Barrasso claims Obama Administration is intentionally misleading Americans on proposed water rule

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WASHINGTON, D.C. – Today, U.S. Senators John Barrasso (R-WY), Ted Cruz (R-TX), Republican Leader Mitch McConnell (R-KY) and Senate Environment and Public Works Committee Ranking Member David Vitter (R-LA) led a group of 25 senators in calling out the Obama Administration for intentionally misleading Americans about the negative impacts of the proposed "Waters of the United States" (WOTUS) rule.

With few exceptions, this proposed rule would give the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) virtually unlimited regulatory authority over all state and local waters, no matter how remote or isolated such waters may be from truly navigable waters. The Small Business Administration's Office of Advocacy (SBA) recently reported this rule will result in a "direct and potentially costly impact on small businesses."

In a letter to EPA Administrator Gina McCarthy and Secretary of the Army John M. McHugh, the senators outline and respond to some of the Administration's misleading talking points about the rule.

"Undoubtedly, there is a disconnect between regulatory reality and the Administration's utopian view of the proposed 'waters of the United States' rule. We believe this reflects the EPA's and the Corps' refusal to listen to the thousands of Americans who have asked that the proposed rule be immediately withdrawn. Indeed, there have been several examples of bias against the proposed rule's critics. For the record, we note here the ways in which the Administration has manipulated this rulemaking in ways that appear to be designed to prejudge the outcome:," the Senators wrote.

The Senators respond in detail to:

· The Obama Administration claims that the proposed "Waters of the United States" rule responds to prior requests for a Clean Water Act rulemaking.

· The Obama Administration insinuating that opposition to the proposed rule is equivalent to opposition to clean water.

· EPA's attempt to delegitimize questions and concerns surrounding the proposed rule.

· EPA and the Corps blatant misrepresentation of the impacts of increased Clean Water Act jurisdiction.

· EPA's social media advocacy in favor of the proposed "Waters of the United States" rule prejudices the rulemaking process.

In addition to Barrasso, Cruz, McConnell, and Vitter, the letter was signed by Senators Pat Roberts (R-KS), Mike Enzi (R-WY), John Cornyn (R-TX), Jim Risch (R-ID), Marco Rubio (R-FL), Mike Crapo (R-ID), Roger Wicker (R-MS), Jim Inhofe (R-OK), Jeff Sessions (R-AL), Chuck Grassley (R-IA), Roy Blunt (R-MO), John Boozman (R-AR), Mike Johanns (R-NE), Tim Scott (R-SC), Deb Fischer (R-NE), Orrin Hatch (R-UT), Jerry Moran (R-KS), Rand Paul (R-KY), Johnny Isakson (R-GA), John Hoeven (R-ND) and Mike Lee (R-UT).

Senators respond to Administration's biased campaign to downplay negative impacts **proposed rule will have on jobs, the economy and private landowners.**

Full text of the letter below:

Dear Administrator McCarthy and Secretary McHugh,

Despite numerous requests for the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) to withdraw the proposed "waters of the United States" rule, the Administration has shown it intends to pursue this unprecedented executive overreach, regardless of the consequences to the economy and to Americans' property rights. The proposed rule would provide EPA and the Corps (as well as litigious environmental groups) with the power to dictate the land use decisions of homeowners, small businesses, and local communities throughout the United States. With few exceptions, it would give the agencies virtually unlimited regulatory authority over all state and local waters, no matter how remote or isolated such waters may be from truly navigable waters. The proposed rule thus usurps legislative authority and Congress's decision to predicate Clean Water Act jurisdiction on the law's foundational term, "navigable waters."

Because the proposed "waters of the United States" rule displaces state and local officials in their primary role in environmental protection, it is certain to have a damaging effect on economic growth. Increased permitting costs, abandoned development projects, and the prospect of litigation resulting from the proposed rule will slow job-creation across the country. Similar concerns led the Small Business Administration's Office of Advocacy (SBA) to recently call for the withdrawal of the proposed rule. As SBA observed, the proposed rule will result in a "direct and potentially costly impact on small businesses," and the "[t]he limited economic analysis which [EPA and the Corps] submitted with the rule provides ample evidence of a potentially significant economic impact."[1] We join SBA and continue to urge EPA and the Corps to withdraw the proposed rule.

Undoubtedly, there is a disconnect between regulatory reality and the Administration's utopian view of the proposed "waters of the United States" rule. We believe this reflects the EPA's and the Corps' refusal to listen to the thousands of Americans who have asked that the proposed rule be immediately withdrawn. Indeed, there have been several examples of bias against the proposed rule's critics. For the record, we note here the ways in which the Administration has manipulated this rulemaking in ways that appear to be designed to prejudge the outcome:

Bias Factor #1: The Obama Administration Claims That the Proposed

"Waters of the United States" Rule Responds to Prior Requestsfor a Clean Water Act Rulemaking.

EPA has repeatedly claimed that the proposed "waters of the United States" rule responds to various requests for the agency to clarify the scope of Clean Water Act jurisdiction. Likewise, the Administration stated last month that the proposed rule "is responsive to calls for rulemaking from Congress, industry, and community stakeholders as well as decisions of the U.S. Supreme Court."[2]

Such assertions are wholly misleading. A request for a regulatory clarification does not provide a license to run roughshod over the property rights of millions of Americans. Yet the Obama Administration has used prior rulemaking requests as an excuse to unilaterally advance a regulatory agenda that defies the jurisdictional limits established by Congress when it enacted the Clean Water Act in 1972.

In fact, the proposed rule would harm the very landowners, small businesses, and municipalities that expressed interest in working with EPA and the Corps to address Clean Water Act jurisdictional issues. Thus, rather than respond to requests for a rulemaking, the proposed rule serves as an example for why so few Americans trust EPA.

Bias Factor #2: The Obama Administration Insinuates That Opposition to the Proposed Rule Is Equivalent to Opposition to Clean Water.

When EPA Administrator Gina McCarthy announced the proposed "waters of the United States" rule last March, she professed that the proposed rule "clarifies which waters are protected, and which waters are not." Similarly, EPA's Office of Water has suggested that those who "choose clean water" should support the proposed rule.

These statements insinuate that the proposed rule's critics oppose clean water. This is an insulting ploy that belies the numerous efforts made in recent years by agriculture, industry, and local officials to improve water quality throughout the country. It ignores the fact that nonfederal waterbodies are subject to local and state water quality regulations. Moreover, the Clean Water Act's emphasis that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" negates the canard that choosing clean water requires acceding to unlimited federal regulatory authority.

Bias Factor #3: EPA Has Attempted to Delegitimize Questions and Concerns Surrounding the Proposed Rule.

Administrator McCarthy has described certain questions regarding the proposed rule as "ludicrous" and "silly."[6] Stakeholders have also observed how EPA officials have responded to concerns over the proposed rule with misrepresentations and a "knock on their intelligence."[7]

EPA's disparaging of the proposed rule's critics serves no one. If EPA believes concerns with the proposed rule are unwarranted, the appropriate course of action would be for the agency to respond formally in the context of the notice and comment procedures accompanying the current rulemaking. Belittling the proposal's critics only furthers the impression that EPA has predetermined the outcome of the "waters of the United States" rulemaking.

Bias Factor #4: EPA and the Corps Have Blatantly Misrepresented the Impacts of Increased Clean Water Act Jurisdiction.

EPA and the Corps have attempted to downplay the substantial outcry over the proposed "waters of the United States" rule as well as the prospect of federalizing thousands of ditches, ponds, streams, and other

waterbodies. They have done so by claiming that the impacts associated with increased Clean Water Act jurisdiction are insignificant.

For example, EPA claims the proposed rule "would not infringe on private property rights," and that the Clean Water Act "is not a barrier to economic development." The Corps has also stated that "when privately-owned aquatic areas are subject to Clean Water Act jurisdiction . . . [that] results in little or no interference with the landowner's use of his or her land."

These assertions strain credulity. Given the history of regulatory and land use issues associated with the Clean Water Act (including numerous congressional hearings, Supreme Court cases, and real world examples of costs and hardship resulting from affirmative jurisdictional determinations), it is astonishing that any federal agency would claim that a designation of private property as "waters of the United States" does not affect the landowner's property rights.

That such statements have come from EPA and the Corps suggests that the agencies either don't appreciate the real-world impacts of the law they're charged with administering, or they are intentionally trying to minimize the effect of the proposed rule. It is likewise not surprising that SBA, an expert agency charged with representing the views of small entities before federal agencies and Congress, has also critiqued the manner in which EPA and the Corps have estimated the proposed rule's impacts.

Bias Factor #5: EPA's Social Media Advocacy in Favor of the Proposed "Watersof the United States" Rule Prejudices the Rulemaking Process.

EPA staff are asking the public to influence the agency's view of the proposed "waters of the United States" rule. In fact, the Twitter account for EPA's Office of Water is now essentially a lobbyist for the proposed rule. A few months ago, EPA established a website called "Ditch the Myth," which declares that the proposed rule "clarifies protection under the Clean Water Act for streams and wetlands that form the foundation of the nation's water resources." The agency has now gone so far as to solicit others to seek to influence EPA regarding the proposed rule, urging social media users to "show their support for clean water and the agency's proposal to protect it." These actions raise serious questions about compliance with the Anti-Lobbying Act.

The integrity of the rulemaking process is in jeopardy, if not already tainted. EPA's social media advocacy removes any pretense that the agency will act as a fair and neutral arbiter during the rulemaking. Why should any landowner believe that EPA will seriously and meaningfully examine adverse comments regarding the proposed rule's impact on ditches, for example, when the agency has already pronounced that the proposed rule "reduces regulation of ditches?" Why should state officials believe that their concerns with the proposed rule will be fully considered, when EPA has already determined that the proposed rule "fully preserves and respects the effective federal-state partnership . . . under the Clean Water Act?"

EPA's social media advocacy is a firm indicator that adverse comments will receive scant attention during the rulemaking period. We question whether the "waters of the United States" rulemaking can be conducted in accordance with the Administrative Procedure Act and its objective that agencies "benefit from the expertise and input of the parties who file comments with regard to [a] proposed rule" and "maintain a flexible and open minded attitude towards its own rules."

We are dismayed that the Administration has failed to adhere to its impartial obligations under the law. Moreover, this bias has been reflected in comments from NGOs as well. Based on similar statements from groups such as Organizing for Action, Natural Resources Defense Council, and Clean Water Action, it is as though the Administration and its environmentalist allies are of one mindset, eager to paint the proposed rule's critics as anything other than concerned citizens.

At the same time, although the above groups are entitled to have a misguided and flawed perspective on the proposed "waters of the United States" rule, the Administration owes the American people a higher level of discourse. To date, however, this rulemaking has been plagued by administrative bias and prejudicial grandstanding. It is therefore incumbent on EPA and Corps to reverse course, withdraw the proposed rule, and commit to working more cooperatively with interested stakeholders in future regulatory proceedings.