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Congress of the United States
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TODD ROKITA
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October 20, 2014

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

The Honorable John M. McHugh
Secretary
Department of the Army
The Pentagon, Room 3E700
Washington, D.C. 20310

RE: Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Secretary McHugh:

I am writing to provide comments on the proposed Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) rule that would re-define “navigable waters” and expand federal authority under the Clean Water Act (CWA). I urge the EPA and Corps to abandon the proposed rulemaking process for three reasons. First, this rule would have disproportionate and harmful economic impacts on multiple Indiana industries, most notably Indiana farmers. Second, questions remain on the scientific and economic analysis used when constructing the rule. Lastly, this rule is unnecessary as the courts have routinely concluded it is the prerogative of the states to monitor and ensure compliance with the CWA.

1. Economic Impact on Farmers

The proposed CWA rule will negatively impact any individual, entity, or business that is involved in the practices taking place on land that the EPA and the Army Corps of Engineers (Corps) deem to be in a “Water of the U.S.”. Specific industries subject to the rule would include farming, agri-business, home and commercial builders, manufacturers and others. Homeowners may also be subject to the regulation, depending on location and land features in, or adjacent to, their communities and their practices, such as fertilizing their yard.

This rule also intrudes into the essential functions of operating a farm. Although the agencies have said there is an exception for “normal farming” practices, those practices will now be determined by the EPA through enforcement actions, not by Congress. Given the extent of the rule and the number of “normal farming” practices that would be restricted, the rule will result in significant cost to farmers. This cost would include a loss of permitting and consulting fees, lost time and productivity, and potentially lost acreage of production.

2. Unreliable Scientific and Economic Analysis

Compounding both the ambiguity of the rule and the highly questionable economic analysis, the scientific report – which the agencies point to as the foundation of this rule – has been neither peer-reviewed nor finalized. The EPA’s draft study, “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” was sent to the EPA’s Science Advisory Board to begin review on the same day the rule was sent to the Office of Management and Budget (OMB) for interagency review. Science should always come before rulemaking, especially in this instance where the scientific and legal concepts are inextricably linked.

In early December of 2013, your agencies released a joint analysis stating that this rule would subject an additional three percent of U.S. waters and wetlands to CWA jurisdiction and that the rule would create an economic benefit of at least \$100 million annually. This calculation is seriously flawed. In this analysis, the EPA evaluated the FY 2009-2010 requests for jurisdictional determinations, a period of time that was the most economically depressed in nearly a century. This period, for example, saw extremely low construction activity, and should not have been used as a baseline to estimate the incremental acreage impacted by this rule. In addition, the derivation of the three percent increase calculation did not take into account the landowners who, often at no fault of their own, do not seek a jurisdictional determination, but rather later learn from your agencies that their property is subject to the CWA. These errors alone, which are just two of many in the EPA’s assumptions and methodology, call into question the veracity of any conclusions drawn from the economic analysis.

3. Court Decisions

Two Supreme Court decisions over the past decade have reaffirmed that the term “navigable waters” under the CWA does not include all waters. The proposed rule fails to clearly respect the limits of federal CWA jurisdiction as articulated by the Supreme Court in *Solid Waste Agency of Northern Cook County (SWANCC)* and *Rapanos*. The Supreme Court rejected the notion that CWA jurisdiction extends to waters with “any” connection to navigable waters (no matter how tenuous) and rejected the agencies’ “land is waters” approach.

The proposed rule would assert CWA jurisdiction over nearly all areas with any hydrologic connection to downstream navigable waters, including man-made

conveyances such as ditches. Contrary to your agencies' claims, this would directly contradict prior Supreme Court decisions, which imposed limits on the extent of federal CWA authority. Although your agencies have maintained that the rule is narrow and clarifies CWA jurisdiction, it in fact aggressively expands federal authority under the CWA while bypassing Congress and creating unnecessary ambiguity.

Additionally, rather than providing clarity and making identifying covered waters "less complicated and more efficient," the rule instead creates more confusion and will inevitably cause unnecessary litigation. For example, the rule heavily relies on undefined or vague concepts such as "riparian areas", "landscape unit", "floodplain", "ordinary high water mark" as determined by the agencies' "best professional judgment", and "aggregation". Even more egregious, the rule throws into confusion extensive state regulation of point sources under various CWA programs.

For these reasons, I urge the EPA to abandon its proposed rule regarding expanding the definition of navigable waters. This rule proposal is not about clean water. It is about control of what occurs on land. To the extent that the Federal Government seeks to address issues with pollution, this rule completely misses the mark. I highly recommend you commit to operating under the limits established by Congress, and recognize Indiana's primary role in regulating and protecting Indiana streams, ponds, wetlands and other bodies of water. Finally, I implore the EPA to recognize the negative impacts this rule will have on Hoosier families, seniors, small businesses and farmers.

Sincerely,



Todd Rokita
Member of Congress

TR/mc