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August 13, 2018

Submitted via regulations.gov

Mr. Andrew Wheeler, Acting Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

**RE: Chesapeake Bay Foundation Comments,
Supplemental Notice of Proposed Rulemaking,
Definition of “Waters of the United States” – Recodification of Preexisting
Rule EPA-HQ-OW-2017-0203**

Dear Acting Administrator Wheeler:

The Chesapeake Bay Foundation, Inc. (CBF) submits the following comments regarding the Environmental Protection Agency (EPA) and the Department of the Army (Agencies) Supplemental Notice of Proposed Rulemaking, *Definition of “Waters of the United States” – Recodification of Preexisting Rule*.¹ In this supplemental notice to the Agencies’ original proposed rule,² the Agencies propose to repeal the Clean Water Rule established in 2015 (Clean Water Rule or 2015 Rule),³ and recodify the regulatory definition of “Waters of the United States” that existed prior to the effective date of the 2015 Rule. EPA issues this supplemental notice to “clarify, supplement and give interested parties an opportunity to comment on certain important considerations and reasons for the agencies’ proposal.”⁴ In a separate move to these notices, the Agencies also promulgated a Final Rule that changed the applicability date of the Clean Water Rule to February 6, 2020.⁵

CBF incorporates by reference our prior comments to the Agencies’ proposals to repeal the Clean Water Rule and recodify the pre-existing rules⁶ and change the

¹ 83 FR 32227, July 12, 2018.

² Proposed rule, *Definition of “Waters of the United States” – Recodification of Pre-Existing Rules*, 82 FR 34899, July 27, 2017.

³ The Clean Water Rule defined “Waters of the United States,” 80 FR 37054, June 29, 2015.

⁴ 83 FR 32227, July 12, 2018.

⁵ 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.

⁶ Chesapeake Bay Foundation Comments Regarding *Rule to Rescind the Clean Water Rule and Recodify the Regulatory Text that Existed Prior to 2015 Defining “Waters of the United States,”* EPA-HQ-OW-2017-0203, September 27, 2017.

applicability date of the Clean Water Rule⁷ mentioned above. CBF maintains its position opposing the repeal of the Clean Water Rule,⁸ and takes this opportunity to restate its support for the 2015 Rule. Wetlands are an important component in the restoration of the Chesapeake Bay, and a clear pathway to regulating them, as we believe is provided in the 2015 Rule, should be followed.

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 members across 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. 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. 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."⁹ In trapping polluted runoff, "they help slow the flow of nutrients, sediments and chemical contaminants into rivers, streams and the Bay."¹⁰ Unfortunately, however, 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, one of the Goals and Outcomes of the 2014 Chesapeake Watershed Agreement, to which EPA is a signatory, is 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.*¹¹

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 In our prior comments, CBF focused on the failure of the Agencies to properly adhere to the requirements of the Administrative Procedures Act, 5 U.S.C. §§ 551-559. We echo those concerns here and note that, here again, by allowing only a 30-day comment period for this *Supplemental Notice*, the Agencies are not fulfilling their substantive and procedural obligations to make policy changes in regulations.

⁹ Chesapeake Bay Program, *Wetlands*, <https://www.chesapeakebay.net/issues/wetlands>.

¹⁰ *Id.*

¹¹ *Emphasis added*, Chesapeake Bay Watershed Agreement, 2014, p. 5, https://www.chesapeakebay.net/documents/FINAL_Ches_Bay_Watershed_Agreement.withsignatures-HIres.pdf

To achieve the goals of the Chesapeake Watershed Agreement, and to meet the requirements of the Chesapeake Bay Clean Water Blueprint,¹² the Clean Water Act (CWA) must be properly interpreted and enforced. The way in which EPA defines “Waters of the United States” (WOTUS) is an important component in that process. The 2015 Rule clarifies that definition and provides certainty to the Bay states in their implementation and enforcement of the CWA and their own wetlands protections. The Agencies now, however, argue that repealing the 2015 is necessary in order to, among other things, provide regulatory certainty regarding the definition of WOTUS.

III. Repealing the Clean Water Rule Does Not Provide Regulatory Certainty.

The impetus behind the 2015 Rule was, as the Agencies are well aware, an abundance of confusion over the definition of WOTUS.¹³ 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.¹⁴ The Agencies now propose going back to that outdated interpretation of WOTUS that prompted an expansive examination of the issues (discussed in more detail below).

In addition to reverting back to the confusing status of things prior to the 2015 Rule, the Agencies indicate that they may consider a new definition of WOTUS or a variety of other options, as follows:

The agencies have considered *other alternatives* that could have the effect of addressing some of the potential deficiencies identified, including proposing *revisions to specific elements of the 2015 Rule, issuing revised implementation guidance and implementation manuals*, and proposing a *further change to the February 6, 2020 applicability date of the 2015 Rule*. The agencies are soliciting comments on whether any of these alternative approaches would fully address and ameliorate

¹² EPA established the Chesapeake Bay TMDL in 2010. The Bay TMDL 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. Env’tl. 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>.

¹³ 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.

¹⁴ 80 FR 37054, 37055, June 29, 2015.

potential deficiencies in and litigation risk associated with the 2015 Rule. Consistent with the President’s Executive Order, the agencies are also evaluating options for *revising the definition of “waters of the United States.”*¹⁵

This approach does not provide clarity; it creates undo confusion, seeks to avoid federal law, and ignores valid science. Rather than repeal the 2015 Rule, the Agencies should move forward with defending and implementing the Clean Water Rule.

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

The 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 case law. The review was conducted over a period of more than 200 days and reflected the over one million public comments received by the Agencies. There were over 400 meetings across the country with “states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others.”¹⁶

In addition, the Agencies relied upon the “best available peer-reviewed science” to guide its policy decision regarding the definition of WOTUS. In particular, the Agencies considered the findings of a comprehensive report issued by the EPA’s Office of Research and Development entitled, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Connectivity Report).¹⁷ The Connectivity Report 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.
- 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

¹⁵ *Emphasis added*, 83 FR 32227, 32249, July 12, 2018.

¹⁶ 80 FR 37054, 37057, June 29, 2015.

¹⁷ 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>.

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.¹⁸

CBF disagrees with the Agencies' suggestion that too much reliance was placed on the findings of the Connectivity Study.¹⁹ We fully support the findings of this incredibly thorough, peer-reviewed, scientific study and the Agencies use of the study to make educated decisions regarding its definition of WOTUS – *while following the statutory and regulatory principles required to promulgate a rule under the relevant sections of the CWA.*

As noted above, the 2015 Rule was established after a lengthy, inclusive and well thought out analysis. Repealing the Clean Water Rule and recodifying the outdated and confusing definition of WOTUS will not lead to regulatory certainty. The restoration of the Chesapeake Bay is dependent upon the health and restoration of its wetlands. As such, we urge the Agencies to withdraw its proposed rule to repeal the Clean Water Rule.

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

Sincerely,



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

¹⁸ 80 FR 37054, 37057, June 29, 2015.

¹⁹ 83 FR 32227, 32241, July 12, 2018.