U.S. EPA and U.S. Army Corps of Engineers Move to Rescind and Replace Clean Water Rule

The U.S. EPA and the U.S. Army Corps of Engineers announced their intent on June 27, 2017 to implement President Trump’s February Executive Order, meant to begin the process of repealing and replacing the 2015 Waters of the United States (WOTUS) Clean Water Rule (CWR). The EPA proposes to rescind the 2015 Clean Water Rule in two steps, initially reverting to pre-2015 regulations, then replacing the existing and long-standing federal Clean Water Act regulation with a new Rule that would be consistent with Justice Scalia’s minority opinion in the 2006 Rapanos v. United States case, which was a 4-1-4 decision.

A Rule determined by Justice Scalia’s opinion would abandon Justice Kennedy’s “significant nexus” standard for federal jurisdiction, thereby excluding isolated wetlands, headwater streams, and adjacent waters from federal protection. Rescinding Justice Kennedy’s standard would be inconsistent with the best available science, technical expertise, and research published in over 1,000 peer-reviewed scientific studies, as noted in the amicus brief filed with the U.S. Court of Appeals for the Sixth Circuit, and the EPA technical report, Connectivity of Streams and Wetlands to Downstream Waters: a Review & Synthesis of the Scientific Evidence (EPA/600/R-14/475F). The EPA Connectivity Report utilized in developing the 2015 Clean Water Rule. These sources document how wetlands, streams (including headwater streams), and adjacent waters support the biological, chemical and physical integrity of traditional navigable waters, interstate waters, and territorial waters, thereby maintaining clean drinking water, storing flood waters, offsetting water shortages during drought, filtering and transforming pollutants, pathogens and excess nutrients, providing resilience to climate change, storing carbon, providing wildlife habitat and fish spawning grounds, and sustaining the economic benefits associated with all of these ecosystem services.

In tandem with the proposed Clean Water Rule repeal and replacement, a House appropriations bill contains a rider to exempt the Clean Water Rule repeal from the Administrative Procedures Act (APA); see Section 108 starting on page 12. If this rider passes, then the Clean Water Rule repeal would be exempt from public comment and scientific review.

The SWS, along with partner societies, strongly supports the 2015 Clean Water Rule, and has written several letters of comment over the past few years:

- SWS supports the EPA proposed rule on waters of the US – July 2, 2015
• **CASS Strongly Oppose Senate Joint Resolution 22 Invalidating the Final Clean Water Rule** – November 2, 2015

• **Endorsement of Amici Curiae Brief of Wetland and Water Scientists in Support of the Clean Water Rule** – March 1, 2017

The SWS is coordinating with our Consortium of Aquatic Science Society (CASS) partners (American Fisheries Society, Association for the Sciences of Limnology and Oceanography, Coastal and Estuarine Research Federation, Freshwater Mollusk Conservation Society, North American Lake Management Society, Phycological Society of America, and Society for Freshwater Science) to issue a statement opposing the repeal and replacement of the 2015 Clean Water Rule. The SWS will also prepare comments on the proposed rule changes for submittal during the short 30-day comment period that follows publication of the proposed rule changes in the Federal Register. The CASS comments will focus on the cost/benefit analysis of ecosystem services provided by wetlands, streams and adjacent waters, because the justification for repeal and replacement of the Clean Water Rule is largely based on eliminating consideration of the economic benefits of these resources. The new EPA Economic Analysis pertaining to the Clean Water Rule is available here. The SWS encourages members to send individual letters of comment during the 30-day comment period (which has not started yet). Responses are required for each comment submitted.