



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 27 2015

OFFICE OF
CONGRESSIONAL AND
INTERGOVERNMENTAL
RELATIONS

The Honorable Lamar Smith
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing today to supplement the U.S. Environmental Protection Agency's May 5, June 22, June 29, July 8, July 22, and August 7, 2015, responses to your letters of March 27, and May 18, 2015, regarding the recently-finalized rule by the U.S. EPA and the U.S. Department of the Army defining "waters of the United States" under the Clean Water Act.

Our staffs have been in communication about the information and documents requested in your letters, and have had conference calls to discuss the Committees' priorities for document production. The EPA has agreed to your staffs' request that we place the highest priority on the following requests:

- All documents and communications, including emails, between and among employees of the EPA and employees of any state agricultural department, state environmental department, and/or state water department related to WOTUS, except any documents and communications filed as part of the public comment period on the proposed rule;
- All documents and communications, including e-mails, between and among employees of the EPA and the United States Department of Agriculture related to the proposed rule;
- All documents and communications responsive to the House Oversight Committee's Office of Information and Regulatory Affairs request, which EPA and the Committees agree are also responsive to the May 18, 2015, letter.

We have collected a substantial number of responsive documents, and are in the process of reviewing the documents we have collected so far. Enclosed with this letter is another set of responsive documents.

Please note that the EPA has identified core Executive Branch confidentiality interests in some of these documents, which reflect internal deliberations, attorney work product, and/or attorney-client communications regarding the recently-finalized rule. While the EPA recognizes the Committee's need to obtain information necessary to perform its important oversight functions, we have concerns about further disclosure of this information beyond the Committee.

First, because portions of these documents reveal the EPA's internal deliberative process, we are concerned about the chilling effects highly likely to occur if EPA employees come to believe that their candid advice, opinions, and analysis cannot be protected from unlimited disclosure in broad, public settings. The inability of senior policy makers to obtain frank, honest opinions and recommendations from their staff would negatively affect the EPA's collaborative work environment, compromise our deliberative process, and ultimately limit the agency's ability to execute our Congressionally-mandated responsibilities.

Second, disclosure beyond the Committee, in public fora or to third parties, or stripped of the EPA's deliberative watermarks, causes needless public confusion. Documents reflecting choices that the agency made in finalizing rules are frequently pre-decisional and do not reflect the agency's full and complete thinking on those matters, which is only revealed by and set forth in the final rule that was published in the Federal Register on June 29, 2015.

Finally, as you are aware, the agency is currently engaged in active litigation regarding these regulations. Additional, future litigation is anticipated. Some of the documents requested, in whole or in part, represent or contain attorney-client communications and/or attorney work product that are ordinarily protected from disclosure in discovery under federal and state law by long-settled litigation privileges.

Wider disclosure of such privileged material – either by posting to public-facing websites or transfer to third parties – may be cited in litigation against, and therefore have material, adverse effects on the interests of the United States, jeopardizing the government's ability to defend its actions in court. To avoid harm to the EPA legal interests, the agency will continue specifically to identify and watermark as subject to litigation privileges all documents in which such confidentiality interests arise. Where appropriate, we have added a watermark that reflects these interests.

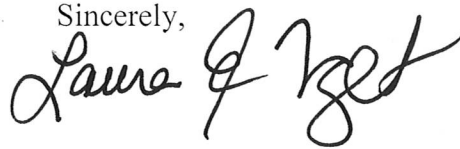
The EPA's production of these documents assumes the Committee's respect for this watermark, which represents an accommodation that preserves the legal interests of the United States by avoiding inadvertent waiver of the EPA's litigation privileges in court. Recent public posting by the Committee of such internal, confidential material serves no legitimate oversight purposes and causes the agency grave concern. Accordingly, the EPA respectfully requests that the Committee take all reasonable and necessary steps to protect documents watermarked by the agency as "internal, deliberative" in litigation from further disclosure. Should the Committee determine that its legislative mandate requires further distribution of this material outside the Committee, we request that such need first be discussed with the agency to help ensure the Executive Branch's confidentiality and litigation interests are protected to the fullest extent possible.

You will also notice that some of the documents contain redactions of non-responsive or non-substantive material, such as personal privacy information. We redacted this information in a manner that does not obscure the identity of any individuals of interest involved in the relevant communications.

The EPA recognizes the importance of the Committee's need to obtain information necessary to perform its legitimate oversight functions, and is committed to continuing to work with your staff on how best to accommodate the Committee's interests in these documents.

Please feel free to contact me if you have any questions, or your staff may contact Tom Dickerson in my office at dickerson.tom@epa.gov or (202) 564-3638.

Sincerely,

A handwritten signature in black ink that reads "Laura Vaught". The signature is written in a cursive, flowing style.

Laura Vaught
Associate Administrator

Enclosures

cc: The Honorable Eddie Bernice Johnson
Ranking Member

