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April 12, 2019
Submitted via regulations.gov
Andrew Wheeler, Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

R.D. James
Assistant Secretary of the Army (Civil Works)
Department of the Army
108 Army Pentagon
Washington, DC 20310-0108

**RE: Chesapeake Bay Foundation Comments,
Proposed Rule,
Revised Definition of "Waters of the United States"
EPA-HQ-OW-2018-0149**

Dear Administrator Wheeler and Assistant Secretary James:

The Chesapeake Bay Foundation, Inc. (CBF) submits the following comments regarding the Environmental Protection Agency (EPA) and the Department of the Army, Corps of Engineers (ACOE) Proposed Rule, *Revised Definition of "Waters of the United States."*¹ In this proposed rule, the EPA and the ACOE (the agencies) propose to change the regulatory definition of the "Waters of the United States" in the federal Clean Water Act.

The health and restoration of the Chesapeake Bay is dependent upon the protection of the very streams and wetlands that the agencies propose to exclude from federal jurisdiction under the Clean Water Act, thus CBF urges the agencies to withdraw this proposal and to fully implement the 2015 Clean Water Rule.

I. The Chesapeake Bay Foundation

CBF is a 501(c)(3) non-profit organization, founded in 1967. The organization's mission -- carried out from offices in Maryland, Virginia, Pennsylvania and the District of Columbia -- is to restore and protect the ecological health of the Chesapeake Bay, the nation's largest and one of its most vital estuaries. As such, and on behalf of our over 275,000 members² across

¹ EPA, Department of the Army, Corps of Engineers, *Revised Definition of "Waters of the United States,"* 84 FR 4154, February 14, 2019.

² Over 2,008 of our members have also submitted their own comments regarding this proposed rulemaking.

the United States, we are very interested in matters that will impact the health of the Chesapeake Bay and the waters that feed into the watershed.

II. Background

In response to President Trump’s Executive Order, *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States’ Rule,”* the agencies embarked upon a two-step process to repeal and replace the 2015 Clean Water Rule (2015 Rule or Clean Water Rule).³ In step one, the agencies proposed to repeal the 2015 Rule, and recodify the regulatory definition of “Waters of the United States” that existed prior to the effective date of the 2015 Rule.⁴ As a part of that process, the agencies also promulgated a Final Rule that changed the applicability date of the Clean Water Rule to February 6, 2020.⁵

CBF opposed all of those efforts and incorporates by reference our prior comments to the agencies’ proposals to repeal the 2015 Rule and recodify the pre-existing rule,⁶ and change the applicability date of the 2015 Rule.⁷

As we have noted numerous times, step one is ill-advised. In this proposal, that establishes six categories of jurisdictional waters and defines eleven exclusions for features that would not be subject to jurisdiction under the CWA,⁸ however, the agencies go much further and propose narrowing the scope of the Clean Water Act beyond any definition considered since its inception in 1972. The sections of the proposal that are most concerning to CBF are those relating to the definition of adjacent wetlands and the list of features that are now excluded from the definition of WOTUS including Delmarva Bays or pocosins, ephemeral streams and interstate waters.

Adjacent wetlands are defined by the agencies as:

³ EPA, Department of the Army, Corps of Engineers, *The Clean Water Rule: Definition of the “Waters of the United States,”* 80 FR 37054, June 29, 2015.

⁴ *Rule to Rescind the Clean Water Rule and Re-Codify the Regulatory Text that Existed Prior to 2015 Defining “Waters of the United States” or WOTUS,* 82 FR 34899, July 27, 2017; *Supplemental Notice of Proposed Rulemaking, Definition of “Waters of the United States” – Recodification of Preexisting Rule,* 83 FR 32227, July 12, 2018.

⁵ EPA, Department of the Army, Corps of Engineers, Final rule, *Definition of “Waters of the United States” -- Addition of an Applicability Date to 2015 Clean Water Rule,* 83 FR 5200, February 6, 2018. This rule was vacated by the federal District Court for South Carolina, *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d (D.S.C. 2018); *See also Puget Soundkeeper v. Wheeler*, 2018 U.S. Dist. Lexis 199358 (W.D. Wash. 2018).

⁶ *Chesapeake Bay Foundation Comments Regarding Rule to Rescind the Clean Water Rule and Re-Codify the Regulatory Text that Existed Prior to 2015 Defining “Waters of the United States,”* EPA-HQ-OW-2017-0203, September 27, 2017; *Chesapeake Bay Foundation Comments Regarding Supplemental Notice of Proposed Rulemaking, Definition of “Waters of the United States” – Recodification of Preexisting Rule,* EPA-HQ-OW-2017-0203, August 13, 2018.

⁷ *Chesapeake Bay Foundation Comments Regarding Definition of “Waters of the United States” – Addition of an Applicability Date to 2015 Clean Water Rule,* EPA-HQ-OW-2017-0644, December 13, 2017.

⁸ EPA and Department of the Army, *Resource and Programmatic Assessment for the Proposed Revised Definition of “Waters of the United States,”* p. 8, December 11, 2018. https://www.epa.gov/sites/production/files/2018-12/documents/wotus_proposed_step_2_rpa_for_clearance_12-7-18_508c.pdf.

The proposal defines “adjacent wetlands” as wetlands that **abut or have a direct hydrological surface connection to other “waters of the United States” in a typical year.** “Abut” is proposed to mean when a wetland touches an otherwise jurisdictional water at either a point or side. A “direct hydrologic surface connection” as proposed occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and jurisdictional water. Wetlands physically separated from other waters of the United States by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent under this proposal.⁹

In addition to the excluded categories of waters that would not be included in the proposed rule, the following features **would not be considered** “waters of the United States:”

The proposed definition specifically clarifies that “waters of the United States” do not include **features that flow only in response to precipitation; groundwater, including groundwater drained through subsurface drainage systems; certain ditches; prior converted cropland; artificially irrigated areas that would revert to upland if artificial irrigation ceases; certain artificial lakes and ponds constructed in upland; water-filled depressions created in upland incidental to mining or construction activity; stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off; wastewater recycling structures constructed in upland; and waste treatment systems.**¹⁰

Finally, agencies propose removing **interstate waters and interstate wetlands** as a separate category of “waters of the United States.”¹¹

The agencies’ reduction in the scope of the features that will be protected under federal law is an astounding assault on the Clean Water Act; one of the most important and fundamental laws we have protecting America’s waters. At the outset, we oppose this proposal and the negative consequences such a shift in policy has on the tone of federal environmental protection in the United States. It is estimated that this rule will affect the status of 18 percent of streams and 51 percent of wetlands nationwide.¹² More specifically, Section 117 of the Clean Water Act¹³ is the foundation under which the restoration efforts of the Chesapeake Bay is built. A narrowing of the definition of “Waters of the United States” weakens not only that section of the Clean Water Act

⁹ *Emphasis added*, EPA, Department of the Army, Corps of Engineers, *Revised Definition of “Waters of the United States,”* 84 FR 4154, 4155, February 14, 2019.

¹⁰ *Emphasis added, Id.*

¹¹ *Id.* at 4174.

¹² E-mail correspondence from John Goodin, EPA, to Stacey Jensen, HQUSACE Regulatory Program Manager, September 4, 2017, https://www.eenews.net/assets/2018/12/11/document_gw_05.pdf.

¹³ 33 U.S.C. § 1267, *et seq.*

generally, but it also has implications for the regional and local programs that fall within its purview. For brevity's sake, these comments focus on the impacts this proposal will have on ephemeral streams, interstate waters and adjacent wetlands in the Chesapeake Bay watershed.

III. Ephemeral Streams, Wetlands and the Chesapeake Bay

The Chesapeake Bay receives half of its water from an intricate network of 111,000 miles of creeks, streams, and rivers and 1.7 million acres of wetlands, many of which are non-navigable tributaries, non-tidal wetlands, and ephemeral and intermittent streams.¹⁴

According to EPA's Chesapeake Bay Program, "Non-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)."¹⁵ Of particular note in the watershed are what are known as "Delmarva Potholes." 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.¹⁶ The waters for these wetlands "often connect beneath the ground, or through ditches, to nearby streams and waterways, especially in rainy seasons."¹⁷

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 fish, birds, mammals and invertebrates."¹⁸ In trapping polluted runoff, "they help slow the flow of nutrients, sediments and chemical contaminants into rivers, streams and the Bay."¹⁹ 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, EPA²⁰ as the signatory on behalf of the United States to the 2014 Chesapeake Watershed Agreement,²¹ an interstate compact, committed to:

¹⁴ Chesapeake Bay Program, *Bay 101: Wetlands*, <https://www.chesapeakebay.net/issues/wetlands>

¹⁵ *Id.*

¹⁶ Fenstermacher, D.E., Rabenhorst, M.C., Lang, M.W. et al., *Wetlands* (2014) 34, 1219, <https://doi.org/10.1007/s13157-014-0583-5>; See also, 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*, pp. 2-3, December 12, 2018.

¹⁷ 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.

¹⁸ Chesapeake Bay Program, *Bay 101: Wetlands*, <https://www.chesapeakebay.net/issues/wetlands>.

¹⁹ *Id.*

²⁰ Along with its partner jurisdictions.

²¹ 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).

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.*²²

Re-establishing 85,000 acres of wetlands and restoring the function of 150,000 more acres of wetlands will be jeopardized if the new definitions are adopted. Instead, the proposal removes tens of thousands of acres from federal protection and will prevent federal protection for thousands of wetlands yet to be identified. To achieve the goals of the Chesapeake Watershed Agreement, and to meet the requirements of the Chesapeake Bay Clean Water Blueprint,²³ the Clean Water Act must be properly interpreted and enforced. The way in which EPA and the Corps define “Waters of the United States” will make those goals unattainable.

IV. The Agencies’ Replacement Definition Will Negatively Impact the Health and Restoration of the Chesapeake Bay.

As noted above, if adopted and implemented, the agencies’ proposed replacement definition of WOTUS eliminates federal protections for specific features, ephemeral streams and wetlands that are not considered “adjacent wetlands.” This will have serious impacts upon the overall restoration and health of the Chesapeake Bay. The greatest impacts will obviously be in the jurisdictions within the watershed that rely upon the federal protections to the greatest degree. Those include Delaware,²⁴ the District of Columbia²⁵ and West Virginia.²⁶ The proposed rule would be devastating for Delaware which uses the federal definition of WOTUS in its state code. Twenty percent of the state is made up of wetlands and over 1,000 miles of streams and almost 200 thousand acres of wetlands would be vulnerable to destruction.²⁷

²² *Emphasis added, Chesapeake Bay Watershed Agreement*, p. 5, 2014, https://www.chesapeakebay.net/documents/FINAL_Ches_Bay_Watershed_Agreement.withsignatures-Hires.pdf

²³ EPA established the Chesapeake Bay TMDL in 2010. The Bay TMDL and the Bay jurisdictions’ Watershed Implementation Plans (WIPS) are collectively known as the Chesapeake Bay Clean Water Blueprint. The Blueprint is based on the EPA’s authority to set limits on the amounts of nitrogen, phosphorous and sediment that can be discharged in the Bay. 33 U.S.C. §§ 1267, 1313. EPA and jurisdictions delegated permitting authority require attainment of those numeric limits in National Pollutant Elimination Discharge System (NDPES) and CWA Section 404 “dredge and fill” permits. 33 U.S.C. §§ 1342, 1344. Included in the Bay jurisdictions’ WIPS are the identification and creation of forested stream side buffers and wetlands protections. See U.S. Envtl. Prot. Agency, *Chesapeake Bay Total Maximum Load for Nitrogen, Phosphorous and Sediment*, December 29, 2010, <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document>.

²⁴ See EPA and Department of the Army, *Economic Analysis for the Proposed Revised Definition of “Waters of the United States,”* Section II, *Discussion and Analysis of the Major Causes of Uncertainty*, p. 41., December 14, 2018.

²⁵ See *Id.* at p. 35, December 14, 2018; See also, D.C. Department of Energy and Environment, *Wetlands Permits*, <https://doee.dc.gov/node/1125232>.

²⁶ West Virginia relies upon the federal definition of wetlands, and also has a state definition of isolated wetlands as waters of the state. See *West Virginia State Wetland Program Summary*, https://www.aswm.org/pdf_lib/state_summaries/west_virginia_state_wetland_program_summary_083115.pdf; W.Va. Code § 22-26-2 (18).

²⁷ Gerald J. Kauffman, University of Delaware Water Resources Institute, *Socioeconomic Benefits of Delaware Wetlands*, p. 7, <http://www.wrc.udel.edu/wp-content/uploads/2018/06/SocioeconomicValueofDelawareWetlandsFinalReportApril2018.pdf>; See also,

Even in Maryland,²⁸ New York,²⁹ Pennsylvania,³⁰ and Virginia³¹ where the states have various programs in addition to the federal Clean Water Act, the impacts will be felt. In Pennsylvania, for example, ephemeral streams are not explicitly included in the definitions of “waters of the Commonwealth” under the Clean Streams Law or “body of water” under the Dam Safety and Encroachments Act.³² Additionally, in Maryland, the “determination of whether an area is a nontidal wetland shall be made in accordance with the publication known as the ‘Federal Manual for Identifying and Delineating Jurisdictional Wetlands.’”³³ There is every likelihood that this manual will be amended to be consistent with the proposed, revised federal definition of WOTUS (if it is finalized and implemented) thereby narrowing protections to nontidal wetlands in Maryland.

It is interesting to note that in their economic analysis³⁴ the agencies consider scenarios whereby states may step in to “fill the gaps” left by this proposed rule. They do not, however, consider that their proposal may have the opposite effect and encourage states that have additional or stricter wetlands protections to follow in kind and narrow their own laws and regulations. While Maryland, Virginia and Pennsylvania have additional state water programs, there have been numerous attempts by the state legislatures in Virginia and Pennsylvania to pass laws that would weaken their programs. In the 2018 Virginia legislative session, a bill was introduced that would have prohibited state environmental agency and regulatory boards from adopting any environmental rule, statute or regulation that is inconsistent with or exceeds the requirements of any duly adopted relevant federal environmental regulatory or standard.³⁵

Salisbury Daily Times, *Farmers Cheer Trump Water Rollback as Environmentalists Worry about Chesapeake Bay Impact*, Jenna Miller, December 17, 2018.

²⁸ See Md. Code Ann., Environment Article § 5-101 *et seq.*; Md. Code Ann., Natural Resources Article § 8-101 *et seq.*

²⁹ <http://www.dec.ny.gov/lands/4937.html>

³⁰ See *Pennsylvania Clean Streams Law*, 33 P.S. 691.1, *et seq.*; *25 Pa. Code Chapters 91, 92a, 93, 95,96, 102 and 105*; *Dam Safety and Encroachments Act*, 32 P.S. 693.1, *et seq.*; *25 Pa. Code Ch. 105*.

³¹ The Virginia nontidal wetlands law was passed in 2000. The law, as enacted, and as existing today defines state waters to include all waters of the state, expressly including all wetlands. Acts of Assembly 2000 chap. 1054 <http://lis.virginia.gov/cgi-bin/legp604.exe?001+ful+CHAP1054+pdf>. The current law is codified at Va. Code §§ 62.1-44.15:20, *et seq.* Section 62.1-10(a) states that, “Water” includes all waters, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction and which affect the public welfare.

³² *Pennsylvania Clean Streams Law*, 33 P.S. 691.1, *et seq.*; *25 Pa. Code Chapters 91, 92a, 93, 95,96, 102 and 105*; *Dam Safety and Encroachments Act*, 32 P.S. 693.1, *et seq.*; *25 Pa. Code Ch. 105*.

³³ Md. Code Ann., Environment Article § 5-901(m)(1).

³⁴ See EPA and Department of the Army, *Economic Analysis for the Proposed Revised Definition of “Waters of the United States,”* December 14, 2018.

³⁵ H.B. 1082 A BILL to amend the Code of Virginia by adding a section numbered 10.1-1184.1, relating to 5 environmental regulations; no stricter than federal law (introduced in Va. House of Delegates, 2018), <https://lis.virginia.gov/cgi-bin/legp604.exe?181+ful+HB1082+pdf>; See also H.B.801 (introduced in Va. House of Delegates, 2018) (would prohibit regulatory board from adopting any stormwater regulation that is inconsistent with or exceeds the requirements of any federal stormwater statute, regulation, standard, guidance, etc.) <https://lis.virginia.gov/cgi-bin/legp604.exe?181+ful+HB801+pdf>. In addition, there have been instances where the Virginia Department of Environmental Quality (DEQ), in developing state regulations or permits, has refused to exceed the level of stringency required in an analogous federal permit or rule. A recent example is in DEQ’s drafting of the revised Virginia Pollution Discharge Elimination System Construction general permit. See *Tentative Agenda, Virginia State Water Control Board Meeting*, April 15, 2019, p. 238 (explaining its decision to reject proposal to

In Pennsylvania, there are several bills under consideration that weaken the state's water laws and the State Government Commission just finished an analysis of which state environmental laws and regulations have more stringent standards than the federal law requires.³⁶ Any changes in those states water laws will obviously have serious ramifications if the agencies' proposal is finalized and implemented.

In addition, the agencies removal of **interstate waters and wetlands** as a separate category of WOTUS exacerbates the problems associated with different states having different protections. As the Maryland Department of Environment states:

Maryland does ... have some concerns about issues which could arise for interstate waters, if an immediately upstream state has a much narrower definition of the scope of regulated waters and wetlands under state law than the immediately downstream state. In these cases, having a broader federal definition of CWA jurisdiction could help avoid complex interstate conflicts that might otherwise arise if the federal definition were too narrow. **It is important that flowing waters that cross state borders be adequately protected from pollution under the upstream state's law** (with provisions for the downstream state to weigh-in on discharge permits and standards) or, if not, be subject to federal jurisdiction so that the downstream state can, if need be, participate as a downstream state in the process of the permitting of discharges and the establishing of water quality standards for such a stream.

According to the Susquehanna River Basin Commission, in the Susquehanna River Basin alone there are eighty-three streams that cross state lines. Several streams traverses the state borders at multiple points, contributing to 91 total crossings. Of those 91 crossings, 45 streams flow from New York into Pennsylvania, 22 from Pennsylvania into New York, 15 from Pennsylvania into Maryland, and nine from Maryland into Pennsylvania. Many streams are small, and 32 are small enough to be "unnamed." **It is important to Maryland to ensure that any upstream discharges of pollutants or nonpoint source inputs of pollutants do not result in violations of water quality standards in the Maryland portion of streams, and potentially impact sources of drinking water or the delivery of pollutants to the Chesapeake Bay.**

strengthen draft permit by requiring monitoring turbidity downstream of construction sites, citing the absence of an equivalent monitoring requirement for NPDES permits in 40 CFR Part 450, townhall.virginia.gov/L/GetFile.cfm?File=Meeting\103\29182\Agenda_DEQ_29182_v2.pdf

³⁶ See HB 534 (PN 526), *Comply with the NDPEs Waiver Program that Exists at the Federal Level*; HB 177 (PN 149), *Amends the Clean Streams Law "potential pollution" to add waivers for riparian buffers*; Joint State Government Commission, *Environmental Laws of Pennsylvania, 2018*, <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2018-04-18%20SR385%20report%20for%20website%204-18-18%201200pm.pdf>.

Ensuring that the federal interpretation of “relatively permanent” waters includes both perennial and intermittent streams is particularly important to Maryland. Similarly, **Maryland would want to ensure that the definition of federally regulated wetlands was sufficiently broad to minimize situations where activities impacting unregulated wetlands in an upstream state could adversely impact Maryland water resources** or cause Marylanders to suffer additional financial, health, or safety-related obligations as a result of an upstream wetland being unprotected.³⁷

The concerns raised by MDE echo the conclusions from the report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review of Synthesis of the Scientific Evidence* (Connectivity Report) – that the agencies relied upon in promulgating the 2015 Clean Water Rule; the streams and waters in each of the states within a watershed are all ultimately connected and contribute to the health of a watershed.

As the Connectivity Report states,

Conclusion 1: Streams

The scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters. **All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers** via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. Streams are the dominant source of water in most rivers, and the majority of tributaries are perennial, intermittent, or ephemeral headwater streams. Headwater streams also convey water into local storage compartments such as ponds, shallow aquifers, or stream banks, and into regional and alluvial aquifers; these local storage compartments are important sources of water for maintaining baseflow in rivers. In addition to water, streams transport sediment, wood, organic matter, nutrients, chemical contaminants, and many of the organisms found in rivers. The literature provides robust evidence that streams are biologically connected to downstream waters by the dispersal and migration of aquatic and semiaquatic organisms, including fish, amphibians, plants, microorganisms, and invertebrates, that use both upstream and downstream habitats during one or more stages of their life cycles, or provide food resources to downstream communities. In addition to material transport and biological connectivity, ephemeral, intermittent, and

³⁷ *Emphasis added*, Letter to Scott Pruitt, Administrator, EPA and Douglas W. Lamont, P.E., Senior Official Performing the Duties of the Assistant Secretary of the Army for Civil Works, from Ben Grumbles, Secretary, Maryland Department of the Environment, pp. 2-3, September 27, 2017, Docket ID No. EPA-HQ-OW-2017-0203.

perennial flows influence fundamental biogeochemical processes by connecting channels and shallow ground water with other landscape elements. Physical, chemical, and biological connections between streams and downstream waters interact via integrative processes such as nutrient spiraling, in which stream communities assimilate and chemically transform large quantities of nitrogen and other nutrients that otherwise would be transported directly downstream, increasing nutrient loads and associated impairments due to excess nutrients in downstream waters.³⁸

With regard to cumulative effects, the Report notes,

Conclusion 5: Cumulative Effects

The **incremental effects of individual streams and wetlands are cumulative across entire watersheds and therefore *must be evaluated in context with other streams and wetlands.***

Downstream waters are the time-integrated result of all waters contributing to them. For example, the amount of water or biomass contributed by a specific ephemeral stream in a given year might be small, but **the aggregate contribution of that stream over multiple years, or by all ephemeral streams draining that watershed in a given year or over multiple years, can have substantial consequences on the integrity of the downstream waters.** Similarly, the downstream effect of a single event, such as pollutant discharge into a single stream or wetland, might be negligible but the cumulative effect of multiple discharges could degrade the integrity of downstream waters.

In addition, when considering the effect of an individual stream or wetland, **all contributions and functions of that stream or wetland should be evaluated cumulatively.** For example, the same stream transports water, removes excess nutrients, mitigates flooding, and provides refuge for fish when conditions downstream are unfavorable; if any of these functions is ignored, the overall effect of that stream would be underestimated.³⁹

The Connectivity Report is clear on these points – the impacts of streams and wetlands must be evaluated in the context of the **entire watershed** and what happens at the headwaters will be felt downstream. In other words, it’s all connected. To evaluate it any other way simply doesn’t follow the science or make any sense.

³⁸ *Emphasis added*, U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Final Report), EPA/600/R-14/475F, (Washington, DC: U.S. Environmental Protection Agency, ES-2, (2015)). <http://www.epa.gov/ncea>.

³⁹ *Emphasis added*, U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Final Report), EPA/600/R-14/475F, (Washington, DC: U.S. Environmental Protection Agency, ES-6, (2015)). <http://www.epa.gov/ncea>.

And yet, the agencies' proposal narrows the protection for these exact types of features. This revised definition would also eliminate the protection for the Delmarva Potholes mentioned above that were specifically protected under the 2015 Clean Water Rule.⁴⁰ The loss of protections for these types of wetlands as well as ephemeral streams and interstate waters that are so important to the Bay and provide so many critical services to its health and restoration will be felt throughout the watershed.

In addition, and equally as important, the Bay—and its surrounding states— are negatively impacted by the effects of climate change. EPA has noted that average temperatures have risen by almost two degrees Fahrenheit between 1895 and 2011 and projections indicate warming of 4.5 to 10 degrees by the 2080s.⁴¹ The Chesapeake Bay suffers from the effects of climate change including sea-level rise, warming temperatures, and extreme weather.⁴²

Within 20 years, nearly 170 U.S. communities will be chronically inundated with flooding⁴³ and more than 70% of these communities will be in Louisiana and Maryland: the “canaries in the coal mine” for sea level rise.⁴⁴ Sea level rise threatens to inundate small coastal communities and major cities alike in the Chesapeake Bay region. In Maryland alone, it threatens to flood over 61,000 homes by 2100, valued at \$19 billion.⁴⁵ Entire inhabited islands are now underwater in the Chesapeake Bay, with more likely to follow if GHG emissions do not decrease substantially.⁴⁶ In Norfolk, Virginia, sea level rise poses significant risk to the public and military infrastructure and operations.⁴⁷

⁴⁰ EPA, Department of the Army, Corps of Engineers, *The Clean Water Rule: Definition of the “Waters of the United States,”* 80 FR 37054, June 29, 2015.

⁴¹ EPA, Chesapeake Bay Program, *Climate Change*, https://www.chesapeakebay.net/issues/climate_change.

⁴² *Id.*

⁴³ Erika Spanger-Siegfried, *et. al*, *When Rising Seas Hit Home: Hard Choices Ahead for Hundreds of US Coastal Communities*, Union of Concerned Scientists 2, 2017.

⁴⁴ *Id.*

⁴⁵ Catherine Rentz, *Rising sea levels threaten \$19 billion in real estate across Maryland*, study says, The Baltimore Sun, Oct. 28, 2017, <http://www.baltimoresun.com/news/maryland/investigations/bsmd-suninvestigates-sea-level-20171026-story.html>.

⁴⁶ Erik Ortiz, *How to Save A Sinking Island*, NBC NEWS, November 13, 2017, <https://www.nbcnews.com/specials/deal-island>; David Farenthold, *Last house on sinking Chesapeake Bay island collapses*, Washington Post, October 26, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/10/24/AR2010102402996.html>; Jon Gertner, *Should the United States Save Tangier Island From Oblivion?*, New York Times Magazine, July 6, 2016, <https://www.nytimes.com/2016/07/10/magazine/should-the-united-states-save-tangier-island-fromoblivion.html>.

⁴⁷ “Sea level rise at just one site can have a significant impact on [both military policy and] strategy. Hampton Roads, Virginia, dubbed ‘the greatest concentration of military might in the world’ for former Secretary of Defense Leon Panetta, is by itself an invaluable operational and strategic hub for both the United States and its allies. It ...is the backbone of the U.S. Atlantic Fleet. It is also a low-lying site and very exposed to seal level rise and storm surge. If significant portions of the Hampton Roads infrastructure we regularly inundated, as is projected under a number of scenarios for the years 2023-2100, the impediment to force deployments for critical Atlantic, Mediterranean and Pacific war-fighting and humanitarian operations – many of which are tied to core strategic goals of the United States – would be significant.” The Center for Climate and Security, Military Expert Panel Report: *Sea Level Rise and the U.S. Military’s Missions, 23-24, 2016*, <https://climateandsecurity.files.wordpress.com/2016/09-center-for-climate-and-security-military-expert-panel-report2.pdf>.

Wetlands can help to mitigate some of those effects, but they are also threatened by sea level rise. As we have noted, these important filters reduce the level of pollutants entering the Bay,⁴⁸ help protect against flooding by absorbing stormwater and protect coastal communities from storm surge and erosion,⁴⁹ but they can also serve as sites of carbon sequestration.⁵⁰ Wetlands inundated with saltwater from sea level rise, however, begin to disappear.⁵¹ They are typically some of the first areas to be exposed to chronic flooding and while they can migrate in response to changes in water levels provided they have the space and time to do so,⁵² the pace of sea level rise and changes in land use in coastal communities have weakened the ability of wetlands to migrate.⁵³ A decrease in the overall acreage of wetlands will lead to a decrease in the natural environment's ability to deal with increased rainfall.

Given the additional challenges to the region resulting from climate change, including an increase in flooding, this is a particularly important time to protect and restore wetlands in the Region. The proposed rule will expose more wetlands to dredge and fill operations destroying their ability to help us cope with climate change.

In addition to the on-the-ground impacts that the revised definition will have on the Bay watershed, the agencies' narrowing of their own jurisdiction under the Clean Water Act sends the wrong message to the states. Under Section 117(g) of the Clean Water Act, EPA has a special role in the restoration of the Chesapeake Bay and is tasked with ensuring the development and implementation of management plans under the 2014 Chesapeake Bay Agreement; that includes the goals of the Chesapeake Bay Total Maximum Daily Load (TMDL) and Watershed Implementation Plans. In 2010, EPA issued the TMDL for the Chesapeake Bay region⁵⁴ and in that process – and in its leadership role - identified backstop measures it would take against the states if they were not meeting the requirements of the TMDL.⁵⁵ This proposal to weaken the Clean Water Act signifies EPA stepping back from its statutory role and the obligations to which it committed. This is inconsistent with EPA's leadership role in restoring the Chesapeake Bay. It is also inconsistent with EPA Administrator Wheeler's statements praising the Bay partnership efforts - as a national and international model - and his commitment to the restoration of the Chesapeake Bay.⁵⁶

⁴⁸ Chesapeake Bay Program, *Wetlands*, <https://www.chesapeakebay.net/issues/wetlands>

⁴⁹ *Id.*

⁵⁰ Kevin D. Kroeger, *et al.*, Scientific Reports, *Restoring Tides to Reduce Methane Emissions in Impounded Wetlands: A New and Potent Blue Carbon Climate Change Intervention*, September 20, 2017, www.nature.com/scientificreports.

⁵¹ Joseph Kurt and Victor Unnone, *Climate Change and the Chesapeake Bay Total Maximum Daily Load: Policy Priorities and Options*, Virginia Coastal Policy Center, 4, 2016.

⁵² Erika Spanger-Siegfried, *et. al*, *When Rising Seas Hit Home: Hard Choices Ahead for Hundreds of US Coastal Communities*, Union of Concerned Scientists, 10, 2017.

⁵³ *Id.*

⁵⁴ EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorous and Sediment*, December 29, 2010, <https://www.epa.gov/chesapeake-by-tmdl/chesapeake-by-tmdl-document>

⁵⁵ *Id.* at Section 7, *Reasonable Assurances and Accountability Framework*.

⁵⁶ Senate Appropriations Subcommittee Hearing, EPA FY 2020 Budget, April 3, 2019; Senate Environment and Public Works Hearing, Nomination of Andrew R. Wheeler as Administrator of EPA, January 16, 2019; Letter from Harry T. Lester, Chairman, and William C. Baker, President, Chesapeake Bay Foundation, to Andrew R. Wheeler, Administrator, EPA, memorializing meeting on March 8, 2019, March 15, 2019.

In this same way, the federal Clean Water Act serves as the overall coordinator – and the example for what the minimum protections are to “restore and maintain the chemical, physical and biological integrity of the nation’s waters ...”⁵⁷ The agencies’ proposal to step away from the goals of the Clean Water Act sends states the message that these protections are no longer in their purview and thus are not as important as they have been – since 1972. This sends the wrong message to states and is counter to Congress’ expectation that they protect local waters and wetlands.⁵⁸

The negative impacts to the health and restoration of the Chesapeake Bay from the agencies’ proposal are vast. We urge EPA and the Corps to withdraw this proposal and fully implement the 2015 Clean Water Rule.

V. The Agencies’ Revised Definition of WOTUS Does Not Provide Regulatory Clarity.

The impetus behind the 2015 Rule was, as the agencies are well aware, an abundance of confusion over the definition of WOTUS.⁵⁹ The goals of the 2015 Rule were to clarify the definition, make it easier to understand, establish more predictably and make it consistent with the law and science.⁶⁰ The agencies now propose narrowing the definition of WOTUS and, in doing so, will create more confusion. For example, while the agencies propose to eliminate ditches as “waters of the United States,”⁶¹ this may actually make them be considered a “point source” under the CWA if they convey pollution to a water that is protected under the CWA. The source of that discharge would then be required to obtain a National Pollutant Discharge Elimination System (NPDES) permit.⁶²

It is also likely that distinguishing between flow resulting from snowfall and flow resulting from melting snowpack, as the agencies suggest⁶³ to distinguish between ephemeral and intermittent streams, is going to be a challenging and confusing task.⁶⁴

⁵⁷ 33 U.S.C. §1251(a).

⁵⁸ 33 U.S.C. § 1251(b).

⁵⁹ CBF incorporates by reference its Comments on the *Proposed Definition of Waters of the United States Under the Clean Water Act*, EPA-HQ-OW-2011, November 14, 2014. In those comments, we highlighted the need for additional clarity as both CWA Section 402 point source discharge and Section 404 dredge and fill permitting regimes – essential to Bay restoration – are predicated upon impacts to WOTUS. We pointed to specific state and federal cases in which the lack of definitional clarity caused confusion between state and federal permitting decisions. We supported the 2015 Clean Water Rule and believe that it addresses those issues. See also, *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corp. of Engineers*, 531 U.S. 159 (2001), 121 S. Ct. 675, 148 L. Ed. 2d 576; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985).

⁶⁰ EPA, Department of the Army, Corps of Engineers, *The Clean Water Rule: Definition of the “Waters of the United States,”* 80 FR 37054, 37055, June 29, 2015.

⁶¹ EPA, Department of the Army, Corps of Engineers, *Revised Definition of “Waters of the United States,”* 84 FR 4154, 4155, February 14, 2019.

⁶² See 33 U.S.C. § 1311, *et seq.*; See also Ariel Wittenberg, E&E, *Would Trump’s rule proposal really help farmers?*, December 17, 2018.

⁶³ EPA, Department of the Army, Corps of Engineers, *Revised Definition of “Waters of the United States,”* 84 FR 4154, 4173, February 14, 2019.

⁶⁴ *Id.*; See also 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. 2, December 12, 2018.

In addition, the proposal is so vast – and the approaches considered and upon which comment is requested so expansive – that it is not possible to easily ascertain its impacts. The agencies admit this in their assessments.⁶⁵

This approach does not provide clarity: it creates undue confusion; seeks to avoid Congressional objectives; and ignores valid science. Rather than redefine WOTUS, the agencies should move forward with defending and implementing the 2015 Rule.

VI. The Manner in Which this Rule was Proposed Violates the Administrative Procedure Act.

The Administrative Procedure Act (APA)⁶⁶ lays out specific requirements for rulemaking. To repeal a rule through the APA, a thorough public comment process needs to be carried out, and the administration must also provide a strong and legally defensible justification for withdrawing the existing rule.⁶⁷ The current proposed rule is inconsistent with these fundamental principles.

The agencies' explanation as to the potential ramifications of their proposed changes to the definition of WOTUS is inaccurate and raises serious concerns as to the process which the agencies utilized in putting forth their proposal. As the Court noted in *FCC v. Fox Television Co.*,⁶⁸ when changing its position on a rule, an agency will often need to address the reasoning underlying the old rule; if “its new policy rests upon factual findings that contradict those which underlay its prior policy... [i]t would be arbitrary or capricious to ignore such matters.”⁶⁹ The Court reiterated the agency's obligation to justify the rule it proposes and noted, “[O]f course ... [the] agency must show that there are good reasons for the new policy.”⁷⁰

Indeed, before the agencies can rescind an existing rule or put a new rule into effect, they need to explain, and seek comment on, their proposed reasons for doing so. Under the Supreme Court's decision in *Motor Vehicle Mfrs. Assn. v. State Farm*, a decision to rescind is subject to the same “arbitrary and capricious” test applied to the rule's promulgation.⁷¹ The Court noted in that case that the absence of any scientific discussion of the rulemaking that was proposed was legally deficient because the agencies “entirely failed to consider some important aspect of the problem” before them.⁷²

⁶⁵The agencies use the term “unable to quantify” thirteen times in their Economic Analysis for this proposal, See EPA and Department of the Army, *Economic Analysis for the Proposed Revised Definition of “Waters of the United States,”* December 14, 2018.

⁶⁶ 5 U.S.C. §§ 551-559.

⁶⁷ 5 U.S.C. § 553(c) (“After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making...”); *Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 771 (1988) (“N)otice must not only give adequate time for comments, but also must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.”).

⁶⁸ 556 U.S. 502 (2009).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29 (1983)

⁷² *Id.*

Here, the agencies simply ignore the science upon which the 2015 Rule was based and there appears to be a lack of effort - or a refusal to acknowledge information - to analyze what the impacts of the proposed revised definition would actually be on water quality as well as wetlands functions and services. For example, the supporting documents to the proposal state that the agencies “are unable to estimate the specific aquatic resource jurisdictional changes that would occur as a result of the proposed rule ...”,⁷³ and the agencies use the phrase “unable to quantify” 13 times in their Economic Analysis.⁷⁴ Yet, a slideshow prepared by EPA and Army Corps of Engineers staff show that at least 18 percent of currently identified streams and 51 percent of currently identified wetlands nationwide would not be protected under the new definition.⁷⁵ The agencies’ approach runs counter to its stated objective in other rulemakings to quantify the costs and benefits associated with a rule.⁷⁶

In contrast to the agencies’ claimed inability to determine the impact of their proposal, Trout Unlimited,⁷⁷ a non-profit organization, was able to overlay federal National Hydrography Dataset maps on federal elevation maps to find areas where rainfall would drain into channels and form ephemeral streams. Specifically, the organization found that ephemeral streams “initiate in areas where there are two acres of upstream watershed in steep areas and up to 24 acres of upstream watersheds in flat areas” and estimated that “‘unmapped’ ephemeral streams existed in areas where more than 11 acres of watershed would be draining.”⁷⁸ Based on these findings, Trout Unlimited created an interactive map where users can identify how many stream miles are mapped, what percentage of those are ephemeral, and the number of unmapped ephemeral streams they estimate for every mapped stream mile.⁷⁹ The James River Association,⁸⁰ using National Hydrology Dataset Plus High Resolution (a data set produced by the U.S. Geological

⁷³EPA and Department of the Army, *Resource and Programmatic Assessment for the Proposed Revised Definition of “Waters of the United States,”* p. 11, December 11, 2018.

⁷⁴ See EPA and Department of the Army, *Economic Analysis for the Proposed Revised Definition of “Waters of the United States,”* December 14, 2018.

⁷⁵ E&E News, Ariel Wittenberg, *EPA falsely claims ‘no data’ on water in WOTUS Rule*, December 11, 2018, <https://www.eenews.net/greenwire/stories/1060109323/search?keyword=EPA+falsely+claims+no+data>; E-mail from Jensen, Stacey M CIV USARMY CEHQ (US) to 'Goodin, John' <Goodin.John@epa.gov> with attached slideshow, September 5, 2017, https://www.eenews.net/assets/2018/12/11/document_gw_05.pdf

⁷⁶ See, *National Emission Standards for Hazardous Air Pollutants: Coal-and Oil-Fired Electric Utility Steam Generating Units – Reconsideration of Supplemental Finding and Residual Risk Technology Review*, 84 FR 2670, February 7, 2019. The agencies’ inability to quantify costs associated with the proposal violates Executive Order 13771 which requires the agency proposing a rule to identify and new incremental costs associated with new regulations and offset those costs by eliminating costs associated with at least two prior regulations. If the agencies cannot identify the costs associated with implementation of the proposed rule to revise the definition of WOTUS, they have failed to comply with the Executive Order.

⁷⁷ Trout Unlimited is a national non-profit organization with 300,000 members and supporters dedicated to conserving, protecting and restoring North America’s coldwater fisheries and their watersheds, <https://www.tu.org/about/>.

⁷⁸ E&E News, Ariel Wittenberg, *Where EPA saw no data, Trout Unlimited crunched the numbers*, April 2, 2019.

⁷⁹ To go to the Trout Unlimited Map, See:

<http://trout.maps.arcgis.com/apps/webappviewer/index.html?id=957daa35322f4e9fb39ae98a55ee56c9>

⁸⁰ The James River Association is a nonprofit organization whose mission is to be the guardian of the James River, <https://thejamesriver.org/>.

Survey and EPA), was also able to put together an interactive map for Virginia that demonstrates changes in environmental protections under the agencies' proposed definition of WOTUS.⁸¹

This lack of candor and thorough evaluation calls into question the foundation upon which this proposed new definition of WOTUS was built.

Finally, the agencies refusal to extend the comment period from 60 days to a more reasonable time for a proposal that will have sweeping effects across the Country is troubling.⁸² During the development of the 2015 Rule, the agencies' review occurred over a period of 200 days. Over 400 meetings were held across the country with "states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others"⁸³ and the agencies received over one million comments. This proposal was published in the federal register on February 14, 2019 (with a close date of April 15, 2019) and only two hearings were conducted.⁸⁴

VII. The 2015 Clean Water Rule was Based on Thorough Procedural and Scientific Analysis and Should be Implemented.

As noted above, the 2015 Clean Water Rule was based on a thorough analysis of all the relevant issues that included proper participation by stakeholders and the consideration of the intent of the CWA and relevant caselaw.

In addition, the agencies relied upon the "best available peer-reviewed science" to guide their policy decision regarding the definition of WOTUS. In particular, the agencies considered the findings of a comprehensive report CBF has already referenced in these comments. The Connectivity Report was issued by the EPA's Office of Research⁸⁵ and was based on a review of over 1,200 peer-reviewed publications and was also reviewed by EPA's Scientific Advisory Board (SAB). Some of the findings of both the SAB and the Connectivity Report are as follows:

- Waters are connected in myriad ways, including physical connections and the hydrologic cycle; however, connections occur on a continuum or gradient from highly connected to highly isolated.

⁸¹ See:

<https://jraava.maps.arcgis.com/apps/webappviewer/index.html?id=594559d2e54b4b909ecc05c72413a908>.

⁸² Numerous requests for an extended comment period were denied by the agencies, E-mail to parties requesting an extension of the Revised Definition of WOTUS comment period, March 18, 2019, https://www.eenews.net/assets/2019/03/19/document_gw_03.pdf.

⁸³ EPA, Department of the Army, Corps of Engineers, *The Clean Water Rule: Definition of the "Waters of the United States,"* 80 FR 37054, 37057, June 29, 2015.

⁸⁴ EPA, Department of the Army, Corps of Engineers, *Notice of Public Hearing, Revision Definition of "Waters of the United States,"* 84 FR 2843, February 7, 2019.

⁸⁵ U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Final Report), EPA/600/R-14/475F, (Washington, DC: U.S. Environmental Protection Agency, (2015)). <http://www.epa.gov/ncea>.

- These variations in the degree of connectivity are a critical consideration to the ecological integrity and sustainability of downstream waters.
- The critical contribution of upstream waters to the chemical, physical, and biological integrity of downstream waters results from the accumulative contribution of similar waters in the same watershed and in the context of their functions considered over time.
- Tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream waters, and influence the integrity of downstream waters.
- Wetlands and open waters in floodplains and riparian areas are chemically, physically, and biologically connected with downstream waters and influence the ecological integrity of such waters.
- Non-floodplain wetlands and open waters provide many functions that benefit downstream water quality and ecological integrity, but their effects on downstream waters are difficult to assess based solely on the available science.⁸⁶

CBF disagrees with the agencies' current statement that too much reliance was placed on the findings of the Connectivity Study.⁸⁷ CBF fully supports the findings of this incredibly thorough, peer-reviewed, scientific study and the agencies' use of the study to make educated decisions regarding its 2015 definition of WOTUS – *while following the statutory and regulatory principles required to promulgate a rule under the relevant sections of the CWA.*

When issuing a regulation under the Clean Water Act, EPA cannot “ignore the directive given to [EPA] by Congress in the ...Act, which is to protect water quality.”⁸⁸ That is precisely what EPA and the Corps are doing with their extremely narrow definition of WOTUS. The health and restoration of the Chesapeake Bay is dependent upon the consistent protection of the headwaters, ephemeral streams, interstate waters and wetlands throughout the Watershed. CBF urges the agencies to withdraw this proposal and to fully implement the 2015 Clean Water Rule.

⁸⁶ EPA, Department of the Army, Corps of Engineers, *The Clean Water Rule: Definition of the “Waters of the United States,”* 80 FR 37054, 37057, June 29, 2015.

⁸⁷ EPA, Department of the Army, Corps of Engineers, *Definition of “Waters of the United States” – Recodification of Preexisting Rule,* 83 FR 32227, 32241, July 12, 2018.

⁸⁸ *Nat'l Cotton Council v. EPA,* 553 F.3d 927, 939 (6th Cir. 2009).

Thank you for the opportunity to comment on this important issue. Please let us know if we can provide any additional information.

Sincerely,

A handwritten signature in black ink that reads "Lisa Feldt". The signature is written in a cursive, flowing style.

Lisa Feldt
Vice President for Environmental Protection and Restoration
Chesapeake Bay Foundation