October 30, 2014

Water Docket
U.S. Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: SUPPORT Docket No. EPA-HQ-OW- 2011-0880

As members of the Choose Clean Water Coalition, we work to protect and restore local streams and rivers leading to a healthy Chesapeake Bay. One of the Coalition's main goals is to defend and support the Clean Water Act. The Coalition strongly supports the proposed "Waters of the United States" rule.

Supreme Court decisions and subsequent agency guidance have caused confusion in establishing Clean Water Act jurisdiction and in implementing its programs. This uncertainty has led to many waters not being sufficiently protected, as well as confusion, delay, and wasted resources within the regulated community and among the agencies making jurisdictional determinations and enforcing the Clean Water Act. The proposed rule will clarify the Clean Water Act's jurisdiction, reduce uncertainty, and protect waters throughout the Chesapeake Bay watershed and across America. For these reasons, we strongly support the proposed rulemaking.

A. The Proposed Rule Is Supported By Legislative History.

When passing the Clean Water Act in 1972, Congress made it clear that the scope of the Clean Water Act was to be far-reaching. The Act's ambitious goal—"to restore and maintain the chemical, physical and biological integrity of the Nation's water"[1]—required extensive federal authority over the "Nation's waters." The record of Congress' deliberation demonstrates that that Congress intended the Clean Water Act "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[2] Congress recognized that "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."[3] Given Congress' clear intent that the Clean Water Act address pollution at its source and its recognition that waters are interconnected, the scope of the proposed rule is well within Congressional intent and is legal.[4]

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[1] 33 U.S.C. § 1251(a).
[2] Sen. Conf. Rep. No. 92-1236, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3376 at 3822.
[3] S. Rep. No. 414 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News at 3752-53.
[4] *See Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842–843 (1984) (holding that if Congress' intent is clear, the Court and the agency must give effect to Congress' unambiguously expressed intent).

The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers are entitled to deference in decisions about the scope of Clean Water Act authority based on their expert ecological judgment about the role that certain kinds of waters play in the aquatic system,[5] unless a particular interpretation "invokes the outer limits of Congress' power."[6] Where, as here, the proposed rule is based on copious scientific evidence and the agencies' judgment about whether the science reveals a "significant nexus" between various categories of waters and downstream navigable or interstate waters, the approach is a reasonable and lawful interpretation of the Clean Water Act.[7]

B. The Proposed Rule Will Protect Drinking Water in the Chesapeake Bay Watershed.

Approximately 11 million people—nearly two out of three—in the Chesapeake Bay watershed get their drinking water directly from the rivers and streams flowing into Chesapeake Bay.[8] All of these river and streams are dependent on high quality water from intermittent and ephemeral streams in their headwater areas - waters that would be protected by this proposed rule.

Delaware: In Delaware, over 280,000 people receive their drinking water from public systems that rely at least in part on intermittent, ephemeral or headwater streams.

Maryland: Nearly four million Marylanders receive their drinking water from public systems that rely at least in part on intermittent, ephemeral or headwater streams.

New York: Across New York, over eleven million people receive their drinking water from public systems that rely at least in part on intermittent, ephemeral or headwater streams.

Pennsylvania: More than 8 million Pennsylvanians receive their drinking water from public systems that rely at least in part on intermittent, ephemeral or headwater streams.

Virginia: Across Virginia, over 2.3 million people receive their drinking water from public systems that rely at least in part on intermittent, ephemeral or headwater streams.

West Virginia: More than one million West Virginians receive their drinking water from public systems that rely at least in part on intermittent, ephemeral or headwater streams. The Elk River disaster in Charleston, West Virginia—which impacted the drinking water source of upwards of 300,000 people—underscored the importance of protecting drinking water sources for all Americans.

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[5] *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132-35 (1985).
[6] *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 172 (2001).
[7] *Rapanos v. United States*, 547 U.S. 715, 767 (2006) (Kennedy, J., concurring).
[8] U.S. Environmental Protection Agency, "National Hydrography Dataset Plus; Federal Safe Drinking Water Information System 4th Quarter 2006 Data."

C. The Proposed Rule Will Protect Sensitive Waters in the Chesapeake Bay Watershed.

One of the most important aspects of the proposed rule is its protection of intermittent and ephemeral streams. Protection of these sensitive headwaters is critical to safeguarding water quality and wildlife throughout the Chesapeake Bay watershed.

The Chesapeake Bay watershed has 147,149 miles of rivers and streams.[9] Thirty eight percent, or 56,689 of those miles, are intermittent or ephemeral streams that would be protected by the proposed rule.[10] In Maryland, sixteen percent or 3,874 of the state's 23,671 steam miles are intermittent or ephemeral. Approximately 32,000 miles—or 65 percent—of Virginia's streams could be considered headwater tributary streams.[11] The Susquehanna River watershed, which runs through New York, Pennsylvania, and a small part of Maryland, boasts 45,582 miles of streams and rivers. Twenty six percent—or 12,878 miles—of those streams are intermittent and would be protected under the proposed rule.

D. The Rule Should Be Expanded to Include Other Important and Sensitive Waters.

The Chesapeake Bay watershed is home to several types of important and sensitive waters that are not currently covered by the rule as *per se* jurisdictional. Coastal plain depressional wetlands[12] are critical to protecting water quality in Maryland, Delaware, and Virginia and should be categorically protected by the Clean Water Act. As noted by University of Georgia scientists in their reports *Physical, Chemical, and Biological Impacts of Geographically Isolated Wetlands on Waters of the United States*[13] and *Evidence of Significant Impacts of Coastal Plain Depressional Wetlands on Navigable Waters*,[14] coastal plain depressional wetlands significantly impact water quality of traditionally navigable waters. Specifically, "The chemical and physical impacts of isolated wetlands on downstream waters occur in part because their isolation allows for the retention of nutrients, sediment, and water, and the exclusion of these from river networks."[15] In the Chesapeake Bay watershed, where we struggle with excess nutrients and sediment in the Chesapeake Bay and throughout the watershed, protection of these wetlands that capture nutrients and sediment is critical to meeting water quality goals and the Chesapeake Bay Total Maximum Daily Load – all under the Clean Water Act.

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[9] United States Geological Service, *available at:* http://nhd.usgs.gov/ ftp://nhdftp.usgs.gov/DataSets/Staged/SubRegions/

[10] United States Geological Service, *available at:* http://nhd.usgs.gov/. ftp://nhdftp.usgs.gov/DataSets/Staged/SubRegions/

[11] Virginia Department of Environmental Quality comments on Advanced Notice of Public Rulemaking on definition of Waters of the US, EPA Docket OW-2002-0050, March 28, 2003.

[12] Coastal plain depressional wetlands, such as Delmarva bays, are found in the Chesapeake Bay watershed. *See* http://www.dnr.state.md.us/naturalresource/spring2001/delmarvabays.html

[13] *See* Attachment A.

[14] *See* Attachment B.

[15] *See* Attachment B, pg. 14 at 23.

Conclusion

We strongly urge the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers to include coastal depressional wetlands in waters categorically protected under the Clean Water Act and then adopt the proposed rule.

Respectfully Submitted,

American Rivers
Anacostia Watershed Society
Audubon Naturalist Society
Clean Water Action
Conservation Pennsylvania
Conservation Voters of Pennsylvania
Delaware Nature Society
Earth Forum of Howard County
Friends of Dyke Marsh
Friends of the North Fork of the Shenandoah River
Izaak Walton League of America
James River Association
Loudoun Wildlife Conservancy
Maryland Academy of Science at the Maryland Science Center
Maryland Conservation Council
Maryland League of Conservation Voters
National Aquarium
National Parks Conservation Association
National Wildlife Federation
Nature Abounds
PennFuture
Pennsylvania Council of Churches
Port Tobacco River Conservancy
Potomac Conservancy
Prince William Conservation Alliance
Savage River Watershed Association
Severn River Association
Sidney Center Improvement Group
Sierra Club – Virginia Chapter
Southern Environmental Law Center
Virginia Conservation Network
West Virginia Rivers Coalition