

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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November 14, 2014

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

The Hon. Jo-Ellen Darcy
Assistant Secretary of the Army
Department of the Army
108 Army Pentagon
Washington, DC 20310

**Re: Definition of “Waters of the United States” Under the Clean Water Act
79 Fed. Reg. 2,2188 (Apr. 21, 2014); Docket ID No. EPA-HQ-OW-2011-0880**

Dear Administrator McCarthy and Assistant Secretary Darcy:

The House Committee on Science, Space and Technology submits the following comments in response to the Environmental Protection Agency’s (EPA) proposed Definition of “Waters of the United States” Under the Clean Water Act.

The Science Committee has jurisdiction over the core technical and scientific issues underpinning this rulemaking. The Committee’s authority includes: environmental research and development; marine research; and scientific research, development, and demonstration, and projects therefor.¹

But this rule is not just about science. The jurisdictional scope of the Clean Water Act (CWA) is also a legal question. Science cannot resolve the ultimate issue: the rights of the American people.

“When the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government.”² Consequently, the government cannot take what the people have not freely given. This is the founding promise of our nation.

¹ House Rule X(1)(p).

² *Martin v. Waddell*, 41 U.S. 16 Pet. 367 367 (1842).

I. Overview

Waterways have long served as highways for commerce. In 1824, the landmark Supreme Court decision in *Gibbons v. Ogden*³ held that the power to regulate interstate commerce and ensure navigability was granted to Congress by the Commerce Clause of the U.S. Constitution. At a time when over-land roads were few and often poorly maintained, Congress sought to keep waterways free of obstacles to navigation. Consequently, the first Rivers and Harbors Act was passed in 1824 and appropriated funds to improve navigation on the Mississippi and Ohio rivers by removing sandbars, snags, and other obstacles.

In the original Rivers and Harbors Act and subsequent statutes of the same name, Congress charged the U.S. Army Corps of Engineers with implementation. The Rivers and Harbors Act of 1899⁴ prohibited the dumping of solid waste into navigable rivers and harbors. Further, the rapidly expanding electric generation sector relied heavily on hydropower, so the statute required a license from Congress to dam navigable rivers. These legislative precursors sought to protect and improve the use of nation's waterways for interstate commerce.⁵

Likewise, the CWA regulates “navigable waters,” which the Act defines as “waters of the United States.”⁶ Over the past 30 years, the Supreme Court has examined the meaning of this statutory language three times. First, in *U.S. v. Riverside Bayview*, the Court upheld the regulation of wetlands “adjacent” to navigable waters because it found that the adjacent wetlands were “inseparably bound up” with the navigable waters.⁷

In 2001, *Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Engineers* (*SWANCC*), the Supreme Court rejected CWA jurisdiction over isolated ponds because they lacked a “significant nexus” to navigable waters.⁸ However, despite the Court’s rebuke, the agencies asserted that the decision only applied to completely isolated waters and that if a body of water had any connection to navigable waters, it did not qualify as an isolated water and was subject to CWA jurisdiction.⁹

Finally, in *Rapanos v. U.S.*, a majority of the Supreme Court rejected the “any connection” theory of jurisdiction, finding that standard too broad.¹⁰ The plurality held that the plain language of the CWA “does not authorize this ‘Land Is Waters’ approach to federal jurisdiction” and that “[i]n applying the definition to ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, manmade drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term ‘waters of

³ 22 US 1 (1824).

⁴ March 3, 1899, Ch. 425, Sec. 9, 30 Stat. 1151.

⁵ Percival, et al. “Statutory Authorities for Protecting Water Quality.” ENVIRONMENTAL REGULATION LAW, SCIENCE, AND POLICY. 6th ed. 643.

⁶ 33 U.S.C. §§ 1344, 1362(7).

⁷ 474 U.S. 121 (1985).

⁸ 531 U.S. 159 (2001).

⁹ See, e.g., Brief for the United States at 31, *Rapanos v. United States*, 547 U.S. 715 (2006) (No. 04-1034); *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) (“The Corps’ theory of jurisdiction in these consolidated cases—adjacency to tributaries, however remote and insubstantial—raises concerns”).

¹⁰ 547 U.S. 715 (2006).

the United States' beyond parody."¹¹ Instead, the plurality held that the CWA "confers jurisdiction over only relatively *permanent* bodies of water."¹²

Justice Kennedy also criticized the Corps' standard as too broad because it "leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes..."¹³ In his concurrence, Justice Kennedy established a "significant nexus" standard.

Noting that the precise reach of the CWA is unclear, the Supreme Court also called on the agencies to undertake a rulemaking to clarify key jurisdictional standards.¹⁴ Specifically, Justice Kennedy noted that the presence of an ordinary high water mark is not a reliable standard for determining whether a water is a jurisdictional tributary.¹⁵ Further, some within the regulated public called for a rulemaking to clarify the reach of the CWA.¹⁶ However, regardless of calls for clarity, the EPA is powerless to claim authority that Congress has not delegated. Likewise, Congress cannot authorize powers beyond the Constitution. In this proposal, the EPA flouts this Constitutional framework and ignores the source of federal power: the people.

II. Science Advisory Board

Under the law, the advice of scientific experts is a pre-requisite, not an afterthought. Specifically, the Environmental Research, Development, and Demonstration Authorization Act of 1978 (ERDDAA)¹⁷ establishes the Science Advisory Board (SAB) as an independent body charged with providing advice to Congress and the EPA. Under ERDDAA, the "Administrator, at the time any proposed criteria document, standard, limitation, or regulation under the... [CAA]... is provided to any other Federal agency for formal review and comment, shall make available to the Board 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."¹⁸

Significantly, the law explains that this process provides the Board with a critical opportunity to share with the Administrator "its advice and comments on the adequacy of the scientific and technical basis of the proposed criteria document, standard, limitation, or regulation."¹⁹ When followed, ERDDAA helps ensure that regulations are informed by sound science before they are ever proposed.

¹¹ *Id.* at 734.

¹² *Id.* (emphasis in original).

¹³ *Id.* at 781 (Kennedy, J., concurring).

¹⁴ See, e.g., *Rapanos*, 547 U.S. at 726 (plurality); *id.* at 782 (Kennedy, J., concurring); *id.* at 758 (Roberts, C.J., concurring); *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

¹⁵ *Rapanos*, 547 U.S. at 781; See also Matthew K. Mersel, U.S. Army Corps of Engineers, *The Ordinary High Water Mark: Concepts, Research, and Applications* (Mar. 20, 2013) (acknowledging that Corps standard for identifying streams is "vague" and has been applied "inconsistently").

¹⁶ Persons and Organizations Requesting Clarification of "Waters of the U.S." by Rulemaking. Available at http://www2.epa.gov/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf (EPA notes that "Request for a rulemaking process does not imply support for the rule as proposed").

¹⁷ Environmental Research, Development and Demonstration Authorization Act of 1978, 42 USC § 4365.

¹⁸ *Id.*

¹⁹ *Id.*

Further, EPA Senior Leadership and the SAB continue to note that waiting until the proposal stage to provide information to the SAB is too late in the process for meaningful input.²⁰ For this very reason, EPA created a new process to ensure that the SAB received planned Agency actions at the pre-proposal stage so that EPA could consider the Board's advice before proposing regulations.²¹

Despite this, on September 17, 2013, the EPA and Army Corps of Engineers announced that a proposed rule defining the scope of CWA jurisdiction had been sent to the Office of Management and Budget (OMB) for interagency review. On the same day *and without making the rule available to the Board*, EPA submitted its Draft Science Synthesis Report on the Connectivity of Streams and Wetlands to Downstream Waters²² to the SAB for peer review.²³ Along with the Report, the EPA assigned technical charge questions to the SAB expert panel with instructions to begin review of the draft Report.

The importance of the peer review process is underscored by the classification of the Connectivity Report as a "Highly Influential Scientific Assessment." In a June 27, 2012 letter to the Committee, EPA confirmed that the "Synthesis is a 'Highly Influential Scientific Assessment' as defined by OMB."²⁴ Specifically, the OMB's *Peer Review Bulletin*²⁵ 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." The Bulletin notes that if the review occurs too late in the process "it is unlikely to contribute to the course of a rulemaking."²⁶

It is clear from the statute and the Agency's own protocol that the Board should review the scientific underpinnings of draft proposals and all supporting science as part of the interagency process *before a rule is ever proposed*. The importance of this principle is compounded when a rule, such as this proposal, purports to rely almost entirely upon this new science. But EPA refused to wait for the science. The Agency wrote this rule and sent it to the White House over a year before the SAB completed its review or made recommendations to the Agency. The EPA's brash actions flaunt both the language and spirit of ERDDAA.

²⁰ See Memorandum from SAB Work Group on EPA Planned Actions for SAB Consideration of the Underlying Science to Members of the Chartered SAB and SAB Liaisons, Nov. 12, 2013, Attachment A, *available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/18B19D36D88DDA1685257C220067A3EE/\\$File/SAB+Wk+GRP+Memo+Spring+2013+Reg+Rev+131213.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/18B19D36D88DDA1685257C220067A3EE/$File/SAB+Wk+GRP+Memo+Spring+2013+Reg+Rev+131213.pdf).

²¹ A November 12, 2013 memo from the Work Group on EPA Planned Actions for SAB Consideration of the Underlying Science to the Members of the Chartered SAB provides a detailed explanation of this process, its history, and the underlying legal obligations of ERDDAA.

²² U.S. ENVIRONMENTAL PROTECTION AGENCY. Office of Research and Development. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, External Review Draft*. EPA/600/R-11-098B. Sep. 2013. *Available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/\\$File/WOUS_ERD2_Sep2013.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf).

²³ The EPA did not provide the Board with the proposed rule until it was published nearly seven months later.

²⁴ Letter from Nancy Stoner, EPA Acting Assistant Administrator to House Committee on Science, Space, and Technology. June 27, 2012. *Available at* <http://science.house.gov/sites/republicans.science.house.gov/files/documents/06-27-2012%20EPA%20to%20Harris%20re%20CWA.pdf>.

²⁵ EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET. *Final Information Quality Bulletin for Peer Review*. Dec. 2004. *Available at* <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2005/m05-03.pdf>.

²⁶ *Id.*

Further, throughout this process, the Science Committee has sought to pose charge questions to the Board pursuant to ERDDAA authorities.²⁷ However, the EPA has intercepted Congressional communications and prevented SAB response to Congressional requests for advice related to this rulemaking. Given the Agency's apparent attempts to unduly narrow the SAB's review and silence inquiries, the EPA should withdraw this proposal until adequate review and participation are complete.

Important documents referenced in this summary of communications are included as **Attachment A** as part of these Science Committee comments on this rulemaking. These documents highlight significant procedural deficiencies in this rulemaking process.

III. Evidence submitted to the Science Committee

Over the past few months, the Committee has gathered evidence related to technical and scientific issues underpinning this proposal through prepared testimony, oral testimony, and witness responses to questions for the record. These materials are included as **Attachment B** as part of these Science Committee comments on this rulemaking.

In reference to the evidence provided in **Attachment B**, does the Agency disagree with any of the testimony provided? If so, please detail any objections and all steps the Agency has taken to consider this evidence.

IV. Unanswered Questions

The Science Committee appreciates testimony provided during hearings. However, to fully understand and meaningfully consider the evidence witnesses convey, Committee members have an opportunity to ask official Questions For the Record (QFRs). The testimony witnesses provide in response to official questions is ultimately a part of the hearing and the official Congressional Record.

The Committee hearings can only be submitted in final publication format when witnesses respond to official QFRs in a timely manner. Unfortunately, former EPA Deputy Administrator Bob Perciasepe has failed to respond to the Committee's official questions, which were due on August 14, 2014. Consequently, the Committee was forced to include the evidence obtained through the July 9, 2014 hearing in a pre-publication format in **Attachment C** as a part of these Science Committee comments. The transcript from that hearing and the unanswered official questions for the record address issues directly related to this rulemaking.

These unanswered questions have direct bearing on the determinations EPA makes in this proposal. We cannot afford to compromise transparency and accountability in the name of expediency. Accordingly, EPA cannot move forward with a final rule until these questions are fully answered. Further, the Agency's thorough responses should be made available for consideration as part of the official rulemaking record and public comment.

To finalize a rule without fully addressing these issues would be arbitrary, capricious, and an abuse of discretion. Reflecting upon the evidence obtained by the Committee on Science, Space, and Technology and all other relevant information the Agency is aware of or has relied

²⁷ Environmental Research, Development and Demonstration Authorization Act of 1978, 42 USC § 4365(a).

on, please respond to the following unanswered questions and detail how such responses were considered in this rulemaking.

1. EPA conducted a literature review on the connectivity of streams: *The Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*.
 - a. Does the “connectivity” report support the proposed rule?
 - b. The Science Advisory Board recommended changes to the “connectivity” report supporting the proposed Waters of the U.S. rule, what changes to the rule have you made after considering SAB recommendations?
 - c. For what period of time has the public had an opportunity to review the SAB’s report reviewing EPA’s draft Connectivity Report before the close of comment on the proposal?
 - d. What changes has the EPA made to the draft report and when will the report be finalized?
2. Why did EPA write the rule and formally propose it before waiting for the Science Advisory Board complete their review process?
3. What is the EPA position on whether or not there are any isolated wetlands or waters?
4. Nancy Stoner recently claimed that this rule does not regulate groundwater. Does the Clean Water Act give the EPA jurisdiction over groundwater?
 - a. Please provide a detailed legal rationale and any supporting examples or precedent.
 - b. If it does not, then does EPA use “ground water” as a means of establishing a “connection?” Please provide a detailed legal rationale and any supporting examples or precedent.
5. Some of the scientists on the SAB panel that reviewed the EPA’s Draft Connectivity Study have commented that “*when you step on the flood plain you are stepping in the river.*” Do you agree with those scientists?
6. What is your legal justification for aggregating the impacts of isolated waters or wetlands? Please provide a detailed legal rationale and any supporting examples or precedent.
7. When the SAB panel reviewing the science behind this Clean Water Act rulemaking meets publicly, EPA has refused to make a transcript of the proceedings available or an archived webcast for the public.
 - a. Why?

- b. Will you commit to make either the transcripts public or archived webcasts available to the public? *Summaries of meetings are not adequate.*
8. Is EPA's use of non-public scientific data consistent with the agency's Scientific Integrity Policy? Please provide a detailed legal rationale and any supporting examples or precedent.
9. Will you guarantee that all data supporting this rule is publically available?
10. Does the SAB need permission from EPA to answer questions from Congress or the public?
11. Does the SAB or the SAB Chair need permission from EPA to testify before Congress?
12. If the scientists on the SAB panel have legal questions, who do they ask? Do they have lawyers who are independent from EPA?
13. An early version of the "connectivity" report was reviewed in a process managed by a contractor, Eastern Research group. While your Agency has provided us with a list of individuals involved in that review, you have not released 1) the contractor-provided report, 2) the original EPA draft, or 3) the charge questions posed to these reviewers. Please provide those documents along with the contract agreement(s) and any related correspondence.
14. In June you testified to Congress that "We are... working with our partners in the states and tribes to assure their voices are effectively represented as we proceed through this rulemaking."

You agreed in the hearing that in some areas, like local water quality or the regulation of some oil and gas activities, state and local officials have more expertise than EPA. Why have you not appointed geographically-diverse state and local experts to all EPA scientific panels?

15. If a small business has never obtained a permit under the CWA before, practically speaking how do they know if they need to get a permit?
- a. How long on average does it take the EPA/Corps to determine if the small business needs a permit?
- b. If it is determined they do need a permit, how long would it take and what are the costs and expenses involved? Are there consultants or lawyers that are usually hired?
- c. If a small business doesn't know that they do indeed need a permit, is there an exemption for honest mistakes?
- d. Can competitors sue to challenge determinations or permits?

16. Many small businesses have stated that this would have a disproportionate impact on them, and have asked that a Small Business Regulatory Fairness Act (SBRFA) Panel be convened. Why have you not held a SBRFA panel?
17. There are a number of manufacturers that have multiple facilities in different states and multiple EPA and Corps regions. There are manufacturers that do not use storm water systems but instead use a system of ditches, impounds, and fields.
 - a. How do you currently deal with this situation?
 - b. Under this rule could these facilities potentially have to get NPDES permits? Is there the potential for any other types of permits? Provide a detailed legal rationale.
 - c. Assuming that they do, how long it does take to obtain these permits and what are the associated costs and expenses?
 - d. Where in the economic analysis did EPA study the cost of compliance if it turns out additional permits are needed?
 - e. Since permits are only good for a maximum of 5 years, did the Agency consider complications that might arise when currently permitted sources are up for review again?
 - f. Who bears the burden of these additional expenses?
18. Please provide detailed metrics related to the jurisdiction this rule claims:
 - a. How many miles of streams does this rule say the CWA covers?
 - b. How many miles of shoreline?
 - c. How many acres of "waters"?
 - d. How many acres of "wetlands"?
 - e. Are there any additional types of waters that may not be accounted for by those numbers? If so please provide appropriate metrics.
 - f. Does the EPA and Corps have the resources to evenly and fairly enforce this rule across the entire country?
 - g. How many people enforce the CWA?
19. What are Constitutional limits to federal authority under the CWA does the EPA recognize? Please provide a detailed legal rationale and any supporting examples or precedent.

20. Has the EPA ever used drones for identification of “waters,” surveillance, enforcement or other purposes? Can you commit to that the EPA will never use drones of any type over private property?
21. Why didn’t the EPA define “water” in this rule?
22. Is “water” wet under the proposed definition?
23. What is the minimum flow requirement for qualification as a “water of the U.S.”?
24. Are any of the assurances or clarifications offered in speeches, blogs, press releases, or other public outreach the Agencies have given since publication of the proposed rule legally binding?
25. EPA says it “consulted” with states, but in your June 11, 2014, testimony before the House T&I Committee you could not name a single state that has come out in support of the rule. That was over a month ago, and you promised to survey the states.
 - a. Please provide that survey and its results.
 - b. Detail the methodology that you used in conducting this “survey.”
26. What specific changes have you made to provide legal certainty and address stakeholder concerns?
27. You say that you have held a number of outreach sessions and listening sessions.
 - a. Summarize the over-all response from the manufacturing, mining, and construction groups. What have been their greatest concerns?
 - b. Detail the actions you have taken to address those concerns.
28. EPA keeps telling opponents of this rule to comment.
 - a. Do you have any legal obligation to make any changes based on the comments you receive?
 - b. EPA frequently mentions meetings and consultations with governments and businesses. What specifically did the Agencies change as a result of these meetings?
29. Why did EPA only look at the cost of 404 permits when developing their economic impact numbers? Did EPA make the determination that there will be cost associated with the other permits such as 303, 311, 401 and 402?

30. Many constituents claim that the proposed rule adds vague terms and undefined concepts to the Clean Water Act regulations. You claim the rule improves clarity and certainty.
- Do you believe that it is less likely that businesses will seek jurisdictional determinations for all potential activities as your economic analysis appears to assume?
 - If it is less likely, is that because fewer areas are covered? Or is it because under this rule more places are automatically covered?
31. A recent study by conducted by Dr. David Sunding a Professor at UC Berkley and Principle at the Brattle Group found that the EPA used data on permitting costs that were almost 20 years old and not adjusted for inflation. Additionally, his analysis showed that EPA's cost estimates excludes costs of avoidance and delay. What is EPA doing to address the concerns with its economic analysis?
32. The Agencies' economic analysis projects a 3 percent increase in regulatory jurisdiction based upon Section 404 permitting activities in 2009-2010.
- What factors did EPA consider in selecting this window as the best representative sample?
 - What percentage of people do you estimate never apply for regulatory determinations and are therefore not part of the sample EPA relied on?
33. Does the proposed rule make all waters in a flood plain federally regulated "waters of the U.S."? Please provide a detailed legal rationale and any supporting examples or precedent.
34. Would a permit be needed to spray pesticide on land that is crisscrossed with erosion features that are considered ephemeral streams, even if there is no water present? Would that change if the land was in a flood plain?
35. Why did EPA only allow an additional 20-day comment period on the interpretive rule for Agriculture exemptions?
36. In the proposed rule, you rely on scientific studies to determine that *any water* in a flood plain, any water in a riparian area, *any water* with a surface or shallow subsurface connection to a jurisdictional water, and *any tributary* – no matter how distant from navigable water – automatically has a significant nexus to traditional navigable waters. That means EPA and the Corps of Engineers do not have to make any case-by-case determination that disturbance or pollution of such water will have an adverse impact on traditional navigable water.

However, many of the studies that EPA relies on never address potential adverse impacts on traditional navigable water. These studies only address the movement of birds, fish, insects

and mammals. EPA's Connectivity Study says that you can establish a connection between waters if a bird, fish, insect, or mammal spends part of its life in navigable water and part of its life in a non-navigable water. EPA's proposed rule says that this connection is sufficient to establish federal jurisdiction over the non-navigable water.

- a. The Supreme Court has already said that use of water by a migratory bird or an endangered species is not sufficient to establish jurisdiction. How can you establish jurisdiction based on use of water by any species?
 - b. How can you establish a nexus to navigable water that is relevant to the Clean Water Act based on studies that do not even discuss water quality?
 - c. How is maintaining the integrity of an animal species the same thing as maintaining the biological integrity of *water*?
37. The Agency appears to abandon the Commerce Clause based limitation to jurisdiction and attempt to create a new science-based limitation. Please provide a detailed legal rationale and any supporting examples or precedent.
38. How does EPA intend to regulate activity involving thousands of dry washes and arroyos in the West? Everyday activities like maintaining a private road by backfilling a persistent washout or replacing a culvert for a stream could require a permit. This seems to raise safety concerns if roads can't be maintained without first obtaining permits. Has EPA provided any non-farming based exemptions for activities like maintaining private roads?
39. Has the agency thought through the practical realities associated with what it is proposing? For example, how will line crews, construction crews, and the like string or replace power lines and poles, repair substations, etc. in the midst of all these "tributaries" without a permit? Please provide a detailed legal rationale and any supporting examples or precedent.
40. If people honestly don't know that they need to get a permit, can they still be subject to penalties for violations of the Clean Water Act?
41. Can a jurisdictional determination impact property values? Why or why not? Please provide a detailed rationale and any supporting examples or precedent.
42. The Forest Service sets Best Management Practices (BMPs) under the Clean Water Act.
- a. Will the Forest Service submit these for approval to EPA?

- b. Which Federal agency – EPA or the Forest Service - is responsible for assuring that these BMPs are consistent with relevant State laws and regulations, especially in 402 delegation states?
 - c. What jurisdiction does the Forest Service have under the Clean Water Act beyond assuring, as a land manager, that its employees aren't violating the Act?
 - d. Has EPA consulted with any other federal agencies that have administrative responsibilities under the Clean Water Act?
 - e. Please submit all written input that you solicited or received from other agencies thought this entire rulemaking process.
43. Discuss in detail how the proposed rule will impact tribes and tribal sovereignty.
44. Provide documentation of all tribes that have spoken out in support of this rule.
45. EPA continues to claim that most ditches are excluded. However, the exemption is narrow because there is no minimum flow requirement, as was in the 2008 guidance. The Supreme Court specified that flow show be considered.
- a. Why has minimum flow not been included? Please provide a detailed legal rationale.
 - b. Why was the change made from the 2008 guidance?
 - c. How many miles of “waters” will the removal of a minimum flow requirement impact? Please include a detailed description of EPA’s methodology in calculating this impact.
46. You testified at a recent House T&I hearing that virtually all highway ditches would be exempted because they are in uplands draining uplands, and that most ditches drain dry land, thereby qualifying for the exemption. However, ditches by their nature provide flood control and may often drain wet areas next to a road.
- a. Are ditches draining wet areas included or excluded?
 - b. Please provide maps of all covered roadside ditches.
 - c. Please provide maps delineating all “upland” areas for purposes of CWA jurisdiction.
47. In her July 1 blog, Acting Assistant Administrator Stoner said that *“Ditches that are IN are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters.”*

- a. Where specifically is this statement made in the rule?
 - b. Please provide a detailed legal rationale explaining why EPA believes that the CWA only regulates ditches that are human altered streams that contribute flow to larger downstream waters.
48. The proposed rule includes two exclusions for ditches but both are very unclear. The first exclusion applies to ditches that are excavated in uplands and drain only uplands if they do not have water year round. But, your rule does not define the term “uplands.”
- a. Does upland mean any higher elevation land?
 - b. Does it mean all land that is not a wetland?
 - c. A ditch may be excavated on dry land, but because it is intended to channel water, it may start to grow cattails. Are ditches that grow cattails still exempt?
 - d. If a ditch is ultimately connected to a water of the U.S, disregarding all breaks in continuity in accordance with the proposed rule, does that mean that it is *not* excavated “wholly in uplands?”
 - e. Is a ditch excluded only if it does not drain?
49. At what depth does water below the surface cease to be shallow subsurface and turn into groundwater?
50. Are all enforcement decisions left up to EPA, the Corp, or a State Regulator?
- a. If EPA says an individual is violating the Clean Water Act, who bears the burden of proof? Does the EPA have to first prove that the creek in your back yard is a “water” and therefore covered? Or does the homeowner bear the burden of proving that the water should not be under EPA jurisdiction?
 - b. If fines were levied for an alleged violation, when do they begin to accrue? After EPA proves its case? After EPA sends a notice to the homeowner? Or do they potentially start at the time of the violation—**before** the homeowner even knows that the EPA or the Corps is asserting jurisdiction?
 - c. Can a neighbor or environmental group sue EPA to force the Agency to enforce against a person? Has this ever happened before? Please provide detailed statistics for all instances of third party complaints.
 - d. Who currently uses these third-party enforcement mechanisms?

- e. Who pays for the legal fees when a third-party sues EPA to enforce against someone?
- f. If a court ultimately vindicates the accused, detail all remunerations paid to make the aggrieved accused whole. Where does this money come from?
- g. Do third party complainants also compensate EPA and DOJ for resources the government has expended in defense of these suits?

51. If certain interpretations are beyond EPA and Corps intent, then how will you prevent third parties from suing to force a more expansive interpretation?

52. As I read the proposed rule, *all waters in a flood plain* are regulated unless expressly excluded. There is a limited exclusion for ponds that are used *exclusively* for stock watering, irrigation, settling basins, or rice growing. But I don't see any exclusion in floodplains for standing water in a field, rainwater, puddles, wet spots, or ponds that have other uses.

On July 1, Acting Assistant Administrator Stoner posted a blog that says that water in a field, ponds, and rainwater are excluded from regulation under the proposed rule. The questions and answers posted on EPA's website also says that water filled areas are excluded. On June 11, 2014, you told the House Transportation and Infrastructure Committee that backyards, wet spots, and puddles are excluded.

Where specifically in the rule are these exclusions for these features in floodplains?

53. Your proposed rule defines "flood plain" as "*an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.*" The determination of what water is in a flood plain is left to the best professional judgment of EPA and Corp officials.

We are currently in the Holocene geologic time period and the most recent climactic phase of that time period (the Subatlantic) began *2500 years ago*. As some read your definition, EPA and the Corps could decide to regulate any "water" located in an area that that has been flooded in the past 2500 years.

How does the rule define "present climatic conditions?" Please provide a detailed legal rationale and any supporting examples or precedent.

54. The word "ephemeral" appears over 75 times in the preamble to the proposed rule, but it is not defined. EPA's Connectivity Report defines "Ephemeral Stream" as "*A stream or river that flows briefly in direct response to precipitation; these channels are above the water table at all times.*" According the preamble to your proposed rule: "*Rills are formed by overland water flows eroding the soil surface during rain storms.*"

- a. Please explain in detail definitional difference between an ephemeral water of the U.S. and a non-jurisdictional rill.
 - b. Where is this distinction made in the proposed rule?
55. In her blog, Acting Assistant Administrator Stoner said that the proposed rule specifically excludes erosional features. She was referring to gullies and rills.
- Does EPA believe that the CWA covers erosional features? Please provide a detailed legal rationale and any supporting examples or precedent.
56. The preamble to the rule recommends that EPA and the Corps trace a tributary connection through direct observation or U.S. Geological Survey maps, aerial photography or other reliable remote sensing information, or other appropriate information. Does this mean that if EPA, the Corps, or a third party can discern a flow path from an aerial photograph or remote sensing technology, then it could be covered by the CWA?
57. The June 5th Draft Report of the SAB on the Connectivity Study notes that light detection and ranging (LiDAR) digital elevation models are increasing the ability to see more features on the land. Some may identify these features as stream networks. *“Hence, the degree of connectivity will be determined in some part by in the database and/or data collection technology used for the analysis.”* Does EPA believe that CWA jurisdiction can expand as technology expands?
58. Your definition of tributary includes water that disappears underground in a so-called “natural break.”
- a. How will the Corps and EPA decide if an upstream channel before a break is the same as a downstream channel after a break?
 - b. Does either distance or timing matter?
 - c. Does it matter how far or how long water has to flow underground to be considered all part of the same tributary system when it recharges surface water somewhere downstream, sometime later?
59. The fact that your rule covers all waters in a flood plain calls into question the municipal, industrial and agricultural use of water. Water from rivers or groundwater aquifers is appropriated or withdrawn (under state law controlling the ownership of water) by municipalities, industry, farmers, and others for use. It may be stored in ponds. It may be conveyed in ditches all year round. But, until it is discharged back into a water of the U.S., any water that is in use should not be considered a water of the U.S. If it is treated, then the water might be considered part of an exempt waste treatment system, but not all water that has been used needs to be treated and some water is never discharged back to a water of the U.S.

In your outreach sessions, EPA and the Corps have told people that you did not intend to regulate these waters. Staff has even suggested that the rule does not reach water that is in use because it is no longer considered “waters” or because a pond or ditch was excavated in uplands.

Unfortunately, there is no clear exemption in the proposed rule that supports these assurances. However, a 2005 EPA General Counsel memo on water transfers says that it is EPA’s longstanding position that water that when is withdrawn from navigable waters for an intervening industrial, municipal or commercial use and then reintroduced to navigable waters, that reintroduction requires a permit. So, water loses its status as “waters of the United States” when it is being used.

Will the final rule will clearly explain that it does not regulate water that is withdrawn, collected, transported, stored, or used for an intervening industrial, municipal, or commercial use, and this includes all management of water internal to a particular site?

60. EPA claims this new Waters of the US rule only brings an additional three percent of waters under its authority and that existing exemptions will remain in place. Can you commit to me that EPA will not eventually attempt to use the rulemaking process to once again expand your authority, up to and including eliminating current exemptions for common agriculture practices?
61. In an op-ed in the Huffington Post, Administrator McCarthy states that “some may think that this rule will broaden the reach of EPA regulations – but that’s simply not the case.” At the same time, EPA has also tried to dissuade fears about any overreach by claiming this expands the scope of covered waters by “only” 3.2 percent. Does the rule expand what the EPA will regulate or not?
62. Additionally, EPA has claimed the rule “would not infringe on private property rights” and would not act as “a barrier to economic development.” Please explain this claim when, according to EPA’s own economic analysis of the rule, landowners and development companies would be most heavily hit by the costs associated with the rule.
63. The Independent Petroleum Association of America, National Association of Manufacturers, Oklahoma State Chamber of Commerce, and the Oklahoma Farm Bureau are united in opposition to this rule. These groups represent hundreds of thousands of jobs in my state in some of the biggest industries in Oklahoma. When interests this varied oppose this rule, you should immediately withdraw it. Has your agency considered this?
64. For the following situations, please tell me if your analysis of the scope of the rule grants the EPA regulatory authority:

- a. A homeowner installs a pond on their property, and the pond is located on the 100 year floodplain of a navigable water. Can EPA regulate the pond, and therefore their property?
- b. A homeowner installs a pond on their property, and the pond is located on the 100 year floodplain of a ditch EPA determines is a tributary to a navigable water. Can EPA regulate the pond, and therefore their property?
- c. A homeowner installs a pond on their property, and the pond is located on the 100 year floodplain of a ditch which is adjacent to yet another floodplain of a navigable water. Can EPA regulate the pond, and therefore their property?

65. In her blog, Acting Assistant Administrator Stoner says “The Clean Water Act only regulates the pollution and destruction of waters.” I agree, but I would expand that to say the Clean Water Act regulates the pollution and destruction of navigable waters. You can’t read the word “navigable” out of the statute.

You claim you are regulating non-navigable water based on potential impact to navigable water. But, if pollution of a water or destruction of a non-navigable water cannot significantly affect the quality of a navigable water by itself, because it is too distant or is too isolated, what is your justification for regulating that non-navigable water under the Clean Water Act?

66. The definition “other waters” makes it sound as if the EPA is concerned there might be something they missed. This definition appears to be a “capture everything else” definition.
- a. Please explain why you need a category called “other waters” and how the Agency plans to provide certainty to the regulated community that the Agency will not take the overly broad view that some fear?
 - b. Can you site another Clean Air Act rulemaking—not a guidance—where the Agency left open an undefined catch all like the “other waters” term here?
 - c. Over the past few months when faced with questions about the vagueness of definitions, the Agency has often claimed that broad definitions are beyond the EPA intended. What legally binding assurances can the EPA provide? Will legal certainty provide protections from third-party law suits?

67. What “waters” does EPA believe it does not and cannot ever have the authority to regulate?

68. The Agency has made statements that make it sound as if the EPA is being generous in providing agricultural exceptions for 56 accepted conservation practices, but it is my understanding NRCS has over 200 accepted practices and the law actually requires EPA to include these 404 exemptions for normal farming practices.

69. Can you explain why a home builder might need to get a Section 402 permit?
- a. What does a home builder need to do to obtain a Section 402 permit?
 - b. What about a 404 permit?
 - c. What percentage of homes or commercial developments would need some type of Clean Water Act permit?
70. It seems like EPA wants to have it both ways. On one hand you are saying that no new waters are being regulated. On the other hand you are saying these changes are going to have huge benefits to the environment.
- a. Which is it?
 - b. What in the current guidance do you feel is not sufficiently protective of water compared with the proposed rule?
 - c. If you are not really changing anything why are we all here today? Why go to all the expense of this rulemaking?

V. Maps

Science Committee investigations revealed that the EPA assembled maps of waters and wetlands in all 50 states. The Agency has claimed that the maps have not yet been used for regulatory purposes. However, the EPA failed to explain why it paid a private contractor to create these maps, and the details of the arrangement remain murky. While the Agency marches forward with a rule that could fundamentally re-define Americans' private property rights, the EPA kept these maps hidden.

Consequently, when the EPA finally disclosed these maps, the Committee posted them on the Committee's website for public review. However, serious questions remain regarding the EPA's underlying motivations for creating such highly detailed maps. In light of the ongoing rulemaking and the obvious questions these maps raise, in an August 27, 2014, letter to the EPA the Committee requested that the Agency immediately:

1. Provide all documents and communications related to the EPA's contract with INDUS Corporation to create these maps, including original contracts, specifications of work, and any internal or external exchanges regarding the October 2013 maps;
2. In an unaltered and original form, enter these and any other previously undisclosed maps in the EPA's possession into the official rulemaking docket for public review and comment; and

3. Keep the public comment period open for at least 60 days after the maps entry in the official rulemaking docket to provide adequate opportunity for public review and comment.

Similar to unanswered Questions for the Record referenced above, to date, the EPA has failed to reply or produce any of the related documentation. Consequently, the public has been deprived of adequate notice and an opportunity for meaningful comment.

VI. Conclusion

Should the Agency undertake a revision, re-proposal, new rulemaking, or other action to provide clarity in a manner consistent with the laws of our nation and principles of due process, the Committee would humbly implore the Agency to begin by clearly answering a simple question: Is water wet?

The EPA's Definition of "Waters of the United States" Under the Clean Water Act proposal is premature, arbitrary, and inadequately supported by the record. For the reasons provided in these comments, EPA must withdraw the proposed rule.

Sincerely,



Lamar Smith
Chairman
Committee on Science,
Space, and Technology

cc: The Hon. John McHugh, Secretary, U.S. Army
The Hon. Shaun Donovan, Director, Office of Management and Budget
The Hon. Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology