

REGULATORY INTEGRITY PROTECTION ACT OF 2015

APRIL 27, 2015.—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. 1732]

[Including cost estimate of the Congressional Budget Office]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 1732) to preserve existing rights and responsibilities with respect to waters of the United States, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Regulatory Integrity Protection Act of 2015”.

SEC. 2. WITHDRAWAL OF EXISTING PROPOSED RULE.

Not later than 30 days after the date of enactment of this Act, the Secretary of the Army and the Administrator of the Environmental Protection Agency shall withdraw the 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” (79 Fed. Reg. 22188 (April 21, 2014)) and any final rule based on such proposed rule (including RIN 2040–AF30).

SEC. 3. DEVELOPMENT OF NEW PROPOSED RULE.

(a) **IN GENERAL.**—The Secretary of the Army and the Administrator of the Environmental Protection Agency shall develop a new proposed rule to define the term “waters of the United States” as used in the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

(b) **DEVELOPMENT OF NEW PROPOSED RULE.**—In developing the new proposed rule under subsection (a), the Secretary and the Administrator shall—

(1) take into consideration the public comments received on—

- (A) the proposed rule referred to in section 2;
- (B) the accompanying economic analysis of the proposed rule entitled “Economic Analysis of Proposed Revised Definition of Waters of the United States” (dated March 2014); and
- (C) the report entitled “Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of Scientific Evidence” (EPA/600/R-14/475F; dated January 2015);

(2) jointly consult with and solicit advice and recommendations from representative State and local officials, stakeholders, and other interested parties on how to define the term “waters of the United States” as used in the Federal Water Pollution Control Act; and

(3) prepare a regulatory proposal that will, consistent with applicable rulings of the United States Supreme Court, specifically identify those waters covered under, and those waters not covered under, the Federal Water Pollution Control Act—

- (A) taking into consideration—
 - (i) the public comments referred to in paragraph (1); and
 - (ii) the advice and recommendations made by the State and local officials, stakeholders, and other interested parties consulted under this section; and
- (B) incorporating the areas and issues where consensus was reached with the parties.

(c) **FEDERALISM CONSULTATION REQUIREMENTS.**—As part of consulting with and soliciting advice and recommendations from State and local officials under subsection (b), the Secretary and the Administrator shall—

(1) seek to reach consensus with the State and local officials on how to define the term “waters of the United States” as used in the Federal Water Pollution Control Act;

(2) provide the State and local officials with notice and an opportunity to participate in the consultation process under subsection (b);

(3) consult with State and local officials that represent a broad cross-section of regional, economic, policy, and geographic perspectives in the United States;

(4) emphasize the importance of collaboration with and among the State and local officials;

(5) allow for meaningful and timely input by the State and local officials;

(6) recognize, preserve, and protect the primary rights and responsibilities of the States to protect water quality under the Federal Water Pollution Control Act, and to plan and control the development and use of land and water resources in the States;

(7) protect the authorities of State and local governments and rights of private property owners over natural and manmade water features, including the continued recognition of Federal deference to State primacy in the development of water law, the governance of water rights, and the establishment of the legal system by which States mediate disputes over water use;

(8) incorporate the advice and recommendations of the State and local officials regarding matters involving differences in State and local geography, hydrology, climate, legal frameworks, economies, priorities, and needs; and

(9) ensure transparency in the consultation process, including promptly making accessible to the public all communications, records, and other documents of all meetings that are part of the consultation process.

(d) **STAKEHOLDER CONSULTATION REQUIREMENTS.**—As part of consulting with and soliciting recommendations from stakeholders and other interested parties under subsection (b), the Secretary and the Administrator shall—

(1) identify representatives of public and private stakeholders and other interested parties, including small entities (as defined in section 601 of title 5, United States Code), representing a broad cross-section of regional, economic, and geographic perspectives in the United States, which could potentially be affected, directly or indirectly, by the new proposed rule under subsection (a), for the purpose of obtaining advice and recommendations from those representatives about the potential adverse impacts of the new proposed rule and means for reducing such impacts in the new proposed rule; and

(2) ensure transparency in the consultation process, including promptly making accessible to the public all communications, records, and other documents of all meetings that are part of the consultation process.

(e) **TIMING OF FEDERALISM AND STAKEHOLDER CONSULTATION.**—Not later than 3 months after the date of enactment of this Act, the Secretary and the Administrator shall initiate consultations with State and local officials, stakeholders, and other interested parties under subsection (b).

(f) **REPORT.**—The Secretary and the Administrator shall prepare a report that—

(1) identifies and responds to each of the public comments filed on—

(A) the proposed rule referred to in section 2;

(B) the accompanying economic analysis of the proposed rule entitled “Economic Analysis of Proposed Revised Definition of Waters of the United States” (dated March 2014); and

(C) the report entitled “Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of Scientific Evidence” (EPA/600/R-14/475F; dated January 2015);

(2) provides a detailed explanation of how the new proposed rule under subsection (a) addresses the public comments referred to in paragraph (1);

(3) describes in detail—

(A) the advice and recommendations obtained from the State and local officials consulted under this section;

(B) the areas and issues where consensus was reached with the State and local officials consulted under this section;

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

(D) the reasons for the continuing disagreements;

(4) provides a detailed explanation of how the new proposed rule addresses the advice and recommendations provided by the State and local officials consulted under this section, including the areas and issues where consensus was reached with the State and local officials;

(5) describes in detail—

(A) the advice and recommendations obtained from the stakeholders and other interested parties, including small entities, consulted under this section about the potential adverse impacts of the new proposed rule and means for reducing such impacts in the new proposed rule; and

(B) how the new proposed rule addresses such advice and recommendations;

(6) provides a detailed explanation of how the new proposed rule—

(A) recognizes, preserves, and protects the primary rights and responsibilities of the States to protect water quality and to plan and control the development and use of land and water resources in the States; and

(B) is consistent with the applicable rulings of the United States Supreme Court regarding the scope of waters to be covered under the Federal Water Pollution Control Act; and

(7) provides comprehensive regulatory and economic impact analyses, utilizing the latest data and other information, on how definitional changes in the new proposed rule will impact, directly or indirectly—

(A) each program under the Federal Water Pollution Control Act for Federal, State, and local government agencies; and

(B) public and private stakeholders and other interested parties, including small entities, regulated under each such program.

(g) **PUBLICATION.**—

(1) FEDERAL REGISTER NOTICE.—Not later than 3 months after the completion of consultations with and solicitation of recommendations from State and local officials, stakeholders, and other interested parties under subsection (b), the Secretary and the Administrator shall publish for comment in the Federal Register—

- (A) the new proposed rule under subsection (a);
- (B) a description of the areas and issues where consensus was reached with the State and local officials consulted under this section; and
- (C) the report described in subsection (f).

(2) DURATION OF REVIEW.—The Secretary and the Administrator shall provide not fewer than 180 days for the public to review and comment on—

- (A) the new proposed rule under subsection (a);
- (B) the accompanying economic analysis for the new proposed rule; and
- (C) the report described in subsection (f).

(h) PROCEDURAL REQUIREMENTS.—Subchapter II of chapter 5, and chapter 7, of title 5, United States Code (commonly known as the “Administrative Procedure Act”) shall apply to the development and review of the new proposed rule under subsection (a).

(i) STATE AND LOCAL OFFICIALS DEFINED.—In this section, the term “State and local officials” means elected or professional State and local government officials or their representative regional or national organizations.

PURPOSE OF THE LEGISLATION

The purpose of H.R. 1732 is to preserve existing rights and responsibilities under the Federal Water Pollution Control Act with respect to Waters of the United States by requiring the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively, the “Agencies”) to withdraw a proposed rule the Agencies have developed regarding the scope of federal jurisdiction under the Federal Water Pollution Control Act, consult with state and local officials, stakeholders, and other interested parties on how to identify those waters covered under, and those waters not covered under, the Federal Water Pollution Control Act, and to develop a new proposed rule after taking into consideration all of the comments received on the original proposed rule and the advice and recommendations made by the state and local officials, stakeholders, and other interested parties that were consulted.

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 ma-

terial. 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 possibly 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 related water quality management provisions under the CWA, 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 CFR § 328.3; 40 CFR § 122.2; 40 CFR § 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. The Court could not say the Corps’ conclusion that the adjacent wetlands were inseparably bound up with the jurisdictional waters is unreasonable.

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, in these cases, held in favor of the petitioners, who had asserted that there are limits to federal jurisdiction under the CWA. However, the court did not clearly define what those jurisdictional limits are.

In the *SWANCC* case, the Supreme Court overturned the authority of the Corps 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 found nothing approaching a clear statement from Congress that it intended CWA jurisdiction under section 404(a) to reach an abandoned sand and gravel pit such as the ones involved in that case, and noted that there were significant constitutional questions raised by the Corps’ application of their regulations. The Court also noted that permitting the Corps to claim federal jurisdiction over ponds and mudflats falling within the migratory bird rule would result in a significant impingement of the states’ traditional and primary power over land and water use.

In the *Rapanos* case, the Supreme Court again questioned the scope of CWA jurisdictional authority. However, 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 concurred with Justice Scalia’s opinion, but 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 regulatory 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 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; 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 well-established notice-and-comment rulemaking procedures. The Agencies received comments outlining other issues, including that the proposed guidance misconstrues

the Supreme Court's cases, is inconsistent with the Agencies' regulations, and expands federal jurisdiction under the CWA.

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 interagency 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 agencies later further extended the public comment period on the rule to November 14, 2014. (See 79 Fed. Reg. 61590 (Oct. 14, 2014) (*Extension of Comment Period for the Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule and Notice of Availability*)).

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 concerns 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 Su-

preme 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.

Approximately seven states, seven counties and 21 cities, along with major environmental groups, breweries, bed and breakfasts, and some outdoor recreational groups, have commented in support of the rule. They expressed support for the proposed rulemaking, and commented that the proposed rule provides much needed clarity and renewed protection over waters where CWA jurisdiction has been called into question under both the rulings of the Supreme Court and by the Agencies' 2003 and 2008 guidance documents. (See, e.g., Testimony of Lemuel M. Srolovic, Bureau Chief, Environmental Protection Bureau, office of New York State Attorney General Eric T. Schneiderman (presented at the Joint Hearing of the House Committee on Transportation and Infrastructure and the Senate Committee on Environment and Public Works on "Impacts of the Proposed Waters of the United States Rule on State and Local Governments" (Feb. 4, 2015) (hereinafter, "2015 CWA Joint Hearing") (noting that the proposed rule is "grounded in solid peer-reviewed science" and "advances the Clean Water Act's protection of state waters downstream of other states by securing a national federal 'floor' for water pollution control, thereby maintaining the consistency and effectiveness of the downstream states' water pollution programs"); Testimony of Commissioner Timothy Mauck, Board of Commissioners, Clear Creek Colorado (presented at the 2015 CWA Joint Hearing) (commenting that the proposed rule "should help provide more regulatory certainty and more timely review of permit applications," noting that "by clarifying and simplifying the question of jurisdiction for [intermittent and ephemeral] tributaries and adjacent wetlands, [permit] applications should be able to more quickly get the substance of their proposals reviewed without those lengthy delays created by doing case-by-case jurisdictional analyses").) Some state and local officials (and EPA, itself) said that the Agencies undertook an extensive public comment period, including conducting over 400 public meetings throughout the country. EPA also said that it created a special process for engaging with state representatives, and established a local government advisory committee workgroup to have local views on the proposed rule.

Those expressing concerns 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, including concerns over the lack of clarity and the broadened scope of the rule.

Approximately 32 states, approximately 370 individual counties and the National Association of Counties and the National Association of County Engineers, and approximately 150 individual towns and the National League of Cities, the U.S. Conference of Mayors, and the National Association of Towns and Townships, along with the majority of the regulated communities, including agriculture, business and industry, energy, forestry, real estate, construction, transportation, mining, manufacturing, and water districts and conservation districts, have commented, expressing concerns with the rule.

The expressed 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, when the Agencies decided to develop a rule, they simply proceeded ahead with a rulemaking that is based on the earlier proposed guidance, thereby codifying the guidance that raised so many concerns; the process prejudices the science underlying the rule; and many representatives of state and local governments and the regulated community 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, follow an open, collaborative rulemaking process, and repropose a revised rule that takes into consideration the advice and recommendations of state and local governments and other stakeholders. (*See, e.g.*, Testimony of the Honorable Sallie Clark, Commissioner, El Paso County, CO, on behalf of the National Association of Counties (presented at the 2015 CWA Joint Hearing); Testimony of Adam H. Putnam, Commissioner of Agriculture, State of Florida, on behalf of the National Association of State Departments of Agriculture (presented at the 2015 CWA Joint Hearing); Testimony of E. Scott Pruitt Attorney General of Oklahoma (presented at the 2015 CWA Joint Hearing); 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 concerns 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 instead result in litigation over their proper meaning. (*See, e.g.*, Testimony of the Honorable Sallie Clark, Commissioner, El Paso County, CO, on behalf of the National Association of Counties (presented at the 2015 CWA Joint Hearing); Testimony of Adam H. Putnam, Commissioner of Agriculture, State of Florida, on behalf of the National Association of State Departments of Agriculture (presented at the 2015 CWA Joint Hearing); Testi-

mony of E. Scott Pruitt Attorney General of Oklahoma (presented at the 2015 CWA Joint Hearing); 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. Pipher, 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.)

Legislation to preserve existing rights and responsibilities with respect to waters of the United States

On April 13, 2015, House Committee on Transportation and Infrastructure Chairman Shuster, along with Water Resources and Environment Subcommittee Chairman Gibbs and 25 other Members of the House of Representatives, introduced H.R. 1732, the “Regulatory Integrity Protection Act of 2015.” The legislation was introduced in response to the concerns that many stakeholders and witnesses have expressed regarding the process used to develop the proposed CWA jurisdiction rule.

The sponsors of H.R. 1732 introduced this legislation to require the Agencies to withdraw the proposed rule, consult with state and local officials, stakeholders, and other interested parties on how to identify those waters covered under, and those waters not covered under, the Federal Water Pollution Control Act, and to develop a new proposed rule after taking into consideration all of the comments received on the original proposed rule and the advice and recommendations made by the state and local officials, stakeholders, and other interested parties that were consulted. 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.

HEARINGS

On February 4, 2015, the House Committee on Transportation and Infrastructure and the Senate Committee on Environment and Public Works held a joint oversight hearing on the “Impacts of the Proposed Waters of the United States Rule on State and Local Governments.” The committees received testimony from the Administrator of the EPA, the Assistant Secretary of the Army for Civil Works, and representatives of state and local governments on the joint EPA and Corps proposed rulemaking to redefine the regulatory term “waters of the United States” under the CWA. A legislative hearing was not held on the bill.

In the 113th Congress, 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 governments and private sector stakeholders on the joint EPA and Corps proposed rulemaking to redefine the regulatory term “waters of the United States” under the CWA.

LEGISLATIVE HISTORY AND CONSIDERATION

On April 13, 2015, House Committee on Transportation and Infrastructure Chairman Shuster introduced H.R. 1732, the “Regulatory Integrity Protection Act of 2015.” On April 15, 2015, the Committee on Transportation and Infrastructure met in open session to consider H.R. 1732, and ordered the bill reported favorably to the House by roll call vote with a quorum present. The vote was 36 yeas to 22 nays.

Delegate Eleanor Holmes Norton offered an amendment in Committee. The amendment would exempt the Agencies from the requirements of the bill to protect the quality of surface water that is available for public water supplies. The amendment was defeated by roll call vote with a quorum present. The vote was 23 yeas to 33 nays. Representative Huffman also offered an amendment in Committee. The amendment would recognize federal deference to state primacy in the development of water law, the governance of water rights, and the establishment of the legal system by which states mediate disputes over water use. The amendment was adopted 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. 1732, two roll call votes were taken.

The first roll call vote was taken on an amendment offered in Committee by Delegate Eleanor Holmes Norton. The Committee disposed of this amendment by roll call vote as follows:

The other roll call vote was taken on reporting the bill, as amended, to the House with a favorable recommendation. The bill, as amended, was reported to the House with a favorable recommendation after a roll call vote which was disposed of as follows:

COMMITTEE OVERSIGHT FINDINGS

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

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

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

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 1732 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 27, 2015.

Hon. BILL SHUSTER,
*Chairman, Committee on Transportation and Infrastructure,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1732, the Regulatory Integrity Protection Act of 2015.

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

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 1732—Regulatory Integrity Protection Act of 2015

H.R. 1732 would require the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to withdraw the proposed rule published in the Federal Register on April 21, 2014, that defines the scope of waters protected by the Clean Water Act (CWA). Under the CWA, EPA and the Corps, along with the states, serve as co-regulators of activities affecting the nation's waters.

CBO estimates that implementing H.R. 1732 would cost \$5 million over the 2016–2020 period, subject to the availability of appropriations. The legislation would affect direct spending because it would reduce fees collected by the Corps for issuing permits under the CWA. However, CBO estimates that the change in those fees would be negligible. Because the legislation would affect direct spending, pay-as-you-go procedures apply. Enacting H.R. 1732 would not affect revenues.

The bill would require EPA and the Corps to develop a new proposed rule, taking into account public comments submitted for the April 21, 2014, proposed rule as well as the regulatory analysis for that proposed rule and a related EPA report issued in January 2015. This legislation also would direct EPA and the Corps to consult with state and local officials, stakeholders, and other interested parties to seek consensus on which waters and wetlands are covered by the CWA. Finally, H.R. 1732 would require EPA and the Corps to prepare a report for the Congress that responds to public comments filed on the April 2014 proposed rule and associated documents and that describes how the new proposed rule addresses such comments. The report also would have to explain how the new proposed rule addresses the advice and recommendations obtained from other parties, and it would have to include a comprehensive regulatory and economic analysis of the new proposed rule.

Under H.R. 1732, CBO expects that funds that would have been used to develop and implement the current proposed rule and to draft guidance would be used to develop an alternative regulatory proposal. Based on EPA's prior experience in developing new regulations, CBO estimates that it would cost an additional \$5 million over the 2016–2020 period to address the roughly 1 million comments EPA and the Corps have received concerning the April 2014 proposed rule, conduct extensive outreach efforts to interested parties, and help prepare a comprehensive regulatory and economic analysis.

The regulatory changes proposed under current law would expand the area covered by federal regulations and increase the number of permits issued by the Corps under the CWA to dispose of dredged or fill material from development projects near regulated waters. CBO expects that the legislation would probably reduce or delay that expansion leading to a reduction in the number of permits issued. Because the amount charged for those permits is nominal, CBO estimates enacting H.R. 1732 would have an insignificant effect on offsetting receipts over the 2016–2025 period.

H.R. 1732 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act; any costs incurred by state, local, or tribal governments would result from participation in a voluntary federal program.

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

PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goals and objectives of this legislation are to withdraw a proposed rule the Agencies have developed regarding the scope of federal jurisdiction under the CWA, consult with state and local officials, stakeholders, and other interested parties on how to identify those waters covered under, and those waters not covered under, the CWA, and to develop a new proposed rule after taking into consideration all of the comments received on the original proposed rule and the advice and recommendations made by the state and local

officials, stakeholders, and other interested parties that were consulted.

ADVISORY OF EARMARKS

In compliance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1732 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(g) of H. Res. 5, 114th Cong. (2015), the Committee finds that no provision of H.R. 1732, as reported, 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(i) of H. Res. 5, 114th Cong. (2015), the Committee estimates that enacting H.R. 1732, as reported, specifically directs the withdrawal of a proposed rulemaking and directs the Agencies to develop a new proposed rule taking into consideration all of the comments received on the proposed rule, within the meaning of section 551 of title 5, United States Code, to replace the withdrawn rulemaking.

FEDERAL MANDATES STATEMENT

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

PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1974 requires the report of any Committee on a bill or joint resolution to include a statement on the extent to which the bill or joint resolution is intended to preempt state, local, or tribal law. The Committee states that H.R. 1732 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. 1732 states that this Act may be cited as the “Regulatory Integrity Protection Act of 2015.”

Section 2. Withdrawal of existing proposed rule

Section 2 of H.R. 1732 requires the Secretary of the Army (“Secretary”) and the Administrator of the Environmental Protection Agency (“Administrator”) to withdraw the 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” (79 Fed. Reg. 22188 (April 21, 2014)) and any final rule based on such proposed rule (including RIN 2040–AF30). The Secretary and the Administrator are to withdraw the proposed rule not later than 30 days after the date of enactment of this Act.

*Section 3. Development of new proposed rule**Subsection (a): In general*

Subsection (a) requires the Secretary and the Administrator to develop a new proposed rule to define the term “waters of the United States” as used in the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

Subsection (b): Development of new proposed rule

Subsection (b) lays out the process the Secretary and the Administrator must go through to develop the new proposed rule.

Paragraph (1) of subsection (b) requires that, in developing the new proposed rule, the Secretary and the Administrator must take into consideration the public comments received on (A) the proposed rule referred to in Section 2; (B) the accompanying economic analysis of the proposed rule entitled “Economic Analysis of Proposed Revised Definition of Waters of the United States” (dated March 2014); and (C) the report entitled “Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of Scientific Evidence” (EPA/600/R–14/475F; dated January 2015).

Paragraph (1) of subsection (b) is intended to ensure that the public input that the Secretary and the Administrator have received from the current proposed rulemaking (referred to in Section 2 of the bill) is utilized in the development of the new proposed rule under Section 3 of the bill. The Secretary and the Administrator received extensive substantive, unique comments on their proposed rule, the accompanying economic analysis, and the scientific review document that the Secretary and the Administrator have said they based the proposed rule on. The Secretary and the Administrator must take into consideration the substantive, unique public comments and insights gained from these public comment processes when developing the new proposed rule.

Paragraph (2) of subsection (b) requires the Secretary and the Administrator to jointly consult with and solicit advice and recommendations from representative state and local officials, stakeholders, and other interested parties on how to define the term “waters of the United States” as used in the Federal Water Pollution Control Act. The requirements for consulting and seeking such

advice and recommendations include those described in subsection (c) “Federalism Consultation Requirements” and subsection (d) “Stakeholder Consultation Requirements.” These requirements aim to ensure transparency and openness in the consultation processes established by this bill, and participation by state and local officials, stakeholders, and other interested parties representing a broad cross-section of regional, economic, policy, geographic, and other perspectives around the nation. The Secretary and the Administrator must aim to include as many state and local officials, stakeholders and other interested parties as have a desire to participate, and must not restrict parties representing particular perspectives.

Paragraph (3) of subsection (b) requires the Secretary and the Administrator to prepare a new regulatory proposal that will, consistent with applicable rulings of the United States Supreme Court, specifically identify those waters covered under, and those waters not covered under, the Federal Water Pollution Control Act. In preparing the new proposed rule, the Secretary and the Administrator must take into consideration the public comments referred to in paragraph (1), and the advice and recommendations made by the state and local officials, stakeholders, and other interested parties consulted under this section. The Secretary and the Administrator also must incorporate, into the new proposed rule, the areas and issues where consensus was reached with the parties.

Part of the Secretary’s and Administrator’s responsibility in developing the new regulatory proposal is to provide clarity regarding waters covered, and not covered, under the CWA. In providing such clarity, the Secretary and the Administrator must specifically identify in the proposed rule what particular waters are covered and what are not covered. General categorizations of waters are not sufficient. Those waters not covered under the CWA are reserved to the states to determine whether and how to regulate.

The new proposed rule will 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. Additionally, the advice and recommendations that come out of the Federalism Consultation (subsection (c)) and the Stakeholder Consultation (subsection (d)) must be taken into account when developing the new rule. Areas of consensus reached with the parties to the consultations regarding which waters are covered and which are not covered must be incorporated into the new proposed rule.

Subsection (c): Federalism consultation

Subsection (c) lays out the requirements the Secretary and the Administrator must follow as they undertake the Federalism Consultation with state and local officials required under subsection (b). The term “State and local officials” (defined in subsection (i)) means elected or professional state and local government officials or their representative regional or national organizations. When consulting with and soliciting advice and recommendations from state and local officials, the Secretary and the Administrator shall comply with the requirements in paragraphs (1) through (9) of subsection (c):

(1) Paragraph (1) requires the Secretary and the Administrator to seek to reach consensus with the state and local officials on how to define the term “waters of the United States” as used in the Federal Water Pollution Control Act.

(2) Paragraph (2) requires the Secretary and the Administrator to provide the state and local officials with notice and an opportunity to participate in the consultation process under subsection (b).

(3) Paragraph (3) requires the Secretary and the Administrator to consult with state and local officials that represent a broad cross-section of regional, economic, policy, and geographic perspectives in the United States.

(4) Paragraph (4) requires the Secretary and the Administrator to emphasize the importance of collaboration with and among the state and local officials.

(5) Paragraph (5) requires the Secretary and the Administrator to allow for meaningful and timely input by the state and local officials.

(6) Paragraph (6) requires the Secretary and the Administrator to recognize, preserve, and protect the primary rights and responsibilities of the states to protect water quality under the CWA, and to plan and control the development and use of land and water resources in the states.

(7) Paragraph (7) requires the Secretary and the Administrator to protect the authorities of state and local governments and rights of private property owners over natural and manmade water features, including the continued recognition of federal deference to state primacy in the development of water law, the governance of water rights, and the establishment of the legal system by which states mediate disputes over water use.

(8) Paragraph (8) requires the Secretary and the Administrator to incorporate the advice and recommendations of the state and local officials regarding matters involving differences in state and local geography, hydrology, climate, legal frameworks, economies, priorities, and needs.

(9) Paragraph (9) requires the Secretary and the Administrator to ensure transparency in the consultation process, including promptly making accessible to the public all communications, records, and other documents of all meetings that are part of the consultation process.

Paragraph (9) of subsection (c) is included in order to make the consultation process transparent to state and local officials and Congress, as well as to other stakeholders and other interested parties.

Transparency in the Federalism Consultation process is essential to ensure that the Secretary and the Administrator comply with both the requirements and the spirit of this legislation. During the consultation process, the Secretary and the Administrator must make promptly available to the public all of the information received or disseminated as part of the consultation process, including any and all documents prepared by the Secretary or the Administrator and distributed at meetings or other events, documents received by the Secretary or the Administrator, lists of invited attendees and of those who attend or participate, and any other data, handouts, communications, records, information, or docu-

ments that are part of the consultation process. The Secretary and the Administrator shall promptly make all such information available to the public, in a centralized and easy to access venue (such as a dedicated, publicly accessible Website on the Internet).

Subsection (d): Stakeholder consultation requirements

Subsection (d) lays out the requirements the Secretary and the Administrator must follow as they undertake the Stakeholder Consultation with stakeholders and other interested parties required under subsection (b).

Paragraph (1) of subsection (d) requires the Secretary and the Administrator to identify representatives of public and private stakeholders and other interested parties, including small entities (as defined in section 601 of title 5, United States Code), representing a broad cross-section of regional, economic, and geographic perspectives in the United States, who could potentially be affected, directly or indirectly, by the new proposed rule under subsection (a), for the purpose of obtaining advice and recommendations from those representatives about the potential adverse impacts of the new proposed rule and means for reducing such impacts in the new proposed rule.

Paragraph (2) of subsection (d) requires the Secretary and the Administrator to ensure transparency in the consultation process, including promptly making accessible to the public all communications, records, and other documents of all meetings that are part of the consultation process.

Paragraph (2) of subsection (d) is included in order to make the consultation process transparent to stakeholders and other interested parties, Congress, as well as to state and local officials.

Transparency in the Stakeholder Consultation process is essential to ensure that the Secretary and the Administrator comply with both the requirements and the spirit of this legislation. During the consultation process, the Secretary and the Administrator must make promptly available to the public all of the information received or disseminated as part of the consultation process, including any and all documents prepared by the Secretary or the Administrator and distributed at meetings or other events, documents received by the Secretary or the Administrator, lists of invited attendees and of those who attend or participate, and any other data, handouts, communications, records, information, or documents that are part of the consultation process. The Secretary and the Administrator shall promptly make all such information available to the public, in a centralized and easy to access venue (such as a dedicated, publicly accessible Website on the Internet).

Subsection (e): Timing of federalism and stakeholder consultation

Subsection (e) requires the Secretary and the Administrator to initiate consultations with state and local officials, stakeholders, and other interested parties under subsection (b) not later than 3 months after the date of enactment of this Act.

Subsection (f): Report

Subsection (f) requires the Secretary and the Administrator to prepare a report, along with the new proposed rule. Subsection (f) details the report's contents and requirements.

Paragraph (1) of subsection (f) requires the Secretary and the Administrator to both identify and respond to each of the public comments filed on the proposed rule referred to in section 2; the accompanying economic analysis of the proposed rule entitled "Economic Analysis of Proposed Revised Definition of Waters of the United States" (dated March 2014); and the report entitled "Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of Scientific Evidence" (EPA/600/R-14/475F; dated January 2015). The purpose of this portion of the report includes ensuring that the public is aware of and has access to all of the public comments filed on the proposed rule under section 2, economic analysis, and report; and ensuring that the Secretary and the Administrator review, evaluate, and respond to each of the public comments that were filed, including each of the issues discussed in each public comment that was filed.

Paragraph (2) of subsection (f) requires the Secretary and the Administrator to provide a detailed explanation of how the new proposed rule under subsection (a) addresses the public comments referred to in paragraph (1).

Paragraph (3) of subsection (f) requires the Secretary and the Administrator to describe in detail the advice and recommendations obtained from the state and local officials consulted under this section; the areas and issues where consensus was reached with the state and local officials consulted under this section; the areas and issues of continuing disagreement that resulted in the failure to reach consensus; and the reasons for the continuing disagreements.

Paragraph (4) of subsection (f) requires the Secretary and the Administrator to provide a detailed explanation of how the new proposed rule addresses the advice and recommendations provided by the state and local officials consulted under this section, including the areas and issues where consensus was reached with the state and local officials.

Paragraph (5) of subsection (f) requires the Secretary and the Administrator to describe in detail the advice and recommendations obtained from the stakeholders and other interested parties, including small entities, consulted under this section about the potential adverse impacts of the new proposed rule and means for reducing such impacts in the new proposed rule. Paragraph (5) also requires the Secretary and the Administrator to describe in detail how the new proposed rule addresses such advice and recommendations.

Paragraph (6) of subsection (f) requires the Secretary and the Administrator to provide a detailed explanation of how the new proposed rule recognizes, preserves, and protects the primary rights and responsibilities of the states to protect water quality and to plan and control the development and use of land and water resources in the states; and how the new proposed rule is consistent with the applicable rulings of the United States Supreme Court regarding the scope of waters to be covered under the CWA. The applicable Supreme Court rulings would include the rulings in the *Riverside Bayview*, *SWANCC*, and *Rapanos* cases.

Paragraph (7) of subsection (f) requires the Secretary and the Administrator to provide comprehensive regulatory and economic impact analyses, utilizing the latest data and other information, on how definitional changes in the new proposed rule will impact, directly or indirectly, each program under the CWA for federal, state, and local government agencies; and impact, directly or indirectly, public and private stakeholders and other interested parties, including small entities, regulated under each such program.

Paragraph (7) of subsection (f) is intended to ensure that the Secretary and the Administrator conduct rigorous regulatory and economic impact analyses of the new proposed rule that use the latest economic data and other information on how the proposed rule will impact all of the programs under the CWA. This requirement includes impacts on 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 given circumstance. This also includes analyzing impacts on the federal government, states, local government agencies, public and private stakeholders, and small entities that might be impacted by the new proposed rule under these CWA programs.

Subsection (g): Publication

Subsection (g) outlines the requirements to the Secretary and the Administrator for publication of the new proposed rule and the report under subsection (f).

Paragraph (1) of subsection (g) requires the Secretary and the Administrator to publish for comment, in the Federal Register, the new proposed rule under subsection (a); a description of the areas and issues where consensus was reached with the state and local officials consulted under this section; and the report described in subsection (f). The description of the areas and issues where consensus was reached with the state and local officials consulted, listed in subparagraph (1)(B), refers to such description to be included in the report described in Subsection (f). The Secretary and the Administrator are to publish the aforementioned items not later than 3 months after the completion of consultations with and solicitation of recommendations from state and local officials, stakeholders, and other interested parties under subsection (b).

Paragraph (2) of subsection (g) requires the Secretary and the Administrator to provide not fewer than 180 days for the public to review and comment on the new proposed rule under subsection (a); the accompanying economic analysis for the new proposed rule; and the report described in subsection (f). The description of the accompanying economic analysis for the new proposed rule, listed in subparagraph (2)(B), refers to the regulatory and economic impact analyses to be included in the report described in Subsection (f).

Subsection (h): Procedural requirements

Subsection (h) clarifies that subchapter II of chapter 5, and chapter 7, of title 5, United States Code, commonly known as the “Administrative Procedure Act,” shall apply to the development and review of the new proposed rule under subsection (a).

Subsection (i): State and local officials defined

Subsection (i) defines “State and local officials” to mean 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. 1732 would not make any changes to existing law.

DISSENTING VIEWS

We recognize that the reach and application of Clean Water Act protections have long been subject to rigorous debate. Since enactment of the Act 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 Clean Water Act permit.

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 businesses and the general public so they can be assured that water quality will be 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 this country, the waters where they fish, swim, drink, hunt, recreate or otherwise enjoy are clean and safe, and that wherever they live, their property is reasonably protected from the risk of flooding.

Unfortunately, that clarity is simply not available today. Confusion and uncertainty on the reach and application of Clean Water Act protections abound—resulting both from recent Supreme Court decisions, as well as guidance documents adopted by the Bush administration that have been uniformly criticized as “arbitrary”, “confusing”, and “frustrating”.

In response to universal calls for greater certainty,¹ April 21, 2014, the Obama administration proposed a new Clean Water rulemaking to replace the existing guidance, and to address the uncertainty and bureaucratic process related to whether a waterbody (or wetland) is covered by the Act. The agencies twice extended the public comment period for the proposed rule, which ultimately concluded on November 14, 2014 (for a total public comment period of 208 days). During that period, EPA testified that they held over 400 public meetings, and received a significant amount of public comment and input on the proposed rule.

In addition, EPA’s Office of Research and Development (ORD) undertook an independent evaluation of more than 1,200 peer-reviewed scientific publications to summarize the current scientific understanding about the connectivity of streams and wetlands to downstream waters. This “connectivity report” concluded that the science supports a strong connection between upstream waters

¹ For over a decade, members of Congress, state and local officials, industry, agriculture, and environmental organizations, and the general public have asked for a rulemaking to provide additional regulatory clarity on the scope of Clean Water Act protections. See <http://www2.epa.gov/cleanwaterrule/persons-and-organizations-requesting-clarification-waters-united-states-rulemaking>.

(and wetlands), including ephemeral (rain-dependent) and intermittent (seasonal) streams, and downstream waters—a conclusion that was supported by a subsequent review of EPA’s Science Advisory Board (SAB).

Now, after over a year of public outreach—on a scale “unprecedented” in the history of the Clean Water Act—as well as countless Congressional hearings, the agencies have submitted a revised Clean Water Protection rule to the Office of Management and Budget for final interagency review—the last step before the revised final rule would be released to the general public later this spring. In testimony to our Committee, the heads of both the Corps and EPA have identified several specific areas where the proposed rulemaking may have lacked specificity and where the agencies have committed to clarifying changes in the final rule to address these areas. But, rather than wait to review the merits of the final proposal, the Committee on Transportation and Infrastructure now reports a bill that would ensure that the agencies’ efforts to date never see the light of day and that they be required to perform the equivalent of a bureaucratic “do-loop.”

We have to ask why? Such an approach would perpetuate the regulatory confusion that exists today, adding additional costs and delay to the construction of vital projects across the nation. It would leave countless acres of wetlands and miles of streams—many of which serve as the primary source of drinking water for 117 million Americans—at risk. And, it would force the agencies to conduct what appears to be the fifth *and* sixth public comment period on interpreting the scope of the Clean Water Act in the last decade. In short, as the EPA Deputy Administrator recently testified, “*I do not know what value would be added [for delaying implementation of the Clean Water rule] other than the addition of time.*”

Blocking the agencies from releasing their final product simply makes no sense. It provides no certainty or predictability to the regulated community on where the rules apply. It requires the agencies to, again, meet with the same groups of stakeholders to talk about the same issues they have talked about for decades. And, it leaves many of our nation’s waters unprotected.

Our waters are too precious to our health, to our economies, and to our cherished way of life to treat in this way. Let the agencies finish their work, and if Congress wants to revisit this issue afterward, it has ample authority to do so.

For these reasons, we oppose H.R. 1732.

Background

The Clean Water Act (CWA) was enacted with a goal to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” The Act prohibits the addition of any pollutants into “navigable waters” unless covered by a point source permit (under section 402 of the Act) or a dredge and fill permit (under section 404). The term “navigable waters” is statutorily defined as meaning the “waters of the United States, including the territorial seas.”

The statutory language of the CWA does not definitively describe the outer reaches of protection, but uses broad terms, such as “waters of the United States,” and allows the Corps and EPA to

further define these terms through rulemaking and other administrative means. Congress' decision to utilize broadly-defined terms was a conscious one, allowing the establishment of a comprehensive "Federal floor" of protection that interested States could expand upon, without having to develop a specific definitional test that could have been inconsistent with the regional variability of waters throughout the nation. This scope of protection was also a direct response to the failed, state-by-state approach that existed prior to the CWA.

From the 1970s through 2001, the prevailing legal theory was that the CWA, like many other Federal environmental statutes, was to be applied broadly—arguably to the limits of the Commerce Clause of the U.S. Constitution. However, in 2001 (with the *SWANCC* decision²) and again in 2006 (with the *Rapanos* decisions³), the Supreme Court *for the first time* suggested some limit to the scope of the CWA; yet, the Court did not clearly define what that limit might be.

In *SWANCC*, the Court concluded only that the Corps could not use the presence of migratory birds as the sole reason for asserting jurisdiction over so-called isolated, intrastate waters. In *Rapanos*, the Court issued a 4–1–4 decision that, again, did not articulate a clear limit to the scope of the Act. Instead, the Court produced three distinct opinions that outlined three separate analyses for determining the Act's scope. Yet, because a majority of the justices did not agree on any single test, the Federal agencies (and the courts) have no majority opinion to guide them in determining what waters are covered (and what waters may not be covered) by the Act. As a result, two Federal judicial circuits currently use one test for determining CWA jurisdiction (the Kennedy significant nexus test), three circuits use both the Kennedy and the Scalia (relatively permanent waters) tests, and the remaining circuits have not concluded which test to use.

Since the *SWANCC* and *Rapanos* decisions, EPA and the Corps have issued several guidance documents to interpret how the agencies will implement these decisions. These interpretations have varied depending on the Presidential administration in office when they were drafted.

While the Clinton administration initially sought to preserve broad CWA protection⁴, the Bush administration reversed and issued guidance that narrowed the reach of CWA protections⁵, however, in doing so, the Bush administration also imposed a water-by-water "jurisdictional determination" test that required the Corps (and EPA) to demonstrate a physical connection between

² *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001).

³ *Rapanos v. United States* (consolidated with *Carabell v. United States Army Corps of Engineers*) 547 U.S. 715 (2006).

⁴ 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>.

⁵ See Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States", Joint Memorandum, 68 Fed. Reg. 1991, 1995 (January 15, 2003); EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after *Rapanos*, 72 Fed. Reg. 31824 (June 8, 2007); and Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*, located at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf.

each and every permit application to some downstream “traditionally navigable water”. This new, and extremely fact-intensive, requirement dramatically slowed the process (and increased the cost and uncertainty) of determining whether a waterbody (or wetland) was even covered by the CWA—a process that must be completed before the merits of the actual permit application, itself, can be evaluated and issued.

As a result, the regulated community, conservation and environmental organizations, and several States have commented that the current process, as outlined by the 2003 and 2008 guidance documents, remains confusing, inconsistent, and costly, and provides little environmental benefit.

For example, the following are public comments from both the regulated community and conservation organizations expressing concern about the current Bush-era guidance, which would be replaced by the proposed Clean Water Protection rule:

- “With no clear regulatory definitions to guide their determinations, what has emerged is a hodgepodge of *ad hoc* and inconsistent jurisdictional theories.”⁶

- “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.”⁷

- “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.”⁸

- “[Clean Water Act] processes and administration under the interim guidance released immediately subsequent to the *SWANCC* and *Rapanos* cases, and under the 2003 and 2008 guidance, seem to have been universally frustrating. Permit applicants, farmers, conservationists, landowners, communities, state and local agencies and other affected entities have all long expressed a strong desire for greater certainty and clearer processes since *SWANCC*. . .”⁹

- “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.”¹⁰

- “The members of [the Waters Advocacy Coalition] hold the commonsense view that an effective [Clean Water Act] enforcement program is essential to protecting our nation’s jurisdictional waters. A touchstone of an effective enforcement program is clarity in the law and implementing regulations. Currently, regulations

⁶Comments 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.

⁷Comments of the American Farm Bureau Federation, the National Association of Homebuilders, et. al., submitted January 22, 2008.

⁸Comments 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.

⁹Comments of Ducks Unlimited, submitted July 20, 2011.

¹⁰Comments of the Waters Advocacy Coalition, submitted July 29, 2011.

and guidance are ambiguous, leading to uncertainty in what the law requires, which makes it difficult for the public and the Government. For these reasons, WAC, consistent with the opinions expressed by several Justices in the *Rapanos* decision, has urged the U.S. Army Corps of Engineers (“Corps”) to conduct a clarifying rulemaking.”¹¹

According to the Corps, as a result of the current regulatory uncertainty, over 66 percent of permit applicants voluntarily *concede* CWA jurisdiction rather than maneuver through the formal process outlined by the 2003 and 2008 guidance documents.

In response to these calls for greater regulatory certainty, on April 21, 2014, the Obama administration proposed a new Clean Water rulemaking to replace the existing guidance, and to address the uncertainty and bureaucratic process related to whether a waterbody (or wetland) is covered by the Act.

Recent statements from the Administration on greater clarification in the Final Rule

As is common with any rulemaking, the agencies received both praise for and concern about the impacts of April 2014 Clean Water rulemaking. In testimony to our Committee, the federal agencies identified several specific areas where the proposed rulemaking may lack specificity and have committed to make changes to these areas before the rule is finalized later this spring.

For example, the American Farm Bureau Federation expressed concern about the distinction between “*ephemeral*” (*rain-dependent*) streams, which are currently subject to the Clean Water Act, and “erosional features” which are not. Recently, EPA testified that the agencies expect the final rule to clarify the distinction between ephemeral streams and erosional features to ensure that the final rule did not, inadvertently, bring erosional features under the scope of the Act.

Similarly, the Farm Bureau expressed concern that the proposed Clean Water Protection rule would subject all activities, even land use activities, within a “*floodplain*” to the Clean Water Act permitting requirements. While EPA clarified that, unless an activity involved the discharge of a pollutant or the placement of dredge or fill material into a “navigable water,” the Clean Water Act simply does not apply, it also recognized the inexact nature of the term “floodplain” in the proposed rule. EPA testified that it expected the final rule to provide more clarity and certainty on this issue.

Numerous groups, including the National Association of Counties, have expressed concern about the impact of the proposed rule on “*ditches*”. In response, the agencies testified that the proposed rule not only codified the current exemption for ditches, but also “expanded the definition of ditches that would be exempt under the Clean Water rule to make it clearer, [including] ditches that basically drain dry land along public lands and highways.” Further, the agencies committed to provide greater certainty, in the final rule, on what ditches are and are not protected by the Act.

¹¹Letter from the Waters Advocacy Coalition to EPA Administrator Stephen Johnson, dated August 6, 2008.

Other groups questioned whether the proposed Clean Water rule would capture *municipal separate sanitary stormwater sewer systems (MS4s) or water reuse or recycling projects*. The EPA administrator testified that “EPA has not intended to capture features . . . that have already been captured in . . . MS4 permits, [and it] is our intent to continue to encourage and respect those decisions and to encourage water reuse and recycling, which very much is consistent with the Clean Water Act and our overall intent.” Further, the administrator testified that EPA would make very clear that these exclusions are articulated in the final rule “so that people will see in writing what they have been asking us about.”

Western water supply agencies have also received clarification from EPA that the rulemaking will not add jurisdictional scope to *water supply canals, water transfers, or groundwater projects*, which are important tools used in the West to address historic drought conditions. EPA testified that “the proposed rule would not expand jurisdiction over water delivery systems [, such as canals used for irrigation, industrial, and residential water deliveries]. If such features are not covered now under the tests established by the Supreme Court, they would not become jurisdictional under the proposed rule.” The EPA also stated that “the proposed rule would not alter the status quo regarding water transfers”. EPA has also testified, numerous times, on the *jurisdictional status of groundwater* by stating, “We explicitly make sure to mention that groundwater is not included.”

Finally, several groups, such as the National Association of Home Builders, voiced concern over the proposed rule’s retaining of the regulatory term “*other waters*”. In many ways, the jurisdictional status of these waters, which can include “isolated waters”. (e.g., prairie potholes), highlights the current legal confusion caused by split Supreme Court decisions. Existing regulations cover a broad category of “other waters” which, today, remain legally subject to the Act based on “interstate or foreign commerce” connections. The proposed rule attempted to narrow jurisdiction over these waters to only those where the agencies can demonstrate a significant connection (nexus) between the water and some other jurisdictional water. Yet, even this narrower scope remains very case-specific, and does not provide the predictability sought in this rulemaking. In response, the agencies are exploring a more “transparent system for people . . . to understand what constitutes a significant nexus to comply with the instructions that the Supreme Court gave us.”

As noted above, the agencies have testified that, in many ways, the final Clean Water Protection rulemaking will result in a clearer, more precise, and more predictable process for determining the scope of Clean Water Act protections than exists today. This increased clarity and predictability will benefit individuals and businesses alike, will ensure continued protection of our water-related environment, and will sustain our precious way of life.

However, if H.R. 1732 were to be enacted, we are assured that the confused and arbitrary process in place today will remain far into the future.

Myths vs. facts on the Clean Water Protection rulemaking

Unfortunately, over the past decade, much of the debate on the reach and application of the Clean Water Act has been driven more by the rhetoric than the reality. Nowhere has this been more evident than with respect to the 2014 rulemaking effort.

Regrettably, over the past year, opponents of the ongoing rulemaking have made several outlandish claims about the intent and the potential scope of this rulemaking effort. These claims have, intentionally or unintentionally, created more confusion and more controversy on an already complicated issue.

Below are several examples of claims being made by opponents of the Clean Water Protection Act:

Ditches

Some stakeholder groups have claimed that the proposed rule would expand Clean Water Act authority over ditches. However, both the Corps and EPA have testified before our Committee that the proposed rule actually reduces federal authority over ditches by excluding ditches (including roadside ditches) that are constructed in dry lands and either (1) contain water less than year-round, or (2) do not flow unto another waterbody subject to the Act. By comparison, under the existing Bush-era guidance, which the proposed rule would replace, similarly constructed ditches that contain water on a seasonal or intermittent basis are, today, considered subject to the Clean Water Act. Accordingly, the scope of ditches covered by the proposed rule is narrower than that currently allowed under the existing guidance documents.

Agricultural practices and groundwater

Others claim that the proposed Clean Water Protection rulemaking would expand Clean Water Act authority over common agricultural practices or groundwater. Again, the facts demonstrate otherwise. For example, the proposed rule provides greater certainty to farmers, ranchers, and forestry operations by preserving all existing statutory and regulatory exemptions for common farming, ranching, and forestry practices, including existing exemptions for prior converted croplands, irrigation return flows, and “normal farming, silvicultural, and ranching activities, such as plowing, seeding cultivating, minor drainage, harvesting for the production of food, fiber, and forest products”¹² Simply put, if you can plow, plant, or harvest today without a Clean Water permit, you will not need a permit for these activities under the proposed rule.

Similarly, contrary to claims, the proposed rule would not affect an existing Clean Water Act statutory exemption for the construction and maintenance of farm or stock ponds,¹³ and would, for the first time, specifically exclude (in the regulations) artificial stock watering and irrigation ponds constructed on dry lands. The proposed rule also does not affect the existing regulatory requirements for pesticide and fertilizer applications—meaning if farmers are applying pesticides and fertilizer to dry land, the Clean Water Act simply does not apply. Finally, the proposed rule definitively states

¹² Section 404(f)(1)(A) of the Clean Water Act (33 U.S.C.1344(0)(1)(A)).

¹³ Section 404(f)(1)(C) of the Clean Water Act (33 U.S.C.1344(0)(1)(C)).

that “puddles . . . obviously are not, and have never been thought to be . . . subject to [Clean Water Act] jurisdiction.”¹⁴

On groundwater, again, contrary to claims, the proposed rule clarifies but does not expand Clean Water Act jurisdiction. Traditionally, the Clean Water Act jurisdiction has not been asserted over groundwater resources; however, that has been by practice, and not by the specific terms of existing Clean Water Act regulations. The proposed rule would, for the first time, specifically exclude “groundwater, including groundwater drained through subsurface drainage systems,” from the scope of the Clean Water Act. The heads of both the Corps and EPA have specifically testified on this point before our Committee, stating definitely that, “We do not regulate groundwater in this rule.”¹⁵

Public comment

Opponents of this rulemaking also repeatedly suggest that the Corps and EPA have failed to solicit and obtain public comments on this proposed rule. On the contrary, according to Federal agency witnesses, the amount of public outreach and comment on this proposed rule is “unprecedented”¹⁶ the history of the Clean Water Act—lasting over 207 days (with two extended public comment periods), and garnering close to 1 million comments.¹⁷ In addition, EPA consulted with various stakeholders, particularly those from the agricultural community, and held over 400 public meetings throughout the country on the proposed rulemaking.

EPA also utilized special processes for engaging the States and local government officials. For the States, EPA worked with the Environmental Council of the States, the Association of Clean Water Administrators, and the Association of State Wetland Managers, to meet with individual state representatives on the proposed rule. Further, when describing EPA’s meetings with state representatives, EPA’s Deputy Assistant Administrator stated, “At the last meeting, which was scheduled for two hours, it was a little over an hour, and that meeting ended because, quite frankly, the states (ran) out of things they wanted to talk about.”¹⁸

For local governments, EPA established a special Local Government Advisory Committee (LGAC) to consult with local officials on the proposed Clean Water Protection rule. Four separate meetings were held in St. Paul, Minnesota (May 28, 2014), Atlanta, Georgia (July 10, 2014), Tacoma, Washington (August 13, 2014), and Worcester, Massachusetts (September 22, 2014). These meetings resulted in a specific LGAC report to the Administrator of EPA which was published on November 5, 2014.

¹⁴ See 76 Fed. Reg. 22188, 22218 (April 21, 2014).

¹⁵ Statement of Assistant Secretary of the Army, Jo Ellen Darcy, Hearing on “The Impacts of the Proposed Waters of the United States” Rule on State and Local Governments,” February 4, 2015.

¹⁶ Statement of the Deputy Assistant Administrator for the Office of Water, Ken Kopocis, Hearing on “The President’s 2016 Fiscal Year Budget: Administration Priorities for the U.S. Environmental Protection Agency,” March 18, 2015.

¹⁷ According to EPA, approximately 19,000 of these comments were characterizes as “unique”; with the remaining comments being part of several mass-mailing efforts by stakeholder groups.

¹⁸ Statement of the Deputy Assistant Administrator for the Office of Water, Ken Kopocis, Hearing on “The President’s 2016 Fiscal Year Budget: Administration Priorities for the U.S. Environmental Protection Agency,” March 18, 2015.

It is also important to remember that the April 2014 proposed rule is not the first effort of the Corps and EPA to interpret the scope of Clean Water Act protections since the two Supreme Court decisions. As noted earlier, this effort marks the sixth effort since 2003 by the Corps and EPA to interpret the impact of these decisions on the scope of the Act. During that entire time, the Corps and EPA have conducted 4 formal public comment periods that have, cumulatively, lasted over 700 days, and have resulted in the submission of over 1.4 million comments.

The magnitude of public outreach and comment on defining the five-word phrase “waters of the United States” led the EPA Deputy Administrator to testify that, “*Quite candidly, I will tell you that there is not a lot of new in the way of issues that are being raised. Many of the issues that are being raised are the same ones that have been raised for several years.*”¹⁹

Scientific basis for proposed rule

Opponents of the proposed rule have also challenged the federal agencies on the science underlying the scope of Clean Water Act protections, especially as it relates to the agencies’ interpretation of justice Kennedy’s “significant nexus” test for determining whether a waterbody (or wetland) is subject to the Act.

Recognizing the statutory purposes of the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” and need for a greater scientific understanding of these connections between various waters (and wetlands), EPA’s Office of Research and Development initiated an independent review and synthesis of existing peer-reviewed publications from the scientific literature on this issue. Note, these publications were, for the most part, conducted by non-Federal scientists and academics; however, EPA undertook an effort to review these independent publications, and compile their results into a single “connectivity report” that was published, for public comment, in September 2013.

EPA published its final connectivity report, in January 2015, which noted that “the scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.” The connectivity report also noted that “the incremental effects of individual streams and wetlands are cumulative across entire watersheds and therefore must be evaluated in context with other streams and wetlands.”

In October 2014, EPA’s Science Advisory Board completed its own scientific review of the Connectivity report, and concluded that the report is “a thorough and technically accurate review of the literature on the connectivity of streams and wetlands to downstream waters” and found that the scientific literature provides enough in-

¹⁹Statement of the Deputy Assistant Administrator for the Office of Water, Ken Kopocis, Hearing on “The President’s 2016 Fiscal Year Budget: Administration Priorities for the U.S. Environmental Protection Agency,” March 18, 2015.

formation to support a more definitive statement on the degree of connection between certain, geographically-isolated waters and downstream waters.

Conclusion

On April 6, 2015, the Corps and EPA submitted a revised Clean Water Protection rule to OMB for final review, and publication later this spring.

The Corps and EPA have testified that this revised final Clean Water rulemaking would provide more certainty and more clarity to the current permitting process, would reduce regulatory confusion and costs, and provide more exacting protections over U.S. waters.

Unfortunately, despite nearly universal calls for increased clarity and certainty from stakeholder groups, the Republican majority has made it a priority to halt the current Clean Water rulemaking, and force the agencies to go back to the drawing board and start the process all over again, *before the public will ever see the final product*.

We have to ask why? Such an approach would perpetuate the regulatory confusion that exists today, adding additional costs and delay to the construction of vital projects across the nation. And, it would leave countless acres of wetlands and miles of streams—many of which serve as the primary source of drinking water for 117 million Americans—at continued risk to pollution and destruction.

Blocking the agencies from releasing their final product simply makes no sense. It provides no certainty to the regulated community on where the rules apply, and it leaves many of our nation's waters unprotected. Let the agencies finish their work, and if Congress wants to revisit this issue afterward, it has ample authority to do so.

For these reasons, we oppose H.R. 1732.

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