



The
Minnesota State
Cattlemen's Association

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Comments of Minnesota State Cattlemen's Association on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules 82 Fed. Reg. 34899 (July 27, 2017)

The Minnesota State Cattlemen's Association (MSCA) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) (together, "the Agencies") proposed rule: Definition of "Waters of the United States" —Recodification of Pre-existing Rules. 82 Fed. Reg. 34899 (July 27, 2017) ("Proposed Rule").

The definition of "waters of the United States" is important to the cattle industry. In particular, section 402 National Pollutant Discharge Elimination System (NPDES) discharge permits, section 404 permit requirements, and Total Maximum Daily Loads (TMDLs) have a direct and immediate impact on cattle producers.

MSCA supports the Agencies' proposal to rescind the Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule"), and codify the status quo that is now being implemented under the Sixth Circuit stay of the 2015 Rule. The Agencies should rescind the 2015 Clean Water Rule because the 2015 Rule's provisions are, in various respects, beyond the Agencies' statutory authority, inconsistent with Supreme Court precedent, and contrary to the goals of the Clean Water Act (CWA), including the Act's goal to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. section 1251(b). The Agencies failure to seek input from state and local entities during the development of the 2015 Rule contributed to the rule's legal flaws and lack of clarity.

Of particular importance to MSCA, whose members are subject to regulation under the CWA, is the regulatory uncertainty that stems from the 2015 Rule's lack of clarity on key terms and definitions, such as "adjacent," "floodplain," "ordinary high water mark," and "significant nexus." Moreover, by allowing for jurisdiction over remote, isolated features and ephemeral washes, as well as 100 year floodplains, the 2015 Rule improperly reads the word "navigable" out of the statute, and implicates significant constitutional concerns about the appropriate scope of federal authority. Furthermore, nothing in the record created during the 2015 rulemaking process dictated the adoption of such a sweeping definition of "waters of the United States."

To address these concerns, the Agencies should rescind the 2015 Rule and recodify the regulations in place immediately prior so that the Code of Federal Regulations accurately reflects the applicable



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regulations. Since the Sixth Circuit's October 2015 issuance of a nationwide stay, the Agencies have been currently implementing the regulations defining WOTUS that were in effect immediately before the 2015 Rule. The proposed action would simply continue that practice and recodify the status quo that has been in place for decades.

Finally, MSCA supports the Agencies' efforts to undertake a substantive rulemaking to reconsider the definition of "waters of the United States." Although codifying the status quo is important to ensure clarity and regulatory certainty in the near term, there are many issues with the current regulations and guidance documents that should be addressed through a new rulemaking. MSCA will continue to support a rulemaking to clearly articulate the extent of federal CWA authority.

Sincerely,

Krist Wollum
Minnesota State Cattlemen's Association, President