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# United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

MARY FRANCES REPKO, *DEMOCRATIC STAFF DIRECTOR*  
ADAM TOMLINSON, *REPUBLICAN STAFF DIRECTOR*

July 30, 2021

The Honorable Michael S. Regan  
Administrator  
US Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20004

Mr. Jaime A. Pinkham  
Acting Assistant Secretary of the Army  
for Civil Works  
US Department of the Army  
108 Army Pentagon  
Washington, DC 20310-0108

Dear Administrator Regan and Acting Assistant Secretary Pinkham:

We write to follow up on our letter of June 21, 2021, which requested that the US Environmental Protection Agency (EPA) and the US Army Corps of Engineers (Corps) provide information on the basis for the decision to repeal and replace the 2020 Navigable Waters Protection Rule (NWPR).<sup>1</sup>

EPA and the Corps provided an initial, incomplete response to us on July 13, 2021, which failed to provide substantive answers to the requests posed in our June 21 letter. Despite the repeated promises for transparency and assurances that any action on the definition of “waters of the United States” would be accompanied by proactive and effective communication, Congress, the states, and regulated entities remain in the dark.

Additionally, since the announcement, EPA officials have made a number of public statements to the press and before Congress on the decision to repeal and replace the NWPR and provided details on the timeline and process to gather key stakeholder input. Many of these statements are inconsistent with or absent from the few details that have actually been provided to Committee, and in many instances contradict input from stakeholders. In response to questions about engagement before changes to the rule were made to inform the path forward, EPA Office of Water Assistant Administrator Radhika Fox detailed an extensive stakeholder input process, with a focus on regional perspectives.<sup>2</sup> This is concerning given EPA’s intent to have a two-step rule “this summer”—timing which does not allow for formal stakeholder engagement to inform a proposal.<sup>3</sup>

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<sup>1</sup> The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22250 (April 21, 2020).

<sup>2</sup> Suman Naishadham, *EPA water chief on clean water protections*, ASSOCIATED PRESS (July 13, 2021), <https://apnews.com/article/joe-biden-business-government-and-politics-environment-and-nature-0f8f453d991e9a032c3f6c33f03f0c33>.

<sup>3</sup> Hannah Nortey, *EPA’s top water official on Biden’s climate, equity goals*, E&E NEWS (July 6, 2021).

Our June 21 letter had a number of specific requests attempting to provide transparency for Congress and the public surrounding the decision to repeal and replace the NWPR and detail on your agencies' plans for engagement and implementation moving forward. The limited information provided by the Agency fails to substantively support the agencies' rationale and contains no referenced stakeholder input of supposed environmental impacts and "implementation challenges." Despite the Administration's nominee for Assistant Secretary of the Army for Civil Works at the Corps admitting there is "available data indicat[ing] the [NWPR] rule is leading to significant environmental degradation"<sup>4</sup> and EPA officials continuing to cite to this rationale, no description of specific instances or what would qualify as "damage" or "harm"—much less when and where they have occurred—have been provided.

While the agencies have issued a list of the locations of the non-jurisdictional projects and ephemeral streams, no information has been made available on the purported environmental "damage" or "harm" observed or documented. For example, while New Mexico and Arizona were referenced as having a "lack of protections," no detailed analysis has been made available other than a general description of the lack of jurisdictional determinations for certain waters in these states. In fact, in contrast to the Corps' position that there is "ongoing damage" resulting from the NWPR,<sup>5</sup> EPA Assistant Administrator Fox has admitted the Agency has not been able to demonstrate any actual harm, but rather EPA is concerned with losing the "ability to really assess the potential water quality impacts."<sup>6</sup> This view is misguided since a lack of required federal permits is not a proxy for environmental harm.

Given the importance of this issue, we reiterate our unanswered requests for the agencies detailed in our June 21 letter and additional questions that have arisen from the agencies' mixed communication regarding the NWPR. Please provide responses to the following additional requests no later than August 20, 2021.

1. An explanation of whether the agencies believe the absence of a federal jurisdictional under the Clean Water Act over a water or water feature leads to de facto environmental "damage" or "harm" if activities occur in that water or water feature?
2. All documents and information on the environmental "damage" or "harm" to the waters in each of the 333 non-jurisdictional projects and 1,500 non-jurisdictional streams cited by the agencies, including but not limited to any data indicating "significant

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<sup>4</sup> *Nomination of Michael Connor to be Assistant Secretary of the Army for Civil Works at the Department of Defense: Hearing Before the S. Comm. on Environment and Public Works*, (July 14, 2021) (responses of Michael Connor to Questions for the Record from Ranking Member Shelley Moore Capito) ("A reduction in the number of federal permits could occur for several reasons, some of which would not result in environmental damage or harm. As directed by EO 13990, however, the Army reviewed the Navigable Waters Protection Rule, which comprehensively revised regulations that defined "waters of the United States" for the purposes of the Clean Water Act. I understand that the Army determined that substantially fewer permits were issued under the current rule, and that available data indicates the rule is leading to significant environmental degradation.").

<sup>5</sup> *President Biden's Fiscal Year 2022 Budget Request: Agency Policies and Perspectives (Part I): Hearing Before the H. Comm. on Transportation and Infrastructure Sub. Comm. on Water Resources and Environment*, (June 24, 2021) (statement of Jaime A. Pinkham, Acting Ass't Sec. of the Army for Civil Works) ("And there was a wide range of concerns about the rule. One, there was a concern, as Chairman DeFazio has pointed out, about this ongoing damage that is occurring now and is expected to continue to occur.").

<sup>6</sup> Nörtey, *supra* note 3.

environmental degradation” as detailed in Assistant Secretary nominee Michael Connor’s responses to questions for the record.

3. A list and details of all projects that are “proceeding in newly non-jurisdictional waters in the states and tribal lands where regulations of waters beyond those covered by the CWA are not authorized” as detailed in agencies’ June 8 memorandum.
4. A list of states that have “begun taking deregulatory steps to change their state regulatory practices” and details of those changes mentioned in agencies’ June 8 memorandum.
5. All documents and information on the scope and details regarding the environmental “damage” or “harm” to the waters in arid states, like New Mexico and Arizona, cited in the agencies’ July 13 response.
6. All documents and communications between EPA and the Corps regarding the environmental “damage” or “harm” cited in the justification of this action.
7. All documents and communications between EPA, the Corps, and all external stakeholders regarding the “significant impacts to critical water bodies under the NWPR” cited in the agencies’ July 13 response.
8. All documents and communications between EPA, the Corps, and all external stakeholders on the “implementation challenges” EPA staff explicitly cited as a basis for repealing the NWPR, including but not limited to any communications regarding the NWPR’s prior converted croplands exclusion, treatment of ditches, and treatment of inundated wetlands.

In addition to the requests above and those detailed in our June 21 letter, we are requesting a detailed briefing by August 13, 2021 and monthly updates on the status of the rulemaking. Thank you for your consider and we look forward to your reply.

Sincerely,



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Shelley Moore Capito  
Ranking Member



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James M. Inhofe  
United States Senator



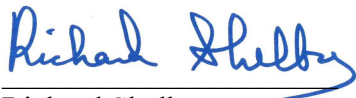
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Kevin Cramer  
United States Senator



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Cynthia Lummis  
United States Senator



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Richard Shelby  
United States Senator



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John Boozman  
United States Senator



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Roger F. Wicker  
United States Senator



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Dan Sullivan  
United States Senator



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Joni K. Ernst  
United States Senator



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Lindsey O. Graham  
United States Senator