

# Congress of the United States

Washington, DC 20515

January 19, 2012

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

Dear Administrator Jackson:

Recently, there have been reports in the press that the Environmental Protection Agency (EPA) is negotiating a settlement agreement with the Conservation Law Foundation and the Buzzards Bay Coalition to resolve two lawsuits. One lawsuit alleges EPA has a non-discretionary duty under the Clean Water Act to regulate pollution of groundwater. The other lawsuit alleges EPA has a non-discretionary duty to mandate states regulate nonpoint source pollution. Since neither allegation is true, we were very surprised to learn that EPA is choosing to settle these cases, rather than to honor the limits of its authority under the Clean Water Act and vigorously defend these cases.

We are concerned that EPA has demonstrated a disturbing trend recently, whereby EPA has been entering into settlement agreements that purport to expand Federal regulatory authority far beyond the reach of the Clean Water Act and has then been citing these settlement agreements as a source of regulatory authority in other matters of a similar nature.

One example of this practice is EPA's out-of-court settlement agreement with the Chesapeake Bay Foundation in May 2010. EPA has referred to that settlement as a basis for its establishment of a Federal total maximum daily load (TMDL) for the entire 64,000 square-mile Chesapeake Bay watershed and EPA's usurpation of state authority to implement TMDLs in that watershed. EPA also has referred to that settlement as a basis for its plan to regulate stormwater from developed and redeveloped sites, which exceeds the EPA's statutory authority.

Another example is EPA's out-of-court settlement agreement with the Natural Resources Defense Council, also in May 2010, under which it agreed to impose regulatory reporting requirements on entities that are not regulated by the Clean Water Act.

As an Executive Branch agency, EPA must carry out the laws passed by Congress. EPA cannot exceed the authority granted to it by Congress. Indeed, the Executive Branch has a clear duty to vigorously defend, to the highest level, lawsuits that seek to compel action by any agency that is not authorized by law. Further, we are sure we do not need to remind you the expenditure of Federal funds to carry out unauthorized actions may be a violation of the Anti-Deficiency Act, which imposes personal liability on Federal officers.

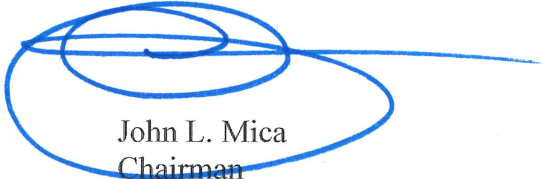
We are not asking for any details of your settlement discussions. However, to allow us, other members of Congress, and the public to fully understand the breadth of the Federal regulatory authority that EPA believes it can assert, please provide responses to the following questions within two weeks of the date of this letter:

1. Does EPA consider a ground water aquifer to be a water of the United States under the Clean Water Act? Please explain.
2. Does EPA consider a ground water aquifer to be a point source? Please explain.
3. Does EPA believe it has the authority under the Clean Water Act to regulate leaching of pollution into ground water? Please explain.
4. Does EPA believe it has the authority under the Clean Water Act to regulate the direct discharge of pollutants into ground water? Please explain.
5. According to a recent press article, an EPA spokeswoman has said section 208 of the Clean Water Act does not authorize EPA to exercise any Federal regulatory authority over nonpoint sources. Please confirm for us that the Clean Water Act does not provide EPA with any authority to craft section 208 areawide plans or to exercise any Federal regulatory authority over nonpoint sources under section 208 or any other section of the Clean Water Act, and that section 208 is consistent with the rest of the Clean Water Act that leaves the management of nonpoint sources to the states.
6. Does EPA believe it has the authority under the U.S. Constitution and under the Clean Water Act to commandeer a state legislature and require a state to enact an enforceable regulatory program for nonpoint sources? Please explain.
7. Does EPA believe it has the authority to withhold Federal funding from a state that is in compliance with an areawide waste treatment management plan that has been approved under section 208? Please explain.
8. Does EPA believe that a requirement in section 603(f) of the Clean Water Act that a state fund projects that are consistent with a state's plan developed under section 208 of the Act constitutes authority to require a state to enact an enforceable regulatory program for nonpoint sources? Please explain.
9. Does EPA believe that a requirement under 603(f) of the Clean Water Act that a state fund projects that are consistent with a state's plan developed under section 208 of the statute constitutes authority to withhold Federal funding from a state whose areawide waste treatment management plan does not include an enforceable regulatory program for nonpoint sources? Please explain.

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Thank you for your prompt attention to this matter.

Sincerely,



John L. Mica  
Chairman  
Committee on Transportation  
and Infrastructure



Bob Gibbs  
Chairman  
Subcommittee on Water Resources  
and Environment



James M. Inhofe  
Ranking Member  
Committee on Environment  
and Public Works



Jeff Sessions  
Ranking Member  
Subcommittee on Water and Wildlife