

The American Fisheries Society • American Institute of Biological Sciences • Association for the Sciences of Limnology and Oceanography • Coastal and Estuarine Research Federation • Ecological Society of America • Freshwater Mollusk Conservation Society • International Association for Great Lakes Research • North American Lake Management Society • Phycological Society of America • Society for Ecological Restoration • Society for Freshwater Science • Society of Wetland Scientists

September 21, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Office of Policy Regulatory Reform
Mail Code 1803A
1200 Pennsylvania Ave NW
Washington, DC 20460

The Honorable Douglas W. Lamont
Senior Official Performing the Duties of the
Assistant Secretary of the Army for Civil
Works
Office of the Assistant Secretary of the Army
for Civil Works
Department of the Army
104 Army Pentagon
Washington, DC 20310-0104

Re: Docket ID No. EPA-HQ-OW-2017-0203; FRL-9962-34-OW; Definition of “Waters of the United States” - Recodification of Pre-existing Rules

Dear Administrator Pruitt and Deputy Assistant Secretary Lamont:

We are submitting these comments regarding the proposed rule, Definition of “Waters of the United States” - Recodification of Pre-existing Rules, EPA-HQ-OW-2017-0203; FRL-9962-34-OW, published in the Federal Register on July 27, 2017; on behalf of the approximately 200,000 members of the Societies listed in the next paragraph. Our societies ***strongly oppose the proposed rule to rescind*** the definition of “Waters of the United States” (WOTUS) as promulgated by the Agencies in 2015 (Clean Water Rule: Definition of Waters of the United States; 80 FR 37054, June 29, 2015) (2015 CWR).

The American Fisheries Society (AFS), American Institute of Biological Sciences (AIBS), Association for the Sciences of Limnology and Oceanography (ASLO), Coastal and Estuarine Research Federation (CERF), Ecological Society of America (ESA), Freshwater Mollusk Conservation Society (FMCS), International Association for Great Lakes Research (IAGLR), North American Lake Management Society (NALMS), Phycological Society of America (PSA),

Society for Ecological Restoration (SER), Society for Freshwater Science (SFS) and Society of Wetland Scientists (SWS) support the sustainable management of the nation's waters. We are science-based organizations with diverse areas of expertise in the ecological and biological sciences. Our collective 200,000+ members and 130+ professional societies and research organizations work in the private sector, academia, and various tribal, state and federal agencies. As non-profit organizations, we support and foster sound science, research, and education on, and restoration and management of, wetlands and other aquatic resources. Thus, we track policies and actions that affect these aquatic resources and we promote science-based policy-making.

Wetlands sustain essential habitat for wildlife, fish, and waterfowl to feed, breed, nest, spawn, and rear their young. The areas comprising our nation's wetlands have been reduced by over 50% over the past 200 years and now cover a small portion of our landscapes (<6% of the land area in the lower 48 states), but they play a disproportionately significant role in protecting our nation's waters.

Wetlands and headwater streams provide vital services that promote human health and safety, and support American businesses. These essential components of our hydrologic networks improve water quality in our streams, lakes, and groundwater by naturally cleansing surface waters, including urban, mining, timber harvesting and agricultural runoff; they also provide stored water during drought, and absorb stormwater runoff and floodwaters, reducing disaster recovery costs. A 2016 study (Narayan et al)¹ found that coastal wetlands prevented \$625 million in property damages during Hurricane Sandy, and that coastal wetlands reduced annual property damages in Ocean County, New Jersey by nearly 20%.

The proposed repeal of the 2015 Clean Water Rule, unlike the 2015 Clean Water Rule itself, is unsupported by the peer-reviewed science and evidentiary analysis, has not been subjected to rigorous independent peer review, nor to a robust public comment process, and poses a significant threat to the integrity and security of our drinking water, public health, fisheries, and wildlife habitat while significantly increasing the risks and costs associated with flood and storm damage. We submit the following comments for your consideration.

Comment #1: The Agencies should provide a body of peer-reviewed publications, comparable to those supporting the 2015 CWR, providing scientific evidence that repeal of the 2015 CWR will not negatively impact the ability of the CWA “to restore and maintain the chemical, physical, and biological integrity of the nation’s waters,” and will not lead to financial losses resulting from deterioration of WOTUS and their associated ecosystem services, as defined by the 2015 CWR.

The 2015 CWR is supported overwhelmingly by the scientific evidence, documented in the EPA *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* report², which underwent external peer review by the EPA Science Advisory

Board, and incorporates results from over 1,200 peer-reviewed scientific publications. Further support for the 2015 CWR is provided by a Brief of the *Amici Curiae* in Support of Respondents and in Support of Upholding the Clean Water Rule³, filed with the U.S. Court of Appeals for the Sixth Circuit, as well as numerous peer-reviewed studies (e.g., Golden et al. 2017)⁴, Agency experience and U.S. Supreme Court precedent. The protection of water quality, water supply, aquatic ecosystem health, prevention of storm, flood, property, and infrastructure damage, and protection of the chemical, physical, and biological integrity of WOTUS will be jeopardized without the protection afforded to headwaters, tributaries, wetlands (including some isolated wetlands), and adjacent waters by the 2015 CWR. Reverting to previous definitions of WOTUS and prior Agency guidance documents has led to incomplete achievement of the CWA mandate, as noted in this comment letter, with costly and significant negative consequences for American citizens, businesses, and communities, as they experience deteriorated water quality, more limited water supplies, more severe flood and storm damage to properties and infrastructure, reduced fisheries, reduced recreational activities supporting American businesses, and degraded ecosystem and wildlife habitat conditions. Compensating for these ecosystem service losses will incur significant financial losses, as mentioned above.

Comment #2: The Agencies should provide extensive, substantive and valid documentation to demonstrate how reverting to a case-by-case approach leads to greater certainty, consistency, clarity, and stability of regulation.

The 2015 CWR establishes greater certainty, consistency, clarity, and stability of regulation than the preceding WOTUS definition and 2003 and 2008 agency guidance documents. Reverting to case-by-case “significant nexus” evaluations will add to the financial and permitting burden of businesses and communities, and will perpetuate the current level of confusion and inconsistency for an unknown period of time. The lack of scientific, peer-reviewed studies in support of repealing the 2015 CWR will likely trigger costly and time-consuming court challenges and contribute further to regulatory uncertainty, instability, and costs to both private and public sectors.

Comment #3: The Agencies should provide a complete economic analysis that includes economic benefits associated with wetlands protected by the 2015 CWR as well as the costs and lost revenues associated with rescinding the 2015 CWR, many of which are enumerated in this comment letter. The revised economic analysis should be supported by peer-reviewed publications, and should provide peer-reviewed publications to support any removal of economic benefits or additions of economic costs associated with rescinding the 2015 CWR, and this economic analysis should be subject to a robust peer review and public comment process.

The proposed rule to rescind is dependent upon, and largely justified by, a highly flawed, incomplete, and weak economic analysis (see: https://www.epa.gov/sites/production/files/2017-06/documents/economic_analysis_proposed_step1_rule.pdf). The Federal Agencies that drafted this rescission rely on an economic analysis conducted for the 2015 CWR, but with one major

change—the Agencies removed the estimated \$313 to \$513 million in annual benefits that resulted from wetland protection under the 2015 CWR, and they failed to provide any other means of estimating the economic value of wetlands protected by the 2015 CWR.

They justify this removal of benefits, in part, by stating that, “public attitudes towards nature protection *could* have changed” over time, but provide no documentation to support this assertion. According to survey results (among others, see <http://www.trcp.org/2017/06/28/new-national-poll-shows-hunter-angler-support-conservation-crosses-party-lines/>), Americans place greater value on clean water than on any other environmental factor, and *increasingly* value wetlands (Costanza et al. 2014)⁵. Further, the Agencies make the specious argument that they were unable to find updated studies of “willingness to pay” wetlands valuation studies, such as those that were part of the 2015 CWR economic analysis. Several contingent valuation studies were conducted between 2005 and 2014 (including Whitehead et al (2005), Whitehead et al (2009), Awondo et al (2011) and Petrolia et al (2014))⁵. In addition, according to John Loomis, Colorado State University professor, and author of “Statistical Efficiency of Double-Bounded Dichotomous Choice Contingent Valuation”, which includes over 1,000 citations and received the Publication of Enduring Quality Award from the Agricultural and Applied Economics Association, there have been no major changes to the scientifically accepted methods for valuing clean water since the studies that support the 2015 CWR, and his seminal 1991 work continues to be used today (personal communication, 8/10/2017). OMB and USACE continue to utilize the “willingness to pay” approach, as do others. Two meta-analyses conducted in 2006 (Brander et al.)⁵ and 2010 (Ghermandi et al.)⁵ continue to support the conclusions of the studies in support of the 2015 CWR.

Further, many additional studies documenting the economic value of wetlands, as measured in a variety of ways, have been produced recently, and are included in the list of economic valuation studies⁵ below. The references appended to this letter include “willingness to pay” studies, as well as other methods for assessing the economic value of wetland ecosystem services. It should be further noted that each of the references appended to this letter includes additional citations of work related to the topic of the article.

The Agencies’ economic cost-benefit analyses should include estimates of the costs to property owners, communities, governments, taxpayers, and health care insurers associated with replacing the ecosystem services provided by wetlands and headwater streams that would be unprotected with the repeal of the 2015 CWR. These costs include those for the construction and operation of additional water quality treatment, water storage, and flood control facilities and infrastructure, increased health care costs, and increased reconstruction and repair costs associated with higher levels of flood and storm damage to properties, roads, and other infrastructure. Additionally, there would be a loss of revenues to private businesses, including many rural small businesses that benefit from fishing, hunting, boating, and other recreation industries that are dependent upon clean and plentiful waters and the wetlands that sustain them.

Comment #4: The Agencies should provide valid and substantive documentation of the commitment of state agencies to take on wetland protection that would be lost should the 2015 CWR be rescinded, and this documentation should be subject to a robust peer review and public comment process.

The Agencies assert that rescinding the 2015 CWR is justified because states will protect wetlands through state wetland protection programs. States have had the option to assume responsibility for the Section 404 permit program since the Clean Water Act (CWA) passed in 1972, yet only two states have chosen to do so. An additional 21 states have some type of dredge-and-fill permit program, many of which rely on federal grant funding and collaboration⁶. The majority of states rely on the technical and financial support of the federal government in administering wetlands protection policies, and thus are not likely to have the capacity or the inclination to take on wetland protection in the absence of federal protection, which would lead to loss of the economic, ecological, and public health and safety benefits discussed in the preceding paragraph and elsewhere in this letter. Furthermore, the current US Administration has proposed drastic reductions to the EPA budget, which would result in diminished federal financial support of state wetland programs. The reduction of federal financial support must also be considered when evaluating the capability of state programs.

Comment #5: We urge that the current 60-day comment period for the proposed rescinding of the 2015 CWR be extended for an additional six months, so that our members, and other stakeholders directly impacted by the proposed rule to rescind, have sufficient time to submit comments.

Americans submitted over 1.1 million comments on the 2015 CWR, and over 90% were in support of the 2015 CWR and protection of our nation's wetlands and waters. The 2015 CWR underwent an extensive stakeholder process, involving over 400 meetings with small business owners, farmers, energy companies, states, counties, municipalities, other federal agencies, sportsmen, conservation groups and environmental organizations, and a public comment period that lasted for over 200 days. The broad public support for the 2015 CWR should not be overridden by an unduly foreshortened comment period and limited stakeholder process.

Considering the critical functions of our nation's wetlands and headwater streams in providing a broad suite of ecosystem services to society and the costs associated with replacing those ecosystem services, the far-reaching implications for fish, wildlife, and their habitat from rescinding the 2015 CWR, and the robust public participation in developing the 2015 CWR, we urge the EPA and the Army Corps of Engineers to either **withdraw the proposed rule to rescind the 2015 CWR and reaffirm the 2015 CWR**, or to develop a revised rule that is as scientifically, legally, and ecologically robust as the 2015 CWR, and that is supported by an economic analysis that incorporates valuation of ecosystem services provided by WOTUS as defined in the 2015 CWR, so that the concerns and interests of American citizens, businesses, communities, and the approximately 200,000 members of our societies are addressed.

Sincerely,



Douglas J. Austen, Executive Director
American Fisheries Society



Robert R. Twilley, President
Coastal and Estuarine Research Federation



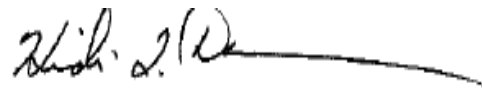
Robert Gropp, Ph.D., Co-Executive Director
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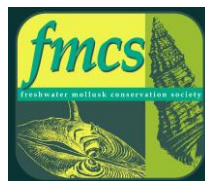
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Erin Dunlop, President
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Colden Baxter, President
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Timothy A. Nelson, President
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Arnold van der Valk, President
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