

Senators Fight to Stop EPA's Takeover of All Water

INTRODUCE LEGISLATION TO HALT EPA'S DRAFT CLEAN WATER ACT JURISDICTIONAL GUIDANCE

March 28, 2012

WASHINGTON, D.C. – Today, U.S. Senators John Barrasso (R-WY), Jim Inhofe (R-OK), Dean Heller (R-NV), Jeff Sessions (R-AL) and 26 other Senators introduced [legislation](#) to stop the Environmental Protection Agency (EPA) from taking over all private water in the United States. The “Preserve the Waters of the U.S. Act” prevents the EPA and the Army Corp of Engineers (Corps) from using their overreaching “guidance” to change legal responsibilities under the Clean Water Act (CWA).

“President Obama’s EPA continues to act as if it is above the law. It is using this overreaching guidance to pre-empt state and local governments, farmers and ranchers, small business owners and homeowners from making local land and water use decisions,” **said Barrasso**. “Our bill will stop this unprecedented Washington power grab and restore Americans’ property rights. It’s time to get EPA lawyers out of Americans’ backyards.”

“As Americans struggle in this anemic economy, the Administration continues to stifle job creation at every turn. Expanding EPA’s authority and threatening personal property rights will only discourage the economic growth we need for long term job creation. It is past time to cut through the red tape, and tear down the barriers to get the American people back to work. I look forward to working with my colleagues to get this bill passed,” **said Heller**.

“The Obama-EPA’s proposed water guidance greatly expands the Clean Water Act’s scope through a slew of new and expanded definitions. This approach is so unpopular, however, that it was originally defeated in the previous Democratic controlled Congress. Nevertheless, the Obama administration continues to move these policies forward. In addition to an increase in Army Corps jurisdictional determinations of as much as 17%, this change in guidance will also result in a change in the responsibilities of states in executing their duties under the Clean Water Act and a change in how individual citizens are governed by the Clean Water Act. These kinds of changes, and passing along more unfunded mandates to state and local governments, should never be done via a guidance document. I call on my colleagues from both the Senate and the House to join us in stopping EPA and the Army Corps from making these unprecedented regulatory changes through a guidance document. I look forward to swift action on this bill,” **said Inhofe**.

The legislation is co-sponsored by Senators Jim Inhofe (R-OK), Jeff Sessions (R-AL), Dean Heller (R-NV), Mitch McConnell (R-KY), Mike Enzi (R-WY), David Vitter (R-LA), John Boozman (R-AR), Mike Crapo (R-ID), Pat Roberts (R-KA), John Thune (R-SD), Roger Wicker (R-MS), Jim Risch (R-ID), John Cornyn (R-TX), Richard Lugar (R-IN), Chuck Grassley (R-IA), Tom Coburn (R-OK), Roy Blunt (R-MO), Marco Rubio (R-FL), Jon Kyl (R-AZ), Pat Toomey (R-PA), Dan Coats (R-IN), Rand Paul (R-KY), Mike Johanns (R-NE), Saxby Chambliss (R-GA), John Hoeven (R-ND), Jerry Moran (R-KS), Johnny Isakson (R-GA), Ron Johnson (R-OH) and Thad Cochran (R-MS).

Background:

In May 2011, the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) issued draft guidance on “Identifying Waters Protected by the Clean Water Act.” This guidance document, which was sent in final form to OMB on February 21, 2012, significantly changes and expands what features are considered protected under the Clean Water Act. It makes substantial additions, such as a first time inclusion of ditches, ground water, potholes, gutters and other water features that may flow, if

at all, only after a heavy rainfall.

These new regulations would make it harder for Americans to build in their backyards, grow crops, manage livestock, expand small businesses and carry out other activities on private lands.

Some of the major problems associated with the EPA's draft CWA Guidance:

- **Regulation through Guidance:** By issuing a guidance document as opposed to going through the rulemaking process, EPA and the Corps are bypassing the necessary public outreach required under the Administrative Procedures Act and failing to fully consider the legal, economic, and unforeseen consequences of their actions.

- **Applies to all CWA Programs:** In addition to the Corps §404 dredge and fill permits, the guidance applies to all CWA programs including §303 water quality standards, §401 state water quality certifications, §311 Oil Pollution Act (including SPCC), and §402 program (including NPDES permits, pesticide general permit, and storm water).

- **Increasing Permits:** EPA and the Corps affirm that this guidance will result in an increase in jurisdictional determinations which will result in an increased need for permits. In addition to more Corps §404 permits, State permitting authorities will be faced with more NPDES permits and more entities will be subject to CWA requirements.

- **Economic and Job Impacts:** Additional regulatory costs associated with changes in jurisdiction and increases in permits will erect bureaucratic barriers to economic growth, negatively impacting farms, small businesses, commercial development, road construction and energy production, to name a few.

- **Impact on State on Local Governments:** Changes to the "waters of the U.S." definition may have far-reaching effects and unintended consequences on a number of state and local programs. The guidance creates significant unfunded mandates and preempts state and local authority.

- **Conflicts with Supreme Court Rulings:** The guidance uses an overly broad interpretation of the Rapanos decision. The effect is virtually all wet areas that connect in any way to navigable waters are jurisdictional. Both the plurality opinion and Kennedy rejected this assertion in Rapanos.

- **Private Property Rights:** Expanding federal control over intrastate waters will substantially interfere with the ability of individual landowners to use their property.

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John Barrasso

112TH CONGRESS
2D SESSION

S. _____

To preserve existing rights and responsibilities with respect to waters of
the United States.

IN THE SENATE OF THE UNITED STATES

Mr. BARRASSO (for himself, Mr. INHOFE, Mr. SESSIONS, Mr. HELLER, Mr. VITTER, Mr. BOOZMAN, Mr. CRAPO, Mr. MCCONNELL, Mr. ROBERTS, Mr. WICKER, Mr. RISCH, Mr. GRASSLEY, Mr. CORNYN, Mr. COBURN, Mr. THUNE, Mr. LUGAR, Mr. BLUNT, Mr. RUBIO, Mr. ENZI, Mr. KYL, Mr. TOOMEY, Mr. COATS, Mr. PAUL, Mr. JOHANNIS, Mr. CHAMBLISS, and Mr. HOEVEN) introduced the following bill; which was read twice and referred to the Committee on _____

*Mr. Moran, Mr. Isakson,
Mr. Johnson of Wisconsin,
and Mr. Cochran.*

A BILL

To preserve existing rights and responsibilities with respect
to waters of the United States.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Preserve the Waters
5 of the United States Act".

1 **SEC. 2. IDENTIFICATION OF WATERS PROTECTED BY THE**
2 **CLEAN WATER ACT.**

3 (a) **IN GENERAL.**—Neither the Secretary of the Army
4 nor the Administrator of the Environmental Protection
5 Agency shall—

6 (1) finalize the proposed guidance described in
7 the notice of availability and request for comments
8 entitled “EPA and Army Corps of Engineers Guid-
9 ance Regarding Identification of Waters Protected
10 by the Clean Water Act” (EPA–HQ–OW–2011–
11 0409) (76 Fed. Reg. 24479 (May 2, 2011)); or

12 (2) use the guidance described in paragraph
13 (1), or any substantially similar guidance, as the
14 basis for any decision regarding the scope of the
15 Federal Water Pollution Control Act (33 U.S.C.
16 1251 et seq.) or any rulemaking.

17 (b) **RULES.**—The use of the guidance described in
18 subsection (a)(1), or any substantially similar guidance,
19 as the basis for any rule shall be grounds for vacation
20 of the rule.