

December 19, 2016

Donald J. Trump Presidential Transition Team  
1717 Pennsylvania Ave  
Washington, DC 20006  
Attn: Governor Michael Pence, Vice President-Elect

**Re: The Waters of the United States Rule**

Dear Vice President-Elect Pence:

We wish to draw your attention to the legal challenge currently pending before the Sixth Circuit Court of Appeals regarding the “Clean Water Rule: Definition of Waters of the United States” (WOTUS Rule) promulgated by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) in June 2015. See 80 Fed. Reg. 37,054–37,127 (June 29, 2015). The WOTUS Rule greatly expands federal jurisdiction beyond the bounds of the Clean Water Act and is one of the Obama Administration’s most ambitious expansions of federal power. We urge the incoming administration to rescind the rule and work with the states and Congress to enact legislation that will provide greater clarity and certainty regarding the scope of federal jurisdiction under the Clean Water Act while preserving the authority of state and local governments to manage their own lands and water resources.

The Sixth Circuit has issued a nationwide stay preventing the WOTUS Rule from going into effect, finding that the parties challenging the rule “have demonstrated a substantial possibility of success on the merits of their claims” because “it is far from clear that the new Rule’s distance limitations are harmonious with the [Supreme Court’s] instruction” and “the rulemaking process by which the distance limitations were adopted is facially suspect.” *In re E.P.A.*, 803 F.3d 804, 807 (6th Cir. 2015). The Court further remarked that “the sheer breadth of the ripple effects caused by the Rule’s definitional changes counsels strongly in favor of maintaining the status quo for the time being.” *Id.* at 808. Similarly, the United States District Court for the District of North Dakota granted a preliminary injunction against implementation of the WOTUS Rule, finding that the state challengers had a substantial likelihood of succeeding on the merits and would suffer irreparable harm both to their sovereign authority to manage their lands and to their concrete financial and administrative interests. *North Dakota v. E.P.A.*, 127 F.Supp.3d 1047 (D. N.D. 2015). The North Dakota litigation is stayed, and the Sixth Circuit action is currently being briefed.

We strongly urge the incoming administration to rescind the rule and work with Congress to expeditiously enact legislation that solves a problem 45 years in the making. As interpreted by federal regulatory agencies, the phrase “waters of the United States” has defied precise meaning since the Clean Water Act’s enactment in 1972, and

has been expanded by the current administration to include virtually any occasionally wet area in the country. Twice in the past 15 years, the U.S. Supreme Court has had to rein in EPA and the Corps for attempting to regulate waters with no appreciable connection to commercially navigable waters, the touchstone of federal jurisdiction. See *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County v. Corps*, 531 U.S. 159 (2001). As we have noted in our briefing to the Sixth Circuit, agency overreach if left unchecked could have the unfortunate further effect of undermining the structure of the Clean Water Act itself, which Justice Kennedy recently opined can “raise troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.” *Corps v. Hawkes, Co.*, 136 S. Ct. 1807, 1817 (2016) (Kennedy, J., concurring). It is time for Congress to revisit the “waters of the United States” definition and rein in the regulatory reach of the federal government over land and water resources that are best managed by state and local governments. We ask the incoming Administration to provide much-needed leadership in this critical area, and to make this a legislative priority for the new administration.

We also ask the new administration to consider strategies for addressing the Sixth Circuit litigation immediately upon taking office. Significant state resources will be consumed having to continue to litigate a rule that clearly violates federal law. Those strategies might include seeking a stay of the litigation or agreeing to a voluntary remand while the new administration considers its regulatory and litigation alternatives, as long as the WOTUS Rule remains inoperative nationwide. This may also be a topic the landing teams want to raise with the current administration, as there is no reason to proceed with the litigation if the new administration agrees to revisit the rule immediately after taking office.

The expanded federal jurisdiction imposed by the WOTUS Rule comes at the direct expense of states—which under the regime the current Administration seeks to impose will be forced to cede exclusive jurisdiction over the majority of their waters. Such action exceeds Congress’s statutory authority in enacting the Clean Water Act under the Commerce Clause and infringes upon the states’ rights under the Tenth Amendment of the Constitution. States and their governmental subdivisions down to cities and counties will also be harmed by the increased burdens placed on them as they develop, build, and maintain important infrastructure projects, such as bridges, roads, sewers, and water supply lines. Further, the new regulation—if allowed to stand—will 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 new burdensome and conflicting federal requirements. This uncertainty especially threatens those states that rely on revenues from commercial development to fund a wide variety of state programs for the benefit of their respective citizens.

We therefore ask that you plan formal administrative action consistent with the Administrative Procedure Act and the Clean Water Act to withdraw the WOTUS Rule,

and we look forward to working with the new administration to develop a sensible and lasting legislative solution to this long-standing problem. We would appreciate an opportunity to speak with you or a designee about the pending litigation, the WOTUS Rule, and potential legislative solutions. To arrange a meeting with the states, please have your staff contact North Dakota Attorney General Wayne Stenehjem at (701) 328-2210, Eric Murphy in the Ohio Attorney General's Office at (614) 995-2273, Misha Tseytlin in the Wisconsin Department of Justice at (608) 267-9323, or Elbert Lin in the West Virginia Attorney General's Office at (304) 558-2021.

Best regards,



Wayne Stenehjem  
Attorney General North Dakota



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West Virginia Attorney General



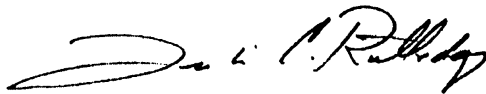
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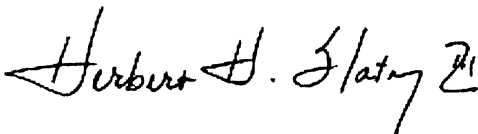
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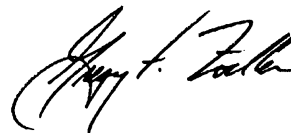
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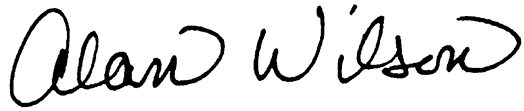
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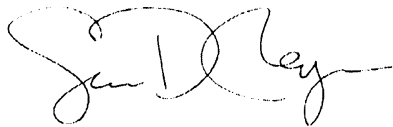
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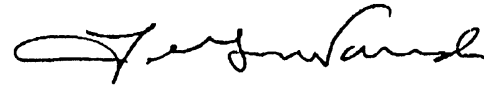
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Vice President-Elect Pence

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