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GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING



DAN WYANT
DIRECTOR

August 22, 2014

VIA E-MAIL

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

Ms. Jo Ellen Darcy
Assistant Secretary of Army (Civil Works)
U.S. Army Corps of Engineers
108 Army Pentagon
Washington, DC 20310-0108

Water Docket
U.S. Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Ms. McCarthy and Ms. Darcy:

SUBJECT: Docket ID No. EPA-HQ-OW-2011-0880, the Proposed Definition of Waters of the United States under the Clean Water Act (CWA)

As one of only two states to administer both Sections 402 and 404 of the CWA, the State of Michigan appreciates the opportunity to comment on the Proposed Definition of Waters of the United States.

Although Michigan agrees the United States Environmental Protection Agency (USEPA) should clarify the definition of Waters of the United States under the CWA, the State of Michigan would like to begin its comments by encouraging the USEPA to wait until the Science Advisory Board Draft Report "Connectivity of Streams and Wetlands to Downstream Waters" is complete and final before moving forward with a rule. As the purpose of this report is to summarize the current scientific understanding of the connections between streams and wetlands, and downstream waters, including physical, chemical, and biological connections that affect the condition or function of downstream waters, any final action to clarify jurisdictional waters under the CWA should be based on the final findings of this report, after consideration of public comments and independent peer review. In short, we believe a determination of this sort should be based on science.

Because Michigan administers the Sections 402 and 404 Programs under state law, the proposed rule will not significantly impact Michigan. Michigan has been administering the Section 402 Program for over 40 years, during which time we have been a leader in

improving and maintaining water quality through both regulatory and non-regulatory initiatives in the program. Although we do not believe the proposed rule will impact Michigan's administration of the Section 402 Program because of the widespread controversy and confusion about this issue, we recommend the USEPA clarify the impact of this rule on activities regulated under the Section 402 Program, specifically regulated agricultural activities.

Michigan's Section 404 Program, with its clear definition of wetlands and other waters, provides a superior jurisdictional framework for the regulated community (i.e., provides predictability and certainty for the regulated community regarding the waters that are regulated) than the federal program does. Furthermore, having administration of the federal program has insulated most of Michigan's citizens from the many jurisdictional process changes over the years at the federal level. However, clarification of the Waters of the United States through a rule would benefit Michigan citizens who need permits from the United States Army Corps of Engineers (USACE) in areas of the state where the USACE has retained administration of the Section 404 Program. In those areas, it has been Michigan's experience that the current jurisdictional determination process at the federal level results in significant delays for the regulated community.

Michigan has administered the Section 404 Program for 30 years. In 2008 following a ten-year review of Michigan's program, the USEPA issued its report identifying issues needing to be addressed in order for Michigan's program to remain consistent with federal regulations. Although Michigan's jurisdictional framework for regulating waters was determined to be consistent with federal regulations and the federal *Rapanos* guidance, other deficiencies were identified that the USEPA stated needed to be addressed. As a result, Michigan's Legislature created the Wetland Advisory Council (WAC) to evaluate the findings of the report and propose solutions to align Michigan's program with the requirements of the CWA. The WAC had broad stakeholder participation, including business groups; drain commissioners; local, state and federal agencies; and conservation and environmental groups. The 2012 recommendations from the Michigan Wetland Advisory Council and eighteen months of debate in the Michigan Legislature resulted in the passage of 2013 PA 98, which narrowed and clarified the exemptions in Michigan's Section 404 Program. These changes are intended to address the 2008 program review findings and modernize the program to allow Michigan to continue to be a leader in protecting and managing water and wetland resources, while being tailored to appropriately regulate Michigan's land-based industries. Michigan is seeking confirmation from the USEPA that the proposed rule will not impact the progress made in 2013 PA 98.

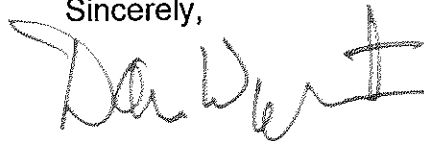
Although Michigan must stay consistent with the provisions of the CWA, having administration of the Sections 402 and 404 Programs has allowed Michigan to develop innovative approaches to provide a streamlined regulatory process while still protecting Michigan's water resources. It has also provided more clarity for the regulated community, so compliance can be achieved in a more timely manner than federal law

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currently provides. We believe it is critical for the USEPA and USACE to continue to work collaboratively with states and tribes to continue to administer the CWA. One area of particular concern is the potential impact the proposed rule may have on the scope of waters for which jurisdiction may be assumed by states under the Section 404 Program. Although it is stated in the preamble and USEPA staff have stated in various forums that it is not the intent of the rule to impact assumable waters, the current language could be misinterpreted otherwise. Michigan does not support any changes to the scope of assumable waters and urges clarification of this issue before promulgation of the final rule.

Thank you for the opportunity to comment on the proposed rule. If you have questions regarding these comments, please contact Ms. Kim Fish, Assistant Division Chief, Water Resources Division, at 517-599-9040; fishk@michigan.gov; or Michigan Department of Environmental Quality (MDEQ), P.O. Box 30458, Lansing, Michigan 48909-7958.

Sincerely,



Dan Wyant
Director
517-284-6700

cc: Ms. Jamie Clover Adams, Director, Michigan Department of Agriculture and Rural Development
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