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Environmental Protection Agency
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Office of Water Docket
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Washington, DC 20460

**Attention Docket I.D. No.: EPA-HQ-OW-2018-0149; FRL-9988-15-OW
Comments in Response to the Revised Definition of “Waters of the United States”**

The Delaware Riverkeeper Network submits this comment in response to the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers’ (collectively referred to as “the Agencies”) Public Notice for Comment on Docket No. EPA-HQ-OW-2018-0149, Revised Definition of Waters of the United States under the Clean Water Act published February 14, 2019 (hereinafter “Proposed Rule”).

The Delaware Riverkeeper Network (“DRN”) champions the rights of communities in the Delaware River watershed to a Delaware River and tributary streams that are free-flowing, clean, healthy, and abundant with a diversity of life. The Delaware Riverkeeper Network is the sole advocacy organization working for over 30 years to protect the health of the entire Delaware River watershed. Our work includes interpreting, applying and enforcing state and federal environmental protection laws through advocacy, legal action, and our in-house law clinic. As a result of our decades of environmental protection experience, it is clear to us that the Proposed Rule fails to fulfill the intent and purpose of the Clean Water Act, fails to follow the procedural and substantial mandates of the Administrative Procedure Act, and will result in harmful consequences to the waters of the US and those who rely on them.

I. The Proposed Rule Runs Against the Purpose and Plain Language of the Clean Water Act.

In enacting the Clean Water Act (“CWA”), Congress directed the EPA to “restore and maintain the chemical, physical, and biological integrity” of the waters of the US.¹ The definition of the “waters of the United States” is the “central term delineating the federal geographic scope of

¹ 33 USC § 1251.
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authority under the Clean Water Act.”² As a result, any changes to the definition, interpretation and application of the term “waters of the United States” must fit with the purpose, intent, and language of the CWA. The definition put forth in the Proposed Rule is inconsistent with the CWA,³ as it narrows the definition of the term to a serious and significant degree that does not comport with science and facts. The proposed definition will inevitably lead to the degradation of the “waters of the United States” and undermine the clearly stated goals of the CWA

In Executive Order 13778⁴, the President postponed the enactment of the 2015 Clean Water Rule⁵ and directed the Agencies to review the rule and make changes “in a manner consistent with the [plurality] opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).”⁶ In *Rapanos*, Justice Scalia finds that “regulatory authority [under the CWA] should extend only to “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters and to “wetlands with a continuous surface connection to” such relatively permanent waters.⁷ The interpretation put forth by Justice Scalia in *Rapanos* considerably narrows the reach and regulatory power of the CWA, by relying on dictionary definitions to determine the limits of EPA’s regulatory authority and not scientific facts.

The Proposed Rule applies Justice Scalia’s reasoning and defines waters of the US as: “Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide.”⁸ Additionally, the Proposed Rule categorically exempts groundwater, ephemeral features, non-adjacent wetlands, ditches, prior converted cropland, artificial irrigated areas, artificial lakes and ponds, storm water control systems, wastewater recycling structures, and waste treatment systems.⁹ This strict definition of waters of the US is against scientific understanding of how water travels through the aquatic ecosystem and impacts nearby flowing waterbodies. And, as a result, it leaves many waters unregulated and open to pollution and will result in the pollution, degradation and irreparable harm to the quality and health of waterways that clearly do and/or should fit squarely within the waters of the US definition.

² Stephens, Susan L. and Adam B. Blacklock, “The Proposed Waters of the United States Rule: Change in a Nutshell”, American Bar Association Water Quality and Wetlands, February 21, 2019, available at https://www.americanbar.org/groups/environment_energy_resources/publications/wqw/20190221-the-proposed-waters-of-the-united-states-rule/.

³ See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (deference does not apply “when the agency’s interpretation is plainly erroneous or inconsistent with the regulation.”) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

⁴ 82 FR 12497.

⁵ “Clean Water Rule: Definition of ‘Waters of the United States,’” 80 Fed. Reg. 37054 (June 29, 2015).

⁶ 82 FR 12497.

⁷ *Rapanos v. United States*, 547 U.S. 715 (2006) (Compare to Stevens “significant nexus test” which asks “if the wetlands, either alone or in combination with similarly situated lands in the regions, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contract, wetlands effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”).

⁸ 80 Fed. Reg. 37054 at page 4218. (additional water bodies are recognized, ditches, lakes and ponds, tributaries, impoundments, and wetlands, but whether they are considered a water of the US depends on their connection to the definition provided)

⁹ Id.

The US Geological Survey has estimated that the rule would remove federal protection from 18% of stream and river miles, and 51% of the wetlands in the United States.¹⁰ The removal of these water bodies will have significant impacts on waters that will be covered. Science has established that removing protections from intermittent or temporary streams and isolated wetlands will greatly impact waters that are considered waters of the US.¹¹ Intermittent and ephemeral streams, small headwater streams, groundwater, wetlands and vernal pools have a vital and irreplaceable role in determining and protecting water quality downstream, i.e. in the waters of the US. Additionally, and contrary to the language of the Proposed Rule, the 2015 EPA Peer Review study found that waters and/or wetlands do not need to be adjacent to navigable waters to have a hydrological, biologic, or chemical impact on them.¹²

The Proposed Rule will allow for the degradation of navigable waters and waters of the US in direct violation of the CWA. If enacted, the Proposed Rule will “leav[e] millions of Americans vulnerable to polluted water”¹³ Such action is against the intention and plain language of the Clean Water Act and demands that the Proposed Rule be rescinded.

II. The Proposed Rule Fails to Follow The Scientific and Procedural Mandates Imposed by The Administrative Procedure Act.

The Proposed Rule would end protections for critical water resources. Such a drastic policy change requires that the Agencies provide scientific facts and rational reasoning under the Administrative Procedures Act (“APA”) in order to support such dramatic action. Because the Proposed Rule has failed to provide any such facts or rational reasoning to support the proposed regulatory rollbacks and changes, its enactment would be in violation of the APA.¹⁴

The APA directs courts to “hold unlawful and set aside agency action, findings, and conclusions,” that violate the law or are otherwise “arbitrary and capricious.”¹⁵ In reviewing the Agencies actions, courts will invalidate determinations that fail to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choices made.’”¹⁶ In order to overcome this legal threshold, the agency must

¹⁰ Wittenberg, Ariel and Kevin Bogardus, *EPA falsely claims ‘no data’ on waters in WOTUS rule*, December 11, 2018, E&E News, available at <https://www.eenews.net/stories/1060109323>.

¹¹ Ecological Society of America (2003). *Sustaining Healthy Freshwater Ecosystems*. Issues in Ecology Number 10.

¹² EPA (2015) *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Final Report).

¹³ Wittenberg, Ariel. ‘Trump’s WOTUS: Clear as mud, scientists say’, February 18, 2019, E&E News, available at <https://www.eenews.net/stories/1060121251>.

¹⁴ Wittenberg, Ariel, *Experts predict legal trouble for Scalia inspired rule*, December 14, 2018, E&E News, available at <https://www.eenews.net/stories/1060109731>. (quoting former EPA attorney Mark Ryan “The science is a big deal, and they have completely side stepped it,””They basically say it is irrelevant under Scalia and we are going with Scalia.”).

¹⁵ 5 U.S.C. §706(2)(A).

¹⁶ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

show that “it engaged in reasoned decision-making when reaching its determination.”¹⁷ Relevant factors that courts look to determine if an action is arbitrary and capricious are:¹⁸

- whether the agency considered the purpose of the law and the regulations appropriate operation under it¹⁹;
- if the agency action contradicts the underlying record²⁰;
- if the agency is taking action that undercuts another simultaneous rulemaking by the same agency²¹;
- if the agency is contradicting the “expert record evidence” without explanation²²;
- if the agency failed to consider a relevant and important factor in making a decision²³;
- if the agency is issuing a rule that was based on “pure political compromise, not reasoned scientific endeavor”²⁴;
- if the agency failed to “exercise sufficiently independent judgement” by deferring to private parties.²⁵

Here, the agency has failed to consider the purpose of the CWA in writing the Proposed Rule and failed to ensure its enactment will result in appropriate operation of the CWA, as explained in Section I. Further in writing and rationalizing the Proposed Rule, the Agencies contradicted the underlying record, failed to provide a coherent explanation for their decisions, failed to consider “expert record evidence”, issued a rule based on political compromise and not on reasoned scientific endeavor, and deferred to private parties’ wants instead of independent judgement.

a. The Narrowing and/or Removal of Protections, Including Through Categorical Exemptions Contained Within the Rule, Are Arbitrary and Capricious and Unsupported By Science.

The Proposed Rule will inappropriately, and without sound scientific basis, remove and/or narrow vital CWA protections for tributaries and wetlands. In addition, it seeks to categorically exclude: groundwater, ephemeral features, ditches, prior converted cropland, artificially irrigated areas, artificial lakes and ponds, water-filled depressions, stormwater control features, wastewater recycling structures, and waste treatment systems.²⁶ These exclusions have weak scientific justification and reflect profit-driven stakeholder concerns that have little or no relationship to protecting water quality. Waterways and water systems are all connected and to categorically exempt them from protection based on an arbitrary definition of connectivity, will most certainly result in water pollution and degradation contrary to the goals and intent of the Clean Water Act.

¹⁷ *State Farm*, 463 U.S. at 52 (“In this case, the agency’s explanation for rescission of the passive restraint requirement is not sufficient to enable us to conclude that the rescission was the product of reasoned decision making.”) (emphasis in original); *Petroleum Commc’ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

¹⁸ Cole, Jared P., “An Introduction to Judicial Review of Agency Action, Congressional Research Service R44699.

¹⁹ *Judulang v. Holder*, 565 U.S. 42 (2011).

²⁰ *Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009).

²¹ *Office of Commc’n of United Church of Christ v. FCC*, 707 F.2d 1413, 1441-42 (D.C. Cir. 1983).

²² *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 93 (D.C. Cir. 2010).

²³ *Dep’t of State v. Coombs*, 482 F.3d 577, 581 (D.C. Cir. 2007).

²⁴ *Midwater Trawlers Coop. v. Dep’t of Commerce*, 282 F.3d 710, 720 (9th Cir. 2002).

²⁵ *Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 327-28 (5th Cir. 2001).

²⁶ 80 Fed. Reg. 37054 at page 4218.

Tributaries

Science supports making *all* tributaries jurisdictional under the CWA. The Science Advisory Board has commented that “[t]ributaries, as a group, exert strong influence on the physical, chemical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of physical, chemical, and biological processes.”²⁷ For this reason, the definition of a tributary should not include the requirement of “contribut[ing] perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year.”²⁸ Nor should it exclude “surface features that flow only in direct response to precipitation, such as ephemeral flows, dry washes, arroyos, and similar features.”²⁹ Instead, the definition of a tributary should include all tributaries as they all have an impact on the waters of the US.³⁰

Wetlands

The proposed definition of wetlands is too narrow, regulating only wetlands that are adjacent to waters of the US. This definition will not cover all wetlands that are known to impact water quality. Wetlands are a critical part of functioning watersheds. Wetlands and headwater streams provide essential services to communities, including: protection of drinking water quality and quantity; provision of flood storage; storm damage prevention; resilience against sea level rise and drought; and essential fish, shellfish, waterfowl, and wildlife habitat. There is clear evidence of connectivity between small or temporary streams, wetland floodplains, and other open-waters to downstream waters. Because of the critical role all wetlands play, these waters should not be defined solely on the basis that they “abut or have a direct hydrologic surface connection to other ‘waters of the United States’ in a typical year.”³¹ Instead, when determining whether a wetland should be regulated, the EPA should examine both the functional relationships and geographical proximity.

Ditches

The Categorical Exclusion of ditches is unsupported by science. Science has established that even ditches that are excavated wholly in uplands, drain only to uplands, and have less than perennial flow may still have impacts on nutrient and sediment loading affecting drinking water, beach use, fishing, and other uses. Additionally, these ditches can drain to areas which are identified as wetlands under the Cowardin classification system,³² through water infiltration can help support (or contaminate) groundwater which feed stream and river systems, can provide important services such as the attenuation of nonpoint source pollution, and may drain into jurisdictional waters. For these reasons, ditches should not be excluded from jurisdiction. Additionally, the rule should not exclude ditches that commonly receive nutrient and pathogen

²⁷ Letter from the Science Advisory Board to The Honorable Gina McCarthy, Administrator of the EPA (Sept. 30, 2013).

²⁸ 80 Fed. Reg. 37054 at page 4173.

²⁹ *Id.*

³⁰ Letter from the Science Advisory Board to The Honorable Gina McCarthy, Administrator of the EPA (Sept. 30, 2013).

³¹ 80 Fed. Reg. 37054 at page 4184.

³² The Cowardin Classification System is a system of classifying wetlands and deepwater habitats which was developed in 1979 for the Fish and Wildlife Service. More information on the system can be found here: <http://www.fws.gov/wetlands/Documents/classwet/index.html>.

discharges from non-point sources such as concentrated animal feeding operations as these ditches can act as major conduits for nutrient pollution..³³

Groundwater and Shallow Subsurface Connections Exclusion

There is no scientific justification for the categorical exclusion of groundwater and shallow subsurface connections. Groundwater connections, especially those with shallow flowpaths in unconfined aquifers, are critical to supporting surface water and biochemical processes of wetlands and other waters, and serve to connect wetlands and waters that have no apparent surface connections..³⁴ Because of their ability to critically influence wetlands, such connections should not be categorically excluded.

Ephemeral Flows, Swales, and Erosional Features Exclusion

Ephemeral flows help move nutrients down streams, can be food sources for fish, and have a significant effect on drinking waters. Without protections, the often-dry creek beds may become a place to store and/or construct items that when a rain event occurs will send water pollution downstream. Ephemeral stream beds have an important flow, quality and volume function during rain events, providing a pathway for supporting stream systems with clean water flows, for helping to manage rain waters that would otherwise cause or exacerbate erosion and/or flood damages. If left unprotected, the water quantity and quality benefits provided by these systems will be lost and result in degraded water quality and waterway health, and will have harmful impacts on downstream communities. Further, ephemeral flows such as gullies, rills, and non-wetland swales are important for moving water between jurisdictional waters and should not be excluded from jurisdiction. Such water bodies should be examined on a case-specific basis as science does not support the exclusion of this class of waters as a whole..³⁵

Artificial Lakes and Ponds

Artificial lakes, ponds, and reflection pools may be connected to jurisdictional waters by shallow or deeper groundwater, and therefore a blanket exclusion should not be provided for these water bodies.

Waste Treatment System Exclusion

Waste Treatment systems should not be excluded, especially those constructed in floodplains or wetlands and subject to flooding or wall collapse. This exclusion was originally added as a footnote after finalization of the CWA and has never been subject to notice and comment. Because EPA did not follow proper due process requirements, it is now obligated to have a public comment period on the exclusion of impoundment waters that are used as wastewater treatment. The Proposed Rule seeks to codify this exclusion without proper notice and comment and for this reason the exclusion should not be included in the final rule. DRN does not support the Water Treatment Exclusion for procedural grounds and substantive grounds, especially when

³³ Kroger, R. et al., Nutrient Through Flow, Deposition and Assimilation in Agricultural Drainage Ditches: When and How do Nutrients Move? (2005) available at http://www.ars.usda.gov/research/publications/publications.htm?seq_no_115=185872.

³⁴ Letter from the Science Advisory Board to The Honorable Gina McCarthy, Administrator of the EPA (Sept. 30, 2013).

³⁵ Memorandum from Dr. Rodewald to Dr. Allen, Regarding Comments to the chartered SAB on the Adequacy of the Scientific and Technical basis of the Proposed Rule Titled “Definition of ‘Waters of the United States’ Under the Clean Water Act.” (Sept. 2, 2014).

these types of facilities are often constructed in floodplains. If a sludge lagoon flooded or was breached due to poor design or maintenance, the responsible party should be fined and ordered to clean up, but under the proposed rule, the taxpayers would be responsible. That conclusion is untenable.

b. The Proposed Rule is Arbitrary and Capricious because it Fails to Consider and Evidence its Departure From the Facts of the EPA Study Conducted For the 2015 Clean Water Rule.

The 2015 Clean Water Rule relied on a study compiled by the EPA from over 12,000 peer reviewed studies, but the current Proposed Rule has no similar study to support its position and runs contrary to findings in this study. Rather, the Proposed Rule relies on a plurality judicial opinion based on dictionary definitions. This fails to meet the substantial requirements of the APA and is arbitrary and capricious as the Proposed Rule contradicts the underlying record, fails to provide a coherent explanation for its regulatory decisions, and fails to consider “expert record evidence.”

While the Proposed Rule does cite to the EPA’s 2015 study, it utilizes aspects that only support its decisions and fails to consider other significant and relevant findings. Including but not limited to conclusions that:³⁶

- Scientific literature unequivocally demonstrates that streams, regardless of their size, or frequency of flow, are connected to downstream waters and strongly influence their function.
- Scientific literature clearly shows that wetlands and open waters in riparian areas (transitional areas between terrestrial and aquatic ecosystems) and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality. These systems act as effective buffers to protect downstream waters from pollution and are essential components of river food webs.
- Ample evidence suggest that many wetlands and open waters located outside of riparian areas and floodplains, when lacking surface water connections, provide physical chemical, and biological functions that affect the integrity of downstream waters. Some potential benefits of these wetlands are due to their isolation rather than their connectivity. Evaluations of the connectivity and effects of individual wetlands or groups of wetlands are possible through case-by-case analysis.
- Variations in the degree of connectivity are determined by the physical, chemical, and biological environment, and by human activities. These variations support a range of stream and wetland functions that affect the integrity and sustainability of downstream waters.
- The literature strongly supports the conclusion that the incremental contributions of individual streams and wetlands are cumulative across entire watersheds and their effects

³⁶ U.S. EPA. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-14/475F, 2015.

on downstream waters should be evaluated within the context of other streams and wetlands in that watershed.³⁷

In addition to the fact that the explanation for the Proposed Rule cherry picks facts and ignores conclusions directly in contradiction with the EPA's 2015 Study's findings, it fails to provide a similar study, or even reference science-based facts to rationalize its drastically different conclusions. Instead, it relies on foundations from a legal case and conclusory statements. This lack of scientific findings and contradiction between the two rules violates the substantial requirements of the APA, that agencies utilize science and rationalize any departures from accepted science, and is therefore arbitrary and capricious.

c. The Proposed Rule is Arbitrary and Capricious as it Caters Towards Industry and Was Enacted to Undercut the 2015 Clean Water Rule.

Finally, the Proposed Rule was fast tracked in order to appease industry and stop the enactment of the 2015 Clean Water Rule. Given the numerous changes and rollbacks the Proposed Rule intends to enact, it does not have sufficient procedural justifications or science-based conclusions that would uphold such a drastic change in policy and rushed process.

In February 2017, the President signed Executive Order 13778³⁸, postponing the enactment of the 2015 Clean Water Rule³⁹ and directing the Agencies to publish a rule rescinding or revising the definition of waters of the US to be consistent with Scalia plurality opinion in *Rapanos*. Also, the President demanded that the new definition of waters of the US be consistent with a policy geared toward ensuring waters remain free from pollution *provided* economic growth is not stifled.⁴⁰ The *Rapanos* opinion and new policy inappropriately caters towards business and industry at the expense of our clean water.

The Agencies have a responsibility to regulate under the CWA in a way that fits the CWA's purpose, "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."⁴¹ The purpose of the CWA is to ensure the protection of water resources vital to supporting healthy communities and healthy lives, and in so doing also provides the clean water and healthy flows that are equally important for supporting economic and job growth. The priority of the law is to protect the health and quality of our waterways, even in those instances where there may be adverse impacts to a particular business or industry in recognition of the irreplaceable value of clean and healthy water supplies on the community scale, including for business and industry. Any proposed regulation that prioritizes economic impact over the

³⁷ See generally U.S. EPA. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-14/475F, 2015.

³⁸ 82 FR 12497.

³⁹ "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37054 (June 29, 2015).

⁴⁰ "to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty and showing due regard for the roles of Congress and States under the Constitution." Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, Executive Order, 82 FR 12497, February 28, 2017.

⁴¹ 33 USC § 1251.

chemical, physical, and biological integrity of the nation's waters is necessarily unsupportable and invalid.

Further, the speed with which the current administration enacted the law and postponed the 2015 Clean Water Rule is further evidence of the arbitrary and capricious nature of the proposed actions. Within one month of entering office, the President ensured that he had postponed the enactment of the 2015 Clean Water Rule and directed the Agencies to revise the definition to ensure a narrow and corporate friendly interpretation of the overarching law. The result was a drastic change in the Agencies' interpretations of waters of the US eliminating many of the water bodies initially proposed to be covered and reversing the legal and scientific ideology the 2015 Clean Water Rule was premised on. The proposed "Revised Definition of 'Waters of the United States' has the potential to greatly impact the implementation of the Clean Water Act, one of the nation's most comprehensive environmental laws and in turn will determine the ease or difficulty people will face in ensuring they have access to safe, clean water. Such a drastic change in policy needs rational, science-backed support for its changes and must provide the public with sufficient time and resources to review the changes in order to provide informed public comment. Neither of which are present.

The Proposed Rule was done with an eye towards economic interests, rushed to stop the enactment of the 2015 Clean Water Rule without sound scientific or factual basis, was politically rather than scientifically motivated, and cannot go into effect as it violates the Administrative Procedures Act and is an arbitrary and capricious action.

IV. Contrary to the Claims by Proponents of the Proposed Rule, it's Enactment Will Have Significant Detrimental Impacts to Communities and Businesses that Depend on Clean Water.

The proposed interpretation of the regulatory power under the Clean Water Act will threaten wetlands and streams that businesses depend on for clean water and to support their operations. For farmers, ponds can serve as the source of water for irrigation purposes and without proper protections bacteria such as E. coli can threaten crops. For wineries or breweries, local waters provide clean water without additives or chemicals necessary to support the crafting of their quality produce. Ecotourism and recreational businesses depending upon fishing, swimming, boating, wildlife viewing and more depend on clean water and the ecosystems that flourish from it. Power plants need clean water, as does the pharmaceutical industry. In fact, there is no business that will thrive, either in advancing its operations or securing the healthy workforce needed to support its operations that does not require and rely upon clean and healthy water flows.

Enacting the Proposed Rule will threaten the continuation and growth of business; as it fails to fully evaluate and appreciate the significant consequences rolling back protections of waters of the US will have on them.

V. Interstate Waters should be Included as a Jurisdictional Category as the Proposed Rule Will Significantly Reduce Funding and Protection for State Water Protections.

Limiting the reach of federal jurisdiction by removing jurisdiction over interstate waters as a separate jurisdictional category will limit access by states to federal funding traditionally used to support protection of clean water, will put a higher burden on state regulatory agencies to quickly have to pass new laws to fill the newly created gap, and will remove protections for downstream states from pollution actions and activities of neighboring states..

The Agencies, in the Proposed Rule, seek to “remove interstate waters and interstate wetlands as a separate category” in an attempt to “balance the state’s policy’s directives to preserve and protect the rights and responsibilities of the States.”⁴² This approach goes against the idea of cooperative federalism that is the basis for many environmental laws. Cooperative federalism occurs when the federal government provides a basis for the states to regulate certain policy areas through national laws that provide a floor (and often times funding) that states can use to regulate within their own borders. Such regulations can also provide states with legal foundations to create stricter regulations that may have previously been unavailable to them.

If the proposed rule is adopted it will mean the 50 states and territories will be required to introduce and pass new laws in order to ensure interstate waters stay protected. This puts an enormous burden on each state. It does not increase the ability of states to protect water resources within their boundaries, that might already exist, but it does remove the floor that will ensure at least a minimal level of protection for all waterways and all US communities. Without such a nationwide floor, a “race to the bottom” occurs where states feel pressure to make their laws more liberal to attract industry away from neighboring jurisdiction; this, to the detriment of all States and the entire United States. Moreover, without a nation-wide floor, states that put in place a lower standard of protection for their water resources may in fact inflict a significant pollution burden on states to which their waterways ultimately flow. The proposed change removes a vital layer of protection for states on the receiving end of water from their upstream neighbors. Enacting the Proposed Rule would leave states and communities vulnerable to water pollution from upstream states with no recourse under the CWA.

VI. The Proposed Rule Must Be Rescinded as it Violates Law, Science, and Due Process.

The Delaware Riverkeeper Network believes that if allowed to pass the Proposed Rule will weaken the protections for headwaters, intermittent and ephemeral streams, and wetlands for the Delaware River Basin and all other rivers across the United States, it will also undermine critical protections for communities, wildlife, aquatic life and necessary to support healthy and long-term economic growth. As outlined in the sections above, the Proposed Rule fails to follow the intent and purpose of the Clean Water Act, fails to follow the substantial and procedural mandates of the APA, and enacts a narrowly construed definition that will ultimately result in harm to economic interests and the degradation of waters across the US. The Proposed Rule must be rescinded.

Water is critical to all life on the planet and follows no boundaries or definitions. Water flows through the hydrologic cycle, so water that is in a stream today, may be in a cloud tomorrow and may fall as rain the next day, entering a new stream and impacting a new waterway. Rainwater may fall on land and drain into streams or it may find its way into groundwater. That

⁴² 80 Fed. Reg. 37054 at page 4171.

groundwater may eventually find its way back into surface water, be used or consumed, making all water—whether surface or ground water, permanent or intermittent—a part of the same hydrologic cycle.

Because all water is recycled across the planet through the hydrologic cycle, if the intent of EPA is to protect the purity of waters of the U.S. via the CWA any legal definition of “waters” must by its very nature simply “follow the water.” So that the Agencies can more effectively, efficiently, and thoroughly enforce these laws for the protection of the health of our waters whether in streams, rivers, or oceans. The broader and simpler the definition, the easier and more predicible it will be to accomplish that objective.

The Delaware Riverkeeper Network opposes the Proposed Rule as being in violation of the law, science and failing to protect our water for present and future generations.

Submitted,



Maya K. van Rossum
the Delaware Riverkeeper