



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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June 19, 2017

Administrator Scott Pruitt
Environmental Protection Agency
CWAwotus@epa.gov

RE: Federalism Process and “Waters of the United States” Rule Development

Dear Administrator Pruitt:

Thank you for seeking input from the states regarding the 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)). We appreciate the implementation of a federalism process that actively solicits state input on the potential implications of federal regulations on the states. In response to your request of May 8, 2017, Washington State (Washington) agrees that the general goal of the final rule should be to provide clarity and certainty on what constitutes a water of the United States at a basic national level to support states and applicants in their projects. To that end, Washington encourages the Environmental Protection Agency and the United States Army Corps of Engineers (Corps) to arrive at a final rule that maintains protections consistent with the federal protections that have been in place to date.

Washington’s citizens and businesses depend upon clean water. Our economy relies on clean water for drinking, agriculture and shellfish industries, tourism and recreation, and growth. A strong federal water protection program is vital to ensuring that the health and integrity of our nation’s waters are maintained. We need federal protections to prevent other states from passing polluted waters to downstream states.

Maintain coordinated permit efficiencies

We support the administration’s goal of minimizing uncertainty and achieving regulatory streamlining. Efficiency in permitting is important to Washington’s economy. The existing process and streamlining options such as general permits with specific well-defined exemptions (Section 404 and Section 402) are easing the burden on both applicants and agencies. We agree that national permits protect the environment while reducing the Corps workload and minimizing time and uncertainty for the applicant. These permits result in significant savings to applicants as well as state and federal agencies. The vast majority of the Corps’ Section 404 permits are Nationwide Permits, demonstrating the efficacy of a general permit program.



We recommend that the federal agencies continue to work cooperatively with the States to develop additional regional general permits that address local conditions and provide streamlining and predictability in permitting. These permitting efficiencies can protect our nation's waters and accommodate the geographic and regional differences among the states that are impractical to address in a nationwide rule. The Washington State Department of Ecology has enjoyed a cooperative and collaborative working environment with both the Corps and the Environmental Protection Agency as we implement the federal Clean Water Act in Washington and we look forward to continuing this relationship.

The Corps has been implementing the 2008 *Rapanos* Guidance¹ for almost a decade now. Starting over again with a new definition will create uncertainty and increased cost on the regulated community. Applicants are aware of where the Corps is likely to exert jurisdiction and a new definition that significantly changes what is protected will create additional uncertainty for everyone. This uncertainty will result in longer permitting timelines and more jurisdictional determination requests resulting in more cost to business.

Maintain federal protections

Protection under the federal Clean Water Act is crucial to ensuring that our residents have adequate clean water for drinking, irrigation and recreating. Reduced federal protection will result in more impacts on downstream states such as Washington through increased pollution of our drinking water supplies and loss of groundwater recharge. If federal jurisdiction is significantly reduced, then the regulated public will see increased costs due to uncertainty in jurisdiction and increased pollution of waters.

Our state's coastal wetlands benefit our economy by protecting coastal communities in the event of natural disasters. Upstream waters and wetlands help provide a buffer to climatic-induced changes in precipitation timing and form. In the future, Washington expects to see snow packs in upper watersheds decline and flood concerns rise as precipitation in the mountains falls as rain instead of snow. Wetlands provide critical buffers against the harms of climate change by storing water and recharging groundwater that reduces flooding and supports base flows to streams. Loss of tributary and headwater wetlands could result in expensive engineered solutions to address increased flooding and reductions of irrigation waters during the dry months. Maintaining natural infrastructure helps reduce costs in addressing problems such as severe weather events and changes in water presence and timing due to climate change. The natural water storage of wetlands in one watershed in Western Washington provided over \$35,000 of value per acre in avoided hard infrastructure costs that were estimated to cost \$1,516,137.²

¹ Memorandum: *Clean Water Act Jurisdiction Following the Supreme Court's Decision in Rapanos v. United States and Carabell v. United States; December 2, 2008.*

² *The Economic Value of Wetlands: Wetlands' Role in Flood Protection in Western Washington*, Leschine, Thomas M. et al; October 1997; Department of Ecology publication #97-100
<https://fortress.wa.gov/ecy/publications/documents/97100.pdf>.

Incorporate Science Advisory Board information

Washington encourages the federal agencies to use the Scientific Advisory Board's "*Connectivity of the Nation's Waters*"³ report to support the new definition to be developed in your second rule making. It is important that the rule be informed by science so that the final definition adopted results in cleaner water, adequate protection, and certainty for this vital resource. I encourage the federal agencies to take the time to fully consider the science and the implications of implementation when drafting the rule.

Implications for Washington

Washington is the leading producer of farmed clams, oysters and mussels in the nation. Annual harvest values exceed \$92 million. It is estimated that the industry contributes over \$270 million to the Washington economy annually and supports over 3,200 direct and indirect jobs.⁴ This industry relies on clean water and Washington has seen several shellfish bed closures due to upstream pollutant discharges into streams. The health and stability of Washington's shellfish industry depends on protection of the waters that drain to these sensitive harvest areas. Backsliding on federal protections will put the industry and the economy of Washington's coastal areas at risk.

Another economic sector in Washington, the wetland mitigation banking industry, would suffer direct impacts if a new, less protective, definition is adopted. The wetland mitigation banking industry has matured over the last eight years. Washington is home to 15 mature wetland mitigation banks. Wetland mitigation banks are large wetland restoration projects developed with private capital to generate "credits" that can be sold to offset wetland impacts. Mitigation banks use market forces and the entrepreneurial creativity of our business sector to develop ecologically and economically successful wetland compensation for impacts to waters of the United States. These entrepreneurs invest considerable funds in large restoration projects to sell mitigation credits to developers. They base their decision to make these investments on a market analysis of forecasted permit activity in the Section 404 program. If federal jurisdiction is reduced, it undermines the market and economy of this fledgling industry that provides a streamlined and innovative way for applicants to meet regulatory requirements.

Together, the state and federal agencies have dedicated significant effort into restoring Washington's federally listed endangered and threatened salmon species. Risk to salmonids comes from increased flows in fall and winter, lowered base flows during the summer, hydrologic alterations, and pollution from wetland loss and tributary manipulation. The loss of federal protections to the waters that federally listed salmon rely on is incongruent with broader efforts to recover salmon and uphold tribal treaty rights.

³ *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. US EPA Office of Research and Development. Washington DC, January 2015. EPA/600/R-14/475F.

⁴ Washington Sea Grant (2015) Shellfish Aquaculture in Washington State. Final report to the Washington State Legislature, 84 p. <https://wsq.washington.edu/shellfish-aquaculture>.

Administrator Scott Pruitt

June 19, 2017

Page 4

In summary, Washington urges the federal agencies to maintain protection of our nation's waters. It forms an important foundation to provide equitable economic opportunity across states, reduces uncertainty and additional costs to the regulated community, and protects our drinking water supplies. Maintaining protection will hedge against increased costs to state residents from flooding, drought and/or polluted waters. Washingtonians deserve waters that are safe to drink and that support fishing and recreation.

Thank you again for the opportunity to provide input and we look forward to working with the federal agencies as the revised rule is developed.

Sincerely,



Maia D. Bellon

Director

cc: Roger Millar, Secretary of Transportation, WSDOT
Derek Sandison, Director, WSDA
Jim Unsworth, Director, WDFW
Hilary Franz, Commissioner of Public Lands, WA-DNR
Denise Clifford, Governmental Relations Director, Ecology
Heather Bartlett, Water Quality Program Manager, Ecology

By email