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United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510–6175

July 6, 2015

The Honorable Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, D.C. 20310-0108

Dear Ms. Darcy:

On June 29, 2015, you and the Administrator of the Environmental Protection Agency (EPA) published a final rule to revise the definition of the term ''waters of the United States'' (WOTUS) in regulations issued by both agencies. 80 Fed. Reg. 37054 (Jun. 29, 2015).

Under a Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exceptions Under Section 404(f) of the Clean Water Act, dated January 19, 1989, the Corps of Engineers has primary responsibility for making jurisdictional determinations, subject to a "special case" designation by EPA, of which there have been fewer than a dozen.

In addition, under a June 5, 2007 Memorandum of Agreement between the Army and EPA, a jurisdictional determination for intra-state, non-navigable, isolated waters potentially covered solely under 33 C.F.R. §328.3(a)(3) is elevated to EPA and Corps headquarters. Since the *SWANCC* decision in 2001, *no such water* has been found to be regulated under the Clean Water Act.

In order to understand the bases for the decisions made by the Army in promulgating the WOTUS rule, please respond to the following requests.

Scientific studies and field observations

Please provide me with copies of jurisdictional determinations or other documentation memorializing the following field observations, including a reference to the page on which the requested information is found. If none exist, please so state. Do not create *post hoc* justifications for the final rule.

1. All field observations relied upon by the Army in developing the final rule that correlate the presence of an ordinary high water mark and the magnitude, frequency, and duration of flow (based on actual measurements) that therefore provide support the following

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statements: "The science also supports the conclusion that sufficient volume, duration, and frequency of flow are required to create a bed and banks and ordinary high water mark." 80 Fed. Reg. at 37066. "The physical indicators of bed and banks and ordinary high water mark (OHWM) demonstrate that there is sufficient volume, frequency, and flow in tributaries to a traditional navigable water, interstate water, or the territorial seas to establish a significant nexus." Technical Support Document (TSD), at 234.

2. All field observations relied upon by the Army in developing the final rule that correlate the presence of features on the ground identified using light detecting and ranging data (LiDAR), and the magnitude, frequency, or duration of flow that reaches a navigable water, based on actual measurement of flow.

3. All field observations relied upon by the Army in developing the final rule to support the statement that "lake and stream gage data, elevation data, spillway height, historic water flow records, flood predictions, statistical evidence, the use of reference conditions, or through the remote sensing and desktop tools described above" are reliable indicators that a stream formerly existed in a particular location and the magnitude, frequency, and duration of flow to a navigable water from such a former stream, based on evidence of flow to a navigable water provided by such a stream. 80 Fed. Reg. at 37077.

4. All field observations relied upon by the Army in developing the final rule to conclude that all streams meeting the definition of tributary have a significant nexus to navigable water that (i) address ephemeral streams specifically, and that (ii) demonstrate that such streams provide flow to a navigable water. For such streams, please indicate whether such flow is provided through a surface connection, a shallow subsurface connection, or an aquifer and please include the quantification of such flow.

5. All field observations relied upon by the Army in developing the final rule that purport to find a connection between an ephemeral stream or geographically isolated body of water and navigable water through the movement of water through an aquifer, and any determination in such studies that the base flow of the navigable water came from the ephemeral stream or geographically isolated body of water.

6. All field observations relied upon by the Army in developing the final rule that support the conclusion that all waters located within 100 feet of the ordinary high water mark of a water identified in subsection (a)(1) through (5) of the WOTUS definition have a "significant nexus" to navigable water. 80 Fed. Reg. at 37085.

7. All field observations relied upon by the Army in developing the final rule that support the conclusion that all waters located in the 100-year floodplain of a water identified in subsection (a)(1) through (5) of the WOTUS definition and not more than 1,500 feet from the ordinary high water mark of such water have a "significant nexus" to navigable water. 80 Fed. Reg. at 37085.

8. All field observations relied upon by Army in developing the final rule that support the conclusion that all waters located within 1,500 feet of the high tide line of a water identified in subsection (a)(1) through (5) of the WOTUS definition and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes have a "significant nexus" to navigable water. 80 Fed. Reg. at 37085.

9. All field observations relied upon by the Army in developing the final rule that support the conclusion that "all water" in the 100-year flood plain of a navigable or interstate water or a territorial sea and "all water" within 4,000 of the ordinary high water mark of any jurisdictional water, including a tributary as defined above, potentially have a significant effect on navigable water. In particular, please provide copies of the jurisdictional determinations that support the following statement: "the agencies' experience and expertise indicate that there are many waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or out to 4,000 feet where the science demonstrates that they have a significant effect on downstream waters." 80 Fed. Reg. at 37059.

Significant nexus

Since the *SWANCC* decision in 2001, no intra-state, non-navigable, isolated waters has been found jurisdictional relying solely on 33 C.F.R. §328.3(a)(3).

Under the final rule, jurisdiction over such waters could be established by any one of the following functions:

> (i) Sediment trapping,
> (ii) Nutrient recycling,
> (iii) Pollutant trapping, transformation, filtering, and transport,
> (iv) Retention and attenuation of flood waters,
> (v) Runoff storage,
> (vi) Contribution of flow,
> (vii) Export of organic matter,
> (viii) Export of food resources, and
> (ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

The preamble to the final rule says "non-aquatic species or species such as non-resident migratory birds do not demonstrate a life cycle dependency on the identified aquatic resources and are not evidence of biological connectivity for purposes of this rule." 80 Fed. Reg. at 37094.

However, use of water as habitat by "resident" birds and other animals and the movement of insects and seeds via any kind of bird (referred to as "dispersal") can establish jurisdiction. *Id.*

According to the Connectivity Report "[p]lants and invertebrates disperse to and from prairie potholes via 'hitchhiking' on waterfowl." Connectivity Report at 5-5. Further, according to the Technical Support Document, any bird, even a migratory bird, can establish jurisdiction by dispersing seeds and insects. "Migratory birds can be an important vector of long-distance dispersal of plants and invertebrates between non-floodplain wetlands and the river network, although their influence has not been quantified." TSD, at 112.

The Technical Support Document refers 30 times to dispersal by organisms such as birds and mammals of plants (as seeds) and invertebrates (as eggs), including the following statement: "Plants and invertebrates can also travel by becoming attached to or *consumed and excreted by waterfowl*. Id. (citing Amezaga et al. 2002). Dispersal via waterfowl can occur over long distances. Id. (citing Mueller and van der Valk 2002)." TSD, at 334 (emphasis added).

According to the Technical Support Document, groundwater is a "hydrologic flowpath." *See* TSD at 129, 132, 148. Similarly, overland flow of water and shallow subsurface flow is considered a connection. 80 Fed. Reg. at 37063, 37070-72, 37085-86, 37089-90, 37093-94. For example, according to the discussion of vernal pools in the Technical Support Document, these pools "typically lack permanent inflows from or outflows to streams and other water bodies," they can be "connected temporarily to such waters via surface or shallow subsurface flow (flow through) or *groundwater exchange (recharge)*." TSD, at 344 (emphasis added). Finally, water storage is a connection. *See, e.g.*, TSD, at 99, 177. According to the Technical Support Document:

> Wetlands and open waters in non-floodplain landscape settings (hereafter called "non-floodplain wetlands") provide numerous functions that benefit downstream water integrity. These functions include storage of floodwater; recharge of ground water that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules (*e.g.*, seeds, eggs, spores) to downstream waters; and habitats needed for stream species. This diverse group of wetlands (*e.g.*, many prairie potholes, vernal pools, playa lakes) can be connected to downstream waters through surface-water, shallow subsurface-water, and groundwater flows and through biological and chemical connections. TSD, at 98.

1. Please explain the difference between a resident and non-resident migratory bird.

2. Has the Army ever sought to establish jurisdiction over water based on waterfowl or mammal excretions?

3. Has the Army ever sought to establish jurisdiction over water based on the attachment of insects and seeds to birds or mammals?

4. Has the Army ever sought to establish jurisdiction over geographically isolated water based on infiltration of that water into the ground, the allegation that the water reaches a groundwater aquifer, the allegation that the aquifer recharges surface water at some other

location, and the allegation that the surface water that obtains part of its baseflow from this groundwater recharge eventually reaches navigable water? If yes, please provide copies of the relevant jurisdictional determinations.

5. Is there any water within 4000 feet of a water identified in §328.3(a)(1)through (5) that could not provide at least one of the listed functions?

6. What makes a nexus provided by a function significant?

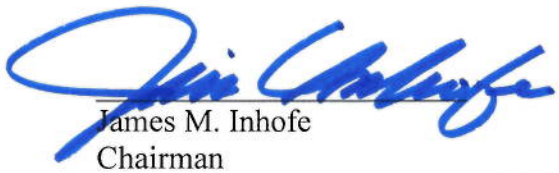
7. The 2008 *Rapanos* guidance states:

   It is clear … that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in *SWANCC*. Nothing in this guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non jurisdictional by *SWANCC*.

   Could the significant nexus definition in the final rule allow the Army to assert jurisdiction over waters deemed non jurisdictional by *SWANCC*?

Given that the final rule is complete, and the information requested all pertains to the record basis for the final rule, we expect the information requested to be readily available. For that reason, please provide the requested information within 30 days.

Sincerely,



James M. Inhofe
Chairman
Committee on Environment and Public Works