



PRESS RELEASE

Attorney General Frosh Joins Coalition of AGs in Challenging Legality of EPA’s Rollback of Clean Water Protections

Coalition: Proposed Repeal of “Clean Water Rule” Is “Arbitrary and Capricious and Not In Accordance With Law”; EPA Administrator Pruitt’s Involvement “Illegal”

Repeal Would Put Chesapeake Bay and Maryland’s Drinking Sources at Risk

Baltimore, MD (September 28, 2017) – Maryland Attorney General Brian E. Frosh, part of a coalition of nine Attorneys General, today challenged the legality of a Trump Administration proposal to void the “Clean Water Rule” that defines “waters of the United States” under federal law. In comments addressed to the Environmental Protection Agency (EPA) and the US Army Corps of Engineers (ACOE), the coalition charges that the proposed repeal of the Clean Water Rule – a rule designed to ensure the nation’s lakes, rivers, streams, and wetlands receive proper protection under the federal Clean Water Act – is “arbitrary and capricious and not in accordance with law.” The coalition also charges that EPA Administrator Scott Pruitt’s involvement in the effort, after suing to negate the Clean Water Rule as Oklahoma Attorney General, is “illegal” and would render any repeal invalid.

[The comments](#) were filed by the Attorneys General of New York, California, Maine, Maryland, Massachusetts, Oregon, Vermont, Washington, and the District of Columbia.

“This proposed rule would set back years of progress in restoring the Chesapeake Bay,” said Attorney General Frosh. “It would also threaten our other natural resources and our supply of clean drinking water. As long as Donald Trump and Scott Pruitt continue their assault on vital environmental protections, we will continue to resist.”

A lake, river, stream, wetland, or any other kind of surface water is afforded protection under the Clean Water Act only if it is a “water of the United States.” Supreme Court decisions in 2001 and 2006 led to substantial uncertainty as to whether some waters – particularly, small, seasonal, or rain-dependent streams, wetlands, and tributaries – are considered waters of the United States. As a result, roughly 20,000,000 wetland acres and 2,000,000 miles of streams in the

Continental United States lost, or were placed in jeopardy of losing, their protections under the Clean Water Act. These at-risk streams help provide drinking water to 117 million Americans.

The decisions also potentially stripped 60 percent of our nation's streams and millions of acres of wetlands nationwide of federal protection. This left these waters – and the downstream waters with which they connect – vulnerable to increased flooding, pollution, damage to hunting and fishing habitat, and fouling of the drinking water supplies. This includes the Chesapeake Bay, 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.

The 2015 Clean Water Rule clarified what types of waters are covered by the Clean Water Act. The Rule was based on over 1,200 peer-reviewed scientific studies that demonstrated how many waters are connected by networks of tributaries, intermittent streams, and wetlands. Because of this “interconnectivity,” physical, chemical, and biological pollution from wetlands and relatively small or infrequently-flowing upland streams often impact larger downstream waters, such as rivers, lakes, estuaries, and oceans. All of the lower 48 states have waters that are downstream of other states and, as such, are recipients of water pollution generated not only within their borders, but also from upstream sources outside their borders over which they lack jurisdiction.

On July 27, 2017, the EPA and ACOE proposed to repeal the Clean Water Rule and reinstate regulations – adopted in 1977 – that had been in place prior to the Clean Water Rule. It was these 40-year-old rules, whose dated science and lack of clarity as to which waters are “waters of the United States,” that had led to years of confusing and inconsistent interpretations by agencies and federal courts. Once the repeal rule is finalized, the reinstated, outdated 1977 regulations could remain in place indefinitely.

In their comments, the coalition of Attorneys General state that EPA and ACOE are in “wholesale breach of foundational administrative law principles and the repeal rule is arbitrary, capricious, and not in accordance with law.” The coalition charges that, among other things, the agencies have:

- Failed to provide a meaningful opportunity for public comment on the substance of the repeal rule – specifically rejecting any comments on the content, basis, or impact of the reinstated 40-year-old regulations – demonstrating “that the agencies are not participating in the rulemaking with an open mind”;
- Failed to consider important aspects of defining “waters of the United States,” including the “well-known ambiguities and inconsistencies that result from applying the 1977 regulations, and the further complications arising from Supreme Court and federal case law interpreting ‘water of the United States’”; and
- Disregarded the voluminous scientific basis and factual findings supporting the Clean Water Rule, including that the 1997 regulations do not specifically address the interconnectivity of waters and thereby leave many floodplains, wetlands, and tributaries without certain protection under the Clean Water Act.

Further, the coalition notes that while Administrator Pruitt has pledged to recuse himself from the litigation he brought as Oklahoma Attorney General to repeal the Clean Water Rule, he has refused to recuse himself from the repeal rulemaking. The coalition charges that Administrator Mr. Pruitt's involvement in this rulemaking is “illegal” and “renders a final rule invalid due to

his illegal refusal to follow [federal recusal requirements] in light of his lack of impartiality, and because the clear and convincing evidence demonstrates his closed mind on the matter in violation of due process.”