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United States Senate

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

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February 3, 2015

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

Dear Administrator McCarthy:

I write to express my concern about the Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) proposed "Waters of the United States" rule under the Clean Water Act.¹ If finalized, I worry that the rule will not only expand the EPA's and the Corps' regulatory powers beyond a scope that Congress ever intended, but it will also force farmers and ranchers as well as state and local governments to bear the burden of additional compliance costs.

In the Clean Water Act, Congress authorized the EPA and the Corps to regulate the "navigable waters" of the United States.² Current regulations limit this term to cover all waters that are used in interstate or foreign commerce; all interstate waters; all intrastate waters in which the use, degradation or destruction of the water could affect interstate or foreign commerce; the territorial seas; all impoundments and tributaries of those waters; and all wetlands adjacent to those waters.³ The EPA's and the Corps' proposed rule, however, significantly expands this authority. Under its proposed rule, the EPA and the Corps could claim jurisdiction over smaller bodies of water that form a "significant nexus" with other navigable bodies of water that are already covered by the Clean Water Act. According to the EPA and the Corps, a "significant nexus" is formed when a pool of water "significantly affects the chemical, physical, or biological integrity of other covered waters [specified in the Clean Water Act]."⁴

Many stakeholders in the agriculture industry worry that the EPA's and the Corps' ambiguous definition of what constitutes a "significant nexus" could lead to confusion and expose farmers to litigation.⁵ According to recent reports, the proposed rule would give the EPA and the Corps the authority to "expand the scope of water protected under the [Clean Water Act] to include not only rivers and lakes but ditches, stream-beds and [man-made] ponds that only

¹ Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22188 (proposed April 21, 2014) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pt. 230.3), <http://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf>.

² See, 33 U.S.C. § 1; 33 U.S.C. § 1362.

³ 33 C.F.R. § 328.3(a) (Corps); 40 C.F.R. §122.2 (EPA)

⁴ Definition of "Waters of the United States," *supra* note 1 at 22189.

⁵ Memorandum from Karen Gefvert, Director of Government Relations, Wisconsin Farm Bureau Federation to U.S. Army Corps of Engineers, Department of the Army, Department of Defense, and Environmental Protection Agency, 3 (Nov. 13, 2014), <http://wfbf.com/wp-content/uploads/2010/12/CWA-WOTUS-Nov-2014-2.pdf>.

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carry water when it rains.”⁶ As a result, farmers could end up having to “pay for costly environmental assessments and apply for federal permits allowing them to till soil, apply fertilizer or engage in some conservation practices.”⁷

The threat of the EPA’s and the Corps’ increased regulatory overreach has already triggered trepidation from many agriculture industry representatives, including farming advocates from Wisconsin. According to the *Green Bay Press Gazette*, Duane Maatz, executive director of the Wisconsin Potato & Vegetable Growers Association, warned that the proposed regulation would “be hazardous to agriculture [and] ... would cost jobs.”⁸ In addition, in its November 2014 comments on the proposed rule, the Wisconsin Farm Bureau Federation (WFBF) explained that the rule “was written without consultation of states that will be designated with enforcement authority. It lacks clarity regarding exemptions. It creates confusion by changing the scope of the definitions and terminologies found within the Clean Water Act.”⁹ Further, WFBF warned that the proposed rule disregards Congressional intent of the Clean Water Act and, if implemented, would result in an “undue burden on agriculture in Wisconsin.”¹⁰

Additionally, the specific benefits of the proposed rule are unclear. In March 2014, the EPA and the Corps released its economic analysis of the “Waters of the United States” rule. Based on the agency’s and the Corps’ calculations, the total estimated cost of the proposed action ranged from \$133.7 million to \$231 million.¹¹ However, according to Dr. David Sunding, a professor of agricultural and resource economics at the University of California, Berkeley, the EPA’s “entire analysis is fraught with uncertainty” and is not an accurate evaluation of the actual cost of implementing the rule.¹² Furthermore, Dr. Sunding stated that “the errors, omissions, and lack of transparency in [the] EPA’s study are so severe [that it renders it] virtually meaningless.”¹³

Given the criticism that surrounds the EPA’s and the Corps’ proposed “Waters of the United States” action as well as the growing concern that the rule will cost jobs and harm agriculture across the country, I ask that you please provide the following information and material:

⁶ Christopher Doering & Donovan Slack, *Wisconsin farmers blast EPA ‘overreach,’* GREEN BAY PRESS GAZETTE, June 29, 2014, <http://www.greenbaypressgazette.com/story/money/2014/06/29/wisconsin-farmers-blast-epa-overreach/11470969>.

⁷ *Id.*

⁸ *Id.*

⁹ Gefvert, *supra* note 5 at 1.

¹⁰ *Id.* at 3.

¹¹ U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, *Economic Analysis of Proposed Revised Definition of Waters of the United States* (March 2014), http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.

¹² David Sunding, REVIEW OF 2014 EPA ECONOMIC ANALYSIS OF PROPOSED REVISED DEFINITION OF WATERS OF THE UNITED STATES at 31 (May 15, 2014), <http://www.nssga.org/economist-reviews-epas-economic-analysis-proposed-waters-united-states-rule>.

¹³ *Id.* at 2.

1. According to the Wisconsin Farm Bureau Federation (WFBF), the proposed “Waters of the United States” rule by the EPA and the Corps was “written without consultation of states that will be designated with enforcement authority.”¹⁴ Did the EPA consult with states that will be designated with enforcement authority while writing the proposed rule?
 - a. When did the EPA’s consultation with states begin? Which EPA official(s) conducted this consultation?
 - b. If the EPA did not consult with the states, why did the EPA not consult with the states before writing this rule?
 - c. Please produce all documents and communications referring or relating to the EPA’s consultation with states that will be designated with enforcement authority.
2. According to the WFBF, under the proposed rule many waters once regulated by the state of Wisconsin would fall under the jurisdiction of the EPA or the Corps.
 - a. How many other states that already regulate bodies of water would be subject to the EPA’s jurisdiction if the proposed rule is finalized?
 - b. Does the EPA believe that the proposed rule would be duplicative in those cases?
 - c. Please produce all documents and communications referring or relating to the EPA’s deliberations for expanding its regulatory authority over waters that have traditionally been under state control.
3. How is the proposed rule compatible with Congressional intent of the Federal Water Pollution Control Act of 1948 and subsequent Clean Water Act of 1972? 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.
4. Many of the broadened definitions in the EPA’s and the Corps’ proposed rule (such as “tributary” and “adjacent wetlands”) have led to confusion within agriculture communities. What steps will the EPA take to ensure that farmers, ranchers, and small businesses understand the expanded definitions proposed by the EPA and the Corps? Please explain.
5. Under the proposed rule, the EPA and the Corps would have jurisdiction to regulate ditches, farm ponds, dry stream beds, and ephemeral streams. Does the EPA believe that a farmer should face potential liability if he fails to secure a

¹⁴ Gefvert, *supra* note 5 at 1.

permit for a farm pond that forms on his property after a rainstorm? Please explain.

6. In *Rapanos v. United States*,¹⁵ a plurality of the Supreme Court held that “the only plausible interpretation” of the phrase “waters of the United States” includes “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’ The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”¹⁶ Please explain the EPA’s legal justification for how the proposed rule comports with this Supreme Court guidance. 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 material as soon as possible but no later than 5:00 p.m. on February 17, 2015.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate “the efficiency, economy, and effectiveness of all agencies and departments of the Government.”¹⁷ Additionally, S. Res. 253 (113th Congress) authorizes the Committee to examine “the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs.”¹⁸ For purposes of this request, please refer to the definitions and instructions in the enclosure.

If you have any questions, please contact Scott Wittmann of the Committee staff at (202) 224-4751. Thank you for your attention to this important matter.

Sincerely,


Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Minority Member

Enclosure

¹⁵ 547 U.S. 715 (2006)

¹⁶ 547 U.S. at 739

¹⁷ S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).

¹⁸ S. Res. 253 § 12, 113th Cong. (2013).

Instructions for Responding to a Committee Request
Committee on Homeland Security and Governmental Affairs
United States Senate
114th Congress

A. Responding to a Request for Documents

1. In complying with the Committee's request, produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data, or information should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization, or person denoted in the request has been or is also known by any other name or alias than herein denoted, the request should be read also to include the alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e. CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic form should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - a. The production should consist of single page Tagged Image Files (".tif"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - b. Document numbers in the load file should match document Bates numbers and .tif file names.
 - c. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - d. All electronic documents produced should include the following fields of metadata specific to each document:

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

Instructions for Responding to a Committee Request

- e. Alternatively, if the production cannot be made in .tif format, all documents derived from word processing programs, email applications, instant message logs, spreadsheets, and wherever else practicable should be produced in text searchable Portable Document Format (“.pdf”) format. Spreadsheets should also be provided in their native form. Audio and video files should be produced in their native format, although picture files associated with email or word processing programs should be produced in .pdf format along with the document it is contained in or to which it is attached.
 - f. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), consult with the Committee staff to determine the appropriate format in which to produce the information.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to the request should be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When producing documents, identify the paragraph in the Committee’s schedule to which the documents respond.
9. Do not refuse to produce documents on the basis that any other person or entity also possesses non-identical or identical copies of the same documents.
10. This request is continuing in nature and applies to any newly discovered information. Any record, document, compilation of data or information not produced because it has not been located or discovered by the return date, should be produced immediately upon subsequent location or discovery.
11. All documents should be Bates-stamped sequentially and produced sequentially. Each page should bear a unique Bates number.
12. Two sets of documents should be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets should be delivered to the Majority Staff in Room 340 of the Dirksen Senate Office Building and the Minority Staff in Room 344 of the Dirksen Senate Office Building.
13. If compliance with the request cannot be made in full by the date specified in the request, compliance should be made to the extent possible by that date. Notify Committee staff as soon as possible if full compliance cannot be made by the date specified in the request, and provide an explanation for why full compliance is not possible by that date.

Instructions for Responding to a Committee Request

14. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
15. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
16. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents which would be responsive as if the date or other descriptive detail were correct.
17. In the event a complete response requires the production of classified information, provide as much information in unclassified form as possible in your response and send all classified information under separate cover via the Office of Senate Security.
18. Unless otherwise specified, the period covered by this request is from January 1, 2009 to the present.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

B. Responding to Interrogatories or a Request for Information

1. In complying with the Committee's request, answer truthfully and completely. Persons that knowingly provide false testimony could be subject to criminal prosecution for perjury or for making false statements. Persons that knowingly withhold requested information could be subject to proceedings for contempt of Congress. If you are unable to answer an interrogatory or information request fully, provide as much information as possible and explain why your answer is incomplete.
2. In the event that any entity, organization, or person denoted in the request has been or is also known by any other name or alias than herein denoted, the request should be read also to include the alternative identification.
3. Your response to the Committee's interrogatories or information requests should be made in writing and should be signed by you, your counsel, or a duly authorized designee.

Instructions for Responding to a Committee Request

4. When responding to interrogatories or information requests, respond to each paragraph in the Committee's schedule separately. Clearly identify the paragraph in the Committee's schedule to which the information responds.
5. Where knowledge, information, or facts are requested, the request encompasses knowledge, information or facts in your possession, custody, or control, or in the possession, custody, or control of your staff, agents, employees, representatives, and any other person who has possession, custody, or control of your proprietary knowledge, information, or facts.
6. Do not refuse to provide knowledge, information, or facts on the basis that any other person or entity also possesses the same knowledge, information, or facts.
7. The request is continuing in nature and applies to any newly discovered knowledge, information, or facts. Any knowledge, information, or facts not provided because it was not known by the return date, should be provided immediately upon subsequent discovery.
8. Two sets of responses should be delivered, one set to the Majority Staff and one set to the Minority Staff. When responses are provided to the Committee, copies should be delivered to the Majority Staff in Room 340 of the Dirksen Senate Office Building and the Minority Staff in Room 344 of the Dirksen Senate Office Building.
9. If compliance with the request cannot be made in full by the date specified in the request, compliance should be made to the extent possible by that date. Notify Committee staff as soon as possible if full compliance cannot be made by the date specified in the request, and provide an explanation for why full compliance is not possible by that date.
10. In the event that knowledge, information, or facts are withheld on the basis of privilege, provide a privilege log containing the following information: (a) the privilege asserted; (b) the general subject matter of the knowledge, information, or facts withheld; (c) the source of the knowledge, information, or facts withheld; (d) the paragraph in the Committee's request to which the knowledge, information, or facts are responsive; and (e) each individual to whom the knowledge, information, or facts have been disclosed.
11. If a date or other descriptive detail set forth in this request is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, provide the information that would be responsive as if the date or other descriptive detail was correct.
12. In the event a complete response requires the transmission of classified information, provide as much information in unclassified form as possible in your response and send all classified information under separate cover via the Office of Senate Security.
13. Unless otherwise specified, the period covered by this request is from January 1, 2009 to the present.

Instructions for Responding to a Committee Request

C. Definitions

1. The term “document” in the request or the instructions means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” in the request or the instructions means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face to face, in meetings, by telephone, mail, telex, facsimile, email (desktop or mobile device), computer, text message, instant message, MMS or SMS message, regular mail, telexes, discussions, releases, delivery, or otherwise.
3. The terms “and” and “or” in the request or the instructions should be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” in the request or the instructions mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, businesses or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify” in the request or the instructions, when used in a question about individuals, means to provide the following information: (a) the individual’s complete name and title; and (b) the individual’s business address and phone number.

Instructions for Responding to a Committee Request

6. The terms “referring” or “relating” in the request or the instructions, when used separately or collectively, with respect to any given subject, mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” in the request or the instructions means agent, borrowed employee, casual employee, consultant, contractor, de fact employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee or subcontractor.
8. The terms “you” and “your” in the request or the instructions refer to yourself; your firm, corporation, partnership, association, department, or other legal or government entity, including all subsidiaries, divisions, branches, or other units thereof; and all members, officers, employees, agents, contractors, and all other individuals acting or purporting to act on your behalf, including all present and former members, officers, employees, agents, contractors, and all other individuals exercising or purporting to exercise discretion, make policy, and/or decisions.

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