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2d Session
HOUSE OF REPRESENTATIVES
REPORT
113–568

WATERS OF THE UNITED STATES REGULATORY OVERREACH PROTECTION ACT OF 2014

JULY 31, 2014.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 5078]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 5078) 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 without amendment and recommend that the bill do pass.

CONTENTS

39–006

PURPOSE OF THE LEGISLATION

The purpose of H.R. 5078 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 (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively, the "Agencies") from developing, finalizing, adopting, implementing, applying, administering, or enforcing a proposed rule or guidance the Agencies have developed regarding the scope of federal jurisdiction under the Federal Water Pollution Control Act. The bill also requires the Agencies to engage in a federalism consultation with state and local officials to formulate recommendations for a regulatory proposal that would identify the scope of waters covered under the Federal Water Pollution Control Act and the scope of waters not covered under the 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 "CWA") with the objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (*See* CWA 101(a); 33 U.S.C. § 1251.) In enacting the CWA, it was the "policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the [EPA] Administrator in the exercise of his authority under this Act." (*See id.* at § 101(b).)

The Clean Water Act prohibits the discharge of any pollutant by any person, unless in compliance with one of the enumerated permitting provisions in the Act. The two permitting authorities in the CWA are section 402 (the National Pollutant Discharge Elimination System, or "NPDES"), for discharges of pollutants from point sources, and section 404, for discharges of dredged or fill material. While the goals of the Clean Water Act speak to the restoration and maintenance of the "Nation's waters," both section 402 and 404 govern discharges to "navigable waters," which are defined in section 502(7) of the CWA as "the waters of the United States, including the territorial seas."

EPA has the basic responsibility for implementing the CWA, and is responsible for implementing the NPDES program under section 402. Under the NPDES program, it is unlawful for a point source 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 Corps for implementing section 404 of the CWA. Under this permitting program, it is unlawful to discharge dredged or fill materials into "navigable waters," unless the discharge is authorized by and in compliance with a dredge or fill (section 404) permit issued by the Corps (or by a state, under a comparable approved state program).

In enacting the CWA, Congress intended the states and EPA to implement the Act as a federal-state partnership, where these par-

ties act as co-regulators. The CWA established a system where EPA and the Corps provide a federal regulatory floor, from which states can receive approval from EPA to administer state water quality programs pursuant to state law, at equivalent or potentially more stringent levels, in lieu of federal implementation. Currently, 46 states have approved-NPDES programs under section 402 of the Act, and two states have approved-dredge or fill programs under section 404 of the Act.

Historical administrative interpretations of federal jurisdiction under the Clean Water Act

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.)

Neither the statute nor the legislative history on the definition of "navigable waters" in the CWA definitively describes the outer reaches of jurisdiction under the Act. As a result, EPA and the Corps have promulgated over the years several sets of rules interpreting the agencies' jurisdiction over "waters of the United States" and the corresponding scope of CWA authority. The latest amendments to those rules were promulgated in 1993.

Because the use of the term "navigable waters," and hence, "waters of the United States," affects both sections 402 and 404 of the CWA, as well as provisions related to the discharge of oil or hazardous substances, the existing regulations defining the term "waters of the United States" are found in several sections of the Code of Federal Regulations.

The current regulatory definition of the term "waters of the United States" is:

"Waters of the United States" or "waters of the U.S." means:

(a) All waters which are currently used, 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;

(b) All interstate waters, including interstate "wetlands;"

(c) 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 would affect or could affect interstate or foreign commerce including any such waters:

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

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

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

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

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(*See, e.g.*, 33 C.F.R. §328.3; 40 CFR 122.2; 40 C.F.R. §230.3 for the definition in the agencies' regulations.)

Supreme Court cases on Clean Water Act jurisdiction

There has been a substantial amount of litigation in the federal courts on the scope of CWA jurisdiction over the past four decades, including three U.S. Supreme Court cases:

- *United States* v. *Riverside Bayview Homes Inc.,* 474 U.S. 121 (1985) ("Riverside Bayview").
- *Solid Waste Association of Northern Cook County* v. *United States Corps of Engineers*, 531 U.S. 159 (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 (2006) (collectively referred to as "*Rapanos*").

The Supreme Court, in the *Riverside Bayview* case, upheld the Corps' jurisdiction over wetlands adjacent to jurisdictional waters, and held that such wetlands were "waters of the United States" within the meaning of the Clean Water Act.

However, in both the *SWANCC* and *Rapanos* case decisions, 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 very broad jurisdiction over most all waters around the nation.

In the *SWANCC* case, the Supreme Court rejected the Corps' assertion of authority to regulate intrastate, isolated waters, including wetlands (here, an abandoned sand and gravel pit with excavation trenches that had evolved into seasonal and permanent ponds) based solely on the presence of migratory birds. 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 the *Rapanos* case, the Supreme Court overturned the expansive definition of 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. The Court issued a 4–1–4 opinion that did not produce a clear, legal standard on determining jurisdiction under the CWA. Instead, the *Rapanos* decision produced three distinct opinions on the appropriate scope of federal authorities under the CWA: (1) the plurality opinion, written by Justice Scalia, provided a "relatively permanent/flowing waters" test, supported by four justices; (2) Justice Kennedy's opinion, which proposed a "significant nexus" test, and (3) Justice Stevens' dissenting opinion, supported by the remaining justices, which advocated for maintenance of existing EPA and Corps authority over waters and wetlands.

Administrative interpretations of the Supreme Court cases

Following the *SWANCC* and *Rapanos* decisions, EPA and the Corps issued several guidance documents interpreting how the Agencies would implement the Supreme Court decisions.

In January 2001, immediately following the Supreme Court's decision in *SWANCC*, the Agencies published a guidance memorandum that outlined the agencies' legal analysis of the impacts of the *SWANCC* decision. (*See Supreme Court Ruling Concerning CWA jurisdiction over Isolated Waters* (Jan. 19, 2001).)

In January 2003, the Agencies published a revised interim guidance memorandum that amended the agencies' views on the state of the law after the *SWANCC* case as to what waterbodies are subject to federal jurisdiction under the CWA. (*See* 68 Fed. Reg. 1991 (Jan. 15, 2003).)

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).)

Then in December 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).)

The December 2008 guidance provided that CWA jurisdiction over navigable waters would be asserted if such waters meet either the Scalia ("relatively permanent waters") or Kennedy ("significant nexus") tests. According to the 2008 guidance, individual permit applications must, on a case-by-case basis, undergo a jurisdictional determination, based on either the Scalia or Kennedy tests.

The 2003 and 2008 guidance remains in effect today.

The Agencies' proposed revised Clean Water Act guidance

In 2010, the Agencies drafted new joint guidance to describe their latest views of federal regulatory jurisdiction over U.S. waters under the CWA and to replace the Agencies' 2003 and 2008 guidance.

The proposed CWA jurisdiction 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*).) The proposed guidance purported to describe how the Agencies would 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 Agencies noted, among other things, 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.)

Members of Congress, stakeholders, and states submitted comments to the Agencies, expressing, among other things, concern 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 (5 U.S.C. 500 *et seq.*) 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; that the Agencies are using interim or final guidance as a substitute for regulation or to change or expand the effects of regulation, and the Agencies should, instead, proceed to formal rulemaking and not issue or apply the proposed guidance in the interim. (*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); *see also* 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); 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).)

In February 2012, the Agencies prepared and sent to the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB/OIRA) for regulatory review under Executive Order 12866 revised proposed CWA jurisdiction guidance. (*Guidance on Identifying Waters Protected By the Clean Water Act* (dated Feb. 17, 2012) (referred to as "Clean Water Protection Guidance," Regulatory Identifier Number (RIN) 2040–ZA11, received Feb. 21,

2012).) The revised guidance was largely unchanged from the proposed version.

In September, 2013, the Corps and EPA announced their withdrawal, from OMB/OIRA, of the proposed guidance before the guidance was finalized. At the same time, the Agencies sent to OMB/OIRA, for regulatory review, a draft rule entitled *Definition of 'Waters of the United States' Under the Clean Water Act* (RIN: 2040–AF30). The draft rule purported to "clarify" which waterbodies are subject to federal jurisdiction under the CWA.

The Agencies' proposed revised Clean Water Act jurisdiction rule

In April 2014, the Agencies published in the Federal Register a proposed rule that would revise the regulatory definition of the term "waters of the United States" under the CWA. (*See* 79 Fed. Reg. 22188 (Apr. 21, 2014) (*Definition of 'Waters of the United States' Under the Clean Water Act*).) The proposed rule purports to "clarify" which waterbodies are subject to federal jurisdiction under the CWA. The rulemaking notice provided a 91 day public comment period on the rule, which the Agencies later extended an additional 91 days. (*See* 79 Fed. Reg. 35712 (June 24, 2014) (*Definition of 'Waters of the United States' Under the Clean Water Act; Extension of Comment Period*).)

The proposed rule would redefine the term "waters of the United States" in the regulations for all CWA programs, and in particular would cover sections 303 (water quality standards), 311 (oil and hazardous substances releases), 401 (state water quality certifications), 402 (NPDES permitting and stormwater), and 404 (wetlands permitting).

The proposed rule would redefine the term "waters of the United States" as follows:

"Waters of the United States" or "waters of the U.S." means:

(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (b) of this definition, the term "waters of the United States" means:

(1) All waters which are currently used, 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) The territorial seas;

(4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this definition;

(5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this definition;

(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this definition; and

(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this definition.

(b) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this definition—

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this definition.

(5) The following features:

(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(ii) 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;

(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(v) Water-filled depressions created incidental to construction activity;

(vi) Groundwater, including groundwater drained through subsurface drainage systems; and

(vii) Gullies and rills and non-wetland swales.

The proposed rule also would provide new definitions of certain terms used in the proposed rule, including "adjacent," "neighboring," "riparian area," "floodplain," "tributary," "wetlands," and "significant nexus."

Stakeholders have expressed both support of and concern with the proposed rule.

Those expressing support for the proposed rule have suggested that this effort will provide greater clarity and certainty in the confusing jurisdictional and regulatory requirements following the Supreme Court decisions, as well as provide a scientifically-based means for protecting headwater and intermittent streams, while preserving existing regulatory and statutory exemptions for certain activities.

Those expressing concern with the proposed rule have criticized the process by which the Agencies have moved forward with the proposed rulemaking, as well as the substance of the rule itself.

The process concerns include the sequence and timing of the actions that the Agencies have taken to develop the rule, which many believe undermine the credibility of the rule and the process to develop it. Among other things, stakeholders have expressed concern

that the process prejudges the science underlying the rule, and state and local governments and the regulated community all have expressed concern that the Agencies have failed to consult with them in the development of the rule, thereby threatening to undermine the federal-state partnership and erode state authority under the CWA. Some have called for the Agencies to step back and follow a collaborative rulemaking process. (See, e.g., Testimony of J.D. Strong, Executive Director of the Oklahoma Water Resources Board, on behalf of the Oklahoma Water Resources Board, Western Governors' Association, and the Western States Water Council (presented at the House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment Hearing on "Potential Impacts of Proposed Changes to the Clean Water Act Jurisdiction Rule" (June 11, 2014) (hereinafter, "2014 CWA Hearing"); Testimony of Warren "Dusty" Williams, General Manager/Chief Engineer, Riverside County Flood Control & Water Conservation District, on behalf of the National Association of Counties and the National Association of Flood and Stormwater Management Agencies (presented at the 2014 CWA Hearing); Testimony of Bob Stallman, President, American Farm Bureau Federation (presented at the 2014 CWA Hearing).)

Many of those expressing substantive concern with the proposed rule suggest the rule fails to provide reasonable clarity, is inconsistent with Supreme Court precedent, and could broaden the scope of CWA jurisdiction, thereby triggering greater regulatory obligations under the CWA, including permit obligations for discharges to waters that currently may not be subject to the Act. Some note that the proposed rule leaves many key concepts unclear, undefined, or subject to Agency discretion, and suggest that the vague definitions and concepts will not provide the intended regulatory certainty and will result in litigation over their proper meaning. (See, e.g., Testimony of J.D. Strong, Executive Director of the Oklahoma Water Resources Board (presented at the 2014 CWA Hearing); Testimony of Warren "Dusty" Williams, General Manager/Chief Engineer, Riverside County Flood Control & Water Conservation District, on behalf of the National Association of Counties and the National Association of Flood and Stormwater Management Agencies (presented at the 2014 CWA Hearing); Testimony of Bob Stallman, President, American Farm Bureau Federation (presented at the 2014 CWA Hearing); Testimony of Mark T. Pifher, Manager, Southern Delivery System, Colorado Springs Utilities, on behalf of the National Water Resources Association (presented at the 2014 CWA Hearing); Testimony of Kevin Kelly, Chairman of the Board, National Association of Home Builders (presented at the 2014 CWA Hearing).)

The Agencies' interpretive rule

Along with the proposed rule, the Agencies published in the Federal Register a notice of availability of an interpretive rule on CWA section 404(f)(1)(a) exemptions for normal farming, silviculture, and ranching activities. (*See* 79 Fed. Reg. 22276 (Apr. 21, 2014) *Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices*).) The statutory exemptions under CWA section 404(f)(1)(a) provide an exemption from Section 404 permitting

requirements for normal farming, silviculture, and ranching practices where these activities are part of an ongoing farming, ranching, or forestry operation. (*See* CWA section 404(f)(1)(a); 33 U.S.C. § 1344(f)(1)(A).)

The interpretive rule became immediately effective and includes a list of 53 agricultural activities that are exempt from permitting requirements so long as they are conducted consistent with Natural Resources Conservation Service (NRCS) conservation practice standards. The interpretive rule has no effect on CWA jurisdiction, since the exemptions are not an exclusion from CWA jurisdiction.

Agricultural stakeholders have expressed concerns with the proposed interpretive rule. For example, many are unsure whether this is intended to be interpretive guidance or a legislative rule under the Administrative Procedure Act, and are concerned that the Agencies made the interpretive rule immediately effective, without advance notice and comment. Many also are opposed to the requirement that, for a farmer to be exempt from permitting requirements, the farmer must conduct an agricultural conservation practice consistent with the listed NRCS conservation practice standards, a requirement, they point out, that is nowhere found in the law. They are concerned that the interpretive rule, in effect, limits a farmer's ability to use the agricultural exemptions by introducing compliance with NRCS standards as a qualification for their use. (*See, e.g.,* Testimony of Bob Stallman, President, American Farm Bureau Federation (presented at the 2014 CWA Hearing).)

Legislation to preserve the rights and responsibilities with respect to waters of the U.S.

In light of the concerns that many stakeholders have expressed regarding the proposed revised CWA guidance, the proposed revised CWA jurisdiction rule, and the interpretive rule, Representative Southerland, along with House Committee on Transportation and Infrastructure Chairman Shuster, Water Resources and Environment Subcommittee Chairman Gibbs, House Committee on Agriculture Chairman Lucas, House Committee on Transportation and Infrastructure Ranking Member Rahall, House Committee on Agriculture Ranking Member Peterson, and Representatives Capito, Crawford, Matheson, Schrader, Ribble, Enyart, Mullin, and Jolly, introduced H.R. 5078 on July 11, 2014.

The sponsors of H.R. 5078 introduced this legislation to prohibit the Agencies from developing, finalizing, adopting, implementing, applying, administering, or enforcing the proposed revised CWA guidance, the proposed revised CWA jurisdiction rule, or the interpretive rule, and to require the Agencies to engage in a federalism consultation with state and local officials to formulate recommendations for a regulatory proposal that would identify the scope of waters covered under the CWA and the scope of waters not covered under the Act. Without this legislation, Congress, the states, and other stakeholders will not have any reasonable assurance that the Agencies will take into consideration, in a meaningful way, the substantive and process concerns expressed by stakeholders about the Agencies' regulatory actions pertaining to redefining the scope of jurisdiction under the CWA or the exemption for agricultural conservation practices.

HEARINGS

On June 11, 2014, the Subcommittee on Water Resources and Environment held a hearing to receive testimony from the Deputy Administrator of the EPA, the Assistant Secretary of the Army for Civil Works, and representatives of state and local government and private sector stakeholders on the joint EPA and Corps proposed rulemaking to redefine the regulatory term "waters of the United States" under the Clean Water Act.

LEGISLATIVE HISTORY AND CONSIDERATION

On July 11, 2014, Representative Steve Southerland introduced H.R. 5078, the "Waters of the United States Regulatory Overreach Protection Act of 2014." On July 16, 2012, the Committee on Transportation and Infrastructure met in open session to consider H.R. 5078, and ordered the bill reported favorably to the House by voice vote with a quorum present.

Delegate Eleanor Holmes Norton offered an amendment in Committee. The amendment would exempt the bill's prohibition on finalizing or using the proposed rule or guidance from applying to any waters used for or affecting certain stated purposes. The amendment was defeated by voice vote with a quorum present. Representative Maloney also offered an amendment in Committee. The amendment would strike the prohibition on finalizing or using the proposed rule and strike the requirement that EPA report on the consensus reached with state and local governments or report on why a consensus was not reached. The amendment was defeated by voice vote with a quorum present.

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. 5078, no recorded votes were taken.

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

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee estimates that enacting this legislation would have no significant impact on the federal budget. The Committee does not have the Congressional Budget Office cost estimate which is being prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974, and will include an estimate of new budget authority, entitlement authority, and tax expenditures or revenues resulting from H.R. 5078. As soon as it is available, the Committee will provide the cost estimate in a supplemental report.

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 estimates that enacting this legislation would have no significant impact on the federal budget. The Committee does not have the cost estimate for H.R. 5078 from the Director of the Congressional Budget Office and will provide it in a supplemental report as soon as it is available.

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 a proposed rule or guidance to redefine the scope of federal regulatory jurisdiction under the Clean Water Act, and to direct the Agencies to develop consensus recommendations for a regulatory proposal that would identify the scope of waters covered under the CWA and the scope of waters not covered under the Act by requiring the Agencies to engage in a federalism consultation with state and local officials.

ADVISORY OF EARMARKS

In compliance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 5078 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.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to section 3(j) of H. Res. 5, 113th Cong. (2013), the Committee finds that no provision of H.R. 5078 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULEMAKINGS

Pursuant to section 3(k) of H. Res. 5, 113th Cong. (2013), the Committee estimates that enacting H.R. 5078 does not specifically direct the completion of any specific rule makings within the meaning of section 551 of title 5, United States Code.

FEDERAL MANDATES STATEMENT

The Committee estimates that enacting this legislation would have no significant impact on the federal budget. The Committee does not have the cost estimate for H.R. 5078 from the Director of the Congressional Budget Office and will provide it in a supplemental report as soon as it is available to provide an 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. 5078 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. Short title

Section 1 of H.R. 5078 states that this Act may be cited as the "Waters of the United States Regulatory Overreach Protection Act of 2014."

Section 2. Rules and guidance

Subsection (a): Identification of waters protected by the Clean Water Act

Paragraph (1)(A) of subsection (a) ("In General") prohibits the Secretary of the Army and the Administrator of the Environmental Protection Agency (hereinafter, the "Agencies") from developing, finalizing, adopting, implementing, applying, administering, or enforcing either the Agencies':

(i) proposed rule described in the notice of proposed rule published in the Federal Register entitled "Definition of 'Waters of the United States' Under the Clean Water Act." The notice was published on April 21, 2014, in Volume 79 of the Federal Register at page 22188; or

(ii) proposed guidance submitted to the Office of Information and Regulatory Affairs of the Office of Management and Budget for regulatory review under Executive Order 12866, entitled "Guidance on Identifying Waters Protected By the Clean Water Act." The guidance document was dated February 17, 2012 and was referred to as "Clean Water Protection Guidance," Regulatory Identifier Number (RIN) 2040—ZA11, received on February 21, 2012.

Paragraph (1)(A) is intended to prevent the Agencies from finalizing the proposed rule or proposed guidance, or in any way using the proposed rule or proposed guidance, including developing, adopting, implementing, administering, or enforcing the proposed rule or proposed guidance, for any purpose whatsoever. The bill prohibits the Agencies from finalizing or implementing the proposed rule or proposed guidance in order to have the Agencies engage in a federalism consultation with state and local officials to formulate recommendations for a regulatory proposal that would

identify the scope of waters covered under the CWA and the scope of waters not covered under the Act.

Paragraph (1)(B) of subsection (a) expands on the prohibition in paragraph (1)(A) by prohibiting the Agencies from using the proposed rule or proposed guidance described in paragraph (1)(A), or any successor document, or any substantially similar proposed rule or guidance, as the basis for any decision regarding the scope or enforcement of the CWA or as the basis for any rulemaking.

Paragraph (1)(B) is intended to prevent the Agencies from attempting to use, either directly or indirectly, the proposed rule or proposed guidance as the basis for any regulatory or other decision regarding the scope or applicability of the CWA. This includes any decision regarding whether any permitting, enforcement, or other regulatory requirement under any section of the CWA (including sections 404, 402, 401, 311, 303, and 301) applies to a particular activity, circumstance, discharge, or water.

This paragraph also is intended to prevent the Agencies from attempting to use, either directly or indirectly, the proposed rule or proposed guidance or any of the guidelines, interpretations, clarifications, considerations, or understandings contained in the proposed rule or proposed 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 proposed rule or proposed guidance, as the basis for any decision regarding the scope of the CWA or any rulemaking, as discussed in the preceding paragraphs. Any successor document or any substantially similar proposed rule or proposed guidance includes any earlier drafts of the proposed rule or proposed guidance developed prior to April 21, 2014 or February 21, 2012, respectively, or any potential future versions of the proposed rule or proposed guidance, or related or similar proposed rule or proposed 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 rule or proposed guidance.

The Agencies' 2003 and 2008 Clean Water Act guidance would be preserved and remain in effect under the bill.

Paragraph (2) of subsection (a) ("Use of Rules and Guidance") states that use of the proposed rule or proposed guidance, or any successor document, or any substantially similar proposed rule or proposed guidance, as the basis for any rulemaking or decision regarding the scope or enforcement of the CWA shall be grounds for vacating the rule, decision, or enforcement action. This paragraph reinforces the prohibition in paragraph (1) against the use of the proposed rule or proposed guidance, or of any successor document or any substantially similar proposed rule or proposed guidance, as the basis for any rulemaking or decision regarding the scope or enforcement of the CWA.

This subsection is intended to provide grounds for a party challenging the validity of a rule, a provision in a rule, or a decision regarding the scope or enforcement of the CWA to vacate the rule, decision, or enforcement action if the proposed rule or proposed guidance, or any successor document or any substantially similar

rule or guidance (including any of the guidelines, interpretations, clarifications, considerations, or understandings contained in the proposed rule or proposed guidance, successor document, or substantially similar guidance), was used as the basis for the rule, provision in the rule, or decision.

Subsection (b): Exemption for certain agricultural conservation practices

Paragraph (1) of subsection (b) ("In General") prohibits the Agencies from developing, finalizing, adopting, implementing, applying, administering, or enforcing the interpretive rule described in the notice of availability published in the Federal Register entitled "Notice of Availability Regarding the Exemption from Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices." The notice was published on April 21, 2014, in Volume 79 of the Federal Register at page 22276. The paragraph is intended to prevent the Agencies from finalizing the interpretive rule, or in any way using the interpretive rule, for any purpose whatsoever.

Paragraph (2) of subsection (b) ("Withdrawal") requires the Agencies to withdraw the interpretive rule. The paragraph makes it clear that the interpretive rule shall have no force or effect.

Paragraph (3) of subsection (b) ("Application") states that the CWA section 404(f)(1)(a) permitting exemptions for normal farming, silviculture, and ranching activities shall be applied without regard to the interpretive rule. The paragraph makes it clear that compliance with NRCS agricultural conservation practice standards is *not* a prerequisite for a farmer to qualify for the section 404(f)(1)(a) permitting exemptions. The exemptions are to be applied independent of the interpretive rule or the NRCS standards.

Section 3. Federalism consultation

Subsection (a): In general

Subsection (a) requires the Agencies to jointly consult with relevant state and local officials to develop recommendations for a regulatory proposal that would, consistent with applicable rulings of the United States Supreme Court, identify the scope of waters covered under the CWA, and also the scope of waters not covered under the Act. Those waters not covered under the Act would be reserved to the states to determine whether and how to regulate. The recommendations for a regulatory proposal would need to be consistent with applicable rulings of the United States Supreme Court. This would include the Supreme Court's rulings in the *Riverside Bayview, SWANCC*, and *Rapanos* cases. The term "state and local officials" (defined in Section 4) means elected or professional state and local government officials or their representative regional or national organizations.

Subsection (b): Consultation requirements

Subsection (b) lays out the consultation requirements the Agencies must follow in conducting the federalism consultation under subsection (a). In developing the recommendations under subsection (a), the Agencies are required to:

(1) provide relevant state and local officials with notice and an opportunity to participate in the consultation process under subsection (a);

(2) seek to consult state and local officials that represent a broad cross-section of regional, economic, and geographic perspectives in the United States;

(3) emphasize the importance of collaboration with and among the relevant state and local officials;

(4) allow for meaningful and timely input by state and local officials;

(5) be respectful of maintaining the federal-state partnership in implementing the CWA;

(6) take into consideration the input of state and local officials regarding matters involving differences in state and local geography, hydrology, climate, legal frameworks, economies, priorities, and needs;

(7) promote transparency in the consultation process under subsection (a); and

(8) explore with state and local officials whether Federal objectives under the CWA can be attained by means other than through a new regulatory proposal.

Subsection (c): Reports

Paragraph (1) of subsection (c) ("In General") requires the Agencies to prepare, and publish in the Federal Register for public review and comment, a draft report describing the recommendations developed in the consultation process under subsection (a). The report is to be published not later than 12 months after the date of enactment of the Act.

Paragraph (2) of subsection (c) ("Consensus Requirement") restricts the Agencies to including, in the report, only those recommendations on which consensus has been reached among the Corps, EPA, *and* the state and local officials consulted in the federalism consultation under subsection (a). Recommendations that one or more of the parties did not agree with or reach consensus on shall not be included in the report.

Paragraph (3) of subsection (c) ("Failure To Reach Consensus") provides that, if the Corps, EPA, and the State and local officials consulted under subsection (a) fail to reach consensus on a regulatory proposal, the draft report shall identify that consensus was not reached and shall describe:

(A) the areas and issues where consensus was reached;

(B) the areas and issues of continuing disagreement that resulted in the failure to reach overall consensus; and

(C) the reasons for the continuing disagreements.

Paragraph (4) of subsection (c) ("Duration Of Review") requires that the Agencies shall provide not fewer than 180 days for the public review and comment of the draft report.

Paragraph (5) of subsection (c) ("Final Report") requires that the Agencies shall, in consultation with the state and local officials, address any comments received during the public comment period under paragraph (4), and prepare a final report describing the final results of the consultation process under subsection (a). The final report shall take into account the views of the state and local officials, in addition to those of the Agencies.

Subsection (d): Submission of report to congress

Subsection (d) requires that, not later than 24 months after the date of enactment of the Act, the Agencies are to jointly submit to the committees of jurisdiction in the House of Representatives and the Senate, specifically the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Environment and Public Works of the Senate, and make publicly available, the final report prepared under subsection (c)(5).

Section 4. Definitions

Section 4 provides definitions for the following terms used in the bill:

(1) *Secretary*. The term "Secretary" means the Secretary of the Army.

(2) *Administrator*. The term "Administrator" means the Administrator of the Environmental Protection Agency.

(3) *State and Local Officials*. The term "State and local officials" means elected or professional State and local government officials or their representative regional or national organizations.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

H.R. 5078 would not make any changes to existing law.

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. Additional uncertainty was created by the Bush administration, which adopted two separate administrative guidance documents (that remain in force today) interpreting these Supreme Court decisions in a manner that has been described as "arbitrary", "confusing", and "frustrating".

In response to this regulatory confusion, and to calls from both the regulated and environmental community for additional regulatory clarity,[2] the Obama administration released a proposed rule [3] to reduce the confusion about what waters are covered by Clean Water Act protections, to clarify the types of waters covered by the Act, based on the best available science, and to save businesses time and money. In addition, the administration has extended the public comment period on the proposed rule (through

[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).

[2] For nearly a decade, members of Congress, state and local officials, industry, agriculture, environmental, and the public have asked for a rulemaking to provide additional regulatory clarity. See http://www2.epa.gov/uswaters/persons-and-organizations-requesting-clarification-waters-united-states-rulemaking.

[3] See Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule. 79 Fed. Reg. 22187 (April 21, 2014).

October, 2014) to allow all parties to weigh in with their support, concerns, or proposed changes to the rule.

Yet, while all parties would benefit from (and most are demanding) greater clarity, the Committee on Transportation and Infrastructure now reports this bill (H.R. 5078) 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 this 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), under both Republican[4] and Democratic[5] 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.

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 vast majority of permit applicants under section 404 would rather concede Clean Water Act jurisdiction[6] 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 [Bush administration] Guidance is causing confusion and added delays in an already burdened and strained permit decision-making process,

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[4] 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.pdf5.

[5] 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>.

[6] 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.

which ultimately will result (and is resulting) in increased delays and costs to the public at large." [7]

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. In our view, this is exactly what would be accomplished by allowing the administration to complete its proposed rulemaking process.

Yet, H.R. 5078 inexplicitly moves in the opposite direction.

H.R. 5078 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. 5078 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. 5078 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. 5078 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. If the intent of this legislation is to benefit the lawyers, lobbyists, and polluters by perpetuating the regulatory confusion and uncertainty that allows unscrupulous individuals to hide in the regulatory shadows—then, again, this legislation may succeed.

We cannot support this legislation. In our view, neither the regulated community nor the general public can logically benefit from passage of H.R. 5078. 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.

We have encouraged all parties to fully utilize the public comment period to make their views on the proposed rule known, and we have received commitments from the administration that, in areas where additional clarity may be necessary (consistent with

[7] 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).

the goals of the Clean Water Act and Supreme Court precedent), such changes will be considered before the rule is finalized.

Instead, H.R. 5078 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.

In our view, 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.[8]

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 eco-

[8] 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."

nomic, environmental, and public health benefits associated with clean water.[9]

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[10] 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 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."[11]
- "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."[12]
- "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."[13]
- "[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

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[9] 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.

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

[11] "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).

[12] 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).

[13] 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).

and other affected entities have all long expressed a strong desire for greater certainty and clearer processes since *SWANCC*. . .'' [14]

• ''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] jurisdiction.'' [15]

In response to these widespread calls for regulatory clarity, on April 21, 2014, EPA and the Corps issued a proposed rulemaking to provide greater certainly on the reach and application of the Clean Water Act. On that date, both agencies published in the *Federal Register,* proposed a rule that would have replaced the existing 2003 and 2008 guidance documents of the Bush administration, and provided a 90 day period for public comment on the proposed changes.[16]

On June 24, 2014, EPA and the Corps extended the public comment period on the proposed rule through October 20, 2014.[17]

Comparison between current 2008 guidance and 2014 proposed rule

In order to understand the legal context in which H.R. 5078 is being considered, it is also important to compare the existing guidance documents with the 2014 proposed rule.

While the rhetoric surrounding the proposed rule may suggest otherwise, generally speaking, the 2008 guidance and the 2014 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 2014 proposed rule

Both the guidance and the proposed rule 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 [18] and 2006 decisions of the Supreme Court on this issue. Both documents state that they are intended

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

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

[16] See 79 Fed. Reg. 22187 (April 21, 2014).

[17] See 79 Fed. Reg. 35712 (June 24, 2014).

[18] 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).

to address the "uncertainty" and permitting delays [19] that have resulted from the Supreme Court decisions, and to improve "predictability and consistency by increasing clarity as to the scope of 'waters of the United States' protected under the Act".[20]

Both documents also describe the process 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 guidance and 2014 proposed rule also provide a strikingly similar list of waterbodies where Clean Water Act protections are applied. For example, under both documents, the agencies will continue to assert Clean Water Act jurisdiction over:

- All waters which are currently used, 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;
- All interstate water, including interstate wetlands;
- The Territorial seas;
- All impoundments of such waters;
- Tributaries; and
- Adjacent wetlands.

In addition, both documents would determine the jurisdiction of certain waterbodies if a fact-based analysis determines that these waters have a "significant nexus" to another traditionally jurisdictional water.

Finally, both documents identify certain types of waterbodies that are not subject to Clean Water Act jurisdiction, such as waste treatment systems, prior converted croplands, and certain erosional features (gullies and rills), swales, and ditches.

Differences between 2008 guidance and 2014 proposed rule

The 2014 proposed rule would replace the existing guidance documents 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 CWA, as interpreted by the Supreme Court, and as supported by science, and to provide maximum clarity to the public, as the agencies work to fulfil the CWA's objectives and policy to protect water quality, public health, and the environment." [21]

Jurisdiction over tributaries and adjacent waters

One significant difference between the 2008 guidance and the 2014 proposed rule addresses how the agencies will assert jurisdiction over tributaries and adjacent waters.

For the first time, the agencies have proposed a definition of the term "tributaries" and propose that only those waters that meet this definition and that flow directly or indirectly into a traditional navigable water, an interstate water, or the territorial seas are jurisdictional as tributaries.

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[19] See 72 Fed. Reg. 31824, 31825 (June 8, 2007).
[20] See 79 Fed. Reg. 2187, 22188 (April 21, 2014).
[21] See 79 Fed. Reg. 22187, 22190 (April 21, 2014).

Similarly, the 2014 proposed rule would amend the definition of "adjacent" to cover both adjacent wetlands and other adjacent waterbodies. This definition (including corresponding definitions of the terms "neighboring," "riparian area", and "floodplain") afford greater clarity to the identification of waters that would be jurisdictional by rule under this category using well understood ecological concepts. In addition, the 2014 proposed rule would clarify that waters outside of riparian and floodplain areas only be jurisdictional if they have a confined surface or shallow subsurface connection to a traditional navigable water, an interstate water, the territorial seas, or an impoundment or tributary of such waters. As a result, no additional site-specific analysis would be required for the adjacent waters category.

This is a change from the process followed under the 2008 guidance. Under the 2008 guidance, only certain waters (traditional navigable waters, interstate waters, wetlands adjacent to traditional navigable waters or interstate waters, and non-navigable tributaries to traditional navigable waters that are relatively permanent) are considered jurisdictional by themselves. As a result, under the 2008 guidance, all other tributaries, waters, and adjacent wetlands are required to undergo a lengthy and costly "significant nexus" evaluation to a traditional navigable water or interstate water before Clean Water Act jurisdiction may be asserted.

According to the 2014 proposed rule, "the finding of significant nexus [for all tributaries, by rule] is based in the chemical, physical, and biological interrelationship between a water, the tributary network, and the traditional navigable waters, interstate waters, and the territorial seas." [22] According to the proposed rule, "tributaries and their adjacent waters, and the traditional navigable waters, interstate waters, and territorial seas to which these waters flow, are an integrated ecological system, and discharges of pollutants, including the discharges of dredged or fill material, into these components of the ecological system, must be regulated under the CWA to restore and maintain the chemical, physical and biological integrity of these waters, [and] is consistent with the statute, the Supreme Court's decisions, the best available science, and scientific and technical expertise." [23]

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.

"Similarly situated in the region" analysis

One critical clarification contained in the 2014 proposed rule 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 appro-

[22] See 79 Fed. Reg. 22187, 22205 (April 21, 2014).
[23] See 70 Fed. Reg. 22187, 22210 (April 21, 2014).

priate 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'".[24] 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 wetlands) and the ecological and hydrological values (including nutrient reduction and food control) provided by these waters.[25]

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."[26]

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 the regulated community (and the Federal and State agencies) in order to demonstrate a significant nexus.[27] This Committee has received numerous reports and Congressional testimony on the associated costs and project delays from this process.

In contrast, the 2014 proposed rule generally authorizes agency field staff to assess whether a waterbody has a significant nexus,

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[24] See *Rapanos* v. *United States*, 547 U.S. 715, 780 (2006).

[25] 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).

[26] 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).

[27] 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.govioig/reports/2009/20090430-09-N-0149.pdf.

where the waterbody "either alone or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus" to a traditionally navigable water, an interstate water, or the territorial seas.[28] The proposed rule defines the term "significant nexus" to mean a water that "significantly affects the chemical, physical, or biological integrity" of a traditional navigable water, an interstate water, or the territorial seas, and further states that, "for an effect to be significant, it must be more than speculative or insubstantial.[29]

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.

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. 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 2014 rulemaking is what analysis EPA or the Corps must utilize to apply Clean Water Act protections over so-called "geographically" 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.[30]

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

[28] See 79 Fed. Reg. 22187 (April 21, 2014).
[29] See 79 Fed. Reg. 22187 (April 21, 2014). The guidance also notes that other waters are similarly situated when "they perform similar functions and are located sufficiently close together or sufficiently close to a 'water of the United States' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity" of a traditionally navigable water, an interstate water, or the territorial seas.
[30] See 531 U.S. 159, 174 (2001).

jurisdiction over 'non-navigable, isolated, intrastate waters' under subsection (a)(3)."[31]

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 jurisdiction 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'".[32] 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),[33] [but] field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters."[34]

The 2014 proposed rule 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 traditionally listed in 33 CFR § 328.3(a)(3). However, where the 2014 proposed rule 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"[35] or "formal project-specific Headquarters approval"[36]—the 2014 proposed rule clarifies that agency staff are to use the same "significant nexus" standard for asserting jurisdiction over isolated, non-navigable, intrastate waters, as they do for other waters that are not jurisdictional by rule.

Under the 2014 proposed rule, "for the purpose of assessing whether a particular 'water is a 'water of the United States' because it, alone or in combination with other similarly situated waters, has a significant nexus to [a traditionally navigable water, an interstate water, or the territorial seas], the agencies are proposing to define each of the elements of Justice Kennedy's significant nexus standard in the definition of significant nexus."[37] The 2014 proposed rule drops the legal distinction of the term "geographically" isolated, which the agencies note "should not be confused with functional isolation, because geographically isolated wet-

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

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

[33] 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."

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

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

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

[37] See 79 Fed. Reg. 22187, 22246 (April 21, 2014).

lands can still have hydrological and biological connections to downstream waters" [38]

This clarification in the 2014 proposed rule 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." [39]

Traditional navigable waters and interstate waters

Another change in the 2014 proposed rule addresses the definition and jurisdictional status of "traditional navigable waters" and "interstate waters".

Both the 2008 guidance and the 2014 proposed rule authorize the agencies to assert Clean Water Act jurisdiction over traditional 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),[40] including commercial water-borne recreation.

However, the 2008 guidance and the 2014 proposed rule 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." [41] Accordingly, the 2014 proposed rule guidance clarifies that such a determination need not be 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 2014 proposed rule clarifies Clean Water Act jurisdiction over interstate waters by stating that such waters are, by definition, subject to Clean Water Act jurisdiction, "without imposing a requirement that they be traditional navigable waters themselves or be connected to a traditional navigable water." [42]

Scope of Clean Water Act authorities affected by Supreme Court decisions

The 2014 proposed rule 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 Act (re-

[38] See 79 Fed. Reg. 22187, 22225 (April 21, 2014).
[39] See 547 U.S. 715, 759 (2006).
[40] 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.
[41] See Proposed 2011 Guidance at 24, citing *FPL Energy Marine Hydro L.L.C.* v. *FERC,* 287 F. 3rd 1151, 1157 (D.C. Cir. 2002) and *Alaska* v. *Ahtna, Inc.*, 891 F. 2d 1401, 1405 (9th Cir. 1989).
[42] See 79 Fed. Reg. 22182, 22200 (April 21, 2014).

lated 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 2014 proposed rule 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."[43]

However, this clarification brings agency *regulations* 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 2014 proposed rule identify types of waters that are generally not protected by the Clean Water Act, including erosional features (gullies and rills), swales, and ditches.

Yet, the 2014 proposed rule *expands the list* of waters and aquatic areas that are no longer covered by the Clean Water Act, and *permanently defines in the regulation* that these waters are no longer subject to the regulatory requirements of the Act, *even if they otherwise fall within the definition of jurisdictional waters.* Under the 2014 proposed rule, the following waters and aquatic areas are, by regulation, not protected by the Clean Water Act:

- Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.
- Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

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

- Ditches that do not contribute flow, either directly or through another water, to a [traditional navigable water, an interstate water, or a territorial sea].
- The following features:
  - Artificially irrigated areas that would revert to upland should application of irrigation water to that area 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;
  - Water-filled depressions created incidental to construction activity;
  - Groundwater, including groundwater drained through subsurface drainage systems; and
  - Gullies and rills and non-wetland swales.

This list of waters and aquatic areas that are permanently excluded from the scope of the Clean Water Act provides greater clarity to the regulated community and the general public as to which waters are subject to the Clean Water Act permitting requirements.

H.R. 5078, 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.

In the 113th Congress, on at least four separate occasions, various Committees of the U.S. House of Representatives have held hearings on the Administration's proposed rulemaking. Yet, despite listening to several hours of questions and answers by administration witnesses on the intent of and potential benefits of the proposed rulemaking, proponents of H.R. 5078 continue to mischaracterize this effort.

For example, the following statements by administration witnesses have been made at hearings before this Committee[44], the Committee on Agricultures,[45] and the Committee on Science, Space and Technology.[46]

Benefits of the proposed Clean Water Act jurisdictional rule

Testimony: "[The proposed rule] will increase transparency, consistency, and predictability in making jurisdictional determinations and reduce existing costs and confusion and delays." EPA Assistant Administrator, Bob Perciasepe (7/9/14)

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[44] Hearing of the House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, entitled "The President's Fiscal Year 2015 Budget: Administration Priorities for the U.S. Army Corps of Engineers (April 2, 2014) and Hearing of the House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, entitled "Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule" (June 11, 2014).

[45] Hearing of the House Committee on Agriculture, Subcommittee on Conservation, Energy, and Forestry, entitled "A review of the Interpretive Rule regarding the applicability of the Clean Water Act agricultural exemptions. June 19, 2014.

[46] Hearing of the House Committee on Science, Space, and Technology, entitled "Navigating the Clean Water Act: Is Water Wet?" July 9, 2014.

Question: What benefit does this proposed rule provide to the variability that exists across the country today in interpreting the scope of the Clean Water Act?

Answer: "[The Corps and EPA have] defined in this proposal clear hydrologic science-oriented approaches to determining jurisdiction—as opposed to the general one under the current regulations, which is will it have an effect on interstate commerce. . . . [That's] pretty important, and [it is going to] really instruct the field people who do this work, mostly in the Army Corps of Engineers, to have a more consistent approach and a more consistent sense of how they get the work done. I think that is my primary reason why I believe that this [proposed rule] would be a significant improvement over the existing situation." Perciasepe (7/9/14)

Scope of waters covered by the Proposed Rule

Testimony: "In adherence with the Supreme Court, [the proposed rule] would reduce the scope of waters protected under the Clean Water Act compared to the existing regulations on the book. It would not assert jurisdiction over any type of waters not previously protected over the past 40 years." Perciasepe (6/11/14)

Question: Is there any body of water that was not regulated by the Clean Water Act in the 30 years it existed prior to the two Supreme Court decisions (*SWANCC* and *Rapanos*) that would be subject to Clean Water Act regulation under the proposed rule?

Answer: "No." Assistant Secretary of the Army (Civil Works), Jo Ellen Darcy (4/2/2014)

Question: Are there any examples where the proposed rule expands the definition of jurisdictional waters that is currently the case under the 2008 Bush guidance?

Answer: "No." Darcy (6/11/14); "I do [agree with that answer]. There is no expansion." Perciasepe (6/11/14)

Question: If the proposed rule is finalized, it would protect roughly 3 percent more waters than are protected today, but almost 5 percent fewer waters than were protected prior to the Supreme Court's 2001 decision. Is that correct?

Answer: "Those numbers are correct." Darcy (6/11/14)

Types of Waters Specifically Excluded from Coverage under the Proposed Rule

Question: Can you tell me what waters would definitely no longer be regulated by the Federal Government under this proposed rule?

Answer: "We have a series of exclusions that are defined here, and if you would like, I can read those to you. It is under section (b)(1) of the definition of the rule. It is "waters that are not going to be considered are waste water treatments, prior converted cropland, ditches that are excavated wholly in uplands, ditches that do not contribute flow either directly or through other waters to a water, and artificially irrigated areas that would revert to uplands, artificial lakes. . . . etc. This whole list. Do you want me to continue?" Darcy (6/11/14)

Ditches

Testimony: "[The proposed rule] would reduce Clean Water Act jurisdiction over ditches compared to the previous 2008 guidance." Perciasepe (6/11/14)

Question: In determining Clean Water Act jurisdiction, would the proposed rule assert jurisdiction over fewer ditches that is currently the case today under the 2008 Bush administration guidance?

Answer: "That is correct." Darcy (6/11/14)

Artificial lakes, ponds, puddles, wet depressions and swimming pools

Testimony: "The [proposed] rule does not apply to lands, whole flood plains, backyards, wet spots or puddles." Perciasepe (6/11/14)

Answer: "Artificial lakes, ponds, swimming pools; they are specifically excluded. We are writing them in the rule." Perciasepe (6/11/14)

Question: If a farmer has a small depression area in their farm field where water ponds after it rains, are these waters subject to Clean Water Act jurisdiction under the proposed rule?

Answer: "They are not." Perciasepe (7/9/14)

Groundwater

Answer: "We explicitly make sure to mention that groundwater is not included [within the scope of the proposed rule]. Perciasepe (6/11/14)

Green infrastructure related projects

Question: Would "green infrastructure" and low-impact technologies fall within the purview of the proposed rule?

Answer: "We don't believe that will happen, and it is not our intent." Perciasepe (6/11/14)

Water recycling projects

Question: Does the waste treatment exemption apply to water recycling projects?

Answer: "We don't think water recycling projects that are existing today are covered [by the Clean Water Act], and we are not trying to change that." Perciasepe (6/11/14)

Stormwater

Answer: "[We] are not trying to change the stormwater rules in this legislation." Perciasepe (6/11/14)

Impact of the Proposed Rule on existing agricultural exemptions

Question: Do the existing farmland exemptions that existed in the Clean Water Act and implementing regulations, such as for prior converted cropland and irrigation return flows, remain within the proposed rulemaking?

Answer: "Yes, they do for farming, silviculture, and ranching." Darcy (4/2/14)

Answer (2): "[All] of the existing exemptions for farming, silviculture, and ranching in the current Clean Water Act, those

exemptions remain in place. In addition, we have done an interpretative rule with the Department of Agriculture and EPA, stating about what additional farming practices would be exempt." Darcy (4/2/14)

Impact of the Interpretive Rule on Agriculture

Testimony: "Under current law, normal farming activities are exempt when they are part of an established farming operation and do not change the reach or use of waters. Normal farming includes things like plowing, cultivating, minor drainage, harvesting, and upland soil and water conservation practices. The Interpretive Rule does not affect any of those existing agricultural exemptions. Indeed, it adds to them, making even more room for agriculture. . . . With the Interpretive Rule, now an additional 56 conservation practices from stream crossings to wetlands enhancement carried out in the waters of the United States are no longer subject to permitting requirements." Under Secretary for Natural Resources and Environment, USDA, Robert Bonnie (6/19/14)

Testimony: "The Interpretive Rule signals a new opportunity for recognizing the value of producers' conservation efforts. . . . America's farm and ranch families make decisions every day that help to improve and secure our water resources. The Interpretive Rule will make those decisions and actions a little easier and produce a substantial benefit for farms and ranches, their communities and the Nation as a whole." Bonnie (6/19/14)

Consistency with the rulings of the U.S. Supreme Court

Question: Would you define "significant"?

Answer: "Significant nexus means that a water, including a wetland, either alone or in combination with other similarly-situated waters in the region in that watershed significantly affects the chemical, physical or biological integrity of a water identified as a jurisdictional water." Darcy (6/11/14)

Question: Is the definition of "significant nexus" in the proposed rule wholly within the confines of Justice Kennedy's ruling in the *Rapanos* case?

Answer: "That is correct." Darcy (6/11/14)

Question: It is correct that the proposed rule also adheres to Justice Scalia's definition of a relatively permanent connection to traditional navigable waters?

Answer: "That is correct." Darcy (6/11/14)

Question: In the proposed rule, there are two tests for asserting potential Clean Water Act jurisdiction—the relatively permanent connection test (of Justice Scalia) and the significant nexus test (of Justice Kennedy). Is there any way in which any aspect of the proposed rule extends jurisdiction beyond the four corners of those two definitions?

Answer: "No." Darcy (6/11/14); "I do [agree with that statement], and, in fact, I would just augment slightly that in addition to [those] definitions . . . we actually are using this rulemaking to, by rule, exclude certain things. So even with that test, some, notwithstanding if they would pass that test or not, are excluded." Perciasepe (6/11/14)

Floodplains

Answer: "We are using the term 'floodplain' to try to get at the issue of adjacency which has been in a number of the Supreme Court cases. But just because it is a floodplain doesn't mean that it is jurisdictional. It still would have to be a water in the floodplain, you know, standing water or a wetland with the hydric soils and the vegetation or an actual running stream through a floodplain area . . . I want to be really clear that the entire floodplain, which may flood, is not jurisdictional." Perciasepe (6/11/14)

Reduced risk of litigation

Question: Do you believe this new rulemaking will create fewer lawsuits?

Answer: "I do." Darcy (6/11/14)

Science

Testimony: "[The proposed rule] represents the best peer-reviewed science about functions and values of the Nation's waters." Perciasepe (6/11/14)

Question: Did the Federal agencies consult with EPA's Science Advisory Board on the proposed rule?

Answer: "The Science Advisory Board will be looking at this proposed rule before it goes final . . . we have extended the time period for public comment [, among other reasons,] to complete the Science Advisory Board's review of some of the science documents so that review is out there at the same time as the rule-making docket is still open." Perciasepe (6/11/14)

Public Comment

Question: Who may comment on the proposed rule?

Answer: "Under the proposed rule, anyone who believes they would be impacted by the proposed rule can comment to us." Darcy (6/11/14)

Question: Are the Federal agencies committed to listening carefully to the objections to the proposed rule, to take them into account, and to modify, where appropriate, the ambiguities and to clarify? Is that your commitment?

Answer: "Yes." Darcy (6/11/14); "Yes." Perciasepe (6/11/14)

At the same time, while the stated intent of this legislation is to block the administration from issuing its proposed rule 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. 5078 would also create significant legal hurdles that would, at a minimum, render future Federal rulemaking efforts more 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 guid-

ance 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. 5078 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 opportunities 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. 5078 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. 5078 creates more problems than it solves, and should be opposed.

Codifying regulatory confusion and delay and increased compliance costs

As introduced, H.R. 5078 carries forward language adopted in the 112th Congress that 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 this provision, 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 provision 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 publicly requested by the regulated community, the conservation and environmental organizations, and several justices of the U.S. Supreme Court.

This language 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. 5078, as "substantially similar" to the 2014 proposed rule. 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 stricken down under H.R. 5078 simple because the concepts proposed in the future rulemaking also appeared in the 2014 proposed rule?

Last Congress, during the Committee markup of similar legislation (H.R. 4965, 112th Congress) proponents of that bill suggested that the administration should engage in a "transparent rulemaking process under the Administrative Procedures Act." That is exactly what the Obama administration did in proposing the 2014 proposed rule. Yet, inexplicability, H.R. 5078 would make any future agency rulemaking efforts more complicated, more costly, and more susceptible to litigation and challenges.

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 uncertainly 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. 5078 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 decision-making process which ultimately will result (and is resulting) 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. The Obama administration has honored the requests of Congress, the Court, and stakeholders from across the spectrum, to initiate a public rulemaking to provide this clarity; however, that effort (and future efforts) would be stymied by H.R. 5078.

In our view, H.R. 5078 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 uncertainly 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. 5078.

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