United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510–6175

June 26, 2015

Ken Kopocis
Deputy Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Deputy Assistant Administrator Kopocis,

It has come to my attention that the U.S. Environmental Protection Agency (EPA) recently exercised a rarely used "special case" authority, one employed less than a dozen times since the adoption of the Clean Water Act (CWA). The effect was to take away from the U.S. Army Corps of Engineers (Corps) the jurisdictional determination (JD) for the Cargill Industrial Salt Harvesting Facility in Redwood City, California, an industrial facility the EPA refused to address three years earlier.

It is my understanding that the project proponent began discussions with both the EPA and the Corps as early as 2006 regarding the site. Then, in May 2012, they made a formal request to both agencies for an approved JD. It was at this stage that the proponent asked the EPA to utilize its authority on the front end in order to avoid an end-of-process surprise. The EPA refused, indicating that the Corps should process the JD in the traditional manner, and that EPA would remain engaged for support and "would not add additional time to the Corps' decision process."

During the three years that the Corps and EPA considered this matter, the Office of Chief Counsel for the Corps, in coordination with its regulatory staff, provided an elaborate analysis regarding the history and characteristics of this unique industrial site (including a federal permit issued in 1940) and the applicability of both the CWA and the Rivers and Harbors Act (RHA) to it. As to the CWA, the Corps determined that there is no basis for the exertion of jurisdiction. On March 18, 2015, the Corps notified EPA that it would be issuing the JD. It was only at this point the EPA notified the Corps that it planned to exert its "special case" authority and take over the CWA portion of the JD. The Corps issued a JD regarding the applicability of the RHA to the site on March 19, 2015. In addition, the Regional Administrator for the EPA in San Francisco informed the media that its review of the matter would take until late 2015 or even 2016, which is nearly four years after the proponent first asked EPA to step in.

In light of these events and circumstances, please respond to the following questions no later than July 10, 2015:

1. Why, specifically, did the EPA feel that utilizing its "special case" authority in this instance was necessary and appropriate?

2. As to the EPA's timing, why did the agency wait over three years to exercise its "special case" authority instead of doing so early on when asked?

3. Why, specifically, did the EPA disagree with the legal analysis of the Office of Chief Counsel of the Corps when it determined that there was no basis for the exertion of jurisdiction under the CWA?

4. How will the EPA's JD analysis for this site change under the new Final "Waters of the United States" Rule?

5. What is the EPA's timing for completing the JD?

If you have any questions regarding this letter, please feel free to have your staff contact the Senate Committee on Environment and Public Works Majority Office at (202) 2246176.

Sincerely,

James Inhofe
Chairman
Senate Committee on Environment and Public Works

cc: Gina McCarthy, Administrator, U.S. Environmental Protection Agency
Jared Blumenfled, Region IX Administrator, U.S. Environmental Protection Agency