

July 26, 2016

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army for Civil Works
U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street NW
Washington, D.C. 20314-1000

Re: Proposal to Reissue and Modify Nationwide Permits (COE-2015-0017; RIN 0710-AA73)

Dear Assistant Secretary Darcy,

As you are well aware, the U.S. Court of Appeals for the Sixth Circuit has placed a stay on the waters of the U.S. (WOTUS) rule proposed on May 27, 2015. Yet, the U.S. Army Corps of Engineers (USACE) Proposal to Reissue and Modify Nationwide Permits (NWP) includes several references to new definitions of bodies of water from the WOTUS rule. I urge the USACE to comply in full with the Sixth Circuit stay in regards to both the WOTUS rule and the proposed extension and modification of NWP and to clarify how it intends to reissue NWP while complying with the spirit of the stay.

Private landowners, whether farmers, ranchers, or businesses, rely on NWP to reduce the burden of complying with certain Clean Water Act (CWA) regulations. When landowners want to take an action on their property that will have a minor effect on a territorial water of the U.S., they can often take advantage of NWP. Without NWP, these landowners would be forced to seek individual permits with the USACE that would be subject to public notice, public interest review, public hearing, activity-specific environmental documentation, and case-by-case evaluation, sometimes leading to hundreds of days of delay for the project in question. As authorized in Section 404(e) of the CWA, NWP for various activities must be renewed every five years, and in advance of all of the nation's NWP expiring in March of 2017, the USACE proposed to reissue and modify the NWP. Unfortunately, in modifying the NWP, the USACE refer to provisions in the stayed WOTUS rule including definitions of "waterbody," "non-tidal wetland," and "ordinary high water mark."

In November of 2015, the USACE and the Environmental Protection Agency (EPA) produced a joint memorandum responding to the nationwide stay of the WOTUS rule instituted by the Sixth Circuit on October 9, 2015. This joint memorandum requires the USACE to go back to the regulations defining waters of the U.S. as clarified by the 2008 *Rapanos* Guidance when making water jurisdiction determinations. The USACE should clarify that its joint memorandum complying with the court ordered stay applies to the definitions of water shared between the WOTUS rule and reissued NWP. The USACE should reissue NWP without any amendments that pertain to the new waters of the U.S. definitions included in the WOTUS final rule.

The USACE should not use definitions related to what constitutes a water of the U.S. in the new NHPs when those same definitions are under judicial review and their implementation has been stayed in the related WOTUS rule. I look forward to your timely response to this request for clarification.

Sincerely,

A handwritten signature in black ink that reads "John Hoeven". The signature is written in a cursive, flowing style with a large initial "J".

John Hoeven
United States Senator