June 16, 2017

Honorable Scott Pruitt
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Honorable Douglas W. Lamont, P.E.
Senior Official Performing the
Duties of the Assistant Secretary of the Army
108 Army Pentagon
Washington, DC 20310

Via email to: CWAwotus@epa.gov and Hanson.Andrew@epa.gov

Re: Definition of "Waters of the United States" Under the Clean Water Act

Dear Administrator Pruitt and Senior Official Lamont,

Please accept these comments in response to USEPA's May 8, 2017 request that states provide input on a new definition of "waters of the United States" that is consistent with Justice Antonin Scalia's *Rapanos v. United States*, 547 U.S. 715 (2006) plurality opinion. As a co-regulator in implementing the Clean Water Act, the Wyoming Department of Environmental Quality (WDEQ) is responsible for the implementation of the NPDES program under Section 402, adoption of state water quality standards and TMDLs under Section 303, water quality certifications under Section 401, and addressing nonpoint source pollution under Section 319, in addition to implementing state water quality requirements under the Wyoming Environmental Quality Act.

WDEQ appreciates that the United States Environmental Protection Agency (USEPA) has reached out directly to Governor's to solicit input on implementing the February 28, 2017 Presidential Executive Order on *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule.* WDEQ understands that the first step in implementing the order involves re-codifying the regulation that was in place prior to issuance of the 2015 Clean Water Rule and that the second step involves proposing a new definition.

Specific to the second step in the process, within Attachment 1 of this letter, WDEQ has provided proposed revisions, in strike and underline format, to 33 CFR § 328.3 that was in place prior to the 2015 Clean Water Rule. WDEQ's proposed revisions to 33 CFR § 328.3 are consistent with Justice Scalia's opinion in *Rapanos*, *Solid Waste Agency of Northern Cook County (SWANCC) v. United States*, 531 U.S. 159 (2001) as well as *United States v. Riverside Bayview Homes, Inc. et al*., 747 U.S. 121, 106 S. Ct. 455 (1985). Considering these United States Supreme Court decisions together with the 2015 Clean Water Rule make it clear that the Army Corps of Engineers (Corps) and the USEPA have extended regulatory authority beyond what Congress intended when passing the Clean Water Act. The result has been an unnecessary expansion of federal involvement and infringement on state's rights to regulate water

quality in surface waters that are clearly not waters of United States. Moreover, the Corps and USEPA have done little to ensure consistency with the decisions from these Supreme Court cases, which has resulted in considerable confusion, regulatory uncertainty, and more litigation regarding waters of the United States. It is, therefore, clear that a commonsense and pragmatic revision to the federal regulations is necessary to draw a bright light between what is, and is not considered a water of the U.S.

WDEQ urges the Corps and USEPA to take advantage of this opportunity by drafting rule language in cooperation with states that provides as much clarity and consistency as possible. To this end, WDEQ urges the Corps and USEPA to draft rule language with the intent of developing, with input from states, jurisdictional maps that clearly identify waters of the United States. Jurisdictional maps will allow States, the Corps, and USEPA to identify and manage waters accordingly, with as much certainty and as few case-by-case determinations as possible. WDEQ also recommends that the Corps and USEPA work with states and regional Corps offices to prioritize and implement the mapping effort.

Revisions to the regulations and jurisdictional maps will provide much needed clarity that will have the added benefits of reducing economic costs associated with uncertainties; improving consistency in jurisdictional determinations while also reducing the need for such determinations; expediting decision making and stream-lining permitting; decreasing compliance costs with respect to the regulated community and government administration; and recognizing the authorities of States in the protection of water quality for waters that are not waters of the United States.

WDEQ's recommended revisions are also based on the intent of Congress to not only "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" in passing the Clean Water Act, but to also "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" by making a clear distinction between navigable waters that are "waters of the United States" and regulated under the Clean Water Act and non-navigable waters that are not "waters of the United States" and are to be regulated by states.

As USEPA and the Corps contemplate a revised definition of waters of the United States, the role of states becomes increasingly important. It is important to remember that regulation by states does not mean lack of regulation; states do and will provide the necessary protections to ensure that water quality is protected and restored. WDEQ currently regulates point source discharges to all surface waters of the state and would strongly consider, under our proposed revisions, implementing a permitting program to cover dredge and fill activities on non-jurisdictional waters (i.e., ephemeral and intermittent waters and adjacent wetlands) that would not be permitted by the Corps.

Essential Elements of Proposed Revisions to 33 CFR § 328.3

To be consistent with the plain text of the Clean Water Act and the three Supreme Court decisions, the proposed revisions to the rule must include: traditionally navigable waters, perennial tributaries to traditionally navigable waters, wetlands adjacent to traditionally navigable waters and their perennial tributaries, and territorial seas. Similarly, the proposed rule must exclude: isolated waters, ephemeral waters, intermittent waters, and non-adjacent wetlands. WDEQ provides the following reasoning behind our proposed definition for waters of the United States.

Traditionally Navigable Waters
Rapanos affirmed 33 CFR § 328.3(a) that "all traditionally navigable waters which are currently used, or

were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" are considered waters of the United States. This not only includes the navigable waters and territorial seas of the United States under Sections 9 and 10 of the Rivers and Harbors Act of 1899, but also perennial waters that are or could potentially be used for navigation in the future. Not all perennial waters, however, are "traditionally navigable waters" and have the capacity to support navigation, so the relative size of the perennial waters is a critical determinant as to whether it qualifies as "traditionally navigable." WDEQ recommends that the perennial mainstem waters identified within each Hydrologic Unit Code (HUC) 6 watershed as a reasonable minimum size criterion for identifying a perennial water as a "traditionally navigable water." This recognizes their historic, current, and potential use as a "highway" to transport humans, animals or freight, while also excluding smaller perennial waters which cannot be used for navigation.

Perennial Tributaries to Traditionally Navigable Waters

SWANCC clarified that connections to traditionally navigable waters must be physical, not solely ecological, while Justice Scalia's plurality opinion in *Rapanos* provided further clarification that in order for a tributary to be considered a water of the United States, it must have "relatively permanent flow," and "under normal circumstances, it must have water." The plurality opinion in *Rapanos* also makes clear that intermittent and ephemeral streams as well as non-perennial ditches, canals, drains, channels, tunnels, conduits and other man-made water conveyance systems are not considered waters of the United States because they only convey water *intermittently* and do not provide "relatively permanent flow." As a result, a continuous hydrologic surface connection to a traditionally navigable water must be present for a water to be a water of the United States. To be consistent with the plurality opinion in *Rapanos* and SWANCC as well as provide the greatest possible clarity and consistency in interpretation, WDEQ recommends that "relatively permanent flow" be defined as "perennial waters" with a *continuous* surface hydrologic connection to a traditionally navigable water and that "perennial" be defined as continuous flow for approximately twelve months of the year except during drought conditions.
Any deviation from this recommended definition is inconsistent with the *Rapanos* plurality opinion and increases confusion and ambiguity in what is, or is not a water of the United States. The requirement of perennial flow also integrates Justice Kennedy's opinion in *Rapanos* that a substantial and non-speculative significant nexus must exist between a water and a traditionally navigable water.

Adjacent Wetlands

As determined in Riverside Bayview, wetlands adjacent to or abutting navigable waters are waters of the United States. The plurality opinion in *Rapanos* further clarified that "wetlands 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*." To be consistent with these opinions, WDEQ recommends that adjacent wetlands be defined as those wetlands within the flood-prone width (i.e., floodplain) of a "traditionally navigable water" or perennial tributaries with continuous hydrologic surface connections to a "traditionally navigable water." The width of the floodplain in this context equates to the elevation that corresponds to twice the maximum channel depth at the 1.5 to 2 year flow event. This definition of floodplain is recommended because it reflects the prevailing flood conditions of a stream and the associated field indicators are consistent with the indicators used to define the ordinary high water mark (OHWM) at 33 CFR § 328.3(e).

Implicit integration of the significant nexus concept into the proposed definition of adjacency removes the need for case-by-case determinations of significant nexus recommended in Justice Kennedy's opinion in *Rapanos.* Moreover, our definition of adjacent rejects the Corps regulatory definition of

"bordering, contiguous or neighboring" and instead adopts the reasonable commonsense meaning of abutting. Lastly, this reaffirms that non-navigable, isolated, intrastate waters are not waters of the United States.

Summary

Requesting input directly from Governors in drafting the waters of the United States rule is an important step in ensuring that the states are allowed to fulfill their role as co-regulators of water quality as envisioned by the Clean Water Act. To ensure this cooperative atmosphere continues, WDEQ urges USEPA and the Corps to continue to work with states and other co-regulators during development of the draft rule language. To this end, WDEQ requests that EPA share draft versions of the proposed rule prior to submission to the Office of Management and Budget, and prior to any formal comment period, so that states can continue to provide essential feedback during development of the proposed rule.

Thank you for the opportunity to comment; we look forward to working with you as the revision process continues.

Sincerely,

Todd Parfitt, Director

Attachment

17-0404

cc: Nephi Cole, Policy Advisor, Governor's Office
Kevin Frederick, Administrator, Water Quality Division, DEQ

Attachment 1. Wyoming Department of Environmental Quality's proposed revisions to the pre-2015 'Waters of the United States' rule 33 CFR § 328.3. Black text is language retained from the pre-2015 rule, red text is language deleted from the pre-2015 rule, green text is language adopted in the 2015 rule, and blue text is new proposed language.

§ 328.1 Purpose.
This section defines the term ''waters of the United States'' as it applies to the jurisdictional limits of the authority of the Corps of Engineers and the United States Environmental Protection Agency under the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations. It prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers and the Environmental Protection Agency concerning ''waters of the United States.'' The terminology used by section 404 of the Clean Water Act includes ''navigable waters'' which is defined at section 502(7) of the Act as ''waters of the United States including the territorial seas.'' To provide clarity and to avoid confusion with other Corps of Engineer and Environmental Protection Agency regulatory programs, the term ''waters of the United States'' is used throughout 33 CFR parts 320 through 330. This section does not apply to authorities under the Rivers and Harbors Act of 1899 except that some of the same waters may be regulated under both statutes (see 33 CFR parts 322 and 329).

~~**§ 328.2 General scope.**~~
~~Waters of the United States include those waters listed in § 328.3(a). The lateral limits of jurisdiction in those waters may be divided into three categories. The categories include the territorial seas, tidal waters, and nontidal waters (see 33 CFR 328.4 (a), (b), and (c), respectively).~~

§ 328.3 Definitions.
For the purpose of this regulation these terms are defined as follows:

(a) The term *waters of the United States* means

(1) All traditionally navigable waters which are currently used~~, or were used in the past,~~ or may be susceptible to use in interstate or foreign commerce, including the territorial seas and all waters which are subject to the ebb and flow of the tide;

~~(2) All interstate waters including interstate wetlands;~~

~~(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:~~

~~(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or~~

~~(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or~~

~~(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;~~

(~~4~~2) All impoundments of waters otherwise defined as waters of the United States under the definition;

(~~5~~3) Perennial t~~T~~ributaries ~~of waters~~ as defined ~~identified~~ in paragraph~~s~~ (c)~~(a) (1) through~~ (5~~4~~) of this

section~~;~~ to waters identified in paragraphs (a)(1) through (2) of this section;

~~(6) The territorial seas;~~

(~~7~~4) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (~~6~~3) of this section.

(~~8~~b) Waters of the United States do not include:

(1) prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(2) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) ~~are not waters of the United States~~.

(3) Ephemeral and intermittent waters.

(4) Isolated waters as defined in paragraph (c)(2) of this section.

(5) Ditches, drains, canals, tunnels, conduits and other man-made water conveyance systems that:

(i) Have ephemeral or intermittent flow;

(ii) Do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(6) The following features:

(i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, and cooling ponds;

(iii) Artificial reflecting pools or swimming pools created in dry land;

(iv) Ornamental waters created in dry land;

(v) Water-filled depressions created in dry land incidental to mining or construction activity, including ponds excavated for obtaining fill, sand, or gravel that fill with water;

(vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of perennial tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(vii) Puddles.

(7) Groundwater, including groundwater drained through subsurface drainage systems.

(8) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(9) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins, percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(c) Definitions:

~~(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.~~

(1) Adjacent. ~~(c)~~ The term adjacent means contained within the floodplain of a water identified in paragraphs (a)(1) through (3) of this section which is located at the elevation that corresponds to twice the maximum channel depth at the 1.5-2 year flow or in the case of standing waters, within the ordinary high water mark (OHWM), including waters separated by man-made dikes or barriers, natural river berms, beach dunes and the like. ~~bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ''adjacent wetlands.''~~ Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f) are not adjacent.

(2) Isolated waters. The term isolated waters mean non-navigable, isolated, intrastate waters that do not have a continuous hydrologic surface connection to a water identified in paragraphs (a)(1) through (3) of this section.

(~~d~~3) High tide line. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence
of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane
or other intense storm.

(4~~e~~) Ordinary high water mark. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. The ordinary high water mark for perennial streams and rivers coincides with the outer boundaries of the floodplain located at the elevation that corresponds to twice the maximum channel depth at the 1.5-2 year flow.

(5) Perennial tributary. The term perennial tributary means a water that continually flows or has water

that is permanent for approximately twelve months of the year except during drought conditions and has a continuous hydrologic surface connection to a water identified in paragraphs (a)(1) through (2).

(6~~f~~) Tidal waters. The term *tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(7) Traditionally navigable waters. The term traditional navigable waters means those waters that are subject to Sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899, the territorial seas, and all perennial mainstem waters as determined at the Hydrologic Unit Code (HUC) 6 scale that have the capacity either currently or in the future for use in the transportation of humans, animals or freight.

(8) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

§ 328.4 Limits of jurisdiction.
(a) *Territorial Seas.* The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles. (See 33 CFR 329.12)
(b) *Tidal Waters of the United States.*
The landward limits of jurisdiction in tidal waters:
(1) Extends to the high tide line, or
(2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.
(c) *Non-Tidal Waters of the United States.* The limits of jurisdiction in non-tidal waters:
(1) In the absence of adjacent wetlands, the jurisdiction extends to the outer boundary of the floodplain located at the elevation that corresponds to twice the maximum channel depth at the 1.5-2 year flow for perennial streams and rivers or in the case of lakes and reservoirs to the ordinary high water mark, or
(2) When adjacent wetlands are present, the jurisdiction extends to the limit of the adjacent wetlands or the outer boundary of the floodplain located at the elevation that corresponds to twice the maximum channel depth at the 1.5-2 year flow for perennial streams and rivers, whichever is more limiting. In the case of standing waters, jurisdiction extends to ~~beyond~~ the ordinary high water mark ~~to the limit of the adjacent wetlands~~.
~~(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.~~

§ 328.5 Changes in limits of waters of the United States.
Permanent changes of the shoreline configuration result in similar alterations of the boundaries of waters of the United States. Gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterway which also change the boundaries of the waters of the United States. For example, changing sea levels or subsidence of land may cause some areas to become waters of the United States while siltation or a change in drainage may remove an area from waters of the United States. Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer. Verification of changes to the lateral limits of jurisdiction may be obtained from the district engineer.