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United States Senate

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November 14, 2014

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

Lieutenant General Thomas P. Bostick
Commanding General and Chief of
Engineers
U.S. Army Corps of Engineers
441 G St, NW
Washington, D.C. 20226

Dear Administrator McCarthy and Lieutenant General Bostick,

I write to express my serious concerns with the proposed waters of the United States (WOTUS) rule and interpretive rule put forth by the Environmental Protection Agency and Army Corps of Engineers. I appreciate that you have twice extended the comment period, as it is critical to gather thoughtful input from all stakeholders. However, extending the comment period on a deeply flawed rule is not enough to regain the trust of the regulated community and you should withdraw the current proposed rule.

North Dakota is in the heart of the prairie pothole region. Even during a year with average rainfall, North Dakota's farmers manage wetlands to maximize soil health while adhering to conservation regulations. North Dakota is currently in the midst of an abnormally wet cycle, which has exacerbated farmers' difficulties managing wetlands, or even receiving certainty from their government on what constitutes a wetland. The enclosed U.S. Geological Survey map illustrates how prevalent water is in North Dakota and the challenges my state faces in managing it.

I have heard virtually unanimous opposition to the proposed draft definition and interpretive rules from every stakeholder in my state as it will create even greater regulatory uncertainty for North Dakota's farmers, ranchers and other industries.

As your colleagues at the Natural Resources Conservation Service (NRCS) will tell you, North Dakota's farmers already face great challenges when it comes to wetland regulations. NRCS has a backlog of approximately 800 wetland determinations in the state. Issues with conservation compliance enforcement and potential loss of farm program payments are in the front of producers' minds, and implementing a WOTUS rule which contains murky definitions of regulated waters and allowed practices will only add to the anxiety and distrust.

Particularly alarming is the rule's determination—and EPA's Science Advisory Board (SAB) recommendation in its September 30, 2014, letter—that the prairie pothole region's wetlands all be subject to case-by-case determinations as "other waters." North Dakotans have enough problems with case-by-case wetlands determinations. They cannot be subject to even further uncertainty and determinations from such an ambiguous regulation.

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Further expanding the definition of adjacent waters to incorporate underground connectivity, as proposed by the SAB, makes the proposal even more unworkable. Specifically, I am concerned about when a producer is expected to know if, or how often, their potholes are connected underground; if every farmer in the pothole region is required to seek a Corps determination for every field on their farm; and if a producer doesn't seek a determination, they may be subject to whistleblower complaints and penalties under the Clean Water Act.

Uncertainty created by case-by-case determinations and underground connectivity is exacerbated by the EPA's interpretive rule. In listing only 56 conservation practices exempt from CWA permitting, producers would be left wondering if their NRCS-approved conservation practice will still leave them vulnerable to EPA action. It is simply unacceptable to tell our producers that 160 practices are approved by USDA, but then have over half of them subject to CWA permits. The interpretive rule does more harm than good, and must be withdrawn.

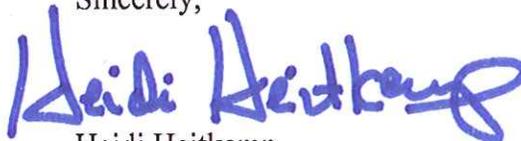
I also have serious concerns about your definition of ordinary high water marks and inclusion of wetlands and ditches as tributaries. In countless North Dakota fields, there are depressions which are occasionally filled with water and discolored due to soil conditions. When these depressions aren't water-logged, producers plant seed and harvest these areas. However, under the proposed rule, the discoloration in the soil could be determined to be a high water mark and subject to regulation under WOTUS, even though they are certainly not tributaries or even consistently full of water.

Of course, the agricultural community is not the only one with serious concerns regarding the current rule and the process under which it has been rolled out. For example, North Dakota's booming construction industry is alarmed by the possibility that it will need new permits for something as simple as installing culverts for access roads.

While I understand that the agencies wish to revise and clarify the definition of waters of the United States, there is no requirement that it be done immediately. It is imperative that your efforts to clarify the definition not create even more confusion, litigation, and distrust of the EPA and Corps.

At this time, it is best for you to withdraw this deeply flawed rule. I encourage you to listen to all stakeholders to better understand their concerns. Finally, I invite you to join me in North Dakota to hear first-hand from the agriculture, construction and energy sectors on this issue.

Sincerely,

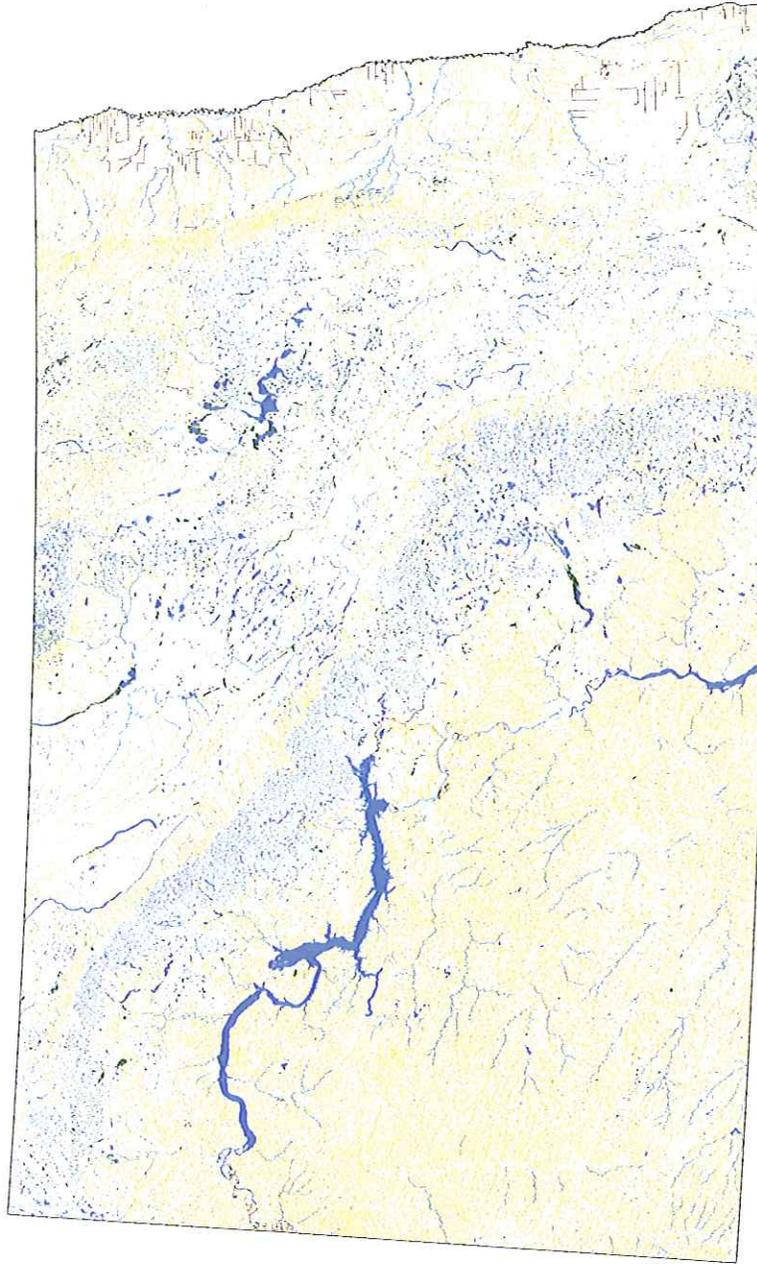


Heidi Heitkamp
United States Senate

Enclosure

STREAMS AND WATERBODIES IN NORTH DAKOTA

The National Hydrography Dataset



- SURFACE WATER FEATURES**
- STREAM/RIVER - PERENNIAL
 - STREAM/RIVER - INTERMITTENT
 - STREAM/RIVER - UNCLASSIFIED
 - CANAL/DITCH
 - LAKE/POND OR RESERVOIR
 - SWAMP/MARSH
 - PLAYA
 - WASH
- ☒ STATE BOUNDARY

This map displays the pattern of different surface water feature types across the state of North Dakota, including perennial, intermittent and ephemeral streams. Perennial streams generally contain water throughout the year, except for periods of extreme drought. Intermittent streams contain water for only part of the year, while ephemeral streams flow only in response to precipitation events. Although the intermittent and ephemeral stream classifications are distinguished from each other in the dataset, many ephemeral streams are included in the "intermittent" category. In addition, some ephemeral streams in the Southwest have been classified as washes. Only recently, and mainly on U.S. Forest Service land, have streams been added to the dataset under the "ephemeral" category. No streams in the state have yet been classified in the "ephemeral" category (data current as of October 2009). The map highlights the predominance of intermittent and ephemeral streams across the state. Of the 80,504 miles of linear streams in North Dakota, 92 percent (72,821 miles) are intermittent or ephemeral. Less than 1 percent of streams are ditches (695 miles), which are not classified by their flow duration in the dataset.

The water features on the map are from the National Hydrography Dataset (NHD) at high resolution (1:24,000 scale or higher). Many smaller waters are not included in the NHD because they could not be detected on the original aerial photos used to create the dataset or were excluded from the maps from which the dataset originates. The majority of perennial and most intermittent streams are captured at this resolution. However, most ephemeral streams are not captured unless they are in the arid west. Additional information on the NHD can be obtained from the NHD website at <https://nhd.usgs.gov>.

