

# United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

BETTINA POIRIER, MAJORITY STAFF DIRECTOR  
ZAK BAIG, REPUBLICAN STAFF DIRECTOR

April 9, 2014

The Honorable Barack Obama  
President of the United States  
The White House  
1600 Pennsylvania Avenue, NW  
Washington, DC 20500

Dear President Obama,

As members of the Senate Environment and Public Works Committee, we write in response to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) release of their proposed rule which would expand federal jurisdiction under the Clean Water Act (CWA). After an initial review of the proposed rule, we are deeply concerned that the agencies are attempting to obtain *de facto* land use authority over the property of families, neighborhoods and communities throughout the United States. Several provisions within the proposed rule demonstrate that EPA and the Corps are unwilling to accept the meaningful limits Congress placed on the agencies' authority under the CWA, limits the Supreme Court has repeatedly recognized. These include the proposed rule's categorical regulation of irrigation and stormwater ditches, unlimited aggregation approach, and broad adjacency definition. The proposed rule would also have EPA and the Corps making case-by-case jurisdictional determinations based on the "significant nexus" test, even as they ominously assert that a "hydrologic connection is not necessary to establish a significant nexus."<sup>1</sup>

Equally important, we believe EPA and the Corps should immediately cease in their proclamations that the agencies' proposal is a justified response to various calls for a CWA rulemaking.<sup>2</sup> In fact, EPA and the Corps are using rulemaking requests as an excuse to pursue a rushed, predetermined agenda, as opposed to engaging in a deliberative, fair, and transparent regulatory process. EPA and the Corps chose to release their proposed rule despite failing to 1) sufficiently consult with affected states; 2) allow for completion of the Science Advisory Board review of the so-called "Connectivity Report"; and 3) conduct a statutorily-required small business analysis and outreach pursuant to the Regulatory Flexibility Act (RFA), among other

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<sup>1</sup> See U.S.E.P.A. and Army Corps of Engineers, Proposed Rule Regarding Definition of "Waters of the U.S." Under the Clean Water Act at 100 (March 25, 2014), [http://www2.epa.gov/sites/production/files/2014-03/documents/wus\\_proposed\\_rule\\_20140325\\_prepublication.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_20140325_prepublication.pdf).

<sup>2</sup> See Nancy Stoner, *Input Critical to Rule on Waters of the U.S.*, EPA Connect (March 25, 2014) ("In large part, it was public input that led us to propose a rule. Since 2008, EPA and the Corps have received numerous requests for a rulemaking to provide clarity on protections under the Clean Water Act from members of Congress, state and local officials, industry, agriculture, environmental groups, scientists, and the public."), <http://blog.epa.gov/epaconnect/2014/03/input-critical-to-rule-on-waters-of-the-u-s/>.

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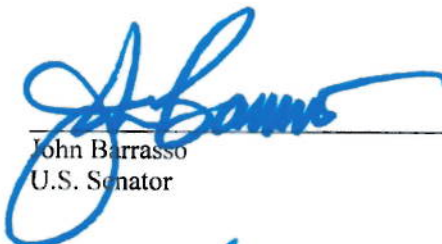
mandatory procedures. EPA and the Corps' decision to proceed despite the numerous concerns identified by lawmakers and stakeholders is incredibly disappointing.

The scope of CWA jurisdiction is one of the most important regulatory issues facing landowners, businesses, and municipalities today. Although EPA and the Corps may have a role in clarifying and limiting CWA jurisdiction, unfortunately the agencies' rule proposal was a significant step in the wrong direction. The decision to move forward with this proposal is a clear breach of your promise to cut through red tape.<sup>3</sup> In light of other recent CWA permitting decisions that have occurred during your administration, moving forward with the proposed rule will exponentially frustrate economic activity and further undermine notions of certainty in the federal permitting process.

Sincerely,



David Vitter  
U.S. Senator



John Barrasso  
U.S. Senator



James M. Inhofe  
U.S. Senator



Jeff Sessions  
U.S. Senator



Mike Crapo  
U.S. Senator



Roger Wicker  
U.S. Senator



John Boozman  
U.S. Senator



Deb Fischer  
U.S. Senator

<sup>3</sup> Exec. Order No. 13563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).