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

August 20, 2015

The Honorable Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, D.C. 20310-0108

Mr. Ken Kopocis
Deputy Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
Mail code 4101M
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Secretary Darcy and Mr. Kopocis,

You are well aware of my deep concerns regarding the revisions to the regulatory definition of the term "waters of the United States" under the Federal Water Pollution Control Act recently promulgated by the Army and the Environmental Protection Agency. 80 Fed. Reg. 37,054 (Jun. 29, 2015). From claiming jurisdiction based on groundwater aquifers or the dispersal of seeds and insect eggs through bird droppings --- to the use of aerial photographs and ground level radar to identify the current or historic presence of a stream channel -- it seems as if each day uncovers yet another extreme and novel expansion of federal authority hidden in this rule.

It has recently been brought to my attention that under your new rule the Army and EPA are claiming the authority to regulate not only current streams and wetlands, but land where streams and wetlands may have existed long before the enactment of the Clean Water Act. If you had adequately consulted with local governments before developing this rule, you would have known that many years ago it was common practice to construct city sewer and stormwater systems in existing streams. Under your radical expansion of federal regulatory authority, these sewer and stormwater systems could now be regulated as waters of the United States, precluding their use to protect the public health and welfare of city residents.

According to the Questions and Answers on EPA's website: "Dry land is those areas that are not water features, such as streams, wetlands, lakes, ponds, and the like."[1] According to the preamble to the final rule, the agencies consider an area to be a "water feature" based on the historic, as well as current, presence of water. The preamble further states: "***Agency staff can determine historical presence of tributaries using a variety of resources, such as historical maps, historic aerial photographs***, local surface water management plans, street maintenance data, wetlands and conservation programs and plans, as well as functional assessments and monitoring efforts." 80 Fed. Reg. at 37,078-79; *see also id.* at 37,098.

[1] http://www2.epa.gov/cleanwaterrule/technical-questions-and-answers-implementation-clean-water-rule

The final rule definition of "tributary" includes water that flows through manmade features "such as bridges, culverts, ***pipes***, dams, or ***waste treatment systems***" and "relocated" streams. *Id.* at 37,078, 37,098. The final rule exemptions for stormwater control features only cover features that are created in dry land. The final rule exemptions for ditches that provide flow to navigable waters do not cover ditches excavated in a tributary or that relocate a tributary. Many stormwater and sewer systems were built in areas that under the new rule may be considered "tributaries." Since they are not covered by the exclusions for ditches and stormwater management features, they may be regulated "waters of the United States."

To demonstrate the extreme nature of that position, I would like to draw your attention to the history of the District of Columbia. Historical maps show the presence of former streams throughout Washington, D.C.[2] Historical photos show the Washington Canal along what is now Constitution Avenue.[3] Historical accounts provide the following information:

> "The Washington Canal has been entombed as an ***underground sewer*** when once it coursed down Constitution Avenue and emptied into the Anacostia River near the Navy Yard. All that remains today is a lock keeper's house on Constitution Avenue."[4]

> "A half a mile below Rock Creek, a stream named ***the Tiber flowed across tidal flats and comprised a marshy estuary in front of where the White House and executive mansion now stands at the base of what is now Capitol Hill. Tiber Creek was an estuary, also called Goose Creek, that originated in an extensive watershed in northeast Washington in what is now the area around Florida Avenue Northeast.*** The Tiber was a treacherous waterway, known for flash floods during heavy rains..."[5]

> "***The Tiber was navigable*** at ten feet deep for small boats up to what is now Florida Avenue."[6]

> "The [Washington] canal was a diagonal that ***began at James Creek at Buzzards Point and met the Tiber estuary on the Mall,*** a bit south of today's Pennsylvania Avenue. The ***canal opened on the Potomac*** at the foot of Seventeenth Street Northwest."[7]

> "***Tiber Creek was ultimately paved over and turned into an underground sewer. The remains of the Washington Canal were filled in to become Constitution Avenue.***"[8]

> "The Washington Canal was opened in 1815, a year after the British burned the capital during the War of 1812. ***It started at the Potomac just below the White House at Tiber***

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[2] *See* map of streams from 1861, available at: http://parkviewdc.com/2011/09/08/hidden-washington-tiber-creek/
[3] *See* photos, available at: http://civilwarwashingtondc1861-1865.blogspot.com/2012/04/washington-canal-cesspool-in-midst-of.html
[4] Wennersten, The Historic Waterfront of Washington D.C., The History Press (2014), at 28.
[5] *Id.* at 29.
[6] *Id.*
[7] *Id.* at 54.
[8] *Id.* at 80.

Creek and then headed east along what is now Constitution Avenue. Near the Capitol, it turned southeast down to the Navy Yard. The canal was filled in and is now Constitution Avenue."[9]

"To the Northwest, streams flowed down the sides of Petworth and Rock Creek Church yard to Piney Branch. To the Northeast, small streams trickled down the steep hills to Northwest Branch of the Anacostia River, while ***many brooks on the Southern slopes of these hills united at what is now First and S Streets Northwest*** and back of old St. Patrick's grave yard site and Moore's lane to form the upper end of Tiber Creek."[10]

"Below Florida Avenue or old Boundary Street and ***in O Street between North Capitol and 1st Street, Reedy Branch joined Tiber*** and deflected it to the East, crossing North Capitol Street above N street."[11]

"From the Northwest flowed ***Reedy Branch*** that had its source as late as twenty-five years ago near 13th Street and Columbia Road and ***took a Southeasterly course towards Sheridan Avenue,*** cutting deep scars in the rolling landscape and forming a lake or marsh at about where the Wilson High School now stands, at Eleventh and Harvard Streets, and whose waters now seep into the basement of that building after a rainy spell." [12]

"***Before the coming of street improvements, sewers and houses,*** this little branch crossed Florida Avenue at Eighth Street and meandered through the plain collecting waters from springs as far West as 14th Street and crossing Seventh Street near R Street and joining Tiber near First and O Streets."[13]

"From the Eastward ***a small stream was formed by two branches at 9th and H Streets from Kendall Green and Trinidad and joined Tiber at a point in front of the present Post Office building at Massachusetts Avenue and North Capitol Street.***"[14]

"The Park View and Grace Dodge Hotels are built over the valley of Tiber Creek while ***Union Station is built over the bed of the little stream from the East.***"[15]

"One more branch started at Willow Tree Spring North of New York Avenue between 4th and 5th Streets and flowed due South to Judiciary Square and turned Southeasterly ***down Indiana Avenue to join Tiber at Second Street.***" [16]

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[9] Peck, The Potomac River: A History and Guide, The History Press (2012), at 101.
[10] Duhamel, Tiber Creek, Records of the Columbia Historical Society. Washington, D.C., vol. 28 (1926), at 205.
[11] *Id.*
[12] *Id.* at 206.
[13] *Id.*
[14] *Id.* at 207.
[15] *Id.*
[16] *Id.*

> "***From the present Post Office site Tiber Creek followed a substantially southwesterly course to the Botanical Gardens and then formed a wide shallow bay running due West to the Potomac.***"[17]
>
> "One of the most popular and useful springs in early Washington history was the one in what is now Franklin Park and which Sessford says yielded several barrels of water per minute. The stream from this spring flowed Southeastward to the corner of 13th and H Streets and turned Eastward back of the Orphan Asylum, Old Ascension Church and the Van Ness Mausoleum between 9th and 10th Streets and then turned Southward along the edge of the hill on which the Patent Office stands and which was graded twice, in 1840 and 1870. ***This stream joined Tiber at 10th or 11th Street and its bed formed the dock of the old canal at that point.***"[18]
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> "***A second stream that crossed Pennsylvania Avenue to join the Tiber, had its origin at the foot of the hill on which the City Hall stands*** and which not only supplied the adjacent baths on C Street, back of the National Hotel, but also the several hotels in the neighborhood with water."[19]
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> "***A very small stream did flow from the Octagon House Southwestward and into the river near the Glass House at 22d Street***, and this seems to have been the only spring South of G Street and West of 17th Street, together with one at Easby's Point.[20]
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> "***From the Willow Tree Spring Branch that ran through Judiciary Square and Indiana Avenue,*** some 2,500 feet of iron pipe were connected in 1821 and a reservoir was built in 1828 at the corner of the latter avenue and 3d Street, from which water was carried as far as Pennsylvania Avenue and 10th Street. Remains of this reservoir could be seen as late as 1885 at the corner referred to before the houses that now stand thereon were built."[21]

Based on this historic information, and the language from the preamble to the final rule, is the D.C. sewer system below Constitution Avenue a buried stream that is considered a water of the United States? Is the stormwater collection system beneath Constitution Avenue a water of the United States? The headwaters of Tiber Creek can still be seen.[22] Is the Flager Place Trunk Sewer that follows the path of one of the former branches of Tiber Creek a water of the

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[17] *Id.* at 208.
[18] *Id.* at 210.
[19] *Id.* at 211.
[20] *Id.* at 219.
[21] *Id.*
[22] http://parkviewdc.com/2011/09/08/hidden-washington-tiber-creek/

United States?[23] In D.C., many sewers were built before 1930, well before the enactment of the Clean Water Act.[24] If built in a former stream, are these sewers also waters of the United States?

If you believe that these sewers are exempt waste treatment systems, please explain how a stormwater system that does not meet the terms of the specific exclusion for stormwater control features can be exempt under the more general waste treatment system exemption. Doesn't that fly in the face of rules of interpretation under which a general provision does not apply if the matter is dealt with more specifically in another provision? Also, please explain how a sewer installed before 1930 meets the condition that it be "designed to meet the requirements of the Clean Water Act." If any wastewater or stormwater management system, no matter when built, is considered to be "designed to meet the requirements of the Clean Water Act," please assure me that this interpretation applies to all waste treatment systems.

Finally, there are unexplained changes to the exclusions between the proposed and final rules. Please explain to me why the definitions of "waters of the United States" at 40 C.F.R. 112.2, 40 C.F.R. 116.3, 40 C.F.R. 302.3, and 40 C.F.R. 401.11 do not exclude waste treatment systems, as was proposed. Please explain to me why the proposed rule would have provided exclusions from all parts of the waters of the United States definition, but under the final rule the exclusions do not apply to navigable or interstate waters. Do the Army and EPA claim the authority to regulate ditches that meet the terms of an exemption but cross state lines, such as ditches along interstate highways? Do the Army and EPA intend to regulate artificial, constructed lakes and ponds created in dry land if they can float a kayak?

These questions demonstrate the grave concerns that many local governments have regarding your final rule, which I share. Thank you for your prompt attention to them. If you have any questions, please contact the Senate Committee on Environment and Public Works Majority Office at (202) 224-6176.

Sincerely,

James M. Inhofe
Chairman

Cc: Tom Cochran, CEO and Executive Officer, U.S. Conference of Mayors
Matthew Chase, Executive Director, National Association of Counties
Clarence Anthony, Executive Director, National League of Cities
George Hawkins, CEO and General Manager, D.C. Water
Adam Krantz, CEO, National Association of Clean Water Agencies

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[23] http://imaginaryterrain.com/blog/2013/07/streams/.
[24] https://www.dcwater.com/news/testimony/2013_testimony_of_charles_kiely.cfm