112TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
112–681

TO PRESERVE EXISTING RIGHTS AND RESPONSIBILITIES WITH RESPECT TO WATERS OF THE UNITED STATES, AND FOR OTHER PURPOSES

SEPTEMBER 20, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. MICA, from the Committee on Transportation and Infrastructure, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4965]

[Including cost estimate of the Congressional Budget Office]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 4965) to preserve existing rights and responsibilities with respect to waters of the United States, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. IDENTIFICATION OF WATERS PROTECTED BY THE CLEAN WATER ACT.

(a) IN GENERAL.—The Secretary of the Army and the Administrator of the Environmental Protection Agency are prohibited from—

(1) finalizing, adopting, implementing, administering, or enforcing the proposed guidance described in the notice of availability and request for comments entitled "EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act" (EPA–HQ–OW–2011–0409) (76 Fed. Reg. 24479 (May 2, 2011)); and

(2) using the guidance described in paragraph (1), any successor document, or any substantially similar guidance made publicly available on or after December 3, 2008, as the basis for any decision regarding the scope of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) or any rulemaking.

(b) RULES.—The use of the guidance described in subsection (a)(1), or any successor document or substantially similar guidance made publicly available on or after December 3, 2008, as the basis for any rule shall be grounds for vacating the rule.

PURPOSE OF THE LEGISLATION

The purpose of H.R. 4965 is to preserve existing rights and responsibilities under the Federal Water Pollution Control Act with respect to Waters of the United States by prohibiting the U.S. Environmental Protection Agency and the Army Corps of Engineers from finalizing, adopting, implementing, administering, or enforcing proposed guidance the Agencies have developed regarding the scope of the Federal Water Pollution Control Act.

BACKGROUND AND NEED FOR THE LEGISLATION

Background

Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (commonly known as the Clean Water Act or the CWA) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The 1972 Amendments significantly changed the approach of the Federal Water Pollution Control Act, which can trace its roots back to the Rivers and Harbors Act of 1899, and more immediately to the Water Quality Act of 1948.

Before 1972, the predecessor statutes to the CWA had addressed water pollution largely by funding State and municipal wastewater treatment systems and by requiring the establishment of State water quality standards. This approach had not been sufficiently effective in controlling individual discharges of pollution. The 1972 Amendments aimed to address this problem by instituting a system requiring individual permits for discharges of pollutants to navigable waters.

The Clean Water Act claims Federal jurisdiction over the Nation's "navigable waters," which are defined in the Act as "the waters of the United States, including the territorial seas." (CWA 502(7); 33 U.S.C. § 1362.) As inferred by the definition of "navigable waters" in the CWA, a somewhat wider variety of waters than just traditional "navigable in fact" waters (which had long been the traditional basis for Federal jurisdiction under previous law) are included under the jurisdiction of the CWA.

The U.S. Environmental Protection Agency (EPA) has the basic responsibility for administering and enforcing most of the CWA, and is responsible for implementing the National Pollutant Discharge Elimination System (NPDES) permitting program under section 402 of the CWA. Under the NPDES program, it is unlawful

for a facility to discharge pollutants into "navigable waters," unless the discharge is authorized by and in compliance with an NPDES permit issued by EPA (or by a State under a comparable approved State program).

EPA shares responsibility with the U.S. Army Corps of Engineers (Corps) for implementing the dredge and fill (wetlands) permitting program under section 404 of the CWA. Under the wetlands permitting program, it is unlawful for a facility to discharge dredge or fill materials into "navigable waters," unless the discharge is authorized by and in compliance with a dredge or fill (404) permit issued by the Corps.

The CWA does not contemplate a single, Federally-led water quality program. Rather, Congress intended the States and EPA to implement the CWA as a Federal-State partnership where the States and EPA act as co-regulators. The CWA established a system where States can receive EPA approval to implement water quality programs under State law, in lieu of Federal implementation. These States are called "authorized States." Under the CWA, 47 States and territories currently have authorized programs.

Federal jurisdiction under the CWA

Since enactment of the CWA in 1972, EPA and the Corps (hereinafter, the Agencies) have individually or jointly promulgated several sets of regulations interpreting the Agencies' jurisdiction over "navigable waters." The first of these regulations was promulgated by the Corps in 1972, shortly after enactment, and generally limited CWA Section 404 jurisdiction to only traditional navigable waters. The EPA's initial interpretation linked jurisdiction under the CWA to waters in or on which activity might affect interstate commerce.

The Agencies later promulgated further sets of regulations, including in 1974, 1975, 1977, 1986, and 1993, which gradually broadened the scope of their asserted Federal jurisdiction over "navigable waters." In the 1986 publication of regulations, the Agencies for the first time explicitly asserted jurisdiction over non-navigable, isolated, intrastate waters that are or may be used as habitat for migratory birds (sometimes referred to as the "Migratory Bird Rule"). (51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).)

Today, the Agencies' regulations assert jurisdiction over a wide range of waters in their regulatory definition of "waters of the United States." Such waters include: waters which have been, are currently, or may be susceptible to being used in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide; interstate waters including interstate wetlands and all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes and natural ponds; the territorial sea; and certain impoundments, tributaries, and wetlands adjacent to such waters. (*See, e.g.,* 33 C.F.R. § 328.3, 40 C.F.R. § 230.3(s) for the complete definition in the Agencies' regulations.)

Federal jurisdiction under the CWA over "traditional" navigable (sometimes referred to as "navigable-in-fact") waters has not been in question. However, controversies quickly arose shortly after enactment of the Act in 1972 over whether there is Federal jurisdiction of the CWA over upstream headwaters, isolated waterbodies,

intermittent and ephemeral streams, manmade ditches, swales, and ponds, and other non-navigable waters, and more generally over where the outer limits of Federal jurisdiction lie under the CWA.

Some interests have sought to preserve a balance of power and long-term cooperative relationship between the Federal government and the States with regard to water management and water quality, and have argued for a limited scope of Federal jurisdiction over waterbodies. This would allow States to assert jurisdiction over State waters where the Federal interest in those waters is limited or nonexistent.

On the other hand, other interests have argued for an expansive (and some, an unlimited) scope of Federal jurisdiction over waterbodies, to include most any wet areas, because of their perceived need for a strong Federal, top-down role in regulating activities affecting them. A strong Federal, top-down approach undermines the Federal-State partnership that Congress originally envisioned for implementing the CWA.

Supreme Court cases on CWA jurisdiction

There has been a substantial amount of litigation in the Federal courts on the scope of CWA jurisdiction over the past nearly 40 years, including three U.S. Supreme Court cases:

- *United States* v. *Riverside Bayview Homes, Inc.,* 474 U.S. 121 (Dec. 4, 1985) ("Riverside Bayview").
- *Solid Waste Association of Northern Cook County* v. *United States Corps of Engineers*, 531 U.S. 159 (Jan. 9, 2001) (also known as *"SWANCC"*).
- The combined cases of *Rapanos* v. *United States* and *Carabell* v. *U.S. Army Corps of Engineers*, 547 U.S. 715 (June 19, 2006) (collectively referred to as "*Rapanos*").

The Supreme Court, in the *Riverside Bayview* case, found that the Corps had acted reasonably in interpreting the Act to require permits for the discharge of material into wetlands adjacent to other jurisdictional waters of the United States.

However, both the *SWANCC* and *Rapanos* case decisions were notable because the Supreme Court began to articulate limits to Federal jurisdiction under the CWA regarding the scope of what are considered "waters of the United States." Some view these cases as signaling a narrowing of the interpreted scope of CWA jurisdiction over "waters of the United States" because the Supreme Court no longer would allow the Agencies to assert essentially boundless jurisdiction over virtually all waters and wet areas around the Nation.

In the *SWANCC* case, the Supreme Court rejected the Agencies' claims that use of an isolated waterbody (here, an abandoned sand and gravel pit with excavation trenches that had evolved into seasonal and permanent ponds) by migratory birds was sufficient to make it a "water of the United States." The Court held that the Corps' interpretation of its jurisdictional regulations was not consistent with the CWA and raised serious constitutional questions regarding the scope of CWA jurisdiction under the Commerce Clause.

In response to the *SWANCC* case, on January 15, 2003, the Agencies published an Advance Notice of Proposed Rulemaking on

Federal regulatory jurisdiction over isolated waters and an Interim Guidance Memorandum for field staff pending completion of the proposed rulemaking or the issuance of further interim guidance. (68 Fed. Reg. 1991 (Jan. 15, 2003).) The Interim Guidance Memorandum noted that the intent of the guidance was to summarize the existing state of the law after the *SWANCC* case as to what waterbodies are subject to Federal jurisdiction under the CWA.

After soliciting public comment to determine if further regulatory clarification was needed, on December 16, 2003, the Agencies announced they would not issue a new rule on Federal regulatory jurisdiction over isolated wetlands. (Press Release, U.S. Army Corps of Eng'rs & U.S. Envtl. Prot. Agency, *EPA and Corps of Engineers Issue Wetlands Decision* (Dec. 16, 2003).) The Interim Guidance Memorandum remains issued and in effect.

In the *Rapanos* case, the Supreme Court overturned the expansive definition of Federal jurisdiction over wetlands claimed by the Agencies, although the Court was unable to agree on the proper test for determining the extent to which Federal jurisdiction applies to wetlands, resulting in a split decision. This split decision left the Agencies with nonuniform guidelines from the Court as to how to interpret the CWA's jurisdictional scope in the future. While the *Rapanos* Court was divided, the Court recognized that there are limits to Federal jurisdiction, and the Agencies' previous view of essentially unbounded jurisdiction under the CWA was unfounded. After *Rapanos*, the Agencies have had to demonstrate whether a water is subject to Federal jurisdiction under the CWA, supported by a careful scientific analysis.

Subsequent to the Supreme Court decision in *Rapanos*, the Agencies developed interpretative guidance on how to implement the *Rapanos* decision. In June 2007, the Agencies issued a preliminary guidance memorandum aimed at answering questions regarding CWA regulatory authority over wetlands and streams raised by the Supreme Court in *Rapanos*. (*See* Joint Legal Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (June 5, 2007) (available at http://water.epa.gov/lawsregs/guidance/wetlands /upload/2007_6_5_wetlands_RapanosGuidance6507. pdf).)

On December 2, 2008, the Agencies issued an updated guidance memorandum on the terms and procedures to be used to determine the extent of Federal jurisdiction over waters, building upon the previous guidance issued in June 2007. (*See* Updated Joint Legal Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) (available at http://water.epa.gov/ lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_ Jurisdiction_Following_Rapanos120208.pdf).) The guidance was not intended to increase or decrease CWA jurisdiction from that as articulated by the Supreme Court in *Rapanos*, and it did not supersede or nullify the January 2003 guidance, which addressed jurisdiction over isolated waters in light of *SWANCC*.

The Agencies' proposed revised CWA guidance

In 2010, the Agencies decided to weigh in again on defining the scope of Federal jurisdiction under the CWA. In late 2010, the Agencies drafted new joint guidance to describe their latest views

of Federal regulatory jurisdiction over waters of the United States under the CWA and to replace the Agencies' 2003 and 2008 guidance.

The draft guidance underwent several months of interagency review before being released in May 2011, when the Agencies published, in the Federal Register, a joint notice announcing the availability of the guidance. (76 Fed. Reg. 24,479 (May 2, 2011) (notice entitled *EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act;* hereinafter, "Proposed Guidance").) The Agencies' Proposed Guidance purported to describe how the Agencies will identify waters subject to jurisdiction under the CWA and implement the Supreme Court's decisions in *SWANCC* and *Rapanos* concerning the extent of waters covered by the CWA.

The Proposed Guidance immediately generated substantial negative reaction, both among stakeholders and within Congress. Criticisms focused on two primary issues: (i) the Proposed Guidance would broaden the number and kinds of waters subject to regulation, beyond what the CWA and the Supreme Court's rulings allow; and (ii) the Agencies are implementing policy changes through supposedly non-binding guidance that generally is not reviewable by courts, instead of through a formal rulemaking.

The Agencies acknowledged in the Proposed Guidance that "the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance." (Proposed Guidance, at p.3 (available at http://water.epa.gov/lawsregs/guidance /wetlands/upload/wous_guidance_4-2011.pdf).) The Agencies also said they intend to expand the applicability of the Proposed Guidance beyond section 404, to all other Clean Water Act provisions that use the term "waters of the United States," including sections 402, 401, 311, and 303. (*Id.*) Further, the Agencies expressly noted that the Proposed Guidance "will supersede" prior interpretations on the scope of "waters of the United States." (*Id.* at p.1.)

Because the Proposed Guidance would go beyond merely clarifying the scope of U.S. waters subject to CWA programs, and is aimed, as even the Agencies have acknowledged, at increasing the scope of the CWA's jurisdiction over more waters and more provisions of the Act as compared to practices under the currently applicable 2003 and 2008 guidance, the Proposed Guidance would make substantive changes in CWA policy that would expand the regulatory powers of the Agencies in implementing the CWA, and would expand the regulated community's regulatory obligations under the CWA.

As a result, many Members of Congress, stakeholders, and even States have become extremely concerned that the Proposed Guidance amounts to being a *de facto* rule instead of mere advisory guidelines, and believe that the Agencies are attempting to short-circuit the process for changing agency policy and the scope of CWA jurisdiction without either Congressional action or approval, or following the proper, transparent rulemaking process that is dictated by the Administrative Procedure Act (5 U.S.C. 500 *et seq.*).

Three separate Congressional letters were sent to the Agencies over the past year expressing concern that the Proposed Guidance

misconstrues and manipulates the legal standards announced in the *SWANCC* and *Rapanos* Supreme Court decisions in order to expand the scope of Federal jurisdiction under the CWA, and abuses proper administrative process by seeking to change the CWA through guidance instead of by a formal rulemaking.

On April 14, 2011, 170 Members of the U.S. House of Representatives sent a letter to the Agencies stating concerns that the development of a new guidance document that would increase significantly the scope of the CWA's jurisdiction would amount to a *de facto* rule instead of mere advisory guidelines, and urged the Agencies to not pursue the guidance but instead to conduct a formal rulemaking. (*See* Letter to Lisa P. Jackson, Administrator, U.S. Environmental Protection Agency, and Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works (Apr. 14, 2011) (letter discussed a draft of the Proposed Guidance) (available at http://republicans.transportation.house.gov/Media/file/112th/Water/2011-04-14-EPA_Guidance_Letter.pdf).)

On June 30, 2011, 41 Members of the U.S. Senate sent a letter to the Agencies outlining specific concerns with the Proposed Guidance and expressing their concerns that the guidance contained clear legal and regulatory consequences that go beyond being simply advisory guidelines, and that changing the legal rights and responsibilities of individuals must be done through a formal rulemaking. The letter went on to request that the Agencies abandon any further action on this guidance document. (*See* Letter to Lisa P. Jackson, Administrator, U.S. Environmental Protection Agency, and Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works (June 30, 2012) (available at http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=ec609d07-a036-49e8-a8a0-c46652b479bd).)

On November 8, 2011, a bicameral letter from the House Committee on Transportation and Infrastructure and the Senate Environment and Public Works Committee, the committees of jurisdiction over the CWA, was sent to the Agencies, again insisting that the Agencies not finalize the guidance and further requesting that they solicit input, through an advance notice of proposed rulemaking, from the general public, scientific communities, and Federal and State resource agencies, to determine the appropriate scope of CWA jurisdiction and the range of issues to be covered by proposed regulations. (*See* Letter to Lisa P. Jackson, Administrator, U.S. Environmental Protection Agency, and Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works (Nov. 8, 2012) (available at http://republicans.transportation.house.gov/Media/file/112th/Water/110811_Jackson_Darcy_Guidance.pdf).)

In addition, representatives of State environmental protection agencies have expressed concern over the Agencies using interim or final guidance as a substitute for regulation or to change or expand the effects of regulation. State environmental protection agency representatives have urged the Agencies to proceed to formal rulemaking and not to issue or apply the Proposed Guidance in the interim. (*See, e.g.,* Letter, Comments of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA), to Nancy K. Stoner, Acting Assistant Administrator for Water and Jo Ellen Darcy, Assistant Secretary of the Army (Civil Works), *Re: EPA and Army Corps of Engineers Draft Guidance on Identifying*

Waters Protected by the Clean Water Act, Docket ID No. EPA–HQ–OW–2011–0409 (July 29, 2011) (available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3521).)

Representatives of State environmental protection agencies also have urged the Agencies to limit the use of guidance to "interpretation" of their regulations, and not as a substitute for regulation, or to change or expand the effects of a regulation, such as adding or deleting entities covered by current regulation. (*See, e.g.,* Environmental Council of the States (ECOS), Policy Resolution Number 11–1, *Objection to U.S. Environmental Protection Agency's Imposition of Interim Guidance, Interim Rules, Draft Policy and Reinterpretation Policy* (approved Mar. 30, 2011); ECOS, Policy Resolution Number 11–8, *On the Use of Guidance* (approved Sept. 26, 2011).)

State environmental protection agency representatives believe that the Agencies should adhere to the requirements of the Federal environmental statutes, the Administrative Procedure Act, and their own guidance governing rulemaking to provide for adequate public notice and comment on proposed and final actions. (*See, e.g.,* ECOS, Policy Resolution Number 11–1.)

Moreover, many stakeholders have submitted comments to the Agencies, expressing concern, among other things, that the Proposed Guidance misconstrues the Supreme Court's cases, is inconsistent with the Agencies' regulations, and expands Federal jurisdiction under the CWA; that the Proposed Guidance amounts to being a *de facto* rule because it effectively amends existing regulations that were at issue in the *Rapanos* and *SWANCC* cases by describing new conditions under which the Agencies may assert jurisdiction; and the Administrative Procedure Act mandates that, when the Agencies revise preexisting regulations or make specific, binding regulatory pronouncements, those pronouncements and rules must be promulgated pursuant to formal notice-and-comment rulemaking. (*See generally*, Comments Submitted to the Agencies, *contained in* EPA Docket Folder, *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, Docket ID No. EPA–HQ–OW–2011–0409 (available at http://www.regulations.gov/#!docketDetail;dct=FR%252BPR%252BN%252BO%252BSR%252BPS;rpp=25;po=0;D=EPA-HQ-OW-2011-0409).)

Despite the many substantive and administrative process concerns voiced by Members of Congress, State environmental protection agency representatives, and stakeholders regarding the Proposed Guidance, the Agencies decided to move forward towards finalizing and implementing the Proposed Guidance, largely unchanged from the proposed version, and not to conduct a formal rulemaking pursuant to the Administrative Procedure Act.

On February 21, 2012, the Agencies sent to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget, for regulatory review pursuant to Executive Order 12866, a final guidance document entitled *Guidance on Identifying Waters Protected by the Clean Water Act* (RIN: 2040–ZA11), relating to the identification of waters subject to jurisdiction under the CWA (hereinafter, "Final Guidance"; available at http://op.bna.com/env.nsf/id/jsun-8s629h/$File/CWA%20guide.pdf). The OIRA notice of pending regulatory review of the Final Guidance is available at http://www.reginfo.gov/public/do/eoDetails?rrid=121645.

The Agencies made some subtle revisions to the guidance, but the core of the Final Guidance for determining CWA jurisdiction remained largely unchanged from the Proposed Guidance, and would continue to assert expanded Federal jurisdiction under the CWA as compared to the Agencies' 2003 and 2008 guidance.

Because of the continued substantive changes in CWA regulatory policy that the Agencies would make with the Final Guidance and the Agencies' continued failure to conduct a formal rulemaking, on March 28, 2012, House Committee on Transportation and Infrastructure Chairman John L. Mica, Senate Environment and Public Works Committee Ranking Member James M. Inhofe, House Committee on Agriculture Chairman Frank D. Lucas, Senate Committee on Agriculture, Nutrition and Forestry Ranking Member Pat Roberts, House Subcommittee on Water Resources and Environment Chairman Bob Gibbs, and Senate Subcommittee on Water and Wildlife Ranking Member Jeff Sessions sent a letter to the Administrator of OIRA, Cass R. Sunstein, requesting that the wetlands jurisdictional guidance not be finalized.

The letter to the OIRA Administrator stated, among other things, that "If the Administration seeks statutory changes to the Clean Water Act a proposal must be submitted to Congress for legislative action. If the Administration seeks to make regulatory changes, a notice and comment rulemaking is required, following the proper, transparent rulemaking process that is dictated by the Administrative Procedure Act." (*See* Letter to Cass R. Sunstein, Administrator of OIRA (Mar. 28, 2012) (available at http://republicans.transportation.house.gov/Media/file/112th/Water/2012-03-28%20_%20Joint%20Letter%20to%20OMB%20re%20CWA%20Guidance.pdf), at p.1.)

After receiving no response from either the OIRA Administrator or the Agencies, and no other indication that the Agencies would abandon their efforts to finalize their guidance, Chairmen Mica, Gibbs, and Lucas, along with House Committee on Transportation and Infrastructure Ranking Member Nick J. Rahall II and House Committee on Agriculture Ranking Member Collin C. Peterson, and Representative Kristi Noem, introduced H.R. 4965 on April 27, 2012.

The sponsors of H.R. 4965 introduced this legislation to prohibit the Agencies from finalizing, adopting, implementing, administering, or enforcing the Proposed or Final Guidance, or using the Proposed or Final Guidance, or any substantially similar guidance, as the basis for any decision regarding the scope of the CWA or for any rulemaking. Without this legislation, Congress, the States, and other stakeholders will not have any assurance that the Agencies will not continue in their efforts to implement, through guidance, policies to expand the scope of CWA jurisdiction.

HEARINGS

On March 2, 2011 and March 28, 2012, the Subcommittee on Water Resources and Environment held hearings to receive testimony from the EPA on the Agency's budget and program priorities, and their impacts on jobs, liberty, and the economy. Among the program priorities the Subcommittee explored in these hearings was the Agencies' efforts and rationale for developing new CWA jurisdictional guidance. On March 8, 2011, the Subcommittee on

Water Resources and Environment held a hearing to receive testimony from the Army Corps of Engineers on the Corps' budget and program priorities. Among the program priorities the Subcommittee explored in this hearing was the Corps' role in developing new CWA jurisdictional guidance. On May 5 and 11, 2011, the Subcommittee held hearings to receive testimony from State regulators, regulated businesses, economists, and the EPA on EPA's surface mining policies and other related extra-regulatory activities. The Subcommittee explored, among other things, the EPA's use of interim or final guidance as a substitute for regulations or to change or expand the effects of regulation, and the need for the EPA to conduct a formal rulemaking instead of issuing guidance in these circumstances.

LEGISLATIVE HISTORY AND CONSIDERATION

On April 27, 2012, Committee on Transportation and Infrastructure Chairman John Mica introduced H.R. 4965, "A Bill to Preserve Existing Rights and Responsibilities with Respect to Waters of the United States, and for other purposes." On June 7, 2012, the Committee on Transportation and Infrastructure met in open session to consider H.R. 4965, and ordered the bill reported favorably to the House by recorded vote with a quorum present. The vote was 33 yeas to 18 nays.

An amendment was offered in Committee by Chairman Bob Gibbs, which was adopted by voice vote. The amendment aimed to clarify that the current effective status of the Agencies' 2003 and 2008 CWA guidance was to be preserved. The amendment provided that the bill's prohibition of using the guidance as the basis for any decision regarding the scope of the Clean Water Act or any rulemaking included the use of any successor document, or any substantially similar guidance made publically available on or after December 3, 2008.

Delegate Eleanor Holmes Norton also offered an amendment that would have exempted the bill from applying to any waters used as or affecting public drinking water supplies. Ranking Member Rahall objected to the amendment by raising a point of order on the grounds that issues relating to drinking water fall under the Safe Drinking Water Act and, thus, under the jurisdiction of the House Committee on Energy and Commerce. Chairman Mica upheld the objection that the amendment was not germane.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the House of Representatives requires each committee report to include the total number of votes cast for and against on each recorded vote on a motion to report and on any amendment offered to the measure or matter, and the names of those members voting for and against. During consideration of H.R. 4965, a total of one recorded vote was taken, ordering the bill reported as amended. The bill, as amended, was ordered favorably reported to the House by a vote of 33 Ayes and 18 Nays.

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
FULL COMMITTEE – ROLL CALL
U.S. HOUSE OF REPRESENTATIVE – 112TH CONGRESS

Number of Members: (33/26) Quorum: 30 **Working Quorum: 20**
Date: 6/7/2012 **Presiding: Mica**
Amendment or matter voted on: H.R. 4965
Vote: 33-18

	Yeas	Nays	Present		Yeas	Nays	Present
Mr. Mica	X			*Mr. Larsen*		X	
Mr. Rahall	X			*Mr. Lipinski*		X	
Mr. Altmire	X			Mr. LoBiondo	X		
Mr. Barletta	X			Mr. Long	X		
Mr. Bishop		X		Mr. Meehan	X		
Mr. Boswell	X			*Mr. Michaud*		X	
Ms. Brown		X		Mr. Miller (CA)	X		
Dr. Bucshon	X			Ms. Miller (MI)	X		
Ms. Capito	X			*Mr. Nadler*		X	
Mr. Capuano		X		*Mrs. Napolitano*		X	
Mr. Carnahan		X		*Ms. Norton*		X	
Mr. Coble				Mr. Petri	X		
Mr .Cohen		X		Mr. Ribble	X		
Mr. Costello	X			*Ms. Richardson*		X	
Mr. Cravaack	X			Ms. Schmidt	X		
Mr. Crawford	X			*Mr. Shuler*			
Mr. Cummings		X		Mr. Shuster	X		
Mr. DeFazio		X		*Mr. Sires*			
Mr. Denham	X			Mr. Southerland	X		
Mr. Duncan	X			*Mr. Walz*		X	
Ms. Edwards		X		Mr. Young			
Mr. Farenthold	X						
Mr. Filner							
Mr. Fleischmann	X						
Mr. Gibbs	X						
Mr. Graves	X						
Mr. Guinta	X						
Mr. Hanna	X						
Dr. Harris							
Mrs. Herrera Beutler	X						
Ms. Hirono		X					
Mr. Holden	X						
Mr. Hultgren	X						
Mr. Hunter	X						
Mr. Johnson (IL)							
Ms. Johnson (TX)		X					
Mr. Landry							
Mr. Lankford	X						

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Transportation and Infrastructure's oversight findings and recommendations are reflected in this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974, included below.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 4965 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 20, 2012.

Hon. JOHN L. MICA,
Chairman, Committee on Transportation and Infrastructure, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4965, a bill to preserve existing rights and responsibilities with respect to waters of the United States, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 4965—A bill to preserve existing rights and responsibilities with respect to waters of the United States, and for other purposes

H.R. 4965 would prohibit the Environmental Protection Agency (EPA) and the Army Corp of Engineers (Corps) from finalizing or implementing guidance provided in the document entitled "EPA and Army Corps of Engineers Guidance Regarding Identification of Water Protected by the Clean Water Act." That document was sent to the Office of Management and Budget for regulatory review earlier this year. Enacting this legislation also would prohibit those federal agencies from using similar guidance as the basis for any decision regarding the scope of the Clean Water Act's jurisdiction or in any rulemaking activities.

Based on information from EPA and the Corps, CBO expects that implementing this legislation would have no significant impact on the budget because the bill would not prohibit the agencies from using existing guidelines (predating the proposed guidance or any

similar guidance) to determine whether waters and wetlands are protected under the Clean Water Act. Pay-as-you-go procedures do not apply to H.R. 4965 because enacting the bill would not affect direct spending or revenues.

H.R. 4965 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Susanne S. Mehlman. This estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goals and objectives of this legislation are to reduce regulatory burdens that would be caused by the Agencies finalizing, adopting, implementing, administering, or enforcing guidance that would expand the scope of Federal regulatory jurisdiction under the Clean Water Act.

ADVISORY OF EARMARKS

In compliance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 4965 does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act (Public Law 104–4).

PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1974 requires the report of any Committee on a bill or joint resolution to include a statement on the extent to which the bill or joint resolution is intended to preempt State, local, or tribal law. The Committee states that H.R. 4965 does not preempt any State, local, or tribal law.

ADVISORY COMMITTEE STATEMENT

No advisory committee within the meaning of section 5(b) of the Federal Advisory Committee Act was created by this legislation.

APPLICABILITY TO THE LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (Public Law 104–1).

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Identification of waters protected by the Clean Water Act

Subsection (a)

The Committee is opposed to changes to the scope and meaning of the Clean Water Act, which the Agencies seek to implement

through the administrative means of issuing what the Agencies label as "guidance." The intent of the Committee with H.R. 4965 is to prohibit the Agencies from finalizing or implementing the Agencies' proposed guidance in order to significantly broaden the scope of Federal jurisdiction under the Clean Water Act.

In this regard, Section 1(a) of H.R. 4965 ("In General") prohibits the Secretary of the Army and the Administrator of the Environmental Protection Agency (hereinafter, the "Agencies") from taking any actions with respect to the Agencies' proposed guidance to identify waters protected by the Clean Water Act. The actions prohibited are further specified in paragraphs (1) and (2) of subsection (a).

Paragraph (1) of Section 1(a) prohibits the Agencies from finalizing, adopting, implementing, administering, or enforcing the proposed guidance described in the Agencies' notice of availability and request for comments entitled *EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act.* The notice was published on May 2, 2011, in Volume 76 of the Federal Register at page 24,479 (No. 84). The docket identification number for the proposed guidance discussed in the notice is: EPA-HQ-OW–2011–0409. The proposed guidance referred to in the notice is entitled "Draft Guidance on Identifying Waters Protected by the Clean Water Act" (hereinafter, "Proposed Guidance").

This paragraph is intended to prevent the Agencies from skirting the law and abusing proper administrative process by prohibiting the Agencies from finalizing the Proposed Guidance, or in any way using the Proposed Guidance, including adopting, implementing, administering, or enforcing the Proposed Guidance, for any purpose whatsoever. The bill prohibits the Agencies from finalizing or implementing the Proposed Guidance because of the concerns that the Proposed Guidance would broaden the number and kinds of waters subject to regulation, beyond what the CWA and the Supreme Court's rulings allow, and that the Agencies are implementing substantive policy changes through supposedly non-binding guidance that generally is not reviewable by courts, instead of through a formal rulemaking.

Paragraph (2) of Section 1(a) expands on the prohibition in paragraph (1) by prohibiting the Agencies from using the Proposed Guidance described in paragraph (1) of subsection 1(a), or any successor document, or any substantially similar guidance made publicly available on or after December 3, 2008, as the basis for any decision regarding the scope of the Federal Water Pollution Control Act or as the basis for any rulemaking.

This paragraph is intended to prevent the Agencies from attempting to use, either directly or indirectly, the Proposed Guidance as the basis for any regulatory or other decision regarding the scope or applicability of the Clean Water Act. This includes any decision regarding whether any permitting or other regulatory requirement under any section of the Clean Water Act (including sections 404, 402, 401, 311, 303, and 301) applies to a particular activity, circumstance, discharge, or water.

This paragraph is also intended to prevent the Agencies from attempting to use, either directly or indirectly, the Proposed Guidance or any of the guidelines, interpretations, clarifications, considerations, or understandings contained in the guidance, as the basis

for any rulemaking that either of the Agencies has initiated or may initiate.

Further, this paragraph is intended to prevent the Agencies from attempting to use any successor document, or any substantially similar guidance as the basis for any decision regarding the scope of the Clean Water Act or any rulemaking, as discussed in the preceding paragraphs. Any successor document or any substantially similar guidance includes any earlier drafts of the Proposed Guidance developed prior to May 2, 2011, or any potential future versions of the Proposed Guidance, or of related or similar guidance, that the Agencies might develop in the future. This includes any previous or subsequent documents that may have been or will be developed that contain any or all of the guidelines, interpretations, clarifications, considerations, or understandings contained in the Proposed Guidance.

The Committee adopted a clarifying change to the language in paragraph (2) in a Committee meeting held on June 7, 2012, to make it clear that the Committee intends to maintain a regulatory status quo under the Clean Water Act by preserving the current effective status of the Agencies' 2003 and 2008 Clean Water Act guidance regarding the scope of jurisdiction under the Act. The change clarified that the bill's prohibition on the use of "any substantially similar guidance" regarding the scope of the Federal Water Pollution Control Act or as the basis for any rulemaking means the use of "any successor document, or any substantially similar guidance made publicly available on or after December 3, 2008." The Agencies' Interim Guidance Memorandum issued after the *SWANCC* decision was dated December 16, 2003 and the Agencies' updated interpretative guidance on how to implement the *Rapanos* decision was dated December 2, 2008. Hence, the Agencies' 2003 and 2008 Clean Water Act guidance would be preserved and remain in effect under the bill.

Subsection (b)

Section 1(b) of the bill ("Rules") states that use of the Proposed Guidance, or any successor document, or any substantially similar guidance made publicly available on or after December 3, 2008, as the basis for any rule shall be grounds for vacating the rule. This subsection reinforces the prohibition in Section 1(a)(2) against the use of the Proposed Guidance, or of any successor document or any substantially similar guidance, as the basis for any rulemaking.

This subsection is intended to provide grounds for a party challenging the validity of a rule or a provision in a rule to vacate the rule if the Proposed Guidance, or any successor document or any substantially similar guidance (including any of the guidelines, interpretations, clarifications, considerations, or understandings contained in the Proposed Guidance, successor document, or substantially similar guidance), was used as the basis for the rule or a provision in the rule.

The Committee adopted a clarifying change to the language of subsection (b) in a Committee meeting held on June 7, 2012, to make it clear that the Committee intends to preserve the current effective status of the Agencies' 2003 and 2008 Clean Water Act guidance and to allow for the development of rules based on the 2003 and 2008 guidance. The change clarified that grounds for

vacating a rule as a result of the use of "any substantially similar guidance" as the basis for the rule means the use of "any successor document, or any substantially similar guidance made publicly available on or after December 3, 2008." (As noted earlier, the Agencies' Interim Guidance Memorandum issued after the *SWANCC* decision was dated December 16, 2003 and the Agencies' updated interpretative guidance on how to implement the *Rapanos* decision was dated December 2, 2008. Hence, the Agencies' 2003 and 2008 Clean Water Act guidance would be preserved and remain in effect under the bill.)

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

Clause 3(e) of rule XIII of the Rules of the House of Representatives (the Ramseyer Rule) requires that changes in existing law made by a bill, as reported, be shown. If enacted, H.R. 4965 would not repeal or amend any statute or part thereof.

DISSENTING VIEWS

We recognize that the reach and application of Federal Clean Water Act protections have long been subject to rigorous debate. Since the Act's enactment over the veto of President Nixon in 1972, the three branches of the Federal government have wrestled with how and where to apply the general premise of the Act—to prohibit the discharge of pollutants into the "waters of the United States" unless such discharges are covered by a point source permit (under section 402) or a dredge and fill permit (under section 404)—in furtherance of its goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Yet, we also recognize that a clear understanding of the Act's reach and application is essential both to the regulated community and the American public. Clarity is essential to the regulated community so they can understand and meet their legal obligations under the Clean Water Act. Likewise, clarity is critical to the general public so they may be assured that water quality is uniformly protected, regardless of what state or region of the country the water may be located. The American people have a right to expect that wherever they travel in the country, the waters where they drink, swim, fish, hunt, or otherwise enjoy nature are clean, and that wherever they live, their property is reasonably protected from the risk of flooding.

Today, confusion and uncertainty on the reach and application of Clean Water Act protections abound. Much of this confusion was created by two decisions of the U.S. Supreme Court [1] which called into question the scope of Federal protections under the Clean Water Act. Yet, while all parties would benefit from (and many are demanding) greater clarity, the Committee on Transportation and Infrastructure now reports this bill (H.R. 4965) that can only perpetuate the confusion and uncertainly, the associated increases in project costs and delays, as well as diminished protection of the nation's rivers, streams, and lakes, and the public health and economic benefits that derive from these waterbodies.

Unfortunately, over the past few years, the debate on the reach and application of the Clean Water Act has been driven more by the rhetoric than the reality. Nowhere is this more evident than with the administration's efforts to interpret the 2001 and 2006 decisions of the Supreme Court through Federal agency actions.

Historically, the U.S. Environmental Protection Agency (EPA) and the Department of the Army, Corps of Engineers (Corps),

[1] See *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers (SWANCC),* 531 U.S. 159 (2001) and *Rapanos* v. *United States,* 547 U.S. 715 (2006).

under both Republican[2] and Democratic[3] administrations, have utilized the Federal regulatory process, including the use of interpretative administrative guidance documents and formal agency rulemaking, to clarify how Federal agencies will implement the Act. Indeed, many Federal agencies, including EPA and the Corps, have for decades used administrative guidance to facilitate the interpretation and implementation of Federal laws. In fact, today, Federal agency decisions on the application and reach of the Act continue to be guided by a 2008 guidance document issued under the Bush administration.

However, the regulated community, conservation and environmental organizations, and several States, as well as several justices of the Supreme Court, have commented that current interpretations on the reach and application of the Act remain confusing, inconsistent, and costly, are unfair to the regulated public, and provide little environmental benefit. According to the Corps, in recent years, the majority of permit applicants under section 404 would rather concede Clean Water Act jurisdiction[4] than maneuver through the formal process for determining whether a waterbody may (or may not) be covered by the Act.

For example, according to the public comments submitted by the American Farm Bureau Federation, the National Association of Home Builders, and other regulated entities, "The [2007 Bush administration] Guidance is causing confusion and added delays in an already burdened and strained permit decision-making process, which ultimately will result (and is resulting) in increased delays and costs to the public at large."[5]

We agree. Yet, at this time, it is unlikely that Congress can reach consensus on how to legislatively respond to the Supreme Court decisions in a way that continues progress towards improving the Nation's water quality. Therefore, Federal agencies must be allowed to utilize every opportunity in the administrative process to clarify the Clean Water Act, in accordance with the precedent of the Supreme Court.

Yet, H.R. 4965 inexplicitly moves in the opposite direction, as this legislation would be in direct contravention to the Committee leadership's recent efforts to streamline project delivery in the Surface Transportation reauthorization bill. Instead of streamlining

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[2] See Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States", Joint Memorandum, 68 Fed. Reg. 1991, 1995 (January 15, 2003); EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after *Rapanos,* 72 Fed. Reg. 31824 (June 8, 2007); and Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos* v. *United States & Carabell* v. *United States,* located at <http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf>.

[3] See EPA and Corps Memorandum, entitled "Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters," dated January 19, 2001, located at <http://www.spn.usace.anny.mil/regulatory/misc/swancc.pdf>.

[4] The Committee received testimony that, following the *Rapanos* decision, the EPA and the Corps regulatory process was in "turmoil" and that the "typical 60 to 120 day permit process . . . slowed to a crawl." See Testimony of Marcus J. Hall, County Engineer, Committee on Transportation and Infrastructure, Hearing on the "Status of the Nation's Waters, including Wetlands, Under the Jurisdiction of the Federal Water Pollution Control Act", July 19, 2007. In response to requests from the regulated community, the Corps published Regulatory Guidance Letter (RGL) 08–02, which allows permit applicants to concede jurisdiction under the Clean Water Act for the waterbody in question, and receive expedited review of the subsequent permit application.

[5] See Comments of American Farm Bureau Federation, the National Association of Home Builders, *et al.,* submitted January 22, 2008, (Docket No. EPA–HQ–OW–2007–0282).

project delivery, this legislation would perpetuate the regulatory confusion and uncertainly (and related increases in compliance costs) in place today.

H.R. 4965 would lock-in-place today's confusing, inconsistent, costly, and controversial program guidance—not only for the current administration, but potentially for future administrations, as well. As reported, H.R. 4965 would create significant legal hurdles that would render future Federal rulemaking efforts difficult and costly, as well as open up additional opportunities for litigation and regulatory confusion in an area that is already prone to such challenges.

Should H.R. 4965 be enacted, this legislation will:

- Perpetuate the increased permitting costs to the regulated community, including construction project sponsors, municipalities, industrial dischargers, and landowners;
- Add unnecessary delay (and increased costs) to project sponsors as they struggle to figure out what the rules may be across the nation;
- Increase the costs of compliance and oversight for States;
- Increase the potential for litigation on the applicability and reach of the Clean Water Act; and
- Abandon Clean Water Act protections over rivers, lakes, and streams, and adversely impact the millions of Americans who rely on these waters for drinking water, recreation, hunting and fishing, and other economic benefits.

If the intent of H.R. 4965 is to make Federal Clean Water Act protections so confusing, costly, and haphazard as to render them meaningless—then this legislation may succeed as intended.

We cannot support this legislation. In our view, neither the regulated community nor the general public can logically benefit from passage of H.R. 4965. A more prudent approach would be to allow the regulatory process to work, as intended, rather than tying the hands of the Executive Branch to pursue clarifying changes.

Instead, H.R. 4965 perpetuates the increased costs and delay experienced by the regulated community, as well as the confusion and uncertainly felt by the general public whether large categories of waterbodies are at increased risk of pollution or degradation. This is the wrong approach.

Background

The Clean Water Act was enacted in 1972, with a goal of to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

Generally speaking, the Clean Water Act prohibits the discharge of any pollutants into the "waters of the United States" unless the discharges are covered by a point source permit (under section 402 of the Act) or a dredge and fill permit (under section 404 of the Act).

The term "waters of the United States" applies equally to both sections 402 and 404 of the Act, as well as the other regulatory provisions of the Clean Water Act (e.g., establishment of water quality standards and total maximum daily load (TMDLs) allocations), and is statutorily defined as meaning "the waters of the United States, including the territorial seas." Both the EPA and the Corps have

further defined the term "waters of the United States" by regulation.[6]

In 2001 and 2006, the Supreme Court issued two decisions that have impacted the jurisdictional scope of the Act. These decisions called into question whether the Act continues to apply to isolated, intrastate, non-navigable waters (the *Solid Waste Agency of Northern Cook County* v. *Corps of Engineers,* or *SWANCC* decision) or to the waters and tributaries in the upper reaches of a watershed (the *Rapanos* decision). Generally speaking, these decisions challenged what had been a decades-old understanding that Federal protections were to be broadly applied, consistent with the comprehensive nature of the Act to restore and protect water quality, and the economic, environmental, and public health benefits associated with clean water.[7]

As a result, the last three Presidential administrations have utilized the regulatory process, using both administrative guidance and rulemaking, to interpret how court decisions have impacted Clean Water Act protections. While attempts by the Bush administration to undertake a rulemaking[8] did not result in changes to Clean Water Act regulations, it issued three interpretative guidance documents. The most recent of these, finalized in 2003 and 2008, remain in use by EPA and the Corps for asserting Clean Water Act jurisdiction. These guidance documents authorize EPA and the Corps to assert Clean Water Act protections using either of the two tests outlined by Justices Scalia and Kennedy in the *Rapanos* decision, as well as for asserting jurisdiction over isolated, non-navigable, intrastate waters under the *SWANCC* decision.

Yet, in years that have passed since these court decisions, stakeholders from both the regulated community and the conservation

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[6] The regulatory definition of the term "waters of the United States" is defined in regulations of the Corps (33 CFR 328.8) and EPA (40 CFR 122.2), as:

"(a) The term waters of the United States means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section."

[7] During the Floor debate on the Conference Report to S. 2770 (which would later be enacted as the 1972 Clean Water Act), Representative John D. Dingell noted that "the conference report defines the term 'navigable waters' broadly for water quality purposes. It means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws. . . . [This] new definition encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill." See Congressional Record, October 4, 1972 at 33756–57.

[8] See Advanced Notice of Proposed Rulema1cing on the Clean Water Act Regulatory Definition of "Waters of the United States", 68 Fed. Reg. 1991 (January 15, 2003).

and environmental community have stated their belief that the *status quo* Clean Water Act regulatory system is broken, and in desperate need of clarity and certainty.

• "With no clear regulatory definitions to guide their determinations, what has emerged is a hodgepodge of *ad hoc* and inconsistent jurisdictional theories." [9]

• "The [2007 Bush administration] Guidance is causing confusion and added delays in an already burdened and strained permit decision-making process, which ultimately will result (and is resulting) increased delays and costs to the public at large." [10]

• "The 2003 *SWANCC* Guidance and the 2008 *Rapanos* guidance have placed millions of wetland acres and tens of thousands of stream miles at risk of pollution and destruction. Given the interrelationship between waters, the existing Guidance has put all of the Nation's waters at risk by retreating from the comprehensive protection needed to achieve the Act's goals." [11]

• "[Clean Water Act] processes and administration under the interim guidance released immediately subsequent to the *SWANCC* and *Rapanos* cases, and under the 2003 and 2008 guidance, seem to have been universally frustrating. Permit applicants, farmers, conservationists, landowners, communities, state and local agencies and other affected entities have all lons expressed a strong desire for greater certainty and clearer processes since *SWANCC* . . ." [12]

• "Until a comprehensive set of rules regarding which water bodies the Agencies will regulate as waters of the United States is promulgated, the public and Agency field staff will be beleaguered by partial answers, confusing standards, and *ad hoc*, overbroad, and arbitrary decisions pertaining to the scope of federal [Clean Water Act] justification." [13]

On May 2, 2011, EPA and the Corps attempted to provide greater certainty on the reach and application of the Clean Water Act. On that date, both agencies published in the *Federal Register*, proposed revisions to 2008 guidance, and provided a 60-day period for public comment on the proposed changes.[14] (In contrast, when the Bush administration published its initial 2007 guidance, it made the guidance "effective immediately," and provided a concurrent comment period to "solicit input on early experience with implementing the guidance.") [15]

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[9] Comments of the American Farm Bureau Federation, the National Association of Realtors, and the Foundation for Environmental and Economic Progress, et al., submitted April 16, 2003, (Docket No. EPA–HQ–OW–2002–0050).

[10] Comments of the American Farm Bureau Federation, the National Association of Homebuilders, et al., submitted January 22, 2008, (Docket No. EPA–HQ–OW–2007–0282).

[11] Comments of the National Wildlife Federation, the Izaak Walton League of America, Theodore Roosevelt Conservation Partnership, Trout Unlimited, and The Wildlife Society, submitted July 31, 2011, (Docket No. EPAHQ–OW–2011–409).

[12] Comments of Ducks Unlimited, submitted July 20, 2011, (Docket No. EPA–HQ–OW–2011–0409).

[13] Comments of the Waters Advocacy Coalition, submitted July 29, 2011, (Docket No. EPA–HQ–OW–2011–0409).

[14] See 76 Fed. Reg. 24479 (May 2, 2011). The text of the draft guidance is electronically available at <http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf> (hereinafter Proposed 2011 Guidance).

[15] See 72 Fed. Reg. 31824 (June 8, 2007).

On July 5, 2011, EPA and the Corps extended the public comment period on the proposed 2011 guidance for an additional 30 days.[16]

In the same *Federal Register* notice, EPA and the Corps announced their intention to undertake a subsequent notice-and-comment rulemaking "to further clarify which waters are subject to [Clean Water Act] jurisdiction, consistent with the Supreme Court decisions."

Comparison between current 2008 guidance and 2011 proposed guidance

In order to understand the legal context in which H.R. 4965 is being considered, it is also important to compare the existing guidance documents with the 2011 proposed guidance.

While the rhetoric surrounding the 2011 proposed guidance may suggest otherwise, generally speaking, the 2008 guidance and the 2011 proposed guidance are remarkably similar in scope. Where these documents most strikingly differ is in providing the regulated community with greater detail on the legal and scientific analysis that will trigger Clean Water Act protections over waterbodies, as well as providing the opportunity to utilize previous Clean Water Act determinations as a basis to assert or deny Clean Water jurisdiction.

It is this lack of detail and required analysis from the 2008 guidance which has caused much of the confusion and uncertainty in the regulated community (and the associated delays and increased permitting costs), as well as the loss of Clean Water Act protections over certain types and categories of waterbodies.

Similarities between 2008 guidance and 2011 proposed guidance

Both guidance documents are intended to provide the public with information on how EPA and the Corps will identify waters protected by the Clean Water Act, and how the agencies will implement the 2001[17] and 2006 decisions of the Supreme Court on this issue. Both guidance documents state that they are intended to address the "uncertainty" and permitting delays[18] that have resulted from the Supreme Court decisions, and to improve "predictability and clarity regarding the scope of 'waters of the United States'".[19]

Both documents also describe the process of applying Clean Water Act protections using either the legal rationale of the *Rapanos* plurality (authored by Justice Scalia) ("relatively permanent waters" and "continuous surface connection" test) or the opinion of Justice Kennedy ("significant nexus" test).

The 2008 and proposed 2011 guidance documents also provide a strikingly similar list of waterbodies where Clean Water Act pro-

[16] See 76 Fed. Reg. 39101 (July 5, 2011).

[17] The 2008 guidance includes a reference to an earlier 2003 guidance document issued by the Bush administration that addressed questions regarding implementation of the 2001 Supreme Court decision (the *SWANCC* decision), which was unaffected by the 2008 guidance. This 2003 guidance document, published in the Federal Register on January 15, 2003, superseded an earlier 2001 guidance document on this issue produced by the Clinton administration (dated January 19, 2001).

[18] See 72 Fed. Reg. 31824, 31825 (June 8, 2007).

[19] See 76 Fed. Reg. 24479 (May 2, 2011).

tections are applied. For example, under both the 2008 and proposed 2011 guidance documents, the agencies:

- Will assert Clean Water Act jurisdiction over the following waters:
  - Traditionally navigable waters;
  - Wetlands adjacent to traditionally navigable waters;
  - Non-navigable tributaries to traditionally navigable waters that are relatively permanent; and
  - Wetlands that directly abut relatively permanent waters.
- Will decide jurisdiction if a fact-specific analysis determines they have a "significant nexus" to a traditionally navigable water:
  - Tributaries (including tributaries that are non-navigable and not relatively permanent); and
  - Adjacent wetlands (including adjacent wetlands to non-navigable tributaries that are not relatively permanent, and wetland adjacent to by that do not directly abut a relatively permanent non-navigable tributary).
- Will consider the following areas as generally not jurisdictional waters (and therefore, not protected by the Clean Water Act):
  - Erosional features (gullies and rills), swales, and ditches.

Differences between 2008 guidance and 2011 proposed guidance

The clarifying changes to the 2008 guidance included in the 2011 proposed guidance are intended to improve the predictability and clarity of Clean Water Act implementation. Yet, like the 2008 guidance document, EPA and the Corps have stated that these differences are "consistent with the principles established by the Supreme Court cases and . . . supported by the agencies' scientific understanding of how waterbodies and watersheds function."[20]

"Similarly Situated in the Region" analysis

One critical clarification contained in the 2011 proposed guidance addresses the agencies' interpretation of Justice Kennedy's significant nexus analysis, and the ability to assess the relationship of a waterbody to its surrounding watershed in determining the reach and application of Clean Water Act protections.

In determining whether a waterbody has a significant nexus to other jurisdictional waters, Justice Kennedy stated that the appropriate analysis included reviewing whether the waterbody "either alone or in combination *with similarly situated lands in the region*, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'".[21] While Justice Kennedy did not define what he meant by the terms "similarly situated" or "in the region," public commentators have argued that it is a reasonable inference for Federal agencies to take into consideration the connections between waters (including wet-

[20] See 76 Fed. Reg. 24479 (May 2, 2011).
[21] See *Rapanos* v. *United States,* 547 U.S. 715, 780 (2006).

lands) and the ecological and hydrological values (including nutrient reduction and food control) provided by these waters.[22]

According to Justice Kennedy: "Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other covered wetlands in the region."[23]

Yet, the 2008 guidance adopted a narrow view in defining the use of the term "similarly situated" by: (1) limiting the significant nexus analysis to only those wetlands that are directly adjacent to the tributary where Clean Water Act coverage is being determined (for purposes of determining collective impacts of adjacent wetlands); and (2) by limiting the scope of significant nexus review to the potential impacts caused by a *singular reach of the stream of the same order* to the downstream traditionally navigable water. In addition, the 2008 guidance did not interpret the "in the region" concept advanced by Justice Kennedy, but instead requires Federal agencies (and the regulated community) to conduct independent (and costly) analyses for each potential reach of targeted waterbodies.

As a result, under the 2008 guidance, agency determinations of Clean Water Act protections have been limited to a review of the significant nexus of the smallest possible reach of a waterbody to a downstream "traditionally-navigable water", and that each reach must be evaluated independently for its own significant nexus evaluation. Ironically, this approach has resulted in more burdensome, expensive, and impractical information gathering exercises by the regulated community (and the Federal and State agencies) in order to demonstrate a significant nexus.[24] This Committee has received numerous reports and Congressional testimony on the associated costs and project delays from this process.

In contrast, the proposed 2011 guidance generally authorizes agency field staff to assess whether a waterbody has a significant nexus, where the waterbody "either alone or in combination with similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of traditionally navigable waters or interstate waters."[25]

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[22] See Comments of the National Wildlife Federation, the Izaak Walton League of America, Theodore Roosevelt Conservation Partnership, Trout Unlimited, and The Wildlife Society, submitted July 31, 2011, (Docket No. EPAHQ–OW–2011–409).

[23] See *Rapanos* v. *United States*, 547 U.S. 715, 782 (2006). This legal reasoning was echoed in public comments on the 2011 guidance, which stated, "There is no indication that if Justice Kennedy meant to apply the significant nexus test on a case-by-case basis to tributaries. . .he would find collective impacts to be irrelevant to such consideration. Indeed, given his stress on ecological factors and aggregation of impacts, all inferences are to the contrary. Justice Kennedy's opinion clearly implies aggregation should take place on a broader regional scale, such as the watershed of traditionally navigable water, using solid ecology." See Comments of the National Wildlife Federation, the Izaak Walton League of America, Theodore Roosevelt Conservation Partnership, Trout Unlimited, and The Wildlife Society, submitted July 31, 2011, (Docket No. EPA–HQ–OW–2011–409).

[24] See Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation, prepared by the EPA Office of Inspector General (Report No. 09-N-0149), available at <http://www.epa.gov/oigireports/2009/20090430-09-N-0149.pdf>.

[25] See Proposed 2011 Guidance at 7–8. For waters to be "similarly situated," they must be of the same resource type, specifically (a) tributaries; (b) adjacent wetlands; or other waters that are in close physical proximity to traditionally navigable waters, interstate waters, or their jurisdictional tributaries ('proximate other waters')". For waters to be "in the region," they must fall within the same watershed. For waters to have a significant nexus, they "alone or in combination with other similarly situated waters in the same watershed have an effect on the chem-

This change recognizes that, over time, there may be multiple determinations of Clean Water Act authority within the same watershed, and allows agency field staff to utilize previous jurisdictional assessments in analyzing future waterbodies. However, the 2011 proposed guidance provides that agency field staff must independently document whether the waterbody is, in fact, jurisdictional "without cross-reference to other files, including an explanation of which waters were considered together as similarly situated and in the same region." [26]

This proposed change will greatly benefit the regulated community, because it will "reduce some permitting costs and speed the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and confusing for field staff and the regulated community.[27] At the same time, this change contains sufficient safeguards to ensure that waterbodies cannot be deemed jurisdictional simply for the fact that they lie within the same watershed as another jurisdictional water.

Clean Water Act protections of isolated, non-navigable, intrastate waterbodies

Another significant clarification proposed in the 2011 guidance is what analysis EPA or the Corps must utilize to apply Clean Water Act protections over isolated, intrastate waterbodies.

In 2001, the Supreme Court raised questions whether non-navigable, isolated, intrastate waterbodies, such as vernal pools, playa lakes, and prairie potholes, were subject to Clean Water Act protections. The Court concluded that neither EPA nor the Corps could apply the Clean Water Act to such waters where the sole basis for asserting Clean Water Act coverage is the actual or potential use of such waters as habitat for migratory birds.[28]

However, neither Republican nor Democratic administrations have interpreted the 2001 Supreme Court decision as *precluding* Clean Water Act protections over isolated, intrastate waters, in any situation.

For example, in 2001, the Clinton administration issued guidance which suggested that the 2001 Supreme Court decision was *limited* in scope, and that "field staff should no longer rely on the use of waters or wetlands as habitat by migratory birds as the sole basis for the assertion of regulatory jurisdiction under the CWA. . . . The Court's decision did not specifically address what other connections with interstate commerce might support the assertion of CWA jurisdiction over 'non-navigable, isolated, intrastate waters' under subsection (a)(3)." [29]

Similarly, in 2003, the Bush administration issued guidance which restated the holding of the 2001 Supreme Court decision that neither EPA nor the Corps could assert Clean Water Act juris-

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ical, physical, or biological integrity of traditionally navigable waters or interstate waters *that is more than 'speculative or insubstantial.'*" (emphasis added).

[26] See Proposed 2011 Guidance at 9.

[27] See U.S. EPA, "Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction" (April 27, 2011) (located at <http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa_guidance_impacts_benefits.pdf>).

[28] See 531 U.S. 159, 174 (2001).

[29] See EPA and Corps Memorandum, entitled "Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters", dated January 19, 2001, located at <http://www.spn.usace.army.mil/regulatory/misc/swancc.pdf.

diction over "isolated waters that are both intrastate and non-navigable where the sole basis for asserting CWA jurisdiction rests on any of the factors listed in the 'Migratory Bird Rule'".[30] However, again, the 2003 guidance suggested that Clean Water Act jurisdiction over other non-navigable, intrastate isolated waters could be asserted "on other grounds listed in 33 CFR 328.3(a)(3)(i)–(iii),[31] [but] field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters."[32]

The proposed 2011 guidance restates the understanding of both the Clinton and Bush administration guidance documents that the Clean Water Act protections *can continue to apply* to isolated, non-navigable, intrastate waters, such as those listed in 33 CFR 328.3(a)(3). However, where the proposed 2011 guidance differs is *how* agencies may assert Clean Water Act protections over such waters.

While both the Clinton and Bush administration guidance documents left undefined how isolated, non-navigable, intrastate waters could be determined jurisdictional—leaving the decision up to an *ad hoc* consultation with "agency legal counse1"[33] or "formal project-specific Headquarters approval"[34]—the proposed 2011 guidance clarifies that agency staff must use the "significant nexus" standard for asserting jurisdiction over isolated, non-navigable, intrastate waters.

Under the proposed 2011 guidance, an "'other water' is jurisdictional only if it both has a significant nexus to a traditional navigable water or interstate water and meets the regulatory definition." This is legally consistent with the opinion of Justice Kennedy when he described the Supreme Court's rationale for asserting jurisdiction over other isolated, non-navigable, intrastate waters, stating "[in *SWANCC*], the Court held, under the circumstances presented there, that to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonable be so made."[35]

However, unlike the significant nexus test articulated above for tributaries and adjacent waters or wetlands, the proposed 2011 guidance directs agency field staff to generally conduct significant nexus analyses for other waters that are not physically proximate to jurisdictional waters, individually, "unless there is *a compelling scientific basis* for treating a group of such waters as similarly situated waters in the same region."[36] In addition, the proposed 2011

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[30] See 68 Fed. Reg. 1995, 1996 (January 15, 2003).

[31] 33 CFR 328.3(a)(3) states that the term "waters of the United States" includes "(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate commerce."

[32] See 68 Fed. Reg. 1995, 1996 (January 15, 2003).

[33] See EPA and Corps Memorandum, entitled "Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters", dated January 19, 2001, located at http://www.spn.usace.army.mil/regulatory/misc/swancc.pdf.

[34] See 68 Fed. Reg. 1995, 1996 (January 15, 2003).

[35] See 547 U.S. 715, 759 (2006).

[36] See Proposed 2011 Guidance at 20. According to the proposed guidance, the Federal agencies may reevaluate whether to use similarly situated waters, in the region, as a basis for as-

guidance states that "*consideration of use by migratory species is not relevant* to the significant nexus determination for such waters."[37]

In addition, the proposed 2011 guidance retains the current practice of requiring field staff to refer Clean Water Act jurisdictional determinations for isolated, non-navigable, intrastate waters to their "respective Headquarters and obtaining formal project-specific approval for asserting or denying jurisdiction."[38]

Traditionally navigable waters and interstate waters

Another change in the 2011 guidance addresses the definition and jurisdictional status of "traditionally navigable waters" and "interstate waters".

Both the 2008 guidance and the proposed 2011 guidance authorize the agencies to assert Clean Water Act jurisdiction over traditionally navigable waters, including those waters subject to sections 9 or 10 of the Rivers and Harbors Act (i.e., waters that are subject to the ebb and flow of the tine and/or are presently used, or have been used in the past, or may be susceptible for being used in commercial navigation),[39] including commercial water-borne recreation.

However, the 2008 guidance and the 2011 proposed guidance differ on the standard of evidence necessary to be considered "susceptible to being used in the future for commercial navigation, including commercial water-borne navigation." Federal court rulings have held that "actual use is not necessary for a navigability determination," and that a waterbody "need only be susceptible to being used for waterborne commerce to be navigable-in-fact."[40] Accordingly, the 2011 proposed guidance clarifies that such a determination need not require evidence of actual use (or intent for use) in commercial navigation, but can be maintained by current boating and canoe trips for recreation or trips taken solely for the purpose of demonstrating a waterbody can be navigated.

In addition, the proposed 2011 guidance clarifies Clean Water Act jurisdiction over interstate waters, and authorizes field staff to find interstate waters (and their tributaries), as well as waterbodies with a significant nexus to interstate waters, subject to Clean Water Act protections.

Scope of Clean Water Act authorities affected by Supreme Court decisions

The proposed 2011 guidance also clarifies the extent to which recent decisions of the Supreme Court have affected the regulatory authorities of the Clean Water Act. While the *SWANCC* and *Rapanos* cases were focused on the application of section 404 of the

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serting Clean Water Act jurisdiction over other waters that are not physically proximate to jurisdictional waters through a rulemaking.

[37] See Proposed 2011 Guidance at 20.

[38] See Proposed 2011 Guidance at 20.

[39] See 33 CFR 392.4. According to regulatory definition of navigable waters, for the purposes of the Rivers and Harbors Act, a determination of navigability, once made, applies laterally over the entire surface of the waterbody and is not extinguished by later actions or events which impede or destroy navigable capacity.

[40] See Proposed 2011 Guidance at 24, citing *FPL Energy Marine Hydro L.L.C.* v. *FERC*, 287 F. 31.d 1151, 1157 (D.C. Cir. 2002) and *Alaska* v. *Ahtna*, Inc., 891 F. 2d 1401, 1405 (9th Cir. 1989).

Act (related to permits for the placement of dredge and fill materials), subsequent judicial decisions have made it clear that any impacts to the regulatory definition of "navigable waters" and "waters of the United States" affect the entirety of the Act.

Accordingly, the 2011 proposed guidance clarifies that questions on the reach and application of the Act affect other regulatory authorities, including section 402 (related to permits for point source discharges), section 311 (related to the discharge of oil or hazardous substances), the establishment of water quality standards and total maximum daily load programs under section 303, and the section 401 state water quality certification program.

This clarification does not represent a change in agency practice, *per se*, as both EPA and the Corps have been applying the holdings of the 2001 and 2006 decisions to all Clean Water Act programs since they were issued. For example, in the 2003 guidance, issued during the Bush administration, EPA and the Corps noted that, "the Court's decision [in *SWANCC*] may affect the scope of regulatory jurisdiction under other provisions of the CWA as well, including the Section 402 [National Pollutant Discharge Elimination System] program, the Section 311 oil spill program, water quality standards under Section 303, and Section 401 water quality certification." [41]

However, this clarification brings agency *guidance* in line with agency *practice* as well as to the holdings of recent judicial decisions.

Waters generally not subject to the Clean Water Act

As stated earlier, both the 2008 guidance and the proposed 2011 guidance contain a list of waters that are generally not protected by the Clean Water Act, including erosional features (gullies and rills), swales, and ditches.

Yet, the proposed 2011 guidance document *expands the list* of waters and aquatic areas that will generally not be protected by the Clean Water Act. Under the proposed 2011 guidance, the following waters and aquatic areas are generally not protected by the Clean Water Act:

- Wet areas that are not tributaries or open waters and do not meet the agencies' regulatory definition of "wetlands";
- Waters excluded from coverage under the Clean Water Act by existing regulations;
- Waters that lack a significant nexus where one is required for a water to be protected by the Clean Water Act;
- Artificially irrigated areas that would revert to upland should irrigation cease;
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

[41] See 68 Fed. Reg. 1995, 1996 (January 15, 2003).

- Water-filled depressions created incidental to construction activity;
- Groundwater drained through subsurface drainage systems; and
- Erosional features (gullies and rills), and swales and ditches that are not tributaries or wetlands.

This list of waters and aquatic areas that are, generally, not considered protected by the Clean Water Act provides greater clarity to the regulated community and the general public as to which waters may be subject to the Clean Water Act permitting requirements.

H.R. 4965, as Reported, Will Perpetuate the Regulatory Uncertainty and Confusion on the Scope of Clean Water Act Protections:

As stated earlier, the debate surrounding the scope of the Clean Water Act has been driven more by the rhetoric than the reality.

At the same time, the potential impacts of H.R. 4965 are largely unknown, as the Committee chose to move this bill directly to markup with no hearings on its potential impacts to the regulated community or public health and the environment.

For example, while the stated intent of this legislation is to block the administration from issuing its proposed guidance on the scope of Clean Water Act protections, enactment of this legislation will lock in place the existing 2008 guidance that, as noted earlier, has been criticized both by regulated entities as well as the conservation and environmental communities.

As reported, H.R. 4965 would also create significant legal hurdles that would, at a minimal, render future Federal rulemaking efforts difficult and costly and open up additional opportunities for litigation and regulatory confusion in an area that is already prone to such challenges.

From their public statements, it is understandable that neither the regulated community nor the conservation and environmental community believe the 2008 guidance adequately addresses the uncertainty raised by the Supreme Court. These groups, and others, recognize how the regulatory uncertainty created by the 2008 guidance is having adverse impacts both on the economy (through confusion, delay, and increased compliance costs) as well as the environment, and have called for additional administrative clarity. Both groups have publicly called on the administration to conduct a formal rulemaking in order to clarify the scope of Clean Water Act protections following the Supreme Court decisions. In their view, having the agencies conduct a rulemaking will provide the general public with clear, consistent regulatory standards, based on underlying science, that should significantly improve the implementation of the Clean Water Act.

Unfortunately, H.R. 4965 was not drafted to promote regulatory clarity, but only perpetuates regulatory uncertainty, in contravention to recent efforts by the Committee to streamline the project delivery process.

It seeks to lock in place the existing guidance documents that have been roundly criticized as causing confusion, adding delays, and increasing costs to the American public. It also seeks to lock in place standards that leave millions of waterbodies vulnerable to pollution, jeopardizing countless recreational, hunting, fishing op-

portunities that are associated with these waterbodies, as well as the associated economic benefits. It also places the public health of over 117 million Americans at risk of having their drinking water sources contaminated.

Finally, H.R. 4965 needlessly complicates the rulemaking process for future administrations, contrary to the wishes of both the regulated and conservation and environmental communities, among others, and opens the door to increased litigation in an already overly litigious area.

In short, H.R. 4965 creates more problems than it solves, and should be opposed.

Codifying Regulatory Confusion and Delay and Increased Compliance Costs: Amendment adopted during Committee markup:

As introduced, H.R. 4965 have would prohibited the EPA Administrator or the Secretary of the Army (acting through the Corps) from "finalizing, adopting, implementing, or enforcing" the draft 2011 guidance, or from using such guidance "or any substantially similar guidance" as the basis for any decision regarding the scope of the Act or any rulemaking. An amendment was adopted at markup to replace the phrase "or any substantially similar guidance" and with the phrase "any successor document, or any substantially similar guidance made publicly available on or after December 3, 2008."

This amendment would lock in place the use of the 2008 administration guidance as the final say on how to interpret the 2001 and 2006 rulings of the Supreme Court. Under the amendment, the current and future Federal agencies would be prohibited from advancing any future guidance or other administrative interpretative documents to provide the general public with additional clarity on how the agencies will interpret the reach and application of the Clean Water Act—either to improve the implementation of the guidance or to narrow its interpretation.

More troubling, the amendment calls into question the ability of the current or future Presidential administrations from proceeding with a future notice-and-comment rulemaking to define the reach and application of the Clean Water Act—a process that has been publically requested by the regulated community, the conservation and environmental organizations, and several justices of the U.S. Supreme Court.

The amendment creates significant uncertainty how Federal agencies would have to proceed with a rulemaking to avoid having such rulemaking be vacated under subsection (b) of H.R. 4965, as "substantially similar" to the proposed 2011 guidance. For example, if any future administration proposes a rulemaking that adopts the legal reasoning of Justice Kennedy to examine the interrelationship of "similarly situated [waters] in the region," could such a rulemaking be struck down under H.R. 4965 simply because the concepts proposed in the future rulemaking also appeared in the proposed 2011 guidance?

During the Committee markup of H.R. 4965, proponents of H.R. 4965 suggested that the administration should engage in a "transparent rulemaking process under the Administrative Procedures Act." Contrary to statements otherwise, EPA and the Corps have

already announced[42] their expectation to propose such a rulemaking in the future. Yet, inexplicability, H.R. 4965, as amended, would make any future agency rulemaking efforts more complicated, more costly, and more susceptible to litigation and challenges.

Protecting the Drinking Water for 117 Million Americans: Amendment offered by Delegate Eleanor Holmes Norton:

During Committee consideration of H.R. 4965, a second amendment was offered by the Delegate from the District of Columbia, Ms. Norton, which would have ensured that Americans can continue to depend on surface waters for clean, safe, and reliable drinking water.

In 2009, EPA conducted a survey[43] to determine where many Americans obtain their drinking water, and whether the 2001 and 2006 decisions of the Supreme Court placed any of these sources at risk of pollution or degradation.

The results were shocking—in the continental U.S., approximately 117 million people, over one third of the total U.S. pollution, get some or all of their drinking water from public drinking water systems that rely at least in part on intermittent, ephemeral, or headwater streams—the very same waters where Clean Water protections have been called into question as a result of the Supreme Court decisions and the 2008 guidance.

As a result, approximately 94 percent of the U.S. population who are served by public drinking water systems now face the possibility that the rivers and streams that they rely on for their drinking water can be polluted without any Federal Clean Water Act protections, as a result of the 2001 and 2006 decisions of the Supreme Court, and the narrow reading of these cases advanced by the Bush administration guidance.

For example, in the state of New York, 97 percent of New Yorkers (or 11.4 million individuals) served by public water systems rely on the very same waters where protection has been called into question by the actions of the Supreme Court and the Bush administration.

A state-by-state breakdown of the number and percentage of surface drinking water provided by intermittent, ephemeral, and headwater streams is included at the end of these dissenting views.

H.R. 4965, as amended, perpetuates the likelihood that the drinking water supplies of millions of Americans could be contaminated by unscrupulous polluters, without any Federal protections, whatsoever.

A common response to the threats to drinking water sources created by H.R. 4965 is that individual States could step in and choose to protect their own waters if they find these waters worthy of protection. Yet, in light of the current fiscal situation being faced by the States, this seems like an unlikely outcome.[44] However,

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[42] See 76 Fed. Reg. 24479 (May 2, 2011).

[43] See <http://water.epa.gov/lawsregs/guidance/wetlands/surface_drinking_water_index.cfm>.

[44] According to a comprehensive study conducted by the Environmental Law Institute, individual states have not uniformly responded to the decisions of the Supreme Court to assert State protections over waters that were once protected by the Federal Clean Water Act. As a result, the report identifies several categories /types of waterbodies where neither Federal nor

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even if some States were to try and fill in the gap, nothing in H.R. 4965 would prevent states that place a higher value on promoting industry development from allowing increased pollution to emanate from their borders and contaminate their downstream neighbors. That is exactly the situation that existed prior to the enactment of the 1972 Clean Water Act, and one that could easily return should this legislation be enacted.

The Norton amendment would have recognized the unique Federal interest in ensuring that the drinking water sources of over 117 million Americans warrant enhanced protection. It would have allowed the Federal agencies to take additional steps to protect those waterbodies where Clean Water Act protections have been lost or called into question as a result of the two Supreme Court decisions (as well as the interpretations of these cases by the 2008 guidance). Finally, it would have reiterated that Congress has a responsibility for ensuring that our constituents have clean, safe, and reliable drinking water supplies.

Unfortunately, the Chairman of the Committee ruled the Norton amendment as not germane to H.R. 4965, and the amendment was not made in order.

Conclusion

We recognize that there is a tremendous amount of confusion and uncertainty surrounding the reach and application of the Clean Water Act, today. Unfortunately, this confusion and uncertainty comes with a real cost to the general public.

First, the confusion and uncertainty has resulted in increased compliance costs and delays in implementing projects and activities covered by the Act's permitting provisions. In addition, the confusion and uncertainty has resulted in the loss of Clean Water Act protections for countless waterbodies that were covered prior to 2001. This loss of protection has left waterbodies that were once protected under Federal law vulnerable to potential polluters. The confusion and uncertainty has also placed at risk the drinking water sources of approximately 177 million Americans that rely on surface waters for all or a portion of their drinking water supply.

Not surprisingly, stakeholders from the regulated community, the conservation and the environmental communities, as well as members of the Supreme Court, have called on Federal agencies to clarify the reach and application of the Clean Water Act.

Clarity is essential to the regulated public so they can understand and meet their legal obligations under the Clean Water Act, and avoid unnecessary project delays and the associated increased compliance costs. Likewise, clarity is essential to the American public so they are assured that water quality is uniformly protected, regardless of what state or region of the country the water is located.

Yet, H.R. 4965 ignores these demands for clarity, and instead proposes to freeze in time an existing 2008 guidance document that the regulated community has characterized as "causing confusion and added delays in an already burdened and strained permit deci-

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State protections may currently be in place. This report is available at <http://www.elistore.org/Data/products/d21-06.pdf>.

sion-making process which ultimately will result (and is resulting) in increased delays and costs to the public at large."

This legislation also makes future agency rulemaking efforts more complicated, more costly, and more susceptible to additional litigation and challenges, which is contrary to calls from both the regulated community and conservation and environmental organizations for a public rulemaking.

Prudence demands that the Federal agencies utilize every means of the regulatory process available to clarify the application and reach of the Clean Water Act in accordance with the precedent of the Supreme Court.

In our view, H.R. 4965 makes no effort to improve the current regulatory process, and, in fact, may make the regulatory process more cumbersome and confusing. This legislation perpetuates the increased costs and delay experienced by the regulated community, as well as the confusion and uncertainty felt by the general public whether large categories of waterbodies are at increased risk of pollution or degradation.

In our view, this is the wrong approach—both for addressing the confusion caused by the Supreme Court decisions as well as for achieving the goals of fishable and swimmable waters called for in the Clean Water Act.

For these reasons, we oppose H.R. 4965.

TIM BISHOP.
MAZIE K. HIRONO.
DONNA F. EDWARDS.
ELEANOR HOLMES NORTON.

State-by-State Breakdown of Surface Drinking Waters Provided by Intermittent, Ephemeral, and Headwater Streams (IEH): [45]

National Totals:

- Total Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 124,364,960
- National Population Dependant on PDWS Relying on IEH Streams: 117,447,743
- Percentage of National Population Dependant on PDWS Relying on IEH Streams: 94 percent

Alabama:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 2,705,859
- State Population Dependant on PDWS Relying on IEH Streams: 2,681,327
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 99 percent

Arizona:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 3,254,601
- State Population Dependant on PDWS Relying on IEH Streams: 3,254,601
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

Arkansas:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 948,185
- State Population Dependant on PDWS Relying on IEH Streams: 941,225
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 99 percent

California:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 7,320,360
- State Population Dependant on PDWS Relying on IEH Streams: 7,314,715
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 99.92 percent

Colorado:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 3,866,332
- State Population Dependant on PDWS Relying on IEH Streams: 3,772,743
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 98 percent

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[45] See "Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S.", found at <http://water.epa.gov/lawsregs/guidance/wetlands/surface_drinking_water_index.cfm>.

Connecticut:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 2,241,030
- State Population Dependant on PDWS Relying on IEH Streams: 2,241,030
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

Delaware:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 281,400
- State Population Dependant on PDWS Relying on IEH Streams: 281,400
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

Florida:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 1,808,955
- State Population Dependant on PDWS Relying on IEH Streams: 1,808,955
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

Georgia:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 4,918,344
- State Population Dependant on PDWS Relying on IEH Streams: 4,912,944
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 99.89 percent

Idaho:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 252,026
- State Population Dependant on PDWS Relying on IEH Streams: 252,001
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

Illinois:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 4,872,325
- State Population Dependant on PDWS Relying on IEH Streams: 1,680,948
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 34 percent

Indiana:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 1,951,112
- State Population Dependant on PDWS Relying on IEH Streams: 1,703,230

• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 87 percent

Iowa:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 667,428
• State Population Dependant on PD WS Relying on IEH Streams: 667,428
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

Kansas:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 1,504,285
• State Population Dependant on PDWS Relying on IEH Streams: 1,503,521
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 99.95 percent

Kentucky:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 3,282,980
• State Population Dependant on PDWS Relying on IEH Streams: 3,282,980
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

Louisiana:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 1,901,559
• State Population Dependant on PDWS Relying on LEH Streams: 1,886,783
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 99 percent

Maine:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 456,041
• State Population Dependant on PDWS Relying on IEH Streams: 454,360
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 99.63 percent

Maryland:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 3,990,271
• State Population Dependant on PDWS Relying on IEH Streams: 3,990,016
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 99.99 percent

Massachusetts:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 5,009,161

• State Population Dependant on PDWS Relying on IEH Streams: 4,915,909
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 98 percent

Michigan:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 1,977,536
• State Population Dependant on PDWS Relying on IEH Streams: 1,400,633
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 71 percent

Minnesota:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 1,068,598
• State Population Dependant on PDWS Relying on IEH Streams: 978,928
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 92 percent

Mississippi:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 110,041
• State Population Dependant on PDWS Relying on IEH Streams: 110,041
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

Missouri:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 2,498,142
• State Population Dependant on PDWS Relying on IEH Streams: 2,498,142
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

Montana:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 351,401
• State Population Dependant on PDWS Relying on IEH Streams: 234,219
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 67 percent

Nebraska:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 515,566
• State Population Dependant on PDWS Relying on IEH Streams: 525,566
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

Nevada:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 23,792
- State Population Dependant on PDWS Relying on IEH Streams: 23,792
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

New Hampshire:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 503,657
- State Population Dependant on PDWS Relying on IEH Streams: 503,196
- Percentage of State Population Dependant on PDWS Relying on 1EH Streams: 99.91 percent

New Jersey:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 4,258,089
- State Population Dependant on PDWS Relying on IEH Streams: 4,258,089
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

New Mexico:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 281,206
- State Population Dependant on PDWS Relying on IEH Streams: 280,906
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 99.89 percent

New York:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 11,471,432
- State Population Dependant on PDWS Relying on IEH Streams: 11,146,815
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 97 percent

North Carolina:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 4,722,950
- State Population Dependant on PDWS Relying on IEH Streams: 4,719,825
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 99.93 percent ttb

North Dakota:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 292,414
- State Population Dependant on PDWS Relying on IEH Streams: 292,414

• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

Ohio:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 5,894,716
• State Population Dependant on PDWS Relying on IEH Streams: 5,285,318
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 90 percent

Oklahoma:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 2,326,616
• State Population Dependant on PDWS Relying on IEH Streams: 2,326,616
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

Oregon:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 1,782,414
• State Population Dependant on PDWS Relying on IEH Streams: 1,770,246
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 99 percent

Pennsylvania:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 8,215,216
• State Population Dependant on PDWS Relying on IEH Streams: 8,035,216
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 98 percent

Rhode Island:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 580,332
• State Population Dependant on PDWS Relying on IEH Streams: 564,893
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 97 percent

South Carolina:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 1,933,219
• State Population Dependant on PDWS Relying on IEH Streams: 1,933,219
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

South Dakota:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 309,421

• State Population Dependant on PDWS Relying on IEH Streams: 309,421
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

Tennessee:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 3,573,078
• State Population Dependant on PDWS Relying on IEH Streams: 3,572,494
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 99.98 percent

Texas:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 11,674,641
• State Population Dependant on PDWS Relying on IEH Streams: 11,557,744
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 99 percent

Utah:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 1,490,700
• State Population Dependant on PDWS Relying on IEH Streams: 1,428,450
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 96 percent

Vermont:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 181,226
• State Population Dependant on PDWS Relying on IEH Streams: 181,226
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 100 percent

Virginia:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 2,369,620
• State Population Dependant on PDWS Relying on IEH Streams: 2,364,709
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 99.79 percent

Washington:

• Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 2,110,490
• State Population Dependant on PDWS Relying on IEH Streams: 2,002,833
• Percentage of State Population Dependant on PDWS Relying on IEH Streams: 95 percent

West Virginia:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 1,007,781
- State Population Dependant on PDWS Relying on IEH Streams: 1,002,731
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 99.50 percent

Wisconsin:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 1,392,700
- State Population Dependant on PDWS Relying on IEH Streams: 391,531
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 28 percent

Wyoming:

- Total State Population Served by Public Drinking Water Systems (PDWS) using Surface Water: 205,712
- State Population Dependant on PDWS Relying on IEH Streams: 202,414
- Percentage of State Population Dependant on PDWS Relying on IEH Streams: 98 percent

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