



# Public Employees for Environmental Responsibility

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August 13, 2018

Andrew Wheeler,  
Acting Administrator  
Environmental Protection Agency  
William Jefferson Clinton Building, *Mail Code:* 1101A  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Lt. General Todd T. Semonite  
U.S. Army Corps of Engineers  
441 G Street NW  
Washington D.C. 20314-1000

RE: EPA-HQ-OW-2017-0203-15104

Submitted electronically via <https://www.regulations.gov>

Dear Acting Administrator Wheeler and Lt. General Semonite,

Thank you for the opportunity to comment on the U.S. Environmental Protection Agency's (EPA's) and the U.S. Army Corps of Engineers (Corps) Supplemental Notice, "Definition of Waters of the United States-Recodification of Preexisting Rule" (hereinafter the "Rule"). Public Employees for Environmental Responsibility (PEER) is a Washington D.C.-based non-profit, non-partisan public interest organization concerned with honest and open government. Specifically, PEER serves and protects public employees working on environmental issues, including those at EPA and the Corps. PEER represents thousands of local, state and federal government employees nationwide.

**Background.** On February 28, 2017, President Trump signed the "Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States Rule.'"<sup>1</sup> This Executive Order (EO) called upon the EPA and the Corps to rescind or revise the 2015 Clean Water Rule. On July 27, 2017, EPA and the Corps published a public notice to repeal the Clean Water Rule. PEER commented on this deeply flawed proposal,

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<sup>1</sup> <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-restoring-rule-law-federalism-economic-growth-reviewing-waters-united-states-rule/>

pointing out that EPA and the Corps zeroed out the benefits associated with wetland protection due to alleged “uncertainty” associated with past economic studies of the public’s willingness to pay to retain wetlands.<sup>2</sup> Upon receiving a plethora of comments on this faulty proposal, the agencies appear to have realized their legal vulnerability, and decided to hedge their bets by postponing the applicability of the 2015 Rule. On February 6, 2018, the agencies issued a Final Rule delaying the “applicability date” of the 2015 Clean Water Rule to 2020.<sup>3</sup> On July 12, 2018, the agencies published a Supplemental Notice, allegedly to support and clarify their earlier proposal to repeal the 2015 Clean Water Rule.

Because the agencies did not change any of the information presented in their July 27, 2017 proposed rule to repeal the 2015 Clean Water Rule, all of our comments still stand; please see our letter, attached, and incorporate those comments.<sup>4</sup> However, the proposed Supplemental Notice that is before is today raises additional serious concerns. Our specific comments on this are set forth below.

**The agencies are rejecting the science behind the Connectivity report without any justification.** In 2015, EPA’s Office of Research and Development (ORD) released the report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*<sup>5</sup> (the Connectivity Report). This comprehensive report reviewed 1,200+ peer-reviewed publications and summarized current scientific understanding about the connectivity and mechanisms by which streams and wetlands affect the physical, chemical, and biological integrity of downstream waters. Specifically, the report focused on the ways small, intermittent, and ephemeral streams, nontidal wetlands, and other waters affect larger waters such as rivers, lakes, and estuaries. The report concluded, in part, that, “open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity ... the evidence for connectivity and downstream effects of ephemeral streams was strong and compelling...”<sup>6</sup>

Trump’s EPA and Corps are now reversing themselves and claiming that:

[t]he agencies now believe that they previously placed too much emphasis on the information and conclusions of the Connectivity Report when setting jurisdictional lines in the 2015 Rule, relying on its environmental conclusions in place of interpreting the

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<sup>2</sup> <https://www.peer.org/news/news-releases/pruitt%E2%80%99s-massive-wetlands-shell-game.html>

<sup>3</sup> 83 FR 5200; note that the agencies were sued for this action due to an alleged violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)

<sup>4</sup> <https://www.peer.org/assets/docs/9-27%20WOTUS%20Step1Ltr%20FINAL.pdf>

<sup>5</sup> 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.

<sup>6</sup> Id. at ES-7

statutory text and other indicia of Congressional intent to ensure that the agencies' regulations comport with their statutory authority to regulate.<sup>7</sup>

Traditionally, EPA, the Corps, and other agencies rely on both science and congressional intent when they propose regulations. In fact, many environmental laws and EOs require that EPA utilize best available scientific data. However, when the language of the statute, congressional intent, and case law leave room for interpretation, the agencies must use science to clarify and guide policies and new regulations. The 2015 Clean Water Rule relied on an exhaustive review of all peer-reviewed scientific literature, and properly concluded which wetlands and waters have a significant effect on the chemical, physical, and biological integrity of navigable waters. In fact, the U.S. Supreme Court has held that federal agencies may assert jurisdiction over certain waters so long as “it is reasonable . . . to conclude that, in the majority of cases,” the category of waters has “significant effects on water quality and the aquatic ecosystem...”<sup>8</sup>

However, today we have the agencies claiming that they placed “too much emphasis” on the science. They provide no scientific basis for challenging the Connectivity Report, no reasons as to why the Connectivity Report is flawed, and no new peer-reviewed studies. Instead, they claim that this compelling science should be tempered by a somewhat vague statute and ambiguous case law. The rejection of the best available science for no reason other than it is “too much” is arbitrary and capricious.

**The estimated extent of increased jurisdiction over waters of the United States under the 2015 Clean Water Rule is correct.** The Supplemental Notice expresses concern that “the 2015 Rule significantly expanded jurisdiction over the preexisting regulatory program.”<sup>9</sup> There are two problems with this concern. First, the Clean Water Act’s objective is to restore and maintain the chemical, physical, and biological integrity of the nation's waters by preventing point and nonpoint pollution sources. The Act prohibits the discharge of pollutants into navigable waterways without a permit. Navigable waters are defined as waters of the United States (WOTUS). Over the years, guidance and policies based on science, together with case law, have dictated the definition of WOTUS. If peer-reviewed scientific studies tell us that the definition of WOTUS must be expanded to protect the chemical, physical, and biological integrity of the nation’s waters, then jurisdiction should be expanded. In other words, nowhere in the statute is there a limit on what percentage of waters can be jurisdictional. The degree to which scientific analysis increases agencies’ jurisdiction is a public relations issue, not a scientific or legal one. An analogous situation would be where EPA determines, through reviews of new peer-reviewed science, that the regulatory limit for a contaminant in drinking water needs to be decreased to protect human health. The percent decrease is not a factor that is considered in promulgating the new regulation.

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<sup>7</sup> 83 FR 32241

<sup>8</sup> United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 n.9 (1985).

<sup>9</sup> 83 FR 32238

Second, the Supplemental Notice argues that the previous estimate of a 2.84 to 4.65% increase in jurisdiction over streams, rivers, wetlands, and other waters due to application of the 2015 Clean Water Rule was incorrect. Instead, the Notice examines *one* category of waters that would become jurisdictional under the 2015 Clean Water Rule, claiming that 34.5% of this “other waters category could become jurisdictional under the 2015 Rule.”<sup>10</sup> By cherry picking the data, the agencies are artificially inflating the estimate of increased jurisdiction. PEER can think of no reason to do this other than to scare people into opposing the 2015 Clean Water Rule. It is worth noting that the draft language we have seen thus far on Step 2 – redefining WOTUS – would *decrease* jurisdiction by as much as 60 to 90% of wetlands and waters across the United States. Given the importance of wetlands and waters to flood control, water purification, groundwater recharge, and fish and wildlife habitat, this is far more alarming than any slight increase in jurisdiction.

**The 2015 Clean Water Rule is not generating confusion.** The Supplemental Notice claims that “the 2015 Rule is creating significant confusion and uncertainty for agency staff, regulated entities, states, tribes, local governments, and the public, particularly in view of court decisions that have cast doubt on the legal viability of the rule,”<sup>11</sup> and thus, the Rule should be repealed permanently. The 2015 Clean Water Rule was enacted in order to provide more certainty in light of confusing court decisions; however, it was never given a chance to operate. The Supplemental Notice also states, “The 2015 Rule was in effect in only 37 States for about six weeks between the 2015 Rule's effective date and the Sixth Circuit's October 9, 2015 nationwide stay order.”<sup>12</sup> Are the agencies alleging that all this confusion stemmed from a rule that was in effect for six weeks in 37 states? The Supplemental Notice also posits that the current regulations are “familiar, if imperfect,”<sup>13</sup> and “the agencies and regulated public have significant experience operating under the longstanding regulations...”<sup>14</sup> which is why the 2015 Rule should be repealed.

Keeping a scientifically invalid rule because it is familiar and because the agencies and public have significant experience with it is non-sensical. Federal agencies issue new rules every day, and people cope. EPA’s mission is to protect human health and the environment, not to ensure that people keep familiar rules that put them at risk.

Moreover, if avoiding confusion and sticking with the familiar are some of the agencies’ priorities, how can they justify redefining WOTUS entirely in Step 2 of this process? Will this new definition *not* cause confusion and be unfamiliar?

Finally, the Supplemental Notice states that:

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<sup>10</sup> 83 FR 32244

<sup>11</sup> 83 FR 32228

<sup>12</sup> 83 FR 32250

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

The agencies received more than 685,000 comments on the NPRM from a broad spectrum of interested parties. ***The agencies are continuing to review those extensive comments.*** Some commenters expressed support for the agencies' proposal to repeal the 2015 Rule, stating, among other things, that the 2015 Rule exceeds the agencies' statutory authority. Other commenters opposed the proposal, stating, among other things, that repealing the 2015 Rule will increase regulatory uncertainty and adversely impact water quality<sup>15</sup> (emphasis added).

The agencies are admitting that they have not yet read the comments, and yet also claim that there is widespread confusion. It is unclear whether this alleged confusion is due to the Rule itself, or the convoluted process that the agencies themselves have initiated:

Because some commenters interpreted the NPRM as restricting their ability to comment on the legal and policy reasons for or against the repeal of the 2015 Rule while others submitted comments addressing these topics, the agencies wish to make clear that comments on that subject are solicited. Additionally, some commenters appeared to be confused by whether the agencies proposed a temporary or interim, as opposed to a permanent, repeal of the 2015 Rule.<sup>16</sup>

Regardless, PEER urges the agencies to rescind this Supplemental Notice and the proposed repeal until it has some valid, scientifically-based reasons to make a change.

**The proposed repeal of the 2015 Clean Water Rule and this Supplemental Notice fail to meet legal standards.** The July 27, 2017 proposed repeal of the 2015 Clean Water Rule fails to meet the legal standard necessary to justify the repeal. Specifically, as the Supplemental Notice states, “The Supreme Court has made clear that ‘[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change...’”<sup>17</sup> The July 2017 proposal did not give a reasoned explanation based on changes in circumstance or changes in statutory interpretation or policy judgment. In fact, there are changes in circumstance that should be taken into account, but these changed circumstances would argue for being *more* protective of wetlands and waters, not less. For example, since the 2015 Clean Water Rule was enacted, scientists are finding that climate change presents increased risks of gastrointestinal illness to small rural groundwater municipalities without drinking water treatment.<sup>18</sup> If the agencies are alleging that they have a changed policy judgment that warrant this repeal, this judgment should be explained, and it must be balanced with additional science in light of hastening climate change and the impact on drinking water. As PEER noted in our letter on the original proposal to

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<sup>15</sup> 83 FR 32230

<sup>16</sup> *Id.*

<sup>17</sup> 83 FR 32231

<sup>18</sup> See, e.g., Uejio, C. K., M. Christenson, C. Moran, M. Gorelick, *Drinking-water treatment, climate change, and childhood gastrointestinal illness projections for northern Wisconsin (USA) communities drinking untreated groundwater*, *Hydrogeology Journal* 25(4), pp. 969-979, (2017)

repeal, the 2015 Clean Water Rule will protect the drinking water of 117 million Americans; this is even more critical given the rate at which climate change has accelerated over the past three years.

**The agencies' claimed lack of data is a double-edged sword.** The Supplemental Notice states that EPA and the Corps are “not aware of any data that estimates with any reasonable certainty or predictability the exact baseline miles and area of waters covered by the 1986 regulation and preexisting agency practice or data that accurately forecasts the additional waters subject to jurisdiction under the 2015 rule.”<sup>19</sup> If this is true, it would be impossible to propose a new definition of WOTUS (i.e., Step 2). This repeal, together with the forthcoming redefinition of WOTUS, must be scientifically defensible. If the agencies cannot understand what is jurisdictional under existing rules, they will not be able to estimate the impacts of a proposed redefinition.

**Conclusion.** PEER does not believe that the agencies have a sound legal basis to repeal the 2015 Clean Water Rule. The dismissal of the Connectivity Report is arbitrary and capricious, particularly in light of the fact that the Supplemental Notice provides *no* scientific challenges to the Report. The fact that the Clean Water Rule would increase jurisdiction is not, in itself, enough to warrant repeal. The confusion around WOTUS jurisdictional determinations cannot be attributed to the 2015 Clean Water Rule; in fact, the Rule was proposed to address existing confusion. The lack of data claimed by the agencies would, if true, prohibit them from redefining WOTUS in absence of those data. Our concerns expressed with the deeply-flawed economic analysis still stand, as do our concerns about the arbitrary Step 2 redefinition. Finally, given the new scientific findings regarding drinking water in these times of hastening climate change, we believe it is incumbent on the agencies to revisit the necessity of protecting wetlands and streams covered under the 2015 Clean Water Rule in order to protect the nation's drinking water supply.

Thank you for the opportunity to comment.

Cordially,

A handwritten signature in black ink that reads "Kyla Bennett" with a horizontal line extending to the right.

Kyla Bennett, PhD, JD  
Science Policy Director  
Public Employees for Environmental Responsibility

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<sup>19</sup> 83 FR 32247