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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

RYAN JACKSON, MAJORITY STAFF DIRECTOR
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July 27, 2015

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

Dear Secretary Darcy:

Thank you for your prompt response to my July 16, 2015 letter to you requesting certain documents, the existence of which only recently came to my attention, relating to the development of the revised definition of the term “waters of the United States” (WOTUS). 80 Fed. Reg. 37054 (Jun. 29, 2015).

These documents, which include staff memoranda to Major General John Peabody, Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers, and memoranda from Peabody to you, contain significant information that is highly relevant to this Committee’s constitutional responsibility to oversee executive branch implementation of our nation’s laws.

Specifically, while interspersed with staff recommendations and legal conclusions that I understand you wish to keep confidential and hidden from the American public, the facts in these documents support my conclusion, and the conclusion of the 30 states that have already filed lawsuits challenging the final WOTUS rule, that the rule is lacking factual, technical and legal support.

I also was surprised to learn that, even though the rule was purportedly a joint effort of EPA and the Corps, it appears that the Corps did not receive the draft final rule until EPA submitted it to interagency review on April 3, 2015, and, according to Peabody’s April 27, 2015 memorandum to you, “the process followed to develop it greatly limited Corps input.”

Some of the factual information in these documents also appears to be directly responsive to my July 6, 2015, letter to you asking for the documents in the administrative record that reflect the “agency experience and expertise” that is the purported basis for the final rule. These recently obtained documents, as well as some of your responses to hearing questions and statements in existing Corps guidance, confirm my suspicion that many of the determinations that purport to support expanded jurisdiction in the final WOTUS rule were not based on the experience and expertise of the Corps.

Accordingly, while I am still expecting a timely and complete response to my July 6 letter, please confirm by July 30, 2015, the following factual conclusions drawn from these materials.

Previous field observations requests

Request #1 from July 6 letter

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 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.

Factual information from July 17 document production relevant to this oversight request

"[T]he draft final rule asserts CWA jurisdiction by rule over every 'stream' in the United States, so long as that stream has an identifiable bed, bank, and OHWM. That assertion of jurisdiction over every stream bed has the effect of asserting CWA jurisdiction over many thousands of miles of dry washes and arroyos in the desert southwest, even though those ephemeral dry wastes, arroyos, etc. carry water infrequently and sometimes in small quantities if those features meet the definition of a tributary." April 24, 2015 Memorandum to Peabody (emphasis in original).

"The TSD emphasizes that the agencies undertook a very thorough analysis of the complex interactions between upstream waters an wetlands and the downstream rivers to reach the significant nexus conclusions underlying the provisions of the draft final rule... [T]he Corps was not part of any type of analysis to reach the conclusions described; therefore, it is inaccurate to reflect that 'the agencies' did this work or that is reflective of Corps experience or expertise." May 15, 2015 Memorandum to Peabody.

"The TSD does not provide support for the determination of how 'significance' will be measured in the SND [significant nexus determination] or what is 'more than speculative or insubstantial?'" May 15, 2015 Memorandum to Peabody.

"The Corps also had no role in performing the analysis or drafting the TSD." May 15, 2015 Memorandum to Peabody.

"It is inaccurate to reflect that the Corps experience and expertise is reflected in the conclusions drawn within the document." May 15, 2015 Memorandum to Peabody.

Given the above statements of fact from these recently obtained documents, please confirm that the Army does not have a record of field observations supporting the determination in the final rule that every “stream” that meets the final rule definition of “tributary” has a significant nexus to navigable water.

Request #2 from July 6 letter

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.

Factual information from Corps guidance and the July 17 document production relevant to this oversight request

“A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States” (Aug. 2014) states that it is not appropriate to use remote sensing information alone to establish the presence of an OHWM.

Given this Corps guidance and the statement of fact quoted above that the TSD does not reflect the Corps experience and expertise, please confirm that the recommendations in the final rule relating to use of LiDAR to establish federal jurisdiction are not based on a record of Army field observations.

Request #3 from July 6 letter

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.

Factual information from July 17 document production relevant to this oversight request

“May be a challenge to identify a ditch that is a relocated tributary or excavated in a tributary. How far back in history does the regulator need to go? If it can't be determined definitely who bears the burden of proof? The landowner or the agency? Need to provide a set of tools/resources that the field can use to make the determination of the history of a ditch.” Appendix B to April 24, 2015 Memorandum to Peabody.

Given the above statements of fact and related questions, as well as the statement of fact that the TSD does not reflect Corps experience and expertise, please confirm that the

Army does not have a record of field observations that support a determination that the tools listed in the preamble to the final rule are reliable indicators that a ditch was a relocated tributary or an excavated tributary and that the former tributary had a significant nexus to navigable water.

Request #4 from July 6 letter

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.

Factual information from July 17 document production relevant to this oversight request

Given the statements of fact identified as relevant to Request #1, above, please confirm that the Army does not have a record of field observations supporting the determination in the final rule that every “ephemeral stream” that meets the final rule definition of “tributary” has a significant nexus to navigable water.

Request #5 from July 6 letter

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.

Factual information from responses to hearing questions and the July 17 document production relevant to this oversight request

In response to questions for the record from our February 4, 2015 hearing on the WOTUS rule you stated that: *“The Corps has never interpreted groundwater to be a jurisdictional water or a hydrologic connection because the Clean Water Act (CWA) does not provide such authority”* (emphasis added).

Further, with respect to the assertion of jurisdiction over geographically isolated water, your documents state that since the Supreme Court decision in *SWANCC*, no geographically isolated water has been found to be jurisdictional. *“None of the isolated JDs [Jurisdictional Determinations] resulted in a positive determination of jurisdiction.”* May 15, 2015 Memorandum to Peabody.

Given the above factual statements, please confirm that the Army does not have a record of field observations supporting the assertion of federal jurisdiction over ephemeral

streams that do not have a surface connection to navigable water or over other geographically isolated bodies of water, by alleging a connection through a groundwater aquifer.

Request #6 from July 6 letter

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.

Factual information from July 17 document production relevant to this oversight request

“Approved JDs are not required to indicate the distance from the aquatic resource to the nearest tributary OHWM.” May 15, 2015 Memorandum to Peabody.

“Neither the Rapanos Guidance nor the form used to implement that guidance (which is used by the Corps to document AJDs) requires the Corps to indicated the distance that an adjacent wetland is located from the nearest jurisdictional tributary’s OHWM or HTL [high tide line] when evaluating whether a significant nexus exists, and in making a jurisdictional determination concerning such waters. Rather, the Guidebook that accompanies the Rapanos Guidance indicates that consideration will be given to the distance between the tributary and traditionally navigable water (TNW) such that the effect of the tributary on the TNW is not speculative or insubstantial. The Guidebook further states that, “it is not appropriate to determine the significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW).” April 24, 2015 Memorandum to Peabody.

Given the fact that the Corps’ JDs do not include distance to the nearest tributary, and adjacency currently applies to wetlands, not all waters, please confirm that the Army does not have a record of field observations supporting the assertion of federal jurisdiction over all water located within 100 feet of the OHWM of a tributary.

Request #7 from July 6 letter

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.

Factual information from July 17 document production relevant to this oversight request

Given the fact that, as noted by the factual statement quoted above, Corps JDs do not include distance to the nearest tributary, and adjacency currently applies to wetlands, not all waters, please confirm that the Army does not have a record of field observations supporting the assertion of federal jurisdiction over all water located in the 100-year floodplain and not more than 1,500 feet of the OHWM of a tributary.

Request #8 from July 6 letter

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) [sic, should be "(3)"] 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.

Factual information from July 17 document production relevant to this oversight request

Given the fact that, as noted by the statement quoted above, Corps JDs do not include distance to the nearest high tide line, and adjacency currently applies to wetlands, not all waters, please confirm that the Army does not have a record of field observations supporting the assertion of federal jurisdiction over all water located within 1,500 feet of the high tide line of a water identified in subsection (a)(1) through (3) of the WOTUS definition and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes.

Request #9 from July 6 letter

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.

Factual information from July 17 document production relevant to this oversight request

"The TSD states that the 4,000-foot distance threshold limit for (a)(8) waters 'will protect the type of waters that in practice have been determined to have a significant nexus on a case-specific basis.' This statement is unfounded. The isolated JDs reviewed for the Economic Analysis by EPA to estimate the change in jurisdiction were originally

considered under the 2003 SWANCC guidance; therefore, jurisdiction was determined based on whether there was an interstate/foreign commerce connection; the jurisdiction was not analyzed through a SND." May 15, 2015 Memorandum to Peabody.

I note that this statement remains on page 356 of the final TSD. Please confirm that the Army does not have a record of field observations 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, potentially have a significant nexus to navigable water.

New request on isolated waters and significant nexus

Based on the concerns raised by these recently obtained documents, please also address the following:

1. All Army field observations relied upon by the Army to support the conclusion that Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands, "function alike and are sufficiently close to function together in affecting downstream waters" and therefore "are considered similarly situated by rule." 80 Fed. Reg. at 37059.

Factual information from July 17 document production relevant to this oversight request

"[T]he draft final rule ... characterizes literally millions of acres of truly 'isolated' waters (i.e., wetlands that have no shallow subsurface or confined surface connection with the tributary systems of the navigable waters or interstate waters) as 'similarly situated.'" April 24, 2015 Memorandum to Peabody (emphasis in original).

"The draft final rule would declare that all isolated waters in each of those five listed categories of isolated waters are 'similarly situated,' but the Corps has never seen any data or analysis to explain, support, or justify this determination." April 24, 2015 Memorandum to Peabody.

"[T]he definition in section (a)(7) for the five categories of isolated waters are not based on any findings that those isolated waters 'are sufficiently close together [sic] to function together in affecting downstream waters' as required by the definition of 'similarly situated.' [], EPA's technical staff has demonstrated that in some areas prairie potholes (for example) are located close together and, in other cases, they are spaced far apart." April 24, 2015 Memorandum to Peabody.

"Need delineation manuals for these waters or at least a definition of the waters, vegetation characteristics, etc." Appendix B to April 24, 2015 Memorandum to Peabody.

Please confirm that the Army does not have a record of field observations to support the determination in the final rule that Prairie potholes, Carolina and Delmarva bays, pocosins,

western vernal pools in California, and Texas coastal prairie wetlands, “function alike and are sufficiently close to function together in affecting downstream waters” and therefore should be considered similarly situated by rule.

2. All Army field observations relied upon by the Army to support the significant nexus determinations in the final rule.

Factual information from July 17 document production relevant to this oversight request

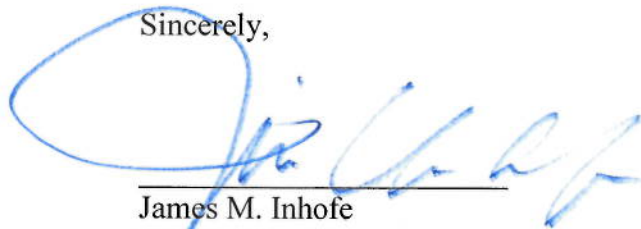
“The TSD emphasizes that the agencies undertook a very thorough analysis of the complex interactions between upstream waters and wetlands and the downstream rivers to reach the significant nexus conclusions underlying the provisions of the draft final rule.....[T]he Corps was not part of any type of analysis to reach the conclusions described; therefore, it is inaccurate to reflect that ‘the agencies’ did this work or that is reflective of Corps experience or expertise.” May 15, 2015 Memorandum to Peabody.

“The TSD does not provide support for the determination of how ‘significance’ will be measured in the SND [significant nexus determination] or what is ‘more than speculative or insubstantial?’” May 15, 2015 Memorandum to Peabody.

Please confirm that the Army does not have a record of field observations to support the determination in the final rule that all waters in the categories that are jurisdictional by rule have a significant nexus to navigable water.

Given that the information needed to respond to these requests has already been compiled in these documents and are readily available to you, I request a response to this letter by July 30, 2015. Please organize your responses individually and in the same order as the questions appear in this letter.

Sincerely,



James M. Inhofe
Chairman
Committee on Environment and Public Works