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RE: Revised Definition of “Waters of the United States”, EPA-HQ-OW-2021-0602

Dear Mses. Christensen and Jensen:

The Chesapeake Bay Foundation, Inc. (CBF) and the undersigned organizations welcome the opportunity to comment on the Environmental Protection Agency (EPA) and the United States Department of the Army proposed rule titled “Revised Definition of ‘Waters of the United States’”¹ (WOTUS). We support the agencies’ proposal to reinstate the pre-2015 definition of WOTUS with updates to reflect Supreme Court precedent, effectively repealing the 2020 Navigable Waters Protection Rule (NWPR). The NWPR did not comply with the purpose of the Clean Water Act (CWA) and stripped protections for hundreds of thousands of streams

¹ 86 Fed. Reg. 69,372 (Dec. 7, 2021).

and wetlands across the country.² We submit the following comments in support of the revised definition of WOTUS and look forward to continuing to work with the administration during any subsequent rulemakings.

I. Ephemeral Streams, Wetlands, and the Chesapeake Bay

The Chesapeake Bay is our nation's largest estuary and the third largest estuary in the world.³ Its watershed spans 64,000 square miles from Cooperstown, New York to Virginia Beach, Virginia and westward to the Allegheny Mountains. In total, it encompasses parts of six states- Delaware, Maryland, New York, Pennsylvania, Virginia, and West Virginia- and the District of Columbia.⁴ There are 11,684 miles of shoreline, which is more than the entire U.S. west coast.⁵ The watershed has 150 major rivers and streams and contains more than 100,000 smaller tributaries.⁶ There are 1.5 million acres of wetlands⁷, many of which are non-navigable tributaries, non-tidal wetlands, and ephemeral and intermittent streams.

According to EPA's Chesapeake Bay Program, "[n]on-tidal, or palustrine, wetlands contain fresh water and make up 86 percent of the wetlands in the watershed. Palustrine wetlands are located on floodplains bordering streams and rivers, along the shorelines of lakes and ponds or covering broad, flat areas where water may collect (such as many areas on the Delmarva peninsula)."⁸ Of particular note in the watershed are what are known as "Delmarva Potholes" and pocosins.⁹ There are over 4,950 of these wetlands that are not adjacent to rivers or other waterways and they cover 34,560 acres on the Eastern Shore of Maryland, Delaware and Virginia.¹⁰

² A number of our groups opposed the adoption of the Navigable Waters Protection Rule. Those comments are incorporated by reference. Additionally, there were a number of lawsuits filed challenging the Navigable Waters Protection Rule. See, e.g., *Chesapeake Bay Foundation, et. al. v. United States Environmental Protection Agency*, Case Nos. 1:20-cv-01063 (consolidated).

³ Environmental Protection Agency (EPA) Chesapeake Bay Program (CBP), Facts and Figures, <https://www.chesapeakebay.net/discover/facts>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ EPA, CBP, Wetlands, <https://www.chesapeakebay.net/issues/wetlands>.

⁸ Environmental Integrity Project, *Undermining Protections for Wetlands and Streams, What the Trump Administration's Proposed Rollback of Wetlands Regulations Means for the Chesapeake Bay Region*, p. 4, December 12, 2018 (hereinafter "EIP Report"), available at <https://environmentalintegrity.org/reports/impact-of-clean-water-rollback-on-chesapeake-bay-region/>.

⁹ A "pocosin" is a "wetland bog with sandy peat soil and woody shrubs throughout. Pocosins are generally found along the Atlantic coastal plain of the United States, from southern Virginia to northern Florida." National Oceanic and Atmospheric Administration, *What is a pocosin*, <https://oceanservice.noaa.gov/facts/pocosin.html>.

¹⁰ EIP Report, at 6.

The waters for these wetlands “often connect beneath the ground, or through ditches, to nearby streams and waterways, especially in rainy seasons.”¹¹

Wetlands play a critical role in supporting the waters and diverse wildlife of the Chesapeake Bay watershed. They soak up storm surges, trap polluted runoff and “provide habitat to hundreds of species of fish, birds, mammals and invertebrates.”¹² In trapping polluted runoff, “they help slow [] the flow of nutrients, sediments and chemical contaminants into rivers, streams and the Bay.”¹³ Unfortunately, they are threatened by development, invasive species and sea level rise caused by climate change.

The protection and restoration of wetlands is a critical component to restoring the Bay. Indeed, EPA as the signatory on behalf of the United States to the 2014 Chesapeake Watershed Agreement¹⁴ committed to:

Continually increase the capacity of wetlands to provide water quality and habitat benefits throughout the watershed. Create or re-establish 85,000 acres of tidal and non-tidal wetlands and enhance the function of an additional 150,000 acres of degraded wetlands by 2025.¹⁵

It is critical that the definition of WOTUS include these non-navigable tributaries, non-tidal wetlands, and ephemeral and intermittent streams that make the Chesapeake Bay watershed unique, like Delmarva bays and pocosins. The NWPR did not provide federal protections for these waters. As explained below we support the effective repeal of the NWPR. We urge the agencies in forthcoming rulemakings to ensure that these waters fall within the definition of WOTUS.

¹¹ *Id.* at 6.

¹² EPA, CBP, Wetlands, <https://www.chesapeakebay.net/issues/wetlands>.

¹³ *Id.*

¹⁴ One of the purposes of the Chesapeake Bay Restoration Act of 2000 was to “expand and strengthen cooperative efforts to restore and protect the Chesapeake Bay; and to achieve the goals established in the Chesapeake Bay Agreement.” 33 U.S.C. § 1267. The Chesapeake Bay Agreement is an interstate compact as Congress developed and authorized the joint state action. See *Cuyler v. Adams*, 449 U.S. 433; 101 S. Ct. 703 (1981); *Seattle Master Builders Assoc. v. Pacific Northwest Electric Power & Conservation Planning Council*, 786 F.2d 1359 (9th Cir. 1986). Additionally, Congress, in recognizing this effort continues to fund wetland restoration in the Chesapeake Bay Watershed. See, e.g., White House Office of Management and Budget, Report to Congress: Chesapeake Bay Restoration Spending Crosscut (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/2021-Chesapeake-Bay-Crosscut-.pdf>.

¹⁵ EPA CBP, Chesapeake Bay Watershed Agreement, https://www.chesapeakebay.net/what/what_guides_us/watershed_agreement.

II. The Agencies' effective repeal of the NWPR will restore protections to numerous waters impacting the health and restoration of the Chesapeake Bay.

The NWPR has serious legal and scientific flaws, chief among them that the rule does not comport with the purpose of the CWA – “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁶ The NWPR removed protections for streams and non-adjacent wetlands without considering the effect on water quality and the purpose of the CWA.¹⁷ Also, the overly narrow definition of WOTUS in the NWPR contradicts the intent of Congress in passing the CWA.¹⁸ Streams and wetlands play an integral role in improving water quality by trapping, storing, and transforming excess nutrients, buffering the effects of flooding, and serving as habitat for aquatic species.¹⁹ It was Congress’ intent to extend CWA jurisdiction as broadly as possible because of the interconnectedness of water and aquatic ecosystems. The Supreme Court confirmed this interpretation, holding that “navigable waters” clearly extends beyond waters that are navigable in the traditional sense, in order to fulfill the obligations of the CWA.²⁰ The CWA, therefore, demands broad federal authority to control pollution.²¹

The NWPR is also inconsistent with the best available scientific information. The rule’s wholesale exclusion of ephemeral streams and non-adjacent wetlands disregarded the longstanding science demonstrating the importance of these features to downstream water quality. In *Connectivity of Streams and Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence*, EPA demonstrated the hydrological importance of streams and wetlands to downstream water quality. The Connectivity Report determined that all tributary streams, be they perennial, intermittent, or ephemeral, are “chemically, physically, and biologically connected to downstream rivers.”²² The Connectivity Report also established that wetlands both in and out of floodplains benefit downstream water quality through floodwater storage, nutrient retention and transformation, and groundwater recharge.²³ The NWPR arbitrarily ignores the findings of the Connectivity Report.

¹⁶ 33 U.S.C. § 1251(a).

¹⁷ 86 Fed. Reg. at 69,407.

¹⁸ See *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132–33 (1985).

¹⁹ EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (2015) Docket ID No. EPA-HQ-OW-2018-0149-11691, ES-2 – ES-3 (hereinafter “Connectivity Report”)

²⁰ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

²¹ *Id.*

²² Connectivity Report, at 6-1.

²³ Connectivity Report, at 4-1-4-2.

The NWPR is difficult to implement, leading to inconsistent jurisdictional determinations across the country. The “typical year” standard was not workable, as available tools cannot reliably demonstrate the presence of surface water connections in a typical year.²⁴ Moreover, “typical” was not defined and left up to interpretation. In addition, states and tribes did not fill the regulatory gap left in the wake of the NWPR.²⁵ On the whole, the implementation of the NWPR has led to a significant decrease of jurisdictional determinations under the CWA.²⁶ Under the pre-2015 regulatory regime, anywhere from 27% to 45% of approved jurisdiction determinations resulted in a finding of no jurisdiction.²⁷ Under the NWPR, that number jumped to 75%.²⁸ The impact of the NWPR is likely even more significant, as individuals did not need to seek jurisdiction determinations for ephemeral streams and non-adjacent wetlands that were expressly excluded from the definition of WOTUS.

Finally, the NWPR failed to analyze the adverse impact the rule would have on environmental justice communities as required under the CWA.²⁹ It is critical that the agencies do so in any forthcoming rulemaking.

For these reasons, and those stated in the proposed rule, we support the agencies’ decision to effectively repeal the NWPR.

III. Reinstating the pre-2015 regulations with updates to reflect Supreme Court precedent is a good first step but additional regulatory certainty is needed.

The proposed rule restores protections for waters and wetlands across the country, which is especially important in the Chesapeake Bay watershed. We support reinstating the long-standing definition of WOTUS (i.e., the pre-2015 regulations definition) along with the updates to reflect Supreme Court case law, namely incorporating the significant nexus test.³⁰ However, we urge the agencies to work swiftly to adopt clear definitions of “perennial,” “intermittent,” and “ephemeral” streams as suggested in the proposed rule.³¹ We would not support a

²⁴ 86 Fed. Reg. at 69,410.

²⁵ 86 Fed. Reg. at 69,415.

²⁶ 86 Fed. Reg. at 69,413.

²⁷ 86 Fed. Reg. at 69,413-14.

²⁸ *Id.*

²⁹ See, e.g., 33 C.F.R. § 320.4(a) (The Army Corps of Engineers in determining whether to issue a section 404 permit under the CWA must conduct a broad “public interest review” analyzing the “probable impacts ... of the proposed activity and its intended use on the public interest” which includes environmental justice concerns.”).

³⁰ 86 Fed. Reg. at 69,418 (adopting the significant nexus test to determine jurisdiction for “other waters”).

³¹ 86 Fed. Reg. at 69,436.

definition of WOTUS that includes the wholesale exclusion of streams based solely on their flow classification, as the NWPR did.

We also urge the agencies to implement the “significant nexus” test in a manner that recognizes the importance and connectivity of ephemeral streams and non-adjacent wetlands, especially Delmarva Bays and pocosins found within the Chesapeake Bay watershed. These features were protected under the 2015 Clean Water Rule if there was a significant nexus to traditionally navigable waters.³² Moving forward, the agencies should consider adopting a similar provision to the Clean Water Rule with respect to Delmarva Bays and pocosins.

Finally, as noted above, the agencies must consider environmental justice implications in any definition of WOTUS. The destruction of wetlands and streams from development projects can exacerbate flooding in environmental justice communities.³³ After wetlands have been disturbed, mitigation projects are then not placed in environmental justice communities at the same rates as in predominately white communities.³⁴ The agencies should include an evaluation of environmental justice impacts, especially in the context of wetland loss and flooding concerns exacerbated by climate change, as socially vulnerable communities experience disproportionate impacts from climate change.³⁵ We encourage the agencies to work with overburdened communities, especially Tribal communities³⁶, to ensure that their interests are protected.

IV. Conclusion

We support the agencies efforts to restore the bedrock CWA protections for our nation’s waters and wetlands with the proposed rule. This is a much needed first step to undo the harm caused by the NWPR.

³² 80 Fed. Reg. 37,054, 37,059 (June 29, 2015).

³³ Environmental justice communities are those defined by EPA as “overburdened communities” thus, “minority, low-income, tribal or indigenous populations or geographic locations in the United States that potentially experience disproportionate environmental harms and risks.” EPA EJ 2020 Glossary, <https://www.epa.gov/environmentaljustice/ej-2020-glossary>.

³⁴ Matthew Adam Dernoga, et. al, Environmental justice disparities in Maryland’s watershed restoration programs, 45 ENVTL SCI. & POLICY 67, 70 (2015), available at <https://mdpestnet.org/wp-content/uploads/2020/11/1-s2.0-S1462901114001634-main.pdf>.

³⁵ See EPA, Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts, (Sept. 2021), available at https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf.

³⁶ Recently seven tribes in the watershed were added to the list of federally recognized tribes: Chickahominy, Eastern Chickahominy, Monacan, Nansemond, Pamunkey, Rappahannock and Upper Mattaponi. 87 Fed. Reg. 4,636 (Jan. 28, 2022). A number of these tribes have wetlands on their lands.

While we support the agencies' decision to reinstate the pre-2015 regulations with updates to reflect Supreme Court precedent in the interim and believe this approach provides more regulatory clarity than the NWPR, we urge the agencies to work swiftly in the next round of rulemaking to provide additional clarity on what is meant by WOTUS.

We appreciate the opportunity to submit comments on the revised definition of WOTUS and look forward to continuing to work with the administration to end the decades-long battle over which waters are protected under the CWA. If you have any questions, please contact Keisha Sedlacek, ksedlacek@cbf.org.

Sincerely,

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Audubon Naturalist Society
Audubon Society of Northern Virginia
Cacapon Institute
Capital Region Land Conservancy
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Chesapeake Legal Alliance
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Citizens to Conserve and Restore Indian Creek
Corsica River Conservancy
Delaware Nature Society
Friends of Lower Beaverdam Creek
Friends of Nanticoke River
Friends of Quincy Run
Friends of St. Clements Bay
League of Women Voters of Pennsylvania
Lynnhaven River NOW
Maryland League of Conservation Voters
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