



COMMONWEALTH OF PENNSYLVANIA

June 19, 2017

Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
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Douglas W. Lamont, P.E.
Senior Official Performing Assistant Secretary Duties
Secretary of the Army (Civil Works)
U.S. Army Corps of the Engineers Headquarters
108 Army Pentagon
Washington, D.C. 20310-0108

RE: Proposal to Revise the Clean Water Act Regulatory Definition of “Waters of the United States” (80 Fed. Reg. 37,054 (June 29, 2015))

Dear Administrator Pruitt and Acting Secretary Lamont:

In response to your letter dated May 8, 2017, we are submitting comments on behalf of the Commonwealth of Pennsylvania, through our respective agencies, related to your intent to revise the definition of “waters of the United States” established in the final rule referenced above.

The Commonwealth of Pennsylvania has abundant and vital water resources with approximately 86,000 miles of streams, 404,000 acres of wetlands, 161,445 acres of lakes, 17 square miles of the Delaware estuary, and 63 miles of Great Lakes shorefront. These water resources are vital to overall ecosystem health and economic well-being of the Commonwealth. Our streams provide drinking water for most of our citizens, supply the water needs of most of our industry, serve as the basis for much of our tourism and recreation, and provide critical habitat for many plant and animal species. Our wetlands also perform vital cost-free filtration of drinking water and source water, often in the headwaters regions. Pennsylvania’s wetlands are small and scattered throughout the Commonwealth, and consist mostly of seeps that pool at the base of hills or mountains; riparian wetlands that are periodically inundated by adjacent or nearby streams; small bogs and fens in the glaciated northwest and northeast corners of the Commonwealth; and vernal pools – small spring wetlands on which many species depend for part of their life cycle. Pennsylvania’s wetlands contain many of our rare, threatened, and endangered species, reflecting

their critical importance to the conservation of biodiversity within the Commonwealth, and provide critical flows for our State fish, the brook trout.

Pennsylvania has already lost more than 50% of its pre-settlement wetlands through conversion, development, drainage, and other activities. From 1956-1979, the U.S. Fish and Wildlife Service reported that Pennsylvania lost 28,000 acres of wetlands, an average of 1,200 per year. Under the Commonwealth's net gain strategy, Pennsylvania has helped reverse this trend, and between 1982 and 1989 gained 4,683 wetlands in the Chesapeake Bay drainage. Today, wetlands comprise only 1.4% of our total land base (less than 400,000 acres). We can't afford to lose more. Pennsylvania's water resources have long been protected by a well-developed body of laws enacted by the Commonwealth. The Pennsylvania Clean Streams Law¹, passed in 1937, is the centerpiece of the Commonwealth's regulatory framework. This State law prohibits pollution or the threat of pollution to "waters of the Commonwealth", which are defined in a clear and comprehensive way that is not subject to confusion or debate. Pennsylvania also provides important protections for the Commonwealth's water resources, including its wetlands, through numerous other statutes and regulations. For example, the Dam Safety and Encroachments Act² and Flood Plain Management Act³ regulate dams and other obstructions and encroachments of the Commonwealth's water resources and floodplains. The Conservation and Natural Resources Act⁴ mandates the conservation of Commonwealth natural resources, including water resources in Pennsylvania's vast 2.5 million-acre public system of forests and parks, and establishes the Commonwealth's inventory of its ecological resources, which identifies its rare, threatened, and endangered species. The Fish and Boat Code⁵, the Game and Wildlife Code⁶, and the Wild Resource Conservation Act⁷ also support the Commonwealth's efforts to conserve and maintain its fish, game, and wildlife species.

The model of cooperative federalism at the heart of the Clean Water Act recognizes that differences in water resources exist at the state level. This model envisions a federal-state partnership in the oversight and protection of the nation's waters with the federal law providing a broad general regulatory framework that relies on and supports strong state programs specifically tailored to the unique attributes of each state. Pennsylvania has effectively worked with its communities, including its rural and small agribusiness communities, to regulate the waters of the Commonwealth under its State laws. However, efforts by your agencies to further define "waters of the United States" to implement the federal Clean Water Act are creating ongoing confusion and uncertainty by relying on various phrases used by the United States Supreme Court in *Rapanos v. United States*⁸ rather than the expertise of your state partners.

¹ 35 P.S. §§ 691.1 – 691.1001; *see also* 25 Pa. Code Chapters 91, 92a, 93, 95, 96, 102 and 105.

² 32 P.S. §§ 693.1 – 693.27; *see also* 25 Pa. Code Chapters 105.

³ 32 P.S. §§ 679.101 – 679.601; *see also* 25 Pa. Code Chapter 106.

⁴ 71 P.S. §§ 1340.101 – 1340.1103.

⁵ 30 Pa.C.S. §§ 101 – 7314; *see also* 58 Pa. Code Chapter 75.

⁶ 34 Pa.C.S. §§ 101 – 2965; *see also* 58 Pa. Code Chapter 133.

⁷ 32 P.S. §§ 5301 – 5314; *see also* 17 Pa. Code Chapter 45.

⁸ 547 U.S. 715 (2006).

During the development of the definition of “waters of the United States” in the 2015 rule, Pennsylvania expressed several concerns regarding the proposed definition. This definition focuses on the “significant nexus” language in Justice Kennedy’s concurring opinion in *Rapanos* and must be implemented through a case-by-case analysis that requires state agencies to engage in complex and, in some cases, subjective decision-making processes. Pennsylvania is concerned that uncertainty created by this definition will increase agency workloads without affording any corresponding increase in protection of the Commonwealth’s water resources. In these times of significant budget constraints, this uncertainty exacerbates the difficulty in projecting budgetary needs for water quality assessment, permitting, inspection, and enforcement programs. Coupled with proposed cuts to the EPA budget, this uncertainty makes future planning difficult.

Despite Pennsylvania’s concerns with the uncertainty created by the 2015 rule, Pennsylvania is equally concerned with your proposed interpretation of phrases used in Justice Scalia’s plurality opinion in *Rapanos* in your plans to revise the definition of “waters of the United States.” In recent webinars, your agencies presented different options for interpreting the phrases “relatively permanent” waters, and wetlands with a “continuous surface connection” to jurisdictional waters and requested feedback from stakeholders. Your agencies, however, did not provide the stakeholders with any informed discussion on the scientific rationale or environmental and regulatory consequences associated with each of these interpretations to allow meaningful evaluation. Your proposed interpretations of these phrases as presented in the webinars will likely result in similar confusion and regulatory uncertainty, and, more importantly, could undermine the fundamental goals of the Clean Water Act.

To achieve the Clean Water Act goals, states must have flexibility to adapt federal programs based on the nature of the water resources within their jurisdictions. To the contrary, your agencies suggest defining “relatively permanent” waters as only perennial streams, or perennial streams plus other streams with some measure of seasonal flow. These one-size-fits-all approaches fail to consider the wide variety of stream functions that exist in natural systems. Likewise, limiting the protection of wetlands based on a one-size-fits-all definition of “continuous surface connection” will similarly ignore the important distinctions in the functions and values of wetlands that occur in natural systems. Such one-size-fits-all definitions applied nationwide in states with distinct surface and groundwater attributes, and extremely divergent average annual rainfall and snowmelt characteristics, will not achieve the important water protection goals of the Clean Water Act, and may in fact undermine existing state law protections. This is important not just for Pennsylvania, but for all states; many headwater streams that flow into Pennsylvania’s major rivers are in adjacent states.

Honorable Scott Pruitt
Douglas W. Lamont, P.E.

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Pennsylvania respectfully requests that your agencies engage in meaningful collaboration with the states, as well as the public and scientific communities, before developing any new approach to defining “waters of the United States”. The cooperative federalism model established through the Clean Water Act requires working with states, both individually and collectively, to identify the water resource needs within their jurisdictions. We ask that you proceed in a manner that recognizes regional differences in geography, biology, climate, geology, soils, hydrogeology and rainfall, and supports strong and comprehensive state programs.

Sincerely,



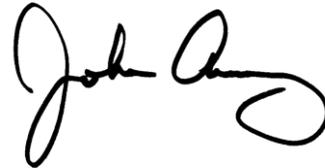
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