Congress of the United States
Washington, DC 20515

April 1, 2014

The Honorable Nancy Stoner
Acting Assistant Administrator for Water
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

Dear Ms. Stoner,

Thank you for providing the Environmental Protection Agency's (EPA) response to our letter concerning Region 8 of the EPA's "Findings of Violation and Administrative Order for Compliance" (Compliance Order) for construction activities conducted by Andrew Johnson in Uinta County, Wyoming. EPA's prompt attention to our inquiry is appreciated. In light of EPA's proposal last week to expand the federal government's jurisdiction over private property under the guise of "clarifying" the scope of the Clean Water Act, our concerns are heightened.

We write today asking clarification of the purpose of the Compliance Order's civil penalties provision. Although our original letter noted that Mr. Johnson could face $75,000 in daily penalties under the Compliance Order's terms, this significant figure was left unaddressed in EPA's March 24, 2014 response. We fear now that our original penalties assessment may have been quite conservative, and that EPA is in fact threatening Mr. Johnson with civil penalties that could easily reach more than $175,000 per day.

Consider the Compliance Order's warning that EPA may charge Mr. Johnson "civil penalties of up to $37,500 per day for each violation of section 301 of the [Clean Water Act] and *for each violation* of an order issued by the Administrator of the EPA or her delegatee,"[1] and that any non-compliance with the terms of the Order "shall be deemed a failure to comply with this Order and shall be subject to EPA enforcement."[2] This language suggests Mr. Johnson may be penalized up to $37,500 per day for any violation of the statute and up to $37,500 per day for each and every violation of the Compliance Order.

Under these terms, it is not difficult to imagine a scenario in which EPA may claim a landowner owes more than $175,000 in daily penalties under the Clean Water Act. If the landowner refrains from immediately acceding to EPA's terms while he reviews his legal options, he may risk violating several of the Compliance Order's requirements, including:

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[1] Compliance Order at 9 (Docket No. CWA-08-2014-0012) (emphasis added).
[2] *Id.* at 8.

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1) The requirement to "inform the EPA in writing of . . . intent to comply fully with" the Compliance Order within ten (10) calendar days of receipt of the Order;

2) The requirement to submit to EPA within fourteen (14) days of receipt of the Order "the names and qualifications . . . of a consultant experienced in stream and wetlands restoration who will prepare a restoration plan . . . and must directly supervise all work performed pursuant to the [p]lan";

3) The requirement to submit within thirty (30) days of receipt of the Order a restoration plan prepared by the consultant referenced above;

4) The requirement to allow access "by any authorized representatives of the EPA, the [Army Corps of Engineers], the U.S. Fish and Wildlife Service . . . or any of the agencies' contractors, upon proper presentation of credentials to sites and records relevant to this Order" for numerous purposes.[3]

A $37,500 charge for violating each of the above requirements as well as a single statutory violation would equate to $187,500 in daily penalties. In one month's time, a landowner could be liable for more than $5.5 million in penalties. Clearly, this cannot be reconciled with EPA's claim that the Compliance Order is "remedial, not punitive."[4] Moreover, such a large figure is concerning given the Agency's announcement to expand the jurisdictional limits of the Clean Water Act. EPA could easily use the proposed rule to bankrupt small landowners for something as simple as building a pond or ditch anywhere near a wetland or stream. We are certain you are also well aware of the citizen suit provisions within the CWA that allow for EPA's environmental allies to sue private landowners—we believe the proposed rule will only enhance the ability of EPA and its environmental allies to subject landowners to endless and costly litigation.

While we remain skeptical of EPA's jurisdictional and exemption assertions, we are especially concerned over the apparent punitive nature of the Compliance Order. In order to obtain more information on this important matter, we request EPA to examine the terms of the Compliance Order and provide its perspective on the above figures. If EPA believes the above figures are correct, please explain how the Compliance Order's terms are not punitive. If EPA believes the above figures are incorrect, please explain the basis for such a determination and the maximum amount of daily penalties a landowner could incur under a compliance order's terms.

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[3] *See id.* at 5-9.
[4] *Id.* at 4.

Thank you again for your prompt attention to our inquiries. We would appreciate a written response to this letter no later than April 11, 2014. If you have any questions regarding this letter, please contact the Environment and Public Works Committee staff at (202) 224-6176.

Sincerely,

David Vitter
U.S. Senator

John Barrasso
U.S. Senator

Mike Enzi
U.S. Senator

Cynthia Lummis
U.S. Representative

cc: The Honorable Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works