



March 1, 2022

The Honorable Michael S. Regan  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460-0001

The Honorable Michael L. Connor  
Assistant Secretary of the Army (Civil Works)  
U.S. Department of the Army  
108 Army Pentagon  
Washington, DC 20310-0108

RE: Docket ID No. EPA-HQ-OW-2021-0602, Revised Definition of “Waters of the United States”

Dear Administrator Regan and Assistant Secretary Connor:

On November 18, 2021, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (together, the Agencies) released the pre-publication version of the proposed rule redefining the scope of waters protected under the Clean Water Act. We write to applaud the Agencies for taking this concrete and positive step toward restoring the strong clean water protections that our constituents, and all Americans, depend on. Federal protections based on sound science and consistent with the Clean Water Act are essential to ensuring clean water, which is essential for our economy and a healthy environment.

This rulemaking is critical to protecting water quality across the nation and the furthering of Congress’s intent when it enacted the Clean Water Act. The Clean Water Act’s sole objective is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>1</sup> Yet under the prior administration’s Navigable Waters Protection Rule (NWPR), now invalidated by two federal courts, streams and wetlands were ruled outside the protections of the Clean Water Act at unprecedented levels.<sup>2</sup> In addition to undercutting the Clean Water Act’s objective, the now-invalidated NWPR took us farther from providing clean, safe water for American families, communities, and businesses. Protecting water quality and maintaining intact wetlands and headwater streams, as contemplated by the administration’s plan to first restore the pre-NWPR regulatory framework, consistent with both the Clean Water Act and recent Supreme Court decisions, and then to develop a lasting, more robust definition of “waters of the United States,” also supports key congressional priorities and initiatives of the Biden administration.

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<sup>1</sup> 33 U.S.C. § 1251(a).

<sup>2</sup> EPA & Dep’t of the Army, Memorandum for the Record re: Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional Determination Data to Assess Effects of the Navigable Waters Protection Rule 2-3 (June 8, 2021), <https://perma.cc/Y66K-ESHC> (“Memorandum for the Record”).

The *Infrastructure Investment and Jobs Act*<sup>3</sup> made the “single largest investment in water that the federal government has ever made[,]” including \$55 billion dedicated to expanding access to clean water through initiatives such as replacement of lead service lines, measures to address PFAS contamination, and the enhancement of wastewater infrastructure.<sup>4</sup> The Act allocated another \$47 billion for climate resilience, including measures to help communities prepare for worsening floods.<sup>5</sup> Intact, healthy wetlands and headwater streams that absorb precipitation and floodwaters, reducing the risk and severity of flooding, protect lives and livelihoods and promote the goals behind the Clean Water Act, as well as the administration’s overarching climate resilience goals.<sup>6</sup> In addition to serving as our most effective, natural guards against flooding, they serve as efficient, natural carbon sinks, mitigating our emissions by sequestering carbon. Without strong federal clean water protections, valuable wetlands and headwater streams, along with their pollution- and flood-prevention functions, will be lost.

Strong federal clean water protections are also key to meeting the Biden administration’s,<sup>7</sup> and EPA’s,<sup>8</sup> commitments to environmental justice. As described above—and as publicly acknowledged by the Agencies<sup>9</sup>—the NWPR has harmed waters across the United States. But this harm does not fall equally on all populations. The effects of such a dramatic withdrawal of federal clean water protections are disproportionately felt by low-income communities and communities of color—in many cases, the communities least equipped to handle them. Only with strong federal clean water protections, can the administration and EPA ensure that everyone—regardless of their zip code—has access to clean, safe water.

As noted above, clean water protections are critical to protecting national, regional, and local economies, including the businesses and industries that depend on the availability of clean water. This is especially true for our nation’s farmers for whom the availability of safe and reliable sources of clean water is essential to safe and healthy crops and livestock. Your efforts to restore long-standing Clean Water Act protections over rivers, streams, and wetlands demonstrate that common-sense protection can, again, ensure robust protection of the nation’s waters and a robust agricultural economy. For example, most ordinary agricultural activities do not require permits under the Clean Water Act, which expressly excludes agricultural stormwater discharges and irrigation return flows, in addition to other normal farming practices like building or maintaining stock ponds or irrigation ditches, building farm roads, maintaining drainage ditches, and farming

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<sup>3</sup> P.L. 117-58.

<sup>4</sup> EPA Fact Sheet, <https://www.epa.gov/infrastructure/fact-sheet-epa-bipartisan-infrastructure-law>

<sup>5</sup> NY Times, Infrastructure Bill Makes First Major U.S. Investment in Climate Resilience, <https://www.nytimes.com/2021/11/06/climate/infrastructure-bill-climate.html>.

<sup>6</sup> See, e.g., The White House, Fact Sheet: Biden Administration Roadmap to Build an Economy Resilient to Climate Change Impacts, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/15/fact-sheet-biden-administration-roadmap-to-build-an-economy-resilient-to-climate-change-impacts/>.

<sup>7</sup> See Executive Order 13985, “Advancing Racial Equity and Support for Underserved Communities through the Federal Government” (Jan. 20, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

<sup>8</sup> Message from the Administrator (Apr. 7, 2021) <https://www.epa.gov/sites/default/files/2021-04/documents/regan-messageoncommitmenttoenvironmentaljustice-april072021.pdf>.

<sup>9</sup> Decl. of Radhika Fox ¶ 8, *Conservation Law Found. v. Regan*, No. 1:20-cv-10820-DPW (D. Mass. June 9, 2021), <https://perma.cc/G8RL-L7S5> (“Fox Decl.”); Decl. of Jaime A. Pinkham ¶ 8, *Conservation Law Found. v. Regan*, No. 1:20-cv-10820-DPW (D. Mass. June 9, 2021), <https://perma.cc/NVB7-KLQC> (“Pinkham Decl.”).

itself. This was true prior to the NWPR and remains true in your proposed replacement of the NWPR. The proposed rule does not affect the exemptions. In fact, the Corps estimates that less than one percent of the wetland area and about two percent of the stream reaches for which it has issued Clean Water Act permits are accounted for by agricultural discharges.<sup>10</sup> When farming operations do need permits, expedited permits under nationwide or general permit programs are often available.

In order to support the administration's and Congress's priorities, and to expeditiously restore science-based protections to the nation's waters and wetlands, we urge the Agencies to move quickly to finalize this proposal, and then turn to proposing a more protective, substantive definition of "waters of the United States." Thank you for considering these comments—we look forward to continuing to provide input as the Agencies pursue these important goals.

Sincerely,




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Benjamin L. Cardin  
United States Senator  
Chairman, Subcommittee on  
Transportation and  
Infrastructure



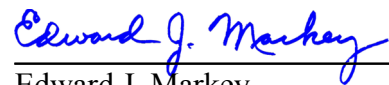
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Tammy Duckworth  
Chair  
Subcommittee on Fisheries,  
Water and Wildlife  
Committee on Environment  
and Public Works



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Elizabeth Warren  
United States Senator



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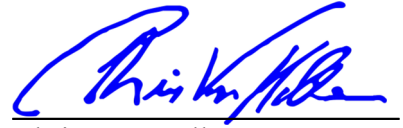
Edward J. Markey  
United States Senator

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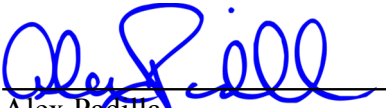
<sup>10</sup> U.S. EPA and Dept. of the Army, Economic Analysis for the Proposed Revised Definition of "Waters of the United States" 96-97 (Dec. 14, 2018) (Table IV-2: Authorized impact area of CWA section 404 permits issued in 2011-2015, by project type).



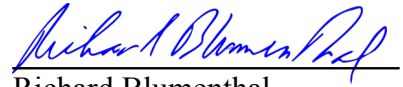
Sheldon Whitehouse  
United States Senator



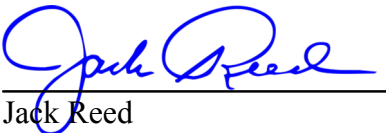
Chris Van Hollen  
United States Senator



Alex Padilla  
United States Senator



Richard Blumenthal  
United States Senator



Jack Reed  
United States Senator



Martin Heinrich  
United States Senator



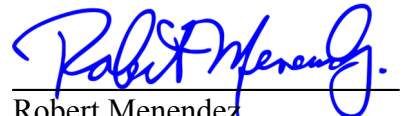
Bernard Sanders  
United States Senator



Thomas R. Carper  
United States Senator



Kirsten Gillibrand  
United States Senator



Robert Menendez  
United States Senator