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July 28, 2015

John C. Cruden
Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division
Law and Policy Section
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Cruden:

At your earliest convenience, please forward the enclosed correspondence to your clients.

Please contact me or AAG Jennifer Verleger at (701) 328-3640 if you have any questions relating to this matter.

Thank you.

Sincerely,

Margaret I. Olson
Assistant Attorney General

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Enclosure
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July 28, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20004

The Honorable Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
Department of the Army
108 Army Pentagon
Washington, D.C. 20310

Dear Administrator McCarthy and Assistant Secretary Darcy:

On May 27, 2015, you signed a final regulation entitled "Clean Water Rule: Definition of Waters of the United States" on behalf of the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("ACOE"). 80 Fed. Reg. 37054-37127 (June 29, 2015) ("WOTUS Rule"). The WOTUS Rule, which is set to go into effect on August 28, 2015, provides sweeping changes for the determination of WOTUS jurisdiction impacting water quality regulation activities conducted by the EPA, ACOE and the states. For the reasons we outline below, we write to ask that you extend the effective date of the Rule by at least nine months to allow for appropriate judicial review.

As you know, the WOTUS Rule was immediately challenged by the States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, and the New Mexico Environment Department and New Mexico State Engineer in the United States District Court for North Dakota, *North Dakota v. U.S. Environmental Protection Agency*, Case No. 15-59 (filed June 29, 2015); by the States of Ohio, Michigan, and Tennessee in the United States District Court for the Southern District of Ohio, *Ohio, et al. v. U.S. Army Corps of Engineers, et al.*, Case No. 2:15-cv-02467 (filed June 29, 2015); by the States of Texas, Louisiana, and Mississippi in the United States District Court for the Southern District of Texas, *State of Texas, et al. v. United States Environmental Protection Agency, et al.*, Case No. 3:15-cv-00162 (filed June 29, 2015); by the States of Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, South Carolina, Utah, West Virginia, Wisconsin, and the North Carolina Department of Environment and Natural Resources in the United States District Court for the Southern District of Georgia, *Georgia v. McCarthy*, Case No. 2-15-79 (filed June 30, 2015); and by the State of Oklahoma in the United States District Court for the Northern District of Oklahoma, *Oklahoma v. U.S. Environmental Protection Agency*, Case No. 15-CV-381-CVE-FHM (filed July 8, 2015) (amended complaint filed July 10, 2015).

Although the states promptly filed their actions challenging the WOTUS Rule, it will necessarily take some time for the courts to resolve the merits of these various cases with their different claims. The agencies must first lodge and serve the administrative record. The parties then will have some time from the lodging of the administrative record to complete briefing on the merits of their challenges. Once briefing has been

completed, the courts considering the various states' challenges will likely schedule hearings and oral argument on the pending challenges. Even under a fairly aggressive schedule, the pending challenges will likely not be fully briefed and argued for at least 9 months.

Under the schedule set by the EPA and ACOE explained in the attached memorandum from EPA headquarters, the WOTUS Rule will become effective well before courts have the opportunity to resolve the merits of the significant pending challenges to this Rule. Absent a court granting preliminary injunctive relief, this schedule will cause immediate harm to the states because their delegated authority under the Clean Water Act, own regulatory programs governing state waters, and local industries will be affected by increased permitting and compliance requirements under the EPA's and ACOE's sweeping new asserted jurisdiction.

The Clean Water Act establishes a system of cooperative federalism that recognizes states have the "primary responsibilities and rights" to "prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources" and to "consult with the administrator in the exercise of his authority under this chapter." 33 U.S.C § 1251(b). Under the Clean Water Act, North Dakota and other states have delegated authority to promulgate water quality standards, designate impaired waters, issue total maximum daily loads, and administer permitting programs reliant upon the WOTUS Rule's jurisdictional definitions.

As the agencies admit in the Economic Analysis of EPA-Army Clean Water Rule (May 20, 2015), the WOTUS Rule will increase EPA and ACOE jurisdiction over existing practice. This directly harms states in their capacity as partners and regulators in implementing programs for which the states have delegated authority. For example, as acknowledged by the EPA in its economic analysis, the regulation will result in an increased volume of permit applications, each of which will be of increased scope and complexity under the new rule. This administrative burden will require significant commitment of additional state resources. States will also need to reassess their designations of water quality standards for waters now brought under WOTUS jurisdiction, and will need to issue more water quality certifications for federally-issued permits under the Clean Water Act 404 program.

The increase in EPA's and ACOE's jurisdiction comes at the direct expense of states—which previously had exclusive jurisdiction over state waters. Such action exceeds the statutory authority of Congress in enacting the Clean Water Act under the Commerce Clause and infringes upon the states' rights under the Tenth Amendment of the Constitution. Since 2000, the Supreme Court has twice restricted the EPA and ACOE's claim of jurisdiction when, as here, it exceeded the outer bounds of the Constitution.

Rapanos v. United States, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*, 531 U.S. 159 (2001).

In addition to injuring the states in their sovereign capacity, states will be harmed by the increased burdens placed on them as they develop and build infrastructure projects important to the well-being of their citizens. The current August 28, 2015 effective date will place a significant hardship on North Dakota and others that have immediately pending and proposed projects to develop state infrastructure by increasing the cost and complexity of obtaining the necessary permits.

Further, the new regulation will also have a significant impact on agricultural, homebuilding, oil and gas, and mining operators as they try to navigate between established state regulatory programs and the EPA's and ACOE's new burdensome and conflicting federal requirements. This uncertainty especially threatens those states that rely on revenues from industrial development to fund a wide variety of state programs for the benefit of their respective citizens.

Contrary to the history of partnership between states and the federal government and in disregard of the sovereign interests implicated and immediate harm to states caused by the rule, EPA and the ACOE assert that the final rule "*does not have federalism implications*." 80 Fed. Reg. 37102 (emphasis added). The agencies declined to conduct a federalism analysis, despite numerous requests by states and others, failing to give consideration to these issues before issuing the final rule. The agencies were required to consult with the states during the development of the proposed and final rule pursuant to both the Clean Water Act and Executive Order, and we remain concerned that EPA and the ACOE fail to recognize the importance of cooperative federalism. The attached memorandum indicates that EPA and the ACOE continue to proceed without acknowledging the impact of the WOTUS Rule on state sovereignty.

Given the gravity of the Constitutional issues implicated by the states' claims and to avoid these hardships, the courts should be granted an opportunity to resolve the pending challenges to the agencies' new WOTUS Rule. We ask that you immediately act to extend the effective date of the WOTUS Rule by at least 9 months. A federal regulation of this scope and significance demands a thorough judicial review before imposing costly and disruptive burdens on the states and their citizens.

Please contact the North Dakota Attorney General's Office, Assistant Attorney General Maggie Olson at (701) 328-3640 if you have any questions or wish to discuss this letter.

Sincerely yours,

Wayne Stenehjem
North Dakota Attorney General

Mark Brnovich
Arizona Attorney General

Leslie Rutledge
Arkansas Attorney General

Sean Reyes
Utah Attorney General

Marty J. Jackley
South Dakota Attorney General

Peter K. Michael
Wyoming Attorney General

Samuel Olens
Georgia Attorney General

Cynthia H. Coffman
Colorado Attorney General

James D "Buddy" Caldwell
Louisiana Attorney General

Jim Hood
Mississippi Attorney General

Patrick Morrisey
West Virginia Attorney General

Pam Bondi
Florida Attorney General

Lawrence Wasden
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Gregory F. Zoeller
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Mike DeWine
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Douglas J. Peterson
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Chris Koster
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Herbert H. Slatery III
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Jack Conway
Kentucky Attorney General

Bill Schuette
Michigan Attorney General

Craig Richards
Alaska Attorney General

Derek Schmidt
Kansas Attorney General

Adam Laxalt
Nevada Attorney General

Scott Pruitt
Oklahoma Attorney General

Donald van der Vaart, Secretary
North Carolina Department of Environment
and Natural Resources

Ryan Flynn, Secretary
New Mexico Environment Department

Tom Blaine, P.E.
New Mexico State Engineer

MEMORANDUM FOR DEPUTY ASSISTANT ADMINISTRATOR FOR WATER
REGIONAL ADMINISTRATORS (REGIONS I – X)
CHIEF OF ENGINEERS
DIVISION AND DISTRICT ENGINEERS

SUBJECT: Implementation of the Clean Water Rule

Our final Clean Water Rule was published in the *Federal Register* on June 29, 2015, and will become effective on August 28, 2015. We thank each of you for your hard work and coordination to complete this rulemaking. As we move into the implementation phase, we must continue this joint effort and ensure that the process of identifying waters that are and are not protected under the Clean Water Act (CWA) is consistent, predictable, and effective. It is imperative that implementation of the Rule continues to reflect our goal to improve transparency, increase public participation, and promote public health and environmental protection for all of us who depend on reliable and abundant sources of clean water. This goal will be particularly important as we work with our state, tribal, and local partners to apply the Rule.

We are enthusiastic about the opportunities provided by the Rule to improve the process of identifying waters covered under the CWA, and making jurisdictional determinations and permit decisions effectively and efficiently. To meet these goals, it is essential that field staff charged with implementation of the Rule have the tools and resources they need. The next 60 days are particularly important as we work to be fully prepared to apply the Rule when it becomes effective.

There are several key areas on which we must focus immediately:

1. **Responding to Information Needs:** The Rule and its preamble provide clear and comprehensive direction regarding the process for conducting jurisdictional determinations. Because of the specificity of the Rule, the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) headquarters shall jointly prepare a comprehensive Questions and Answers document, based on discussions with field staff, negating the need for any new manual or guidance document. As with any new procedures, field staff and the

the end of calendar year 2015, the workgroup shall develop a suite of options for our consideration.

As public servants, we have a profound obligation to implement the Rule in the most effective and efficient manner possible. Nothing less is acceptable. The move from old to new procedures must be as seamless and effective for the public as we can make it. We will be relying heavily on the experience and judgment of our senior leadership team as we transition to the new Rule. Your personal attention is needed if we are to succeed in this all-important phase. We look forward to working with each of you in addressing the key issues and in achieving the goals and strategic targets outlined above.

July 8, 2015

Gina McCarthy (Date)
Administrator
U.S. Environmental Protection Agency

Jo-Ellen Darcy July 7, 2015

Jo-Ellen Darcy (Date)
Assistant Secretary for Civil Works
Department of the Army