

Congress of the United States

Washington, DC 20515

March 27, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Dear Administrator McCarthy:

We appreciated your testimony on February 4, 2015, at the bicameral hearing entitled “Impacts of the Proposed Waters of the United States Rule on State and Local Governments.” As a follow-up to that important hearing, the House Committee on Agriculture, the House Committee on Oversight and Government Reform, and the House Committee on Science, Space, and Technology (jointly, “the Committees”) are conducting oversight of the integrity of the Environmental Protection Agency’s rulemaking process related to the Clean Water Act. More specifically, the Committees are interested in ensuring that in the course of promulgating the definition of “waters of the United States” (“WOTUS” or “the proposed rule”), the EPA considered the views of all stakeholders. As part of this oversight initiative, we are writing to request documents and information related to the proposed rule.

Congress is obligated to ensure the integrity and transparency of the rulemaking process. The American people, including farmers and ranchers, have a right to be assured their voices are being heard by the Administration. Their advocate, as you know, is Secretary Vilsack. On February 11, 2015, Secretary Vilsack testified before the House Committee on Agriculture. During his testimony, he was asked about the proposed rule. During an exchange with Congressman Gibbs, he stated:

Rep. Gibbs So the impact to American agriculture can be quite severe in this area. And, you know, what has USDA done to advocate for farmers on this? Did you make comments that—on the comment period that has been ongoing? You know, what is USDA’s role been to address the agricultural community’s issues?

Mr. Vilsack: Congressman, we have indeed discussed this issue with the Administrator, and with EPA officials. The ephemeral issue is one that we have specifically commented on, the difficulty of establishing something ... So we have educated – that is – we see our role as educating, as providing input in terms of how this might impact. Obviously, it is not our decision to make. It is another sister agency, we have to respect that, but we have

expressed some issues and some concerns about the ephemeral definition.¹

The Committees appreciate the efforts of the Secretary and the U.S. Department of Agriculture (USDA) to represent farmers and ranchers. We hope EPA considers the Department's comments. Similarly, we hope the EPA gives equal weight to public comments and input from the U.S. Army Corps of Engineers (Corps).

On February 20, 2015, *Inside EPA* reported that the agency is moving forward on the proposed rule "with only limited input from the Army Corps of Engineers."² Allegedly, the Corps has not been permitted to review revisions since November 2014.³ One source to *Inside EPA* claimed the "Corps staff have 'expressed frustration' that they've had limited involvement in the rulemaking." Another source stated that the Corps had been allegedly "told to 'stand down' on the rulemaking process."⁴ Both the Corps and EPA told *Inside EPA* that comments were being reviewed and "extensive coordination" was occurring.⁵

The article also raised concerns about whether EPA is considering the input of its regional offices.⁶ Specifically, the article stated: "EPA regional offices have provided data to agency headquarters on potential impacts associated with the rulemaking, but that headquarters has not kept them abreast of the process of revising the proposed rule."⁷ The article alleges that the rulemaking is largely being handled by the EPA headquarters officials. This is troubling. We would caution the agency against discounting the input of offices outside the Beltway.

A separate but related issue involves concerns raised by the House Science, Space, and Technology Committee. Chairman Lamar Smith learned that EPA hired a contractor to create detailed maps of the entire U.S., but concealed the maps from the public.⁸ Then, in a subsequent briefing to Committee staff, EPA staff stated that the maps were not created for regulatory purposes.⁹ However, the documents tell a different story. Documents produced by the staff of EPA's Office of Water show they were almost certainly working with the contractor to produce maps to further their regulatory agenda.¹⁰ Again, questions are being raised about the integrity of the rulemaking process and EPA's neutrality in the process.

¹ *Hearing to Review the State of the Rural Economy*, Preliminary Hearing Transcript, 114th Cong. at 16 (Feb. 11, 2015).

² Staff Writer(s), *EPA Said to Eye CWA Rule Revisions With Limited Corps, Regional Input*, INSIDE EPA, Feb. 20, 2015 (available with subscription).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Press Release, Smith: Documents Show EPA Maps Intended to Expand Regulatory Reach, *available at* <http://science.house.gov/press-release/smith-documents-show-epa-maps-intended-expand-regulatory-reach> (last visited on Feb. 24, 2015).

⁹ *Id.*

¹⁰ *Id.*

In order to dispel any misconceptions or erroneous reporting about this rulemaking, the Committees request that the EPA answer the following questions and provide the following documents and information, in electronic format, for the time period January 1, 2010, to the present:

1. How often, if at all, does EPA meet with the U.S. Army Corps regarding WOTUS?
2. Has EPA been in contact with the Office of Management and Budget and specifically, the Office of Information and Regulatory Affairs related to WOTUS?
3. All documents and communications, including e-mails, between and among employees of EPA and the USDA related to the proposed rule.
4. All documents and communications, including e-mails, between and among employees of EPA and the U.S. Army Corps of Engineers related to the proposed rule.
5. All documents and communications, including e-mails, between and among employees of EPA headquarters and employees of EPA regional offices related to the effects of WOTUS.
6. All documents and communications, including e-mails, between and among employees of EPA and employees of any state agricultural department, state environmental department, and/or state water department related to WOTUS, except any documents and communications filed as part of the public comment period on the proposed rule.
7. All documents and communications, including e-mails, between and among employees of EPA and employees of the U.S. Small Business Administration related to WOTUS.
8. All documents and communications, including e-mails, related to any WOTUS cost-benefit analysis performed by EPA as required under the Administration Procedures Act.

The Committee on Agriculture is the principal authorizing committee for all matters related to agriculture in the House of Representatives and “shall have general oversight responsibilities” as set forth in House Rule X. The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at “any time” investigate “any matter” as set forth in House Rule X. The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and “shall review and study on a continuing basis laws, programs, and Government activities” as set forth in House Rule X.

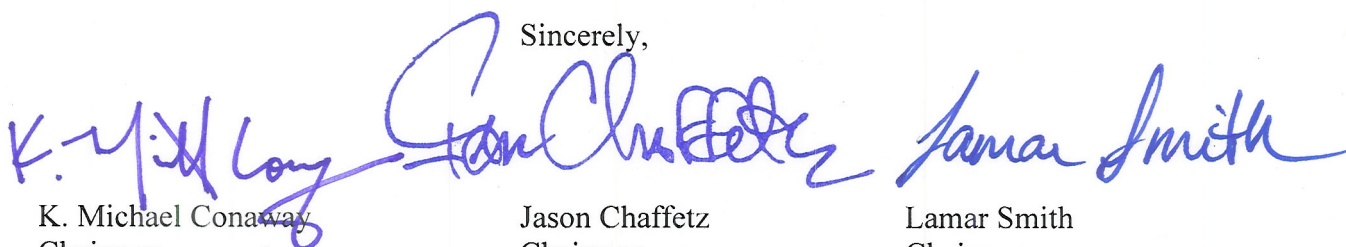
An attachment to this letter provides additional information about responding to the Committees’ requests.

The Committees request that you provide the requested documents and information, in electronic format, as soon as possible, but no later than 5:00 p.m. on April 10, 2015. When producing documents to the Committee, please deliver production sets to the following locations:

- Majority Staff of the Agriculture Committee in Room 1301 of the Longworth House Office Building and Minority Staff of the Agriculture Committee in Room 1010 of the Longworth House Office Building;
- Majority Staff of the House Oversight Committee in Room 2157 of the Rayburn House Office Building and Minority Staff of the House Oversight Committee in Room 2471 of the Rayburn House Office Building; and,
- Majority Staff of the House Science Committee in Room 2321 of the Rayburn House Office Building and Minority Staff of the House Science Committee in Room 394 of the Ford House Office Building.

If you have any questions about this request, please contact Ashley Callen of the Agriculture Committee staff at 202-225-2171, Joe Brazauskas of the House Oversight Committee staff at 202-225-5074, or Rachel Jones of the House Science Committee at 202-225-6371. Thank you for your attention to this matter.

Sincerely,



K. Michael Conaway
Chairman
Committee on Agriculture

Jason Chaffetz
Chairman
Committee on Oversight
and Government Reform

Lamar Smith
Chairman
Committee on Science,
Space, and Technology

Encl.

cc: The Honorable Collin C. Peterson, Ranking Minority Member
House Committee on Agriculture

The Honorable Elijah E. Cummings, Ranking Minority Member
House Committee on Oversight and Government Reform

The Honorable Eddie Bernice Johnson, Ranking Minority Member
House Committee on Science, Space, and Technology

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committees' preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), or PDF files.
 - (b) Document numbers in the load file should match document Bates numbers and TIF or PDF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
6. Documents produced to the Committees should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committees' schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2010 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered to each Committee, one set to the Majority Staff and one set to the Minority Staff.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter,

computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.