



June 10, 2014

The Honorable Robert Gibbs
Chairman
House Subcommittee on Water
Resources and Environment
Washington, D.C. 20515

The Honorable Timothy Bishop
Ranking Member
House Subcommittee on Water
Resources and Environment
Washington, D.C. 20515

Dear Chairman Gibbs and Ranking Member Bishop:

On behalf of the Waters Advocacy Coalition (WAC), I appreciate the opportunity to submit our concerns about the proposed “Waters of the United States” rule for the record of the June 11 hearing before the Subcommittee on Water Resources and Environment. WAC is an inter-industry coalition representing the nation’s construction, real estate, mining, agriculture, forestry, manufacturing, and energy sectors, and wildlife conservation interests. As WAC’s trade association members have worked with their respective members to identify how the proposed rule is likely to affect their ability to generate jobs and create economic activity, WAC’s concerns with the proposed rule have increased. Accordingly, we urge the Subcommittee and Congress to take action to halt the proposed expansion of federal authority under the Clean Water Act (CWA).

Under the proposed rule, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have crafted a complicated set of regulatory definitions, including new and poorly defined terms, based on ambiguous and untested legal theories and regulatory exclusions. The result is a proposal that expands the scope of waters protected under the CWA beyond those waters currently regulated. This could trigger additional permitting and regulatory requirements for both the regulated community and state regulators.

The proposal asserts jurisdiction over waters, including many ditches, conveyances, isolated waters, and other waters, that were previously under the jurisdiction of the states. The rule asserts that most waters categorically have a “significant nexus” to traditional navigable waters and then provides a catch-all category to sweep in any remaining waters by allowing the EPA or the Corps to establish a “significant nexus” on a case by case basis. The criteria for establishing a significant nexus is very low and equally ambiguous—“more than speculative or insubstantial effect....” The result will increase federal control over water and land, subjecting activities that might impact these areas to more complicated and layered reviews and potential citizen suits. This will substantially impact job creation, economic investment, and growth.

Moreover, the EPA and the Corps’ proposed rule redefines the fundamental term “Waters of the United States” (WOTUS) for all sections of the CWA: Sections 303, 304, 305 (state water quality standards), 311 (oil spill prevention), 401 (state water quality

certification), 402 (effluent/stormwater discharge permits) and 404 (dredge and fill permits). At a minimum, this is likely to require substantial state resources to administer and issue additional permits, and to develop and/or revise water quality standards and total maximum daily loads (TMDLs), as third parties are likely to argue that they are required for all waters subject to the CWA. Third party actions will also almost certainly precipitate litigation, leading to further delays in project implementation and a climate of regulatory uncertainty and disorder. The EPA has not provided any meaningful analysis of the potential for impact on CWA programs. In fact, the economic analysis accompanying the rule downplays non-404 impacts, concluding that only an artificially small increase in jurisdictional waters will occur. Many questions remain about the definitions used in the proposal and the impacts to most CWA programs, leaving these to become known only after the proposed rule is finalized and implementation begins.

The regulatory changes suggested by the rule will have significant direct economic impacts on our sectors of the economy. For example:

- In light of the scope of the proposed jurisdictional expansion, it will be nearly impossible for private property owners, state and local governments and industry to use or develop public or private land containing water that is arguably subject to the rule's expansive jurisdictional reach without first obtaining a costly federal CWA permit. Many activities that could previously have been carried out under a nationwide general permit may no longer qualify, and regulated entities (and state counterparts) will be forced to obtain individual permits, which are far more costly, time consuming and administratively resource intensive. The costs alone of obtaining a Corps 404 permit are significant: averaging 788 days and \$271,596 for an individual permit and 313 days and \$28,915 for a nationwide permit—not counting costs of mitigation or design changes. “Over \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.”¹ This will have negative impacts on activities ranging from farming and ranching to energy production and critical infrastructure development, and the construction of affordable housing.
- Under the proposal, third parties could assert that features such as drainage ditches, stormwater ditches and water storage or treatment ponds, utilized by municipalities, states and industry to manage and convey water in order to protect jurisdictional waters, would now become jurisdictional waters. As a result, the continued use, care and maintenance of these features (*e.g.*, allowing sediment to settle out of stormwater, adding chemicals to adjust pH, dredging solids, pesticide application) could require federal permits. Likewise, conveyances used for collecting and directing stormwater such as green infrastructure (*e.g.*, roof gardens and permeable pavement) could be regulated as WOTUS, effectively forcing permittees to create federally jurisdictional waters on their property to meet other requirements of the CWA.

¹ David Sunding and David Zilberman, “The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process,” 2002

- The proposed rule would subject private land conservation projects to added regulatory burdens and costs therefore creating a disincentive to landowners pursuing important and needed conservation projects that benefit watersheds, waterfowl and riparian habitats. The majority of wildlife habitat in the continental United States is on private land and there should be no disincentives to their improved conservation and management. Requiring landowners to obtain Corps permits for routine erosion control and soil stabilization work, including improving and protecting riparian areas, would reduce the number of those projects on private lands and habitat and wildlife may suffer.

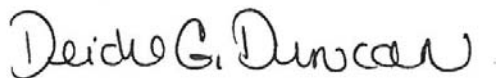
The EPA and the Corps have completed only a cursory analysis of the proposed rule's many implications for states, the regulated community, and for small entities. Furthermore, the agencies' unnecessary haste to complete the rulemaking has cut short the time necessary for stakeholders to collect data and comment on the agencies' economic assertions.

The rush to a final rule has also produced a proposal based on highly speculative, incomplete science, which EPA has itself admitted. Recently, an EPA representative, speaking on a teleconference of the agency's Science Advisory Board (SAB) reviewing EPA's draft report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, announced that "the agency is still trying to figure out how best to review the science." Notwithstanding EPA's confusion about how to interpret the underlying science, the agency, nevertheless has forged ahead to propose a rule.

Finally, we believe the proposal is inconsistent with congressional intent, the language of the CWA and Supreme Court precedent. Twice the Supreme Court has affirmed a limit to federal jurisdiction and rejected, first, the agencies' broad assertion of jurisdiction based on potential use of isolated waters by migratory birds and, second, the agencies' assertion of jurisdiction based on "any hydrological connection." Yet, the proposed rule defines jurisdiction as broadly as these theories rejected by the Supreme Court, and does so to such an extent that the agencies have to specifically exempt swimming pools and ornamental ponds from being considered "Waters of the United States."

A list of WAC members is attached. We encourage your continued oversight of the agencies' proposed rule, and appreciate your attention to our concerns. We urge you to stop the agencies from finalizing their proposed rule, and welcome the opportunity to discuss any of these concerns with you.

Sincerely,



Deidre G. Duncan

Attachment

See WAC member list below

WAC Members:

Agricultural Retailers Association
American Coke & Coal Chemicals Institute
American Exploration & Mining Association
American Farm Bureau Federation
American Forest & Paper Association
American Gas Association
American Iron and Steel Institute
American Petroleum Institute
American Public Power Association
American Road & Transportation Builders Association
Associated Builders and Contractors
The Associated General Contractors of America
CropLife America
Dairy Farmers of America
Edison Electric Institute
The Fertilizer Institute
Florida Sugar Cane League
Foundation for Environmental and Economic Progress (FEEP)
The Independent Petroleum Association of America (IPAA)
Industrial Minerals Association – North America
International Council of Shopping Centers (ICSC)
Interstate Natural Gas Association of America (INGAA)
Irrigation Association
NAIOP, the Commercial Real Estate Development Association
National Association of Home Builders
National Association of Manufacturers
National Association of Realtors
National Association of State Department of Agriculture
National Cattlemen's Beef Association
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Industrial Sand Association
National Mining Association
National Multifamily Housing Council
National Pork Producers Council (NPPC)
National Rural Electric Cooperative Association
National Stone, Sand and Gravel Association (NSSGA)
Portland Cement Association
Public Lands Council
Responsible Industry for a Sound Environment (RISE)
Southern Crop Production Association
Texas Wildlife Association
Treated Wood Council
United Egg Producers
U.S. Chamber of Commerce