I am writing to express my appreciation for the opportunity to provide input on the efforts to revise the definition of waters of the United States.

When Congress passed the Clean Water Act in 1972, the Act's declared objective in Section 101(a) is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." In Section 101(b), Congress also specifically declared "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator [of EPA] in the exercise of his authority under this Act." In South Dakota, we firmly believe these two declarations can and should go hand-in-hand.

However, in recent years, this objective and policy have appeared at odds with one another. In our federalist system, the states and the federal government share responsibility for controlling water pollution. Much of the progress under the Clean Water Act has depended on the ability of state and federal regulators working together toward protecting and restoring the nation's water quality. We stand ready to resume the partnership envisioned by the original authors of the Clean Water Act.

In President Trump's February 28, 2017, Executive Order on "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule," he encourages EPA and the Corps to give consideration to Justice Antonin Scalia's plurality decision in *Rapanos v United States*, 547 U.S. 715 (2006). Justice Scalia notes that "the Act's term 'navigable waters' includes something more than traditional navigable waters." He also notes that "the transition from water to solid ground is not necessarily or even typically an abrupt one," and that "the Corps must necessarily choose some point at which waters ends and land begins."

The checks and balances within the three branches of U.S. Government hold that Congress passes all federal laws, the U.S. Supreme Court interprets the laws, and the

Executive branch ensures the laws are carried out. In Justice Scalia's opinion, he states that an expansive interpretation of the Clean Water Act would significantly impinge the states' role over land and water use. The expansive definition of waters of the United States presented in EPA's Clean Water Rule defies Justice Scalia's interpretation and represents an intrusion into traditional state authority. Thirty states, including South Dakota, sought a judicial review of the Clean Water Rule. We welcome the opportunity to step back and engage in a robust conversation about the appropriate construction of the waters of the United States definition.

Justice Scalia's opinion stated that Clean Water Act jurisdiction only applies to "relatively permanent" waters. EPA has invited states to provide input into the implementation of this approach. It will be critical for EPA and the Corps to take into account regional considerations for this definition due to wide variations in state laws, geographic and climatic differences across the United States, and widely varying regulatory constructs. States must not only be a partner in the development of this rule but in the effective implementation of the rule going forward, since 46 of the states administer federal water pollution control programs through delegated NPDES programs.

Thank you again for the opportunity to participate in this important rule.



Steven M. Pirner, PE
Secretary

cc: Senator John Thune
Senator Mike Rounds
Representative Kristi Noem
Governor Dennis Daugaard
Attorney General Marty Jackley
Deb Thomas, Region 8 Acting Administrator, EPA
Western States Water Council
Association of Clean Water Agencies