PennFuture

September 27, 2017

Via Online Submission

Scott Pruitt
Administrator, USEPA
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Douglas W. Lamont, P.E.
Senior Official Performing the Duties of
the Assistant Secretary of the Army for Civil Works
108 Army Pentagon
Washington, D.C. 20310

Re: Docket ID No. EPA-HQ-OW-2017-0203

Public Comments of Citizens for Pennsylvania's Future Regarding the Proposed Rule Entitled "Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules," 82 Fed. Reg. 34,899 (July 27, 2017)

Dear Messrs. Pruitt and Lamont:

Please accept these comments on behalf of Citizens for Pennsylvania's Future ("PennFuture") and its members. The United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Army Corps") (together, "the Agencies") should not repeal the 2015 Final Rule entitled "Clean Water Rule: Definition of Waters of the United States"[1] as set forth in the July 27, 2017 Proposed Rule, 82 Fed. Reg. 34,899 ("Proposed Repeal Rule").[2] Repealing the Clean Water Rule would unnecessarily lead to confusion, waste, and delay, and would jeopardize the health of those waters that support industry, recreation, commerce, and clean drinking water across Pennsylvania and the United States.

[1] 80 Fed. Reg. 37,053 (June 29, 2015) (codified at 40 CFR Parts 110, 112, 116, *et al.* and 33 CFR Part 328) ("Clean Water Rule").
[2] These comments are timely submitted on the Proposed Repeal Rule as the public comment period was extended to September, 27, 2017. *See* 82 Fed. Reg. 39,712 (Aug. 22, 2017).

PennFuture is a public interest membership organization dedicated to leading the transition to a clean energy economy in Pennsylvania and beyond. PennFuture strives to protect our air, water and land, and to empower citizens to build sustainable communities for future generations. One focus of PennFuture's work is to improve and protect water resources and water quality across Pennsylvania through public outreach and education, advocacy, and litigation, with a particular emphasis on advocating for the health interstate rivers that flow through or along Pennsylvania, including the Delaware River and its tributaries, which provides drinking water for over 15 million people (nearly 5 percent of the nation's population).

In 2014, PennFuture strongly supported the Clean Water Rule. We noted then that Supreme Court decisions and subsequent agency guidance confused rather than clarified the definition of "waters of the United States" in the Clean Water Act ("CWA"). This confusion led to many waters not being protected under the CWA, and wasted resources within both the regulated community and state and federal agencies responsible for enforcing the CWA. The 2015 Clean Water Rule clarified the Clean Water Act's jurisdiction, reduced uncertainty, and protected critical waters throughout Pennsylvania, the Delaware River Basin, and across America.

For the same reasons that PennFuture supported the promulgation of the Clean Water Rule in 2015, the Agencies' Proposed Rule repealing the Clean Water Rule is an ill-conceived notion that is not supported by reason or evidence. Accordingly, and for the reasons set forth herein, the Agencies must not repeal the Clean Water Rule.

I. BRIEF HISTORY OF THE NEED FOR THE CLEAN WATER RULE

A brief recitation of how we got to the Clean Water Rule demonstrates the unreasonableness of the Agencies' Proposed Repeal Rule. As EPA recognized in 2015, "[t]he expression of statutory goals combined with the legislative history of the CWA historically was interpreted as evincing an intent by Congress to extend application of the Clean Water Act broadly to the fullest extent allowed by the Constitution."[3] Repeal of the Clean Water Rule would violate this legislative mandate.

[3] EPA, *Technical Support for the Clean Water Rule: Definition of Waters of the United States* (May 27, 2015) ("EPA CWR Technical Support Document"), at 22, *available at* https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf. The statutory goal of CWA was "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

When Congress amended the Federal Water Pollution Control Act in 1972 to create what we know today as the Clean Water Act, federal jurisdiction over "waters of the United States" was extended beyond traditionally "navigable" waters.[4] EPA's definition of "waters of the United States" included navigable waters; interstate waters; interstate lakes, rivers and streams (including intermittent streams) the use, degradation, or destruction of which could affect interstate commerce; and wetlands adjacent to and tributaries of waters of the United States, as defined by the regulations.[5] After some political and legal controversies, the Army Corps' definition was amended to align with EPA's "waters of the United States" definition, but also included isolated waters and wetlands that are not connected by surface water or adjacent to traditional navigable waters.[6] Thus, by 1982, the agencies had matching regulatory definitions of waters of the United States, and those definitions remained basically unchanged for over thirty years.

Since 1982, the Supreme Court of the United States issued three rulings addressing federal jurisdiction under the CWA. These decisions ultimately led to confusion and uncertainty regarding the definition of waters of the United States, which necessitated EPA's thoughtful and scientifically-supported Clean Water Rule.

In the first case, *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) ("*Riverside Bayview*"), the issue before the Court was whether the defendant's land (wetlands) fell within the CWA's jurisdiction. The Court upheld the Army Corps' inclusion of wetlands in the definition of waters of the United States, concluding that "the [Army] Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."[7]

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[4] CWA, 33 U.S.C. § 1362(7); *see also Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) ("as used in the [Clean] Water Act, the term ['navigable waters'] is not limited to the traditional tests of navigability.").

[5] *See* EPA, EPA CWR Technical Support Document, at 20-21 (citing 33 C.F.R. 323.2(a)(5) (1978)), *available at* https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf.

[6] *See* Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794, 31,810 (July 22, 1982). Note that as early as 1975, the Army Corps recognized the importance of wetlands: "[w]etlands considered to perform functions important to the public interest include . . . [w]etlands which serve important natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species." *See* Permits for Activities in Navigable Waters or Ocean Waters (Corps of Engineers Interim Final Regulation), 40 Fed. Reg. 31,320, 31,328 (1975)).

[7] *Riverside* Bayview, 474 U.S. at 134. The term "adjacent" was left as defined in the Army Corps' 1985 definition to mean "bordering, contiguous, or neighboring" and wetlands that were separated from other waters of the United States by man-made ditches or natural barriers were within the definition of adjacent. *See* EPA CWR Technical Support Document, at 35-36.

In the second case, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the Court ruled that the Clean Water Act's jurisdiction did not extend to wholly intrastate and isolated excavation trenches on an abandoned sand and gravel pit that had come to be used seasonally by migrating birds. The Supreme Court held that such isolated, intrastate wetlands were not "waters of the United States" and thus were beyond the CWA.[8] In this 5-4 decision, the Supreme Court first hinted at what would become the "significant nexus test" (discussed below), which required that there be a "significant nexus" between navigable waters and those over which the Corps sought to exercise jurisdiction.[9]

Importantly, EPA and the majority of federal courts construed *SWANCC* narrowly (e.g., limiting the holding either to the Migratory Bird Rule or to isolated waters where the *only* basis for asserting jurisdiction was a connection to interstate commerce) and continued to assert a broad interpretation of the jurisdiction of the CWA.[10] That jurisdiction extended "to all waters that have a hydrologic connection to and from part of the tributary system of traditionally navigable waters," including wetlands.[11]

The third Supreme Court case, *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"), perhaps created the most confusion as to the meaning of waters of the United States, and ultimately led to the need for the Clean Water Rule. In a 4-1-4 split decision, the Supreme Court overturned the lower court's ruling that wetlands on the defendant's property were hydrologically connected to navigable waters so as to confer CWA jurisdiction. All Justices agreed that "waters of the United States" covers some waters that are not traditionally navigable. Justice Scalia, writing for four justices in the majority, voted to overturn the Army Corps' definition based on a new "continuous surface water connection" standard. Justice Kennedy voted with the majority but on the basis of the "significant nexus" test articulated in *SWANCC*.[12] As such, *Rapanos* failed to provide a definitive jurisdictional test between navigable waters and non-traditionally-navigable hydrologic features.

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[8] As a result, EPA and the Army Corps issued guidance in 2003 that narrowly interpreted the *SWANCC* decision to mean that CWA jurisdiction could no longer be based solely on fact that certain waters were used by migratory birds (2003 Guidance). *See, e.g.*, Proposed Repeal Rule, 82 Fed. Reg. at 34,900. The 2003 Guidance required field staff to coordinate with headquarters as to the jurisdiction over isolated, intrastate, non-navigable waters. *Id.*

[9] *SWANCC*, 531 U.S. at 167-68 ("It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*. . . .In order to rule for [the Army Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open waters. But we conclude that the text of the statute will not allow this.").

[10] *See* EPA CWR Technical Support Document, at 27-28.

[11] *Id.* at 28.

[12] *Id.* at 810 (Stevens, J., dissenting).

Justice Scalia's plurality opinion overly-simplified the jurisdictional question by focusing on the dictionary definition of "waters" to conclude that "[o]n this definition, 'the waters of the United States' include only relatively permanent, standing or flowing bodies of water."[13] Justice Scalia also rejected the notion that ecological considerations can provide an independent basis for jurisdiction under the CWA,[14] and consequently added the requirement that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters covered by the Act."[15] However, the plurality noted that this test did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought" or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months."[16]

Justice Kennedy, while concurring in the judgment, opined that the appropriate jurisdictional test was whether a hydrologic feature (e.g., wetland or water) possessed a "'significant nexus' to waters that are or were navigable-in-fact or that could reasonably be made so."[17] Justice Kennedy concluded that where there is "little or no connection" between navigable and non-navigable waters, then the non-navigable water is not within the CWA's jurisdiction.[18] Consequently, "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[19]

These decisions, while leaving the definition of waters of the United States in place, muddled the jurisdictional determination under the CWA. Indeed, subsequent court decisions disagreed on how to apply the law, with most courts agreeing that Justice Kennedy's significant nexus test is *a minimum* for jurisdiction, but no court holding that a water is jurisdictional *only if* it meets Justice Scalia's "continuous surface connection" test.[20] It is against this backdrop of confusion that EPA took up crafting the Clean Water Rule.

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[13] *Rapanos*, 547 U.S. at 732.
[14] *Id.*
[15] *Id.* at 741-42.
[16] *Id.* at 732, n. 5 (emphasis in original).
[17] *Id.* at 759.
[18] *Id.* at 767 (Kennedy, J., concurring).
[19] *Id.* at 779-80 (Kennedy, J., concurring).
[20] *See* Manahan, Kacy, *Navigating with an Ocean Liner: The Clean Water Rule, Trump's Executive Order, and the Future of the "Waters of the United States,"* Harv. Envtl. L. Rev. (April 17, 2017), syndicated on Envtl. L. Rev.

As the Proposed Repeal Rule details, the Agencies issued joint guidance in 2007 in response to the *Rapanos* decision to help guide jurisdictional determinations for WOTUS.[21] In 2008, the agencies issued revised guidance that explained that the existing, codified definition of waters of the United States included traditional navigable waters and their adjacent wetlands, relatively permanent waters and wetlands that abut them, and waters with a significant nexus to traditional navigable waters ("2008 Guidance").[22] For example, the 2008 Guidance clarified, "consistent with the regulatory definition, that a wetland is adjacent if it has an unbroken hydrologic connection to jurisdictional waters, or is separated from those waters by a berm or similar feature, or if it is in reasonably close proximity to a jurisdictional water."[23] The agencies would conduct a fact-specific, significant nexus analysis for non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally, wetlands adjacent to such tributaries, and wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.[24]

But even with this 2008 Guidance in place, both regulators and the regulated were at a loss for clarity as to what waters fell under the CWA's jurisdiction. As Chief Justice Roberts observed in his concurring opinion in *Rapanos*: "It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case

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Syndicate, *available at* http://harvardelr.com/2017/04/17/navigating-with-an-ocean-liner-the-clean-water-rule-trumps-executive-order-and-the-future-of-waters-of-the-united-states/ (listing cases); EPA CWR Technical Guidance Document, at 40-47 (detailing case holdings).

[21] *See* EPA, Legal Memorandum – Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (June 5, 2007), *available at* https://www.epa.gov/sites/production/files/2016-04/documents/rapanosguidance6507.pdf EPA & Army Corps, Memorandum for Director of Civil Works and US EPA Regional Administrators, Re: Coordination on Jurisdictional Determinations under CWA Section 404 in Light of the *SWANCC* and *Rapanos* Supreme Court Decisions (June 5, 2007), *available at* https://www.epa.gov/sites/production/files/2016-04/documents/rapanosmoa6507.pdf.

[22] *See* EPA, Legal Memorandum – Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) ("2008 Guidance"), *available at* https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf; *see also* Proposed Repeal Rule, 82 Fed. Reg. at 34,901. The 2008 Guidance instructed the agencies to apply the significant nexus evaluation by assessing "the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if in combination they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters," including the consideration of "hydrologic and ecological features." EPA, Questions and Answers Regarding the Revised *Rapanos & Carabell* Guidance (Dec. 2, 2008), at 3, *available at* https://www.epa.gov/sites/production/files/2016-04/documents/rapanos_guidance_qa_120208.pdf.

[23] *See* 2008 Guidance, at 5.

[24] 2008 Guidance, at 1.

basis."[25] Indeed, even with the 2008 Guidance, EPA and Army Corps staff were hamstrung and potential enforcement actions were scuttled as a result of remaining confusion regarding CWA jurisdiction.[26] EPA regional offices warned that, as a result of the lack of clarity following *Rapanos*, "they are no longer able to ensure the safety and health of our nation's waters."[27] The "dramatic decline" in inspections, investigations, and enforcement of the Clean Water Act as a result of jurisdictional confusion put the health of our watersheds – and in some cases drinking water supplies – at risk.[28]

Thus, in 2013, the agencies issued a proposed rule[29] that would codify the 2008 Guidance in order to "provide clarity and certainty on the scope of the waters protected by the CWA"[30] ("Proposed Clean Water Rule"). Although the Proposed Repeal Rule fails to mention it, the agencies engaged in an almost 7-month public comment period, met with over 400 stakeholders, and received over *one million* comments on the Proposed Clean Water Rule, with over 87% of them in favor of the agencies' proposed waters of the United States definition. More than 50,000 Pennsylvanians supported the Clean Water Rule, including business owners, local officials, farmers, and health professionals. In support of the Proposed Clean Water Rule, EPA issued a report that reviewed over 1,200 peer-reviewed scientific publications and confirmed that streams and wetlands are connected to downstream waters in significant and important ways such that CWA jurisdiction is warranted.[31]

PennFuture strongly supported the promulgation of the Clean Water Rule because it was supported by the legislative history of the Clean Water Act, it would protect drinking water supplies used by millions of Pennsylvanians, and it would protect sensitive and critical headwaters and wetlands, which, in turn, protect the water quality for thousands of stream miles in the Commonwealth.

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[25] *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).
[26] *See* EPA & Army Corps, *Economic Analysis of Proposed Revised Definition of Waters of the United States* (March 2014), *available at* http://www.epadatadump.com/pdf-files-2014/wus_proposed_rule_economic_analysis.pdf.
[27] *See* Memorandum: Decline of the Clean Water Act Enforcement Program, Committee on Oversight and Government Reform and Committee on Transportation and Infrastructure (Dec. 16, 2008), *available at* http://newsletters.wetlandstudies.com/docUpload/Memo_DeclineCWAEnforcement.pdf.
[28] *Id.*
[29] EPA, Water Quality Standards Regulatory Clarifications, 78 Fed. Reg. 54,518 (Sept. 4, 2013).
[30] *See id.*
[31] *See* EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of Scientific Evidence* (Jan 2015), *available at* https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414.

II. THE AGENCIES SHOULD NOT REPEAL THE CLEAN WATER RULE

The Proposed Repeal Rule seeks to "re-codify in regulation the *status quo*,"[32] that existed prior to the Clean Water Rule.[33] For the reasons set forth below, the Agencies should not repeal the Clean Water Rule.

A. Repealing the CWR Would Harm the Delaware River Watershed[34]

One of the most important aspects of the Clean Water Rule is its protection of intermittent and ephemeral streams. Protection of these sensitive headwaters is critical to safeguarding water quality and wildlife throughout Pennsylvania and the United States. Small headwater streams and wetlands provide the greatest connections between land and water, trapping and storing nutrients, providing critical habitat, storing floodwaters, contributing to drinking water supplies, and filtering out pollutants. These streams are critical to protect drinking water; in Pennsylvania 58% of the streams that provide water for surface water intakes that supply public drinking water are intermittent, ephemeral, or headwater streams.[35] But just as importantly, headwater streams have biological, chemical, and hydrologic connections to downstream waters.[36] Scientific studies repeatedly demonstrate that the health of downstream lakes, rivers, and estuaries are tied to the health of small streams and wetlands upstream.[37] Leaving these critical waters vulnerable to pollution puts the health of our rivers and the communities that depend upon them at risk.

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[32] 82 Fed. Reg. at 34,903.
[33] The Agencies have indicated that at some future unknown time, the Agencies anticipate attempting to promulgate another definition of waters of the United States, although there is no current plan, process, or substance regarding any "replacement" rule.
[34] Although these comments focus on the Delaware River watershed as an example, the repeal of the Clean Water Rule would also harm other watersheds of concern to PennFuture and its members, including but not limited to, the Susquehanna River and Chesapeake Bay watersheds.
[35] EPA, Percentage of Surface Drinking Water from Intermittent, Ephemeral, or Headwater Streams in Pennsylvania, *available at* https://www.epa.gov/sites/production/files/2015-06/documents/2009_12_29_wetlands_science_surface_drinking_water_surface_drinking_water_pa.pdf.
[36] Meyers, Judy L., Louis A. Kaplan, Denis Newbold, et. al., Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands, February 2007, *available at* http://www.americanrivers.org/assets/pdfs/reports-and-publications/WhereRiversAreBorn1d811.pdf.
[37] *See* Hynes, H.B.N., 1975, The stream and its valley, Proceedings of the International Association for Theoretical and Applied Limnology, 19:1-5; Pringle, C.M., 1997, Exploring how disturbance is transmitted upstream: Going against the flow, *Journal of the North American Benthological Society*, 16:425-438; Ward, J.V., 1989, The four dimensional nature of lotic ecosystems, *Journal of the North American Benthological Society*, 8:2-8; Fausch, K.D., C.E. Torgersen, C.V. Baxter, and H.W. Li, 2002, Landscapes to riverscapes: Bridging the gap between research and conservation of stream fishes, *BioScience*, 52:483-498.

According to a recent analysis, **the Proposed Repeal Rule would result in a loss of CWA protections to 55% of all stream miles in the Delaware River Watershed**.[38] These intermittent, ephemeral, and headwater streams in the Delaware River Watershed provide not only clean drinking water but are also spots for outdoor recreation and esthetic enjoyment of the natural environment. Without the clear jurisdiction over these critical waters that the Clean Water Rule provides, regulators will likely be once again hamstrung into ineffectiveness, the regulated community will again be adrift as to whether the CWA applies to their waters, and the water quality of the Delaware River watershed and the people who rely on these waters will suffer.

B. Repealing the CWR Would Reduce Protections to Pennsylvania Waters

Notwithstanding the protections of the "waters of the Commonwealth" provided by Pennsylvania's Clean Streams Law[39] and Dam Safety and Encroachments Act,[40] the fate of the Clean Water Rule matters in Pennsylvania. For example, Pennsylvania Department of Environmental Protection ("PADEP") is responsible for implementing Section 401 of the CWA, which requires an applicant for a federal license or permit to obtain a Water Quality Certification from each state in which the construction or operation of facilities may result in a discharge to "navigable waters."[41] Because the CWA defines "navigable waters" to include "waters of the United States,"[42] the Proposed Repeal Rule could remove the CWA § 401 protections from thousands of miles of critical headwater streams and wetlands in Pennsylvania. As more and more pipelines are proposed in the Commonwealth, they have become an increasing threat to water quality to Pennsylvania's streams and wetlands, with these smaller waters potentially facing greater impacts from the same project than the larger streams and wetlands.

Moreover, loss of clear protections at the federal level for these critical headwaters and wetlands could result in the future weakening of protections in Pennsylvania as well, especially where the state regulatory agency is so underfunded and under-staffed. Indeed, the heads of four Pennsylvania agencies, including PADEP, submitted a letter to EPA on June 19, 2017 that

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[38] *See* PennEnvironment, News Release – Analysis: Repealing the Clean Water Rule would be Devastating for the Delaware River Watershed (July 25, 2017), http://www.pennenvironment.org/news/pae/analysis-repealing-clean-water-rule-would-be-devastating-delaware-river-watershed?utm_source=CDRW+%E2%80%A6.
[39] 35 P.S. §§ 601.1-691.1001.
[40] 32 P.S. §§ 693.1-693.27.
[41] 33 U.S.C. § 1341(a)(1). Under Section 401, the responsible state agency shall issue a certification that the proposed action will comply with the CWA, including applicable water quality standards; without this certification, the project may not proceed. *See id.*
[42] *See* 33 U.S.C. § 1362(7).

outlines their concerns about how uncertainty regarding "waters of the United States" could undermine clean water protection in Pennsylvania:

> Pennsylvania is concerned that uncertainty . . . will increase agency workloads without affording any corresponding increase in protection of the Commonwealth's water resources. In these times of significant budget constraints, this uncertainty exacerbates the difficulty in projecting budgetary needs for water quality assessment, permitting, inspection, and enforcement programs. Coupled with proposed cuts to the EPA budget, this uncertainty makes future planning difficult.[43]

The Clean Water Rule clarifies the safeguard for thousands of acres of Pennsylvania wetlands that provide flood protection, recharge groundwater supplies, filter pollution, and provide essential wildlife habitat. These protections have untold benefits to Pennsylvania's outdoor recreational economy as well as communities and small businesses. Additionally, because many headwater streams that flow into Pennsylvania's major rivers are in adjacent states, a clear understanding of what is protected by the Clean Water Act is critical for water quality within the Commonwealth. The federal government must not undermine the base water protections that Pennsylvanians rely upon to protect their waters.

C. Repealing the Clean Water Rule as Proposed Would Reinstate a 30-Year Old Definition that Confused Regulators *and* the Regulated Community

The Proposed Repeal Rule absolutely fails to "minimiz[e] regulatory uncertainty."[44] Instead, it would do the exact opposite by reinstating the "regulatory status quo," meaning going back to the post-*SWANCC*, post-*Rapanos* jurisdictional principles that the Proposed Repeal Rule states was so wrought with confusion and uncertainty that "Members of Congress, developers, farmers, state and local governments, environmental organizations, energy companies and others asked the agencies to replace the guidance with a regulation that would provide clarity and certainty on the scope of the waters protected by the CWA."[45] It is beyond comprehension that

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[43] Letter from Secretaries McDonnell, Redding, Dunn, and Executive Director Arway to Administrator Pruitt and Acting Secretary Lamont, Re: Proposal to Revise the Clean Water Act Regulatory Definition of "Waters of the United States" [80 Fed. Reg. 37,054 (June 29, 2015)] (June 19, 2017), at 3.
[44] *See* Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule (February 28, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic.
[45] Proposed Repeal Rule, at 82 Fed. Reg. 34,901.

the Proposed Repeal Rule is somehow "intended to ensure certainty" by putting back into play the very language that the Agencies admit lacked the necessary clarity for CWA jurisdiction.

Indeed, the Agencies propose to "re-codify the exact same regulatory text that existed prior to the 2015 rule" which is the exact same regulatory text that caused immense confusion and waste for 30 years. That text, which the Agencies acknowledge was "largely established in 1977," would discount everything that the Agencies have learned since then. Moreover, the Agencies have no basis to conclude that reinstatement of the pre-2015 "status quo" would "establish a clear regulatory framework" given the Agencies' admission that the definition of waters of the United States at that time was so confusing that various groups from both sides of the table brought legal challenges seeking clarification.

D. The Agencies Failed to Provide "Good Reasons" for the Proposed Repeal Rule

As the Agencies clearly admit, this Proposed Repeal Rule "does not undertake any substantive reconsideration of the pre-2015 'waters of the United States' definition,"[46] which is what was required by the Executive Order. Indeed, there is no legitimate justification for excluding these rivers, streams, lakes, and wetlands from the protections they already have under the Clean Water Act.

Understanding that a change in presidential administrations can result in some policy changes, federal agencies are nevertheless required to "show that there are good reasons for the new policy."[47] As detailed above, when boiled down, the Proposed Repeal Rule states that it will make the definition of "waters of the United States" clearer by re-codifying the very language that people from all corners of the country and all walks of life, including justices and judges, found so thoroughly ambiguous and confusing. It is inconceivable that reinstating the source of the problem in this manner would constitute a good reason for the proposed policy change.

Moreover, the Proposed Repeal Rule is not based on science, common sense, or even an appropriate reading of the Clean Water Rule itself. EPA Administrator Pruitt recently stated: "The Obama administration reimagined their authority over the Clean Water Act and defined a water of the United States as being a puddle, a dry creek bed and ephemeral drainage ditches all

[46] Proposed Repeal Rule, 82 Fed. Reg. 34,903.
[47] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

across this country, which created great uncertainty, as you might imagine."[48] This is a fundamental and atrocious misunderstanding of the very rule Administrator Pruitt wants to repeal. Indeed, despite the fact that puddles clearly did not qualify as "waters of the United States" in the first place, in response to comments on the proposed rule, the final Clean Water Rule expressly excluded puddles from the definition:

> The proposed rule did not explicitly exclude puddles because the agencies have never considered puddles to meet the minimum standard for being a 'water of the United States,' and it is an inexact term, . . . However, numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so.[49]

In short, the Agencies have failed to articulate any rational support or "good reason," for the Proposed Repeal Rule.

III. CONCLUSION

Repealing the Clean Water Rule would do nothing the Agencies claim it would do; it would not clarify the jurisdiction of the Clean Water Act, it would not comply with the President's Executive Order, and it would not protect the critical intermittent streams and wetlands that are necessary for a healthy watershed. In fact, repealing the Clean Water Rule (especially without proposing a new rule) would result in *more* confusion, *more* governmental waste, and *fewer protections* of critical waters, such as up to 55% of the Delaware River Watershed. These waters are important in their own right, but also for the overall water quality of the resources that Pennsylvanians – and all Americans – rely on for clean drinking water and recreational and economic benefits. For all these reasons, the Agencies must **not** repeal the Clean Water Rule.

Thank you for your consideration of these comments.

Respectfully submitted,

Abigail M. Jones, Esq.

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[48] *See* E&E News, Greenwire, *Pruitt stars in industry video promoting WOTUS repeal* (Aug. 21, 2017), https://www.eenews.net/greenwire/2017/08/21/stories/1060058985 (last visited Aug. 21, 2017).
[49] 80 Fed. Reg. 37,054, 37,099 (June 29, 2015) (Clean Water Rule final rule).

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