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MEMORANDUM

TO: **INTERESTED PARTIES**

FROM: **KAREN BUDD-FALEN**
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DATE: **MAY 9, 2016**

RE: **GUEST COLUMN - EPA'S ASTOUNDING TAKE-OVER OF STATE WATER LAW – COMMENT PERIOD ENDS JUNE 17, 2015**

In a stunning display of federal over-reach, on March 1, 2016, the Environmental Protection Agency and the U.S. Geological Service (collectively "EPA") issued a "Scientific Investigations Report" arguing that the Clean Water Act ("CWA") can also be used to regulate the quantity (amount) of water in the Nation's rivers and streams. According to the federal government's logic, because stream flows can potentially effect aquatic life and because the Clean Water Act requires the protection of the chemical, physical, and biological integrity of our Nation's waters, "National Pollution Discharge Elimination System" ("NPDES") permits or CWA Section 401 certifications should be required when an individual, community or municipality alters the quantity or amount of water available in rivers and streams. In an area that has ALWAYS been left to the purview of the individual states based upon state Constitutional mandates and since a water right is a private property right, I believe that this amounts to an outright attack on state sovereignty and private property rights.

The comment period on the Draft EPA-USGS Technical Report: Protecting Aquatic Life From Effects of Hydrologic Alteration, Docket ID No. EPA-HQ-OW-2015-0335 ends June 17, 2016.

I. EPA'S DRAFT REPORT ARGUMENTS

According to the EPA, more needs to be done to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." Human alteration of the natural flow regime can change a stream's physical and

chemical properties, "leading to a loss of aquatic life and reduced biodiversity." The EPA goes on to state that the human activities that can alter a stream's characteristics include impoundments, channelization, diversions, agricultural practices, groundwater pumping, urban development, thermoelectric power generation and others. Climate change, the agency claims, exacerbates these harms.

Because the CWA requires the EPA to protect the "nation's waters," the Report urges:

- First, states (or the federal government) should do more to quantify water quality standards for water flow to "protect aquatic life designated uses." "Doing more" should include using numeric standards to quantify stream flow impacts on aquatic life.

- Second, once states adopt such water quantity standards, water quantity monitoring programs should be developed to determine if flow is contributing to water quality impairments such as altering the channel geomorphology, reducing riparian and flood-plain connectivity, causing salinity, sedimentation, erosion and temperature increases, and encouraging the invasion of non-native aquatic species.

- Because there are now numeric standards, the third step is to alter NPDES permitting programs to incorporate the new water quantity (amount) standards. Currently, the only time the EPA has included numeric standards for water quantity (or water flow) is for post-construction municipal storm water systems that can require the treatment of storm water run-off or require retention of a specified volume of water runoff. The EPA Draft Report would argue that this type of numeric standard setting and management should apply to <u>all</u> permitted activities impacting water quantity.

- In the alternative, even if a state does not have any type of numeric water quantity standards in place, the EPA argues that the state can still require a CWA Section 401 certification related to water quantity. Under the CWA, an applicant for a federal license or permit to conduct any activity that may result in a discharge to "waters of the United States" must provide the federal permitting agency with a CWA Section 401 certification. The certification declares that the discharge will not exceed water quality standards. Since the EPA Report argues that water quantity (amount) standards should be included in a state's water quality standards, the CWA Section 401 certification would be required for diversions or uses that may require a federal permit since the diversion or use would impact the quantity of water in a stream.

To bring this home, consider these examples:

- If an irrigator wants to divert water on his private land, but is applying for federal funding through EQIP or any of the other numerous Farm Bill programs, he would be required to get a CWA Section 401 certification because he may impact the quantity of water in a stream.

- If a municipality wants to drill wells for drinking water and is using federal funds to supply clean, safe drinking water to their citizens, it would be required to get a CWA Section 401 certification because the EPA believes that groundwater pumping can impact stream characteristics.

- If a rancher is working to develop additional water sources on his Forest Service or BLM grazing allotment, he would also be required to get a CWA Section 401 certification, separately from the BLM or Forest Service National Environmental Policy Act or other permitting requirements.

II. REASONS TO BE VERY CONCERNED WITH THIS REPORT

The EPA's draft report is disheartening on so many levels. First, the EPA's Draft Report is the first step in significantly expanding federal power over the individual states. The management of water quality, water rights and water use has always remained completely within the purview of the state, without any interference from the federal government. Wyoming's Constitution, like the constitutions in most western states, provides that the water of all natural streams, springs, lakes or other collections are the property of the state. Even in eastern states, where water rights are based upon riparian uses, water rights and uses are governed by state law. The EPA's Draft Report is the first step in advocating federal oversight of an individual state's ownership of water quantity.

Second, the courts have time and again recognized that a water right, properly granted by the state, is a private property right. Even the right to use water in a riparian system is a private property right. And while the EPA will argue that these new requirements are not prohibiting the use of water, giving the state or federal government the ability to grant a permit under the Clean Water Act is giving them the ability to condition the permit to meet some state or federal numeric standards simply based on water quantity. Additionally giving the state or federal agency the ability to require a permit is giving them the chance to deny a permit.

Third, although the EPA's Draft Report claims that it is merely providing a "flexible, nonprescriptive framework" and it is not impinging on state management of water rights, there is an entire appendix called "Legal

Background and Relevant Case Law" arguing that the Clean Water Act applies to water quantity, not just water quality. I believe that this section is solely meant to counter any argument from water right property owners that the CWA cannot be used to regulate water rights.

Finally, although the CWA has been applied to "pollutants" being added to water whether from a point source or a non-point source, the Draft Report advocates CWA control over the use of the water itself. Under this theory, a state of federal permit would be required even if a water right is simply exercised.

Again, the comment period on the Draft EPA-USGS Technical Report: Protecting Aquatic Life From Effects of Hydrologic Alteration, Docket ID No. EPA-HQ-OW-2015-0335 ends June 17, 2016.

Should you have any questions, please do not hesitate to contact me.

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