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**BEFORE THE COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY  
UNITED STATES HOUSE OF REPRESENTATIVES**

**July 9, 2014**

Good afternoon Chairman Smith, Ranking Member Johnson, and members of the Committee. I am Bob Perciasepe, the Deputy Administrator of the U.S. Environmental Protection Agency. I am pleased to be here today to discuss the EPA's and the U.S. Army Corps of Engineers' recently proposed rule which would clarify the jurisdictional scope of the Clean Water Act (CWA), simplifying and improving the process for determining waters that are, and are not, covered by the Act. The agencies' proposed rule was published in the Federal Register on April 21, 2014, and is available to the public now for their review and comment.

I want to begin by emphasizing that we are discussing a proposed rule that we anticipate will receive tens of thousands of public comments. We look forward to addressing these comments when we finalize revisions that further clarify our regulations and make them more effective in implementing the statute, consistent with the law and sound science. Our goal in revising the rule is straightforward: to respond to requests from stakeholders across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. We believe the result of this rulemaking will be to improve the process for making jurisdictional determinations for the CWA by minimizing delays and costs and to improve predictability and consistency for landowners.

The proposed rule preserves all existing agricultural exemptions under the CWA and in addition, we

worked closely with our partners at the U.S. Department of Agriculture to promote additional conservation practices that enhance farming and protect water quality through a companion Interpretive Rule that clarifies which practices are exempt from CWA permitting requirements. We are also working with our partners in the states and tribes to assure their voices are effectively represented as we proceed through this rulemaking. The proposed rule continues to respect states' well-defined and long-standing relationships with federal agencies in implementing CWA programs.

We are working closely with our partners at the U.S. Department of Agriculture to reduce regulatory burdens for the nation's farmers, ranchers, and foresters by promoting practices that enhance farming and protect water quality, and by clarifying that these practices are exempt from CWA permitting requirements. We are also working with our partners in the states and tribes to assure their voices are effectively represented as we proceed through this rulemaking. The proposed rule continues to respect states' well-defined and long-standing relationships with federal agencies in implementing CWA programs.

In my testimony today, I plan to highlight the uncertainty and confusion that prompted stakeholders to ask the agencies to develop a proposed rule. I will then describe the primary elements of the proposed rule and how the rule will provide additional clarity regarding waters that are and are not "waters of the United States." I will discuss our agencies' efforts to improve clarity and preserve existing CWA exemptions and exclusions for agriculture, and the agencies' recently released interpretive rule, which clarifies that certain agricultural conservation practices that protect or improve water quality are exempt from CWA Section 404 permitting requirements. Finally, I will describe our work to improve the scientific basis for our decision-making and to gather public input on the proposed rule.

## **The Importance of Clean Water**

The foundation of the agencies' rulemaking efforts to clarify protection under the CWA is the goal of providing clean and safe water to all Americans. Clean water is vital to every single American – from families who rely on affordable, safe, clean waters for their public drinking water supply, and on safe places to swim and healthy fish to eat, to farmers who need abundant and reliable sources of water to grow their crops, to hunters and anglers who depend on healthy waters for recreation and their work, to businesses that need a steady supply of clean water to make their products. The range of local and large-scale businesses that we depend on—and who, in turn, depend on a reliable supply of clean water—include tourism, health care, farming, fishing, food and beverage production, manufacturing, transportation and energy generation.

In addition to providing habitat, rivers, lakes, ponds and wetlands supply and cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for some flood waters, and enhance our quality of life by providing myriad recreational opportunities, as well as important water supply and power generation benefits. Consider these facts about the value of clean water to Americans:

- Manufacturing companies use nine trillion gallons of fresh water every year.
- 31 percent of all water withdrawals in the U.S. are for irrigation, highlighting the extent to which the nation's farmers depend on clean water.
- About 40 million anglers spend \$45 billion annually to fish in U.S. waters.
- The beverage industry uses more than 12 billion gallons of water annually to produce products valued at \$58 billion.
- About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but are critically important to the health of downstream waters.

- Approximately 117 million people – one in three Americans – get their drinking water from public systems that rely on seasonal, rain-dependent, and headwater streams.<sup>1</sup>

### **Legal Background and Recent Confusion Regarding CWA Jurisdiction**

In recent years, several Supreme Court decisions have raised questions regarding the geographic scope of the Act. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Supreme Court in a 5-4 opinion held that the use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of Federal regulatory authority under the CWA . Five years after this case, the Court again addressed the Clean Water Act term “waters of the United States” in *Rapanos v. United States*, 547 U.S. 715 (2006), which involved two consolidated cases in which the CWA had been applied to wetlands adjacent to non-navigable tributaries of traditional navigable waters. While all Members of the Court agreed that the term “waters of the United States” encompasses waters, including wetlands, beyond those that are navigable in the traditional sense, the case yielded no majority opinion. Neither the plurality nor the concurring opinion in *Rapanos* invalidated any of the agencies’ existing regulations defining “waters of the United States,” but these opinions did raise questions concerning how to determine which waters were jurisdictional pursuant to their regulations.<sup>2</sup>

Following these decisions, there has been a lack of clarity regarding CWA jurisdiction over some streams and wetlands. For nearly a decade, members of Congress, state and local officials, industry, agriculture, environmental groups, and the public have asked our agencies for a rulemaking to provide

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<sup>1</sup> A county-level map depicting the percent of the population receiving drinking water directly or indirectly from streams that are seasonal, rain-dependent or headwaters is available at <http://water.epa.gov/type/rsl/drinkingwatermap.cfm>.

<sup>2</sup> Additional background information on these cases is included in the preamble to the agencies’ proposed rule, as well as a legal appendix to the proposed rule, which are available at <http://www2.epa.gov/sites/production/files/2014-04/documents/fr-2014-07142.pdf>.

clarity.<sup>3</sup> This complexity has made enforcement of the law difficult in many cases, and has increased the amount of time it takes to make jurisdictional determinations under the CWA.

In response to these implementation challenges and significant stakeholder requests for rulemaking, the agencies began developing a proposed rule. To help inform the proposed rule, the agencies began reviewing available peer-reviewed science regarding the connectivity or isolation of aquatic resources and effects on downstream waters, a topic I will discuss in more detail later. Consistent with EPA and U.S. Army Corps of Engineers (“the Corps”) policy to promote communications among the agencies, states and local governments, and in recognition of the vital role states play in implementation of the CWA, the EPA undertook federalism consultation for this effort. The EPA held a series of meetings and outreach calls with state and local governments and their representatives soliciting input on a potential rule. During this process, state and local governments identified a number of issues, which the agencies have considered in developing the proposed rule.

### **Key Elements of the Proposed Rule**

The agencies’ proposed rule helps to protect the nation’s waters, consistent with the law and currently available scientific and technical expertise. The rule provides continuity with the existing regulations, where possible, which will reduce confusion and will reduce transaction costs for the regulated community and the agencies. Toward that same end, the agencies also proposed, where consistent with the law and their scientific and technical expertise, categories of waters that are and are not jurisdictional, as well as categories of waters and wetlands that require a case-specific evaluation to determine whether they are protected by the CWA.

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<sup>3</sup> A list of individuals and organizations who requested clarification of Clean Water “Waters of the United States” by rulemaking is available at [http://www2.epa.gov/sites/production/files/2014-03/documents/wus\\_request\\_rulemaking.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf).

Specifically, the proposed rule clarifies that, under the CWA:

- All tributaries to the nation’s traditional navigable waters, interstate waters, the territorial seas, or impoundments of these waters would be protected because they are critical to the chemical, physical, and biological integrity of these waters.
- Waters, including wetlands, that are adjacent to traditional navigable waters, interstate waters, the territorial seas, jurisdictional tributaries, or impoundments of these waters would be protected because such waters possess a significant nexus to traditional navigable waters, interstate waters, or the territorial seas.
- Some waters would remain subject to a case-specific evaluation of whether or not such waters meet the legal standards for federal jurisdiction established by the Supreme Court.
- Certain waters are excluded, as described below.

The proposed rule also discusses several regulatory alternatives that would reduce or eliminate the need for case-specific evaluations, to provide even greater clarity for the public. The proposed rule retains the agencies’ longstanding exclusions for waste treatment systems and prior converted cropland, from the definition of “waters of the United States.” Moreover, the agencies also propose to clarify for the first time, by rule, that certain features and types of waters are not considered “waters of the United States.” These include features such as certain intermittent and ephemeral ditches; artificially irrigated areas that would revert to uplands if irrigation were to cease; artificial lakes and ponds used for purposes such as stock watering, irrigation, settling basins, or rice growing; and groundwater, including groundwater drained through subsurface drainage systems.

The agencies’ proposed rule continues to reflect the states’ primary and exclusive authority over water allocation and water rights administration, as well as state and federal co-regulation of water quality.

The agencies worked hard to assure that the proposed rule reflects these fundamental CWA principles,

which we share with our state partners. Now that the agencies have released a proposed rule, we look forward to additional opportunities for close collaboration with state and local governments to review the comments we received during our voluntary federalism consultation and to discuss how the proposed rule addresses those comments. The agencies will continue to take input from state and local governments as the rulemaking process continues.

Concurrent with the release of the proposed rule, the agencies published an economic analysis of the benefits and costs of the proposed rule based on implementation of all parts of the CWA. We concluded that the proposed rule would provide an estimated \$388 million to \$514 million annually of benefits to the public, including reducing flooding, filtering pollution, providing wildlife habitat, supporting hunting and fishing, and recharging groundwater. The public benefits significantly outweigh the costs of about \$162 million to \$278 million per year for mitigating impacts to streams and wetlands, and taking steps to reduce pollution to waterways.<sup>4</sup>

### **Benefits of the Proposed Rule for Agriculture**

For the past several years, the EPA and the Corps have listened to input from the agriculture community while developing the proposed rule. Using the input from those discussions, the EPA and the Corps then worked with the U.S. Department of Agriculture to ensure that concerns raised by farmers and the agricultural industry were addressed in the proposed rule. The proposed rule does not change, in any way, existing CWA exemptions from permitting for discharges of dredged and/or fill material into waters of the U.S. associated with agriculture, ranching, and forestry activities, including the exemptions for:

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<sup>4</sup> This analysis is available at [http://www2.epa.gov/sites/production/files/2014-03/documents/wus\\_proposed\\_rule\\_economic\\_analysis.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf).

- Normal farming, silviculture, and ranching practices, which include plowing, seeding, cultivating, minor drainage, and harvesting for production of food, fiber, and forest products;
- Upland soil and water conservation practices;
- Agricultural stormwater discharges;
- Return flows from irrigated agriculture;
- Construction and maintenance of farm or stock ponds or irrigation ditches;
- Maintenance of drainage ditches; and
- Construction or maintenance of farm, forest, and temporary mining roads, where constructed and maintained in accordance with best management practices.

I want to emphasize that farmers, ranchers, and foresters who are conducting these activities covered by the exemptions (activities such as plowing, tilling, planting, harvesting, building and maintaining roads, ponds and ditches, and many other activities in waters on their lands), can continue these practices after the new rule without the need for approval from the Federal government. Additionally, the proposed rule expressly excludes groundwater from jurisdiction, including groundwater in subsurface tile drains. It reduces jurisdiction over ditches, and maintains the existing exclusions for prior converted cropland and waste treatment systems, including treatment ponds or lagoons.

In addition, in coordination with USDA's Natural Resources Conservation Service (NRCS), the EPA and the Corps clarified that certain additional NRCS conservation practices occurring in "Waters of the U.S", identified by the USDA, the EPA, and the Corps, and implemented in accordance with published USDA conservation practice standards, are exempted from CWA Section 404 permitting as normal farming activities. The agencies did so through an interpretive rule that was published at the same time as the proposed rule and that went into effect on April 3, 2014. Moreover, through a memorandum of understanding, EPA, the Corps, and USDA now have a collaborative process for working together to



implement these exemptions. It will facilitate the periodical identification, review, and update of the list of NRCS conservation practice standards and activities that would qualify under the exemption.<sup>5</sup>

### **Science and Public Input in the Agencies' Rulemaking Efforts**

The agencies' rulemaking efforts have been informed by the latest peer-reviewed science regarding the connections between aquatic resources and effects on downstream waters. In preparation for the proposed rule, the EPA reviewed and considered more than 1,000 peer-reviewed scientific papers and other data, and the EPA's Office of Research and Development prepared a draft peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of tributaries and wetlands on downstream waters. This draft report, "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*," informed the agencies' development of the proposed rule.<sup>6</sup> Following an earlier external peer review, the Report is currently undergoing peer review led by EPA's Science Advisory Board (SAB). We expect the SAB review to be completed later in 2014. The rule will not be finalized until the EPA develops a final scientific report that considers the results of the SAB review, which will help inform the final rule.

### **Next Steps**

The agencies published the proposed rule in the Federal Register on April 21, and the public comment period on the proposed rule will be open for 182 days, closing on October 20. During this period, the agencies are launching a robust outreach effort, holding discussions around the country and gathering input from states, local governments, and other stakeholders needed to shape a final rule. We welcome comments from all stakeholders on the agencies' proposed rule. At the conclusion of the rulemaking

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<sup>5</sup> The agencies' interpretive rule and memorandum of understanding are available at <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>.

<sup>6</sup> The draft report is available at [http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr\\_activites/Watershed%20Connectivity%20Report](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report).

process, the agencies will review the entirety of the completed administrative record, including public comments and the EPA's final science synthesis report. The comments will be summarized and made publicly available. The agencies will make appropriate revisions to the rule in response to public comments and to recommendations from the Science Advisory Board's review of the scientific report.

## **Conclusion**

Thank you Chairman Smith, Ranking Member Johnson, and members of the Committee, for this opportunity to discuss the agencies' efforts to provide additional clarity regarding the geographic scope of the Clean Water Act. I look forward to robust public input on the agencies' proposed rule to ensure that it achieves the goal of providing greater predictability, consistency, and clarity in the process of identifying waters that are, and are not, covered by the CWA.

Thank you again, and I will be happy to answer your questions.