



May 17, 2017

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

RE: Review of Michigan Clean Water Act Section 404 Permitting Program

Dear Administrator Pruitt,

On behalf of the Michigan Farm Bureau, the Michigan Chamber of Commerce, and the thousands of individuals and businesses represented by these organizations, we are writing to request a re-review of Michigan's Clean Water Act (CWA) Section 404 Permitting Program—as amended in 2013 by Michigan Public Act 98 (PA 98)—for compliance with the requirements of the CWA for state-administered Section 404 programs.

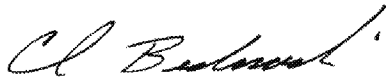
In 1984, Michigan assumed authority to administer the CWA Section 404 permit program for the discharge of dredged or fill materials into waters of the United States, and has continued to administer the program since that time. In 1997, a request was made by the Michigan Environmental Council to the United States Environmental Protection Agency (EPA) to review the program for compliance with the requirements of Section 404. An informal program review by the EPA was completed in April 2008, which identified a number of deficiencies in Michigan's program. Michigan's response to EPA's findings culminated in the passage of PA 98 in 2013, which made significant amendments to Parts 301 and 303 of Michigan's Natural Resources and Environmental Protection Act (NREPA) in an effort to address the identified programmatic deficiencies. The amended statute was sent to EPA in July 2013 by the Michigan Department of Environmental Quality (MDEQ) as a proposed revision to Michigan's CWA Section 404 program. EPA again reviewed the amended program for compliance, and in December 2016 issued its final determination that the revised program continued to show deficiencies and was therefore noncompliant with Section 404. EPA warned that failure to address these persisting deficiencies would result in revocation of the authority granted Michigan in 1984 to administer the permitting program.

It is our belief that the EPA's final determination regarding Michigan's revised program was in error, as it appeared to discount, if not entirely neglect, a number of mitigating factors and legal principles that would, together, mandate the opposite conclusion: that Michigan's program, as amended, is functionally equivalent to and at least as stringent as the standards imposed by CWA

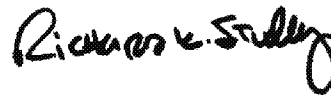
Section 404 and should therefore be approved, as written. For this reason, we believe a second review of Michigan's amended program is both appropriate and necessary. Attached to this letter is a brief discussion of our primary legal reasons for disagreeing with the agency's conclusion regarding the fourteen (14) sections in NREPA that it identified as nonconforming, and for requesting a second review of Michigan's amended program.

We appreciate your time and attention to this matter, and look forward to working with you and your staff to facilitate a quick and thorough review of Michigan's program so the State can move forward with its implementation and stakeholders can proceed with certainty in planning and executing projects across our great state.

Sincerely,



Carl Bednarski, President
Michigan Farm Bureau



Richard K. Studley, President & CEO
Michigan Chamber of Commerce

Cc: Rick Snyder, Governor, State of Michigan
Heidi Grether, Director, Michigan DEQ
Michigan Congressional Delegation

Appendix A

Legal Arguments Contesting EPA's Decision of Non-Compliance

1.) Section 30103(1)(g)(vii) Exemption for Culvert Replacement, Including Culvert Extensions of Not More Than 24 Additional Feet Per Culvert

EPA found that the exemption for culvert replacement, including the extension of an existing culvert by not more than 24 feet is inconsistent with the CWA because it entails more than maintenance of a structure to its original design and would result in more than a minor impact to the water body. Although a culvert extension does indeed alter the scope of size of the original fill design (which would be prohibited under 40 CFR § 232.3(c)(2)), EPA failed to consider the application of § 232.3(c)(6), which permits the construction or maintenance of roads in accordance with best management practices “to assure that flow and circulation patterns and chemical and biological characteristics of water of the United States are not impaired.” This explicitly includes the practice of “bridg[ing], culvert[ing], or otherwise design[ing]” road fill “to prevent the restriction of expected flood flows.” Many culverts in the state were constructed during a time when engineering knowledge was not as advanced as it is today, and as a result, a number of these culverts do not meet best management practices and are inadequate to prevent the restriction of flood flows and to protect the condition of the road and the transected water body. By denying an exemption for the replacement of a legacy culvert with one that is more appropriately sized to the roadway and water body (limited to no more than 24 feet of additional length), the EPA is acting inconsistently with the underlying purpose of the federal road maintenance exemption, which is to prevent the degradation of roadways and culverts in order to avoid the potential for even greater damage to the water body (such as erosion) should the culvert fail of its intended purpose. Therefore, Michigan’s exemption is both defensible and more logically consistent with the purposes of the analogous federal exemptions.

2.) Section 30103(1)(m) Exemption for Controlled Access of Livestock to Streams

EPA objected to a new exemption for the construction of structures built to provide livestock access to water or to cross streams. The statute explicitly conditions the exemption on construction of the access or crossing in accordance with USDA, NRCS applicable practice standards, however, EPA was not satisfied, since the subsection itself is not explicitly limited to established (i.e., ongoing) farming operations. If one were to consider the livestock crossing exemption (which has no exact federal analogue) in isolation, it certainly could be susceptible to EPA’s argument that it exceeds the scope of the federal farming exemption by not being limited to areas of established and ongoing farming/ranching use. However, statutory sections must be considered in the context of the entire statute, and PA 98 explicitly limits Michigan’s agricultural exemption to activities that are part of “an established ongoing farming, ranching, horticultural, or silvicultural operation.” MCL § 324.30305. Other exemptions throughout Michigan’s law that touch or concern agriculture need not be explicitly limited to areas of established use because they all must be understood in light of the restrictions placed on the overarching agricultural exemption.

Further, as with the culvert maintenance exemption, the purpose of this exemption is to encourage practices that will serve to further the goals of the CWA and Michigan’s law: to wit, the protection of regulated water bodies through the implementation of best-management practices. Requiring a permit to implement such conservation practices on a farm or ranch has the effect of discouraging their implementation, thereby creating a perverse incentive to avoid these practices. Ironically, by taking issue with this exemption, EPA is actually discouraging those activities that would serve to further the purposes and goals of the Act. At some point, the agency must consider functional equivalence rather than mere textual analogy.

3.) Section 30305(2)(m) Exemption for Modification of Utility Line Installation

EPA found this exemption to be problematic both because the term “knifing in” with reference to utility line installation (when the line is less than six (6) inches in diameter) was not defined to explicitly exclude the discharge of fill into regulated wetlands and because there was no direct analogue in federal statute or regulations. The second contention is insufficient grounds to reject a state exemption. The Act does not assert that qualifying state programs are limited to the explicit exemptions contained in federal regulations. The

test, rather, is whether the state program is at least as stringent as the federal program. It is entirely possible that a state could expound on a federal exemption while remaining as stringent in its regulation of discharges to regulated waters. For example, the EPA found Michigan's fencing exemption to be consistent with the federal law even though neither Part 323 of Title 33 or Part 232 of Title 40 explicitly mention fencing. Likewise, allowing the knifing in of utility lines, though not explicitly included in the federal regulations, is not inconsistent with federal law because the practice of knifing does not result in the discharge of additional fill material to wetlands, nor does it change the bottom elevation of wetlands, and therefore would not, by definition, be a prohibited activity. That Michigan chose to clarify this point by including "knifing-in" in its exemption is entirely within its discretion, and does not somehow change the inherently "exempt" nature of the activity. EPA's contention to the contrary lacks any possible factual grounding.

EPA also took issue with the exemption for placement of utility poles and pilings as "the placement of pilings...may, but does not always, include the discharge of fill material." Although this is certainly true, this is the purpose of exemptions – to exempt otherwise unlawful discharges when such discharge is deemed necessary and/or of such minimal impact as to not transgress the purposes of the Act. In this case, the exemption for utility pole placement is explicitly limited to installations with "minimal" (i.e. less than 1 cubic yard) of structural support and that "[minimize] any adverse effect on the wetland." Again, such carefully enunciated constraints demonstrate that this exemption is narrowly tailed to further the purposes of the Act.

4.) Section 30305(2)(o) Exemption for Placement of Biological Residues in Wetlands

EPA objected to this exemption on the grounds that the federal definition of "fill material" specifically includes woodchips, and because the discharge of woody wetland vegetation into a jurisdictional wetland in the course of land clearing has been considered by the courts to be a Section 404-regulated discharge. While citing the case of *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983) in support of its contention that the placement woody wetland vegetation that is removed from a wetland back into that wetland is *per se* an unlawful discharge of fill material, the EPA ignores cases that have added flexibility to this rule, including, e.g., *Save our Wetlands, Inc. v. Sands*, 711 F.2d 634 (5th Cir. 1983), in which the court noted that mechanized removal of trees from wetlands and incidental fallback associated therewith is not a discharge of dredged or fill material when the activity is not intended to permanently change the area from wetland into non-wetland. Although Michigan's exemption does not include this limitation verbatim, by limiting the exemption to the cutting of woody vegetation and in-place grinding of stumps (as opposed to leveling or addition of other, outside biological residues), it is clear that it is only meant to cover mechanized land-clearing activities that would have a minimal impact on the wetland and that would not result in the conversion of wetland to non-wetland.

5.) Section 30305(4) Exclusions for Incidentally Created Wetlands

EPA took issue with a number of the descriptions of incidentally created wetlands that are expressly excluded from regulation under Michigan's program. One of the exclusions (for wetlands created due to construction or operation of water treatment pods or stormwater facilities) that EPA pointed out as being inconsistent was present in Michigan's law prior to the passage of PA 98 and was not flagged by EPA during its initial review and noncompliant. Therefore, EPA's objection to that section appears to be entirely arbitrary. Further, Part 230 of Title 40 similarly exclude from regulation "[t]reatment ponds or lagoons designed to meet the requirements of the [Act]," and "[s]tormwater control features constructed to convey, treat, or store stormwater," so EPA's conclusion appears to even fly in the face of federal regulations.

The other exclusions flagged by the agency were added or modified by PA 98, but two of them address wetlands incidentally created by structures that drain only *uplands* (which are certainly outside of the purview of the CWA), and the final excludes wetlands created by the adoption and implementation of agricultural conservation practices, which one would think the agency would attempt to encourage, rather than discourage by threatening to pull any incidentally created wetlands within the reach of the Act. To justify its claim that such structures are jurisdictional, EPA relied on guidance documents promulgated by the agency, but cited no sections of statute or regulation to demonstrate that such an expansive reading of the Act's jurisdiction is legally defensible.

6.) Section 30305(5) Exemption for Waters that are Made Contiguous to Regulated Waters as a Result of Commercial Excavation and Mining.

EPA objected to this categorical exemption from regulation on the grounds that artificial structures such as commercial mining and excavation pits may be used to pull waters that would otherwise be non-jurisdictional within the reach of the Act. This conclusion, again, appears to completely ignore the fact Part 230 of Title 40 explicitly excludes from the definition of “waters of the United States” “water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water.” It follows that if such features themselves are not jurisdictional, they could also not be used to advance the line of regulation further “inland” (i.e. if a water was not previously jurisdictional by virtue of being within the prescribed distances of regulated waters, it makes no sense that it could *become* jurisdictional if a categorically non-jurisdictional water was created adjacent to it).

7.) Section 30311(7) Consideration of Feasible and Prudent Alternatives

EPA determined that subsection (7) of Michigan’s “prudent and feasible” analysis was inconsistent with Section 230.10(a) of Title 40 by virtue of the guidelines’ presumption that practicable alternatives to citing a project in a regulated wetland exist when the project is not water dependent. Why EPA believes that Section 230.10(a)’s formulation is applicable to this clause is not entirely clear, especially since subsection (4) of Section 30311 already addresses water-dependency by stating that “a permit shall not be issued unless the applicant also shows either [that]: (a) The proposed activity is primarily dependent upon being located in the wetland; [and] (b) A feasible and product alternative does not exist. Clearly, then, subsection (7) does not stand for the proposition that the nature of the activity (i.e. whether it is water dependent or not) shall not be considered when completing the feasible and prudent alternative analysis. Rather, it means that—aside from the water-dependency analysis in subsection (4)—MDEQ will not consider the use to which a permitted structure will be put when considering prudent and feasible alternatives. For example, a food processing facility would be treated the same as an industrial warehouse. We are not aware of any federal provisions that directly prohibit this type of analysis.

8.) Section 30311d(6) Conservation Mitigation Credits for Easement for Impacted Agricultural Sites

EPA’s objection to Michigan’s allowance for a conservation easement with MDEQ *as part* of mitigation requirements appears to be based on the assumption that this section means that such easement would entirely replace other mitigation requirements. The inclusion of the phrase “in part” renders the agency’s interpretation invalid, as it clarifies that a conservation easement would not constitute the sum-total of mitigation required by the department. The remainder of Michigan’s wetland protection act clearly demonstrates that the state continues to adhere to a “no net loss” principal of wetland mitigation.

9.) Section 30321(5) Definition of “Not Contiguous”

EPA objects to Michigan’s limitation of the concept of “contiguity” (which is roughly equivalent to “adjacency” under the federal regulations) to those cases where there is either a direct surface water or interflowing groundwater connection to an otherwise jurisdictional water on the grounds that the federal regulations do not require such physical connection for a water to be deemed a regulated “water of the United States.” Although it is true that in the most recent regulations, the agency extends the jurisdictional reach of the Act to certain bodies of water that are merely within a prescribed proximity to another jurisdictional water, it did so in an attempt to incorporate Justice Kennedy’s “significant nexus” test from *Rapanos v. United States*, 547 U.S. 715 (2006) into the regulations. Michigan’s requirement of some degree of hydrological connection between water bodies is not inconsistent with this principal, and it accomplishes the purposes of the Act by ensuring that those waters that could impact the water quality of other, downstream waters are regulated. Further, Michigan also regulates as jurisdictional isolated waters that are greater than five acres in size. When coupled together, it is highly unlikely that Michigan regulates *less* than would be regulated under the federal program,

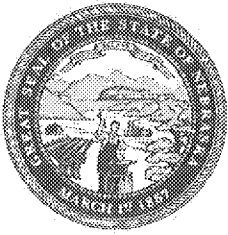
notwithstanding the requirement for a hydrologic connection between a water body that is less than five acres in size and other, traditional jurisdictional waters.

10.) Section 30321(6) Use of Agricultural Drains to Establish Jurisdiction

PA 98 changed Michigan law to directly prohibit the use of agricultural drains (defined as a human-made conveyance of water that does not have continuous flow, flows primarily as a result of precipitation-induced surface runoff or groundwater drained through subsurface drainage, and serves agricultural production) to determine whether a wetland is contiguous—and, thus, regulated—to a jurisdictional lake, pond, river, or stream. EPA objected to this addition on the grounds that “[n]othing in federal law excludes consideration of agricultural drains when determining connection to waters of the United States.” As a matter of first principals, EPA does not object to Michigan excluding agricultural drains, *themselves*, from regulation. In fact, the EPA also provides a categorical exemption for certain man-made ditches in its 2015 rule amending the definition of “waters of the United States.” Rather, the agency asserts that even non-jurisdictional waters may be used to demonstrate a sufficient “connection” between an otherwise isolated, non-jurisdictional water to a downstream, jurisdictional water to bring such water within the purview of the Act. In addition to the argument advanced against this premise in the discussion of Section 30305(5), above, it must also be noted that both the majority opinion and Kennedy’s concurring opinion in *Rapanos* strongly criticized the agency for attempting to regulate man-made drainage ditches and indicated in no uncertain terms that the Act’s reach does not extend that far. *See, Rapanos*, at 734, 778-79. To the extent, therefore, that the agency relies on its own post-*Rapanos* guidance document to demonstrate that such waters may be regulated, this document appears to be an unfaithful reading of the court’s opinion.

11.) Section 30321(7) Categorical Exemption for Drainage Structures from Definition of Wetland

As with the previous section, EPA found that the first part of this section was noncompliant on the grounds that a drainage structure could be a regulated wetland if it met the three wetland criteria. This section obviously does not stand for the proposition that an artificial drain could not possibly run through a wetland or that it could not possibly take on wetland characteristics, itself, through neglect or lack of maintenance. Rather, as it states, “in and of itself,” an artificial drainage structure will not be considered a wetland. This is, again, consistent with the opinion of the Court in *Rapanos*, and is in the same vein as the agency’s regulations, which list out a number of man-made structures that are excluded from the definition of “waters of the United States” even though they might manifest all of the characteristics of regulated wetlands or other waters. The Court has clearly endorsed excluding such manmade features from regulation under the Act, and the agency’s decision to the contrary thus does not accord with the law.



Pete Ricketts
Governor

STATE OF NEBRASKA

OFFICE OF THE GOVERNOR
P.O. Box 94848 • Lincoln, Nebraska 68509-4848
Phone: (402) 471-2244 • pete.ricketts@nebraska.gov

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

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.

Nebraska Reply Letter
June 16, 2017

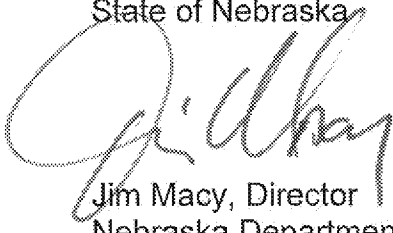
Nebraska appreciates your willingness to engage with states to better balance the principles of federalism that are set forth in the United States Constitution.

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

To: Kwok, Rose[Kwok.Rose@epa.gov]; Wesson, Dolores[Wesson.Dolores@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; McDavit, Michael W.[Mcdavit.Michael@epa.gov]; Downing, Donna[Downing.Donna@epa.gov]
From: Eisenberg, Mindy
Sent: Wed 7/26/2017 12:33:10 PM
Subject: FW: WOTUS letter & resolution from Western States Land Commissioners Association
WSLCA vacate WOTUS letter and resolution 7-25-2017.pdf

Hi,

Can someone add this to the docket for step 1?

Thanks!

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4504T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

From: Greenwalt, Sarah
Sent: Wednesday, July 26, 2017 6:49 AM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Forsgren, Lee <Forsgren.Lee@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>
Subject: FW: WOTUS letter & resolution from Western States Land Commissioners Association

FYI

Sarah A. Greenwalt

Senior Advisor to the Administrator

for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722|Cell: **Ex. 6**

Greenwalt.Sarah@epa.gov

From: Kathy Opp [<mailto:> **Ex. 6**]

Sent: Tuesday, July 25, 2017 7:45 PM

To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>

Cc: Harry Birdwell <harry.birdwell@clo.ok.gov>

Subject: WOTUS letter & resolution from Western States Land Commissioners Association

Dear Ms. Greenwalt,

During a recent visit to the state of Utah, Administrator Pruitt met with representatives from the Utah SITLA. Utah is a member of the Western States Land Commissioners Association (WSLCA) along with 20 other western states whose land offices manage over 515 million acres of surface, mineral and waterway acres for the benefit of K-12 public education and other state institutions. The association has actively commented for the past three years on the impact the WOTUS rule has on states and our ability to meet our constitutional mandate to maximize revenue for our beneficiaries and serve our citizens.

Attached please find a letter from WSLCA president, Harry Birdwell (Oklahoma), and a resolution detailing our concerns and recommended actions. As major land owners and land managers across the west our association members possess a wealth of practical, on-the-ground knowledge. We welcome the opportunity to find real solutions and appreciate Administrator Pruitt's expressed willingness to work with WSLCA. If you would, please acknowledge receipt of our correspondence and feel free to contact me if you have any questions.

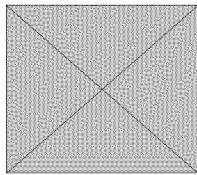
Thank you for your consideration.

Kathy Opp

executive director - WSLCA

Ex. 6
Ex. 6 mobile

208-362-5439 fax



"Helping States Fund Education"

www.wslca.org

"Always do right. It will gratify some people and astonish the rest" Mark Twain

Harry Birdwell
President, WSLCA

Kathy J Opp
Executive Director, WSLCA

Ex. 6



Official Correspondence
c/o Linda Fisher, Secretary
1707 N 9th Street
PO Box 5523
Bismarck, ND 58501

July 25, 2017

Mr. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Washington, DC 20510

[sent via e-mail to Sarah Greenwalt]

Dear Mr. Pruitt:

The Western States Land Commissioners Association (WSLCA) support efforts to vacate the rule, Definition of "Waters of the United States" under the Clean Water Act (WOTUS), that was adopted in May 2015. Adoption of WOTUS by the EPA failed to give due regard to the core principles of federalism embodied in the Clean Water Act and to appropriately consider local plans and priorities for land and water resources. As a result, the rule is marked by regulatory uncertainty and overreach.

WSLCA concern stems from our constitutional and statutory mandates to manage public lands and natural resources to generate income for the benefit of K-12 public education and to support other public purposes. The association is comprised of the land commissioners of 20 states, which together manage over 515 million acres of land, mineral properties, submerged lands, and water resources. Collectively, WSLCA's membership represents the nation's second largest landowner. WSLCA also consists of affiliate members representing businesses, industries, and organizations that support WSLCA's mission and help to conserve, develop, and maximize the value of the lands and natural resources within the western states.

The WOTUS rule directly impacts 20 state education budgets due to impairing our ability to effectively manage the 515 million acres of land, minerals, and waterways which are held in trust for our school children and individual state residents. We therefore support swift action to vacate the final rule. If a future rulemaking process is deemed necessary, it should be developed from a process based on peer-reviewed scientific studies and comprehensive economic analyses, through input from landowners and state and local officials, and full integration of state land and water management authorities and plans.

Thank you for your consideration of our concerns on this matter.

Sincerely,

Harry Birdwell, President

Enclosure:
Resolution 2017-11

'Connecting the management of lands and assets to education funding'



RESOLUTION 2017-11
WATERS OF THE UNITED STATES AND CLEAN WATER ACT JURISDICTION

Whereas, the Western States Land Commissioners Association ("WSLCA") and its member states manage over 515 million acres of trust lands, minerals, and waterways that are interspersed with federal lands; and

Whereas, members of WSLCA have state constitutional mandates to manage millions of acres of lands for economic development, public education, conservation, recreation, and other public purposes provided by state law; and

Whereas, the ability of member states to fulfill their constitutional mandates is severely hindered when trust lands are surrounded by federal lands and federal wildlife management mandates; and

Whereas, the Western States Land Commissioners Association ("WSLCA") reaffirms its commitment to the conservation and preservation of America's waters; and

Whereas, the Environmental Protection Agency (EPA) implemented Waters of the United States (WOTUS) Rule to revise the regulatory definition of "waters of the United States" under the Clean Water Act in August of 2015; and

Whereas, the EPA's WOTUS Rule significantly broadens federal jurisdiction over state lands, waterways, and water resources in a manner that disregards sound science, contravenes Supreme Court precedent, and infringes on the constitutional and economic rights of western states and citizens; and

Whereas, members of WSLCA have state constitutional mandates to manage millions of acres of lands and waterways for public education, economic development, conservation, recreation, and other public purposes provided by state law, which will be significantly and adversely impacted if the proposed rule is adopted; and

Whereas, the WOTUS Rule expands federal jurisdiction over wholly intrastate water bodies, wetlands, intermittently wet features, and all tributaries, regardless of their size, function, amount, and regularity of flow and relationship to traditional navigable waters, in contravention of Supreme Court precedent and the current scope of federal authority under the Clean Water Act; and

Whereas, multiple litigation efforts across the nation were initiated by States and stakeholders to stay implementation of the WOTUS Rule and to remand the Rule to the EPA; and

Whereas, multiple Federal Courts stayed implementation of the Rule and the 6th Circuit Federal Court stayed implementation nation-wide; and

Whereas, President Trump signed Executive Order 13778 in February of 2017 requiring the EPA and the U.S. Army Corps of Engineers to review the WOTUS Rule to insure the Rule “...is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.”

Whereas, states have primary jurisdiction for the management of bodies of water within their own borders, and several states have drafted, or are in the process of creating, their own water management plans based on sound science and local information to conserve and preserve water and waterways while allowing for responsible economic growth within their state.

BE IT THEREFORE RESOLVED AS FOLLOWS:

1. The WSLCA urges the EPA to fully implement Executive Order 13778, respect the limits of Supreme Court precedent and the scope of federal authority under the Clean Water Act, and to refrain from any efforts to extend regulatory jurisdiction to reach tributaries, waterways, wetlands, and other water bodies and systems that lack a significant nexus to navigable waters as traditionally understood; and

2. The WSLCA urges the EPA to rescind the WOTUS Rule and issue a new Rule with concise definitions that respect the rights of states to regulate waters within their borders, recognize the validity of existing delineations and protect the rights and interests of landowners relying on the federal government's existing jurisdictional determinations; and
3. The WSLCA recommends that all federal land use management and water management plans and policies strictly comply with and conform to the state water management plans and policies implemented in each state's jurisdiction; and
4. The WSLCA urges Congress to take federal legislative action to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution of waters wholly within a state while allowing responsible economic development of state and private lands and water resources.

Adopted this 12th day of July, 2017.



Harry Birdwell, President
WSLCA



Linda Fisher, Secretary
WSLCA

Ariel Wittenberg

From: Amanda De Jong <adejong@iowacorn.org>
Sent: Monday, August 07, 2017 10:23 AM
To: kayla.lyon@iowa.gov
Cc: Ben Gleason
Subject: WOTUS talking points
Attachments: 8.02.17 NCGA WOTUS TP's.docx; RVP TPs August 2017.docx

Hi Kayla – got you voicemail. These are the talking points Bob Hemesath and Mark Heckman will be using tomorrow. They are brief and obviously not an exhaustive list of all of our thoughts and concerns on WOTUS, but they are important points that I believe will likely not be covered by other stakeholders at the meeting. In addition, I am including some talking points on RVP, which is at the top of our list for things we need to work on with EPA.

You asked about the Scalia opinion. We are supportive of a new rulemaking that includes both congressional intent and the limitations set forth by the Scalia opinion in Rapanos. Offline, I would tell you Scalia offered one opinion, but not the only one the Sp. Court has set. Relying solely on Scalia could set us up for an overturn of the rule. Significant nexus for example is going to have a role to play. So our “official” opinion is that a new rule must include the limitations of Scalia. But knowing that these other opinions and congressional intent also needs likely addressed. This is consistent with the comments we submitted on the rule in 2014. Hope this helps!

I’ve also got our NCGA consultant working on a question that might be beneficial to ask Pruitt about the DSMWW lawsuit and ways to protect from that sort of thing happening in the context of the CWA. I’ll send that over soon.

Let me know if you need any additional information. Good luck!
Amanda

Greenwalt, Sarah

From: Hargiss, Christina <christina.hargiss@ndsu.edu>
Sent: Wednesday, August 9, 2017 5:44 PM
To: Greenwalt, Sarah
Subject: RE: Contact

Hi Sarah,

Thank you so much for reaching out. Here are a few more thoughts I had during the meeting that I wasn't able to articulate with the time allotted.

1) I know there is concern about the WOTUS rule including road ditches (which can be wet and have "wetland" characteristics) and this is not an appropriate water area that should be considered WOTUS. To be defined as a wetland (hydrology, hydric soils, and hydric vegetation) areas only need to have surface water for 5% of the growing season, and this can equate to surface water for as little as 7-10 days in our state. That is a far reaching definition to be protected under WOTUS. In the case of road ditches it may fit the criteria to be considered a "wetland", but this is not a site that should be protected under WOTUS.

2) I think most would agree that they are interested in protecting prairie pothole wetlands that provide ecological functions such as holding water on the landscape in times of flooding, filtering/cleaning water, food/water source for domestic animals and wildlife, habitat for wildlife (the prairie pothole region has 10% of the duck habitat in the US but produces 50% of the duck population), and recharging the groundwater. As these functions meet the idea of the original clean water act to maintain "physical, chemical, and biological integrity" of the nation's waters. However, I am not sure this is always represented in North Dakota by adjacency to navigable waters. Sometimes it is more of an issue of size or permanence of water. Again I think this brings up the uniqueness of our wetlands and waters where recodifying WOTUS would provide an opportunity for innovate state solutions to deal with our wetlands/waters.

3) Condition of wetlands is a tricky subject so I wouldn't recommend basing WOTUS on it. However it is important. Small wetlands (those mentioned above that may be wet for 5% + of the growing season) in North Dakota that are cropped through year after year provide very little ecological benefit and stopping farmers from farming them doesn't benefit anyone. However, these same small wetlands in good condition (likely on grazed rangeland areas) are very useful as they provide water for cattle and food for ducks early in the season before the ducks move up to bigger ponds for nesting, breeding and staging. So the functions provided don't always depend on the size or adjacency, but condition also is a factor.

If you need any additional information or if there is anything I can help with please don't hesitate to ask.

Thanks,

Christina

Christina Hargiss, Ph.D.
Natural Resources Management Program
School of Natural Resource Sciences
203B Morrill Hall
Phone: (b) (6)

-----Original Message-----

From: Greenwalt, Sarah [mailto:greenwalt.sarah@epa.gov]

Sent: Wednesday, August 09, 2017 11:28 AM

To: Hargiss, Christina <christina.hargiss@ndsu.edu>

Subject: Contact

Christina,

Thank you for your comments today; it was great meeting you. Feel free to email me any additional comments and I will make sure they are a part of the record.

Best,

Sarah Greenwalt

Sent from my iPhone

From: [Schaefer-Gomez, Julia](#)
To: [Schaefer-Gomez, Julia](#)
Subject: Article: ND leaders want repeal of EPA rule
Date: Tuesday, August 22, 2017 11:33:29 AM

Submitted on 08/21/2017 11:12AM

Submitted values are:

Name: ND State Senator Larry Luick

Email Address: lluick@nd.gov

Comments: Firstly, I had the opportunity to sit in on the meeting that Mr. Pruitt had in Fargo a few weeks ago. I was encouraged by his willingness to listen and hopefully digest the information and concerns that were presented to him by ND folks and agriculture groups. I am the chairman of the Senate Agriculture Committee and I am asked about this quite a lot. The concerns are real and the fear is that not only will our farmers be needing to fend off the wetland grabbers for waterfowl, but if this is enacted, for any other deemed control. My efforts are very focused on water management, soil management, nutrient loss management, and other natural resource concerns that go hand-in-hand with agriculture, and we are enacting laws to protect the environment, as well as negative downstream impacts. We, ND, as well as all of the other states have many intelligent people that are very capable of overseeing these issues. I think that the federal government is very needed to cooperate with the states on this, and that the federal government should have a very responsible role in the original 'navigable' water rule, but no further. Sincerely, Senator Larry Luick

Message

From: Nielsen_Adam [ANielsen@ifb.org]
Sent: 9/1/2017 8:48:40 PM
To: Bennett, Tate [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1fa92542f7ca4d01973b18b2f11b9141-Bennett, E]
Subject: RE: WOTUS discussion at EPA -- Weds. Sept 13 -- 1 p.m.
Attachments: USEPA Regulatory Reform.docx; IFB Roster for EPA Visit 091317.docx

Hi Tate, So sorry for the delay. My roster was just recently finalized. It is attached for the 1 p.m. September 13 visit. I have a total of 16 in the group, including a writer for our state Farm Bureau publication -- FarmWeek -- who understands the meeting is off the record. Most of the farmers are corn-soybean producers. We have a few with livestock, including a fairly big cattle operator.

I have attached our USEPA Regulatory Reform Comments filed in May. We would like to discuss:

- Waters of the United States new rulemaking – what are the contours of the new rule? What kind of response are you expecting from us? We tried to provide an “echo chamber of gratitude” when you launched the reg reform process.
- RFS – what does the future hold?
- Narrowing of “normal farming” activities under Sect 404 of the CWA
- What’s the future of Region V?
- The administrator’s views on cooperative federalism

Please let me know if you need anything further from us. We will be coming over from lunch at USDA’s Whitten Building - taking the Metro to Federal Triangle Station.

Thanks so much,

Adam Nielsen

From: Bennett, Tate [mailto:Bennett.Tate@epa.gov]
Sent: Friday, August 18, 2017 10:44 AM
To: Nielsen_Adam <ANielsen@ifb.org>
Subject: RE: WOTUS discussion at EPA

Of course. 1 PM that day would be great. Please come to WJC North Building. Any ideas what topics you’d like to discuss?

From: Nielsen_Adam [mailto:ANielsen@ifb.org]
Sent: Friday, August 18, 2017 11:14 AM
To: Bennett, Tate <Bennett.Tate@epa.gov>
Subject: RE: WOTUS discussion at EPA

Hi Tate, Thanks for your willingness to meet with Illinois Farm Bureau on Sept. 13. Our group will have 15 - 12 farmers, me and two other staff. We’re eating lunch across the mall at USDA and can be at WJC or wherever we need to be at about 1 p.m. Let me know when you need names, etc, for security. Thank you! Adam

Adam Nielsen

Director of National Legislation & Policy Development
Illinois Farm Bureau
1701 Towanda Ave.

Bloomington, IL 61701

Personal Phone/Ex. 6 | mobile

anielsen@ilfb.org



From: Bennett, Tate [<mailto:Bennett.Tate@epa.gov>]

Sent: Thursday, August 17, 2017 9:06 PM

To: Don Parrish <donp@fb.org>

Cc: Nielsen_Adam <ANielsen@ilfb.org>

Subject: Re: WOTUS discussion at EPA

No current plans to be in IL in Sept. happy to meet with your group on the 13th, however.

Don- I owe you a call!

Sent from my iPhone

On Aug 17, 2017, at 9:53 PM, Don Parrish <donp@fb.org> wrote:

No ag counsel yet - but you should reach out to Tate Bennett for both your visit and the Administrator's potential trip to Illinois.

Don

Sent from my iPhone

On Aug 17, 2017, at 4:54 PM, Nielsen_Adam <ANielsen@ilfb.org> wrote:

Hi Don, I'm taking a group of farmers to DC next month. We're in town from Sept 11-13 and I'm interested in stopping by EPA on the last day to discuss the next steps in WOTUS. Is there an ag counselor on staff at HQ yet? If so, do you have a name?

BTW, Mr. Shimkus says the administrator will be in Illinois next month. No date has been set, but they have sent Pruitt a list of proposed Illinois stops including the ones Lauren and I are suggesting.

Thanks, Adam

Adam Nielsen

Director of National Legislation & Policy Development

Illinois Farm Bureau

1701 Towanda Ave.

Bloomington, IL 61701

Personal Phone/Ex. 6 | mobile

anielsen@ilfb.org

<image001.jpg>

**Illinois Farm Bureau -- 1 p.m. with Tate Bennett
September 13, 2017**

Adam Nielsen Personal Phone/Ex. 6

Nielsen	Adam	Director of National Legislation
Whitehouse	Ryan	Assoc Director of National Legislation
Benson	Dale	Peoria County Farm Bureau
Streitmatter	Jake	Peoria County Farm Bureau
Doran	Lynn	Champaign County Farm Bureau
Charles	Clinton	Ford-Iroquois County Farm Bureau
Sheaffer	Leonard	Lee County Farm Bureau
Kirwan	Jeff	IFB District 3 Director – Mercer County
Halterman	Tamara	IFB District 5 Director – Grundy County
Stroisch	Deana	FarmWeek writer
Lyman	Karen	Henry County Farm Bureau
Fricke	Steve	Stephenson County Farm Bureau
Bartman	John	McHenry County Farm Bureau
Deuth	Daniel	Ogle County Farm Bureau
DeSutter	Drew	Knox County Farm Bureau
Bremer	Marc	State Young Leader Committee Chairman



May 12, 2017

U.S. Environmental Protection Agency
Office of Policy Regulatory Reform
Mail Code: 1803A
Docket ID No. EPA-HQ-OA-2017-0190
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: Comments on Environmental Protection Agency's ("EPA") Evaluation of Existing Regulations

Dear Ms. Rees:

Illinois Farm Bureau® ("IFB®") submits the following comments in enthusiastic support of the Environmental Protection Agency's ("EPA's or "Agency") evaluation of existing regulations.

IFB is a member of the American Farm Bureau Federation®, a national organization of farmers and ranchers. Founded in 1916, IFB is a non-profit, membership organization directed by farmers who join through their county Farm Bureau. IFB has a voting membership of more than 82,000. IFB represents three out of four Illinois farmers.

Specifically, IFB represents individuals engaged in agricultural production, both for crops and livestock. Requirements imposed by the Agency through its regulations can have significant impacts on our farmer members. Many of the impacts can be felt in the areas outlined by the Agency for review, including: 1) eliminating jobs or inhibiting job creation; 2) requiring action in the name of compliance that is outdated, unnecessary or ineffective; and 3) imposing costs that exceed benefits.

In these comments, IFB seeks to meet the Agency's request to be as specific as possible. In some instances, where the Agency's request for "supporting data or other information such as cost information" is not available, we have attempted to quantify the impact of the regulatory burden as concretely as possible and to "provide specific suggestions regarding repeal, replacement or modification." We welcome questions from your office or the Regulatory Reform Task Force if these comments need further amplification and will do our best to respond in as prompt and comprehensive a manner as possible. We greatly value this effort and hope the Agency succeeds in alleviating unnecessary and costly regulatory burdens on the agriculture community.

In this context, we wish to make a brief preparatory remark. As of May 10, the docket exceeded 19,500 comments, the overwhelming majority of them anonymous. These are presumably submitted from well-intentioned individuals, but they preponderantly assume

that the Agency's initiative is to undo, weaken, rescind or otherwise impair the nation's environmental safeguards. We see nothing in the Federal Register notice that supports such an inference. We wish to state for the record that IFB is not requesting that the Agency engage in, nor would we expect the Agency to pursue, an effort to impair, rescind, weaken or in any way retreat from health or environmental safeguards that have been authorized by Congress. Nothing in Executive Order 13777 would have the Agency ignore its statutory obligations to administer the environmental laws Congress has passed. We are not asking the Agency to weaken its commitment to health and the environment. We have identified regulatory obligations that can be modified or repealed consistent with the laws Congress has enacted, and we strongly encourage the Agency to consider these recommendations. It should also be noted that, also as of May 10, 2016, over 1,100 of those same 19,000 comments were filed by IFB members in *support* of this reform.

1. Waters of the US ("WOTUS") Rule (80 Fed. Reg. 37054, June 29, 2015; 40 CFR 230.3)

On February 28, President Trump signed Executive Order 13778 directing EPA to review the WOTUS rule and to publish a proposal rescinding or revising it. We strongly support the President's EO and urge EPA to pursue this effort aggressively.

Recommendation: We recommend that the Agency: 1) repeal the existing rule (80 Fed. Reg. 37054); and 2) in a separate rulemaking, propose a revised rule that more closely adheres to the language of the Clean Water Act and Supreme Court decisions in *Riverside Bayview*, *SWANCC* and *Rapanos*.

2. Spill Prevention Control and Countermeasures ("SPCC") Rule (40 CFR 112)

While EPA attempted to address concerns of the agriculture community raised by the SPCC rule, the program presents nearly insurmountable difficulties for agricultural producers. That assessment is borne out by the Agency's own Regulatory Impact Analysis ("RIA"). EPA examined the Clean Water Act violation data from 2001 to 2006. In over 10,000 violations in that time period, only 292 involved oil spills of any type, and only one of those involved a farm. Many other estimates in the RIA were incorrect as well. EPA estimated an approximate figure of 152,000 affected farms based on United States Department of Agriculture ("USDA") numbers. Nowhere did EPA mention the USDA numbers presented in the 2005 round of proposals that numbered potentially affected farms closer to 400,000. Yet despite these facts, EPA moved to place a costly and burdensome rule on the agricultural industry with no data to show a risk justifying the cost. EPA included other incorrect assumptions to bolster the cost-savings analysis. They estimated a savings of \$3.6 million due to exempting pesticide application equipment, but that cost was only based on a report from one state. They estimated \$2,000+ savings from not regulating home heating oil tanks, but those tanks were exempted in the original 1973 rule and no one has ever applied SPCC to those

tanks anyway. While Congress granted the Agency flexibility to address any concerns on farms, the Agency rejected this approach and imposed the strictest limit possible.

Recommendation: The SPCC for farms should be repealed.

3. CERCLA/EPCRA

- i. On April 11, 2017, the US Court of Appeals for the DC Circuit issued a ruling in long running litigation that struck down a 2008 rule providing an exemption from federal reporting of emissions from livestock farms. As a result of the DC Circuit ruling, in late May or early June 2017 livestock farmers will be responsible for calculating the rate of various chemical emissions associated with the storage of manure for use as a fertilizer, and treat and report these emissions as “emergencies” to state and local authorities under 42 USC § 11004 (EPCRA § 304) and to the Coast Guards National Response Center under 42 USC § 9603 (CERCLA § 103). These reports provide no benefit to regulators or the public, and in fact will cause significant harm to emergency reporting services (and the public’s reliance on them) that will be overwhelmed as hundreds of thousands of reports of livestock odor will swamp a system designed for responding to true emergencies. Failure to file the reports will subject livestock farmers to expensive citizen suit litigation filed by eco and animal rights activists.

Recommendation: EPA should develop a regulation that relieves farms of the obligation to file these reports by: (1) clarifying that the storage of manure for use as a fertilizer is a “routine agricultural operation” and, therefore, exempt under EPCRA from the definition of a hazardous chemical; and (2) changing the regulatory threshold for reporting emissions from agricultural operations under CERCLA.

- ii. In recent years, efforts have been made to extend the liability provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 and the Emergency Planning and Community Right-To-Know Act (EPCRA) of 1986 to livestock and poultry operations for emissions or discharges from manure produced in those operations. Animal agriculture operations are already regulated under the Clean Water Act, the Clean Air Act, and various state laws to protect the environment; these statutes provide for permitting, enforcement and, if needed, remediation. Manure is not a superfund waste and was not intended by Congress to be regulated as such.

Recommendation: EPA should promulgate regulations confirming that manure is not regulated under CERCLA or EPCRA.

4. Worker Protection Standards (“WPS”) rule (40 CFR 170)

- i. Designated Representative. In the WPS rule promulgated November 2, 2015, EPA included a provision that permits anyone claiming to be a ‘designated representative’ (“DR”) to gain access to a farmer’s proprietary records relating to pesticide use.¹ This provision provides farmers with no protection from fraudulent or counterfeit claims; does not assure that records released by the farmer will actually be shared with workers; and imposes no constraints on what DR’s may do with documentation once it is obtained. EPA has never cited any data or facts that demonstrate that such a provision would improve worker safety. Thus, the regulation imposes an unnecessary regulatory burden and cost, while exposing farmers to legal liability, with no discernible benefit.

Recommendation: EPA should repeal 40 CFR 170.311(b)(9) and related provisions.

- ii. Application Exclusion Zone (AEZ). In the final WPS, EPA inserted a final articulation of the Application Exclusion Zone (AEZ) that unduly burdens state agencies and the regulated community.² As finalized, the AEZ goes beyond the Agency’s stated intent to create a one-hundred foot buffer surrounding the application equipment that, according to the regulations now in place, extends beyond the agricultural establishment, arguably jeopardizing a farmer’s ability to manage all his land and prohibiting appropriate pest mitigation activities if there is any kind of structure, permanent or otherwise, inhabited or vacant within one hundred feet of the agricultural establishment. Furthermore, any individual, structure, or a passing vehicle within one hundred feet of the property can effectively cease the farmer’s application activity. After the final rule was promulgated, EPA’s Office of General Counsel (“OGC”) was working to issue interpretive guidance clarifying the Agency’s intent under the final regulation; however, Agency guidance does not carry the weight and authority of a codified federal regulation and does not provide the necessary clarity to assist state regulatory agencies or the grower community with compliance and enforcement activities. In short, both EPA and the state regulatory agencies are still uncertain on how to enforce or deliver compliance assistance on the AEZ.

Recommendation: EPA should revoke the Application Exclusion Zone (AEZ), which

¹ The specific requirement is at 40 CFR 170.311(b)(9).

² WPS provision at 170.405(a)(1) establishes the applicable AEZ distances, and WPS provision 170.405(a)(2) establishes a requirement for the agricultural employer not to allow any worker or other person in the AEZ within the boundaries of the establishment until the application is complete. Provision at 170.505(b) establishes a requirement for the handler to suspend the application if any worker or other person is anywhere in the AEZ. Thus, the AEZ goes beyond the boundaries of the establishment in question and applies to any area on or off the establishment within the AEZ while the application is ongoing.

goes beyond EPA's original intent and creates an unworkable and unenforceable provision that does not provide any additional regulatory protections beyond those already required under law.

5. Resource Conservation and Recovery Act

In 1979, EPA promulgated regulations that reflect Congress' intent that the Agency not regulate manure or crop residue under the Solid Waste Disposal Act (42 U.S.C. 6903(27)). Certain court decisions, however, have injected uncertainty in this area of the law. Legislation is now pending in Congress (the Farm Regulatory Certainty Act) to provide legal certainty for farmers.³ The legislation would also amend Section 7002 of the Solid Waste Disposal Act (42 U.S.C. 6972(b)(1)) to clarify that farmers are not to be targeted twice if they are engaged in legal action with a federal or state regulatory entity to address identified issues.

Recommendation: EPA should continue its policy of not regulating agricultural nutrients under RCRA. The EPA also should vigorously defend existing regulatory actions should a farming operation be targeted with a third-party lawsuit for an alleged violation that is already being addressed by a federal or state legal or administrative proceeding.

6. "Normal farming" activities under §404(f) of the Clean Water Act (33 CFR 323.4)

Sec. 404(f) of the Clean Water Act (33 USC 1344(f)(1)) provides an exemption from permitting for a wide range of normal farming and ranching activities, including plowing, seeding, cultivating, harvesting for the production of food, fiber, and forest products as well as construction or maintenance of farm or stock ponds or irrigation ditches and for the maintenance of drainage ditches. Even though this language is written in the law, EPA has increasingly used its regulatory and enforcement authority to narrow its interpretation of what constitutes a "normal farming" activity.⁴ Thus, even some explicitly exempt activities (i.e., plowing) have come under enforcement action. Congress has included appropriations riders directing EPA and the Army Corps of Engineers ("Corps") to eliminate funding for 404(f)(2) yet EPA and the Corps have ignored Congress' directives.

³ The Farm Regulatory Certainty Act would amend Section 1004(27) of the Solid Waste Disposal Act to codify EPA's existing regulations.

⁴ For example, while the Clean Water Act itself does not restrict the exemption, the Agency has seemingly used the recapture provision in 404(f)(2) to claim that the exemptions for normal activities only apply to "established, ongoing" operations. It has further extended this interpretation to claim that changing an operation from one agricultural activity (e.g., grazing cattle) to another (e.g., planting, cultivating and harvesting crops) constitutes a 'change in use' and therefore does not enjoy the exemption provided in the law. See [https://efotg.sc.egov.usda.gov/references/public/NM/CWA_404\(f\)_Ag_Exemptions.pdf](https://efotg.sc.egov.usda.gov/references/public/NM/CWA_404(f)_Ag_Exemptions.pdf)

Recommendation: EPA should undertake a rulemaking to clarify the normal farming exemptions under §404(f)(1) of the Clean Water Act

7. Total Maximum Daily Loads (TMDLs) (40 CFR. Part 130)

Recent regulations promulgated by the Agency with respect to total maximum daily loads (“TMDLs”) have injected great uncertainty into the TMDL process and blurred the lines of authority between the Federal government and state and local governments. These disputes have a direct impact on agricultural producers.

Recommendation: EPA should revise its TMDL regulations to provide clarity and certainty to the regulated community and state and local governments by assuring that:

- i. States, not EPA, have the authority to set allocations for waters within their borders and incorporate the allocations into state implementation plans. This provides states and localities with the flexibility they need to change allocations when needed.
- ii. EPA’s TMDL authority is limited to setting the *sum* of all state allocations for a particular pollutant, as required by the statutory term “*total maximum daily load*.”.
- iii. To ensure the achievability of a TMDL’s goals, EPA should conduct a use attainability analysis under certain circumstances. Certain factors, such as the presence of naturally occurring substances can undermine the ability of communities to meet a TMDL’s goals regardless of cost.

8. Prior Converted Cropland (33 CFR. 328.3(b))

In 1993, EPA and the Corps promulgated a regulation that said wetlands converted before 1985 into farmland were “prior converted croplands” (“PCC”) and were therefore not “waters of the US.” The preamble to the rule clearly provided that land remains as PCC regardless of the use to which the land is put. Yet, in 2005, the Corps issued guidance eroding this exemption by removing land’s PCC status as soon as the land is put to a non-agricultural use. A federal court has already found the guidance unlawful because it conflicts with the 1993 rule,⁵ but the Corps ignored the court decision and continues to implement the guidance in order to re-regulate land.

Recommendation: EPA should undertake a rulemaking to clarify the 1993 rule that

⁵ *New Hope Power Company and Okeelanta Corporation v. U.S. Army Corps of Engineers and Stockton* 2010 WL 3834991 (S.D. Fla. September 29, 2010)

PCC lands are not subject to wetlands regulations regardless of the use to which the land is put.

9. Army Corps of Engineers 1987 Wetlands Delineation Manual and Regional Supplements

In 1993, Congress prohibited the Corps from using appropriated funds to delineate wetlands under the 1989 Wetlands Delineation Manual.⁶ Congress further stated that no funds shall be used to implement *any subsequent manual adopted without the public notice and comment* procedures of the Administrative Procedure Act (“APA”). In the meantime, Congress authorized the Corps to use the 1987 Wetlands Delineation Manual (“1987 Manual”), but only until the adoption of a final delineation manual.

Almost 25 years later, the Corps has failed to propose, much less adopt, a final wetlands delineation manual. Instead, the Corps continues to use the 1987 Manual, adding regional “supplements” to modify the very same delineation criteria Congress disallowed in 1993. Rather than placing the 1987 Manual and regional supplements through the rulemaking process, the Corps has used the supplements to avoid the Congressional directive to formally promulgate a final manual.

Recommendation: We recommend that EPA suspend all regional supplements and/or put the wetlands delineation manual through the rigors and transparency of the APA’s public notice and comment process.

10. EPA’s proposed revision regarding objection to administratively continued permits (40 CFR 123.44) (Docket ID No. EPA-HQ-OW-2016-0145c)

EPA has proposed granting to itself the power to object to administratively continued permits by providing EPA Regional Administrators the discretion to change the status of an administratively continued permit to “proposed permit,” an outcome that would trigger the robust federal review process outlined in 81 Fed. Reg. 31344, 31372 (May 18, 2016).

This proposed revision marginalizes a valuable tool afforded to states with authorized

⁶ See Energy and Water Development Appropriations Act, Pub. L. No. 102-377, 106 Stat. 1315: “None of the funds in this Act shall be used to identify or delineate any land as a “water of the United States” under the Federal Manual for Identifying and Delineating Jurisdictional Wetlands that was adopted in January 1989 or any subsequent manual adopted without notice and public comment. Furthermore, the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual, as it has since August 17, 1991, until a final wetlands delineation manual is adopted. PUBLIC LAW 102-377—OCT. 2, 1992 106 STAT. 1325 None of the funds in this Act shall be used to finalize or implement the proposed regulations to amend the fee structure for the Corps of Engineers regulatory program which were published in Federal Register, Vol. 55, No. 197, Thursday, October 11, 1990.”

National Pollutant Discharge Elimination System (“NPDES”) permit programs - the ability to administratively continue an existing NPDES permit in lieu of permit reissuance. This tool is important because it allows states to prioritize limited resources and limited personnel to ensure the most efficient management of their state NPDES program. EPA’s proposed revision strongly dis-incentivizes the use of this tool by exposing state NPDES programs to additional federal oversight and, ultimately, denial of state permits. Further, by allowing EPA to deny NPDES permits without the due process afforded to permit holders, it creates a regulatory hook for the EPA to commandeer state NPDES programs. Many states assumed authority over the NPDES program so that these unique programmatic decisions could be left to the states, not EPA. This revision, if finalized, further erodes State authority to manage their own programs and will discourage unauthorized states from assuming NPDES authority.

The use of this new authority would put farmers who hold NPDES permits in jeopardy. Denial of an administratively continued permit, which this rule revision entails, would leave members without permit coverage and vulnerable to citizen lawsuits. It also raises a constitutional concern due to the lack of due process considerations. Lawful permit holders whose permit may be denied by EPA through the exercise of this new administrative power should, in the very least, have a voice in the process. “In its most basic form, procedural due process requires that the government provide affected individuals with adequate notice of the proposed action and an opportunity to be heard prior to final action by the government.” Preserving and Asserting Due Process Rights in the Context of Coal Mining Regulation, 28 Rocky Mt. Min. L. Inst. 6-1 1982 (2015). As the revision is currently drafted, there is no procedure to challenge the EPA’s decision to change a permit’s status to “proposed.” To meet the rigors of procedural due process, permit holders must be provided recourse to protect their interest in a permit when the EPA attempts to change the status.

The revision raises additional concern because it appears to be a self-grant of authority that only Congress can mandate. The Clean Water Act §402(d), as written by Congress, grants EPA the authority to review proposed permits and to object to them, which if objected to prohibits the permit from issuing. The revision here would replicate this administrative power and apply it to administratively continued permits, a step that goes beyond the power Congress granted to EPA in the Clean Water Act. This revision, if finalized, would mark the latest attempt by EPA to insert itself into state management of NPDES programs. This revision compromises the principle of cooperative federalism underlying the Clean Water Act.⁷ By disregarding the intent of Congress by seizing authority that is delegated to the states, permit holders are

⁷ This principle is enunciated explicitly in §101(b) of the Act: “It 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 in the exercise of his authority under this Act.”

exposed to an additional layer of federal regulatory scrutiny on top of the vigorous requirements already required by the states. We disagree with the EPA's statement in section (VI)(E) in the preamble of the proposed rule: "[t]his action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government." The EPA's purported federalism analysis appears to be nothing more than a conclusory statement. This is not enough. This revision will have a direct impact on how states manage their programs, specifically in their use of administratively continued permits.

Further, this effort by EPA is not needed because EPA already manages a largely successful effort that resolves the underlying issue. The Priority Permit Measure provides an avenue for EPA to target state-issued NPDES permits to undergo the reissuance process by designating them as "priority permits". U.S. Environmental Protection Agency, <https://www.epa.gov/npdes/npdes-program-management-and-oversight>. Of the 50 states and 2 territories targeted in EPA's 2015 priority permit initiative, 42 succeeded in EPA's goal of renewing their priority permits. That's an 80% success rate. Clearly, the vast majority of states are making a concerted effort to renew permits. This is good news; the Priority Permit Measure appears to be working. And it obviates the need for this regulatory revision.

IFB contends the reason that some states do not renew permits and instead rely on the tool of administrative continuance is due to limited resource and personnel availability. A self-grant of authority to deny administratively-continued permits will not reduce a backlog due to resource and personnel constraints. If finalized as proposed, this revision will further engender distrust for EPA within state programs and NPDES permit holders.

Recommended: EPA omit from finalization EPA's proposed revision regarding objection to administratively continued permits (40 CFR 123.44) (Docket ID No. EPA-HQ-OW-2016-0145c)

11. National Ambient Air Quality Standards ("NAAQS") for Coarse Particulate Matter ("PM₁₀")

The NAAQS standards and definition for coarse particulate matter are overly broad and do not take into account naturally occurring sources like dust found on farms.

Recommendation: EPA should clarify its NAAQS regulations to ensure that agricultural producers are not found out of compliance for conditions beyond their control when operating under general farming practices.

U.S. Environmental Protection Agency
Docket ID No. EPA-HQ-OA-2017-0190
May 12, 2017
Page 10

Thank you for considering these comments and recommendations. Please feel free to contact me should you have any questions.

Sincerely,

A handwritten signature in cursive script, reading "Lauren Lurkins". The ink is dark and the signature is fluid, with a large initial 'L'.

Lauren Lurkins
Director of Natural and Environmental Resources
Illinois Farm Bureau®
1701 Towanda Avenue
Bloomington, IL 61701-2050