



# Maryland

## Department of the Environment

Larry Hogan  
Governor

Boyd Rutherford  
Lieutenant Governor

Ben Grumbles  
Secretary

July 18, 2017

The Honorable E. Scott Pruitt  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Mr. Douglas W. Lamont, P.E.  
Senior Official Performing the Duties of the  
Assistant Secretary of the Army for Civil Works  
108 Army Pentagon  
Washington, DC 20310-0108

Dear Administrator Pruitt and Mr. Lamont:

As Secretary of the Maryland Department of the Environment, Governor Larry Hogan has asked me to respond to your May 8, 2017 letter soliciting input on a proposal to revise the definition of waters of the United States (Clean Water Rule: Definition of “Waters of the United States: Final Rule, 80 Fed. Reg. 37,054 - June 29, 2015). Maryland Department of the Environment (MDE) appreciates the opportunity to provide perspectives on the definition of waters to be protected under the Clean Water Act (CWA) and also appreciates your intent to improve clarity and balance in current federal regulations and policies.

We are concerned that any potential rollback of environmental protections would have a negative impact on the progress that has been made, but we are also sensitive to the concerns expressed by the agricultural community regarding the previous administration's WOTUS policy.

With that in mind, we suggest that instead of reversing course, EPA conduct a full review of the previous administration's policy by bringing all stakeholders to the table to develop common sense, bipartisan solutions that protect our precious natural resources while ensuring that our robust agricultural sector is able to succeed.

For example, immediately upon taking office, Governor Hogan worked closely with the agricultural and environmental communities to develop enhanced Phosphorous Management Tool regulations, reflecting his commitment to seek innovative solutions to reduce sediment, nitrogen, and phosphorus pollution in Maryland's waterways and protect our most precious natural resource, the Chesapeake Bay.

In considering revisions to the definition of waters of the U.S., Maryland is focused on how such changes to reduce the scope of federal jurisdiction will or will not help advance the work we are doing in Maryland to protect and restore our waters, including the Chesapeake Bay. Maryland has comprehensive state laws in place to protect and restore waterways and wetlands within state boundaries. Currently, ephemeral streams (i.e., streams that have a bed and bank but no perennial flow and no contact with groundwater) are the only waterways which, as a matter of practice, Maryland has generally not considered jurisdictional under certain provisions of state law but which are currently considered jurisdictional under the CWA. A reduced scope of federal jurisdiction could also result in the loss of protection that is otherwise provided for under Section 401 of the CWA. This would occur in situations where the federal government is issuing a license or permit to a facility with a discharge to a water, but where that water is no longer considered a water of the United States under the CWA.

Protecting and restoring Maryland's waters, particularly drinking water sources and the Chesapeake Bay, are priorities of Governor Hogan. A total of \$3 billion has been invested in the Chesapeake Bay since the Governor took office. Governor Hogan's fiscal year 2017 budget was the first in state history that did not divert funding dedicated for the restoration of the Chesapeake Bay to the general fund. This included investing \$53 million in the Chesapeake and Atlantic Coastal Bays Trust Fund, the highest level of funding since the fund was established. In addition to state efforts, however, it is important to recall that the Chesapeake Bay is not only important to Maryland, but it is also the nation's largest estuary, with a 64,000 square mile watershed covering six states and the District of Columbia and home to nearly 18 million people. Protecting this resource cannot be accomplished by Maryland alone, but calls for a region-wide approach and a supportive federal role.

Regarding CWA coverage of wetlands, Maryland considers all tidal and nontidal wetlands (including "isolated" wetlands with no continuous surface connection to relatively permanent, standing, or continuously flowing bodies of water) to be jurisdictional under state law. Thus, a change in the federal definition of waters of the U.S. which might, for example, reduce the scope of federal jurisdiction to protect only wetlands that have a continuous surface connection with a relatively permanent, standing, or continuously flowing body of water would, for wetlands in Maryland, only change the extent to which a CWA Section 404 permit from the Army Corps of Engineers for dredge or fill activities would be required in addition to a state permit. Maryland would welcome thoughtful efforts to eliminate duplicative permitting requirement for wetlands within state boundaries.

Maryland does, however, have some concerns about issues which could arise for interstate waters, if an immediately upstream state has a much narrower definition of the scope of regulated waters and wetlands under state law than the immediately downstream state. In these cases, having a broader federal definition of CWA jurisdiction could help avoid complex interstate conflicts that might otherwise arise if the federal definition were too narrow. It is important that flowing waters that cross state borders be adequately protected from pollution under the upstream state's law (with provisions for the downstream state to weigh-in on discharge permits and standards) or, if not, be subject to federal jurisdiction so that the downstream state can, if need be, participate as a downstream state in the process of the permitting of discharges and the establishing of water quality standards for such a stream.

According to the Susquehanna River Basin Commission, in the Susquehanna River Basin alone there are eighty-three streams that cross state lines. Several streams traverse the state borders at multiple points, contributing to 91 total crossings. Of those 91 crossings, 45 streams flow from New York into

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Pennsylvania, 22 from Pennsylvania into New York, 15 from Pennsylvania into Maryland, and nine from Maryland into Pennsylvania. Many streams are small, and 32 are small enough to be “unnamed.”

It is important to Maryland to ensure that any upstream discharges of pollutants or nonpoint source inputs of pollutants do not result in violations of water quality standards in the Maryland portion of streams, and potentially impact sources of drinking water or the delivery of pollutants to the Chesapeake Bay. Ensuring that the federal interpretation of “relatively permanent” waters includes both perennial and intermittent streams is particularly important to Maryland. Similarly, Maryland would want to ensure that the definition of federally regulated wetlands was sufficiently broad to minimize situations where activities impacting unregulated wetlands in an upstream state could adversely impact Maryland water resources or cause Marylanders to suffer additional financial, health, or safety-related obligations as a result of an upstream wetland being unprotected.

In analyzing the impacts of the new EPA/Corps regulation, it will be important to consider not just the current situation with regard to state definitions of jurisdictional waters under state law, but also how those definitions may change if the federal definition of waters of the U.S. is narrowed. Some states have in place laws or executive orders that limit state agency authority to adopt environmental rules and regulations which are more stringent than federal law requires.

Maryland appreciates the challenge you have before you, to strike the right balance in ensuring that the Nation’s waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, increasing clarity and consistency, and showing due regard for the roles of Congress and the states under the Constitution. CWA jurisdiction is a confusing and complex issue but our nation has made great strides in protecting and restoring wetlands and waterways. This is in large part due to the efforts of states to put in place independent, state-level regulatory frameworks to advance the protection and restoration of their wetlands and waterways, with the federal government providing an important regulatory “backstop.” We would also encourage EPA and the Corps to be mindful of the need for training, guidance, and continued financial support to state programs to ensure a smooth transition as we implement any new definition of waters covered by the CWA.

Thank you again for the opportunity to offer perspectives on these important issues. Maryland looks forward to working with EPA and the Corps in the true spirit of cooperative federalism.

Sincerely,



Ben Grumbles  
Secretary

cc: Mark Belton, Secretary, Maryland Department of Natural Resources  
Joseph Bartenfelder, Secretary, Maryland Department of Agriculture  
Andrew Hanson, EPA Headquarters