



November 18, 2015

Dear [Senator]:

If anything has emerged from the Senate's recent debate on the federal rule to define "waters of the U.S." (WOTUS) and its aftermath, it is a broad and striking degree of consensus that the rule is broken and must be fixed. In a November 3 letter, 11 additional Senators joined those who called for a remedy through their votes on S. 1140, the Federal Water Quality Protection Act, and S.J. Res 22, the Congressional Review Act resolution. The difference is now merely one of how best to provide a remedy: through a new rulemaking or guidance.

As you know, the undersigned organizations strongly support the bipartisan, Barrasso-Donnelly bill, S.1140, and were heartened by the bipartisan action in the House approving H.R. 1732, the Regulatory Integrity Protection Act. Since promulgation of the WOTUS rule, we have repeatedly met with staff to explain the impact this regulation will have on business interests in the respective states, underscore how this regulation departs from congressional intent by expanding jurisdiction, and explain why passage of S. 1140 is critical.

While the November 3 letter underscores the profound need to fix the rule, it creates the false impression that the critical scientific, technical, legal, and policy defects in the rule can somehow be remedied through agency guidance. Agency guidance is not and cannot be the answer to addressing the rule's major defects.

In fact, it is years of agency guidance that created the current legal quagmire and the need for a rule. Even assuming some of the flaws could be lawfully addressed through guidance, allowing the agencies to address such significant legal and policy issues in this way will only increase the danger, as the 11 Senators put it, that regulators will "enforce this rule in a way that erodes traditional exemptions." Furthermore, agency guidance does not offer stakeholders the public participation protections of the Administrative Procedure Act (APA). When crafting guidance, the agency is not obligated, and rarely seeks, public participation. Therefore, the only remedy to flawed guidance—if any—is either expensive litigation or the hope of congressional intervention.

The rule is riddled with flaws and ambiguities that create confusion and uncertainty. For example, the rule fails to define essential terms, such as "water" and "dry land," that are critical for determining whether a landscape feature is a regulated "water of the United States." Moreover, the rule fails to clarify key concepts, such as "floodplain" and "ordinary high water mark" that have been widely recognized to cause confusion and lead to inconsistent jurisdictional decisions in the field. These flaws are not superficial; they go to the rule's basic foundation and cannot be addressed effectively through guidance.

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Legal precedent establishes that guidance cannot be used to make substantive changes to a rule. For the agencies to properly address these legitimate issues, a new rule is required. *See U.S. Telecom. Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995). Under the APA, if the agencies made the necessary revisions to the rule, they would be required to provide the public with notice of the new proposal and an opportunity for comment. Indeed, in the myriad legal challenges against the rule—brought by 31 states and over 50 industry and local water management groups—many parties have asserted that the final rule is not a logical outgrowth of the proposed rule because the agencies improperly made significant changes to the final rule that a reasonable person would not have anticipated. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983). At this point, guidance would widen the gap between the proposed rule and the final rule, and compound noncompliance with the APA.

Unfortunately, this rulemaking is history repeating itself. When faced with criticism over the ambiguity of the *Rapanos* Guidance in 2008, the agencies claimed that specifics could only be provided through rulemaking. Yet, the agencies have now promulgated a rule even vaguer than the underlying statute, and one that raises more questions than it answers regarding the jurisdictional status of different waterbodies. Calling for more guidance only perpetuates the endless loop of the agencies avoiding the tough issues.

The final rule's inherent ambiguity on fundamental issues does not provide the basis for effective and consistent jurisdictional decisions, but is instead a recipe for arbitrary and capricious enforcement. Because violations of the Clean Water Act carry the potential for criminal liability, the possibility of a cure by non-binding guidance provides cold comfort to any American who must navigate the uncertainties of the rule and is a recipe for arbitrary and capricious enforcement decisions.

We continue to support S. 1140 and H.R. 1732, and the need for legislative action. While we were disappointed that the Senate was not allowed to proceed to a full debate and final vote on S. 1140, the interests of such a diverse and large segment of the U.S. economic engine, including the construction, real estate, mining, agriculture, transportation, forestry, manufacturing, energy, wildlife conservation and recreation sectors, should not be ignored.

We need your help to obtain real and meaningful solutions to a broken rule.

Sincerely,

Agricultural Retailers Association
American Exploration & Mining Association
American Farm Bureau Federation
American Gas Association
American Petroleum Institute
American Public Power Association
American Road & Transportation Builders Association (ARTBA)
Associated Builders and Contractors
The Associated General Contractors of America
Association of Equipment Manufacturers (AEM)

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Association of Oil Pipe Lines
Club Managers Association of America
Corn Refiners Association
CropLife America
Edison Electric Institute
Federal Forest Resources Coalition
The Fertilizer Institute
Golf Course Superintendents Association of America
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Industrial Minerals Association – North America
International Council of Shopping Centers (ICSC)
International Liquid Terminals Association (ILTA)
Leading Builders of America
National Association of Home Builders
National Cattlemen's Beef Association
National Club Association
National Corn Growers Association
National Industrial Sand Association
National Mining Association
National Multifamily Housing Council
National Oilseed Processors Association
National Pork Producers Council (NPPC)
National Rural Electric Cooperative Association
National Stone, Sand and Gravel Association (NSSGA)
Public Lands Council
Responsible Industry for a Sound Environment (RISE)
Southeastern Lumber Manufacturers Association
Sports Turf Managers Association
Texas Wildlife Association
Treated Wood Council
United Egg Producers
U.S. Chamber of Commerce