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Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
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October 18, 2013

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator McCarthy:

We are concerned that the Environmental Protection Agency (EPA) is pushing through a rule with vast economic and regulatory implications before the Agency's Science Advisory Board (SAB or "Board") has had an opportunity review the underlying science. It is widely anticipated that in its upcoming proposal, EPA intends to expand federal regulatory authority under the Clean Water Act (CWA) to include even the most isolated wetlands, seasonal drainages, and prairie depressions. A sweeping reinterpretation of EPA jurisdiction would give the agency unprecedented control over private property across the nation. In light of the significant implications this action would have on the economy, property rights, and state sovereignty, this process must be given more thought and deliberation to allow for important, statutorily-required, weighing of the scientific and technical underpinnings of the proposed regulatory changes.

On September 17, 2013, EPA announced that it had sent a proposed rule on the scope of CWA jurisdiction to the Office of Management and Budget (OMB) for interagency review. According to the agencies, "[t]his draft rule takes into consideration the current state-of-the-art peer reviewed science reflected in the draft science report. Any final regulatory action related to the jurisdiction of the Clean Water Act in a rulemaking will be based on the final version of this scientific assessment."

At the same time, EPA's Office of Research and Development (ORD) released its Draft Science Synthesis Report on the Connectivity of Streams and Wetlands to Downstream Waters ("Connectivity Report" or "Report"). Along with the Report, EPA gave technical charge questions to the SAB expert panel who will conduct a peer review of the Report. As reflected in EPA's technical charge, the "[f]indings from this Report will help inform EPA and the U.S. Army Corps of Engineers in their continuing policy work and efforts to clarify what waters are covered by the Clean Water Act."

We request that EPA immediately provide to the SAB expert panel a copy of the draft rule that has been submitted to OMB and other federal agencies. Without a copy of the draft rule, the Members of the Panel for the Review of the EPA Connectivity Report cannot

meaningfully review this regulatory science in context. Review of the Report must be undertaken in conjunction with a thorough examination of the jurisdictional modifications contemplated in the draft rule.

Our request is consistent with the SAB organic statute: The Environmental Research, Development and Demonstration Authorization Act (ERDDAA). Under ERDDAA, the "Administrator, at the time any proposed criteria document, standard, limitation, or regulation under the... [CWA]... is provided to any other Federal agency for formal review and comment, shall make available to the Board such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based." [1] Significantly, the law goes on to explain that this process provides the Board with a critical opportunity to share with the Administrator "its advice and comments on the adequacy of the scientific and technical basis of the proposed criteria document, standard, limitation, or regulation."[2] When followed, ERDDAA ensures that regulations are fashioned with the sound scientific foundation requisite for balanced decisions. Under the law, the advice of scientific experts is a pre-requisite, not an afterthought.

It is clear from the statute that the Board should review the scientific underpinnings of the draft rule as part of the interagency process. Any attempt to issue a proposed rule before completing an independent examination by the Agency's own science advisors would be to put the cart before the horse. In light of recent concerns raised by the small business community[3] and others, the Agency's current approach to CWA jurisdiction appears to represent a rushed, politicized regulatory process lacking the proper consultation with scientific peer reviewers and the American people. If EPA has not already provided SAB with the proposed rule, the House Science Committee urges the agency to do so immediately.

Additionally, we write to inform EPA and the SAB that pursuant to our authority under ERDDAA, the House Science Committee intends to provide the SAB panel additional charge questions related to the Connectivity Report. Mindful of the unique role created for the Committee under the statute, we anticipate a robust examination of the issues encompassed in the charge questions.

In facilitating these statutorily-required interactions between the Committee and the Board, my staff has met with your Office of General Counsel and the SAB to establish a co-operative approach. As you know from our past communications regarding the Board's Hydraulic Fracturing Research Advisory Panel, SAB received questions from the Committee for Panel review. We remain concerned that, despite assurances from the SAB staff[4] and testimony by the Chairman of the Panel,[5] members of the hydraulic fracturing Panel have not yet been

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[1] Environmental Research, Development and Demonstration Authorization Act of 1978, 42 USC § 4365.
[2] Ibid.
[3] http://www.nfib.com/LinkClick.aspx?fileticket=t4KBpjZCLBs%3d&tabid=1083.
[4] http://yosemite.epa.gov/sab/sabproduct.nsf/5D5CE0E575A799D285257B8300615C98/$File/Chris+Stewart+Response+Letter.pdf.
[5] http://science.house.gov/hearing/subcommittee-environment-and-subcommitte-energy-joint-hearing-lessons-learned-epa%E2%80%99s.

afforded an opportunity to respond to these questions which were transmitted at the beginning of May 2013. Given our shared interests in obtaining candid scientific advice, we trust these questions will receive priority status moving forward. Our continued collaboration ensures wise stewardship of limited SAB resources and promotes scientific integrity.

Thank you for your attention to this important matter.

Sincerely,

Lamar Smith

Rep. Lamar Smith
Chairman
Committee on Science, Space, and Technology

Chris Stewart

Rep. Chris Stewart
Chairman
Subcommittee on Environment

cc: Rep. Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology
Rep. Suzanne Bonamici, Ranking Member, Subcommittee on Environment, Committee on Science, Space, and Technology
Lieutenant General Thomas Bostick, Commanding General and Chief of Engineers, US Army Corps of Engineers
Dr. David Allen, Chair, EPA Science Advisory Board
Dr. Amanda Rodewald, Chair, EPA Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report
Mr. Christopher Zarba, Director, EPA SAB Staff Office