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Office of Environmental Information (OEI) Docket (Mail Code 28221T)  
Docket # EPA-HQ-OA 2013-0582

Dear Dr. Armitage:

On behalf of the thousands of constituents from my district who own property with wetlands, streams, or other forms of water sources, I write urging you to revisit certain conclusions reached by the Environmental Protection Agency's ("EPA") Office of Research and Development in their report on the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* ("Report").

If implemented, this Report will significantly expand the EPA and U.S. Army Corps of Engineers' jurisdiction under the Clean Water Act ("CWA"). This expansion of regulatory authority over even the most isolated wetlands, streams, ditches, tributaries, and other water sources is far beyond what Congress intended when passing the CWA. The EPA does not have the authority to regulate every type of water "connection" regardless of how remote it might be to large downstream waters. The hardworking taxpayers of Missouri and those throughout the United States should not have to sacrifice their private property rights in this process. Many of these taxpayers are already struggling under the weight of agency regulations from their respective state Department of Natural Resources.

I am deeply concerned by the ramifications of expanding the applicability of the CWA – this report potentially declares that rainwater has a significant nexus to navigable waters. Given the fact that rain can fall anywhere, the adoption of this report's definitions could lead to the illogical conclusion that all waters are subject to EPA jurisdiction under the CWA. The CWA was intended and enacted to protect public property, not to infringe on private lands where rain might fall, drain, or submerge at times without a significant nexus to navigable waters. This Report and the CWA need to clearly and explicitly differentiate between private property and navigable waterways.

The Report also needs to provide some type of limiting principle on the "potential function" of a stream, wetland, or open-water (*See* Page 1-6, line 21). The EPA should not be permitted to protect waters solely because they have the potential to serve a functional purpose when they do not actually

serve it. This would arguably give the EPA unlimited authority to regulate any area with water because a new material may *potentially* enter the water or environmental conditions may *potentially* change. Government cannot regulate potentials without encountering a dangerous slippery slope of excessive regulation. Everyone has the potential to break the law, but we do not punish people until they actually break it.

Another concerning section of the Report is its apparent attempt to redefine the word "isolated" (See Report 1-2, 3-39, and 1-14). If there is evidence of an insect from one wetland being eaten by a frog in another nearby creek, there should be a substantial showing of connectivity before the wetland is classified as "connected." This Report attempts to redefine the definition of "isolated", suggesting that "isolated wetlands" do not even exist. Defining isolated so narrowly betrays the intended and natural scope of its definition.

Furthermore, this Report contravenes existing law under *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC") and *Rapanos v. United States*, 547 U.S. 715 (2006). The SWANCC Court clarified that "isolated" meant "not adjacent," and therefore not physically abutting. The Court held that non-adjacent waters fall outside CWA jurisdiction, regardless of their connection to other waters. Similarly, the *Rapanos* Court established a limiting principle through the significant nexus test where wetlands only qualify as "waters of the U.S." if they significantly affect the chemical, physical, or biological integrity of navigable waters. The Report at issue needs to be revised to explain how its technical wetland vocabulary adheres to this existing legal terminology. Additionally, it needs to be revised to clearly distinguish the varying degrees of interconnectedness among the various classes of wetlands. The Report suggests that a roadside ditch is now jurisdictional under the CWA because of its ability to actually or potentially transport sediment, directly contravening the limiting principles set in *SWANCC* and *Rapanos*.

In light of these concerns, we urge the EPA Office of Research and Development to clearly differentiate private property from navigable waterways, to regulate on the actual function instead of the limitless potential of waterways, and to narrow the scope of "isolated" to comport with its intended meaning. Moreover, the EPA needs to provide full disclosure and transparency of the intended public policy underlying this Report. If implemented, this Report stands to alter the regulatory policies of the EPA and the CWA quite significantly. While we can all agree that we must protect the health of America's waters, this should be accomplished through a fair and reasonable regulatory framework that respects private property rights and establishes limiting principles under the CWA. We appreciate your attention to this important matter and look forward to your response.

Sincerely,



Jason Smith  
MEMBER OF CONGRESS