PACIFIC LEGAL FOUNDATION

June 17, 2016

Ms. Elizabeth Olsen
Committee on Environment and Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

Via Email: Elizabeth_Olsen@epw.senate.gov

Dear Ms. Olsen:

In accordance with the June 10, 2016, letter from Chairman Inhofe and Ranking Member Boxer, please find below my responses to the questions for the record.

1. *Senators Cardin and Markey implied there was a relationship between expanded federal jurisdiction over land and water and basic water quality protection, invoking the Cuyahoga River. They suggested that absent broad Clean Water Act jurisdiction, that river and others would burn. Would you respond to that allegation?*

Federal water quality regulation may have accelerated the clean-up of the nation's waters. But it is not true that broad federal command-and-control regulation was the only way to improve the environmental health of the country's waters.[1] Nor is it correct that such federal intervention was essential to remedy the pollution problems of the Cuyahoga or other rivers.[2]

---

[1] Richard A. Epstein, *Modern Environmentalists Overreach: A Plea for Understanding Background Common Law Principles*, 37 Harv. J.L. & Pub. Pol'y 23, 25 (2014) ("The appropriate response [to pollution like that with the Cuyahoga River] is not to pass some new huge, unwieldy, and overambitious law [but rather] to ramp up effective state enforcement, conferring, if necessary, standing on private individuals who use the rivers to coerce public bodies to take steps to clean up the river."); Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 Duke Envtl. L. & Pol'y F. 253, 263 (2013) ("While the federal government has a role to play in environmental protection, the virtues of federal intervention have been oversold."). *See also* Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. Envtl. L.J. 130, 160 (2005) ("[T]he bulk of federal environmental regulations on the books concern matters that do not directly address interstate spillovers or benefit from the sort of economies of scale that would justify federal regulation.").

[2] Adler, *Conservative Principles*, *supra* n.1, at 265 ("While there were plenty of serious environmental problems in the 1960s, it is wrong to suggest everything was getting inexorably worse until the federal government got involved."); Henry N. Butler, *A Defense of Common Law Environmentalism: The Discovery of Better Environmental Policy*, 58 Case W. Res. L. Rev. 705, 730 (2008) ("But, because the common law evolves slowly, it sometimes lags behind more rapid changes in public preferences.

HEADQUARTERS: 930 G Street | Sacramento, CA 95814 | (916) 419-7111 | FAX (916) 419-7747
ATLANTIC: 8645 N. Military Trail, Suite 511 | Palm Beach Gardens, FL 33410 | (561) 691-5000 | FAX (561) 691-5006
DC: 300 New Jersey Avenue, NW, Suite 900 | Washington, DC 20001 | (202) 888-6881 | FAX (202) 888-6855
HAWAII: P.O. Box 235856 | Honolulu, HI 96823-3514 | (808) 733-3373 | FAX (808) 733-3374
NORTHWEST: 10940 NE 33rd Place, Suite 210 | Bellevue, WA 98004 | (425) 576-0484 | FAX (425) 576-9565
ALASKA: (907) 278-1731 | OREGON: (503) 241-8179

E-MAIL: plf@pacificlegal.org
WEB SITE: www.pacificlegal.org

"Much of the Cuyahoga story . . . is mythology . . . ."[3] In fact, the "conventional narratives, of a river abandoned by its local community, of water pollution at its zenith, of conventional legal doctrines impotent in the face of environmental harms, and of a beneficent federal government rushing in to save the day, is misleading in many respects."[4] To be sure, rivers that catch fire because of pollutants on their surface present a grave water quality issue. But "it appears [that] the tide [against such events] was turning well before Congress enacted the 1972 Clean Water Act."[5] For example, by 1966, "every state had enacted water pollution legislation of some sort delegating responsibility to one or more state agencies."[6] Similarly, EPA's 1973 National Water Quality Inventory showed that "there had been significant improvements in most major waterways over the preceding decade, at least in regard to organic wastes and bacteria."[7]

In contrast, federal involvement prior to the 1972 Clean Water Act actually may have retarded state and local efforts to improve water quality. "In 1966, 237 federal installations continued to discharge insufficiently treated waste into domestic waters."[8] It is also "important to remember that prior to 1972 the federal government had potentially powerful tools"[9]—like the 1899 Rivers and Harbors Act[10]—"to address at least some aspects of the nation's water pollution problems."[11] Indeed, "enforcing the longstanding federal prohibition on dumping refuse into navigable waters could well have prevented the 1969 Cuyahoga fire, if not any of

---

Arguably, this timing problem is what allowed national politicians to exploit the perceived need for federal intervention in the early 1970s. Even if it is true that the common law could not keep up with rapid changes in public preferences in the 1960s, it does not follow that the common law could not have caught up over time.").

[3] Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 Fordham Envtl. L.J. 89, 93 (2002). For example, the famous *Time Magazine* cover of the Cuyahoga River burning was *not* an image of the 1969 fire but rather an archive photo of a 1952 blaze. *Id*. at 98.

[4] *Id*. at 93. *See Adler, Conservative Principles, supra* n.1, at 266 ("[C]ontrary to the standard fable, federal environmental regulation was not always necessary or an improvement over the available alternatives.").

[5] Adler, *Fables of the Cuyahoga, supra* n.3, at 95. *See id*. at 106 ("Yet contrary to popular perception, Cleveland officials began river cleanup *before* the 1969 fire.").

[6] *Id*. at 111. "[T]here is reason to believe that state and local efforts produced measurable, if modest, improvement in water quality in many areas." *Id*.

[7] *Id*. at 111-12 (citation omitted).

[8] *Id*. at 132.

[9] *Id*. at 138.

[10] 33 U.S.C. § 407.

[11] Adler, *Fables of the Cuyahoga, supra* n.3, at 138.

the earlier fires as well."[12] Thus, "it makes no more sense to blame state and local governments for the gross pollution of [the pre-Clean Water Act] period than it makes sense to blame the federal government or any other institutional force."[13] Moreover, recent scholarship demonstrates the relative superiority of state, local, and private/common-law efforts to control pollution over ill-fitting, excessively centralized, and frequently counterproductive federal regulation.[14]

2. *The Pacific Legal Foundation just won a significant Supreme Court victory in the* Hawkes *case. However, the Administration is suggesting they may change a MOU between the Corps and EPA so that Corps jurisdictional determinations are not binding on EPA. Does this issue require a legislative fix?*

Chief Justice Roberts' majority opinion in *United States Army Corps of Engineers v. Hawkes Co.*[15] states that an approved jurisdictional determination is binding on the government generally, not just on the Corps or the EPA.[16] Although the Chief Justice's opinion cites the MOU between

---

[12] *Id.* at 135.

[13] *Id.* at 143-44.

[14] Jonathan H. Adler & Andrew P. Morriss, *Introduction*, 58 Case W. Res. L. Rev. 575, 576 (2008) ("Today there is widespread dissatisfaction with many aspects of federal environmental law."); Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 Geo. Mason L. Rev. 923, 925 (1999) ("[M]ost federal pollution control efforts are fundamentally misguided. The common law, combined with various state-level controls, was doing a better job addressing most environmental problems than the federal monopoly, which directed most environmental policy for the last part of this century. America's move down the track of central environmental planning is incompatible with . . . environmental protection itself."); Adler, *Conservative Principles*, *supra* n.1, at 278-80 (contending that "environmental protection efforts would benefit from greater decentralization" because (i) "most environmental problems are local or regional in nature," (ii) it "creates the opportunity for greater innovation in environmental policy," and (iii) the federal government could then focus on "those environmental concerns where a federal role is easiest to justify, such as in supporting scientific research and addressing interstate spillovers"); William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547, 1556 (2007) ("The common law system's independence and private incentives to challenge the status quo are particularly valuable antidotes to complacency and ineffective regulation."), *quoted in* Adler & Morriss, *supra* n.14, at 577 n.15.

[15] 136 S. Ct. 1807 (2016).

[16] *Id.* at 1814 (noting that an approved JD "will also be 'binding on the Government and represent the Government's position in any subsequent Federal action or litigation concerning that final determination'") (quoting Memorandum of Agreement: Exemptions Under Section 404(f) of the Clean Water Act §§ IV–C–2, VI–A (1989)).

the Corps and EPA, the decision was not dependent on the MOU.[17] Justice Kagan, in a concurring opinion, stated that the MOU "is central to the disposition of this case" because it clearly shows that jurisdictional determinations are "binding on the Government."[18] In counterpoint to Justice Kagan's take on the case, Justice Ginsburg wrote in her separate concurring opinion that the Court need not rely on the MOU at all because jurisdictional determinations are "definitive."[19] Therefore, they are final as to jurisdiction and are subject to review under the Administrative Procedure Act.[20] Importantly, Justices Kennedy, Alito, and Thomas sided with Justice Ginsburg on this point. Their concurring opinion states that even if the MOU is not enough to establish final agency action, "the Court is right to construe a [jurisdictional determination] as binding in light of the fact that in many instances it will have a significant bearing on whether the Clean Water Act comports with due process."[21] In other words, altering the MOU to make jurisdictional determinations non-binding would raise a constitutional issue. If the Corps and EPA were to revise the MOU, it would certainly be for the purpose of exploiting any ambiguity in the *Hawkes* decision to argue that the decision no longer applies to the EPA. To avoid such an outcome, it would be both prudent and desirable for Congress to provide a legislative "fix."

3. *Can the Corps respond to the Hawkes case by refusing to provide jurisdictional determinations in the absence of a completed permit application? If so, could that undermine the protections the Supreme Court provided and would this issue require a legislative fix?*

The Corps' current regulations provide for standalone jurisdictional determinations along with a right of appeal identical to that for permit decisions.[22] Under these regulations, the project proponent is entitled to a jurisdictional determination.[23] If the Corps were to refuse to provide a jurisdictional determination, a project proponent could challenge the Corps' failure to act

---

[17] For example, as discussed in the Chief Justice's opinion, the Corps' own regulations bind the agency to the outcome of the JD process, regardless of the MOU. *See Hawkes Co.*, 136 S. Ct. at 1814.
[18] *Id.* at 1817 (Kagan, J., concurring).
[19] *Id.* at 1817 (Ginsburg, J., concurring in part and concurring in the judgment) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967)).
[20] *Hawkes Co.*, 136 S. Ct. at 1817-18 (Ginsburg, J., concurring in part and concurring in the judgment).
[21] *Id.* at 1817 (Kennedy, J., concurring).
[22] *See* 33 C.F.R. §§ 320.1(a)(2), 331.2. The Corps will issue a jurisdictional determination as part of its permitting process.
[23] *See id.* § 320.1(a)(6) ("The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act . . . to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities.").

under the Administrative Procedure Act.[24] Therefore, the Corps may legally refuse to provide a jurisdictional determination only if the agency rescinds its current regulations. As suggested above, because of the breadth and uncertain reach of the Clean Water Act,[25] the government's failure to provide a definitive and binding jurisdictional determination would raise a serious due process issue. Justice Kennedy, speaking for himself and Justices Thomas and Alito, observed in his *Hawkes* concurrence that the "Act, especially without the JD procedure were the Government permitted to foreclose it, continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."[26] Unfortunately, these due process concerns may not be enough to deter the Corps from refusing to provide standalone jurisdictional determinations.[27] To avoid this outcome, it would be both prudent and desirable for Congress to provide a legislative "fix."

Respectfully submitted,

DAMIEN M. SCHIFF
Principal Attorney

---

[24] *See* 5 U.S.C. § 706(1).

[25] *See Hawkes Co.*, 136 S. Ct. at 1816 ("[T]he reach and systemic consequences of the Clean Water Act remain a cause for concern."); *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) ("The reach of the Clean Water Act is notoriously unclear.") (Alito, J., concurring).

[26] *Hawkes Co.*, 136 S. Ct. at 1817 (Kennedy, J., concurring).

[27] *See* Jonathan H. Adler, *Wetlands, Property Rights, and the Due Process Deficit in Environmental Law*, 2012 Cato Sup. Ct. Rev. 139, 163 ("[T]here remains a due process deficit in environmental law, and in the federal regulation of wetlands in particular.").