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To: Administrator Pruitt and Deputy Assistant Secretary Lamont
Re: Proposed Repeal of the Clean Water Rule
Docket ID: EPA-HQ-OW-2017-0203

September 26, 2017

Dear Administrator Pruitt and Deputy Assistant Secretary Lamont:

The Northeast-Midwest Institute appreciates the opportunity to comment on the notice of proposed repeal of the “waters of the United States” rule, also known as the Clean Water Rule, published in the Federal Register on July 27, 2017.¹ While the notice states that repeal of the existing rule would provide “continuity and certainty” to stakeholders, the Institute is concerned that repeal would not result in these effects and would likely result in *more* uncertainty than the *status quo*.² Consequently, the Institute recommends that the proposed rescission of the Clean Water Rule be withdrawn.

As you know, attempts to determine the scope of the Clean Water Act’s protections have been hindered by the difficulty in interpreting the Act’s use of the phrase “waters of the United States.”³ This issue has been litigated on more than one occasion, resulting in multiple high-profile cases. The most recent Supreme Court case on the issue, *Rapanos v. United States*, did not resolve the question, notoriously resulting in a four-justice plurality opinion, a concurring opinion from Justice Kennedy, and a four-justice dissenting opinion.⁴

It was in this climate of uncertainty that the Environmental Protection Agency and the United States Army Corps of Engineers proposed a regulation in 2014 to clarify which bodies of water

¹ Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899-34909 (July 27, 2017).

² *Id.* at 34899.

³ See 33 U.S.C. §1362(7).

⁴ 547 U.S. 715 (2006).

do and do not qualify as “waters of the United States.”⁵ After an extensive comment period—substantially longer than even the extended period for the current proposed rescission—the final regulation was codified in 2015.⁶ Responding to the over 1.1 million comments and embracing the best science available in this area, the EPA and Army Corps of Engineers produced a rule that provided clarity regarding which bodies of water were and were not protected by the Clean Water Act.

Critically, the rule makes it easier to identify which headwater, seasonal, and intermittent streams are protected. It also helps identify which wetlands, including prairie potholes and vernal pools, are covered. Easier identification of which bodies of water are covered by the Act facilitates more robust protection and allows homeowners, farmers, and anglers to enjoy the natural resources in their backyards and communities.

By the EPA’s own analysis, over 117 million Americans depend on public drinking water systems that “rely at least in part on intermittent, ephemeral, or headwater streams.”⁷ By clarifying the protection of these bodies of water, the Clean Water Rule makes it easier for communities to protect these drinking water systems at a time when they are already at risk of pollution from a variety of natural and industrial hazards. Rescinding the rule would only increase the risk that millions of Americans will not have access to consistently safe drinking water.

Similarly, rescinding the Clean Water Rule would jeopardize America’s wetlands. These wetlands are important in their own right as vibrant ecosystems that are home to countless species of native plants, birds, and insects. They also serve a number of vital functions throughout the country. For example, they help protect against land loss and flooding. In addition, by absorbing and slowing the release of runoff pollution, wetlands play an enormously beneficial role in protecting the rivers that are hydrologically connected to them.

Weakening protections for these wetlands, thus jeopardizing their ability to protect America’s rivers, could not be more poorly timed. In the Mississippi River, for instance, agricultural runoff pollution that enters the river ultimately enters the Gulf of Mexico. Once there, it feeds the algae, leading to explosive growth of the algae population. Once the algae die and begin to decay, they

⁵ Definition of “Waters of the United States” Under the Clean Water Act, Proposed Rule, 79 Fed. Reg. 22188-22274 (April 21, 2014).

⁶ Clean Water Rule: Definition of “Waters of the United States,” Final Rule, 80 Fed. Reg. 37054-37127 (June 29, 2015).

⁷ United States Environmental Protection Agency, *Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral and Headwater Streams in the U.S.* (2009), https://www.epa.gov/sites/production/files/2015-04/documents/2009_12_28_wetlands_science_surface_drinking_water_surface_drinking_water_study_summary.pdf.

consume the oxygen in the water, leading to a severe lack of oxygen. This condition, known as hypoxia, is a significant threat to the other organisms in the Gulf.

This annual hypoxic effect is referred to as the dead zone. The dead zone in the Gulf this year was, as the National Oceanic and Atmospheric Administration predicted it would be, the largest on record.⁸ While there is no doubt that federal environmental laws have helped prevent this problem from being worse than it already is, the fact remains that eliminating the yearly dead zone remains a goal for the future. The Clean Water Rule helps identify which wetlands in the Mississippi River Basin are within the scope of the Clean Water Act which helps stakeholders protect them and ultimately reduce nutrient loading in the river. This protects the River as a whole as well as the Gulf, and supports a vibrant economy across the Mississippi River Basin.

Although it is true that the Clean Water Rule is being stayed nationally by the Sixth Circuit Court of Appeals and in thirteen states by a federal district court in North Dakota, it is premature to begin the process of rescinding the rule. Fundamentally, the federal courts and executive agencies have decades of experience with promulgating regulations, judicial review, and the challenges that sometimes arise when different jurisdictions take differing interpretations of a law or regulation. The mere possibility of an ultimately adverse court decision, or the chance that the rule would be stayed in thirteen states at the district level but not nationwide, is not, as you suggest, a reason in and of itself to rescind the Clean Water Rule.⁹ As a general governing principle, a strategy of weakening or rescinding a regulation because of a hypothetical future adverse court decision would make it impossible for agencies to perform their vital work of promulgating the regulations that protect the country.

In addition, rescinding the rule at this stage does not reduce uncertainty for stakeholders. At present, there are two basic potential outcomes of the litigation surrounding the rule: either the rule will be upheld or it will be struck down. If it is upheld, then stakeholders will be held to a rule that has been discussed, in consultation with scientists and the stakeholders themselves, for years. If the rule is ultimately struck down, then the *status quo* will remain. In either event, stakeholders know exactly what to expect.

In contrast, however, the proposed rescission has been initiated with tight deadlines, making it more difficult for stakeholders and scientists to engage with the process, and it has been drafted in such a way as to prevent substantive discussion of what the ultimate post-rescission rule

⁸ National Oceanic and Atmospheric Administration, *Gulf of Mexico 'Dead Zone' is the Largest Ever Measured* (published Aug. 2, 2017), <http://www.noaa.gov/media-release/gulf-of-mexico-dead-zone-is-largest-ever-measured>.

⁹ See Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34901-34902 (July 27, 2017).

would look like.¹⁰ By initiating a plan to rescind the current rule without any suggestion of the final outcome, no one can know what to expect. The net result is that the EPA and the Army Corps of Engineers are increasing, not decreasing, the amount of uncertainty around this rule.

For all of these reasons, the Institute recommends that the agencies withdraw the proposal to rescind the Clean Water Rule. If litigation ultimately invalidates the rule, then the process to replace it should feature ample time for stakeholder engagement and utilize the best science available.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Joseph Vukovich".

Joseph Vukovich
Senior Policy Analyst
Northeast-Midwest Institute

¹⁰ *See id.* at 34903.