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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

MARY FRANCES REPKO, *DEMOCRATIC STAFF DIRECTOR*
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June 21, 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 were very disappointed to learn of the decision made public on June 9, 2021 by the Environmental Protection Agency and the US Army Corps of Engineers (Corps) to repeal and replace the 2020 Navigable Waters Protection Rule (NWPR).¹ The NWPR provides clarity, predictability, and consistency in application of the Clean Water Act (CWA). The NWPR also clearly delineates where federal regulations apply and gives states and local authorities more flexibility to determine how to best manage waters and protect the environment within their borders.

After the Administration's continued commitments to transparency, engagement, and communication with stakeholders and Congress on this issue, the lack of transparency surrounding the decision to abandon this legally defensible and environmentally sound rule is disheartening.

On a briefing call provided to Congressional staff after the announcement, EPA and the Corps made a number of assertions to justify the decision to repeal and replace the NWPR. To date, the limited details provided to support those assertions has contributed to only greater uncertainty for Congress, the states, and regulated entities. EPA and the Corps stated the decision was based on "significant environmental damage" and "ongoing environmental harm" as well as "implementation challenges" and a reduction in findings of federal jurisdiction resulting from the NWPR. The agencies have not provided a complete analysis to back those assertions.

In order to understand the basis for this decision, we request the agencies produce the information relied upon. Please provide the following materials no later than July 5, 2021:

1. Details on, and the definitions of, the "significant environmental damage" and "ongoing environmental harm" EPA and the Corps cite in justifying this action, including the specific instances and locations of the purported "damage" or "harm" EPA and the Corps observed and documented due to the NWPR.

¹ The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (April 21, 2020).

2. Details on the “implementation challenges” EPA staff explicitly cited during the briefing call as a basis for repealing the NWPR, including the NWPR’s prior converted croplands exclusion, treatment of ditches, and treatment of inundated wetlands. Please identify which entities specifically—the agencies themselves, regulated communities, or others—have experienced and reported those challenges, as well as any environmental impacts occurring from those challenges.
3. The complete analysis conducted by the Corps and any supporting information, which reportedly found that there were 333 projects that did not require a permit under the NWPR that would have required a permit under the 2015 “Clean Water Rule: Definition of ‘Waters of the United States’” (2015 WOTUS Rule).
 - a. If not included in the analysis, please provide a list and details on the jurisdictional determinations of the waters in each of these projects, including the purported “damage” or “harm” EPA and the Corps observed and documented due to the NWPR.
 - b. If not included in the analysis, please provide a list and details on the alleged 75 percent of ephemeral streams that would have been jurisdictional under the 2015 WOTUS Rule are not jurisdictional under the NWPR, including the purported “damage” or “harm” EPA and the Corps observed and documented due to the NWPR.
4. Details on the process and standards by which EPA and the Corps will review any permitting decisions currently pending and submitted under the NWPR, as well as any future federal permitting decisions made before a potential replacement rule is in place.
5. Details and a timeline on the process to gather stakeholder input—including the types of stakeholders consulted—and all input that was provided or obtained in advance of the June 9th decision.
 - a. Please also describe your plans for future information gathering and stakeholder listening sessions going forward as you prepare the proposal to repeal the NWPR.

It is vital that the American public and their elected officials have confidence in the decisions and statements being made by EPA and the Corps, particularly on a rulemaking with such significant environmental, economic, and legal implications. This confidence can only be achieved through a transparent process, with sufficient information to understand the agencies’ scientific and legal rationales.

Thank you for your consideration and we look forward to your reply.

Sincerely,



Shelley Moore Capito
Ranking Member



James M. Inhofe
United States Senator



Kevin Cramer
United States Senator



Cynthia Lummis
United States Senator



Richard Shelby
United States Senator



John Boozman
United States Senator



Roger F. Wicker
United States Senator



Dan Sullivan
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Joni K. Ernst
United States Senator



Lindsey O. Graham
United States Senator