

Congress of the United States
Washington, DC 20515

June 25, 2021

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Mr. Jaime Pinkham
Acting Assistant Secretary of the Army
for Civil Works
108 Army Pentagon
Room 3E446
Washington, DC 20310-0108

Dear Administrator Regan and Acting Assistant Secretary Pinkham:

We are writing to you in response to the June 9, 2021, announcement by the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (collectively, the “Agencies”) regarding the Agencies’ intent to revise the definition of the “waters of the United States” (WOTUS) under the *Clean Water Act*.¹ This could negatively impact the Navigable Waters Protection Rule, which the Trump Administration issued to provide long awaited clarity on the extent of waters covered by the *Clean Water Act* for farmers, homeowners, private property owners, manufacturers, small businesses, water districts and local governments while maintaining the United States’ world-renowned standards of environmental protection.²

We are concerned that the approach the Agencies intend to take in revising this important regulation will regress from the clarity provided by the Navigable Waters Protection Rule, and will reimpose a vastly overbroad interpretation of Federal jurisdiction over waters around the Nation. We are also concerned that, rather than soliciting and genuinely listening to input from the general public, small businesses, regulated community, and Federal and state resource agencies regarding the appropriate scope of *Clean Water Act* jurisdiction and the range of issues to be covered by those regulations, the Agencies intend to proceed with a rulemaking that will once again confuse regulated parties and lead to the same misinterpretations of legal standards as the Obama Administration’s WOTUS rule.³ We are gravely concerned that the Agencies will let the flawed Obama WOTUS rule dictate the scope and content of any new rule the Agencies might now promulgate. The Agencies must *not* let institutional capture predetermine the outcome of a rulemaking, which we fear is going to happen here.

Public input from those stakeholders who will be most affected by a new regulation is crucial to any transparent rulemaking process. It is essential that, before the Agencies begin drafting any new rule, they first issue an advance notice of proposed rulemaking (ANPRM) to

¹ Press Release, EPA, *Army Announce Intent to Revise Definition of WOTUS*, June 9, 2021, available at <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus>; see, e.g., 33 CFR § 328.3; 33 U.S.C. §1251 et seq.

² *The Navigable Waters Protection Rule: Definition of “Waters of the United States,”* Final Rule, 85 Fed. Reg. 22250 (Apr. 21, 2020).

³ *Clean Water Rule: Definition of “Waters of the United States,”* Final Rule, 80 FR 37054 (June 29, 2015) (Obama Administration WOTUS rule).

solicit input from the general public, regulated community, and resource agencies on the scope of *Clean Water Act* jurisdiction and the range of issues to be covered by the regulations, to support any revisions to the definition of “waters of the United States.”⁴ If the Agencies decide to move forward with a rulemaking after the ANPRM, we expect they will undertake a robust economic analysis, including a cost-benefit analysis, for whatever proposed rule might be developed. This economic analysis must include an accurate quantification and monetization of the consequences anticipated from the proposed rule.⁵

In addition, the *Regulatory Flexibility Act* requires the Agencies to assess the impact of this proposed regulation on “small entities,” which are defined as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations.⁶ Because of the scope of this rule and the way in which “waters of the U.S.” has previously been expanded, we expect to see a thorough regulatory flexibility analysis of the economic impact on small entities. Finally, because of the EPA’s role in this rulemaking, we expect that the Agencies will convene an “advocacy review panel” pursuant to the *Small Business Regulatory Enforcement Fairness Act*’s requirement to hear from representatives of small entities affected by the proposed rule.⁷ We are hopeful that the Agencies will not again fail to calculate the significant impact of this rule like they did in 2014, leading to a failure to hold a small business advocacy review panel in the future.⁸

The Obama Administration’s overreaching WOTUS rule had a disastrous effect on farmers, businesses, and families.⁹ That rule drew substantial opposition from states, local governments, and citizens across the Nation challenging the overbreadth of the definitions included.¹⁰ The regulatory burden placed on average Americans and the effect on the economy would be detrimental if the Agencies were to remove the definitions included in the Navigable Waters Protection Rule, especially as we look to restart the economy after the COVID-19 pandemic. If we want to help get Americans back to work, the Administration cannot continue to propose partisan executive and legislative actions which will only slow down or reverse the economic recovery. Instead, we must have reasonable regulation to enable Americans to thrive and to grow our Nation’s economy, including in rural and other underserved parts of the country. To do this, the Agencies must keep in mind the multitude of concerns and issues previously raised about the Obama Administration’s WOTUS rule and maintain the updated definitions of the Navigable Waters Protection Rule.

Regulation of the Nation’s waters must be done in a manner that responsibly protects the environment without unnecessary and costly expansion of the Federal government in order to prevent unreasonable and burdensome regulations and to protect small businesses, farmers, and families. Consequently, it is critical that the Agencies take the proper steps to ensure that any

⁴ See 5 U.S.C. § 553.

⁵ See OMB Circular A-4, Executive Order 12866, and Executive Order 13563.

⁶ 5 U.S.C. §§601-612.

⁷ 5 U.S.C. § 609(b).

⁸ SBA Office of Advocacy letter to Administrator McCarthy (Oct. 1, 2014), available at https://www.sba.gov/sites/default/files/Final_WOTUS%20Comment%20Letter.pdf.

⁹ American Farm Bureau Federation “Clean Water Act, WOTUS,” available at <https://www.fb.org/issues/regulatory-reform/clean-water-act/>.

¹⁰ Snider, Annie, “9 more states sue Obama admin over hot-button rule,” *Greenwire*, June 30, 2015.

new regulations provide an appropriate and clear definition of “waters of the United States,” and be consistent with the *Clean Water Act* and the governing U.S. Supreme Court decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* and *Rapanos v. United States* concerning the extent of waters covered by the Act.¹¹

We will be closely monitoring the process as a new rulemaking is initiated. We are aware this is a significant rulemaking and we strongly urge the Agencies to maintain the positive changes that were put into place under the Trump Administration’s Navigable Waters Protection Rule. This Administration must cast aside ideological biases and carefully consider how this regulatory action will impact those who must live and work under this rule. With all the other crises confronting our nation it makes little sense to unravel a final rule that has taken decades of Agency action, litigation, and legislation to settle. Instead, we encourage the Administration to focus its attention and resources on the more pressing economic and international issues confronting our nation such as inflation, the border crisis, the safety of our communities, reopening schools, and protecting America from our adversaries who seek to do us harm.

Thank you for your prompt attention to this matter.

Sincerely,



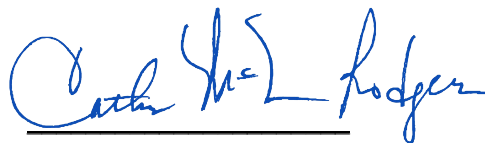
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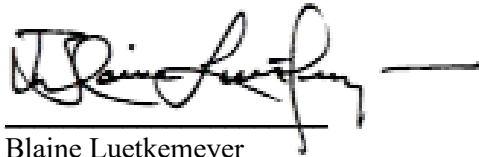


Cathy McMorris Rodgers
Ranking Member
Energy and Commerce Committee

¹¹ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).



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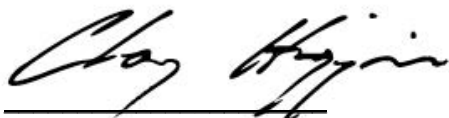
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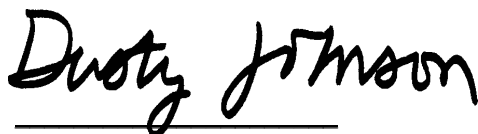
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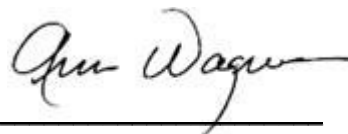
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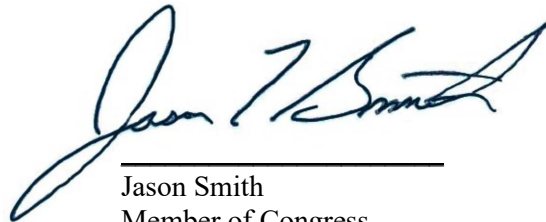
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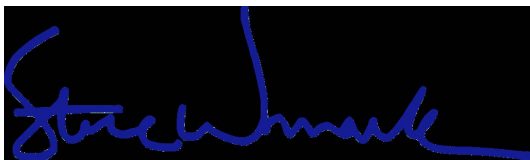
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