



Mary Fallin
Office of the Governor
State of Oklahoma

November 13, 2014

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
Department of the Army
108 Army Pentagon
Washington, DC 20310-0101

Re: Docket ID No: EPA-HQ-OW-2011-0880 – Proposed Rule to Define “Waters of the United States”

Dear Administrator McCarthy and Secretary Darcy:

I would like to thank the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE), jointly “the Agencies”, for the opportunity to provide comments on a proposed rule to define "Waters of the United States" (WOTUS) that will have monumental impacts on the citizens, the economy and the environment of Oklahoma. I wish to submit these comments on behalf of the State of Oklahoma and in addition to comments submitted by a number of Oklahoma’s agencies.

Second only to our people, water is Oklahoma’s most precious natural resource. This significant contributor to Oklahoma’s prosperity is integral to the three largest Oklahoma industries: energy, agriculture and tourism. With these and other vital water uses in mind, Oklahomans understand the need to responsibly develop our resources to attract industry, support economic development and create jobs.

Preventing pollution and ensuring water quality in our lakes, rivers and streams have always been at the heart of our water programs. Beginning in the 1920s, Oklahoma established laws to curb water pollution. Those efforts were followed by the passage of the Oklahoma Pollution Remedies Act in 1955, which prompted substantial progress to protect and improve our water resources. In fact, Oklahoma’s first water quality standards were promulgated in 1968, predating those required under the federal Clean Water Act of 1977 (CWA). As shown by our history of water prioritization, Oklahomans are committed to responsible development and protection of our natural resources through well-crafted, inclusively developed laws and regulations. For decades, Oklahoma has worked collaboratively with the Agencies in proactively managing our water resources and we believe this relationship should continue. However, the proposed rule is confusing and will not help our collective work to continue improving the quality of our water. As currently developed by the Agencies, I believe the proposed rule will reverse much of the progress Oklahoma has made on this crucial issue.

When Congress enacted the CWA, they envisioned a cooperative program between the states and the federal government. Recognizing this partnership, the central tenet of the CWA sets states as the primary regulators of surface waters within their boundaries with limited oversight by the EPA. States best know the needs of their citizens and their resources. As proof, consider the vast improvements in water quality across the nation since implementation of the CWA. In Oklahoma, we have achieved impressive water quality improvement through voluntary programs such as our non-point source pollution control program administered by the Oklahoma Conservation Commission and local conservation districts. These efforts were implemented in addition to Farm Bill programs administered by the Natural Resources Conservation Service (NRCS). During my time as Governor, I have seen the value of working cooperatively to improve water quality with private land owners and all impacted parties.

Coupled with the release of the proposed WOTUS rule, the Agencies established an Interpretive Rule (IR) for agricultural exemptions under section 404 of the CWA limiting exemptions to farmers and ranchers only if they follow one or more of 56 NRCS approved practices. I am deeply disappointed with this decision and ask for the IR to be withdrawn. For generations Oklahoma agricultural producers have enjoyed a mutually beneficial relationship with the NRCS, largely due to the non-regulatory status of the NRCS. This relationship has resulted in the implementation of modern, more efficient farming practices that protect and improve our land and water. However, implementation of the IR effectively makes the NRCS a regulatory agency. This shift could destroy the trusted partnership currently enjoyed by the NRCS and agricultural producers, while slowing the implementation of non-point source pollution control programs that have made improvements to Oklahoma waters. I urge the Agencies to work with the U.S. Department of Agriculture, NRCS and state agriculture agencies to develop a new interpretive rule that allows for a normal, inclusive and fair evaluation of farming practices to occur.

Oklahomans understand the current WOTUS system, and because of our strong relationship with the Tulsa District of USACE, there have been very few administrative challenges to the current rule and no judicial challenges to a jurisdictional determination. Any new definitions of WOTUS should clearly delineate what is and what is not subject to federal permitting requirements. If the Agencies are unable to provide clarity for landowners and developers, the current rule and guidance should remain in place. While we understand recent U.S. Supreme Court decisions have raised concerns about the definition of WOTUS, under this proposal the Agencies have simply moved the already unclear line, rather than providing true clarity or consistency. Instead of issuing a new unclear rule, the Agencies should consider issuing updated guidance to the USACE Districts to ensure fair and consistent implementation of the current rule between districts. At a minimum, the Agencies should work collaboratively with the states to develop regional solutions. With the proposed WOTUS rule, I believe state water management primacy is being eroded with no gain in the management of our water resources.

Additionally, the proposed WOTUS rule introduces new definitions that are inconsistent with those used by other federal, state and local agencies. Particularly troubling are those related to floodplains and ephemeral streams. Like many other states, Oklahoma has chosen to use a definition of floodplain established by the Federal Emergency Management Agency (FEMA), but the Agencies have developed a new and extremely broad definition that will only add to the confusion of developers and the regulated community. Even more troubling is that EPA will determine exactly where a floodplain exists. To provide better continuity, the Agencies should change the meaning of floodplain within the proposed WOTUS rule to a definition already understood by citizens, such as the FEMA definition. I also disagree with the determination that ephemeral streams should be subject to the proposed WOTUS rule. Similar to the floodplain definition, the ephemeral definition provided in the proposed WOTUS rule is inconsistent with Oklahoma's definition of ephemeral streams in our water quality standards. These differing definitions are examples of the confusion created by the proposed WOTUS rule and would add an additional burden on landowners, developers and other stakeholders who will be required to operate between conflicting terminologies.

Another area of serious concern from the proposed WOTUS rule is the introduction of "shallow sub-surface connections" and the potential for groundwater to be regulated for the first time under the CWA. Oklahoma defines groundwater as "...fresh water under the surface of the earth regardless of the geologic structure in which it is standing or moving outside the cut bank of any definite stream." (82 OKLA. STAT. §1020.1(1)). The CWA specifically excludes any regulation of groundwater, but the Agencies appear to be ignoring this intentional exclusion. In order to correct this issue, the Agencies should remove any doubt and clarify groundwater or connections below ground will not be regulated under the proposal.

Furthermore, the proposed WOTUS rule basis continues to be Justice Kennedy's concurring opinion in *Rapanos*, using the "significant nexus" test to determine if a stream meets the WOTUS definition. This presents a unique standard that will continue to require an individual determination of whether or not a stream is a WOTUS. By implementing this option, the Agencies will continue to allow discrepancies from one part of the country to the other. In order to promote better use of resources and bring more consistency to the permitting process, I recommend you base the final rule off the plurality opinion in the *Rapanos* case. Quoting Justice Scalia, WOTUS should "... include only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features'...". This definition based on "relative permanence" would afford much more delineation of jurisdictional waters, which would help reduce the scope of federal jurisdiction in favor of traditionally delegated

state regulation. It would also better allow the Agencies to develop clear maps identifying the separation between the WOTUS and Waters of the State.

Many of my concerns with the proposed WOTUS rule could have been avoided by meaningful consultation with the states during the formulation process. States serve as the co-regulators of the CWA, and it is disappointing a federal agency would not involve us in developing a landmark rule the states would be forced to implement. I urge the Agencies to pause all work on this proposal until such meaningful consultation is afforded, and then to reintroduce the proposed WOTUS rule once direct input from the states has been incorporated.

In summary, the proposed WOTUS rule, will unnecessarily burden our economy, strain Oklahoma development and will not improve water quality. Oklahoma has made great strides to voluntarily improve water quality through local implementation of Farm Bill provisions and Section 319 of the Clean Water Act programs. This proposed WOTUS rule makes the development rights of Oklahomans more ambiguous, rather than providing the common sense and clarity necessary for our citizens. If the current proposal moves forward, it will harm development, cause construction delays of critical infrastructure, and burden our farmers and ranchers. The current proposed rule creates more confusion and should not be made permanent. EPA and USACE should consult with the states in order to develop a workable solution.

Once again, thank you for the opportunity to provide comments on this critical issue to Oklahoma.

Sincerely,

A handwritten signature in black ink that reads "Mary Fallin". The signature is written in a cursive, flowing style.

Mary Fallin
Governor