

Congress of the United States
Washington, DC 20510

August 5, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator McCarthy,

We write to ask for your cooperation in assisting the Committee on Environment and Public Works (EPW) and, the Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management (RAFM), understand EPA actions in promulgating the “Waters of the United States” (WOTUS) rule. EPA’s actions during the notice-and-comment process raise significant concerns at how the WOTUS rule was promulgated. In addition, EPA’s actions raise concerns about its compliance with the Regulatory Flexibility Act, the Small Business Enforcement Fairness Act, and Executive Order 13132 on Federalism.

According to a recent *New York Times* article, EPA utilized a public lobbying campaign to generate EPA-backed proWOTUS comments during the pendency of the rule’s notice-and-comment process.¹ This unprecedented campaign was successful in driving up the number of comments supporting the rule. In testimony before the EPW Committee in March, you claimed that EPA had received “more than one million comments,” and that 87.1 percent supported the proposed rule, thus justifying EPA action.² However, as the Army Corps of Engineers later clarified for the Committee, in fact the vast majority of the 1 million comments you spoke of reflected generic support for Clean Water – the message requested by your media campaign – rather than substantive comments on the rule.³ According to Assistant Secretary of the Army Jo-Ellen Darcy, only 20,567 of the comments on the rule – just two percent of the total received – were unique. In fact, of the unique and substantive comments received by your agency, only 39 percent supported the rule.⁴ Your characterization of the comments on the WOTUS rule appeared to politicize what should be a procedural public notice and comment process.

The Administrative Procedure Act generally requires that agencies involved in rulemaking use “notice and comment” processes,⁵ which include publishing proposed rules in the Federal Register, giving interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments; and considering relevant matter presented in making the final rule. By using social media to solicit mass approval from a targeted

¹ Eric Lipton and Coral Davenport, *Critics Hear E.P.A.’s Voice in ‘Public Comments’*, N.Y. TIMES, May 18, 2015.

² *Examining the President’s Budget Request for the U.S. Env’tl. Prot. Agency: Oversight Hearing before the S. Comm. on Env’tl. Pub. Works*, 114th Cong. 46-47 (2015) (statement of Gina McCarthy, Administrator, Env’tl. Prot. Agency).

³ Jo-Ellen Darcy, Sec’y of the Army, U.S. Army Corps of Eng’rs letter to Sen. Mike Rounds (May 14, 2015).

⁴ U.S. Army Corps of Engineers letter to Senator Mike Rounds, *Re: Clean Water Act questions* (May 14, 2015).

⁵ 5 U.S.C. § 553.

base, the EPA appears to have manipulated the notice and comment process. The EPA also took their campaign one step further by aggressively attacking comments from certain stakeholders with its “Ditch the Myth” campaign. The EPA turned the comment period into an adversarial debate rather than a neutral request for input. In participating in carefully planned, political advocacy meetings with outside groups and creating social media links from the EPA’s website to advocacy websites urging action on both the rule and legislation pending in Congress, the EPA moved even further away from its appropriate role as an agency seeking public comment on a rulemaking. Finally, none of these ex parte communications were included in the public docket for the rulemaking. These actions contravene the Administrative Procedures Act (APA) and its goal of meaningful public participation involving all interested stakeholders.

EPA’s actions contravene other statutes and procedural requirements as well. The Regulatory Flexibility Act (RFA)⁶ together with the Small Business Enforcement Fairness Act (SBREFA)⁷ require agencies to “carefully consider the economic impacts its rules will have on small entities, and ensure that small entities have a voice in the regulatory development process.”⁸ Executive Order 13132 on Federalism requires agencies to consult with state and local governments before taking actions that affect the distribution of power and responsibilities among the various levels of government. Unfortunately, rather than complying with these requirements, EPA claimed that no outreach or consultation was required, arguing that the WOTUS rule has no direct impacts and would even narrow its jurisdiction. States, local governments, and the Small Business Administration’s Office of Advocacy strongly disagree with the EPA’s assertions.⁹ Instead of meeting its obligation to consult with small businesses, states and local governments, EPA utilized taxpayer provided resources to amplify the viewpoint it wanted to hear.

Given the potential violations of the APA the Regulatory Flexibility Act, the SBREFA, and of Executive Order 13132, we would like to review documents from your rulemaking process, from January 1, 2014 until May 31, 2015. Please provide the following documents no later than 5:00 p.m. on August 26, 2015:

1. All documents, including emails, relating to outreach efforts, public relations strategies, social media efforts, and public meetings undertaken in connection with the WOTUS rule, and the dates of those actions.

⁶ 5 U.S.C. §§ 601 *et seq.* (1980); *see also* Small Bus. Ass’n. Office of Advocacy letter to the Env’tl. Prot. Agency and the U.S. Army Corps of Eng’rs., Oct. 1, 2014).

⁷ Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat 847 (1996).

⁸ *Overview of the Regulatory Flexibility Act (RFA)*, ENVIRONMENTAL PROTECTION AGENCY, (last updated May 21, 2015), <http://www.epa.gov/rfa/overview.html>.

⁹ Ass’n of Clean Water Adm’rs., *Comments on U.S. Env’tl Prot. Agency’s and U.S. Army Corps of Eng’rs’ Proposed Rulemaking: Definition “Waters of the United States” Under the Clean Water Act*, Docket ID No. EPA-HQ-OW-2011-0880-13069, (Nov. 14, 2014) <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-13069>; U.S. Conference of Mayors, Nat’l League of Cities, Nat’l Ass’n of Counties, Nat’l Ass’n of Reg’l Councils, Nat’l Ass’n of County Eng’rs, Am. Pub. Works Ass’n, and the Nat’l Ass’n of Flood and Stormwater Mgmt Agencies, *Comments on the Proposed Rule on “Definition Waters of the United States” Under the Clean Water Act*, EPA Docket No. EPA-HQ-OW-2011-0880-15784, (Nov. 25, 2014) at 2, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-15784>; Small Bus. Admin.’s Office of Advocacy, *Comments on Definition of “Waters of the United States” under the Clean Water Act*, EPA Docket No. EPA-HQ-OW-2011-0880-7958 (Oct. 17, 2014) at 9, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-7958>; *Examining How Proposed Env’tl Regulations Would Affect Am.’s Small Businesses: A Hearing before S. Comm. on Small Bus. & Entrepreneurship*, 114th Cong. (2015) (statement of Interagency Affairs, Office of Advocacy, U.S. Small Bus. Admin.).

The Honorable Gina McCarthy

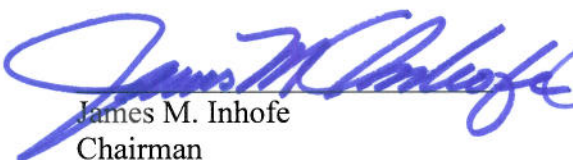
August 5, 2015

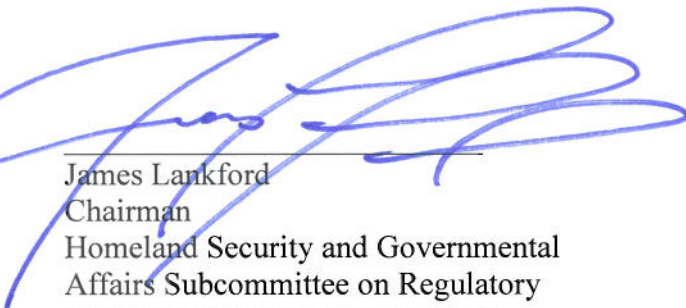
Page 3

2. All documents, including e-mails regarding EPA outreach efforts, including all communication via official EPA Facebook, Twitter, Instagram, Vine, Pinterest, Thunderclap, and all other media platforms, as well as the dates they were disseminated.
3. All documents, including e-mails regarding efforts made by EPA in furtherance of soliciting comments from varied groups of stakeholders with viewpoints surrounding the WOTUS rule, including those opposed to the rule.
4. All documents, including e-mails regarding EPA decision to prioritize WOTUS rule as the subject of a public outreach campaigns.
5. All documents, including e-mails regarding WOTUS items that EPA decided it would include and exclude from the rulemaking docket.
6. All documents, including e-mails, relating to the process EPA implemented when counting comments to reach over 1 million public comments on the proposal, along with the determination process for duplicative comments from January 1, 2015 to the present. For example, was a list of 69,369 email addresses collected by Organizing for Action considered to be 69,369 comments? How were 218,542 duplicates from Environment America or 108,072 duplicates from Natural Resources Defense Council or 99,793 duplicates from Earth Justice or 53,317 duplicates from Sierra Club considered and weighed in deciding whether or not to adopt the WOTUS rule?

If you have any questions, please contact Laura Atcheson with the Environment and Public Works Committee at (202) 224-6176 or Nathan Kaczmarek the Regulatory Affairs and Federal Management Subcommittee at (202) 224-6704.

Sincerely,


James M. Inhofe
Chairman
Committee on Environment and
Public Works


James Lankford
Chairman
Homeland Security and Governmental
Affairs Subcommittee on Regulatory
Affairs and Federal Management

cc: The Honorable Barbara Boxer
Ranking Minority Member
Committee on Environment and Public Works

The Honorable Heidi Heitkamp
Ranking Minority Member
Homeland Security and Governmental Affairs
Subcommittee on Regulatory Affairs and Federal Management