



April 15, 2019

Honorable Andrew Wheeler
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U.S. Environmental Protection Agency
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Honorable R.D. James
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Attn: Docket Nos. EPA-HQ-OAR-OW-2018-0149; FRL-9988-15-OW

RE: Comments on the Proposed Rulemaking: Revised Definition of “Waters of the United States”. 84 Fed. Reg. 4154 (February 14, 2019)

Dear Administrator Wheeler and Assistant Secretary James:

The Pennsylvania Department of Environmental Protection (PADEP or Department) submits this comment letter in response to the notice of proposed rulemaking entitled *Revised Definition of “Waters of the United States”* published jointly by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (ACOE) (herein after “agencies”) on February 14, 2019 (84 Fed. Reg. 4154) (Proposed Rule). In this letter, PADEP also provides comments on the agencies December 14, 2018 Economic Analysis for the Proposed Rule (Economic Analysis) located in the above referenced EPA docket.

The Department incorporates by reference the analysis and findings of the U.S. Global Change Research Program (USGCRP) contained in the Fourth National Climate Assessment¹ (NCA4 or Assessment), released by the Trump Administration on November 23, 2018 and the May 23, 2017 study released by the Trump Administration entitled, “Ohio River Basin Pilot Study – Formulating Climate Change Mitigation/Adaptation Strategies through Regional Collaboration with the ORB Alliance (ORB Study).”² The Department of Defense and EPA participated in both of these studies.

¹ USGCRP, 2018: Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)] U.S. Global Climate Change Research Program, Washington DC, USA. Doi: 10.7930/NCA4.2018, available at: <https://nca2018.globalchange.gov>.

² Kirshen, P., Elly Best, H. Stone, J. Kovatch, L. Yeghiazarian, J. Noel, J. Stark, E. Emery, J. Trimboli, D. Raff, J. Arnold, AND R. Drum. OHIO RIVER BASIN – FORMULATING CLIMATE CHANGE MITIGATION/ADAPTATION STRATEGIES THROUGH REGIONAL COLLABORATION WITH THE ORB

I. Introduction

Pennsylvania's water resources have long been protected by a well-developed body of laws. The Pennsylvania Clean Streams Law³, passed in 1937, is the centerpiece of the Commonwealth's regulatory framework. The Dam Safety and Encroachments Act⁴ and the Flood Plain Management Act⁵ regulate dams, water obstructions, and encroachments of the Commonwealth's water resources and floodplains. PADEP is concerned over some of the consequences that the Proposed Rule will have on state regulatory programs, the continued ability of states to protect and maintain state water quality standards, and the ability of states to minimize the effects of global climate change.

II. PADEP Comments on the Agencies' Proposed Rule

The Proposed Rule would significantly reduce federal protection of wetlands in two primary ways. First, the Proposed Rule shrinks the existing definition of "adjacent" to exclude most adjacent wetlands that have been regulated since the 1977 amendments to the Clean Water Act (CWA). 84 Fed. Reg. 4219. Second, the Proposed Rule removes protection of wetlands defined by rule as having a significant nexus with traditional navigable waters as proposed by Justice Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), and as implemented in the post-*Rapanos* guidance for the pre-2015 Rule⁶ and 2015 Clean Water Rule.⁷ *Id.* at 4167, 4172, and 4217. PADEP believes that aspects of the Proposed Rule lack adequate scientific justification, whereas the significant nexus test has a strong scientific basis. Rather than proceeding with the Proposed Rule, PADEP continues to recommend that the agencies develop a rule that supports strong and comprehensive state programs, and that recognizes key regional differences in climate, hydrogeology, soils, and biota.⁸

PADEP is concerned about the following aspects of the Proposed Rule: (1) the practicality of implementing/coordinating the Proposed Rule at the state level (e.g., as pertains to PADEP's programs), in cooperation with the agencies' programs; (2) the resulting impact on state agencies and the regulated community; and (3) the legal and scientific justification for modifying the scope of the CWA as it has been traditionally administered. Changes intended on providing a "straightforward definition that would result in significant cost savings, protect the nation's navigable waters, help sustain economic growth, and reduce barriers to business development" could have unintended consequences of confusion, delay, and inadequate water resource protection. PADEP has established programs and has demonstrated the ability to develop and effectively administer regulations to implement many CWA programs in the Commonwealth in accordance with EPA's requirements, and with financial and technical support from EPA.

ALLIANCE. US Army Corps of Engineers, Washington DC, 2017, USEPA website, Science Inventory, available at: https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NRMRL&dirEntryId=339719

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

⁴ 32 P.S. §§ 693.1-693.27; *see also* 25 Pa. Code Chapter 105.

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

⁶ 51 Fed. Reg. 41250 (November 13, 1986).

⁷ 80 Fed. Reg. 37054 (June 29, 2015).

⁸ The agencies have the ability to develop regional supplement manuals for different regions of the United States based on their unique regional characteristics similar to ACOE's regional supplements for the 1987 *Wetlands Delineation Manual (Technical Report Y-87-1)*.

Effective administration of the CWA requires balancing state and federal interests and responsibilities. PADEP is concerned that revising the definition of “Waters of the United States” under the CWA will alter this balance especially if the Proposed Rule reduces federal protection of certain wetlands, especially those that are connected through groundwater/subsurface hydrology. Subsurface hydrologic connections between wetlands and jurisdictional tributary waters are critical in the determination of adjacency. Further, the definition of “adjacent wetlands” should not eliminate wetlands based on the inclusion or reference to man-made features such as dikes, barriers, and similar structures that have artificially separated “upland” wetlands from wetlands adjacent to intermittent and perennial waters. This proposed restriction could include most adjacent wetlands that do not have a physical connection with other jurisdictional waters – i.e. are not “abutting” as defined in the Proposed Rule; non-adjacent wetlands that currently may be regulated where they collectively have a significant nexus with navigable waters. Finally, PADEP is requesting clarity regarding the agencies’ use of the term “typical year” in the Proposed Rule (*Id.* at 4218) and whether the meaning of this term accounts for changes in precipitation, increased storm intensity, and altered hydrologic patterns of streams and wetlands resulting from global climate change.⁹

PADEP requests clarification from the agencies regarding how impacts to waters of the United States are to be compensated for under the *Compensatory Mitigation for Losses of Aquatic Resources Final Rule* (2008 Mitigation Rule) that amended 33 CFR Parts 325 and 332 and 40 CFR Part 230. 73 Fed. Reg. 19594 (April 10, 2008). The Proposed Rule appears to conflict with the agencies 2008 Mitigation Rule which was established to offset unavoidable impacts to waters of the United States authorized through the issuance of Department of the Army (DA) permits pursuant to Section 404 of the CWA (33 U.S.C. § 1344) and/or Sections 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401 and 403). The 2008 Mitigation Rule directs that the standards and criteria shall, to the maximum extent practicable, “maximize available credits and opportunities for mitigation, *provide for regional variations in wetland conditions, functions, and values*, and apply equivalent standards and criteria to each type of compensatory mitigation.” *Id.* at 19595. PADEP requests further clarification from the agencies regarding the contrast in “waters of the United States” or “navigable waters of the United States,” and state jurisdictional waters to maximize available credits and opportunities for mitigation, to provide for regional variations in wetland conditions, functions, and values, and to apply equivalent standards and criteria to each type of compensatory mitigation.

Also, while helpful in identifying likely locations of wetlands, PADEP would like to point out that geospatial and remote sensing tools are not a complete and accurate substitute for site-level verification of conditions. Any mapping dataset should include the caveat that maps are not definitive of actual conditions on any specific location and require “boots on the ground” verification of hydrology, plant, and soil identification for determination of wetland conditions. Additionally, PADEP notes based upon its experience and understanding that the National Wetlands Inventory (NWI) insufficiently captures and underestimates wetland acreage. For example, a recent study *Assessing the relative vulnerabilities of Mid-*

⁹ See generally, 2015 Pennsylvania Climate Impacts Assessment Update, Pennsylvania State University, University Park, PA, May 2015, available at: <http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=5002&DocName=2015%20PENNSYLVANIA%20CLIMATE%20IMPACTS%20ASSESSMENT%20UPDATE.PDF%20>

Atlantic freshwater wetlands to projected hydrologic changes identifies that the NWI underestimated the wetland acreage in the study area, potentially “capturing as little as 54% of the total wetland acreage.”¹⁰

Lastly there is a concern that the Proposed Rule will result in interstate disparity and inconsistency. In addition, the processes to review federally supported infrastructure projects (highways, airports, etc.) that are currently controlled in part by review under the National Environmental Policy Act (42 U.S.C. §§ 4321-4370h) could be significantly diminished. The consistent application of water resource protection across state boundaries and throughout the country is important in addressing economic and environmental equivalency and maintaining a level playing field. Individual states, such as Pennsylvania, cannot directly regulate actions in upstream or adjacent states impacting waters flowing across or along their borders, or fully control pollution of large shared waters such as the Delaware River, Great Lakes, or the Chesapeake Bay. Further, other states either exclusively rely on CWA Section 404 authority to avoid, minimize, and otherwise compensate for project impacts to water resources, or lack the legal authority to adequately protect and maintain water resources at the state level. Reducing CWA jurisdiction could result in the unintended consequence of creating complex and contradictory programs among the states.

III. PADEP Comments on the Agencies’ Economic Analysis

PADEP believes that the agencies’ Economic Analysis is inadequate.

A. The Agencies Do Not Compare Current Law to the Proposed Rule

On August 16, 2018, the U.S. District Court for the District of South Carolina granted summary judgment in favor of the plaintiffs in *South Carolina Coastal Conservation League et al. v. Pruitt* (D.S.C. 2-18-cv-330) and issued an injunction enjoining the agencies final rule entitled, *Definition of Waters of the United States- Addition of an Applicability Date to 2015 Clean Water Rule* (Suspension Rule) (83 Fed. Reg. 5200; February 6, 2018). At the time of the Proposed Rule, the 2015 Clean Water Rule remains the law in 22 states. Because the 2015 Clean Water Rule remains effective and contains bright line jurisdictional indicators in defined terms such as “neighboring”, the agencies’ economic analysis approach should include a direct comparison between the 2015 Clean Water Rule and the Proposed Rule in terms of jurisdiction and cost-benefit analysis for these 22 states.

B. The Agencies Avoided Costs Analysis Is Incomplete

The agencies acknowledge that their Proposed Rule will shift economic burden from the federal government to states and tribes, and in turn, could result in state and local taxpayers picking up the expenses. *See* Economic Analysis at p. 29. The Economic Analysis, however, does not provide any actual analysis of the costs to states and tribes. Instead, to justify the Proposed Rule, in their Economic Analysis the agencies make their own generic assumptions about what states will do in response to the Proposed Rule. *See* Economic Analysis at pp. 33 and 40-45. PADEP received an inquiry regarding the scope of its

¹⁰ Wardrop, D.H., A.T. Hamilton, M.Q. Nassry, J.M. West, and A.J. Britson. 2019. *Assessing the relative vulnerabilities of Mid-Atlantic freshwater wetlands to projected hydrologic changes*. *Ecosphere* 10(2):e02561.10.1002/ecs2.2561, p. 5, available at: <https://esajournals.onlinelibrary.wiley.com/doi/full/10.1002/ecs2.2561>

jurisdiction and authority to regulate water resources under Pennsylvania law following the agencies' States Co-Regulators Workshop in Washington D.C., but did not receive any other inquiry from the agencies to obtain information or data regarding its expenses to administer its relevant state regulatory programs under the pre-2015 Rule or 2015 Clean Water Rule. It is reasonable for agencies to reach out to states with such relevant inquiries let alone obtain their *own* data when analyzing costs. Additionally, a robust assessment of potential increased costs to third parties attributable to the Proposed Rule should be included in the Economic Analysis. Because the agencies failed to analyze all costs, let alone obtain the relevant information and data, their Economic Analysis is incomplete.

C. The Agencies Foregone Benefits Analysis Should Quantify Co-Benefits

PADEP believes that the agencies must include a comprehensive assessment of co-benefits in their foregone benefits analysis. The Economic Analysis acknowledges that the Proposed Rule could lead to fewer mitigation measures along with greater losses of wetlands acreage and multiple functional benefits such as flood control, water filtration, habitat support, recreation, and aesthetic benefits over time in states without avoidance, minimization, or compensation requirements. *See* Economic Analysis at pp. 100 and 146. For example, the Economic Analysis notes that Arkansas, Mississippi, and Missouri are likely to reduce regulatory practices or may reduce permitting practices as a result of the Proposed Rule (*See* Economic Analysis at p. 41). Meanwhile, EPA's website notes "[p]reserving and restoring wetlands together with other water retention can often provide the level of flood control otherwise provided by expensive dredge operations and levees. The bottomland hardwood-riparian wetlands along the Mississippi River once stored at least 60 days of floodwater. Now they store only 12 days because most have been filled in or drained."¹¹ Because the agencies' do not adequately examine foregone co-benefits, including direct and indirect benefits, the Economic Analysis is incomplete.

D. The Co-Benefits Must Include Minimization of Global Climate Change Impacts

The Economic Analysis does not take into consideration the long-term importance of minimizing the effects of global climate change. In Pennsylvania alone, the impacts of climate change range from more frequent and severe inland waterway flooding from increased storm intensity and precipitation, increased landslide and sedimentation runoff resulting in water pollution and infrastructure damage, and a disruption of commerce. For example, Pennsylvania experienced severe flooding from frequent extreme weather events throughout the Delaware, Ohio, and Susquehanna River Basins in 2018, which has resulted in substantial costs to federal, state, county, and municipal governments, as well as to businesses, farmers, and homeowners. Similarly, the damages, repairs, and recovery from the March and April 2019 Midwestern storms and substantial flooding in several states has caused substantial harm and will cost billions of dollars.

The agencies' Economic Analysis should fully consider the foregone long-term benefits of wetlands as a mitigation/ adaptation strategy to deal with global climate change. PADEP notes the agencies agreed in the 2008 Mitigation Rule that protecting our Nation's existing aquatic resource based through compensatory mitigation projects provide ecosystem functions that "also provide the ecological and

¹¹ See generally, USEPA website, "Why Are Wetlands Important?", last updated June 13, 2018, available at: <https://www.epa.gov/wetlands/why-are-wetlands-important>

economic resilience to address climate change.”¹² 73 Fed. Reg. 19611. Notably, the Trump Administration’s Assessment states, “[M]any [adaptation] strategies can provide multiple benefits, resulting in long-term cost savings. For example, restoring wetlands can provide valuable habitat for fish and wildlife as well as flood protection to nearby communities.”¹³ Finally, the Trump Administration’s May 2017 ORB study includes restoring adjacent wetlands as a strategy to adapt to changing climate conditions in the Ohio River Basin. *See* ORB Study at pp. 84-85. Conducting an accurate long-term assessment of the foregone co-benefits is important in light of the more frequent storms, increases in heavy precipitation events, rising sea levels, and other effects of climate change on water resources in rural and urban areas alike.¹⁴ Because the agencies fail to consider the long-term benefits of water resources in minimizing the effects of global climate change, their Economic Analysis is incomplete.

IV. Conclusion

In summary, PADEP appreciates the opportunity, albeit insufficient in duration, to examine and comment on the agencies’ Proposed Rule. PADEP remains concerned about long-term consequences of the Proposed Rule and notes that the agencies’ Economic Analysis is incomplete, and therefore, inadequate. PADEP encourages the agencies to proceed in a manner consistent with the objective of the CWA and in a manner that recognizes regional differences in water resources.

Thank you for your time and consideration of the Department’s comments.

Respectfully,



Patrick McDonnell
Secretary

¹² See also, USEPA website, “Why Are Wetlands Important?”, last updated June 13, 2018 (Noting the valuable role of wetlands in helping moderate global climate conditions by storing carbon).

¹³ NCA4, chs 21 (Midwest) and 28 (Adaptation).

¹⁴ NCA4, ch 18 (Northeast); Box 18.6: Building Resilience in the Chesapeake Bay Watershed.