

**Pete Ricketts**  
Governor

STATE OF NEBRASKA

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June 16, 2017

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

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

RE: Waters of the United States

Dear Mr. Pruitt and Mr. Lamont:

In response to your letter of May 8, 2017, on behalf of the State of Nebraska, we are submitting these comments on the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (the Corps) forthcoming proposal to revise the Clean Water Rule: Definition of Waters of the United States, Final Rules, 80 Fed. Reg. 37,054 (June 29, 2015).

We appreciate that states and other stakeholders directly impacted by the rule are being contacted for comment. Congress intended that the Clean Water Act ("CWA") "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). Given the importance of water quality to Nebraskans, it is critical that a new rule be developed and implemented which recognizes that states have the primary responsibility for decisions involving the intricacies of land use and water management.

Our state remains concerned about the proposed expanded definition of "Waters of the United States" ("WOTUS") adopted in 2015, both because of its expansive reach and because of the difficulty in determining what water or land may be considered jurisdictional under the existing regulation. That is why Nebraska joined with a majority of states to legally challenge that rule on both procedural and

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substantive fronts. We continue to be committed to preserving our authority over our land and water resources.

With those concerns in mind, Nebraska supports a definition of WOTUS that provides for limited federal jurisdiction by adopting a clear and predictable standard for state and federal governmental agencies. This will also benefit those impacted by subsequent regulatory decisions. In addition to the effects on agriculture, uncertainty with regard to jurisdiction can delay critical infrastructure and other important projects.

Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) stated that Clean Water Act jurisdiction includes relatively permanent streams and wetlands with a direct surface connection. If properly implemented, this provides a clear, bright-line approach to jurisdictional limits that agencies can apply and the regulated public can readily understand. We support further definition of the term "relatively permanent" in this context. We would expect that, at a minimum, the definition would allow for regional variation. As states are best positioned to understand regional variations, we are ready to be a part of that continuing conversation.

Nebraska, like other states, clearly has the authority to protect waters of the state. Principles announced by Justice Scalia would exclude from federal jurisdiction waters that are properly under state control, such as groundwater, agricultural waters including farm ponds, stock ponds, and irrigation ditches, and man-made dugouts, pits, and ponds used for irrigation where not connected to jurisdictional surface waters. Although these waters fall outside federal jurisdiction, it does not mean that the waters are unregulated – our state regulatory agencies are well-equipped to protect state waters without federal intervention.

We also have several concerns about the recent federal application of the Clean Water Act. Nebraska is a leading agricultural state with an economy that centers heavily on the production of crops and livestock. Specifically, Nebraskans object to the unclear scope of the "normal farming exemption" under 33 U.S.C. § 1344(f)(1).

Finally, we want to emphasize the importance of providing certainty to the regulated public with regard to whether their planned activities would be subject to requirements of the Clean Water Act. As you move forward with rulemaking, we hope you will continue in the spirit of cooperative federalism to solicit input from the states and all stakeholders in developing a limited, clear, and predictable definition of "waters of the United States" which respects the work of states to responsibly manage land and water resources.

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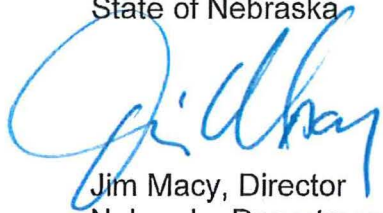
Nebraska appreciates your willingness to engage with states to better balance the principles of federalism that are set forth in the United States Constitution.

Thank you for the opportunity to comment.

Sincerely,



Pete Ricketts, Governor  
State of Nebraska



Jim Macy, Director  
Nebraska Department of Environmental Quality



Gordon W. Fassett, Director  
Nebraska Department of Natural Resources



Greg Ibach, Director  
Nebraska Department of Agriculture