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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

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May 28, 2014

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

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
U.S. Army Corps of Engineers
108 Army Pentagon, Room 3E446
Washington, DC 20310

Dear Administrator McCarthy and Secretary Darcy:

I write specifically today to challenge the Administration's claim that the proposed "waters of the United States" (WOTUS) rule is about "protecting our natural resources."¹ It is clear that the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) are resorting to an unfounded narrative in order to mask the hardship the rule will bring to private landowners. Indeed, if finalized, the proposed WOTUS rule would result in the federal takeover of private property owned by millions of American families, farmers, small businesses, and municipalities. However, as explained below, EPA and the Corps ignore the agencies' history under the Clean Water Act (CWA) of shutting-down local conservation efforts as well as the likelihood that other stewardship projects could be impeded if the proposed rule is finalized.

Your agencies have repeatedly inhibited environmental restoration through excessive CWA regulation. For example, Peter and Frankie Smith purchased a parcel of land in New Mexico which, having been previously used as a local dump, was full of trash and other debris. In 2011, the Smiths were in the midst of cleaning up their recently purchased property when they received a determination from the Corps that the property was subject to federal control because it contained a dry arroyo. The Corps effectively stopped the Smiths' clean-up efforts by warning them that any further work on the property would be considered a knowing violation of the CWA. Eventually, the Corps backed down, but only after a lawsuit pointed out that the agency had dubiously asserted federal jurisdiction over a dry arroyo located 25 miles from the nearest navigable water.²

In Pennsylvania, one man's attempt to clean up an illegal auto dump led to relentless harassment from EPA and the Corps under the CWA. The agencies prosecuted John Pozsgai based on the logic that, since a collection of old tires occasionally caused the property to flood, the property was a wetland, and therefore Mr. Pozsgai had violated the CWA when he used fill material to improve his property. In

¹ U.S. Environmental Protection Agency, *EPA Administrator Gina McCarthy Gives an Overview of EPA's Clean Water Act Rule Proposal*, YOUTUBE (Mar. 25, 2014), <http://www.youtube.com/watch?v=ow-n8zZuDYc>.

² See Press Release, Pacific Legal Foundation, *PLF Sinks Feds' Scheme to Grab Dry Private Land by Calling It "Wet"* (Mar. 8, 2013), <http://www.pacificlegal.org/releases/PLF-sinks-feds-scheme-to-grab-dry-private-land-by-calling-it-wet>.

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the end, Mr. Poszgai spent several months in prison and was forced to pay thousands in fines, a significant toll for an individual who only wanted to clean up the environment.³

In Wyoming, it appears you can't improve your property without incurring the wrath of EPA. In 2010, the agency sued David Hamilton under the CWA after he removed discarded cars, appliances, and other debris from an irrigation ditch. Last month, however, a federal court reached the common sense conclusion that Mr. Hamilton's clean-up efforts were normal farming activities and were beyond the reach of EPA's CWA authority.⁴ However, EPA is apparently undeterred—the agency is now threatening another Wyoming landowner, Andrew Johnson, with CWA fines possibly as large as \$187,500 per day for building a stock pond which has attracted new wildlife to the property.⁵

Unfortunately, the proposed WOTUS rule will only expand the agencies' authority to obstruct environmental stewardship efforts. As one witness recently testified before the Senate Environment and Public Works Subcommittee on Water and Wildlife, the proposed rule “will hinder many projects that would benefit the environment” in part because it effectively precludes local implementation of best management practices and treatment controls that benefit downstream, navigable waters.⁶ Further, if the examples above are an indication of how the agencies will implement and enforce the proposed rule, many Americans will be surprised to learn that the rule could turn weekend environmental restoration projects near community ponds, creeks, or streams into nightmare ordeals complete with red tape, federal bureaucracy, onerous permitting requirements, and the threat of environmental litigation from far-left advocacy organizations.

In short, the Administration's claim that the proposed WOTUS rule is about “protecting our natural sources” rings hollow. Real-world examples combined with the proposal's sweeping language reveal EPA and the Corps' unending quest for expanded federal control over the environmental and economic land use decisions of American families, small businesses, and communities. I am hopeful that EPA and the Corps will be mindful of the above history and related concerns as the agencies consider withdrawing the proposed rule.

Sincerely,



David Vitter
Ranking Member
Committee on Environment and Public Works

³ See Iain Murray, *Case Studies in Regulation: John Poszgai*, WASHINGTON EXAMINER (April 19, 2011), <http://washingtonexaminer.com/case-studies-in-regulation-john-poszgai/article/144015>.

⁴ See William Perry Pendley, *EPA Out of Touch, Out of Control in Wyoming*, WASHINGTON TIMES (May 2, 2014), <http://www.washingtontimes.com/news/2014/may/2/pendley-earth-to-epa/>.

⁵ See Kelly David Burke, *EPA Targets Couple's Private Pond in Wyoming, Threatens Huge Fines*, FOXNEWS.com (May 19, 2014), <http://www.foxnews.com/politics/2014/05/19/feds-target-private-pond/>.

⁶ *Solving the Problem of Polluted Transportation Infrastructure Stormwater Runoff: Hearing Before the Subcomm. on Water and Wildlife of the S. Comm. on Environment & Public Works*, 113 Cong. 19 (2014) (testimony of J.G. Andre Monette, Attorney, Best Best & Krieger LLP).