United States Senate
WASHINGTON, DC 20510

April 23, 2013

The Honorable Bob Perciasepe
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, D.C. 20460

Dear Acting Administrator Perciasepe:

The Environmental Protection Agency (EPA) has indicated that it plans to move forward with a formal rulemaking to clarify the definition of "waters of the United States" under the Clean Water Act (CWA).[1] We understand that the agency has yet to determine whether it will go forward with finalizing the proposed guidance in addition to the rulemaking or choose to conduct only a rulemaking.[2] As you know, this rulemaking is of extreme significance, as the scope of the final rule will indicate whether EPA intends to redefine when isolated wetlands, intermittent streams, and other non-navigable waters should be subject to regulation under the CWA.

We write to express continued concern over the possible finalization of the proposed guidance. We request that you formally withdraw the draft guidance sent to Office of Management and Budget (OMB) in February 2012, and redirect the agency's finite resources.[3] The draft guidance promulgated in 2011, if finalized, could expand the scope of the waters to be regulated beyond that intended by Congress. Moreover, leaving the guidance in place would further frustrate any potential rulemaking process. Given the significance of redefining jurisdictional limits to impose CWA authority, a formal rulemaking process provides a greater opportunity for public input and greater regulatory certainty than a guidance document.

With regard to the rulemaking, we ask that you stay within the confines of current law and eschew attempts to expand jurisdiction beyond the intent of Congress. Any rulemaking should identify limits to EPA's jurisdiction under the statute consistent with those articulated in the Supreme Court decisions of *SWANCC*[4] and *Rapanos*.[5] In both of these cases, the U.S.

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[1] Clean Water Act Definition of "Waters of the United States," http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm.

[2] *Fate Of Controversial Guide Seen As Key To Rule Clarifying CWA Scope*, InsideEPA.com, Mar. 8, 2013, *available at* http://insideepa.com/Water-Policy-Report/Water-Policy-Report-03/11/2013/fate-of-controversial-guide-seen-as-key-to-rule-clarifying-cwa-scope/menu-id-127.html.

[3] *Draft Guidance on Identifying Waters Protected by the Clean Water Act* (May 2, 2011), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf.

[4] Solid Waste Agency of Northern Cook County. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).

[5] Rapanos v. United States, 547 U.S. 715 (2006).

Supreme Court made it clear that not all water bodies are subject to federal jurisdiction under the CWA. Any proposed rule should reflect this principle.

As you are aware, several recent cases indicate that the courts remain critical of EPA's efforts to expand jurisdiction or aggressively exercise the agency's enforcement powers. For example, in March 2012 the Supreme Court unanimously rejected EPA's position that a compliance order issued under the CWA was not final agency action subject to judicial review.[6] More recently, the District Court for the Eastern District of Virginia held that EPA lacks authority under the CWA to establish a Total Maximum Daily Load (TMDL) for the flow of a non-pollutant (i.e., stormwater discharges) to regulate pollutant levels of an impaired water body.[7] Just last month, the Supreme Court again thwarted attempts to expand jurisdiction when it held that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a "discharge of a pollutant" under the CWA.[8] These cases demonstrate the readiness of the courts to ensure that EPA does not abuse the statutory and regulatory authority granted to it by Congress.

Accordingly, we request that you formally withdraw the proposed guidance and proceed with a formal rulemaking process. In conducting this process EPA should not attempt to expand its statutory authority beyond that intended by Congress. The final rule should reflect the principles promulgated in recent case law and identify limits on the agency's jurisdiction under the CWA.

Sincerely,

John Barrasso
U.S. Senator

David Vitter
U.S. Senator

Roy Blunt
U.S. Senator

John Boozman
U.S. Senator

[6] Sackett v. EPA, 132 S.Ct. 1367 (2012).
[7] Virginia Dep't of Transp. v. EPA, No. 1:12–CV–775, 2013 WL 53741 (E.D.Va. 2013).
[8] Los Angeles County Flood Control Dist. v. Natural Res. Def. Council, Inc., 133 S.Ct. 710 (2013).

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