

Congress of the United States

Washington, DC 20515

April 9, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

The Honorable Ricky “R.D.” James
Assistant Secretary of the Army (Civil Works)
U.S. Department of the Army
108 Army Pentagon
Washington, D.C. 20310

RE: Revised Definition of Waters of the United States
Docket ID: EPA-HQ-OW-2018-0149

Dear Administrator Wheeler and Secretary James:

We write to voice our strenuous objection to the Trump administration’s weakening of Clean Water Act protections over the Nation’s waters. This Dirty Water Rule¹, if finalized, would result in the single-largest rollback in clean water protections in history. This proposal eliminates bedrock Clean Water Act protections over rivers, lakes, streams, and wetlands, established by Congress, and championed by Democratic and Republican administrations alike – most notably baseline protections established by the Reagan and Bush administrations that apply in every state today. The proposal will result in greater regulatory confusion and increased costs for average American families, as well as the likely degradation or destruction of our Nation’s precious natural resources. In short, the Dirty Water Rule represents a fundamental reversal of our Nation’s bipartisan commitment to protect our water-related environment and needs to be withdrawn.

Americans depend on clean water for our health and the health of our communities and economy. We need clean water upstream to have healthy communities downstream. The health of rivers, lakes, bays, and coastal waters depend on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities by trapping floodwaters, recharging groundwater supplies, filtering pollution, and providing habitat for fish and wildlife. People depend on clean water for their health – where about 117 million Americans – one in three people – get drinking water from sources fed by streams that are especially vulnerable to pollution. Our cherished way of life depends on clean water – when healthy ecosystems provide wildlife habitat and places to fish, paddle, surf, and swim. And our economy depends on clean water – with manufacturing, farming, tourism, recreation, energy production, and other economic sectors requiring clean water to function and flourish.

¹ 84 Fed. Reg. 4154 (2019).

Congress recognized the importance of rivers, streams, lakes, and wetlands when it overwhelmingly, and on a bipartisan basis, enacted the Clean Water Act over the veto of former-President Nixon in 1972. By declaring the goal of the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," Congress clearly and decisively sought to address the water quality disasters of the 1970s – when rivers served as little more than open sewers, when Lake Erie was pronounced "dead", and when Ohio's Cuyahoga River literally caught fire. What Congress then achieved, and continues to support today, was a fundamental shift away from a failed state-by-state approach to addressing water pollution. In enacting the Clean Water Act, Congress established a comprehensive, national program, with Federally established minimum standards implemented in partnership with approved state programs.

In the legislative history of the 1972 Clean Water Act, Congress recognized that earlier efforts to protect the quality of the Nation's water had failed by relying too heavily on individual state efforts to establish individual state water quality standards. What resulted was a patchwork of often-conflicting state water pollution control efforts, with national efforts limited to only interstate waters and requests by individual states to resolve interstate conflicts. As noted in the Report of the Senate Committee on Public Works in 1971:

Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act² was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.³

The Clean Water Act of 1972 realigned Federal and state responsibilities for protecting water quality by instituting a comprehensive, national system to prevent adverse water quality impacts of pollutant discharges to the Nation's waters. Unlike earlier efforts, the Clean Water Act established a "Federal floor" for the protection of water quality and wetlands but allows states to administer their own programs (including the establishment of stricter standards than the Federal standard) should states apply for and have such programs approved by the Administrator of the U.S. Environmental Protection Agency (EPA).⁴

By establishing a uniform baseline for the protection of the Nation's waters, including wetlands, the Clean Water Act ensured that all states and communities start from a level playing field with respect to the protection of water quality, and avoided potential conflicts between upstream and downstream states instituting conflicting water quality standards for the same waterbody. In this way, the Clean Water Act helps states with stronger water quality standards from being at a significant economic competitive disadvantage relative to their less-protective neighbors.

² The Water Quality Act of 1965 (P.L. 89-234).

³ Report of the Senate Public Works Committee, *Federal Water Pollution Control Act Amendments of 1971*, (Report No. 92-414), page 77.

⁴ To date, 46 individual states have approved programs under section 402 of the Clean Water Act; the States of Idaho, Massachusetts, New Hampshire, and New Mexico (and the District of Columbia) do not have approved programs, and such programs are administered by EPA. To date, 2 individual states have approved dredge and fill permit programs under section 404 of the Clean Water Act; these states are Michigan and New Jersey.

Similarly, Congress recognized the importance of comprehensive protection of rivers (including their tributaries), lakes, streams, and wetlands to restoring and maintaining chemical, physical, and biological integrity of the Nation’s waters. In rejecting earlier, rigid interpretations that premised Federal authority on the navigability of a waterbody, Congress understood, even in 1972, the importance of preventing the discharge of new pollutants at the source far upstream, rather than trying to address the same pollutants as they move downstream. This fundamental understanding reflected Congress’ appreciation of the critical relevance of all waters—including tributary systems, wetlands and downstream streams and rivers to the health of the Nation’s waters.⁵

As the late-Congressman John Dingell noted on the House floor during consideration of the Clean Water Act Conference Report:

[The] the conference bill defines the term “navigable waters” broadly for water quality purposes. It means all “the waters of the United States” in a geographic sense. It does not mean “navigable waters of the United States” in the technical sense as we sometimes see in other laws. The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability – derived from the *Daniel Ball* case (77 U.S. 557, 563)...[This] new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability...going to govern matters covered by this bill. Indeed, the conference report states on page 144: “The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation...”⁶

Further, during the debate on the 1977 amendments to the Clean Water Act, the Congress specifically rejected a proposal to limit the jurisdictional reach of the Act over non-navigable waters,⁷ similar to the approach outlined in Trump’s Dirty Water Rule. Rather, Congress opted to retain the broad reach of the 1972 Act, but included specific authorities for individual states to assume permitting responsibilities under section 404 of the Act – mirroring a similar authority contained in the 1972 Act for point source discharges (under section 402(b)), as well as a provision that exempted specific activities, such as normal farming, ranching, and forestry activities, that otherwise did not impair the flow or reduce the reach of waterways, from the permitting requirements of section 404.⁸

Over the past four decades, the Clean Water Act has been instrumental in addressing the most obvious sources of water pollution – the open discharge of chemicals and untreated sewage into our rivers, lakes, and streams – as well as in bringing the country closer to the bipartisan goal of

⁵ This scientific concept was confirmed by EPA’s Office of Research and Development’s comprehensive review of the scientific literature, entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, during the formulation of the 2015 Clean Water Rule (80 Fed. Reg. 37053 (2015)) by the Obama administration, and later reconfirmed by EPA’s Scientific Advisory Board.

⁶ A Legislative History of the Water Pollution Control Act Amendments of 1972, January 1973, page 250.

⁷ See H. Comm. on Pub. Works and Transp., H.R. Rep. No. 94-1107, at 22-23. (May 7, 1976).

⁸ A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act, October 1978, pages 281-289.

"no net loss" of our Nation's wetlands.⁹ According to EPA reports¹⁰, implementation of the Clean Water Act has doubled the number of waters that are safe for fishing and swimming, prevented—through the creation of national water quality standards—the annual release of billions of pounds of pollution into our rivers, lakes, and streams, and doubled the number of Americans served by sewage treatment.

Yet, in spite of all these clear and compelling benefits, President Trump's Dirty Water Rule proposes to revert our existing, comprehensive system of protecting our Nation's water to the failed model that existed prior to the 1972 Act. The Dirty Water Rule would, in essence, elevate individual state autonomy over water quality protection over a uniform national standard – retaining existing clean water protections on only the narrowest subset of waters, and expecting that states can and will fill in the gaps in protecting all remaining waters. That expectation, much relied upon in the EPA's and U.S. Army Corps of Engineers' (Corps) justification for this proposed rule, will be hard for most states to realize, as 26 states are subject to laws that either prohibit any state protections beyond those provided by the Clean Water Act, or severely restrict their ability to implement or enforce laws with provisions more stringent than the Act.

In addition, the Trump administration has tried to promote its Dirty Water Rule under the guise of certainty, clarity, and cost-savings; however, this Rule fails everyday American families in every way.

First, the Dirty Water Rule fails to provide any certainty on the potential impacts of the rulemaking, leaving everyday Americans in the dark on whether their local waters are important enough to retain their current Clean Water Act protections. In fact, both the EPA and Corps have repeatedly failed to inform the American public on the locations or percentages of waters that would lose Clean Water Act protections under the Dirty Water Rule – despite a clear acknowledgement that the Rule would drop whole categories of waters from existing protections.¹¹ For example, in December 2018, the press reported¹² on analysis prepared by the Corps and EPA which suggests that the proposed Dirty Water Rule would roll back existing clean water protections on more than 51 percent of the Nation's wetlands and 18 percent of the Nation's streams, while encouraging comment on further restrictions that would exempt up to 70 percent of stream miles from current protections. However, despite repeated Congressional requests, the agencies have failed to disclose what rivers, lakes, streams, and wetlands would lose protection under the Dirty Water Rule, stating that, "No one has that data."¹³ If that is truly the case, and the agencies do not have sufficient information to meaningfully assess the impacts of the Dirty Water Rule, then proceeding further on

⁹ See Memorandum of Agreement Between The Department of the Army and The Environmental Protection Agency on the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, February 6, 1990.

¹⁰ U.S. EPA "Water Pollution Control: 25 Years of Progress and Challenges for the New Millennium," EPA-833-F-98-003, June 1998.

¹¹ As a separate argument, we believe that this administration's attempt to exempt from the scope of the Clean Water Act entire categories of waters, which the agencies have previously and meticulously documented as integral to the chemical, physical, and biological health of our Nation's waters, is contrary to and frustrates the intent of Congress in enacting the Clean Water Act. See *NRDC v. Callaway*, 392 F. Supp. 685 (1975).

¹² Wittenberg, Ariel and Bogardus, Kevin, "EPA falsely claims 'no data' on waters in WOTUS rule," Greenwire, December 11, 2018.

¹³ See *id.*

this Rule when the agencies cannot inform the American public of the consequences of this action or identify the specific waterbodies where current Clean Water Act protection will be lost is entirely unreasonable.

Second, the Dirty Water Rule fails to provide clarity to working farmers, landowners, and other stakeholders who rely on or otherwise interact with Clean Water Act protections on a regular basis. In the administration's rollout of the Dirty Water Rule, an EPA press release suggested that the Rule's "simpler and clearer definition would help landowners understand whether a project on their property will require a federal permit or not, *without spending thousands of dollars on engineering and legal professionals.*"¹⁴ However, we believe just the opposite will be true, and that the average landowner will find the Dirty Water Rule more complicated than the status quo. For example, the Rule introduces new, subjective terms, such as "typical year" and "typical flow," for determining whether a waterbody retains existing Clean Water Act protections. Under the Dirty Water Rule's "simpler and clearer definition," to determine whether protections continue to apply, a landowner could need to determine whether a waterbody on their property is flowing the right amount of water during a year where the "observed rainfall from the previous three months falls within the 30th and 70th percentiles established by a 30-year rainfall average generated at National Oceanic and Atmospheric Administration (NOAA) weather stations."¹⁵

In addition, in recognition of recent observed changes in precipitation patterns, recurring droughts, and extreme weather events, a waterbody's status of protection under the Rule could change over time. Rather than clarify the scope of Clean Water Act protections, the Dirty Water Rule proposes a new set of subjective, open-ended terms and concepts that will be difficult to assess, and the agencies concede, will likely require technical consultants to interpret.

Third, the Dirty Water Rule fails to provide cost-savings to everyday American families who will likely be forced to pay more to protect the health and safety of their families because of the rollbacks for polluters contained in this proposal. In fact, the Corps' and EPA's own economic analysis of this Rule highlights the cascading adverse consequences on water quality from the proposal, including reduced wetlands habitat (and ecosystem values), increased flood risk, greater pollutant loads that result in greater waterbody impairments (and increased restoration costs) and greater drinking water treatment costs, and greater risks in the frequency, magnitude, and reduced response effectiveness of oil and hazardous waste spills.¹⁶

While the overall adverse impacts of the Rule are troubling, we are particularly concerned that this proposal will, in essence, void thousands of existing Clean Water Act permits to facilities ranging from industrial facilities to sewage treatment plants. The EPA conservatively estimates¹⁷ that over 16,000 Clean Water Act permitted facilities are located on waterbodies that are expected to lose

¹⁴ <https://www.epa.gov/newsreleases/epa-and-army-propose-new-waters-united-states-definition>.

¹⁵ See 84 Fed. Reg. 4154, 4177 (2019).

¹⁶ U.S. EPA and Department of the Army, Economic Analysis for the Proposed Definition of "Waters of the United States", December 14, 2018.

¹⁷ See Hearing of the Committee on Transportation and Infrastructure, "Status of the Nation's Waters, Including Wetlands, Under the Jurisdiction of the Federal Water Pollution Control Act," House Doc. 110-61, July 17 & 19, 2007. See also, Senate Committee on Environment and Public Works Report to accompany S. 787, the Clean Water Restoration Act, Senate Report 111-361, December 10, 2010.

Federal protections under this proposal. We strongly object to allowing ANY existing permitted facility to be alleviated of their existing discharge requirements as a result of this Rule. Similarly, we note how the agencies own analyses¹⁸ concede that communities will incur greater drinking water costs to address the increased levels of pollution that will result from this Rule. As we have recently seen in communities such as Des Moines, Iowa,¹⁹ when upstream areas are alleviated of their responsibilities to control pollution discharge levels, downstream communities and families will ultimately pay a higher cost for clean water as they will pay more to clean up what was once someone else's responsibility.

Finally, the Dirty Water Rule fails to protect our nation's most precious natural resources – the water we drink, the rivers, lakes, and streams that support our communities and our way of life, and the wetlands that protect our homes and communities from storms and flooding and nourish our natural environment. In recent years, communities across the country have experienced the unthinkable – the consequence of losing their drinking water supplies. From Toledo, Ohio to Charleston, West Virginia to Alamosa, Colorado, cities both large and small, urban and rural, have had to shut down their drinking water supplies because the water being delivered to their communities was unsafe to drink due to contamination. Similarly, in the arid West where communities hope to conserve and reuse every drop of water for municipal, agricultural, and other purpose, the EPA has studied how the destruction of the intricate network of streams, groundwater recharge areas, and wetlands will only exacerbate the challenges in protecting the lives and livelihoods of our communities, our farmers, and our way of life.²⁰

As David Uhlmann, the former Chief of the U.S. Department of Justice, Environmental Crimes Section, recently noted:

With fresh water supplies vulnerable to a changing climate, and our infrastructure outdated, as seen in Flint, Michigan, we need to do more to protect America's waterways and ensure continued progress in the effort to provide clean drinking water, and fishable and swimmable streams — the goals Congress set when it passed the Clean Water Act in 1972. The last thing we should do is turn back the clock, weaken the Clean Water Act and further fray our national commitment to clean water and a healthy environment.²¹

Yet, that is exactly what the Trump Dirty Water Rule would do – it would needlessly weaken our Nation's premiere clean water law that has achieved remarkable improvements in water quality over the last four decades. In short, if the Dirty Water Rule is finalized, generations to come will point to this action as the moment where comprehensive water quality protections in the United States ceased to exist.

¹⁸ See id. See also, U.S. EPA and Department of the Army, Resource and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States", December 11, 2018.

¹⁹ Elmer, MacKenzie, "Water Works plans \$15 million for expanded nitrate facility," Des Moines Register, May 24, 2017.

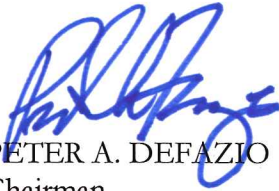
²⁰ U.S. EPA, The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest, November 2008

²¹ Uhlmann, David. M, "Trump Wants to Weaken Clean-Water Rules," New York Times, December 12, 2018.

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We urge you to withdraw this misguided, misinformed, and fundamentally flawed proposal, and recommit to your agencies' missions under the Clean Water Act to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. That is what the American people demand²² of us, and what is right and just for the generations of American families yet to come.

Sincerely,



PETER A. DEFAZIO
Chairman
Committee on Transportation
and Infrastructure



GRACE F. NAPOLITANO
Chairwoman
Subcommittee on Water Resources
and Environment



TOM CARPER
Ranking Member
Senate Committee on Environment
and Public Works



TAMMY DUCKWORTH
Ranking Member
Senate EPW Subcommittee on Fisheries,
Water, and Wildlife

²² McCarthy, Justin, "In U.S., Water Pollution Worries Highest Since 2001," Gallup News, March 31, 2017.