



Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

Peter A. DeFazio
Chairman

Katherine W. Dedrick, Staff Director

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Ranking Member

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October 1, 2020

The Honorable R.D. James
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, D.C. 20310-0108

Dear Assistant Secretary James:

I remain deeply concerned with the Trump administration's unlawful actions to remove federal protections over our Nation's rivers, lakes, streams, and wetlands through implementation of its Navigable Waters Protection rule (hereinafter the Dirty Water Rule).¹ These actions are yet another disturbing example of the Trump administration's pattern of ignoring the law, ignoring science, and siding with special interests and polluters rather than the American people.

As highlighted in recent news reports², your agency is leading the Trump administration's unconscionable efforts to remove decades-old protections over our nation's waters and wetlands through implementation of the Dirty Water Rule—which is, without question, the single-largest rollback of clean water protections in history. This radical departure from water quality protections established by Congress and championed by Democratic and Republican administrations alike threatens the health and safety of American families, places our nation's drinking water supplies at risk, increases the cost to American taxpayers, and invites costly litigation.

The Dirty Water Rule is premised on this administration's misplaced view the private sector can, and will, always act in the best interests of the nation. That is the same failed logic that resulted in rivers catching fire in the 1970s and was universally rejected through enactment of the Clean Water Act. Yet, the Dirty Water Rule puts polluters and special interests back in charge of protecting human health and the health of our nation's waters and wetlands by removing historic Federal protections on what EPA's own internal analyses say are over 50 percent of the nation's remaining wetlands and between 18 and 71 percent of the nation's rivers, streams, and lakes.

¹ 85 Fed. Reg. 22250 (Apr. 21, 2020).

² Saiyid, Amena H., "Companies Eager to 'Lock In' Trump-Era Water Rule Exemptions", *Bloomberg Environment* (Sept. 10, 2020), found at <https://news.bloombergenvironment.com/environment-and-energy/companies-eager-to-lock-in-trump-era-water-rule-exemptions>.

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Further, the Dirty Water Rule transfers the costs for protecting the health and safety of our communities from polluters to working American families and squanders our Nation's precious natural resources—including our oceans, rivers, streams, and wetlands—to unfettered pollution and destruction. In short, the Dirty Water Rule fundamentally reverses our Nation's bipartisan commitment to protect our water-related environment.

The Dirty Water Rule ignores the fact that 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 science is unequivocal that the health of rivers, lakes, bays, and coastal waters depend on the streams and wetlands where they begin—which is why the Dirty Water Rule ignores science. 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 and 117 million Americans, or one out of every three individuals in this country, get their drinking water from sources fed by smaller, headwater streams that are especially vulnerable to pollution. Our cherished way of life depends on clean water and healthy ecosystems that provide wildlife habitat and places for people to fish, paddle, surf, and swim. Our economy depends on clean water—with manufacturing, farming, tourism, recreation, energy production, and other economic sectors requiring clean water to function and flourish.

I have already raised these concerns with you and with the political leadership of the U.S. Environmental Protection Agency (EPA); however, these warnings—and the warnings of millions of everyday Americans—have been summarily ignored. In fact, in formal testimony before the Subcommittee on Water Resources and Environment, EPA's Assistant Administrator for the Office of Water, Dave Ross, refused to answer even the most basic questions I asked about the real-world implications of the Dirty Water Rule.

This administration's refusal to disclose the list of rivers, streams, lakes, and other waterbodies that are no longer protected under the Dirty Water Rule was an intentional effort to hide the scope of this giveaway to polluters. Even when presented with EPA's own internal estimates on the magnitude of waters and wetlands that would lose protection under that the Dirty Water Rule, agency officials have refused, and continue to refuse, to provide any clear answers on how many waterbodies would lose protection under the Dirty Water Rule.

I remain deeply concerned with the serious deficiencies and shortcuts the Trump administration took in finalizing the Dirty Water Rule.

The rule misinterprets the legal standards for asserting Clean Water Act jurisdiction announced in the three U.S. Supreme Court decisions relevant to Clean Water Act jurisdiction, ignores the peer-reviewed science on the chemical, physical, and biological connections among waters and wetlands, as well as on the protection of water quality, and fails to demonstrate the economic burden the rule imposes on everyday American families, municipalities, and small

businesses, including hard-working family farms. In addition, based on recent news accounts³, Federal agencies appear to have increased the number of “desk assessments” (rather than field visits) of Clean Water Act protection, relying on sources of information that, only a few months ago, Assistant Administrator Ross testified to Congress were “not designed to do that, and have never been designed to do that.”⁴

Now that the Dirty Water Rule has taken effect, the U.S. Army Corps of Engineers (Corps) and EPA have an obligation to disclose how the agencies are implementing the Dirty Water Rule and to describe the methodology used by the agencies for eliminating Clean Water Act protections over our nation’s waterbodies and wetlands.

In furtherance of that obligation and to help the Committee on Transportation and Infrastructure (the Committee) properly fulfill its congressional role overseeing the Clean Water Act, I request you to provide the Committee with the following:

1. Please provide the Committee with a copy of every Clean Water Act jurisdictional determination (JD) that has been issued by the Corps since June 22, 2020.⁵ Please include both JDs and non-jurisdictional determinations (NJD), and both approved and preliminary determinations. For each JD, please provide the following information:
 - a. a summary of the basis for finding jurisdiction/no jurisdiction for the request;
 - b. a description of the specific regulatory authority for finding jurisdiction/no jurisdiction for the request, and cumulative summary of such determinations (e.g., [X number] NJDs were based on a conclusion that the stream was ephemeral and therefore excluded under 33 CFR 328.3(b)(3));
 - c. in instances where the decision was based on the Corps’ interpretation of flow regime for the waterbody or wetlands:
 - i. a detailed description of the analysis that went into determining the “typical year” conditions; and
 - ii. the basis for determining that waterbody’s flow or connections to other waters/wetlands falls within a “typical year” condition;
 - d. a summary of whether the JD was made with or without a field visit, and for each instance where the JD was made without a field visit, a specific description of the information (including identification of any maps) used in making the determination, and the process undertaken to verify that such information is accurate, and reflects actual conditions of the waterbody and surrounding hydrologic and jurisdictional connections;
 - e. a description of whether the requestor had technical or legal assistance to make the determination request; and

³ See id at 2.

⁴ See Q&A testimony of the Honorable Dave Ross, Assistant Administrator for EPA’s Office of Water, before the Subcommittee on Water Resources and Environment, hearing on “The Administration’s Priorities and Policy Initiatives Under the Clean Water Act”, September 19, 2019.

⁵ June 22, 2020 is the date that the Trump administration rule on “waters of the United States” went into effect. <https://www.federalregister.gov/documents/2020/04/21/2020-02500/the-navigable-waters-protection-rule-definition-of-waters-of-the-united-states>.

- f. for each instance where no jurisdiction was determined, a description of whether jurisdiction would have been asserted under the regulations in place immediately prior to the Dirty Water Rule (e.g. the 1986 regulations as interpreted by the Corps and EPA guidance following the *SWANCC*⁶ and *Rapanos*⁷ decisions).
2. Please provide the Committee with a cumulative calculation (broken down by Corps district) of each of the following:
 - a. The total number of waters found jurisdictional and the total number of waters found non-jurisdictional through JDs since June 22, 2020;
 - b. The total acreage of wetlands found jurisdictional and the total acreage found non-jurisdictional through JDs since June 22, 2020;
 - c. The total acreage of ponds found jurisdictional and the total acreage found non-jurisdictional through JDs since June 22, 2020;
 - d. The total acreage of lakes found jurisdictional and the total acreage found non-jurisdictional through JDs since June 22, 2020;
 - e. The total linear feet of perennial streams found jurisdictional and the total linear feet found non-jurisdictional through JDs since June 22, 2020;
 - f. The total linear feet of intermittent streams found jurisdictional and the total linear feet found non-jurisdictional through JDs since June 22, 2020; and
 - g. The total linear feet of ephemeral streams found jurisdictional and the total linear feet found non-jurisdictional through JDs since June 22, 2020.
3. Please provide the Committee with the number of requests for JDs or NJDs received by the Corps from June 22, 2020 until September 30, 2020 and for the same period in 2019.
4. Please identify each instance where an existing Clean Water Act permittee has asked EPA or the Corps for a new jurisdictional determination under the Dirty Water Rule and the disposition of any such determination.
5. Please provide the Committee with a copy of any policy guidance developed or under review by the Corps and/or EPA in connection with implementation of the Dirty Water Rule, including any implementation guidance, regulatory guidance letters, memorandums, or other policy documents interpreting how the Corps and/or EPA will implement the Rule.
6. In June 2020, the Corps and EPA released a memorandum establishing a new process for elevating to their respective headquarters certain determinations related to traditionally navigable waters (TNW).⁸ This process establishes new procedural hurdles for designating a waterbody as a TNW when the sole basis for that determination is whether the waterbody is

⁶ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

⁷ *Rapanos v. United States*, 547 U.S. 715 (2006). See Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in *Rapanos v. U.S.* and *Carabell v. U.S.* (December 2, 2008), found at: <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll5/id/1411>

⁸ See Memorandum for U.S. Army Corps of Engineers Director of Civil Works and U.S. EPA Regional Administrators I-X, signed by EPA Assistant Administrator Ross and Assistant Secretary of the Army (Civil Works) James, found at https://www.epa.gov/sites/production/files/2020-07/documents/final_tnw_elevation_memo_06.2020.pdf.

utilized for recreationally-based commerce; however, the memorandum does not require similar headquarters consultation when field staff decide that recreationally-based commerce does not warrant designating the waterbody as a TNW.

- a. As you know, the Corps has been criticized for prior efforts to establish overly-bureaucratic processes to avoid making politically-disfavored JDs.⁹ What is the legal and scientific rationale for this new elevation policy? What safeguards has the Corps and EPA put in place to ensure transparency on recreationally-based commerce JDs?
- b. Please provide the Committee with the following information (broken down by Corps district):
 - i. A copy of each TNW determination or draft JD that has been elevated to headquarters since June 2020.
 - ii. A copy of the resolution by headquarters of each TNW determination or JD referred to in (b)(i).
 - iii. A copy of each TNW determination or draft JD covered by the June 2020 memorandum where the Corps district staff determined the waterbody was not a TNW or did not elevate the request to headquarters.
- c. A copy of any draft or approved JD or NDJ that indicates a waterbody meets the requirements of paragraph (a)(1)¹⁰ of the Dirty Water Rule, but no jurisdiction was determined based on the waterbody also meeting one or more of the exclusions under paragraph (b)¹¹ of the Rule.

Please provide this information as soon as possible, but no later than November 1, 2020. Provide two sets of copies of all the requested data and deliver one set of these records to the Majority Staff in Room 2165 of the Rayburn House Office Building and one set to the Minority Staff in Room 2164 of the Rayburn House Office Building. If you have any questions, please contact Ryan C. Seiger of the Committee on Transportation and Infrastructure at (202) 225-0060.

Sincerely,



PETER A. DEFAZIO
Chair
Committee on Transportation and Infrastructure



GRACE F. NAPOLITANO
Chair
Subcommittee on Water Resources and
Environment

cc: Representative Sam Graves, Ranking Member, Committee on Transportation and Infrastructure

⁹ In September 2005, the U.S. Government Accountability Office (GAO), in assessing a similar headquarters elevation procedure related to “isolated” non-navigable waters, noted that Corps field staff viewed this procedure as signal that Corps “headquarters does not want them to assert jurisdiction over these waters or wetlands.” See GAO, “Waters and Wetlands: Corps of Engineers Needs to Better Support Its Decisions for Not Asserting Jurisdiction (GAO-05-870)”.

¹⁰ 33 CFR 328.3(a)(1).

¹¹ 33 CFR 328.3(b).