

Congress of the United States

Washington, DC 20515

June 27, 2018

The Honorable Jeff Sessions
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Dear Attorney General Sessions and Administrator Pruitt:

We are writing to express our concern that the Trump administration is unlawfully slowing or ending enforcement of the Clean Water Act in cases that fall outside the administration's overly narrow and currently legally unsupported interpretations of the law's reach. These actions call into question this administration's commitment to the rule of law, including the precedents of the U.S. Supreme Court, in implementing the Act's goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹

It is clear that the Trump administration opposes the Obama administration's efforts² to clarify the scope of Clean Water Act protections. For example, President Trump issued an Executive Order³ to narrow the Act's protections over waterbodies that EPA has identified as a source of drinking water to about 117 million people in the United States.⁴

However, under the U.S. Constitution, the President must uphold the laws of the United States, as enacted by Congress and further interpreted by the U.S. Supreme Court. It is unlawful for the administration to execute any law in any manner that is inconsistent with the terms of the statute or the interpretations of the U.S. Supreme Court, including selective enforcement of the law based on the President's own political philosophies. Unfortunately, that is what we believe is happening – that this administration is selectively enforcing the Clean Water Act based on how this

¹ See 33 U.S.C. 1251(a).

² See 80 Fed. Reg. 37053 (June 29, 2015).

³ See Presidential Executive Order 13778 (February 29, 2017).

⁴ See Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S., <https://www.epa.gov/cwa-404/geographic-information-systems-analysis-surface-drinking-water-provided-intermittent>.

administration perceives the law *should* be, rather than how the Congress and the Court have defined the law to be.

In 2006, the Supreme Court issued a 4-1-4 decision in Rapanos v. United States⁵ addressing Clean Water Act jurisdiction over waterbodies in the United States. In his concurring opinion, Justice Kennedy rejected the view of the Court's plurality that only "relatively permanent waters" are covered by the Act, noting that "these limitations . . . are without support in the language and purposes of the Act or in our cases interpreting it."⁶ Rather, Justice Kennedy restated his view that waterbodies which "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters"⁷ fall under the protection of the Clean Water Act.

In 2008, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) released agency guidance implementing the Rapanos decision that outlined those waters subject to Clean Water Act protections – including waterbodies that "significantly affect the chemical, physical, and biological integrity" of other covered waters.⁸ This administration claims that the 2008 guidance continues to define the scope of Clean Water Act authority.⁹

However, recent press reports have questioned whether this is true, and whether this administration continues to follow the rule of law in implementing the Clean Water Act. Specifically, these reports suggest EPA and the Department of Justice are ignoring Supreme Court precedent in enforcement of the Act, and purposefully suspending cases that fall outside this administration's overly narrow perception that its scope of protection should be limited to only "relatively permanent waters", as described in the 2017 Executive Order.

For example, last year, the publication *Inside EPA* reported on an internal EPA memo that directed agency enforcement staff to identify any pending Clean Water Act cases where jurisdiction was premised on the Kennedy significant nexus test. The memo implied that use of this test would be "the basis for slowing or even dropping work on those cases."¹⁰ Just last month, EPA enforcement personnel publicly acknowledged that the agency is slowing down or dropping

⁵ 547 U.S. 715 (2006).

⁶ Id at 768.

⁷ Id at 780.

⁸ See Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States, https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf

⁹ See Definition of "Waters of the United States" – Addition of an Applicability Date to the 2015 Clean Water Rule, 83 Fed. Reg. 5200 (February 6, 2018), noting that "Subject to further action by the agencies, until the applicability date of the 2015 Rule, the agencies will administer the regulations in place prior to the 2015 Rule, and will continue to interpret the statutory term 'waters of the United States' to mean the waters covered by those regulations, as they are currently being implemented, consistent with Supreme Court decisions and practice, and as informed by applicable agency guidance documents."

¹⁰ See "EPA May End CWA Enforcement Using Kennedy Test Ahead of New Rule" <https://insideepa.com/daily-news/epa-may-end-cwa-enforcement-using-kennedy-test-ahead-new-rule>.

enforcement cases where Clean Water Act jurisdiction is not a “slam dunk”¹¹ – again, suggesting that the agency is failing to fully enforce the laws as Congress and the Court intended.

Similarly, the *Washington Post* reports that the political head of EPA’s enforcement office has imposed a new procedural hurdle on the referral of civil enforcement cases to the Department of Justice.¹² According to a March 2018 EPA memo, all civil enforcement cases, including cases involving alleged Clean Water Act violations, now require specific sign-off from EPA political appointees, creating the possibility for outside influences to dictate enforcement of our Nation’s environmental laws.

These reports call into question this administration’s commitment to the rule of law in enforcement of the Clean Water Act, one of this Nation’s most successful environmental laws. In light of these concerns, and in furtherance of our Congressional oversight of Clean Water Act programs, we ask that you respond immediately to the following questions and requests for information:

- (1) Does the Trump administration believe that Justice Kennedy’s significant nexus analysis is currently the basis for asserting Clean Water Act jurisdiction over a waterbody or wetland? If so, please provide us with evidence of actions initiated by EPA and/or the Department of Justice to diligently prosecute Clean Water Act violations where jurisdiction is premised on a significant nexus determination.
- (2) Please provide us with the status of all cases, both civil and criminal, under the Clean Water Act and identify the legal basis for which jurisdiction is premised (e.g. traditionally navigable waters, relatively permanent waters, and significant nexus) in each case. Please include in your response the status of all Clean Water Act cases that were pending prior to January 20, 2017, and the status of all cases that were initiated after that date to the present.
- (3) Please provide us with a copy of all EPA, Corps, or Department of Justice memos, internal communications, emails, or other documents that –
 - a. define, reference, or propose changes to the policies of the Bush or Obama administrations related to enforcement of cases where Clean Water Act jurisdiction is premised on a significant nexus jurisdiction;
 - b. call on agency staff to identify pending or potential Clean Water Act cases on the basis of how jurisdiction is asserted; and
 - c. define the administration’s enforcement priorities and practices related to Clean Water Act jurisdiction.

¹¹ See “EPA Official Says CWA Jurisdiction Uncertainty Might Defer Enforcement” <https://insideepa.com/daily-news/epa-official-says-cwa-jurisdiction-uncertainty-might-deter-enforcement>.

¹² See “Trump appointee at EPA to scrutinize which pollution cases may go to court” <https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2018/06/15/the-energy-202-trump-appointee-at-epa-to-scrutinize-which-pollution-cases-may-go-to-court/5b22ec7e1b326b3967989ace/>.

- (4) As you recall, in March 2018, the EPA Administrator issued a memorandum consolidating within the Office of the Administrator the authority to make certain, special-case jurisdictional determinations under the Clean Water Act. That same month, the Assistant Administrator for the Office of Enforcement and Compliance Assurance issued the earlier referenced memorandum on “Interim Procedures for Providing Early Notice of Civil Judicial Referrals.” In both instances, EPA has consolidated significant authority to act on potential Clean Water Act violations in the hands of political appointees of the agency, with little regard to established procedures or public transparency.
- a. Please provide us with a list of every Clean Water Act jurisdictional determination or civil enforcement referral for a Clean Water Act-related case that has utilized the new processes identified in these 2018 memos.
 - b. For Clean Water Act civil enforcement cases, please provide a list of any case where a referral to the Department of Justice was not made, and please identify the recommendations of the case team and regional administrator for such case, and the rationale for not making a referral to the Department.
 - c. Please provide a justification for how the new civil enforcement process will “reduce the average time from violation identification to correction.”
 - d. Please provide a summary of what procedures are in place to ensure that decisions to refer Clean Water Act enforcement cases to the Department are transparent and free of political influences.

We thank you for your prompt attention to this matter, and request a reply to this letter as soon as possible, but no later than July 31, 2018. If you have any questions, please contact us or have your staff contact Ryan Seiger of the House Committee on Transportation and Infrastructure at (202) 225-0060 or Christophe Tulou of the Senate Committee on Environment and Public Works at (202) 224-8832.

Sincerely,



PETER DeFAZIO
Ranking Member
Committee on Transportation
and Infrastructure
U.S. House of Representatives



TOM CARPER
Ranking Member
Committee on Environment and
Public Works
U.S. Senate

cc: The Honorable Ricky “R.D.” James, Assistant Secretary of the Army (Civil Works)