

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

KEITH B. ASHDOWN, STAFF DIRECTOR
GABRIELLE A. BATKIN, MINORITY STAFF DIRECTOR

April 27, 2015

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Dear Administrator McCarthy:

The Committee on Homeland Security and Governmental Affairs is examining the Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) proposed "Waters of the United States" rule. I write today to request clarification of the EPA's response to my February 3, 2015 letter.¹ With a number of still-unaddressed concerns in the agriculture and farming communities about the proposed rule,² I request your assistance with this matter.

In my February 3rd letter, I asked for the EPA to respond to questions and provide documentation about the proposed rule's impact on state regulation of waters, the rule's consistency with the Congressional intent of the Clean Water Act ("CWA"), and the legal analysis justifying the rule's compliance with the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006).³ The response I received was incomplete as it lacked a full explanation and supporting documents to justify EPA's conclusions.

On March 24, 2015, the Senate Committee on Agriculture held a hearing about the hazards that the proposed "Waters of the United States" rule would present to farmers, local governments, and various contributors to the agriculture and public health communities.⁴ The hearing featured testimony from groups as varied as forestland owners, mosquito-control departments, and livestock producers, who stated that they would be subject to significant policy changes and confusion if the proposed rule is adopted.⁵ Although the EPA has stated the proposed rule clarifies pre-existing law, one lumber businessman testified that the rule does otherwise. He testified:

¹ See Letter from Kenneth J. Kopocis, Deputy Assistant Admin., U.S. Env'tl. Prot. Agency (Mar. 16, 2015) (on file with the Comm.); See also Letter from Sen. Ron Johnson, Chairman, Sen. Comm. on Homeland Sec. & Governmental Affairs, to Hon. Gina McCarthy, Adm'r., U.S. Env'tl. Prot. Agency (Feb. 3, 2015) (on file with author).

² See *Waters of the United States: Stakeholder Perspectives on the Impacts of EPA's Proposed Rule Before the Senate Comm. On Agric., Nutrition and Forestry*, 114th Cong. (2015).

³ See Johnson, *supra* note 1, at 3.

⁴ See *Waters of the United States: Stakeholder Perspectives on the Impacts of EPA's Proposed Rule Before the Senate Comm. On Agric., Nutrition and Forestry*, *supra* note 2.

⁵ See *id.*

[T]he proposed rule would expose our facilities to significant uncertainty and risk. It will not be a simple process to determine whether a water is regulated, and the ambiguity will not work in our favor. It will expose us to lawsuits and will require a massive expenditure of time and money to ensure compliance.⁶

Further, according to testimony provided during the hearing, the proposed rule threatens to duplicate existing state-based regulations. Some states already regulate discharges to “waters of the state,” and impose specific restrictions on livestock producers.⁷ Wisconsin has a similar statute which individuals in the agriculture community have been operating under since 1973.⁸ Those stakeholders have applied for permits, paid substantial costs in associated fees, improved farm operations, and have become familiar with the existing regulations. A new and complex federal regulatory scheme threatens farmers with duplication, more costs, and added potential liability.

On April 6, 2015, you and Jo-Ellen Darcy, United States Assistant Secretary of the Army, issued a joint statement announcing that the EPA and Army Corps had submitted the draft rule to the Office of Management and Budget.⁹ The statement notes that given the “more than one million public comments” on the proposed rule, the EPA is considering some changes to the rule’s original language.¹⁰ Specifically, the EPA stated it would “better define how protected waters are significant”; “define tributaries more clearly”; clarify what waters are considered “adjacent”; and specify what constitutes as “other waters.”¹¹ While clarity in any regulation is important, EPA’s statements do not alleviate stakeholders’ concerns that the rule, once finalized, may result in burdensome requirements.¹²

Because the EPA’s March 16, 2015, response did not fully answer all of the Committee’s requests and given the additional concerns raised since then about the proposed rule, I reiterate my requests contained in my February 3, 2015 letter. Specifically, I ask that you provide clarification on the following issues:

⁶ *Waters of the United States: Stakeholder Perspectives on the Impacts of EPA’s Proposed Rule Before the Senate Comm. On Agric., Nutrition and Forestry*, 114th Cong. (2015) (statement of T. Furman Brodie, Vice President, Charles Ingram Lumber Inc.).

⁷ *Waters of the United States: Stakeholder Perspectives on the Impacts of EPA’s Proposed Rule Before the Senate Comm. On Agric., Nutrition and Forestry*, 114th Cong. (2015) (statement of Jeff Metz, Owner & Operator, Metz Land & Cattle Co.).

⁸ Wis. Stat. § 283.01.20 (1979)

⁹ Gina McCarthy & Jo-Ellen Darcy, *Your Input is Shaping the Clean Water Rule*, EPA Connect (Apr. 6, 2015, 12:10 PM), <http://blog.epa.gov/epaconnect/2015/04/your-input-is-shaping-the-clean-water-rule>.

¹⁰ *See id.*

¹¹ *Id.*

¹² *See Waters of the United States: Stakeholder Perspectives on the Impacts of EPA’s Proposed Rule Before the Senate Comm. On Agric., Nutrition and Forestry*, 114th Cong. (2015) (statement of T. Furman Brodie, Vice President, Charles Ingram Lumber Inc.).

1. I asked about the effect of the proposed rule on existing state regulation of bodies of water.¹³ The EPA responded that “the proposed rule in no way affects or supersedes the ability of states to protect their waters.”¹⁴ However, the Corps’ response to the same question explained that the proposed rule would not “have substantial direct effects on the states, on the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government.”¹⁵
 - a. Given this difference between the EPA’s response that the proposed rule will “in no way” affect state protection of waters and the Corps’ response that the rule will have no “substantial direct effects” on the state protection of water, please clarify whether the proposed rule will impose changes to state protection that may not be considered “direct” effects.
 - b. Given the Corps’ response, does the EPA anticipate the proposed rule having indirect effects to state protection of waters? If so, please describe what indirect effects may occur.

2. I asked about the proposed rule’s compliance with Congressional intent of the Clean Water Act.¹⁶ The EPA responded that in working with states to support their efforts to protect water quality, “[t]he agencies have worked hard to ensure that the proposed rule embodies and reflects these fundamental [Clean Water Act] principles, to which we are strongly committed.”¹⁷ The EPA’s answer was incomplete, and the EPA withheld the requested documents.
 - a. Please explain the EPA’s justification for the proposed rule’s consistency with the specific Congressional intent provided by the legislative history of the Federal Water Pollution Control Act of 1948 and the subsequent Clean Water Act of 1972.
 - b. Please produce all documents and communications referring or relating to the EPA’s evaluation of the Congressional intent of the Federal Water Pollution Control Act of 1948 and subsequent Clean Water Act of 1972.

3. I asked for an explanation of the EPA’s legal justification for how the proposed rule comports with the Supreme Court guidance given by the plurality decision in *Rapanos v. United States*, 547 U.S. 715 (2006).¹⁸ The EPA’s conclusory response stated that the proposed rule is consistent with Supreme Court guidance,¹⁹ without explanation or supporting documentation.

¹³ Letter from Sen. Ron Johnson, Chairman, Sen. Comm. on Homeland Sec. & Governmental Affairs, to Hon. Gina McCarthy, Adm’r., U.S. Env’tl. Prot. Agency (Feb. 3, 2015) (on file with author).

¹⁴ Letter from Kenneth J. Kopocis, Deputy Assistant Admin., U.S. Env’tl. Prot. Agency (Mar. 16, 2015) (on file with the Comm.).

¹⁵ Letter from Steven L. Stockton, Dir., U.S. Army Corps of Eng’rs, to Sen. Ron Johnson, Chairman, Sen. Comm. on Homeland Sec. & Governmental Affairs (Mar. 10, 2015) (on file with the Comm.).

¹⁶ Johnson, *supra* note 13, at 3.

¹⁷ Kopocis, *supra* note 14, at 2.

¹⁸ Johnson, *supra* note 13, at 4.

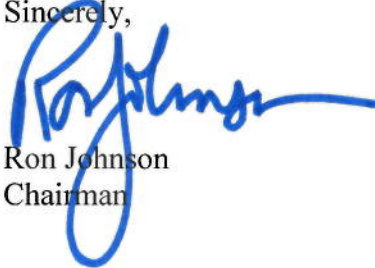
¹⁹ Kopocis, *supra* note 14, at 2.

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- a. Please explain the EPA's legal analysis behind the conclusion that the proposed rule comports with Supreme Court guidance.
- b. Please produce all documents and communications referring or relating to the EPA's evaluation of its legal authority to pursue this proposed rulemaking in light of *Rapanos*.

Please provide this clarifying information as soon as possible, but no later than by 5:00 p.m. on May 11, 2015. Thank you for your prompt attention to this matter.

Sincerely,



Ron Johnson
Chairman

cc: Thomas R. Carper
Ranking Member