United States Senate

WASHINGTON, DC 20510

April 15, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency 1200
Pennsylvania Avenue NW
Washington, D.C. 20004

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 Acting Administrator Wheeler and Assistant Secretary James:

We write in strong opposition to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (USACE) proposed *Revised Definition of "Waters of the United States"* (WOTUS) rule, published in the Federal Register on February 14, 2019.

For more than 45 years, the Clean Water Act has preserved, protected and restored our Nation's most important natural resource. The Act has advanced its goals to maintain and restore the physical, chemical, and biological integrity of the nation's waters. That is why admirers of the Clean Water Act appropriately labeled this landmark law as one of the most successful public health initiatives ever enacted. Today's progress is the result of hard work, strict enforcement and billions of dollars invested in remediation and infrastructure.

Continued success of the Clean Water Act requires a clear and scientifically sound definition for determining which bodies of water are protected, while protecting those waters that influence the physical, chemical, and biological integrity of the nation's waters—the goal at the heart of the Act. However, the proposed rule provides neither the certainty requested by our constituents, nor the clean and healthy waters upon which we all depend. Instead, this draft makes it nearly impossible for stakeholders and regulators to easily and consistently define perennial, intermittent and ephemeral streams. Far from fulfilling the President's promise to create a nationally consistent rule, this proposal injects ambiguity into the law at the expense of our decades of progress in cleaning up our waters.

Contrary to previous administrations, the 2018 WOTUS proposed rule eliminates all protections for ephemeral streams and many wetlands by ignoring former U.S. Supreme Court Justice Anthony Kennedy's central opinion in *Rapanos v. United States* that calls for a "significant nexus" test, which requires the regulating agency to determine if the wetland or waterway has a

chemical, biological or hydrological connection to downstream waters for establishing jurisdiction. While the proposed rule acknowledges that previous administrations and the courts have relied on Justice Kennedy's significant nexus test as an essential component of assessing water bodies' status under the Clean Water Act, it provides no sound justification for its shift away from this established significant nexus standard.

EPA's 2015 report titled, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence," provides overwhelming scientific evidence that the significant nexus test is met for all tributary streams, regardless of flow, and all floodplain wetlands and open waters. These features significantly affect the physical, chemical, and biological condition the traditionally navigable waters and interstate waters with which they interact. As the Connectivity Report states:

> The scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.
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> The literature clearly shows that wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in rivers, and transformation and transport of stored organic matter.

The Report likewise finds that non-floodplain wetlands, including so-called "isolated" wetlands, "provide numerous functions that benefit downstream water integrity. These functions include storage of floodwater; recharge of ground water that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules to downstream waters; and habitats needed for stream species."

Eliminating protections for ephemeral streams and most wetlands abandons the significant nexus jurisdictional standard and undermines the goals of the Clean Water Act. Furthermore, the rule's novel and ambiguous definitions inject uncertainty by requiring regulators, landowners, and other stakeholders to conduct long-term monitoring programs in order to distinguish between streams that flow intermittently or ephemerally. The rule's approach ignores the significant nexus standard and the underlying connectivity science and deviates from longstanding agency practice. Consequently, adopting this proposal would guarantee confusion and will make the final rule legally vulnerable when it is inevitably challenged in the U.S. courts.

The Administration's analysis supporting the revised WOTUS rule also overestimates the potential for states to protect their waters and wetlands in the absence of Federal responsibility under the Clean Water Act. While some states can and do enforce stronger water pollution laws, many states lack the financial resources to sustain protective state pollution control programs

absent Federal support. Moreover, seven states are prohibited from establishing rules that exceed national minimum standards set by the Clean Water Act, and many more have at least some limitation on protecting waters beyond whatever Federal standards may exist. For these states, the Federal standards may become both the floor and the ceiling, and this proposed rule would create an enforcement gap for ephemeral streams and wetlands lacking a surface water connection to other protected waters. This troubling fiscal and regulatory landscape among states limits their inability to ramp up their clean water enforcement programs to compensate for the Federal Government's abrogation of its clean water obligations.

Failing to accurately characterize state circumstances, the *Economic Analysis for the Proposed Revised Definition of "Waters of the United States"* wrongly assumes that "states with existing [dredge-and-fill permit] programs, regardless of scope, are likely to have the capacity and interest to regulate waters that may no longer be jurisdictional following a change in the definition of 'Waters of the United States.'" Indeed, 30 states have no permitting programs for so-called "isolated," non-floodplain wetlands, and theoretically under the proposed WOTUS rule, would have no restrictions on dumping, draining, filling and other damaging wetlands activities. Furthermore, 33 states have no monitoring and assessment programs, so would have no means to know who is destroying wetlands and for what purpose. The Clean Water Act encourages states to be more protective than its minimum "federal floor" requirements, and yet the reality is states are going in the opposite direction—passing laws that make it difficult or impossible to go further than the Federal law. Clearly, many states want to protect their waters and wetlands less, not more. Even states with robust programs would need to expand their budgets and programmatic scope to prevent any significant lapse in protections for streams and wetlands. And states that invest in strong programs still cannot protect their waters from pollution originating in upstream states with less protective pollution control programs.

In response to questions for the record following EPA Administrator Wheeler's confirmation hearing before the Senate Environment and Public Works Committee, EPA and the USACE demonstrated they do not possess even remotely reliable estimates of the number and extent of waters that would be affected by this proposed rule.[1] What these unreliable data suggest is disturbing enough: estimates by USACE and EPA suggest at least 18 percent of streams and 51 percent of wetlands will not be protected under the new rule, as proposed.[2] Under the proposal, the Trump Administration asks commenters to suggest even more radical exclusions from Federal protection, potentially expanding the scale of impacted waters well beyond the base proposal.

At best, the agencies have been careless in proposing this rule. At worst, they have failed to meet their duties to inform the public, uphold the law, and protect the public and the environment. This proposed rule ignores Justice Kennedy's significant nexus standard, which courts have found to be an essential element of the jurisdictional standard. It ignores the

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[1] "Carper Releases Acting Administrator Andrew Wheeler's Responses to Questions for the Record." 29 Jan. 2019, www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=A51C28E0-D79B-453E-AB57-29E485EEE5AA.

[2] Wittenberg, Ariel. "Trump's WOTUS: Clear as Mud, Scientists Say." *E&E News*, 18 Feb. 2019, www.eenews.net/stories/1060121251.

scientific connectivity between waterbodies upstream and downstream. And, it deviates from the longstanding jurisdictional legal reasoning and practices applied by previous administrations' WOTUS rules and policies. As a result, courts will likely find that this rule fails to abide by the Administrative Procedure Act and arbitrarily and capriciously shrinks the "waters of the United States" protected by the Clean Water Act, putting millions of wetland acres and stream miles at increased risk of pollution and destruction.

Americans deserve and expect safe drinking water. Americans expect their Government to protect their waterways. This proposed rule provides them none of that comfort or assurance. Instead, we fear—as many Americans do—that this proposed rule will compromise their health, their environment and their economy.

Protecting our waters and wetlands is not just a legal responsibility or scientific aspiration, it is a moral obligation. As a Nation, we should be advancing toward these responsibilities, aspirations and obligations, not retreating to appease the relative few. We urge you to withdraw this proposed rulemaking and reconsider how our Nation should define which waters deserve the Clean Water Act's strong protections.

Sincerely,

Tom Carper
Ranking Member
Committee on Environment and
Public Works

Tammy Duckworth
United States Senator

Benjamin L. Cardin
United States Senator

Chris Van Hollen
United States Senator

Richard Blumenthal
United States Senator

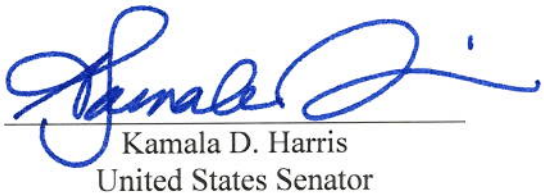
Jeffrey A. Merkley
United States Senator

Sheldon Whitehouse
United States Senator

Martin Heinrich
United States Senator

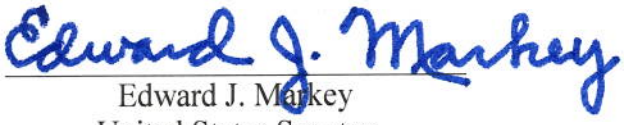
Cory A. Booker
United States Senator

Kirsten Gillibrand
United States Senator



Kamala D. Harris
United States Senator

Robert P. Casey Jr.
United States Senator



Edward J. Markey
United States Senator

Mazie K. Hirono
United States Senator

Jack Reed
United States Senator

Bernard Sanders
United States Senator