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United States Senate

October 7, 2014

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

The Honorable John McHugh
Secretary of the Army
101 Army Pentagon
Washington, DC 20310

Dear Administrator McCarthy and Secretary McHugh,

I am writing in regard to the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) jointly proposed rule defining "Waters of the United States" within the Clean Water Act (CWA) and the interpretive rule regarding CWA exemptions for certain agricultural conservation practices. I appreciate the agencies' intentions to clarify the jurisdictional coverage of the CWA and the decision to engage in a rulemaking process so stakeholders can have the opportunity to comment and help the agencies produce an effective rule.

Clean water is essential to our local communities and economy, and I support efforts to clearly define CWA protections. An unworkable rule will likely halt ongoing water quality improvements and create further bureaucratic confusion; therefore, it is important for the agencies to take the time to ensure the rule avoids unintended negative consequences to existing environmentally-friendly practices in agriculture or property development. The rule should also avoid the negative economic impacts of excessive permitting, especially on small businesses.

In November 2013, during a visit to Johnson County, Indiana, Administrator McCarthy experienced firsthand the importance of clean water to Hoosiers. We know that water is a shared resource, and we want to improve water quality throughout the country. We all have incentives to invest in clean water, including safe drinking; more productive farms and businesses; and improved hunting, fishing, and recreational opportunities. For these reasons, leading Hoosier agricultural organizations have voluntarily developed a ten-year nutrient management and soil health strategy that will reduce nutrient loss from farms and improve water quality throughout the state.

From the feedback that I have received from agricultural, manufacturing, property development, and conservation stakeholders about the proposed rule and interpretive rule, however, I am concerned that the proposed rule as currently written does not meet the intended goal of clarifying the jurisdictional reach of the CWA. I urge the agencies to revise the rule to better protect our national waters from pollution without hampering economic growth.

Nearly every stakeholder I have heard from has expressed the need for greater clarity for the proposed rule's key definitions in order to provide certainty to producers, landowners, and developers. Further, I am particularly concerned about the agencies' claim that the proposed rule will not have a significant impact on small businesses and the decision to skip some of the

requirements of the Regulatory Flexibility Act and Small Business Regulatory Enforcement Act as was mentioned by the Small Business Administration's Office of Advocacy in its October 1, 2014, letter to the agencies.

Regarding the interpretive rule, I have concerns it will not meet its intended goal of promoting conservation practices and providing certainty for farmers and ranchers. Before the release of the interpretive rule, many Hoosier farmers were unaware that conservation practices could ever trigger CWA permitting requirements. By creating a specific exemption for a certain number of conservation practices, an assumption has been created that without a stated exemption, other conservation practices could require a CWA permit before being implemented. I am particularly concerned about how this might impact conservation efforts that do not involve the National Resource Conservation Service. As a strong supporter of voluntary conservation practices like cover crops and two-stage ditches that improve water quality and crop production, I do not want the fear of permitting to inhibit voluntary conservation practices from being implemented. I ask that you work with conservation stakeholders to improve the interpretive rule so that it will be successful in promoting conservation practices.

Providing a clear understanding of the jurisdictional reach of the CWA is a complicated matter that requires careful consideration and thoughtful discourse with stakeholders throughout the country. I am hopeful the agencies can develop a rule that protects the integrity of the nation's water without unnecessarily encumbering the economic growth of the regulated community. Administrator McCarthy has publically committed to address issues of concern raised by stakeholders, and it is clear to me that the proposed rule requires further development and clarification in order to achieve its admirable goals. I ask that the agencies continue to work with stakeholders to address their valid concerns, consider input from those on the local level, and fulfill the requirements to study the proposed rule's impact on small businesses and manufacturers before proposing the rule for another round of public comment.

Sincerely,

Joe Donnelly

Senator Joe Donnelly