

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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November 6, 2013

Howard Shelanski
Administrator,
Office of Information and Regulatory Affairs
Office of Management and Budget
Executive Office of the President
725 17th Street, NW
Washington, DC 20503

Dear Mr. Shelanski:

The Office of Management and Budget (OMB) plays a pivotal role in ensuring that agencies follow the law. Executive Order (EO) 12866 assigns the OMB's Office of Information and Regulatory Affairs (OIRA) the responsibility of coordinating interagency review of rulemaking to assure that the regulations are consistent with applicable law and the EO's principles, which include incorporating public comment, considering alternatives to the rulemaking, and analyzing both costs and benefits. This oversight is designed to promote balanced evaluation of agency rulemaking. As the Environmental Protection Agency (EPA) expands its Clean Water Act (CWA) jurisdiction, OMB needs to ensure full evaluation and compliance with the Executive Order and the law.

Rather than allowing time for a review of their proposed regulations, the EPA is rushing forward regardless of whether the science actually supports the rule. This rule could represent a dramatic expansion of EPA's authority to include isolated wetlands, streams and ditches. Such unrestrained federal intrusion poses a serious threat to private property rights, state sovereignty and economic growth.

On September 17, 2013, EPA sent a draft rule to your office for interagency review. The draft rule would redefine "waters of the United States" under the CWA. On the same day, EPA submitted a draft scientific assessment to its Scientific Advisory Board (SAB) for peer review. The draft "Connectivity Report"¹ evaluates the significance of potential connections between isolated streams and wetlands with navigable waters. EPA explained that "[f]indings from this Report will help inform EPA

¹ *Draft Science Synthesis Report on the Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*

and the U.S. Army Corps of Engineers in their continuing policy work and efforts to clarify what waters are covered by the [CWA].” However, although EPA claims this Report will provide the bedrock for this rulemaking, EPA sent the rule to OMB before the science was reviewed.

In accordance with OMB requirements, the Connectivity Report must be fully and openly peer reviewed before interagency review of the draft rule. Further, after peer review of the underlying science, OMB should ensure that EPA provides the SAB with the draft rule during the interagency review process. Specifically, the law requires that when CWA proposals are “provided to any other Federal agency for formal review and comment, [EPA] shall make available to the [SAB] such proposed criteria document, standard limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based.”² Despite this statutory requirement, the SAB has not been asked to review the draft CWA rule that is undergoing peer review.³

The need for OMB to ensure that the statutory peer review process is followed is underscored by the fact that these are “highly influential” scientific documents as that term is defined in OMB’s 2004 *Peer Review Bulletin* (“OMB Bulletin”).⁴ Because the Report and the draft rule “have a potential impact of more than \$500 million in any one year on either the public or private sector or that the dissemination is novel, controversial, or precedent-setting, or has significant interagency interest,” both trigger the OMB definition requiring an additional level of review. Further, according to your Office’s list of EPA regulations currently under review, the draft rule is considered “economically significant” and there is no legal deadline for completion of interagency review.⁵ EPA also confirmed that the Report is “highly influential” in a June 27, 2012 letter to the Committee.⁶

“Highly influential” scientific documents must be peer reviewed *early* in the rulemaking process. Specifically, the OMB Bulletin states that “it is important to obtain peer review before the agency announces its regulatory options so that any technical corrections can be made before the agency becomes invested in a specific approach or the positions of interest groups have hardened.” Significantly, the Bulletin notes that if the review occurs too late in the process “it is unlikely to contribute to the course of a rulemaking” and that investing in peer review early will increase net benefits by reducing the likelihood of litigation. We agree.

Transparent peer review of scientific assessments is a prerequisite to the rulemaking process. Just last year, EPA assured the Science Committee that it would release the study in a manner sufficient to “provide the agencies and the public with data

² *Environmental Research, Development and Demonstration Authorization Act of 1978*, 42 USC § 4365.

³ http://science.house.gov/sites/republicans.science.house.gov/files/documents/Letters/101813_letter.pdf

⁴ <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2005/m05-03.pdf>

⁵ <http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp>

⁶ <http://science.house.gov/sites/republicans.science.house.gov/files/documents/06-27-2012%20EPA%20to%20Harris%20re%20CWA.pdf>

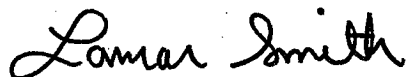
and information relevant to this rulemaking” and the opportunity for meaningful public comment.

By rushing through this process, the Agency not only violates the law, but ignores its commitments to Congress and the American people. This rushed rulemaking is a clear attempt to rubber stamp the pre-determined regulatory agenda.

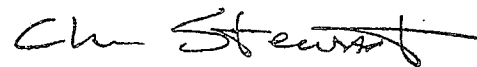
Your office should not complete the interagency review of the draft rule until both the draft Connectivity Report and the draft rule on CWA jurisdiction have been fully and openly peer reviewed. This will allow sufficient time for offices participating in the interagency review process to reflect on the SAB peer review comments.

Putting the regulatory cart before the scientific horse is a direct violation of the EPA’s pledge to make “sound science and public participation the backbone of our rulemaking efforts.”⁷ The proposed rule could give the EPA unprecedented power over private property in the U.S. Racing through the approval process without proper peer review and transparency amounts to an EPA power play to regulate America’s waterways.

Sincerely,



Rep. Lamar Smith
Chairman
Committee on Science, Space,
and Technology



Rep. Chris Stewart
Chairman
Subcommittee on Environment

cc: Rep. Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology
Rep. Suzanne Bonamici, Ranking Member, Subcommittee on Environment, Committee on Science, Space, and Technology
The Honorable Gina McCarthy, Administrator, EPA
Lieutenant General Thomas Bostick, Commanding General and Chief of Engineers, US Army Corps of Engineers
Dr. David Allen, Chair, EPA Science Advisory Board
Dr. Amanda Rodewald, Chair, EPA Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report
Mr. Christopher Zarba, Director, EPA SAB Staff Office

⁷ Ibid.