



**The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency**

**The Honorable R.D. James
Assistant Secretary of the Army
Department of the Army, Civil Works**

April 15, 2019

RE: Docket ID Number No. EPA-HQ-OW-2018-0149, Revised Definition of “Waters of the United States” Proposed Rule, Federal Register Vol. 84, No. 31

Dear Administrator Wheeler and Assistant Secretary James:

On behalf of our millions of members and supporters, Audubon is pleased to provide comments on the proposed revised definition of “waters of the United States” published in the Federal Register on February 14, 2019. The proposal, if finalized and implemented, would severely weaken Clean Water Act (CWA) protections for critical wetland areas and streams important to birds and their habitats. We urge you to withdraw the current proposed rule and instead retain the definition of “waters of the United States” promulgated in the June 29, 2015, Final Rule, “Clean Water Rule: Definition of ‘Waters of the United States’.”

Application of a new definition of “waters of the United States” by your agencies contradicts solid scientific evidence on the value of a variety of waters to birds and ecosystems. The proposed rule change does not, as claimed in the proposal, achieve the goals of clarification or simplification of jurisdictional waters under the CWA. Existing finalized rule provisions that define terms such as “adjacent”, “tributary”, and “significant nexus” are legally sound and were developed after considerable scientific analysis and public input. Altering or omitting these definitions actually serves to increase uncertainty and confusion for conservation groups such as Audubon, as well as developers and landowners who must make important decisions about when to seek a permit for their activities that have the potential to harm wildlife and habitat.

For more than a century, Audubon has worked to protect water resources as part of our mission to protect birds and the places they need for today and tomorrow. With our national and international programs, 23 state and regional offices, dozens of education centers and sanctuaries, and nearly 500 local chapters, we have played a key role in some of the country’s most important and lasting conservation victories.

IMPLICATIONS OF THE PROPOSED RULE FOR BIRDS OF THE UNITED STATES

Waters throughout the United States, including waters adjacent to or neighboring traditional navigable waters, ephemeral streams, and wetlands without a direct surface hydrological connection to traditional navigable waters, serve as essential habitat for birds and other wildlife. Birds use lakes, tributaries, streams of all types, ponds, isolated wetlands, prairie potholes, and other water bodies for breeding, nesting and raising young. These water bodies provide crucial sources of drinking water, food, and nutrition for birds, from invertebrate insects and small vertebrates to a wide variety of plants found along streams, shorelines, and in wetland areas. Birds require these waters for stop-overs during migration, where they can rest and access food and clean water during their journey. Wetlands, riparian areas, and associated vegetation create needed shelter for birds as they seek protection from predators and harsh weather. Streams and wetlands also provide space and opportunity for important social interactions among birds, supporting healthy individuals and thriving species populations.

Wetlands in particular are critical for bird health and population stability. Approximately one-third of North American bird species, including the Bald Eagle, Great Blue Heron, the Brown Pelican, and the Prothonotary Warbler use wetlands for food, shelter, or breeding. One hundred thirty-eight species and subspecies of birds in the U.S. are designated as “wetland dependent.”¹ These birds include cranes, grebes, herons, kingfishers, loons, owls, perching birds, pelicans, shorebirds, falcons, and waterfowl. Twenty-seven types of ducks, from the Wood Duck to the Blue-Winged Teal, twenty types of gulls and terns, seventeen types of herons, seven types of Warblers, egrets, bitterns, and many other species depend on wetlands of many types at some point in their lifecycle in every region of the country.

Currently, fifteen of these wetland-dependent species and subspecies are designated as federally endangered or threatened: the Bachman’s Warbler, California Ridgway’s Rail, Cape Sable Seaside Sparrow, California Least Tern, Eskimo Curlew, Everglade Snail Kite, Light-footed Ridgway’s Rail, Mississippi Sandhill Crane, Piping Plover, Snowy Plover, Whooping Crane, Willow Flycatcher, Wood Stork, and the Yuma Ridgway’s Rail. Protecting these birds’ habitats is absolutely essential to their future survival.

Birds require the clean water and thriving ecosystems found in and around healthy water bodies to survive. They do not just depend on the water itself, but on the entire areas along rivers, streams, shorelines, water in depressions in the landscape, the soil, as well as the fish, insects, and plants across the entire watershed. To provide this important resource for birds, surface waters must have adequate flow and be the appropriate depth for the feeding or resting behaviors of different bird species. Wetlands and streams must be allowed to flood or be inundated with water at appropriate intervals, whether regular, intermittent, or seasonal, in order to restore water levels, replenish useful nutrients in the soil, and support critical vegetation. Clean, accessible water is vital to birds for fish, insect and plant food sources, healthy breeding habitats, adequate protection from predators, and necessary resting points during migration.

When rivers, streams, and wetlands are not protected under the CWA and allowed to be altered, degraded, filled, or even eliminated, the bird species depending on those waters face serious risks. Construction, industrial activity, and pollution of various forms drastically alters the delicate ecological balance of these ecosystems. For birds, the scope of important wetland and stream areas extend

¹ American Ornithologists' Union, 1983, Check-list of North American Birds.

beyond only the traditional navigable waters and directly connected tributaries and wetlands that are proposed to be within the CWA's jurisdiction in the proposed rule.

NEW PROVISIONS AND OMISSIONS FROM PREVIOUS RULE NEGATIVELY IMPACTING BIRDS AND HABITATS

We oppose the following approaches and specific provisions of the proposed rule revising the definition of "waters of United States":

Lack of Overall Scientific Basis and Ecological Foundation

The 2015 rule's scientific and evidenced-based approach to connectivity of waters more fully supported the wide geographic and hydrological range of waters birds need to survive and thrive. Rather than the narrow jurisdictional approach in the proposed rule, birds are better served with CWA protections that recognize that wildlife and the waters that support them depend on the strength of entire watershed ecosystems. Many bird species rely on multiple watersheds around the U.S during a year and throughout their life-cycle. Wetlands not directly connected to a jurisdictional water, ephemeral streams, ponds, and other waters excluded in this proposal serve important aquatic functions for all life in local and regional ecosystems, including sediment trapping, nutrient recycling, pollution trapping and transformation, and flood water storage. They also provide fundamental habitat services for birds such as foraging, feeding, nesting, breeding, and use as a nursery area.

Exclusion of Ephemeral Streams

Exclusion of ephemeral streams from the definition of "tributary," by designating that the waters must contribute perennial or intermittent flow to downstream navigable waters, removes important protections from waters that flow as a result of precipitation. Along with changes to what constitutes "flow," this provision would result in a narrower scope of "waters of the United States" that excludes many waters important to birds. Though ephemeral streams may only flow after a rain or shorter-term surface inundation, they provide water for larger streams and rivers, filter pollutants, capture nutrients, and provide important habitat for wildlife. Categorically excluding all ephemeral streams from CWA protection is a dramatic departure from decades of regulatory practice that followed science and common sense to protect our nation's water resources. Whether a stream flows year-round or a few weeks a year, from snowmelt, surface flow, or groundwater, birds need the protection of the waters for shelter, food, and breeding.

Narrow Definition of "Adjacent Wetland"

The new proposed definition of "adjacent wetland" and the expanded requirement that to be protected, a wetland must meet all three delineation criteria, will not protect all waters that feature important ecological connections to traditional jurisdictional waters and tributaries. Wetlands that meet just one or two of the delineation requirements, whether inundation or saturation by water, sufficient frequency and duration of this saturation or inundation, or the presence of wetland vegetation, are still critical for many birds' access to clean, adequate water sources. Wetlands that do not fall within the proposed requirements for abutting a jurisdictional water, but that met the 2015 criteria for adjacent wetlands, would also be left out in the new definition. This provision would result in many critical wetland areas not being protected under the CWA, likely exposing birds and their habitats to harm through development and degradation.

Limited Surface-Only Hydrological Connection

Requirements that, to be covered as an adjacent water, a water body must have a direct surface hydrological connection to traditional navigable waters or their tributaries excludes many streams and wetlands important to birds from CWA protection. Along with removing protections for the many waters separated by a natural or constructed barrier that do not convey consistent flow downstream, this provision would remove protection for water resources critical for bird populations, whether resident species or migratory species who rely on clean water during crucial rest and stop-over periods. Many wetlands and streams throughout the U.S. receive water from precipitation such as rain or snow and/or through a sub-surface hydrological connection. Furthermore, many wetland features, such as prairie potholes, operate as an interconnected ecological system that contributes vital physical, biological and chemical functions in the region, rather than operating in isolation, and must be considered as such when determining CWA protection.

New Limiting Definition of "Intermittent"

The addition of this provision defining the term intermittent, which requires a water flow from more than precipitation, narrows coverage of many important streams for birds that receive a combination of water from groundwater, surface water, and precipitation.

Exclusion of Precipitation as Water Source

Many bird species depend on the clean water in streams and wetlands that are primarily fed through precipitation, whether seasonal, intermittent, or ephemeral in nature. The rule should not exclude protections from certain waters simply because their source is rainfall or snowfall/snowmelt at certain times of the year, which can provide clean water and healthy, suitable habitat for some bird species.

Omission of Case-by-Case "Significant Nexus"

The proposal would remove the opportunity to apply CWA protections through a case-by-case analysis for three important categories of waters: subtypes of wetlands including prairie potholes, Carolina Bays and Delmarva bays, pocosins, Western vernal pools, and Texas coastal prairie wetlands; all waters within the 100-year floodplain of a traditional navigable water; and all waters located within 4,000 feet of the high tide line or ordinary high water mark of these waters and their tributaries. When carefully and consistently applied, including these waters as jurisdictional - as they affect the biological, chemical, or physical integrity of downstream waters - supports critical functions of watersheds and ecosystems for birds' nutritional, shelter, and breeding needs.

Narrow Inclusion of Lakes and Ponds

The proposed rule's inclusion as jurisdictional only those lakes and ponds that meet the exact definition of a traditional navigable water or contribute perennial or intermittent flow to those waters, excludes protections of lakes and ponds that are covered by being adjacent to jurisdictional waters under the 2015 rule. As with other types of waters, lakes and ponds play very important roles in bird health and survival as sources of drinking water, breeding and nesting habitat, food sources, and shelter.

Removal of Great Lakes Region Protection

Omission of specific protection for waters within 1,500 feet of the ordinary high water mark of the Great Lakes, as included in the previous rule, would remove vital protections that support the health and populations of dozens of bird species in and around the Great Lakes region.

HOW THE PROPOSED RULE WOULD ADVERSELY IMPACT SPECIFIC BIRDS AND HABITATS

The actions of your agencies in changing CWA protections for water resources through finalizing the proposed rule would have significant real-life consequences for bird health and population survival. Below, we provide several examples that demonstrate likely impacts on birds and habitats due to changes in jurisdictional waters of the United States in regulation and guidance. This is just a small sample of the millions of miles of streams, tens of thousands of acres of wetlands, and dozens of bird species that would face degradation and harm with lower, or completely eradicated, CWA protections.

Serious Risk to Avian Species in the Arid Southwest

Riparian forests and wetlands, which are fed by ephemeral as well as perennial and intermittent water flow, are essential for birds in the arid Southwest. Losing protections on thousands of stream and river miles because they only flow at certain times of the year or after rain events or snowmelt will negatively impact the birds who rely on these important water resources throughout the Southwest.

Under the proposed rule, many waterways in the Southwest that flow for only portions of the year would be excluded from Clean Water Act protections. This means ephemeral waterways like the Rio Puerco in New Mexico, Centennial Wash in Arizona, Milpitas Wash in Southern California's Imperial County and Chemehuevi Wash in San Bernardino County would no longer be protected. Without these protections, developers can build in these areas without federal permits, and the waterways and their surrounding environments would be unprotected from potentially harmful discharges.

Along many of the dry washes in the desert Southwest, trees like mesquite, palo verde, and ironwood thrive. Growing into dense forests, these trees then support abundant avian life, especially Lucy's Warblers, Bell's Vireos, Black-tailed Gnatcatchers, Phainopeplas, and Ladder-backed Woodpeckers. These woodlands comprise only five percent of the acreage in the desert regions of the Southwest but support 90 percent of the bird life, according to *A Natural History of the Sonoran Desert*. For these habitats to be stripped of their protections under the Clean Water Act means a serious risk of habitat loss in areas of outsized importance for birds.

Endangering Great Lakes Migration Habitat Recovery

The Great Lakes region provides habitat for more than 400 diverse bird species passing through the region twice every year on their annual migration or to find suitable habitat to breed. Many of these birds depend on the availability of wetland habitat to rest and refuel on their long journeys or to find a safe place to settle and raise young. The Great Lakes region has already lost 66 percent of its historic wetlands. Audubon's analysis of marsh bird population trends ("Great Lakes Marsh Monitoring Program, Bird Studies Canada) tells us that many bird species in Great Lakes are near the brink and cannot afford to lose any more habitat. Species such as Least Bittern and Pied-billed Grebe were once

abundant in the region, but, consistent with the loss of quality wetland habitat, have been in steep decline for the past 30 years. The Black Tern in particular has seen an 80% reduction in its Great Lakes population.

Additionally, half of the streams in the Great Lakes states do not flow year round, putting them, and adjacent wetlands, at risk if this new rule takes effect. Development has already fragmented the majority of large wetland complexes throughout the region, leaving smaller pockets of marsh or wet grasslands as critical refuge for birds and other wildlife. Virginia Rail and Sora, for example, are both known to successfully breed in wetlands smaller than five acres. Wetlands are vital to protecting the Great Lakes watershed and the birds that depend on them. Protecting and enhancing wetlands has been a key part of the Great Lakes recovery story - there has been more than \$3.1 billion in federal funding invested to restore the Great Lakes over the last ten years with programs such as the Great Lakes Restoration Initiative. This new rule would put this past investment at future projects at risk.

Degraded Critical Habitat in Carolina Low County

Since 1969, Audubon has led the conservation efforts for important wetlands and streams within Four Holes Swamp and surrounding land in the Audubon-owned Francis Beidler Forest north of Charleston, SC. We protect 18,000 acres of old-growth cypress swamp forest that is home to cypress trees as old as 1, 500 years. Four Holes Swamp, a Ramsar Wetland of International Importance, provides a large portion of freshwater flow into the Edisto River, which then feeds over 60 percent of the water into the ACE Basin, a 200,000 acre river delta.

The streams, wetlands, and associated plants, animals, and insects throughout the swampland together support the entire life-cycle of the birds who make it their home. The historic cypress trees are essential bird habitat for the Barred Owl, Prothonotary Warbler, and nearly 140 other bird species in the riparian corridor. They serve as critical shelter areas for these species, which need contiguous habitat for breeding, nesting, and raising young. Along with plentiful trees, the wetlands are home to amphibians, insects, and vegetation that bird species depend on as part of the food web.

If some waters in or around Four Holes Swamp were not considered “waters of the United States” and the area was opened for alteration or development, changes to the swampland, upstream areas, and gaps within the greenbelt buffer would certainly degrade or eliminate important bird habitat and impair water quality. Under the proposal, it is unclear whether certain wetland areas would fall under the definition of “waters of the United States” and be subject to CWA protections based on different potential determinations of “intermittent flow”, what is a “typical year” based on a 30 year rolling average, or what exactly demonstrates a “direct hydrological connection.” With this confusion, development effecting upstream and other ecologically-connected waters could occur, likely resulting in the removal the very trees essential for birds as well as expose the streams and wetlands to degradation from disturbance and increased pollution, further imperiling species dependent on available, clean water sources for health and survival. In addition, tree removal and development changes regional water hydrology and would likely expose wetlands to increased flooding, further disrupting the ecosystem functions and hydrological balance in Four Holes Swamp and the surrounding ecologically significant forest that Audubon has worked so hard for 50 years to conserve.

Significant Wetland Losses in the Everglades

The Audubon Corkscrew Swamp Sanctuary in Naples, FL, is critical nesting habitat for wading birds like the threatened Wood Stork. This sanctuary was once the largest Wood Stork rookery in the nation, and requires further protection and restoration of shallow, seasonal wetlands and scarce wet prairies to fully recover. However, most wet prairies are threatened by the rule because they are inundated less than six months a year. Half of Florida's nearly 12 million wetland acres are at risk of losing protections under this new proposal. Hundreds of thousands of acres of Florida's shallow, seasonal wetlands – including wet prairies, hydric pine flatwoods, and hydric hammock – are particularly vulnerable to losing Clean Water Act safeguards. The Florida Department of Environmental Protection has estimated that over 800,000 acres of wetlands in the Panhandle region alone are so called “isolated” waters likely to lose Clean Water Act protection.

Jeopardizing Economic and Ecological Progress in the Delaware River Watershed

The Delaware River Watershed covers portions of Pennsylvania, Delaware, New York and New Jersey over a 13,500-square-mile area, gives home to over 400 bird species and provides a valuable source of clean water for over 13 million people. A reduction in waters covered under the Clean Water Act as “Waters of the United States” would open habitat throughout the Watershed to development and impair water quality. Riparian forests and wetlands serve an essential function for birds in the Delaware River Watershed. Wetland-dependent species in the Watershed that may be impacted by the proposed rule include the American black duck, blue winged teal and black winged teal.

Recognizing the Watershed's national importance, Congress passed the Delaware River Basin Conservation Act in 2016. Significant funding has been committed to this nascent program for on-the-ground conservation and restoration projects that will conserve and restore fish and wildlife habitat, improve and maintain water quality, sustain and enhance water management and reduce flood damage, and improve recreational opportunities and public access in the Watershed. Weakening the Clean Water Act by promulgating the proposed rule puts the future success of this critical program at risk.

When adequately protected, a healthy watershed is an advantage to future economic growth in key parts of the Watershed. The Watershed as a whole generates \$25 billion in annual economic activity, including agriculture, recreation and eco-tourism, hunting and fishing, port benefits, commercial fishing, and supports at least 600,000 jobs with over \$10 billion in annual wages.

A key driver of this value is a high-quality environment. For example, in Carbon County, Pennsylvania, a “Return on Environment” study was performed in 2018, which sought to quantify the value that complex natural systems provide to the community. This robust economic analysis revealed the county's natural environmental features – including wetlands and forested stream buffers – deliver productive assets generating over \$800 million annually in avoided costs for natural system services, revenues from outdoor recreation and local and state taxes, and increased tax revenues from real estate premiums.

Land areas with the highest Return on Environment are headwaters and forested wetlands, riparian and floodplain forests, and upland forests over 750 acres, the report found.² If key landscapes in Carbon County are not considered “Waters of the United States” – and removal of the case-by-case “significant

² Kittantiny Ridge Carbon County Return on Environment. https://kittatinnyridge.org/wp-content/uploads/2018/07/KIT_ROE_carbon_report_final.pdf

nexus” analysis makes that more likely – they may be at risk for development and it will fall to Pennsylvania to regulate this nationally important landscape. A loss of federal protection for these key wetlands would trigger a cascade of ecological and economic impacts.

Audubon opposes finalizing this proposed rule. The science-based definition of “waters of the United States” set forth in the 2015 Clean Water Rule provides a feasible and ecologically sound definition for the large range of water resources on which hundreds of bird species depend. From the Wood Stork to Warblers, birds are valuable contributors to entire ecosystems and need your agencies to expand or retain, not remove, critical CWA protections.

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