

Office of the Governor

September 30, 2014

Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

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

Re: Docket Number EPA-HQ-OW-2013-0820

Dear Administrator McCarthy and Assistant Secretary Darcy,

I write with deep concern over agency actions in defining “Waters of the United States,” Docket ID No. EPA-HQ-OW-2011-0880.

While I thank you for the extensions provided to allow additional comments, it is clear that there are fundamental problems with both process and content that cannot be rectified by the extension. In the best interest of all, the proposed rule needs to be withdrawn.

Several key concerns warrant this action. In a recent meeting with the U.S. Environmental Protection Agency (EPA) in Washington, D.C., (which included the Administrator and several key deputies) the EPA acknowledged that little was done to solicit input specific to the proposed rule prior to publication. EPA staff indicated that the agency considered comment related to previously proposed and withdrawn guidance documents as a substitute. The EPA then acknowledged that additional consultation was needed, and in an attempt to rectify the lack of opportunity for comment, the agency has been working to visit stakeholders and provide information during an extended comment period.

This approach is problematic. These sessions are public meetings publicized as “not recorded, not for comments and only to provide information.” Holding public information presentations is an inadequate alternative to public comment and the consultation process that should have occurred specific to this proposed rule. The EPA reached out for input on “guidance,” and then plugged this unrelated input into a rulemaking process as comment. This is unacceptable. It invites questions about whether the agency has a pre-determined goal and plans a course of action to arrive at that goal. The EPA’s admission that it has little substantive change in preferred direction or content as guidance morphed into rule adds to the question.

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There is also a question on the validity of the upcoming “science report” — a still pending report that the EPA has said it is comfortable supports their proposal. The implication — pre-knowledge of the conclusions of the science report not yet issued — raises concern. A report should not be developed to justify a pre-determined agency position as it appears may be the case here. Rather, science should be the neutral foundation to begin discussions with the states (where, for the most part, regulatory responsibility rests) and other interested partners.

In public meetings, the EPA continues to assert that concerns with the content of the proposed rule are unfounded. In presentations a variety of interpretations for the proposed rule have been presented by the EPA. To be clear, the *intent* being expressed by the agency in verbal, non-recorded sessions, does not match the *content* of the proposed rule. The EPA is stating publicly that no new protections, expansion, broadening of coverage, or expanded jurisdiction of regulatory authorities is occurring. The conclusion is not borne out by the content of the rule or by the interpretation of the rule by outside agencies and states. The rule both expands authorities and discounts the narrowed reach directed by the United States Supreme Court in the *Solid Waste Agency of Northern Crook County v. Army Corps of Engineers* and *Rapanos v. United States* decisions.

The EPA has approached agriculture, industry, and government representatives to help “fix” problems being identified. The juxtaposition of assurance that there is no need for concern and hurried “fixing” is unsettling. Cobbling together “fixes” cannot address the significant deficiencies in clarity and content that underlie the proposal. Further, the EPA’s information sharing does not meet the bar of consultation and is misleading at best.

The question is at what point does management responsibility shift from the states to the EPA? This cannot be pre-determined and is as much a question of policy as it is of science, arguably more so. I have growing concern with the EPA and other federal agencies. Decisions are being made without consultation or consideration of the states, the public and outside experts. The current process is directed to justify decisions that have already been made. There is a closing window of opportunity for the EPA to rectify the problems with this rule and to proceed in a manner that is designed to work substantively with partners in regulation — the states.

The EPA should withdraw this proposed rule now.

Sincerely,



Matthew H. Mead
Governor

MHM:md

cc: The Honorable Michael B. Enzi, U. S. Senate
The Honorable John Barrasso, U. S. Senate
The Honorable Cynthia Lummis, U. S. House of Representatives