



December 13, 2017

Via Online Submission

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

Ryan A. Fisher  
Acting Assistant Secretary of the Army (Civil Works)  
108 Army Pentagon  
Washington, D.C. 20310

**Re: Docket ID No. EPA-HQ-OW-2017-0644**

**Public Comments of Citizens for Pennsylvania's Future Regarding the Proposed Rule Entitled "Definition of 'Waters of the United States'— Addition of an Applicability Date of 2015 Clean Water Rule," 82 Fed. Reg. 55,542 (November 22, 2017)**

Dear Administrator Pruitt and Acting Assistant Secretary Fisher:

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 add a new "applicability date" to the 2015 Final Rule entitled "Clean Water Rule: Definition of Waters of the United States"<sup>1</sup> as set forth in the November 22, 2017 Proposed Rule, 82 Fed. Reg. 55,542 ("Proposed Delay Rule"). Adding a new applicability date to the Clean Water Rule as proposed is designed to essentially override the August 28, 2015 effective date of the Clean Water Rule. Delaying the effective date as proposed by the Proposed Delay Rule, especially after the Rule has already gone into effect in some states, is neither desirable nor appropriate and doing so would only lead to confusion and would jeopardize the health of those

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<sup>1</sup> 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").

waters that support industry, recreation, commerce, and clean drinking water across Pennsylvania and the United States.

The Agencies must not delay the implementation of the Clean Water Rule at all, let alone for the two years proposed. Instead, the Agencies should allow the Clean Water Rule to remain in place, as adopted in 2015, with its original effective date of August 28, 2015.

## **I. INTRODUCTION**

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 adoption of the proposed Clean Water Rule. We noted then that Supreme Court decisions and agency guidance had 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, which went into effect in Pennsylvania on August 28, 2015, clarified the Clean Water Act's jurisdiction, reduced uncertainty, and protected critical waters throughout the Delaware River Basin and Pennsylvania, and across America.

More recently, on September 27, 2017, PennFuture submitted comments opposing the Agencies' proposed rule to repeal the Clean Water Rule ("Proposed Repeal Rule").<sup>2</sup> In short, PennFuture opposed repealing the Clean Water Rule because doing so would harm the Delaware River Watershed, reduce protections to Pennsylvania's waters, and reinstate a 30-year old definition that confused regulators and the regulated community, and because the Agencies failed to provide "good reasons" for the abrupt reversal of course the Proposed Repeal Rule would effect. We concluded our comments by stating that repealing the Clean Water Rule would

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<sup>2</sup> See Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules," 82 Fed. Reg. 34,899 (July 27, 2017) ("Proposed Repeal Rule").

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 2017 Executive Order,<sup>3</sup> 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 would result in more confusion, more governmental waste, and fewer protections of critical waters, such as up to 55% of the Delaware River Watershed.

In addition, in response to the Agencies' solicitation of recommendations on what any proposed replacement rule should say, PennFuture presented oral comments during EPA's Listening Session for Conservation Stakeholders on October 3, 2017. In those comments, we noted that the Clean Water Rule helps to protect the pristine headwaters of the Delaware River Basin, which supports a thriving recreational economy that represents hundreds of jobs and tens of millions of dollars annually. We also pointed out that, as the 2015 Clean Water Rule demonstrates, the Agencies have the authority, and the technical and popular support, to reject Justice Scalia's unnecessarily restrictive definition of "waters of the United States,"<sup>4</sup> especially since the 2017 Executive Order merely directs the agencies to "consider" Justice Scalia's interpretation. We concluded that, based on the information presented by EPA at the Listening Session, it was clear that the definition in the 2015 Clean Water Rule is the only one that not only complies with the spirit and purpose of the Clean Water Act but will also continue to protect the critical headwaters and wetlands that are necessary for a thriving outdoor recreational economy in Pennsylvania.

For all these reasons and for the reasons set forth below, the Agencies' Proposed Delay Rule, like their Proposed Repeal Rule, is ill-conceived. The 2015 Clean Water Rule was adopted with overwhelming public and scientific support, and the clarification it provides and the protections it affords must be implemented as soon as the Agencies are authorized by the courts to do so. Accordingly, the Agencies must not further delay its implementation by adopting the Proposed Delay Rule.

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<sup>3</sup> 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).

<sup>4</sup> See *Rapanos v. United States*, 547 U.S. 715, 732 (2006) (relying on Webster's New International Dictionary to support the definition of "waters of the United States" as "only relatively permanent, standing or flowing bodies of waters").

## **II. THE AGENCIES SHOULD NOT DELAY THE IMPLEMENTATION OF THE CLEAN WATER RULE**

In 37 states, including Pennsylvania, the Clean Water Rule was both in effect and applicable as of August 28, 2015. Although there is presently a nation-wide stay on the Clean Water Rule,<sup>5</sup> that stay did not occur until October 9, 2015, *after* the rule's August 28, 2015 effective date. And while the District Court of North Dakota issued a temporary injunction on the rule one day before the effective date,<sup>6</sup> that temporary injunction only applied to 13 states.<sup>7</sup> Thus, for 42 days, the Clean Water Rule was in effect – and its definition of “waters of the United States” applicable – in 37 states, including Pennsylvania. The Proposed Delay Rule does not address the fact that the Clean Water Rule *was already in effect* in a majority of the states.

Courts have recognized that an “order delaying the rule’s effective date . . . [is] tantamount to amending or revoking a rule,” especially when an agency has expressed intent to revoke the rule.<sup>8</sup> Thus, as the D.C. District Court concluded, by using a delay rule “to bridge the gap to rescission, the agency has effectively erased — rather than delayed — the benefit” of the final rule.<sup>9</sup> Here, the practical application of the Proposed Delay Rule is akin to the proposed repeal rule the Agencies announced on July 27, 2017.<sup>10</sup>

For the same reasons the Agencies must not repeal the Clean Water Rule, they must not delay the rule’s implementation; doing so will result in the regulatory confusion the Proposed Delay Rule purports to alleviate, and in the removal of the critical protections the Clean Water Rule accords to certain wetlands and waterbodies.

### **A. Delaying the Clean Water Rule as Proposed Would Lead to Increased Confusion**

The Agencies’ proposal to delay the implementation of the Clean Water Rule would prolong the exact same regulatory scheme that caused immense confusion and waste for nearly

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<sup>5</sup> See *Ohio v. U.S. Army Corps of Eng’rs* (In re *Envtl. Prot. Agency*), 803 F.3d 804 (6th Cir. 2015).

<sup>6</sup> See *North Dakota v. U.S. Env’tl. Prot. Agency*, 127 F. Supp. 3d 1047 (D.N.D. 2015)

<sup>7</sup> Those States are Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming.

<sup>8</sup> *Nat’l Venture Capital Ass’n v. Duke*, 2017 U.S. Dist. LEXIS 197738, \*32-33 (D.D.C., Dec. 1, 2017) (quoting *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (internal quotations omitted)).

<sup>9</sup> *Id.*

<sup>10</sup> See Proposed Repeal Rule, 82 Fed. Reg. 34,899.

30 years.<sup>11</sup> Indeed, the Agencies have admitted that the post-*Rapanos* jurisdictional principles that would remain in effect were 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 [Agencies’] guidance with a regulation that would provide clarity and certainty on the scope of the waters protected by the CWA.”<sup>12</sup> It is beyond comprehension that the Proposed Delay Rule will somehow “provide continuity and certainty”<sup>13</sup> by putting back into play the very language that the Agencies admit lacked the necessary clarity for CWA jurisdiction.

The Agencies properly responded to the call for clarifying the scope of the “water of the United States” by adopting the 2015 Clean Water Rule. The Agencies should allow that clarifying rule to be implemented as soon as possible, and therefore should not adopt the Proposed Repeal Rule.

### **B. The Clean Water Rule Should Be Implemented As Soon As Possible to Protect Our Critical Headwaters and Wetlands**

In addition to drawing clear lines, the 2015 Clean Water Rule defined the “waters of the United States” in scientifically-justified manner this is faithful to the Clean Water Act’s objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>14</sup> Because any delay in implementing the Clean Water Rule will put our water and health at risk, it is imperative that the proposed “applicability date” for the Clean Water Rule not be added.

The Clean Water Rule was the result of input from over one million commenters, over 400 stakeholders, and over 1,200 peer-reviewed scientific publications. Over 87% of the commenters favored the Clean Water Rule protections, including over 50,000 Pennsylvanians.

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,

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<sup>11</sup> See, generally Proposed Repeal Rule, 82 Fed. Reg. 34,899 (detailing history which lead to need for Clean Water Rule).

<sup>12</sup> Proposed Repeal Rule, at 82 Fed. Reg. 34,901.

<sup>13</sup> Proposed Delay Rule, at 82 Fed. Reg. 55,542.

<sup>14</sup> 33 U.S.C. § 1251(a).

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. But just as importantly, headwater streams have biological, chemical, and hydrologic connections to downstream waters. Scientific studies repeatedly demonstrate that the health of downstream lakes, rivers, and estuaries are tied to the health of small streams and wetlands upstream. Leaving these critical waters vulnerable to pollution puts the health of our rivers and the communities that depend upon them at risk.

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.<sup>15</sup> 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.

This proposed delay of the Clean Water Rule will jeopardize clean water even in states that have other water protections, like Pennsylvania has with our Clean Streams Law. The definition of “waters of the United States” in the Clean Water Rule impacts state agency authority over and enforcement of Clean Water Act protections under Section 401, for example. Because the CWA defines “navigable waters” to include “waters of the United States,”<sup>16</sup> the Proposed Delay 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.

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<sup>15</sup> 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](http://www.pennenvironment.org/news/pae/analysis-repealing-clean-water-rule-would-be-devastating-delaware-river-watershed?utm_source=CDRW+%E2%80%A6).

<sup>16</sup> See 33 U.S.C. § 1362(7).



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 essential water protections that Pennsylvanians rely upon to protect their waters by delaying the implementation of the Clean Water Rule.

### **III. CONCLUSION**

Adding an "applicability date" to the Clean Water Rule would effectively rescind the rule that took effect over two years ago. Delaying the implementation of the Clean Water Rule until 2020 or beyond 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** delay the Clean Water Rule.

Thank you for your consideration of these comments.

Respectfully submitted,

A handwritten signature in black ink that reads "Abigail M. Jones".

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