Michael J. Teague
Secretary of Energy & Environment

Mary Fallin
Governor

STATE OF OKLAHOMA
OFFICE OF THE
SECRETARY OF ENERGY & ENVIRONMENT

May 11, 2015

The Honorable Shaun Donovan
Director
Office of Management and Budget
Executive Office of the President
725 17th Street, NW
Washington, DC 20503

Re: Docket ID No: EPA-HQ-OW-2011-0880 – Proposed Rule to Define "Waters of the United States", RIN 2040-AF30

Dear Director Donovan:

I would like to thank the Office of Management and Budget for the opportunity to provide comments on a proposed rule from the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE), jointly "the Agencies", 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 state 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 in improving our waters.

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). Throughout Governor Fallin's Administration, 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. In a great example of the Agencies hearing the concerns of Oklahoma and other states I am glad to see that the IR for agriculture has been withdrawn.

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 that 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 from the start in developing a landmark rule the states would be forced to implement. Oklahoma has urged the Agencies to withdraw this proposal and work with the states from the beginning on a new proposal. While significant outreach has occurred since the release of the current proposal, it does not replace the need for co-regulators to be at the table during the initial drafting. The State of Oklahoma thanks the agencies for their post rule release outreach and based off information released by the agencies to states, we believe significant changes have been made to the proposal. If these changes are truly significant, then OMB should require the Agencies to release the updated rule with a new public comment period. This will also provide for further consultation and vetting by the states, which will result in a rule that is both workable and implementable.

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. More importantly, it will slow down the great strides we have made to improve our waters. The current proposed rule creates more confusion and should not be made permanent. EPA and USACE should continue to 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,

Michael Teague
Secretary of Energy and Environment