CORY GARDNER
4TH DISTRICT, COLORADO

ENERGY AND COMMERCE COMMITTEE
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ENVIRONMENT AND ECONOMY SUBCOMMITTEE
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July 29, 2011

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
for Civil Works
108 Army Pentagon
Room 3E446
Washington, DC 20310-0108

Dear Administrator Jackson and Assistant Secretary Darcy:

This letter is an addendum to the June 30, 2011 letter sent by 15 of my colleagues in the House of Representatives. I am writing to urge that the Environmental Protection Agency (EPA) and Army Corps of Engineers promptly terminate any attempt to adopt or enforce any change in jurisdiction to waters under the Clean Water Act (CWA), unless and until Congress gives you the proper authority to do so.

The proposed "guidance" introduced by the EPA and Army Corps on April 27, 2011 will substantively change federal policy with respect to which waters fall under the jurisdiction of the CWA, significantly increasing the scope of the federal government's power to regulate waters. Furthermore, it will significantly expand the federal government's regulatory reach on private property.

As a result, constituents in my state will be subject to federal enforcement of onerous permitting requirements that demand a substantial expenditure of time and money. Even where jurisdiction is in question, the federal agencies have shifted the burden to landowners and permit applicants to establish that jurisdiction is not appropriate.

I also believe that the decision to issue guidance on this topic, as opposed to a notice-and-comment rulemaking, violates requirements of the Administrative Procedures Act, which is designed to ensure public input and a full assessment of the economic impacts before making any final agency decisions. Despite repeated claims by the agencies that they would undertake a formal rulemaking, they have not.

Legislative attempts to expand this authority have been met with strong bipartisan resistance in previous Congresses and, in April of this year, a bipartisan letter signed by 170 Members of Congress was sent to the EPA and Army Corp of Engineers. The letter expressed serious concerns about the expansion of federal jurisdiction without following the proper rulemaking process.

There is no doubt that the extent of waters over which the agencies assert jurisdiction under the CWA will increase with this guidance. This expansion of jurisdiction goes beyond what Congress intended under the CWA and beyond the Supreme Court's decisions in *Rapanos* and *SWANCC*. Furthermore, the guidance will have material economic impacts, which EPA itself has acknowledged. The agencies, however, have failed to provide an adequate economic impact analysis in light of the broad scope of changes encompassed by the guidance.

The Department of the Interior, as you know, created a "wild lands" classification last year—without any congressional authority to do so. Members of the Western Caucus swiftly acted to defund the program in the FY11 appropriations bill. Similar threats to usurp congressional authority, including the aforementioned guidance, are already facing similar defunding efforts in Congress. As such, I urge your prompt termination of any attempt to adopt or enforce any change in jurisdiction to waters under the Clean Water Act, unless and until Congress gives you the proper authority to do so.

Thank you for your time and attention to my request. I look forward to your expeditious reply.

Sincerely,

Cory Gardner
Member of Congress