United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510–6175

September 27, 2017

The Honorable E. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Mr. Douglas W. Lamont
Deputy Assistant Secretary of the Army
108 Army Pentagon
Washington, DC 20310

Re: *EPA Docket No. EPA-HQ-OW-2017-0203, Definition of "Waters of the United States" – Recodification of Pre-existing rules*

Dear Administrator Pruitt and Deputy Assistant Secretary Lamont:

We commend you for your proposal to withdraw the deeply flawed "Waters of the United States" (WOTUS) rule that was promulgated by the prior administration in June 2015.[1]

Your proposal solicits comment as to whether it is desirable and appropriate to withdraw the 2015 WOTUS rule. 82 Fed. Reg. 34899, 34903 (July 27, 2017). Not only is it desirable and appropriate, the proposed action is necessary.

As you know, on August 27, 2015, Judge Erickson of the District of North Dakota, issued an injunction that prevented the WOTUS rule from going into effect in 13 states because the rulemaking record is "inexplicable, arbitrary, and devoid of a reasoned process." In October of 2015, the Sixth Circuit Court of Appeals issued a nationwide stay of the 2015 WOTUS rule.

Eighty-eight members of Congress filed an *amicus* brief on November 8, 2016, in support of state petitioners, and business and municipal petitioners, challenging the 2015 WOTUS rule. All 88 members of Congress concluded that the 2015 WOTUS rule exceeds the authority granted to the Environmental Protection Agency (EPA) and the Corps of Engineers (Corps) by Congress.[2] The 2015 WOTUS rule should be withdrawn because the rule exceeds the authority granted to these agencies by Congress.

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[1] 80 Fed. Reg. 37,054 (Jun. 29, 2015).

[2] *See* Brief of Members of Congress as Amici Curiae in Support of State Petitioners and Business and Municipal Petitioners, 6th Cir. Case No. 15-3751, Nov. 8, 2016 (hereinafter Congressional Amicus Brief) (attached).

Further, as demonstrated by memoranda prepared by the Corps of Engineers, as well as testimony received by the Committee on Environment and Public Works on April 26, 2017, at a hearing entitled "A Review of the Technical, Scientific, and Legal Basis of the WOTUS Rule," the 2015 WOTUS rule is not based on the experience and expertise of the Corps of Engineers, and cannot be justified by scientific studies.[3] Thus, the 2015 WOTUS rule is arbitrary and capricious and must be withdrawn on this basis as well.

We submit this comment letter and its attachments for your consideration.

The 2015 WOTUS Rule Is Contrary To Law

The 2015 WOTUS rule was based on the erroneous premise that federal jurisdiction over water is whatever the federal agency wants it to be to advance its latest policy objectives. The courts have been clear however that a federal agency may not exceed the statutory authority granted to it by Congress. Courts have made this point many times:

- *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315 (2000))("[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate … we typically greet its announcement with a measure of skepticism.").

- *Rapanos v. United States*, 547 U.S. 715, 755-56 (2006) (Scalia, J., plurality) ("This is the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different statute that achieves the same purpose.").

- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."); *id.* at 173 ("This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.").

- *Rodriguez v. United States*, 480 U.S. 522, 525-266 (1987) ("But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates, rather than effectuates, legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.").

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[3] *See* April 27, 2015 letter from General Peabody to Assistant Secretary of the Army Darcy; May 15, 2015 letter from General Peabody to Assistant Secretary of the Army Darcy; May 15, 2015 memorandum from Jennifer Moyer to General Peabody; April 24, 2015 memorandum from Lance Wood to General Peabody; April 24, 2015 Memorandum from Jennifer Moyer to General Peabody; April 26, 2017 Testimony of Dr. Michael Josselyn before the Senate Committee on Environment and Public Works; April 26, 2017 Testimony of MG John Peabody (ret.) before the Senate Committee on Environment and Public Works; April 26, 2017 Testimony of Misha Tseytlin before the Senate Committee on Environment and Public Works. (all attached).

- *Mexichem Fluor, Inc. v. Environmental Protection Agency*, D.C. Cir. Case no. 15-1348 (Aug. 8, 2017) ("The agency must have statutory authority for the regulations it wants to issue.").

- *National Mining Ass'n v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) ("If the agencies and NWF believe that the Clean Water Act inadequately protects wetlands and other natural resources by insisting upon the presence of an "addition" to trigger permit requirements, the appropriate body to turn to is Congress.").

In the 2015 WOTUS rule, EPA and the Corps attempted to expand their authority to meet their policy preferences. However, in the Federal Water Pollution Control Act, Congress did not grant EPA and the Corps unlimited authority to define the extent of their own regulatory authority. Thus, it does not matter if EPA and the Corps concluded in 2015 that all water is connected, including isolated, non-navigable intrastate water, rainwater runoff and ephemeral flows, groundwater, and water that does not contribute pollutants to navigable water. Congress did not give the agencies the authority to regulate such water.

The limitations on federal jurisdiction under the Federal Water Pollution Control Act are apparent from the text of the statute as well as the contemporaneous debate over federal authority that provides context to both the 1972 and the 1977 amendments to the Federal Water Pollution Control Act.

The 1972 amendments to the Federal Water Pollution Control Act directly responded to concerns over the limits of both the permitting authority under the 1899 Rivers and Harbors Act and enforcement of water quality standards under the 1965 amendments to the Federal Water Pollution Control Act.[4] The 1972 amendments established a regulatory framework under which state-developed water quality standards were federally enforceable in intrastate navigable waters, as well as interstate navigable waters and their tributaries, and under which the states could take the lead in issuing permits applying effluent limitations for discharges into those waters.[5]

In support of the 2015 WOTUS rule, the previous administration, EPA and the Corps made the novel claim that federal jurisdiction over water is as broad as the objective of the Federal Water Pollution Control Act set forth in section 101(a) (stating that the objective of the Act is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters"). 80 Fed. Reg. at 37,055-56. These agencies further reinterpreted the objective of the Act to expand the reference to "physical" integrity to encompass water supply and the reference to "biological" integrity to encompass wildlife habitat. This claim of authority conflicts with the Supreme Court's rulings in *Rodriguez*, and other cases cited above, as well as the language and structure of the statute and its legislative history.[6] The goal statement of the Federal Water Pollution Control Act does not address jurisdiction at all. It is nothing more than a statement of water *quality* goals for the water that is regulated.[7]

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[4] *See* S. Rept. 92-414, 92nd Cong. 1st Sess. 70-71.

[5] *Id.* at 77.

[6] *See Congressional Amicus* Brief at 15-18.

[7] *See* Congressional *Amicus* Brief at 18 (citing the explanation of the Act's objective provided by Senator Muskie).

In 1965, Congress made water quality standards federally enforceable in interstate navigable waters only. The 1972 amendments expanded federal jurisdiction from interstate navigable waters and their tributaries to include intrastate navigable waters and their tributaries, if part of a highway of commerce that could include highways and railways, in addition to water transportation.[8]

In enacting this expansion, at no time did Congress consider regulating isolated, non-navigable intrastate water, rainwater runoff and ephemeral flows, groundwater, water that does not contribute pollutants to navigable water, or waters based solely on their use as wildlife habitat. In fact, the 1973 report issued by the congressionally-chartered National Water Commission *after* the enactment of the current definition of "waters of the United States," recommended that *states* protect state-owned wetlands used by waterfowl. None of the water experts who served on the Commission suggested that those wetlands were already regulated by the federal government.[9]

Consistent with the legislative history of the Act, the Commission described the jurisdictional expansion in the 1972 amendments as follows: "The water quality standards established in response to the 1965 Water Quality Act are retained as a floor under the new effluent limitations and are expanded to include *all navigable waters*."[10] The Commission further noted that permits for dredging and channel alteration issued by the Corps of Engineers Act "are required only when the waters are navigable in interstate or foreign commerce, and no application for a Corps permit need be filed for those activities in other inland waters."[11] As a result, the Commission made the following recommendation: "Since the States historically have been viewed as having regulatory jurisdiction over waters which are not navigable in interstate or foreign commerce, the Commission believes that the States should enact statutes which would provide adequate measures of protection to fish and wildlife values."[12] This contemporaneous interpretation of the 1972 amendments confirms that the objective of the Federal Water Pollution Act is to protect the quality of navigable water, not wildlife habitat generally, which is an important subject addressed in other federal and state legislation.

Nothing in *United States v. Riverside Bayview Homes, Inc*, 474 U.S. 121 (1985) contradicts this interpretation. In that case the Supreme Court deferred to the Corps' determination that regulation of navigable water included regulation of adjacent wetlands because the agencies must make a determination of where open waters end and dry land begins. *Id.* at 132. In the fact pattern presented to the Court, the wetlands were an extension of the navigable water. That may be an "ecological" connection, but *Riverside Bayview* does not support an argument that any "ecological" connection to navigable water creates jurisdiction. If there was any doubt of that fact, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001) the Supreme Court put that doubt to rest. Use of water as

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[8] *See* Congressional *Amicus* Brief at 5-6.

[9] *See* Congressional *Amicus* Brief at 8-9.

[10] *See* National Water Commission (June 1973), Water Policies For The Future: Final Report to the President and to the Congress of the United States at 87 (emphasis added) (attached).

[11] *Id.* at 201.

[12] *Id.* at 202.

wildlife habitat is not a basis for federal jurisdiction under the Federal Water Pollution Control Act. *Id.* at 172-173.

In expanding the jurisdiction of the Federal Water Pollution Control Act to include intrastate navigable water, Congress also did not consider regulating isolated, non-navigable intrastate water, rainwater runoff and ephemeral flows, groundwater, and water that does not contribute pollutants to navigable water, based on their effects on water supply. Congress made that very clear in 1977, when Congress added section 101(g) to the Federal Water Pollution Control Act.[13] This amendment responded to an attempt by federal agencies to use the Act to regulate surface flows and groundwater. According to the amendment's sponsor: "This 'State's jurisdiction' amendment reaffirms that it is the policy of Congress that this act is to be used for water *quality* purposes only." 123 Cong. Rec. 39, 211-12 (1977) (floor statement of Senator Wallop) (emphasis added).[14]

Despite the limited grant of federal authority in the Federal Water Pollution Control Act, the June 2015 WOTUS rule purports to regulate water based on its use by birds or mammals or insects, based on its use to control supplies of water through runoff storage, or based on its use to augment water supplies by movement through the ground or over the land. The statute does not give the agencies that authority. The Federal Water Pollution Control Act is and always was a water quality protection statute. The primary responsibilities and rights of States to "to plan the development and use . . . of land and water resources" are expressly preserved. 33 U.S.C. § 1251(b). Thus, the June 2015 WOTUS rule is contrary to law.

The 2015 WOTUS Rule Is Arbitrary and Capricious

The preamble to the 2015 WOTUS rule and the Technical Support Document for that rule repeat nearly *100 times* the claim that the rule is based on the agencies' expertise and/or experience. These documents also claim over *500 times* that the rule is based on "science" or relies on "science." The preamble to the final rule further states:

> This immersion in the science along with the practical expertise developed through case specific determinations across the country and in diverse settings is reflected in the agencies' conclusions with respect to waters that have a significant nexus, as well as where the agencies have drawn boundaries demarking where ''waters of the United States'' end. 80 Fed. Reg. at 37,065.

The brief filed by the U.S. Department of Justice on January 13, 2017, defending the WOTUS rule, makes similar claims. The brief states *over 30 times* that the rule is based on agency experience and/or expertise and references the "science" or EPA's Science Report *over 150 times*.

These statements are not supported by the record.

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[13] "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act." 33 U.S.C. § 1251(g).

[14] *See* Congressional *Amicus* Brief at 21-22.

The Corps of Engineers is the agency that makes the vast majority of jurisdictional determinations that identify waters that are regulated under the Clean Water Act. However, according to memoranda sent by Major General John Peabody, former Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers, to Assistant Secretary Darcy on April 24, 2015, and on May 15, 2015, EPA shut the Corps of Engineers out of the development of the WOTUS rule. These memoranda state that the WOTUS rule is *not* based on the experience and expertise of the Corps. For example, an attachment to General Peabody's May 15, 2015 memorandum stated:

> "The [Technical Support Document] emphasizes that the agencies undertook a very thorough analysis of the complex interactions between upstream waters and wetlands and the downstream rivers to reach the significant nexus conclusions underlying the provisions of the draft final rule… *[T]he Corps was not part of any type of analysis to reach the conclusions described; therefore, it is inaccurate to reflect that 'the agencies' did this work or that it is reflective of Corps experience or expertise."*[15]

Further, the 2015 WOTUS rule is not justified or supported by scientific findings. In May 2011, the prior administration issued a draft guidance that purported to delineate the extent of federal jurisdiction under the Federal Water Pollution Control Act. After receiving criticism for issuing a guidance instead of a rule, EPA developed a proposed rule to mirror the draft guidance and collected ecological studies to justify the conclusions *already made* in the draft guidance. In September 2013, the prior administration sent a draft proposed rule to OMB. At the same time, the prior administration issued a draft "Connectivity Study" that purported to justify the proposed rule.

The prior administration convened a panel of scientists to review their study. The panel unsurprisingly agreed that ecological studies show connections among all waters. However, the Connectivity Study does not demonstrate that all waters covered by the rule must be regulated to protect the quality of navigable water. In fact, most of the studies do not even mention navigable water.[16]

A panel member, Dr. Josselyn, raised concerns about the lack of scientific support for regulating ephemeral water in his preliminary comments on the Connectivity Study:

> "The Draft Report contains references that are focused on more perennial and intermittent flowing streams, but presents *very little information on the processes occurring within ephemeral streams.* Because these systems are often the focus of jurisdictional disputes, the specific case history discussion contained in the Draft Report on southwestern streams is very useful. A conclusion reached is that such systems are important to recharging local groundwater systems following surface flow events; however, *it is not clear how this would relate to downstream water quality."*[17]

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[15] May 15, 2015 memorandum from Jennifer Moyer to MG Peabody (attached). See also testimony of General Peabody before the Senate Environment and Public Works Committee on Apr. 26, 2017 (attached).

[16] *See* Congressional *Amicus* Brief at 22-23, 25, 29.

[17] *See* December 2, 2013 letter from Dr. Josselyn to Dr. Rodewald (attached). *See also* testimony of Dr. Josselyn before the Senate Environment and Public Works Committee on Apr. 26, 2017 (attached).

Corps legal counsel raised similar concerns about the lack of scientific support for the tributary definition in the WOTUS rule:

> "[T]he draft final rule asserts CWA jurisdiction by rule over every 'stream' in the United States, so long as that stream has an identifiable bed, bank, and OHWM. That assertion of jurisdiction over every stream bed has the effect of asserting CWA jurisdiction over many thousands of miles of dry washes and arroyos in the desert southwest, even though those ephemeral dry wastes, arroyos, etc. carry water infrequently and sometimes in small quantities if those features meet the definition of a tributary."[18]

The brief filed by states in the litigation challenging the rule explains the inadequacies of the scientific record:

> "According to the Agencies, the scientific basis for the Rule is that water flows downhill to create hydrological connections, see 80 Fed. Reg. at 37,063, and that the "protection of upstream waters is critical to maintaining the integrity of the downstream waters," id. at 37,056. This is nothing but a truism, and implies a limitless expansion of federal power."
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> "The mere existence of a hydrological connection—even a continuous one—is insufficient under Justice Kennedy's holding in Rapanos, 547 U.S. at 769, but that is all the Connectivity Study demonstrates."[19]

Accordingly, even if EPA and the Corps had the authority to expand federal control over land and water, which these agencies do not, the 2015 WOTUS rule lacks record support, is arbitrary and capricious, and should be withdrawn.

The 2015 WOTUS Rule Has Little Chance of Surviving Judicial Review

The indefensibility of the 2015 rule also is a justification for its withdrawal. In addition to the grounds stated by the courts staying the 2015 WOTUS rule, its notable that the Corps raised similar concerns before the final rule was issued, stating that the rule is "... not likely to survive judicial review in federal courts," and is "...inconsistent with SWANCC and Rapanos." The Corps further stated that, "This assertion of CWA jurisdiction over millions of acres of isolated waters...undermines the legal and scientific credibility of the rule" [20]

Given the indefensibility of the 2015 rule, it is preferable to withdraw that rule now, rather than wait for the judicial *vacatur*.

The Economic Impacts of the 2015 WOTUS Rule

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[18] April 24, 2015 Memorandum from Lance Wood to MF Peabody (emphasis in original) (attached).

[19] *See* Opening Brief of State Petitioners, 6th Cir. Case No. 15-3751, Nov. 1, 2016, at 55, 57 (attached). *See also* Tseytlin testimony, at 15.

[20] April 24, 2015 memorandum from Lance Wood to General Peabody, at 9-10.

In November 2015, four months after the final WOTUS rule was published, EPA added a review of 199 jurisdictional determinations to the WOTUS rule docket.[21] Of the 199 jurisdictional determinations EPA evaluated, 57 were negative. In 47 of those 57 negative jurisdictional determinations, the Corps concluded that federal jurisdiction did not exist because there was no surface connection to navigable water. The 2015 WOTUS rule however no longer requires a surface connection to navigable water to establish federal jurisdiction. Accordingly, some or all of the 47 negative jurisdictional determinations evaluated by EPA could become positive jurisdictional determinations under the 2015 WOTUS rule. If all of the 47 jurisdictional determinations were positive, it would represent 82 percent of the negative jurisdictional determinations reviewed. That is a substantial expansion of federal jurisdiction which would cause economic impacts that should be addressed.

Small Entity Impacts and Federalism

The proposed withdrawal alleges that the action will not have a significant impact on small entities, and does not have federalism implications. 82 Fed. Reg. at 34904. We strongly disagree. Withdrawing the 2015 WOTUS rule will lift a significant threat to small businesses and small governmental entities across the country. Withdrawing the 2015 WOTUS rule also acknowledges the existence of waters of the State that are not federally regulated, consistent with the intent of Congress.

Conclusion

In closing, we noted that the proposed withdrawal of the 2015 WOTUS rule is styled as a "Recodification of Pre-existing Rules." However, the agencies also disavow any intent to reconsider the pre-existing definition. 82 Fed. Reg. at 34903. Accordingly, we interpret the agencies' proposed rule to be a proposal to withdraw the 2015 WOTUS rule. While that withdrawal will result in the reinstatement of the pre-existing regulations, that is a ministerial task of updating the Code of Federal Regulations necessitated by the withdrawal, not a substantive proposal to adopt those regulations.

Having said that, we urge EPA and the Corps to develop a replacement WOTUS rule as soon as possible. The definition of waters of the United States has been the subject of many years of litigation, which could be brought to rest by a scientifically sound WOTUS rule that respects the intent of Congress.

Thank you for considering these comments and supporting documents as you develop your final rule to withdraw the 2015 WOTUS rule.

[21] *See* Analysis of Jurisdictional Determinations for Economic Analysis and rule, EPA-HQ-OW-2011-0880-20877 (attached).

Sincerely,

John Barrasso, M.D.
Chairman

Dan Sullivan
United States Senator

Shelley Moore Capito
United States Senator

John Boozman
United States Senator

Joni K. Ernst
United States Senator

Roger Wicker
United States Senator

Jerry Moran
United States Senator

James M. Inhofe
United States Senator

M. Michael Rounds
United States Senator

Richard C. Shelby
United States Senator

Deb Fischer
United States Senator