

CFM Supports the New (2015) Definition of Waters of the United States

WHEREAS, the Conservation Federation of Missouri, representing over 80 conservation organizations and more than 80 Missouri-based Business Alliance Members, with a combined membership of more than 80,000 of Missouri's citizens, has a mission to ensure conservation of Missouri's wildlife and natural resources, and preservation of our state's rich outdoor heritage through advocacy, education and partnerships and to educate, inspire and empower individuals and organizations to take action to conserve and support the wise use of Missouri's natural resources; and

WHEREAS, nothing is more vital to this mission as the protection of our nation's and state's waters; and

WHEREAS, in 1972 Congress enacted the Clean Water Act to "maintain and restore the physical, chemical, and biological integrity of the nation's waters"; and

WHEREAS, subsequent amendments in 1981 and 1987 served to streamline the regulatory process and increase partnerships between the EPA and the states; and

WHEREAS, we need clean water upstream to have healthy communities downstream; and

WHEREAS, all people depend on clean water for their health; and

WHEREAS, one in three Americans get drinking water from streams that were vulnerable to pollution before the Clean Water Rule; and

WHEREAS, one in four Missourians get their drinking water from sources that rely on small, ephemeral streams that will be protected by the updated 2015 version of the Clean Water Rule; and

WHEREAS, Missouri has more than 110,000 miles of flowing water that provide recreation and many other uses for all Missourians; and

WHEREAS, American manufacturing, farming, tourism, recreation, energy production, and other economic sectors need clean water to function and flourish; and

WHEREAS, floodplain wetlands that are protected by the rule are essential for mitigation of damaging floods; and

WHEREAS, the health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin and provide many benefits to communities by trapping floodwaters, recharging groundwater supplies, filtering pollution, and providing habitat for fish and wildlife; and

WHEREAS, clean water is not only essential for human health, but also for countless aquatic species, including the fish and wildlife resources pursued for recreation or harvest by many CFM members and millions of other Americans; and

WHEREAS, the existing 2015 Waters of the United States (WOTUS) rule went through a lengthy full rulemaking process, including public notice, public comment, responses to comment, and development of substantial technical, policy and scientific evidence in support of the rule; and

WHEREAS, this development process included more than 400 meetings and over 1,000,000 public comments from citizens including manufacturers, business owners, farmers and many others; and

WHEREAS, polluted drinking water and the pollution of rivers, lakes and reservoirs have consistently topped Americans' concerns throughout Gallup's 27-year trend measuring these environmental issues; and

WHEREAS, a majority of Americans expressed "a great deal" of concern about polluted drinking water (61%) and the pollution of rivers, lakes and reservoirs (56%) in the March 2017 Gallup Poll; and

WHEREAS, conservation and recreation groups supporting the 2015 WOTUS rule are many, including the science based-groups that make up the Consortium of Aquatic Sciences, the Nature Conservancy, the Wildlife Society, and the National Wildlife Federation (of which CFM is an Affiliate); and

WHEREAS, the 2015 WOTUS rule clearly defined and protected tributaries that impact the health of downstream waters to include headwaters that have a bed, bank and ordinary high water mark that science has shown can have a significant connection to downstream waters; and

WHEREAS, the 2015 rule protects waters that are next to rivers and lakes and their tributaries because science shows that they impact downstream waters; and

WHEREAS, the 2015 rule protected our nation's regional water treasures that included prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands as science shows that these specific water features can function like a system and impact the health of downstream waters; and

WHEREAS, the isolated wetlands described above provide critical habitat for millions of waterfowl and other migratory birds throughout the nation including Missouri; and

WHEREAS, the 2015 rule limits protection to ditches that are constructed out of streams or function like streams and can carry pollution downstream; ditches that are not constructed in streams and that flow only when it rains are NOT regulated; and

WHEREAS, the 2015 rule does not change how Municipal Storm Sewer Systems are treated and encourages the use of green infrastructure; and

WHEREAS, the development of the 2015 WOTUS rule was intended to reduce the regulatory complexity and confusion surrounding the previous version of the rule; and

WHEREAS, the 2015 rule significantly limits the use of case-specific analysis by creating clarity and certainty on protected waters and limiting the number of similarly situated water features; and

WHEREAS, the 2015 rule maintains exemptions for farming activities like planting, harvesting and moving livestock while also providing greater clarity and certainty to farmers and does not add any new requirements or economic burden on agriculture; and

WHEREAS, the 2015 rule does not interfere with or change private property rights, or address land use and does not regulate groundwater, shallow subsurface flows or tile drains or change policy on irrigation or water transfers and does not apply to rills, gullies, or erosional features; and

WHEREAS, on February 28, 2017, the White House issued an Executive Order (EO) requiring a review of the 2015 “Waters of the United States” rule to:

- “ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution”;
- direct the USEPA and the Corps of Engineers to, among other things, review the current WOTUS rule “for consistency” with the policy reasons set forth in the EO and to include a review of “all orders, rules, regulations, guidelines, or policies implementing or enforcing” the WOTUS rule;
- direct the agencies to “publish for notice and comment a proposed rule rescinding or revising the rule”
- and finally direct that the agencies propose a new rule defining “navigable waters” with an interpretation “consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).”;

WHEREAS, Justice Scalia’s opinion in *Rapanos v. United States* expressed the narrowest view of the reach of the CWA, writing that WOTUS include only navigable waters, “that are navigable-in-fact, relatively permanent, standing or flowing bodies of waters” and “wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right” which is not consistent with scientific findings and puts thousands of isolated wetlands, headwater streams and tributaries without protection under the CWA; and

WHEREAS, since February 2016 the 2015 rule addressed in the Order has been under a nationwide stay and as a result the federal guidance currently in effect is the previous Bush-era rule which applies the CWA to “jurisdictional waters” which are navigable or interstate, or which have a “significant nexus” to navigable or interstate waters; the “significant nexus” test has been applied on a case-by-case- basis which led to the backlog of determinations and

environmental inconsistency and uncertainty and a disdain by landowners and businesses for the bureaucracy of the “significant nexus” rule in the first place;

NOW, THEREFORE, BE IT RESOLVED that the Conservation Federation of Missouri fully supports the role of science in the determination of which waters will be protected under the Clean Water Act, fully supports the 2015 rule, and asks the United States Environmental Protection Agency, the Missouri Legislature, and the Missouri Department of Natural Resources to adopt the 2015 rule.

BE IT FURTHER RESOLVED that under any future review or revision efforts CFM will offer public comments and letters where appropriate, advocating that the rule should:

- Be scientifically and administratively pragmatic
- Promulgate a rule that is clear and understandable and protects the Nation’s waters supported by science and consistent with the law
- Be consistent with Justice Kennedy’s language regarding the application of science in determining jurisdiction
- Promote increased clarity, certainty, and predictability
- Be consistent with the regulating agencies’ public statements that the new rule would not be an expansion of jurisdiction relative to the existing regulations, and that the agricultural and ranching sectors, in particular, should not be subject to increased permitting requirements
- Clearly identify which waters are exempt from the CWA, taking into consideration the concerns of the regulated community
- Establish, to the greatest extent possible, a uniform approach for the agencies when determining whether a water body is “jurisdictional.” This is critical to avoid the current problem of inconsistency across regions, which prevents the regulated stakeholders from being able to effectively plan and ensure compliance with the CWA
- Establish streamlined processes for permitting, jurisdictional determination, and other CWA compliance obligations.