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

July 14, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW (1101A)
Washington, D.C. 20460

Dear Administrator McCarthy:

On March 4, 2015, you testified before the Environment and Public Works Committee. At that hearing, Senator Sullivan asked you for a legal opinion explaining the Environmental Protection Agency's (EPA's) legal rationale for the rule to revise the regulatory definition of the term ''waters of the United States'' (WOTUS).

The Committee has yet to receive a response to that request and you have now published the final WOTUS Rule. The final rule raises even more questions regarding its legality.

In fact, it appears that EPA is once again rewriting a statute to meet its policy goals despite repeated warnings from the Supreme Court against such actions.

In 1987, the Supreme Court admonished that "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States,* 480 U.S. 522, 526 (1987).

Last year, the Supreme Court warned that:

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," *Brown & Williamson*, 529 U. S., at 159, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance." *Utility Air Regulatory Group v. EPA*, 573 U. S. ___, ___; slip op. at 19 (2014) (*UARG*).

Finally, just last month, the Supreme Court twice cited its holding in *UARG* to warn agencies that their statutory interpretations will not necessarily receive deference. In *King v. Burwell*, the

Court chose not to defer to the IRS' interpretation of the Affordable Care Act. 576 U.S. ___, ___ (2015); slip op. at 8 (June 25, 2015). In *Michigan v. EPA*, the Court said that it will not defer to the agency when it relies on unreasonable interpretations of its statutory authority:

> *Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers. *Id.*, at 842– 843. Even under this deferential standard, however, "agencies must operate within the bounds of reasonable interpretation." *Utility Air Regulatory Group* v. *EPA*, 573 U. S. ___, ___ (2014) (slip op., at 16). 573 U.S. ___, ___ (2015); slip op. at 6 (June 29, 2015).

Based on our review of the final rule, it appears to rely on "unheralded power" that fails to fall "within the bounds of reasonable interpretation." To help the Committee understand how EPA interprets its authority under the Clean Water Act (CWA), in light of the language of the statute and Supreme Court rulings, please respond to the following questions.

Constitutional Basis for Authority

In the Technical Support Document (TSD) for the final rule EPA states that it is no longer relying on effects to interstate or foreign commerce to establish CWA jurisdiction.

> Presented with an assertion of jurisdiction under that provision of the existing rule and based on the effects of migratory birds' on interstate or foreign commerce, the Court stated in SWANCC that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made. See, e.g., United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-408, 85 L. Ed. 243, 61 S. Ct. 291 (1940)," SWANCC at 172. In light of that statement, the agencies concluded that the general other waters provision in the existing regulation that asserted jurisdiction based on a different aspect of Congress' Commerce Clause authority – authority over activities that "could affect interstate or foreign commerce" – was not consistent with Supreme Court precedent. TSD, at 78.

Based on this statement, it appears that the final rule is based on Congress' traditional authority over navigable water. That authority is based on the authority to regulate water borne commerce. The test set forth by the Supreme Court requires a traditional navigable water to be a "highway of commerce." *The Daniel Ball,* 77 U.S. 557 (1870). According to the Supreme Court, use as a highway is the "gist of the federal test." *Utah v. United States,* 403 U.S. 9 (1971). As noted by the Supreme Court in 1865:

> Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove

> such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. *Gilman v. Philadelphia*, 70 U.S. 713, 724-25 (1865).

Congress' Commerce Clause authority extends to (1) channels of interstate commerce, (2) instrumentalities of interstate commerce, and (3) activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995).

Questions:

1. Please explain which prong of Commerce Clause authority EPA is relying on to promulgate the final rule.

2. If EPA is relying on Congress' traditional authority over navigable water as a channel of interstate commerce, please explain how the final rule is an exercise of this authority when none of the scientific studies cited by EPA even identify whether the waters studied are navigable or not.

3. If EPA is relying on Congress' traditional authority over navigable water as a channel of interstate commerce, please explain how the final rule is an exercise of this authority when the final rule extends to activities that do not affect navigation or interstate commerce.

4. Please explain how intrastate, geographically isolated, non-navigable water has an effect on navigable water as a highway of commerce such that it may be subject to regulation as an exercise of Congress' authority over navigation.

SWANCC

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001) the Supreme Court ruled that the mere fact that a pond is used by "approximately 121 bird species ..., including several known to depend upon aquatic environments for a significant portion of their life requirements" does not create federal jurisdiction. *SWANCC*, at 164.

Specifically, the Court stated:

> We thus decline respondents' invitation to take what they see as the next ineluctable step after Riverside Bayview Homes: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute ... does not have any independent significance." [citing the oral argument transcript] We cannot agree that Congress' separate definitional use of the phrase "waters

> of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. 531 U.S. at 171-172.

In *SWANCC*, the Court disallowed use of the "Migratory Bird Rule" to establish federal jurisdiction. The Court explained the "Migratory Bird Rule" as follows:

> In 1986, in an attempt to "clarify" the reach of its jurisdiction, the Corps stated that §404(a) extends to intrastate waters:
> "a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
> "b. Which are or would be used as habitat by other migratory birds which cross state lines; or
> "c. Which are or would be used as habitat for endangered species; or
> "d. Used to irrigate crops sold in interstate commerce." 51 Fed. Reg. 41217.
>
> This last promulgation has been dubbed the "Migratory Bird Rule."

SWANCC, at 164.

The holding of *SWANCC* applies to the entire "Migratory Bird Rule."

> We hold that 33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the "Migratory Bird Rule," 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA.

Id. at 174.

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 *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court did not modify *SWANCC*. 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*.

Under the final rule, a significant nexus (and therefore federal jurisdiction) can 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, the Technical Support Document refers 30 times to dispersal of plants (as seeds) and invertebrates (as eggs) by organisms such as birds and mammals, 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.

In addition to the studies referenced above, the Technical Support Document cites such studies as:

> Roscher, J.P. 1967. "Alga Dispersal by Muskrat Intestinal Contents." *Transactions of the American Microscopical Society* 86:497-498.;
>
> Figuerola, J., *et al.* 2005. "Invertebrate Eggs Can Fly: Evidence of Waterfowl-Mediated Gene Flow in Aquatic Invertebrates." *American Naturalist* 165:274-280.
>
> Figuerola, J., and A.J. Green. 2002. "Dispersal of Aquatic Organisms by Waterbirds: A Review of Past Research and Priorities for Future Studies." *Freshwater Biology* 47:483-494.
>
> Frisch, D., *et al.* 2007. "High Dispersal Capacity of a Broad Spectrum of Aquatic Invertebrates Via Waterbirds." *Aquatic Sciences* 69:568-574.
>
> Mueller, M.H., and A.G. van der Valk. 2002. "The Potential Role of Ducks in Wetland Seed Dispersal." *Wetlands* 22:170-178.

The docket for the final rule also includes an amicus brief filed in the *SWANCC* case. (EPA-HQ-OW-2011-0880-8591 (including Likens, G. E., et al. 2000. Brief for Dr. Gene Likens et al. as Amici Curiae on Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, No. 99-1178.

Submitted by T.D. Searchinger and M.J. Bean, attorneys for Amici Curiae.). The amicus brief is cited by Justice Stevens in his *SWANCC* dissent for the proposition that many isolated waters have ecological connections to nearby waters. *SWANCC*, at 176, n.2. Thus, the ecological connections argument for jurisdiction was raised in *SWANCC*, but was rejected by the majority of the Court.

The final rule creates some exclusions, including one for "pits excavated [in dry land] for obtaining fill, sand, or gravel that fill with water."

Questions:

1. Is it your position that, after *SWANCC*, you can reasonably interpret the statute to rely on use of geographically isolated water as habitat by non-migratory birds and other species as a basis for jurisdiction as long as the species lives part of its life in a navigable water?

2. Is it your position that, after *SWANCC*, you can reasonably interpret the statute to rely on use of geographically isolated water as habitat by endangered species as a basis for jurisdiction as long as the species lives part of its life in a navigable water?

3. Is it your position that, after *SWANCC*, you can reasonably interpret the statute to rely on the ingestion of insect eggs or plant seeds by a bird or mammal in one location and the subsequent excretion of those eggs or seeds in another location as a basis for jurisdiction over geographically isolated water? When did you discover this "unheralded power?"

4. Why does EPA rely on an amicus brief cited by the dissent in *SWANCC* as support for the final rule?

5. Why is EPA relying on ecological connections to that were rejected by the *SWANCC* majority to create jurisdiction under the final rule?

6. Is it your position that by excluding "pits excavated [in dry land] for obtaining fill, sand, or gravel that fill with water" from the definition of WOTUS the final rule avoids the assertion of jurisdiction over waters that the Supreme Court determined were not jurisdictional in *SWANCC?*

7. Is it your position that *SWANCC* applies only to its facts?

Rapanos

In *Rapanos v. United States*, the Supreme Court addressed tributaries and their adjacent wetlands in a divided opinion. 547 U.S. 715 (2006). The four justice plurality held that to be subject to the CWA, water must be surface water with a relatively permanent connection to navigable water. In a concurring opinion Justice Kennedy held that to be subject to CWA jurisdiction, water must have a "significant nexus" to traditional navigable water. The four dissenting

justices argued for broader jurisdiction, based on "entwined" ecosystems. 547 U.S. at 797. None of the opinions indicated intent to overturn *SWANCC.*

Under the Supreme Court's ruling in *Marks v. United States*, 430 U.S. 188, 193 (1977), when no opinion of the Court garners a majority, "the holding of the Court may be viewed as that position taken by those Members who *concurred in the judgments on the narrowest grounds.*" *Marks*, 430 U.S. at 193 (emphasis added). The only justices who concurred in the *Rapanos* judgment were the justices who joined the plurality opinion and Justice Kennedy.

The plurality disagrees with the proposition that jurisdiction under the CWA turns on an evaluation of significant effects on the chemical, physical, and biological integrity of water.

> This is the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different statute that achieves the same purpose. ... It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that "significantly affect the chemical, physical, and biological integrity of" waters of the United States. It did not do that, but instead explicitly limited jurisdiction to "waters of the United States. *Rapanos v. United States*, 547 U.S. 715, 755-56 (2006) (plurality).

In addition, while Justice Kennedy created a new test based on "significant effects" he did not go as far as the dissent. According to Justice Kennedy:

> When ...wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."
>
> . . .
>
> [The dissent] concludes that the ambiguity in the phrase "navigable waters" allows the Corps to construe the statute as reaching all "non-isolated wetlands," just as it construed the Act to reach the wetlands adjacent to navigable-in-fact waters in *Riverside Bayview*, see *post*, at 11. This, though, seems incorrect. The Corps' theory of jurisdiction in these consolidated cases -- adjacency to tributaries, however remote and insubstantial -- raises concerns that go beyond the holding of *Riverside Bayview;* and so the Corps' assertion of jurisdiction cannot rest on that case.
>
> *Rapanos* at 780 (Justice Kennedy concurring).

Despite the direction of the Supreme Court in *Marks,* the final rule does not find jurisdiction only when both the plurality test and Justice Kennedy's test are met. And, despite the limitations established by Justice Kennedy, the final rule does not find jurisdiction based on significant effects on water quality. Instead, under the final rule:

> The agencies assess the significance of the nexus in terms of the CWA's objective to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' When the effects are speculative or insubstantial, the ''significant nexus'' would not be present. 80 Fed. Reg. at 37056.

This test requires no demonstration of water quality impacts, much less a demonstration of significant impacts. For example, one of the functions cited above that could establish jurisdiction is "contribution of flow." However, the final rule provides no quantification of flow. This approach is similar to the approach recommended in the *Rapanos* dissent, which was rejected by Justice Kennedy: "the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters."

The final rule also adopts the existing Corps practice of identifying a tributary based on the presence of an ordinary high water mark (and the bed and banks that are part of the current ordinary high water mark evaluation). According to Justice Kennedy, this standard provides no assurance that a tributary (or adjacent wetlands) would significantly affect downstream navigable water.

> [T]he breadth of this standard--which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it--*precludes its adoption* as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*. Cf. Leibowitz & Nadeau, Isolated Wetlands: State-of-the-Science and Future Directions, 23 Wetlands 663, 669 (2003) (noting that isolated is generally a matter of degree.). 547 U.S. at 781-82 (emphasis added).

EPA claims that "the science" supports the new definition of waters of the United States. However, the studies referenced by EPA do not address impacts to navigable waters and most do not address water quality. Finally, none address significance even though Justice Kennedy and the Science Advisory Board panel that reviewed of the proposed rule both raised the concern that connectivity or isolation is a "matter of degree." Instead of relying on studies that show significant impacts to water quality, in the preamble EPA claims that the agencies' determination that a "significant nexus" exists is based on "scientific and policy judgment, as well as legal interpretation." 80 Fed. Reg. at 37057.

Questions

1. Is it your position that you can reasonably interpret the statute to establish jurisdiction over water absent a showing of "effects on water quality" that are not "speculative or insubstantial?"

2. Is it your position that the dispersal of seeds and eggs is an effect on water quality?

3. Is it your position that Justice Kennedy's opinion in *Rapanos* modifies the agencies' legal requirements regarding geographically isolated waters even though it did not overturn *SWANCC*?

4. When identifying waters that are jurisdictional by rule, how did EPA evaluate or quantify the significance of an effect on the quality of navigable water?

5. When identifying waters that are jurisdictional on a case-by-case basis, how will EPA evaluate or quantify the significance of an effect on the quality on navigable water?

Groundwater

The Final Rule asserts jurisdiction based on contribution of flow. The Technical Support Document is clear that flow includes groundwater. It calls groundwater a "hydrologic flowpath." *See* TSD at 129, 132, 148. For example, the Technical Support Document discussion of vernal pools states that while they "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.

Questions

1. Is it your position that a contribution of flow that can establish a "significant nexus" under the final rule includes flow contributed through a groundwater aquifer?

2. Is it your position that a channel is *per se* a regulated tributary even if any indication of a bed, bank and ordinary high water mark ends before the channel reaches a navigable water, if the agencies allege that flow from the channel reaches a navigable water via groundwater?

3. While groundwater is not a water of the United States, what new controls over groundwater could result from this assertion? For example:

    a. Does this analysis make septic systems, such as those on Cape Cod or those built in the fossil coral of the Florida Keys, potential point sources?

    b. Does this analysis give the agencies the authority to make every feature that holds water above the Ogallala Aquifer a WOTUS on a case-by-case basis, if water from the feature infiltrates the ground and reaches that aquifer?

    c. Under the Final Rule, drinking water reservoirs and distribution systems are potentially waters of the United States. If they are leaking and that leak is recharging a groundwater aquifer, could EPA, notwithstanding water rights, object to or place conditions on a 404 permit that would now be needed to fix the leak if EPA wants that groundwater recharge to continue?

d. How would such a result be consistent with CWA § 101(g)? ("It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.").

Flood Control

Under the final rule, retention and attenuation of flood waters, is sufficient to establish jurisdiction. Flood control is not a mission granted EPA or the Corps under the CWA. In various flood control acts, Congress gave the Corps authority to provide assistance to states and local governments to mitigate flood damages through cost-shared projects, including reservoirs and levees. The Corps' flood control authorities are not regulatory except as provided in specific acts authorizing certain non-federal reservoir projects and, under the Federal Power Act, reservoir projects operating under licenses issued by the Federal Energy Regulatory Commission. Nothing in the legislative history of the CWA suggests it includes flood control authority. In fact, when, section 101(g) was added to the Act in 1977, its sponsor stated:

> This amendment came immediately after the release of the Issue and Option Papers for the Water Resource Policy Study now being conducted by the Water Resources Council. Several of the options contained in that paper called for the use of Federal water quality legislation to effect Federal purposes that were not strictly related to water quality. Those other purposes might include, but were not limited to Federal land use planning, plant siting and production planning purposes. This "State's jurisdiction" amendment reaffirms that it is the policy of Congress that this act is to be used for *water quality purposes only.*

123 Cong. Rec. &. S19677-78, (daily ed., Dec. 15, 1977) (floor statement of Senator Wallop) (emphasis added).

Questions

1. Is it your position that the CWA authorities go beyond water quality?

2. Is it your position that the CWA authorizes EPA to exert federal control over a geographically isolated water because it can hold water?

3. If a geographically isolated water is jurisdictional based on its capacity to hold water, do you claim the authority to object to a permit that could either increase or decrease that water storage capacity, based on EPA's views of where and when water should flow, notwithstanding water rights?

Given that you have had since March 4, 2015, to prepare your legal justification for your WOTUS rule, 30 days should be ample time to respond to this letter. Please respond to these questions by August 13, 2015.

Sincerely,

James M. Inhofe
Chairman
Committee on Environment and Public Works

Dan Sullivan
Chairman
Subcommittee on Fisheries, Water and Wildlife

David Vitter
United States Senator

John Barrasso
United States Senator

Shelley Moore Capito
United States Senator

Mike Crapo
United States Senator

John Boozman
United States Senator

Jeff Sessions
United States Senator

Roger Wicker
United States Senator

Deb Fischer
United States Senator

M. Michael Rounds
United States Senator