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United States Senate

SENATE STEERING COMMITTEE

April 3, 2014

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator McCarthy:

We write to you today regarding our concerns about the Environmental Protection Agency's (EPA) proposed rule to significantly expand its permitting authority over American farmers, construction workers, miners, manufacturers and private landowners, among others, by unilaterally changing the definition of "waters of the United States" under the Clean Water Act. We believe that this proposal will negatively impact economic growth by adding an additional layer of red tape to countless activities that are already sufficiently regulated by state and local governments.

This proposed rule will do little to clarify the ambiguities of Clean Water Act regulation. In fact, the agency's proposed interpretation of "significant nexus" is vague enough to allow EPA to assert its jurisdiction over waters not previously regulated, rather than to curtail its jurisdiction, as the agency suggests. Furthermore, the rule continues to incorporate the Kennedy "sufficient nexus" test that arose out of *Rapanos v. United States* (547 U.S. 715 (2006)) without meaningfully addressing the Scalia test that also arose out of that ruling. Specifically, Justice Scalia called for jurisdictional waters to mean only *relatively permanent, standing or flowing bodies of water*, such as streams, rivers, lakes, and other bodies of water "forming geographic features."[1] This definition leads him to exclude "channels containing merely intermittent or ephemeral flow."[2] We feel there is no justification for EPA's failure to respond in detail to the equally important interpretation put forth by Justice Scalia.

We also take issue with EPA's reckless disregard for the science that will apparently underpin this ruling. The report, titled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,* has not been finalized, and Science Advisory Board peer review for the report is not yet complete. For EPA to propose a rule without

[1] 547 U.S. at 732-33, *emphasis added.*
[2] *Id.* At 733-34.

the supposed foundational scientific document firmly in place both violates the spirit of the Administrative Procedures Act, as well as OMB and agency circulars. It is our belief that EPA should withdraw this proposed ruling until such time as the Science Advisory Board completes its review of the *Report* and the *Report* is finalized. Failure to do so puts the legitimacy of the *Report*, and thus, the underlying science of the rule, in doubt, and creates the impression that the EPA intends to finalize this rule on its own whims, rather than on the validity of the science.

Finally, we understand that EPA is currently soliciting comments from the public on this proposal. Given the serious impact that this proposal will have on our constituents, if enacted, we request that you give all due consideration to the correspondence that you receive and extend the comment period to the full 180 days as provided by current law.

We appreciate your prompt attention to this matter.

Sincerely,

Pat Toomey

David Vitter

(FL)

Tom Cole

John Cornyn

Mike Enzi

Deb Fischer

Jeff Sessions

Ron Johnson

Jim Risch

Sarpy Chambliss