Congress of the United States
Washington, DC 20515

November 15, 2013

The Honorable Howard Shelanski
Administrator
Office of Information and Regulatory Affairs
The Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Administrator Shelanski,

We write regarding the Environmental Protection Agency's (EPA) draft rule on the definition of "waters of the United States" under the Clean Water Act (CWA), currently before the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs for interagency review.[1] As you may be aware, EPA has already declared that its final rule should be and will be based on a scientific report titled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*.[2] EPA has committed to predicating the final rule on the *Connectivity Report*, even though critical review of the *Report*'s draft version is far from complete.

We are concerned that EPA's decision to base the final "waters of the United States" rule on a report that is still only in draft form creates the appearance that peer review and public input for the *Connectivity Report* are nothing more than paper exercises. We likewise fear that EPA will rely on the *Report* regardless of any deficiencies which may be identified during the review process. We note as well that EPA's decision to transmit the draft rule to OMB prior to the completion of rigorous Science Advisory Board (SAB) peer review and finalization of the *Connectivity Report* contradicts EPA and OMB peer review principles. Therefore, and in order to preserve the integrity of critical review of the rule's foundational scientific report, we ask that OMB immediately return the draft rule to EPA. Only by returning the draft rule to EPA may OMB's interagency review eventually proceed in a fully informed manner.

EPA's draft "waters of the United States" rule was transmitted to OMB on September 17, 2013. Despite the early stages of the rulemaking process, EPA declared that the final rule will be

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[1] *See* Nancy Stoner and Lek Kadeli, *EPA Science: Supporting the Waters of the U.S.*, EPA CONNECT (Sept. 17, 2013, 2:10 p.m.) (announcing that draft "waters of the United States" rule was sent to OMB for interagency review), http://blog.epa.gov/epaconnect/2013/09/watersoftheus.

[2] *See id. See also* Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Draft) (hereinafter *Connectivity Report*), available at http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf.

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based on the *Connectivity Report*, a document the agency claims to "represent[] the state-of-the-science on the connectivity and isolation of waters in the United States."[3] According to EPA, the *Connectivity Report* "will provide the science foundation for agency decisions concerning the implementation of the Clean Water Act."[4]

Given that EPA has already decided the final "waters of the United States" rule will be based on the *Connectivity Report*, one would think the *Report*'s validity and scientific merit are foregone conclusions. In reality, however, EPA has committed to relying on a report whose legitimacy is far from certain. For one, the *Report* is still in draft form and was only recently disseminated to the public for review and input. In fact, several parties have highlighted significant flaws in reviewing the *Report* and in particular its failure to distinguish between significant and insignificant connections to downstream waters.[5] EPA's decision to predicate the final rule on the *Report* implies no amount of criticism will convince the agency to take an alternative path. OMB should not sanction such inflexibility.

Equally important, SAB peer review of the draft *Connectivity Report* is still in its early stages. In theory, the SAB peer review should proceed openly and transparently, with its results allowing EPA to make an informed decision on whether or not to base its rule on the *Report*. Yet EPA has already made this decision without SAB's input. This leads us to wonder whether EPA feels the SAB peer review is merely a box-checking task, rather than an opportunity to meaningfully examine the scientific merits of a significant regulatory report.

We also note the EPA's presumptuous approach contradicts peer review principles recognized by OMB as well as EPA itself. For example, OMB has observed that "[w]hen an information product is a critical component of rule-making, it is important to obtain peer review before the agency announces its regulatory options so that any technical corrections can be made *before the agency becomes invested in a specific approach* or the positions of interest groups have hardened."[6] EPA has likewise remarked that peer review "is a process for enhancing a scientific or technical work product so that the decision or position taken by the Agency, based

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[3] Stoner and Kadeli, *supra* note 1.

[4] *Id. See also* Environmental Protection Agency, http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345 (noting that "[a]ny final regulatory action related to the jurisdiction of the Clean Water Act in a rulemaking will be based on the final version" of the *Connectivity Report*).

[5] *See, e.g.* Letter from Pacific Legal Foundation to SAB Panel Members re: *Connectivity Report* (Oct. 11, 2013) ("[I]n many respects the [*Connectivity Report*] diverges unnecessarily from existing law and usage in such a way as to confuse the reader and increase the chances of an error-filled rulemaking."); *and* Letter from State of Alaska Department Natural Resources to Dr. Thomas Armitage, EPA Science Advisory Board Staff Office re: *Connectivity Report* (Nov. 6, 2013) ("EPA has failed to make many of the documents underlying the [*Report*] available, which makes it extremely difficult, if not impossible, to adequately critique the [*Report*]."). The State of Alaska has also submitted that EPA's commitment to the *Report* as a basis for the rule is premature. *See id.* ("[T]he State believes that any scientific review used to underpin the process for making federal jurisdictional determinations must be completed *before a draft rule is prepared by the agencies.*") (emphasis added).

[6] OMB Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664, 2668 (Jan. 14, 2005) (emphasis added).

on that product, has a sound, credible basis."[7] Thus, with respect to the *Connectivity Report*, the proper course of action would be for EPA to allow the SAB peer review panel to provide relevant input on the *Report*'s draft; depending on the resulting changes to the *Report*, EPA can then decide whether it should serve as a basis for the rule. As it stands now, however, EPA is already invested in basing the rule on the *Report*, no matter the flaws that may be exposed during the SAB peer review process.

The consequences of a rushed "waters of the United States" rulemaking are too important to ignore. The property rights of millions of Americans are at stake, as many fear their ability to make productive use of their land will become subject to EPA's regulatory whims. EPA has already sent a dangerous signal by committing to the *Connectivity Report* well before the *Report*'s merits have been decided. Further, given that the text draft rule would provide EPA with authority over ponds, tributaries, and ditches never before subject to federal regulation, the significance of the *Report* and its relationship to the rule make EPA's premature commitment to the *Report* even more suspect.

OMB must not countenance EPA's current approach, which calls for OMB to review a draft rule predicated on a report whose validity is uncertain. It would make a mockery of OMB's responsibility, described on its website, and fulfilled through the Office of Information and Regulatory Affairs (OIRA) to "oversee[] agency implementation of the Information Quality Law, including the peer review practices of agencies."[8] EPA must allow full review and evaluation of the *Report* to be completed by SAB and others, and then it will be in a position to decide whether it should serve as a basis for the rule.[9] Therefore, we request that OMB and the Office of Information and Regulatory Affairs immediately return the draft rule to EPA so that the *Connectivity Report* can be properly and fully evaluated and the rulemaking may eventually proceed in a credible manner.

If you have any questions regarding this request, please feel free to have your staff contact the Senate Environment and Public Works Committee at (202) 224-6176 or the House Judiciary Committee at (202) 225-3951.

Sincerely,

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[7] Environmental Protection Agency, Science Policy Council, *U.S. Environmental Protection Agency Peer Review Handbook*, available at http://www.epa.gov/peerreview/pdfs/peer_review_handbook_2006.pdf.
[8] Office of Mgmt. & Budget, Office of Info. and Regulatory Affairs (OIRA) Q&A's, http://www.whitehouse.gov/omb/OIRA_QsandAs (last visited Nov. 7, 2013).
[9] We note that EPA imposed an unreasonably brief time period for public review of the draft *Report* and input to the SAB panel, denying state agency requests for an extended review period. Returning the draft rule to EPA would allow state agencies and others a better opportunity to provide needed input to the SAB panel. *See* Letter from State of Alaska Department of Natural Resources, *supra* note 5 (noting that Alaska "remains very concerned about the lack of adequate time allowed for state regulatory agencies to review [the *Report*] and the information it relies upon").

Sen. David Vitter
Ranking Member
Senate Committee on Environment
and Public Works

Rep. Bob Goodlatte
Chairman
House Committee on the Judiciary

Rep. Spencer Bachus
Chairman
House Subcommittee on Regulatory Reform,
Commercial and Antitrust Law,
Committee on the Judiciary

cc: Gina McCarthy
Administrator, U.S. Environmental Protection Agency