Congress of the United States
Washington, DC 20515

April 24, 2018

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

Dear Administrator Pruitt:

We are writing to express our concern over recent actions by the U.S. Environmental Protection Agency (EPA) to strip EPA experts across the country of their authority to make important decisions about Clean Water Act protections, and to consolidate this authority in your offices in Washington, D.C. These actions call into question your commitment, as EPA Administrator, to follow the law (including existing precedent of the U.S. Supreme Court), as well as to ensure that Clean Water Act decisions are based on established science and precedent, and conducted in a transparent manner.

In your March 30, 2018, Memorandum to the Assistant Administrator for the Office of Water and EPA Regional Administrators (hereinafter the 2018 Memorandum), you consolidate, within your office, absolute power over how EPA will make geographic jurisdictional determinations under the Clean Water Act, effectively sidelining the local EPA offices who have historically informed this process. We are concerned that this newly announced process provides no guidance on how EPA will evaluate jurisdictional decisions, whether those decisions will be informed by science or appropriate legal precedents, or whether the decisions will be publicly available for review. Your actions appear nothing more than a power grab to consolidate absolute authority in your personal offices, with no assurance that you will follow the rule of law, science, or the precedents of the agency in exercising your statutory responsibility under the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1]

Similarly, we are concerned that, by centralizing Clean Water Act jurisdictional decisions in Washington D.C, especially precedent-setting, special case determinations, you will ignore important regional differences in rivers, streams, and wetlands. Understanding of these regional differences has historically been informed by the local, on-the-ground efforts of EPA regional offices and affected States. As you noted in an October 2017 news report, the "challenges for air and water quality are

[1] See 33 U.S.C. § 1251(a).

PRINTED ON RECYCLED PAPER

very diverse across the country."[2] Yet, by divorcing Clean Water Act jurisdictional determinations from the local EPA offices where they originate, you imply that your office in Washington, D.C., knows more about local water conditions than those Federal and State officials based in the affected area.

In light of these concerns, and in furtherance of our Congressional oversight of the Clean Water Act program, we ask that you respond immediately to the following questions and requests for information and documentation:

1) Please provide a detailed description of the new EPA process (created by the 2018 Memorandum) regarding the EPA's determinations of its jurisdiction under the Clean Water Act, including the specific roles undertaken by specific offices within EPA (including regional offices) in this process.
    a. Please identify the specific EPA offices that will interact with the U.S. Army Corps of Engineers in carrying out this authority.
    b. Please include a description of the specific safeguards and technical personnel in place to ensure that such actions will be consistent with law, science, and agency precedents, and performed in a consistent, uniform, and transparent manner.
    c. Please specifically describe how this new process is consistent with, or proposes to change, the existing 1989 Memorandum of Agreement[3] between EPA and the Corps related to determinations of geographical jurisdiction under section 404 of the Clean Water Act, including whether EPA proposes to expand or limit its authority over "special case" determinations or "special 404(f)" determinations defined in the 1989 MOA.
    d. Please include in this description a detailed comparison of this new process with the one that existed immediately prior to the 2018 Memorandum, as well as any documentation or memorandum issued by the agency to describe this process prior to the issuance of the 2018 Memorandum.

2) Please provide a detailed description of the following:
    a. How the 2018 Memorandum proposes to change the current process for restricting or prohibiting the designation of disposal sites under section 404(c) of the Clean Water Act, and a specific justification for this change. Please include in this description how this potential change could affect the process for reviewing pending (or expected) projects, such as the proposed Pebble Mine project, Bristol Bay, Alaska.
    b. How the 2018 Memorandum proposes to change the current process for EPA to request a review by the Assistant Secretary of the Army of proposed permit decisions, and a specific justification for this change.

---

[2] See http://www.ksdk.com/article/news/nation-now/pruitt-moves-to-shake-up-epa-advisory-boards-further-antagonizing-environmental-activists/465-47a84660-85ec-47d8-89e4-3bff481cd431.

[3] See Memorandum of Agreement: Determination of Geographic Jurisdiction of the Section 404 Program and Application of Exemptions Under Section 404(f) of the Clean Water Act, <https://www.epa.gov/cwa-404/memorandum-agreement-determiniation-geographic-jurisdiction-section-404-program-and>

3) The 2018 Memorandum highlights specific changes to the implementation of the section 404 program under the Clean Water Act. Please describe whether this memo proposes any similar changes to implementation of the National Pollution Discharge Elimination System program, under section 402 of the Clean Water Act. Please describe the current process by which Clean Water Act jurisdictional determinations are made under section 402, including the respective roles for approved State programs under section 402(b), EPA regional offices, or EPA headquarters (including the Offices of the Administrator or Water).

4) In December 2008, EPA and the Corps released a joint memorandum, titled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States"[4] (hereinafter the 2008 Guidance), to provide guidance to EPA regions and Corps districts on implementing decisions of the U.S. Supreme Court related to Clean Water Act jurisdiction over waters of the United States. In that document, EPA and the Corps stated that they would assert Clean Water Act jurisdiction over three categories of waters: (1) traditionally navigable waters and their adjacent wetlands; (2) relatively permanent non-navigable tributaries of traditionally navigable waters and wetlands with a continuous surface connection with such tributaries; and (3) certain adjacent wetlands and non-navigable tributaries that are not relatively permanent. With respect to this last category, the 2008 Guidance stated it would assert Clean Water Act jurisdiction "where such tributaries have a significant nexus to a traditionally navigable water"[5] and outlined several hydrologic and ecological factors for how the agency would determine such a significant nexus existed.
    a. Do EPA headquarters and its regional offices continue to utilize the 2008 Guidance as a basis for how the agency determines whether a particular waterbody or wetland is jurisdictional under the Clean Water Act? If not, what is EPA's current basis or guidance for asserting Clean Water Act jurisdiction?
    b. Does EPA believe that the Rapanos significant nexus analysis is a basis for asserting Clean Water Act jurisdiction over a waterbody or wetland? If so, please provide the percentage of waters/wetlands where Clean Water Act jurisdiction was established using the significant nexus test during calendar year 2017 and to date in calendar year 2018?
    c. What percentage of waters, for which jurisdictional determinations are reviewed by EPA, rely on the relatively permanent waters legal analysis of the Rapanos decision, and what percentage rely on a significant nexus approach?
    d. Press has reported that staff in EPA's Office of Enforcement and Compliance Assurance "were directed to quickly compile a list of ongoing CWA enforcement cases based on a significant-nexus finding" which may have been a pretext for "slowing or even dropping work on those cases." Has any employee at EPA, including in the Administrator's office or the Offices of Water or Enforcement and Compliance Assurance, been directed to compile or already produced a list of potential or active Clean Water Act enforcement cases where the issue of jurisdiction based on the significant nexus has been identified as a factor? If such a list has been compiled or produced, please provide a copy to our offices.

---

[4] See https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf
[5] See id at 8.

5) In June 2007, EPA and the Corps released a joint memorandum, titled "Memorandum for Director of Civil Works and US EPA Regional Administrators"[6] (hereinafter the 2007 Memorandum). The 2007 Memorandum outlines the coordination procedures for EPA and the Corps related to Clean Water Act jurisdictional determinations, including the respective roles, procedures, and responsibilities of EPA regional offices and headquarters.
   a. In light of the 2018 Memorandum, will EPA headquarters and its regional offices continue to utilize the 2007 Memorandum regarding how the agency will coordinate jurisdictional determinations?
   b. In light of the 2018 Memorandum, please describe any changes to the coordination procedures outlined in the 2007 Memorandum.
   c. If changes are intended, will the Corps and EPA issue a revised coordination memorandum to replace the 2007 Memorandum?

Thank you for your prompt attention to this matter, and we request a reply as soon as possible, but in no event later than May 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 Democratic 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
U.S. House of Representatives
Committee on Transportation
and Environment

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

[6] See https://www.epa.gov/sites/production/files/2016-04/documents/rapanosmoa6507.pdf.