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# United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

RYAN JACKSON, *MAJORITY STAFF DIRECTOR*  
BETTINA POIRIER, *DEMOCRATIC STAFF DIRECTOR*

September 20, 2016

Dear Senator King,

On November 3, 2015, you wrote a letter to Gina McCarthy, Administrator of the Environmental Protection Agency, and Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) regarding the regulatory definition of “waters of the United States,” or “WOTUS,” a term that defines the scope of federal jurisdiction under the Clean Water Act.

In your letter, you stated that it was premature to take legislative action on Clean Water Act jurisdiction, given the fact that the new WOTUS definition promulgated by the agencies in June 2015 was stayed by the courts. However, you also stated that: “Farmers, ranchers, water utilities, local governments, and contractors deserve [ ] clarity and certainty. Should the EPA not provide this clarity or enforce this rule in a way that erodes traditional exemptions, we reserve the right to support efforts in the future to revise the rule.”

In this session of Congress, my Committee has investigated how EPA and the Corps are interpreting and implementing their authority under the Clean Water Act, even before their new rule goes into effect. The enclosed report summarizes case studies that demonstrate that:

- EPA and the Corps have and will continue to advance very broad claims of jurisdiction based on discretionary authority to define their own jurisdiction.
- The WOTUS rule would codify the agencies’ broadest theories of jurisdiction, which Justice Kennedy recently called “ominous.”
- Landowners will not be able to rely on current statutory exemptions or the new regulatory exemptions because the agencies have narrowed the exemptions in practice and simply regulate under another name. For example, if activity takes place on land that is wet:
  - plowing to shallow depths is not exempt when the Corps calls the soil between furrows “mini mountain ranges,” “uplands,” and “dry land;”
  - disking is regulated even though it is a type of plowing;
  - changing from one agricultural commodity constitutes a new use that eliminates the exemption; and
  - puddles, tire ruts, sheet flow, and standing water all can be renamed “disturbed wetlands” and regulated.

Given the facts set forth in the attached report, it is clear to me that the test set forth in your November 3<sup>rd</sup> letter has been met. There is no certainty or clarity regarding CWA jurisdiction and EPA and the Corps have eroded traditional exemptions. In fact, the scope of jurisdiction that EPA and the Corps are now claiming would astonish the drafters of the Federal Water Pollution Control Act, including Senator Ed Muskie of Maine.

I hope that you live up to the commitment you made last November and work with me on tailored legislation to end the abuses identified in the case studies presented in the attached report.

Sincerely,



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James M. Inhofe  
Chairman