

United States Senate

WASHINGTON, DC 20510

October 24, 2014

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator McCarthy,

We write to echo concerns recently raised by both the regulated community and the Small Business Administration regarding the Environmental Protection Agency's (EPA) proposed rule expanding the definition of "waters of the United States" under the Clean Water Act (CWA).

As you are aware, maps completed purportedly at the request of EPA by the United States Geological Survey (USGS) showing more than 8 million miles of perennial, intermittent, and ephemeral streams across the national landscape were recently made public.¹ These maps are alarming evidence of the agency's apparent intent on ensuring that all perennial, intermittent, and ephemeral tributaries (with the exception of those tributaries that meet the "narrow ditch" exclusion) would categorically fall under federal regulatory control. In fact, they are in stark contrast to reports provided by states to EPA and Congress. Under Section 305(b) of the CWA, it is the role of individual state governments to submit "a description of the water quality of all navigable waters" in their state to the EPA Administrator on a biennial basis, and the Administrator in turn provides those reports to Congress. According to an analysis prepared by stakeholders likely to be impacted by an expansive regulatory definition,² the latest National Water Quality Inventory Report to Congress indicated that there were only approximately 3.5 million miles of waters that the states considered subject to federal regulation.³

If the USGS maps created for EPA are a reasonable surrogate for the expanded scope of regulatory jurisdiction under the proposed rule and the latest inventory report an approximation of the current level of regulatory control, a comparison would point to a dramatic 130 percent increase in waters under federal control nationwide – or an additional 4.4 million miles of jurisdictional waters. The impact varies by state. With a 1,882 percent increase, Nevada would see the largest jump in jurisdictional waters. The miles of jurisdictional water in Arizona would increase by more than 200 percent. Yet, EPA asserts that the proposal does not expand

¹ EPA State and National Maps of Waters and Wetlands. (n.d.). Retrieved October 15, 2014, from <http://science.house.gov/epa-maps-state-2013#overlay-context>

² Letter from the Waters Advocacy Coalition to U.S. Senators re: Support of H.R. 5078 (September 17, 2014), available at https://www.uschamber.com/sites/default/files/9.17.14-coalition_letter_supporting_senate_consideration_of_h.r._5078_the_wotus_regulatory_overreach_protection_act.pdf.

³ U.S. Environmental Protection Agency, Office of Water, National Water Quality Inventory: Report to Congress (January 2009), http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2009_01_22_305b_2004report_2004_305Breport.pdf

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jurisdiction.⁴ We would appreciate the agency providing an explanation squaring their belief that the proposed rule fails to expand jurisdiction in light of the above analysis.

In addition, as you are aware, the Small Business Administration's (SBA) Office of Advocacy has recently indicated that the agency's "waters of the United States" proposed rule will have a severe impact on small businesses. SBA stated that the proposal will result in a "direct and potentially costly impact on small businesses" and the "limited economic analysis which [EPA and the Corps] submitted with the rule provides ample evidence of a potentially significant economic impact."⁵ We share the SBA's concern and echo their call for this rule to be withdrawn. We reiterate our call for the current proposal to be abandoned and a meaningful proposal be developed that limits federal jurisdiction and provides for regulatory clarity and consistency. At a minimum, in light of the SBA's recent letter, we ask for clarification on how the current proposed rule's impacts on small businesses will be addressed.

We would appreciate a written response to our concerns detailed in this letter and ask that this matter be handled in strict accordance with agency rules, regulations, and ethical guidelines.

Sincerely,



JEFF FLAKE
United States Senator



JOHN McCAIN
United States Senator

⁴ Questions and Answers about Water of the U.S. Proposal (n.d.). Retrieved October 15, 2014, from http://www2.epa.gov/sites/production/files/2014-09/documents/wotus_qa_0.pdf

⁵ Letter from SBA to the Hon. Gina McCarthy and Maj. Gen. John Peabody re: Definition of "Waters of the United States" Under the Clean Water Act (October 1, 2014), available at http://www.sba.gov/sites/default/files/Final_WOTUS%20Comment%20Letter.pdf.