



Save the Sound®

FOR IMMEDIATE RELEASE  
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Contact: Laura McMillan - 540-292-8429 (c)

## **Save the Sound to EPA and Army Corps: Don't Roll Back 2015 Waters of the U.S. Rule**

New Haven, Conn. – The Waters of the United States Rule defines the types of waterbodies that fall within the protection of the Clean Water Act. In 2015, the U.S. Environmental Protection Agency re-affirmed longstanding water quality protections when it found the definition includes seasonal headwaters, weather-dependent streams, and similar waterways.

The Court of Appeals for the Sixth Circuit issued a stay of the rule's implementation later that year. As a result, the new rule's protections have never gone into full effect.

On Monday, Save the Sound submitted formal comments to the EPA and U.S. Army Corps of Engineers on the agencies' proposal to revoke the 2015 Rule and revert to previous, inconsistent definitions for an indefinite period of time while the agencies attempt to draft a new rule.

"Failing to protect headwaters and intermittent streams could impact nearly one-third of the country's drinking water, and undoing the 2015 Rule without a real plan for replacement would return us to a regulatory quagmire," said Andrew W. Minikowski, legal fellow at Connecticut Fund for the Environment/Save the Sound. "The 2015 Waters of the United States Rule would make about 117 million American's drinking water supply safer—and for all of us, it would make our rivers healthier. We're urging the EPA and Army Corps not to roll back this progress. The agencies should discuss options with citizens and stakeholders, while planning for eventual implementation of the 2015 Rule's clear definitions and stronger protections."

The two agencies are accepting public comment until September 27, 2017.

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### **TEXT OF CFE/SAVE THE SOUND COMMENTS:**

September 18, 2017

Mr. E. Scott Pruitt, Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, D.C. 20460

Lt. Gen. Todd T. Semonite  
Commanding General and Chief of Engineers  
U.S. Army Corps of Engineers  
441 G Street NW

Washington, D.C. 20314

**Re: Definition of Waters of the United States; Docket ID No. EPA-HQ-OW-2017-0203**

Dear Administrator Pruitt,

Connecticut Fund for the Environment, and its bi-state program Save the Sound, (“CFE/STS”) respectfully submit the following comments in regard to the Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers’ (“USACOE”; collectively “agencies”) proposed administrative rule to strike the existing definition of “waters of the United States” from the Code of Federal Regulations and replace it with pre-existing definitions pending a new agency rulemaking on the definition of “waters of the United States.” EPA’s actions will prolong regulatory uncertainty in this instance will have dire consequences for natural resources, public health, and the national economy. An estimated 117 million Americans receive their drinking water from systems that source from seasonal headwaters and rain-dependent streams—the very water bodies that revocation of the 2015 Rule would place at risk of impairment.<sup>1</sup> The cleanliness and security of nearly one-third of the country’s drinking water and attendant standard of living will therefore be subject to degradation.

CFE/STS is a state and region-wide nonprofit organization devoted to environmental protection and advocacy that represents approximately 5,300 member households throughout both Connecticut and New York. Since its founding in 1978, CFE/STS has prioritized the stewardship of the region’s fragile water resources, with particular emphasis on the protection of water quality within Long Island Sound and its watersheds. CFE/STS strongly objects to the agencies’ rule as proposed. Although presented as a temporary and transitional measure, re-implementation of the pre-2015 Waters of the United States Rule will engender legal chaos and uncertainty for an indeterminate period of time. On a more fundamental level, however, the agencies have failed to articulate any compelling reasons as to why revocation of the 2015 rule serves the public interest and is warranted under present circumstances. Imposing the status quo for an indefinite period of time will have dire consequences on water quality within Connecticut and its associated watersheds. The Connecticut River has a total drainage basin of 11,000 square miles and provides an estimated 70% of the fresh water that ultimately enters Long Island Sound.<sup>2</sup> Approximately 15% of Connecticut’s land area, or 450,000 square acres, consists of wetlands that provide crucial recharge within the watershed.<sup>3</sup>

As EPA itself acknowledges in its own rationale for revoking the 2015 rule, the state of the law prior to promulgation of that rule was nothing short of anarchic, with relevant stakeholders mired in perpetual uncertainty as to whether particular hydrological resources were properly considered waters of the United States within the ambit of the Clean Water Act’s jurisdiction.<sup>4</sup> This state of uncertainty, the result of several decisions of the United States Supreme Court that failed to arrive at consensus on the

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<sup>1</sup> Jon Devine, “Trump’s Attack on Clean Water: What You Need to Know,” NATURAL RESOURCES DEF. COUNCIL (June 27, 2017), available at <https://www.nrdc.org/experts/trumps-attack-clean-water-what-you-need-know> (last visited Aug. 24, 2017).

<sup>2</sup> “Watershed Facts,” CONN. RIVER CONSERVANCY, available at <https://www.ctriver.org/river-resources/about-our-rivers/watershed-facts/> (last visited Aug. 29, 2017).

<sup>3</sup> “Inland Wetlands,” COUNCIL ON ENV’T’L QUALITY (2009), available at <http://www.ct.gov/ceq/cwp/view.asp?a=3718&Q=435672> (last visited Aug. 29, 2017).

<sup>4</sup> 82 Fed. Reg. 34899, 34902 (July 27, 2017).

exact parameters of what constitute waters of the United States,<sup>5</sup> is the “status quo” to which EPA now asserts it is necessary to return. Despite EPA’s prior promulgation of the 2015 Waters of the United States Rule—designed to bring clarity to murkiness surrounding this issue—that rule, of course, has never gone into full effect at the national level due to the stay issued by the United States Court of Appeals for the Sixth Circuit.<sup>6</sup> As such, the actual on-the-ground impacts and efficacy of the 2015 Waters of the United States Rule remain unknown to EPA, USACOE, and the public at large. Yet EPA presumes as certain that implementation of the 2015 Rule, pending potential expiration of the Sixth Circuit’s stay, would lead to “inconsistencies, uncertainty, and confusion as to the regulatory regime that would be in effect pending substantive rulemaking under the [Executive Order issued on February 28, 2017].”<sup>7</sup> EPA’s solution to this alleged problem, however, is to reinstate a status quo that was itself maligned by the regulated community and public for being inconsistent, uncertain, and confusing. Such a course of action is the epitome of arbitrary decision making and provides none of the regulatory clarity that EPA states that it seeks as a result of the present administrative rulemaking.

Indeed, EPA’s decision to pursue to the current two-tiered process of revoking the 2015 Rule appears to be crafted specifically to ensure that the 2015 Rule does *not* go into effect pursuant to some future action of the Court of Appeals for the Sixth Circuit or the United States Supreme Court. To be sure, the explicit stated purpose of the Executive Order is to revoke the 2015 Rule and replace it with a new rule reflecting the reasoning of Justice Scalia’s plurality opinion in *Rapanos v. United States*. There is nothing preventing EPA or USACOE from commencing notice and comment rulemaking for that new rule immediately. Should the 2015 Rule go into effect without major upheaval in the interim, however, EPA’s predictions about the alleged adverse economic impacts of the 2015 Rule will prove foundationless as a basis for revoking the rule.<sup>8</sup> The course of action that EPA proposes is, in fact, what would lead to disaster: ensuring a period of regulatory uncertainty for an indeterminate length of time while the agencies draft an entirely new rule. As EPA’s eventual replacement rule will doubtless be subject to nationwide legal challenges, it is likely that this period of uncertainty will last for longer than just the amount of time necessary to draft and finalize a new rule.

Furthermore, EPA’s proposed revocation is not pursuant to any public mandate. Indeed, polling reveals that the vast majority of American voters support the 2015 Rule, with majority support among both conservative and liberal voters.<sup>9</sup> Likewise, polling of small business owners reveals that a majority of those stakeholders also support the 2015 Rule, with a further majority recognizing that access to clean water fosters further economic growth and investment.<sup>10</sup> Accordingly, EPA’s proposed revocation

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<sup>5</sup> See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L.Ed.2d 419 (1985); *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 148 L.Ed.2d 576 (2001); *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 165 L.Ed.2d 159 (2006)

<sup>6</sup> *In re U.S. Dep’t of Def. and U.S. Env’tl Protection Agency Final Rule: Clean Water Rule: Definition of “Waters of the U.S.”*, 817 F.3d 261 (6th Cir. 2016).

<sup>7</sup> 82 Fed. Reg. at 34902.

<sup>8</sup> The focus of EPA and USACOE’s economic analysis of the impacts of re-codifying the status quo is severely misaligned with the costs and impacts it should properly be quantifying. Rather than evaluate actual impacts, the “analysis” summarily concludes that re-imposing the status quo will have no cost impacts on non-jurisdictional waters and spends the remainder of its pages editorializing on the state of the U.S. labor market and business climate. See Env’tl Protection Agency and U.S. Army Corps of Engineers, *Economic Analysis for the Proposed Definition of “Waters of the United States”—Recodification of Pre-existing Rules 2*, 13–18 (July, 2017).

<sup>9</sup> “Memo: Voters Favor the Clean Water Rule by a Wide Margin,” LEAGUE OF CONSERVATION VOTERS (May 18, 2015), available at <https://www.lcv.org/article/memo-voters-favor-the-clean-water-rule-by-a-wide-margin/> (last visited Aug. 24, 2017).

<sup>10</sup> “New Poll: Small Business Owners Want Strong Clean Water Rules,” AMERICAN SUSTAINABLE BUSINESS COUNCIL (July 23, 2014), available at <http://asbcouncil.org/news/press-release/new-poll-small-business-owners-want-strong-clean-water-rules#.WaAvBfmGPcs> (last visited Aug. 24, 2017).

contravenes the policy preferences of a majority of both regular Americans and the regulated community.

In sum, CFE/STS opposes EPA and USACOE's proposal to revoke the 2015 Rule and re-impose the status quo pending future administrative rulemaking for the aforementioned reasons. CFE/STS believes that the present action is both arbitrary and capricious. EPA must further engage with stakeholders and citizens prior to moving forward on this proposal. CFE/STS looks forward to further comment and participation as EPA moves forward on both stages of this proposed rulemaking.

Respectfully submitted,

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