

# United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

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

October 2, 2013

## **VIA ELECTRONIC MAIL** **IMMEDIATE ATTENTION REQUESTED**

The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Ave, NW  
Washington, DC 20460

Dear Administrator McCarthy:

We write in response to the Environmental Protection Agency's (EPA) announcement last month that a draft rule on Clean Water Act (CWA) jurisdiction has been sent to the Office of Management and Budget (OMB) for interagency review. We are concerned that EPA created ambiguity regarding the status of the agency's 2011 draft guidance on CWA jurisdiction. In order to confirm EPA's quiet revelation that the draft guidance has been withdrawn, we request that EPA immediately and publicly instruct agency and Army Corps of Engineers (Corps) personnel and field staff that the draft guidance may not be used or relied on in making CWA jurisdictional determinations.

This request stems from EPA's September 17, 2013 blog post indicating that the agency and the Corps would proceed with rulemaking for CWA jurisdiction.<sup>1</sup> In conjunction with this announcement, EPA informed congressional staff that it would "withdraw[] the draft guidance previously sent to OMB and concentrat[e] on the rule per stakeholder request."<sup>2</sup> News reports likewise indicated that the draft guidance would be withdrawn.<sup>3</sup>

Yet EPA conspicuously refrained from explaining the draft guidance's status in correspondence with the public at large. The apparent withdrawal of the draft guidance was not mentioned in the September 17 blog post, nor was it referenced in contemporaneous email correspondence to stakeholder groups.<sup>4</sup> To our knowledge, EPA has not provided a notice or

<sup>1</sup> Nancy Stoner and Lek Kadeli, *EPA Science: Supporting the Waters of the U.S.*, EPA CONNECT (Sept. 17, 2013, 2:10 p.m.), <http://blog.epa.gov/epaconnect/2013/09/watersoftheus>.

<sup>2</sup> E-mail from Denis Borum, Congressional Liaison Specialist, U.S. Environmental Protection Agency to Congressional Staff (Sept. 17, 2013, 12:51 p.m.) (attached).

<sup>3</sup> See Amanda Palleschi, *Agencies Float CWA Jurisdiction Plan But Drop Plan for Interim Guide*, INSIDE EPA.COM (Sept. 17, 2013), <http://insideepa.com/201309172446978/EPA-Daily-News/Daily-News/agencies-float-cwa-jurisdiction-plan-despite-uncertainty-on-pending-guide/menu-id-95.html?s=dn> (noting that an EPA spokeswoman "confirmed that the guidance would be withdrawn from interagency review").

<sup>4</sup> See E-mail from Travis Loop, Director of Communications, Office of Water, U.S. Environmental Protection Agency (Sept. 17, 2013) (attached).

statement for public and agency dissemination which confirms the draft guidance's termination. Further, EPA's claim that it is "withdrawing the draft guidance" leads to questions on what exactly the draft's "withdrawal" means and when precisely the "withdrawal" takes effect.<sup>5</sup>

EPA's lack of transparency regarding the draft guidance's status is troubling. Given the significant criticism generated by the draft guidance's expansive interpretation of CWA jurisdiction, EPA should have completely and unconditionally abandoned the draft in any and all circumstances. But because EPA chose to be less than forthright, the agency's rulemaking efforts may now be plagued by uncertainty and distrust on interim jurisdictional questions.

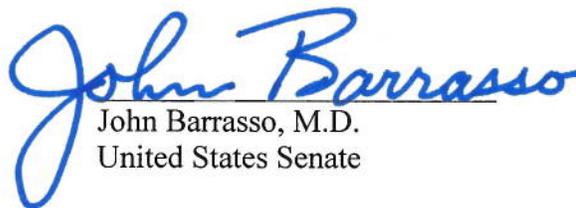
We are likewise unconvinced that the draft guidance's "withdrawal" will result in a meaningful practical change. To illustrate, we were disturbed to learn that Corps field staff have apparently relied on the draft guidance in making recent CWA jurisdictional determinations, despite the fact that the draft was never finalized. It is disconcerting to hear of the Corps' eagerness to use the draft guidance's improper "aggregation" approach in order to assert jurisdiction over one particular farmer's drainage ditches. EPA's vague announcement last month leaves open the possibility that federal officials may for the foreseeable future look to the draft guidance and its dubious regulatory agenda when making jurisdictional determinations.

Accordingly, we request that EPA formally announce to the public and to EPA and Corps field personnel no later than October 9, 2013 that the draft guidance is withdrawn and that the draft may not be used or otherwise relied on when making CWA jurisdictional determinations. We also request that you provide Committee staff with copies of such correspondence. As there is no legitimate reason for EPA's vague approach thus far, the agency's failure to accommodate our requests will serve as a confirmation that EPA and the Corps intend to improperly rely on the draft guidance when making jurisdictional determinations during the rulemaking period.

Sincerely,



David Vitter  
Ranking Member  
Environment and Public Works



John Barrasso, M.D.  
United States Senate



Deb Fischer  
United States Senate



Mike Crapo  
United States Senate

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<sup>5</sup> See Stoner and Kadeli, *supra* note 1. See also Lauren Gardner, *EPA Seeks Definition of 'Bodies of Water' for Clean Water Act*, ROLL CALL (Sept. 24, 2013 3:15 p.m.), [http://www.rollcall.com/news/epa\\_seeks\\_definition\\_of\\_bodies\\_of\\_water\\_for\\_clean\\_water\\_act-227853-1.html](http://www.rollcall.com/news/epa_seeks_definition_of_bodies_of_water_for_clean_water_act-227853-1.html) (noting that "an EPA spokeswoman said the agency *will* withdraw it from interagency review") (emphasis added).

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John Boozman  
United States Senate



James Inhofe  
United States Senate

CC:

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108 Army Pentagon  
Room 3E446  
Washington, DC 20310-0108