

# Straight TALK

by *John A. Arway*

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## Draining the Swamp

The phrase “Draining the Swamp” was coined many years ago to address the malaria problem, which caused the alarming deaths of millions of people around the world. Malaria is a disease caused by a parasitic protozoan, in the genus *Plasmodium*, that is spread to humans and other warm-blooded animals by a species of mosquitos in the genus *Anopheles*. The most common methods for controlling mosquito populations include spraying insecticides and draining swamps. Dichlorodiphenyltrichloroethane (DDT) was one of the first chemicals used to kill mosquitos during the second half of World War II. Fortunately, thanks to Pennsylvania’s own Rachel Carson and her 1962 book “Silent Spring,” we recognized the need to better evaluate the fate and effects of persistent cancer-causing chemicals and banned the agricultural use of DDT in 1972. We continue to use pesticides and biocides to treat standing and flowing waters to combat waterborne diseases and nuisance species. For example, the Pennsylvania Department of Environmental Protection (PA DEP) spends millions of dollars treating water bodies throughout our Commonwealth for mosquito control with insecticides to combat West Nile Virus and with the biocide *Bacillus thuringiensis israelensis* (BTI) to control nuisance black fly populations. If you have ever spent time fishing one of Pennsylvania’s large rivers, you, like me, have been sprayed with BTI that is aerially applied by helicopter or fixed-wing aircraft. Fortunately, BTI is a United States Environmental Protection Agency (US EPA)-approved chemical, and according to the manufacturer, Arbio Organics, “is harmless to beneficial insects, wildlife, humans, pets or livestock.”

The other method to deal with mosquitos living in swamps (a.k.a. wetlands) was to subsidize farmers to drain swamps, which not only took care of the mosquito problem but also provided more land to farm. We eventually realized that draining swamps was a bad idea since swamps provided many public benefits to society. Early in my career, my staff and I assisted the United States Fish & Wildlife Service (USFWS) with an assessment of



photo-Jerry Regan

*Pennsylvania Fish & Boat Commission Executive Director John A. Arway at the Governor Tom Ridge Wetlands Preserves in Bald Eagle Valley, just west of State College. These wetlands were dedicated by the Wildlife For Everyone Endowment Foundation in honor of former Pennsylvania Governor Tom Ridge who served as our country’s first Secretary of Homeland Security.*

wetlands in Pennsylvania, which contributed to a national wetlands inventory (Tiner 1984).

Tiner defined wetlands to include the variety of marshes, swamps and bogs that produce many benefits for society including flood control, water quality maintenance, erosion control, timber and other natural products for man’s use, and recreation besides providing homes for many fish and wildlife species. Tiner reported that approximately 215 million acres of wetlands existed in the conterminous United States at the time of the nation’s settlement. In the mid-1970s, only 99 million acres remained, just 46% of our country’s original wetlands acreage. In 1984, wetlands covered about 5% of the land surface of the lower 48 states. Between the mid-1950s and the mid-1970s, about 11 million acres of wetlands were lost, while 2 million acres of new wetlands were created. A net loss of 9 million acres of wetlands occurred over that 20-year period. Annual wetlands losses averaged 458,000 acres. Agricultural development was responsible for 87% of the national wetlands losses. Urban development and other development caused only 8% and 5% of the losses respectively.

President George H. W. Bush (1989-1993) vowed that America would lose no “wetlands” under his watch and a



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government wetlands manual was created that provided regulatory agencies like US EPA and the US Army Corps of Engineers guidance to protect the nation's wetlands, just as intended by the Clean Water Act.

"Draining the Swamp" has also been commonly used by politicians from all parties as a promise to change the bureaucracy at either the state or national level. Most recently, it was a campaign slogan for President Donald Trump that described his plan to fix problems in Washington, D.C. However, a part of that campaign promise may literally change the rules that protect our nation's swamps and headwater streams. Current US EPA Administrator Scott Pruitt along with Mr. Douglas W. Lamont, Acting Assistant Secretary of the Army (Civil Works), signed a proposed rule, Docket ID No. EPA-HQ-OW-2017-0203 which was published in the Federal Register on July 27, 2017, that would revise the definition of "Waters of the United States" (WOTUS). This proposal is considered by the current administration to be consistent with the Executive Order signed on February 28, 2017, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule"—[www.epa.gov/sites/production/files/2017-07/documents/2017-13997.pdf](http://www.epa.gov/sites/production/files/2017-07/documents/2017-13997.pdf). The public comment period closed on September 27, 2017.

I recently joined Pennsylvania Secretary Patrick McDonnell (Department of Environmental Protection), Secretary Russell C. Redding (Agriculture) and Secretary Cindy Adams Dunn (Department of Conservation

and Natural Resources) in signing a letter in response to the proposed WOTUS rule, which explains the Commonwealth's position on draining our swamps and reducing protections to our headwater streams. This letter is included on pages 6 and 7.

We ask that Pennsylvania anglers and boaters join Rachel Carson, President George H. W. Bush, our Commonwealth agencies, many of our nation's conservation groups and over 20,000 scientists who have already spoken out about how draining America's swamps and allowing impacts to our headwater streams puts aquatic resources at risk not only in Pennsylvania but across the entire nation.

Remember fish can't talk, so only we can speak out in defense of our aquatic resources.

Your Director,

><(John){(°>

*Tiner, R.W. 1984. Wetlands of the United States: Current Status and Recent Trends. National Wetland Inventory, United States Fish & Wildlife Service, Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402.*



## COMMONWEALTH OF PENNSYLVANIA

June 19, 2017

Dear Administrator Pruitt and Acting Secretary Lamont:

In response to your letter dated May 8, 2017, we are submitting comments on behalf of the Commonwealth of Pennsylvania, through our respective agencies, related to your intent to revise the definition of “Waters of the United States” established in the final rule referenced above.

The Commonwealth of Pennsylvania has abundant and vital water resources with approximately 86,000 miles of streams, 404,000 acres of wetlands, 161,445 acres of lakes, 17 square miles of the Delaware estuary and 63 miles of Great Lakes shorefront. These water resources are vital to overall ecosystem health and economic well-being of the Commonwealth. Our streams provide drinking water for most of our citizens, supply the water needs of most of our industry, serve as the basis for much of our tourism and recreation, and provide critical habitat for many plant and animal species. Our wetlands also perform vital cost-free filtration of drinking water and source water, often in the headwaters regions. Pennsylvania’s wetlands are small and scattered throughout the Commonwealth, and consist mostly of seeps that pool at the base of hills or mountains; riparian wetlands that are periodically inundated by adjacent or nearby streams; small bogs and fens in the glaciated northwest and northeast corners of the Commonwealth; and vernal pools—small spring wetlands on which many species depend for part of their life cycle. Pennsylvania’s wetlands contain many of our rare, threatened and endangered species, reflecting their critical importance to the conservation of biodiversity within the Commonwealth, and provide critical flows for our state fish, the Brook Trout.

Pennsylvania has already lost more than 50% of its pre-settlement wetlands through conversion, development, drainage and other activities. From 1956-1979, the United States Fish & Wildlife Service reported that Pennsylvania lost 28,000 acres of wetlands, an average of 1,200 per year. Under the Commonwealth’s net gain strategy, Pennsylvania has helped reverse this trend, and between 1982 and 1989 gained 4,683 wetlands in the Chesapeake Bay drainage. Today, wetlands comprise only 1.4% of our total land base (less than 400,000 acres). We can’t afford to lose more. Pennsylvania’s water resources have long been protected by a well-developed body of laws enacted by the Commonwealth. The Pennsylvania Clean Streams Law<sup>1</sup>, passed in 1937, is the centerpiece of the Commonwealth’s regulatory framework. This State law prohibits pollution or the threat of pollution to “waters of the Commonwealth,” which are defined in a clear and comprehensive way that is not subject to confusion or debate. Pennsylvania also provides important protections for the Commonwealth’s water resources, including its wetlands, through numerous other statutes and regulations. For example, the Dam Safety and Encroachments Act<sup>2</sup> and Flood Plain Management Act<sup>3</sup> regulate dams and other obstructions and encroachments of the Commonwealth’s water resources and floodplains. The Conservation and Natural Resources Act<sup>4</sup> mandates the conservation of Commonwealth natural resources, including water resources in Pennsylvania’s vast 2.5 million-acre public system of forests and parks, and establishes the Commonwealth’s inventory of its ecological resources, which identifies its rare, threatened and endangered species. The Fish and Boat Code<sup>5</sup>, the Game and Wildlife Code<sup>6</sup> and the Wild Resource Conservation Act<sup>7</sup> also support the Commonwealth’s efforts to conserve and maintain its fish, game and wildlife species.

The model of cooperative federalism at the heart of the Clean Water Act recognizes that differences in water resources exist at the state level. This model envisions a federal-state partnership in the oversight and protection of the nation’s waters with the federal law providing a broad general regulatory framework that relies on and supports strong state programs specifically tailored to the unique attributes of each state. Pennsylvania has effectively worked with its communities, including its rural and small agribusiness communities, to regulate the waters of the Commonwealth under its State laws. However, efforts by your agencies to further define “Waters of the United States” to implement the federal Clean Water Act are creating ongoing confusion and uncertainty by relying on various phrases used by the United States Supreme Court in *Rapanos v. United States*<sup>8</sup> rather than the expertise of your state partners.

During the development of the definition of “Waters of the United States” in the 2015 rule, Pennsylvania expressed several concerns regarding the proposed definition. This definition focuses on the “significant nexus” language in Justice Kennedy’s concurring opinion in *Rapanos* and must be implemented through a case-by-case analysis that requires state agencies to

engage in complex and, in some cases, subjective decision-making processes. Pennsylvania is concerned that uncertainty created by this definition will increase agency workloads without affording any corresponding increase in protection of the Commonwealth's water resources. In these times of significant budget constraints, this uncertainty exacerbates the difficulty in projecting budgetary needs for water quality assessment, permitting, inspection and enforcement programs. Coupled with proposed cuts to the Environmental Protection Agency budget, this uncertainty makes future planning difficult.

Despite Pennsylvania's concerns with the uncertainty created by the 2015 rule, Pennsylvania is equally concerned with your proposed interpretation of phrases used in Justice Scalia's plurality opinion in *Rapanos* in your plans to revise the definition of "Waters of the United States." In recent webinars, your agencies presented different options for interpreting the phrases "relatively permanent" waters, and wetlands with a "continuous surface connection" to jurisdictional waters and requested feedback from stakeholders. Your agencies, however, did not provide the stakeholders with any informed discussion on the scientific rationale or environmental and regulatory consequences associated with each of these interpretations to allow meaningful evaluation. Your proposed interpretations of these phrases as presented in the webinars will likely result in similar confusion and regulatory uncertainty, and, more importantly, could undermine the fundamental goals of the Clean Water Act.

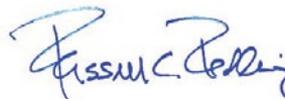
To achieve the Clean Water Act goals, states must have flexibility to adapt federal programs based on the nature of the water resources within their jurisdictions. To the contrary, your agencies suggest defining "relatively permanent" waters as only perennial streams, or perennial streams plus other streams with some measure of seasonal flow. These one-size-fits-all approaches fail to consider the wide variety of stream functions that exist in natural systems. Likewise, limiting the protection of wetlands based on a one-size-fits-all definition of "continuous surface connection" will similarly ignore the important distinctions in the functions and values of wetlands that occur in natural systems. Such one-size-fits-all definitions applied nationwide in states with distinct surface and groundwater attributes, and extremely divergent average annual rainfall and snowmelt characteristics, will not achieve the important water protection goals of the Clean Water Act, and may in fact undermine existing state law protections. This is important not just for Pennsylvania, but for all states; many headwater streams that flow into Pennsylvania's major rivers are in adjacent states.

Pennsylvania respectfully requests that your agencies engage in meaningful collaboration with the states, as well as the public and scientific communities, before developing any new approach to defining "Waters of the United States." The cooperative federalism model established through the Clean Water Act requires working with states, both individually and collectively, to identify the water resource needs within their jurisdictions. We ask that you proceed in a manner that recognizes regional differences in geography, biology, climate, geology, soils, hydrogeology and rainfall, and supports strong and comprehensive state programs.

Sincerely,



Patrick McDonnell  
Secretary  
Department of Environmental Protection



Russell C. Redding  
Secretary  
Department of Agriculture



Cindy Adams Dunn  
Secretary  
Department of Conservation and Natural Resources



John Arway  
Executive Director  
Pennsylvania Fish & Boat Commission

<sup>1</sup> 35 P.S. §§ 691.1 – 691.1001; *see also* 25 Pa. Code Chapters 91, 92a, 93, 95, 96, 102 and 105.

<sup>2</sup> 32 P.S. §§ 693.1 – 693.27; *see also* 25 Pa. Code Chapters 105.

<sup>3</sup> 32 P.S. §§ 679.101 – 679.601; *see also* 25 Pa. Code Chapter 106.

<sup>4</sup> 71 P.S. §§ 1340.101 – 1340.1103.

<sup>5</sup> 30 Pa.C.S. §§ 101 – 7314; *see also* 58 Pa. Code Chapter 75.

<sup>6</sup> 34 Pa.C.S. §§ 101 – 2965; *see also* 58 Pa. Code Chapter 133.

<sup>7</sup> 32 P.S. §§ 5301 – 5314; *see also* 17 Pa. Code Chapter 45.

<sup>8</sup> 547 U.S. 715 (2006).

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