Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

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January 30, 2015

SUMMARY OF SUBJECT MATTER

TO: Members, Committee on Transportation and Infrastructure
FROM: Staff, Subcommittee on Water Resources and Environment
RE: Joint Hearing on "Impacts of the Proposed Waters of the United States Rule on State and Local Governments"

PURPOSE

On Wednesday, February 4, 2015, at 10:00 a.m., in HVC-210 of the House Visitors Center, the Committee on Transportation and Infrastructure will hold a Full Committee joint hearing with the Senate Committee on Environment and Public Works on "Impacts of the Proposed Waters of the United States Rule on State and Local Governments." The committees will receive testimony from the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (Corps), and several state and local governmental stakeholder representatives on a joint EPA and Corps proposed rulemaking to redefine the regulatory term "waters of the United States" under the Clean Water Act.

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).) 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 parties 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 SCOPE OF CLEAN WATER ACT JURISDICTION

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 CWA JURISDICTION

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

In the first case, *United States v. Riverside Bayview Homes, Inc.*[1] (*Riverside Bayview*), the Supreme Court unanimously 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.

In the second case, *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*[2] ("*SWANCC*"), the Court issued a 5-to-4 decision that overturned the authority of the Corps of Engineers to regulate intrastate, isolated waters, including wetlands, based solely upon the presence of migratory birds.

In the third case, *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*[3] (hereinafter collectively referred to as "*Rapanos*"), 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 Justice Scalia plurality opinion, providing a "relatively permanent/flowing waters" test, supported by four justices; (2) the Justice Kennedy opinion, which proposed a "significant nexus" test, and (3) the Justice Stevens dissenting opinion, supported by the remaining four justices, advocating 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*, dated January 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*

[1] *See* 474 U.S. 121 (1985).
[2] *See* 531 U.S. 159 (2001).
[3] The Supreme Court granted *certiorari* in both *Rapanos v. United States*, No. 04-1034, and *Carabell v. Army Corps of Engineers*, No. 04-1384, and consolidated the cases for review. *Rapanos v. United States*, 126 S.Ct. 2208 (June 19, 2006).

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 water") 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.

In May 2011, EPA and the Corps published in the Federal Register proposed guidance regarding identification of waters subject to jurisdiction under the CWA. (*See* 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*").) This guidance would have replaced the 2003 and 2008 guidance. In September 2013, the Corps and EPA announced their withdrawal of the proposed guidance before the 2011 guidance was finalized.

THE AGENCIES' PROPOSED REVISED CWA JURISDICTION RULE

On April 21, 2014, EPA and the Corps published in the Federal Register a proposed rule on the regulatory definition of the term "waters of the United States" under the CWA. (*See* 79 Fed. Reg. 22188.) The proposed rule was subject to a public comment period, which closed on November 14, 2014.

Under the proposed rule, the Corps and EPA would define 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 provides 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 concern with and support of the proposed rulemaking.

Those expressing concern with the proposed rulemaking have criticized the process by which the agencies have moved forward with the proposed rulemaking, as well as the substance of the rule itself, which they suggest fails to provide reasonable clarity, is inconsistent with Supreme Court precedent, and could broaden the scope of CWA jurisdiction, thereby triggering greater permit obligations for discharges to waters that currently may not be subject to the Act.

Those expressing support for the proposed rulemaking have suggested that this effort will provide greater clarity and certainty in the confusing jurisdictional/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.

The current regulatory agenda for EPA identifies a date of April 2015 for issuance of the final rule. (*See* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=2040-AF30.)

WITNESSES

Panel I

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
for Civil Works

Panel II

The Honorable E. Scott Pruitt
Attorney General
State of Oklahoma

The Honorable Adam H. Putnam
Florida Commissioner of Agriculture
Florida Department of Agriculture and Consumer Services
[On behalf of the National Association of State Departments of Agriculture]

The Honorable Sallie Clark
Commissioner, District 3
El Paso County, CO
[On behalf of the National Association of Counties]

The Honorable Timothy Mauck
Commissioner, District 1
Clear Creek County, CO

Lemuel M. Srolovic
Bureau Chief, Environmental Protection Bureau
Office of New York State Attorney General Eric T. Schneiderman