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FEDERAL WATER QUALITY PROTECTION ACT

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Mr. INHOFE, from the Committee on Environment and Public Works, submitted the following

R E P O R T

together with

MINORITY VIEWS

[to accompany S. 1140]

[Including cost estimate of the Congressional Budget Office]

The Committee on Environment and Public Works, to which was referred a bill (S. 1140) to require the Secretary of the Army and the Administrator of the Environmental Protection Agency to propose a regulation revising the definition of the term "waters of the United States," and for other purposes, having considered the same, reports favorably thereon with amendment and recommends that the bill as amended do pass.

BACKGROUND AND NEED FOR LEGISLATION

In 1972, with the enactment of the Federal Water Pollution Control Act (Clean Water Act or CWA), Congress gave EPA and the Secretary of the Army (acting through the Chief of the Corps of Engineers) (Corps) the authority to regulate the discharge of pollutants or the discharge of dredged or fill material into navigable waters, which Congress defined as "waters of the United States." EPA and the Corps of Engineers (the agencies) promulgated several regulatory definitions of "waters of the United States," most recently by the Corps in 1986 and by EPA in 1993.

Despite the fact that there has been no statutory change in the definition of "navigable waters" or "waters of the United States" since 1972 and no regulatory change since 1993, the agencies have

gradually asserted broader authority by expanding their interpretation of the term "waters of the United States." Challenges to that assertion of authority, claiming regulatory overreach, have reached the Supreme Court three times.

Supreme Court Cases

1. Riverside Bayview

In *United States v. Riverside Bayview*, 474 U.S. 121 (1985), the Supreme Court addressed adjacent wetlands and found that a wetland that directly abuts a "water of the United States" is a continuation of such water. In doing so, the Court approved the rationale provided by the Corps when it included adjacent wetlands in the 1977 definition of "waters of the United States." *See* 474 U.S. at 134. As the Court noted: "In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins." Thus, in situations where a wetland abuts a water of the United States, *Riverside Bayview* stands for the proposition that the landward extent of that particular water of the United States includes the wetland. It does not address a wetland that is not connected to a water of the United States as part of a continuum. The Court did not express any opinion regarding "the authority of the Corps to regulate discharges of fill material that are not adjacent to bodies of open water." *Id.* at 132 n.8.

Under the current regulatory definition of "waters of the United States:" "[t]he term 'adjacent' means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" In 2004, the Government Accountability Office (then referred to as the General Accounting Office) (GAO) reviewed the interpretations of this definition by the various Corps Districts. GAO found that Corps Districts apply different approaches to identify wetlands that are adjacent to other waters of the United States and thus subject to federal regulation. According to GAO, "one district generally regulates wetlands located within 200 feet of other waters of the United States, while other districts consider the proximity of the wetland to other waters of the United States on a case-by-case basis without any reference to a specific linear distance." [1] Similarly, some Corps Districts considered the flood plain when evaluating adjacency while others did not.[2]

2. SWANCC

In the second case, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), the Court addressed water that was not adjacent to a navigable water. In *SWANCC*, the Court declined to go beyond *Riverside Bayview* and assert jurisdiction over waters or wetlands that were not "*inseparably bound up with* the 'waters' of the United States." 531 U.S. at 167 (quoting *Riverside Bayview*).

[1] Waters and Wetlands, Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction (GAO–04–297) (hereinafter 2004 GAO report), at 3.
[2] *Id.* at 17–18.

> We thus decline respondents' invitation to take what they see as the next ineluctable step after Riverside Bayview Homes: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute . . . does not have any independent significance." [citing the oral argument transcript] We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. 531 U.S. at 171–172.

The Court further said: "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. *But we conclude that the text of the statute will not allow this.*" 531 U.S. at 167–68 (emphasis added).

Based on this analysis, the *SWANCC* Court determined that use of a body of water by migratory birds is not a basis for jurisdiction under the Act. The rationale used to reach this conclusion severely called into question the legitimacy of using paragraph (a)(3) of the current regulatory definition of waters of the United States to assert jurisdiction: "All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3). This section of the regulatory definition of "waters of the United States" has been invalid in the states that encompass the Fourth Circuit (Maryland, Virginia, West Virginia, North Carolina, and South Carolina) since 1997. *United States v. Wilson*, 133 F. 3d 251, 257 (4th Cir. 1997).

EPA and the Corps currently evaluate jurisdiction over isolated, intrastate, non-navigable waters under guidance issued in 2003. 68 Fed. Reg. 1995 (Jan. 15, 2003). Since the *SWANCC* decision in 2001, in evaluating non-navigable, intrastate, non-tributary, non-adjacent water on a case-by-case basis, EPA and the Corps have not identified a set of facts that would support federal jurisdiction and so have not regulated any such waters.

3. Rapanos

The third case, *Rapanos v. United States*, addressing a third category of jurisdictional waters, tributaries and their adjacent wetlands, resulted in a divided opinion. 547 U.S. 715 (2006). The four justice plurality held that to be subject to the CWA, water must be surface water with a relatively permanent connection to navigable water. In a concurring opinion Justice Kennedy held that to be subject to CWA jurisdiction, water must have a "significant nexus" to traditional navigable water. The four dissenting justices argued for broader jurisdiction, based on "entwined" ecosystems. 547 U.S. at 797. None of the opinions purported to overturn *SWANCC*.

EPA and the Corps currently evaluate jurisdiction over tributaries and adjacent water under a guidance issued December 2,

2008. This guidance applies only to those provisions of the agencies' regulations at issue in *Rapanos*—33 C.F.R. 328.3(a)(1) (navigable water), (a)(5) (tributaries), and (a)(7) (adjacent wetlands) and asserts jurisdiction over tributaries based on either the "relatively permanent" connection test of the plurality or the "significant nexus" test of Justice Kennedy. However, this guidance also states: "It is clear . . . that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in *SWANCC*. Nothing in this guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non jurisdictional by *SWANCC*."

Legislative Attempts to Expand CWA Jurisdiction

On May 20, 2009, then EPA Administrator Lisa Jackson, Acting Assistant Secretary of the Army Terrence Salt and three other agency officials sent a letter to Senator Boxer urging Congress to amend the CWA to extend jurisdiction to the broadest extent of Commerce Clause authority.[3]

To achieve this objective, former Senator Feingold introduced the "Clean Water Restoration Act" in the 110th Congress (S. 1870) and 111th Congress (S. 787), which would have removed the term "navigable" from the statute and extended federal jurisdiction over all waters. This Committee marked up the legislation in the 111th Congress and ordered it reported to the Senate in June 2009. The Committee did not file its report and place the bill on the Senate Calendar until December 10, 2010, after the November election in which the sponsor of the legislation, Senator Feingold, as well as the sponsor of the House counterpart, Congressman Oberstar, both failed to be reelected. S. Rept. No. 111–361. No further action was taken on this legislation and similar legislation was not introduced in subsequent Congresses.

Administrative Expansion of CWA Jurisdiction

After the failed legislative attempts of the 110th and 111th Congresses, the agencies began to take administrative action to assert authority to regulate geographically isolated wetlands and waters that do not contribute surface flow to navigable waters (notwithstanding the limitations of *SWANCC* and *Rapanos*) by creating new regulatory definitions for "adjacent" and "tributary" and by expanding the connections that the agencies would consider sufficient to create federal jurisdiction.

The agencies initiated this process by issuing a draft guidance in April 2011. In November 2011, the agencies performed limited outreach to state and local governments on this draft guidance. The agencies did not conduct any small business outreach. Stakeholders on all sides of the issue objected to the agencies' attempt to make substantive changes to federal jurisdiction through guidance.

In September 2013, the agencies withdrew the draft guidance and announced that the guidance would form the basis for a new

[3] Letter dated May 20, 2009 to Chairman Boxer, Senate Environment and Public Works Committee from Nancy Sutley, Chair of the White House Council on Environmental Quality; Lisa Jackson, Administrator of the Environmental Protection Agency; Tom Vilsack, Secretary of the Department of Agriculture; Ken Salazar, Secretary of the Department of the Interior; and Terrence Salt, Acting Assistant Secretary of the Army for Civil Works.

regulation. At the same time, EPA released a draft report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (Connectivity Report). According to EPA, that report, when final, was intended to form the scientific basis of its new waters of the United States definition.

EPA and the Corps did not perform a federalism consultation or small business outreach when developing the proposed rule.

EPA and the Corps published a proposed rule to redefine "waters of the United States" on April 21, 2014, and took comments on the proposal until November 14, 2014. After developing and releasing their proposal, the agencies (primarily EPA) held over 400 meetings and webinars to explain it, often with a power point presentation.

EPA released its final Connectivity Report on January 15, 2015, two months after the close of the comment period.

EPA and the Corps released the final rule on May 27, 2015, less than 200 days after the close of the comment period even though the agencies received over 20,000 unique comments on the proposed rule, 10% (about 2,000) of which were substantive.[4] The final rule was published in the Federal Register on June 29, 2015. 80 Fed. Reg. 37054.

Substantive Concerns with Final Rule

An objective of the agencies has been to "restore" federal jurisdiction to the reach claimed by the agencies before the Supreme Court issued its opinions in *SWANCC* and *Rapanos*, as they requested Congress to do in 2009.[5] However, no agency has the authority to issue a rule to return to an interpretation of a statute that the Supreme Court has declared invalid. Once the Supreme Court has identified the limits of authority under a federal law, only Congress can change those limits.

Unfortunately, the final rule fails to recognize the limits established by the Court and even the limits the agencies themselves recognized "historically."

These issues are exemplified by treatment of "tributaries" in the final rule, and by the type of connections that the rule relies on to assert federal control over "ephemeral," "adjacent," and "other" waters.

Tributaries

Current regulations include "tributaries" in the definition of "waters of the United States" but do not define that term. However, the new definition of tributary in the final rule exceeds both the limits established by the Supreme Court and prior agency interpretations of that term.

The tributary definition in the final rule codifies the agency practice of relying on a "bed, bank, and ordinary high water mark" to

[4] Letter dated May 14, 2015 to Senator Rounds, from Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works.

[5] *See* McCarthy and Darcy, May 27, 2015, blog describing the final rule ("It doesn't protect new *kinds* of waters that the Clean Water Act didn't *historically* cover.") (emphasis added), available at *http://blog.epa.gov/blog/?s=water*

identify the geographic extent of CWA jurisdiction over streams,[6] even though this approach was rejected by both the plurality and Justice Kennedy in *Rapanos*. According to Justice Kennedy, the Corps' existing standard for tributaries provides no assurance that they (or adjacent wetlands) would significantly affect downstream navigable water.

> [T]he breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it—*precludes its adoption* as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in SWANCC.

547 U.S. at 781–82 (emphasis added).

Contrary to EPA's assertions, the record for this rulemaking does not demonstrate that all features that meet the definition of "tributary" in the final rule will have a significant effect on navigable water. For example, the tributary studies in EPA's Connectivity Report that refer to downstream water do not discuss navigable water. Instead, EPA assumes, without any record support, that an impact to downstream water is equivalent to an impact on navigable water.[7] Further, there are no studies that correlate the existence of an ordinary high water mark and the magnitude, frequency, or duration of flow.[8]

The preamble to the final rule further diminishes the relevance of the presence of water in a tributary by declaring that a bed, bank and ordinary high water mark can be identified using remote sensing information, including light detecting and ranging data (LiDAR),[9] even though the United States Geological Survey warns that LiDAR can identify any "network" and is more likely to identify land, not water.[10] The preamble even says that these remote sensing technologies can be used in lieu of a site visit, even though Corps guidance says this is not appropriate.[11]

The preamble to the final rule also makes it clear that agencies will rely on historic conditions, as well as current conditions, to identify a tributary:

> Such reliable methods that can indicate prior existence of bed and banks and other indicators of ordinary high water mark include, but are not limited to, lake and stream gage data, elevation data, spillway height, historic

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[6] The Corps of Engineers already considers a bed and bank to be part of an ordinary high water mark. *See* Corps of Engineers Regulatory Guidance Letter 05–05 (2005).

[7] Connectivity Report, at 38.

[8] Robert Pierce, Technical Principles Related To Establishing the Limits of Jurisdiction for Section 404 of the Clean Water Act (April 2003), at section 5.2.

[9] 80 Fed. Reg. at 37077.

[10] *See* Frequently Asked Questions about the NHD & WBD Datasets, revised 10/20/14, available at *http://nhd.usgs.gov/Frequently+Asked+Questions+about+the+NHD+&+WBD.htm*

[11] *Compare* 80 Fed. Reg. at 37077 *with* A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States (Aug. 2014) at 39–40.

> water flow records, flood predictions, statistical evidence, the use of reference conditions, or through the remote sensing and desktop tools described above.[12]

The agencies claim that historic records are needed to address "unpermitted alteration of streams" but do not acknowledge that such alteration may have occurred before any permits were required.[13] For example, part of Constitution Avenue in Washington, D.C. was once Tiber Creek. Tiber Creek was incorporated into the city's sewer system in 1880 and maps exist depicting this former stream.[14] Under the final rule, this part of D.C.'s sewer system could be a "water of the United States."

While the new definition of "tributary" requires it to "contribute flow" to a navigable water, the background documents for the final rule make it clear that the seepage of water into a groundwater aquifer is considered "contributing flow," if the same aquifer recharges surface water at any distance or any period of time in the future. This means that under the final rule an ephemeral stream can disappear completely through evaporation and infiltration and still be considered a "water of the United States."

EPA's Technical Support Document for the final rule acknowledges that not all ephemeral streams that will be regulated actually connect to navigable water.[15] In fact, the conclusions in the Connectivity Report that ephemeral streams impact downstream water are based on studies of ephemeral streams in the arid west, many of which evaporate and infiltrate the ground instead of flowing downstream.[16] Despite these facts, the final rule nonetheless asserts that all ephemeral streams are "waters of the United States" as long as they have a bed, bank, and ordinary high water mark.

The agencies satisfy the requirement to "contribute flow" by assuming that an ephemeral stream contributes flow to navigable water through groundwater.[17] In doing so, it appears that the agencies also are assuming that water from a stream that infiltrates the ground is the same water that recharges a surface stream at another location. As noted by Dr. Robert Pierce, there is no scientific basis for that assumption. In response to questions from Senator Fisher, he notes: "the Rule with its Preamble and Study ignores the fact that most base flows in navigable waters or the U.S. are likely formed from ground water sources not related

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[12] 80 Fed. Reg. at 37077.

[13] *Id.*

[14] *http://parkviewdc.com/2011/09/08/hidden-washington-tiber-creek/*

[15] *See* Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 27, 2015) U.S. Environmental Protection Agency, at 266 ("[M]any southwestern streams lose streamflow to channel transmission losses as runoff travels downstream. Connection of runoff and associated materials in ephemeral and intermittent streams to downstream waters is therefore a function of distance, the relative magnitude of the runoff event, and transmission losses.") (citations omitted) (hereinafter TSD).

[16] Connectivity Report at B.5 (Case Study: Southwestern Intermittent and Ephemeral Streams) (describing "downstream disappearance of surface flow" and groundwater recharge occurring over "months to centuries").

[17] Testimony of Robert J. Pierce, Ph.D., before the Subcommittee on Fisheries, Water, and Wildlife of the Committee on Environment and Public Works, May 19, 2015, at 5 ("Here we are today with EPA trying to regulate ephemeral channels whose only connection to navigable waters of the U.S. are that they might recharge ground water.").

to the water in the upstream channel that is morphologically connected to the navigable water of the U.S." [18]

As a result, the new definition of tributary not only goes beyond the limits identified by both the plurality and Justice Kennedy in *Rapanos*, it also is broader than prior agency practice. For example, the Corps has not always considered ephemeral streams to be tributaries.[19] And, the Corps has never considered the movement of water through a groundwater aquifer to be a basis for creating federal jurisdiction. According to Assistant Secretary of the Army, Jo-Ellen Darcy, "the Clean Water Act (CWA) does not provide such authority." [20] Despite this admission, the final rule adopts this approach.

Finally, as discussed below, by expressly including man-made or man-altered features in the definition of "tributary" the final rule creates significant confusion about the status of ditches and other water management features.

Adjacent Waters

The current definition of "waters of the United States" regulates adjacent wetlands, not adjacent waters. "Adjacent" is defined as "bordering, contiguous, or neighboring," and the definition includes "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like."

The final rule expands this definition to apply to "all waters" that are adjacent, rather than wetlands only, and by adding a definition of "neighboring" that encompasses:

> (A) all waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
>
> (B) all waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
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> (C) all waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (5) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

Like the new definition of tributary, the expansion of the term "adjacent" by creating a definition of "neighboring" exceeds both

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[18] June 16, 2015 Responses of Robert J. Pierce, Ph.D. to Follow-Up Questions for Written Submission, at 2 (citing Heath, R. C. 1983. Basic ground-water hydrology. U.S. Geological Survey, Water-Supply Paper 2220,Washington, D.C.).

[19] *See* Branch Guidance Letter, COE, Baltimore District, CENAB–OP–R, No.95–01, Oct. 17, 1994 ("Project Managers are frequently required to determine the upstream limits of regulatory jurisdiction, including differentiating between intermittent streams, which are regulated (33 CFR § 328.3(a)(3)), and ephemeral streams, which are not regulated.").

[20] Responses of Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) to Environment and Public Works WOTUS Hearing February 4, 2015, Follow-Up Questions for Written Submission, at 1–2 ("The Corps has never interpreted groundwater to be a jurisdictional water or *a hydrologic connection because the Clean Water Act (CWA) does not provide such authority*.") (emphasis added).

the limits established by the Supreme Court and prior agency interpretations of the term "adjacent."

According to the preamble, the distances adopted to establish the boundaries of waters that will be considered "neighboring" and therefore jurisdictional by rule, are "[b]ased on a review of the scientific literature, the agencies' technical expertise and experience, and the implementation value of drawing clear lines."[21] Despite this assertion, there is nothing in the scientific literature that supports the conclusion that all waters within these geographic limits are "inseparably bound up with the 'waters' of the United States" such that they fall within the definition of "adjacency" approved by the Supreme Court in *Riverside Bayview*. *See* 474 U.S. at 134; *see also SWANCC*, 531 U.S. at 167 (quoting *Riverside Bayview*).

Further, there is nothing in the record for this rulemaking that describes the technical expertise and experience relied upon to establish these boundaries. As this definition is not consistent with current practice it is difficult to understand how it is based on agency experience.[22]

Finally, as discussed below, by expanding jurisdiction by rule to include all adjacent "waters" rather than adjacent wetlands, the final rule creates confusion about the status of water management features.

Other waters with a "significant nexus"

The final rule allows the agencies to regulate "all waters" in two categories if the agencies determine on a case by case basis that the waters have a "significant nexus" to a navigable or interstate water or territorial sea.

The first category consists of prairie potholes, Carolina Bays and Delmarva Bays, Pocosins, Western vernal pools, and Texas coastal prairie wetlands. All wetlands in each of these categories will be combined for the "significant nexus" analysis. The agencies expect this aggregation will result in the wetlands "being found jurisdictional." 79 Fed. Reg. 22188, 22215 (Apr. 21, 2014).

This means that wetlands found on farmers' fields and other land in North Dakota, South Dakota, Iowa, Montana, Minnesota, Wisconsin, Texas, Louisiana, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina, Tennessee, Virginia, Maryland, Delaware, New Jersey, New York, Connecticut, Massachusetts, New Hampshire, Maine, and California will be regulated as "waters of the United States" even though they are geographically isolated from any navigable or interstate water or territorial sea.

This is a radical change from current law. The Corps of Engineers has not identified any isolated water or wetland as a water of the United States since the Supreme Court issued its 2001 opinion in *SWANCC*.[23] The U.S. Fish and Wildlife Service acknowledges that 88% of prairie potholes are isolated and therefore not regulated so they work with farmers throughout the upper Midwest

[21] 80 Fed. Reg. at 37082.

[22] For example, some Corps Districts consider 200 feet to be the geographic limit of adjacency or the practice of other Corp Districts recognize that multiple barriers can eliminate adjacency. *See* 2004 GAO Report at 3, 17–18.

[23] Email dated June 5, 2015, from Jennifer Greer, U.S. Army Corps of Engineers.

on cooperative conservation measures to address habitat.[24] Prairie pothole wetlands total 5.3 million acres.[25] Currently, "[w]etland easements and Partners for Fish and Wildlife agreements protect these important wetlands on private land."[26] The final rule instead brings those acres of private land under federal control.

The second category is "all water" in the 100-year flood plain of a navigable or interstate water or a territorial sea and "all water" within 4,000 of the ordinary high water mark of any jurisdictional water, including a tributary, as defined above. There is no explanation for the geographic limit in the preamble to the final rule other than the claim that: "the agencies' experience and expertise indicate that there are many waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or out to 4,000 feet where the science demonstrates that they have a significant effect on downstream waters."[27] As with the definition of "adjacent," there is no information in the record to support this claim.

EPA's economic analysis of final rule suggests that the geographic limits may be outcome based, rather than scientifically based. In this document, EPA states: "The agencies have determined that the *vast majority of the nation's water features* are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea."[28] So, as in the proposed rule, under the final rule the vast majority of water features are potentially regulated.

Under the final rule, a significant nexus can be established by any one of the following functions:

(i) Sediment trapping,

(ii) Nutrient recycling,

(iii) Pollutant trapping, transformation, filtering, and transport,

(iv) Retention and attenuation of flood waters,

(v) Runoff storage,

(vi) Contribution of flow,

(vii) Export of organic matter,

(viii) Export of food resources, and

(ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

Use of aquatic habitat, groundwater flow, overland flow, and water retention or storage as bases for jurisdiction is particularly expansive.

Aquatic habitat

The preamble to the final rule says "non-aquatic species or species such as non-resident migratory birds do not demonstrate a life cycle dependency on the identified aquatic resources and are not

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[24] *See* Dahl, T.E. 2014. Status and trends of prairie wetlands in the United States 1997 to 2009. U.S. Department of the Interior; Fish and Wildlife Service, Ecological Services, Washington, D.C., at 48.

[25] *http://www.fws.gov/mountain-prairie/pfw/sd/sd10.htm*

[26] *http://www.fws.gov/mountain-prairie/pfw/sd/sd10.htm*

[27] 80 Fed. Reg. at 37059.

[28] Economic Analysis of the EPA-Army Clean Water Rule (May 2015), U.S. Environmental Protection Agency, at 11 (emphasis added) (hereinafter EPA Economic Analysis).

evidence of biological connectivity for purposes of this rule." [29] However, use of water as habitat by "resident" birds and other animals and the movement of insects and plants via any kind of bird (referred to as "dispersal") can establish jurisdiction. According to the preamble:

> Evidence of biological connectivity and the effect on waters can be found by identifying: resident aquatic or semi-aquatic species present in the case-specific water and the tributary system (e.g., amphibians, aquatic and semi-aquatic reptiles, aquatic birds); whether those species show life-cycle dependency on the identified aquatic resources (foraging, feeding, nesting, breeding, spawning, use as a nursery area, etc.); and whether there is reason to expect presence or dispersal around the case-specific water, and if so whether such dispersal extends to the tributary system or beyond or from the tributary system to the case-specific water.[30]

The breadth of these considerations is demonstrated by the analysis in the Technical Support Document for prairie potholes, Carolina Bays and Delmarva Bays, Pocosins, Western vernal pools, and Texas coastal prairie wetlands.

For example, the movement of species to and from prairie potholes is considered a connection that can establish jurisdiction:

> Waterfowl often move between prairie wetlands during the breeding season in search of food and cover, and some species also use habitats within the river network as wetlands dry or freeze. In addition, a diverse assemblage of microorganisms, invertebrates, amphibians, reptiles, and sometimes fish, use potholes to feed or reproduce. Overland movement of amphibians and mammals can connect potholes to each other and to lakes and streams, and some species can disperse over long distances to feed and breed.[31]

The Technical Support Document makes this assertion even though the Connectivity Report says direct evidence of such connections "is sparse." [32]

"Dispersal" also is considered a connection that can create jurisdiction. According to EPA "[p]lants and invertebrates disperse to and from prairie potholes via 'hitchhiking' on waterfowl." [33] Further, according to the agencies, any bird, even a migratory bird, can establish jurisdiction by dispersing seeds and insects. "Migratory birds can be an important vector of long-distance dispersal of plants and invertebrates between non-floodplain wetlands and the river network, although their influence has not been quantified." [34] In fact, the Technical Support Document refers 30 times to dispersal by organisms such as birds and mammals of plants (as seeds) and invertebrates (as eggs), including the following statement: "Plants and invertebrates can also travel by becoming at-

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[29] 80 Fed. Reg. at 37094.
[30] 80 Fed. Reg. at 37094.
[31] TSD, at 334 (citations omitted).
[32] Connectivity Report, at 5–5.
[33] Connectivity Report at 5–5.
[34] TSD, at 112.

tached to or *consumed and excreted by waterfow*l. *Id.* (citing Amezaga *et al.* 2002). Dispersal via waterfowl can occur over long distances. *Id.* (citing Mueller and van der Valk 2002)."[35]

The analysis is similarly broad for Carolina and Delmarva Bays and vernal pools. According to the Technical Support Document, "Carolina and Delmarva bays provide valuable habitat and food web support for numerous plant and animal species that can move between bays and other water bodies."[36] With respect to vernal pools, EPA admits "[d]irect surface connection of vernal pools to downstream waters is infrequent."[37] But, according to EPA, they can still be regulated because "they are connected to other aquatic habitats through dispersal."[38]

As a result, even though in *SWANCC* the Supreme Court said CWA jurisdiction cannot be based on the use of water as habitat by a migratory bird, under the final rule seeds and insects that move between navigable water and an isolated wetland by "hitchhiking" in the intestines of a bird are sufficient to assert federal control. With this new rationale, the agencies can regulate the same waters that the Supreme Court said were outside the scope of the CWA. This is a stark departure from the 2008 guidance, which states:

> It is clear . . . that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in *SWANCC*. Nothing in this guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non jurisdictional by *SWANCC*.

Groundwater and over land flow

The agencies also claim jurisdiction based on groundwater connections and overland flow of water. They call groundwater a "hydrologic flowpath" even though, as noted above, Assistant Secretary Darcy has told the Committee that jurisdiction based on connections through groundwater would violate the CWA.[39] Similarly, overland flow of water and shallow subsurface flow is considered a connection.[40] This means that the reference to "contribution of flow" in the "significant nexus" definition includes groundwater flow and sheet flow of rainwater or snowmelt over than land and movement of water through soil.

For example, according to the discussion of vernal pools in the Technical Support Document, they "typically lack permanent inflows from or outflows to streams and other water bodies," they can be "connected temporarily to such waters via surface or shallow subsurface flow (flow through) or groundwater exchange (recharge)."[41] According to EPA's Connectivity Study, groundwater recharge can take from months to centuries.[42]

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[35] TSD, at 334 (emphasis added).
[36] TSD, at 338 (citations omitted).
[37] Connectivity Report at 5–8
[38] *Id.* at 5–9.
[39] *See* TSD at 129, 132, 148.
[40] 80 Fed. Reg. at 37063, 37070–72, 37085–86, 37089–90, 37093–94.
[41] TSD, at 344.
[42] Connectivity Report at B.5.

Water storage

Under the final rule, water storage alone is sufficient to establish jurisdiction.[43]

The agencies claim that prairie potholes can prevent flooding. However, that is not true of all prairie potholes. The Connectivity Report says:

> Considered collectively, unaltered prairie pothole systems have infrequent direct surface-water connections to downstream waters. Evidence of the consequences of these connections on downstream waters is variable. Some studies document measurable effects of water storage capacity of potholes on flood attenuation and maintenance of stream baseflow, whereas other studies show no effect of pothole water storage on streamflows.[44]

Despite this variability, the agencies claim they can assert jurisdiction over prairie potholes and all other isolated ("non-floodplain") wetlands and waters based on the following connections:

> Wetlands and open waters in non-floodplain landscape settings (hereafter called "non-floodplain wetlands") provide numerous functions that benefit downstream water integrity. These functions include storage of floodwater; recharge of ground water that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules (e.g., seeds, eggs, spores) to downstream waters; and habitats needed for stream species. This diverse group of wetlands (e.g., many prairie potholes, vernal pools, playa lakes) can be connected to downstream waters through surface-water, shallow subsurface-water, and groundwater flows and through biological and chemical connections.[45]

After reviewing the connections identified in the analysis of prairie potholes, Carolina Bays and Delmarva Bays, Pocosins, Western vernal pools, and Texas coastal prairie wetlands, it is difficult to identify any water that the agencies could not find jurisdictional under the final rule.

Exclusions

According to EPA, under the final rule the "vast majority of the nation's water features" can be regulated, unless excluded. The final rule excludes some water features, but the exclusions are limited.

For example, the final rule excludes ditches with ephemeral or intermittent flow. The terms "ephemeral" and "intermittent" are defined in the preamble using the definitions similar to these used by the Corps of Engineers in its nationwide permit program.[46] However, these terms do not address water management systems into which water is intentionally introduced. For example, ditches can be used to manage irrigation water. Irrigation water is not ephemeral flow because it does not flow "only in response to pre-

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[43] *See, e.g.*, TSD, at 99, 177.

[44] Connectivity Report, at 5-4. *See also*, Connectivity Report at B-18 ("Studies in some regions show a lack of association between pothole water storage and aspects of streamflow.").

[45] TSD, at 98.

[46] 80 Fed. Reg. at 37076.

cipitation events in a typical year."[47] Irrigation ditches also do not hold intermittent flow because groundwater does not provide part of the ditch's flow.[48]

The final rule excludes ditches with ephemeral or intermittent flow only if the ditch is not a "relocated tributary" or "excavated in a tributary." However, the definition of tributary includes "ditches," so the definition and the exclusion are circular. It is not clear where one ends and the other begins. This limitation also fails to recognize that many ditches are located in low areas that, if they were unaltered, might be considered a tributary under the final rule. In cases where ditches were created long before permits were required the final rule creates significant uncertainty by giving the agencies the authority to claim they can infer the prior existence of a tributary where none exists today.[49] Under the final rule, if the agencies think a tributary once existed where a ditch is located today, they can claim that the ditch is a "water of the United States."

Further, the treatment of ditches in the final rule is different from the treatment of waste treatment systems and grassed waterways. In creating a regulatory exemption for waste treatment systems, EPA expressly recognized that this exemption was intended to cover pre-existing treatment systems, even if built in waters of the United States, or impoundments of waters of the United States.[50] However, no such consideration is given to ditches that predate the enactment of the CWA. The new exemption for grassed waterways also is more expansive. If a grassed waterway was "lawfully constructed" it is not a "water of the United States." In contrast, roadside and other ditches that were lawfully constructed in an area that the agencies now consider to be a "tributary" will be regulated under the final rule. There is no explanation for this inconsistent treatment.

The exclusion for ditches that do not flow into a navigable or interstate water or territorial sea uses the same language found in the definition of "tributary" regarding flow "directly or through another water." As noted in the discussion of the tributary definition above, the agencies are taking the position that "flow" includes infiltration into a groundwater aquifer. This interpretation will render this ditch exclusion meaningless.

The final rule excludes a number of water features, including stormwater control features and wastewater recycling features. However, each of these exclusions applies only to features built on "dry land." The final rule does not define "dry land." Further, unlike waste treatment systems or grassed waterways, no consideration is given to the fact that water management features that may have been built before enactment of the CWA or water management features may have been lawfully constructed, with section 404 permits, after the enactment of the CWA.

Finally, there is no exclusion in the final rule for the management of water that is not wastewater or stormwater, such as water supply systems. This means that reservoirs and canals used to

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[47] *Id.*
[48] *Id.*
[49] 80 Fed. Reg. at 37077.
[50] 45 Fed. Reg. 48,620 (July 21, 1980) (suspending the limitation that the exclusion is limited to manmade bodies of water to address this issue).

move water around would be regulated if considered adjacent waters or tributaries. This expansion of jurisdiction raises significant questions about control over these water supplies. For example, if a reservoir or distribution system is leaking and that leak is recharging a groundwater aquifer, is a 404 permit required to fix the leak? Could EPA, notwithstanding water rights, object to or place conditions on the permit to if EPA wants that groundwater recharge to continue?[51] If a distribution system is leaking and the water from the leak has created a wetland, is a 404 permit required to fix the leak and, notwithstanding water rights, could EPA object to the permit in order to maintain the wetland? As these questions demonstrate, without an exemption for water management features, the final rule could give Corps, EPA, and citizen litigants the ability to use section 404 permits reallocate water resources. This result would be directly contrary to the CWA, which states that:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.[52]

Section 101(g) was added to the Act in 1977. According to its sponsor:

> This amendment came immediately after the release of the Issue and Option Papers for the Water Resource Policy Study now being conducted by the Water Resources Council. Several of the options contained in that paper called for the use of Federal water quality legislation to effect Federal purposes that were not strictly related to water quality. Those other purposes might include, but were not limited to Federal land use planning, plant siting and production planning purposes. This "State's jurisdiction" amendment reaffirms that it is the policy of Congress that this act is to be used for water quality purposes only.[53]

The final rule ignores section 101(g) of the CWA and will implement that Act "to effect Federal purposes" that go far beyond water quality.

Procedural Concerns with Proposed Rule

Timing of Connectivity Report

The Connectivity Report was not finalized before EPA issued the proposed rule and the final Connectivity Report was not available during the public comment period on the WOTUS proposed rule.

The agencies developed and published a proposed rule in April 2014, before the Draft Connectivity Report had been reviewed by EPA's Science Advisory Report. In fact, that review was not com-

[51] For example, the United States Geological Survey found that as a result of reservoirs, percolation following irrigation, and seepage from distribution system of the Columbia Basin Project, groundwater in the Pasco basin had increased by five million acre feet.

[52] CWA § 101(g).

[53] 123 Cong. Rec. &. S19677-78, (daily ed., Dec. 15, 1977) (floor statement of Senator Wallop).

pleted until October 17, 2014, and the Final Connectivity Report was not completed until January 15, 2015, over two months after the comment period had ended on the proposed rule. Thus, the report that is purported to be the foundation for the agencies' rule was not available for public comment.

Failure to Comply with Executive Order 13132 on Federalism

In developing the proposed rule, the agencies failed to conduct outreach to state and local governments. The limited outreach conducted in 2011 on the draft guidance and presentations made after issuing the proposed rule are no substitute for consultation when developing a proposal and do not meet the requirements of Executive Order 13132 on Federalism.

Instead of conducting a federalism consultation, the agencies asserted that: "This rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."[54] Comments on the proposed rule by the U.S. Conference of Mayors, the National League of Cities, the National Association of Counties, the National Association of Regional Councils, the National Association of County Engineers, the American Public Works Association, and the National Association of Flood and Storm Water Management Agencies strongly disagree with this conclusion.[55] In testimony before this Committee, a witness representing the National Association of Counties also strongly disagreed.[56]

Failure to Comply with the Regulatory Flexibility Act

The Regulatory Flexibility Act requires agencies to examine the impacts of a proposed regulation on small governmental entities and on small businesses. In the final rule, EPA and the Corps certified that the proposed rule will not have significant economic impacts on a substantial number of small entities.[57] To support this certification, the agencies claim that the final rule will have no adverse economic impact. They based this claim on an assertion that the scope of jurisdiction under the final rule is narrower than under existing regulations.[58]

The Chief Counsel for the Small Business Administration Office of Advocacy determined that the agencies' certification was in error and improper. Comments filed by SBA Office of Advocacy state:

> Advocacy and small businesses are extremely concerned about the rule as proposed. The rule will have a direct and potentially costly impact on small businesses. The limited economic analysis which the agencies submitted with the rule provides ample evidence of a potentially significant economic impact. Advocacy advises the agencies to with-

[54] 80 Fed. Reg. at 37102.
[55] EPA Docket No. EPA–HQ–OW–2011–0880–15784, at 3.
[56] Testimony of the Honorable Sallie Clark, Commissioner, El Paso County, Colorado, on behalf of the National Association of Counties, before the Senate Committee on Environment and Public Works and the House Committee on Transportation and Infrastructure, February 4, 2015.
[57] 80 Fed. Reg. at 37102.
[58] *Id.*

draw the rule and conduct a SBAR panel prior to promulgating any further rule on this issue.[59]

The SBA Office of Advocacy reiterated this positon in testimony before the Senate Committee on Small Business and Entrepreneurship.[60]

The comments filed by the U.S. Conference of Mayors, the National League of Cities, the National Association of Counties, the National Association of Regional Councils, the National Association of County Engineers, the American Public Works Association, and the National Association of Flood and Storm Water Management Agencies make the same point with respect to impacts on small governmental entities, saying "based on analysis by our cities and counties, the proposed rule will have a significant impact on all local governments, but on small communities particularly." [61]

Failure to conduct an Unfunded Mandates Reform Act analysis

The final rule states that "[t]his action does not contain any unfunded mandate under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531–1538), and does not significantly or uniquely affect small governments." [62] In support of this claim the agencies assert that, as a definition, the final rule imposes no enforceable duties on small governments. As noted above, local governments and the SBA Office of Advocacy disagree with this analysis and believe that the final rule will impose direct and significant costs on small local governments and small businesses.

Failure to conduct an adequate economic analysis of the proposed rule

The Regulatory Flexibility Act also requires an economic analysis. However, the agencies chose not to comply with that Act and instead EPA conducted a superficial analysis of the impacts of the rule.

For example, EPA's economic analysis asserts that states will incur no costs associated with water quality standards development, monitoring, or developing total maximum daily loads for impaired waters.[63] States disagree. Susan Metzger, the current Deputy Secretary for Agriculture for the State of Kansas, and the former head of the state water program, testified that the rule will increase the miles of federally regulated streams in Kansas by 460%, increasing state costs to run their water quality program.[64] This conclusion is supported by an evaluation conducted by the State of Missouri. After an extensive stakeholder process, the State of Missouri recently adopted changes to its stream classification program, expanding it to include all streams represented in the 1:100,000 scale of the USGS National Hydrology Dataset. Based on

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[59] EPA Docket No. EPA–HQ–OW–2011–0880–7958, at 9.

[60] Testimony of Charles Maresca, Director of Interagency Affairs, Office of Advocacy, U.S. Small Business Administration, before the Senate Committee on Small Business and Entrepreneurship, May 19, 2015.

[61] EPA Docket No. EPA-HQ-OW-2011-0880-15784, at 2.

[62] 80 Fed. Reg. at 37102.

[63] EPA Economic Analysis, at 15-16.

[64] Testimony of Susan Metzger, before the Subcommittee on Fisheries, Water, and Wildlife of the Committee on Environment and Public Works, May 19, 2015, transcript, at 46.

an evaluation of the aquatic resources of the state, Missouri chose not to regulate ephemeral waters. According to the State, if it had to regulate all stream miles discernable at the 1:24,000 scale of the National Hydrology Dataset, it would add an additional 158,565 miles of stream to its existing classified waters network and would more than double the State's monitoring costs from about $11.2 million a year to $24.2 million.[65]

OBJECTIVES OF THE LEGISLATION

The purpose of S. 1140 is to return this rulemaking to EPA and the Corps to develop a new definition of "waters of the United States" that respects the limits of Clean Water Act jurisdiction identified by the *SWANCC* and *Rapanos* courts, and that is developed in consultation with state and local governments after taking into account small business and small local government impacts, unfunded mandates, Executive Orders 12866 and 13563, relating to improving regulation, and Executive Order 13604, relating to federal permitting and review of infrastructure projects.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title: Federal Water Quality Protection Act

Sec. 2. Findings

(1) Cooperative federalism and consultation with states are the policy of Congress under section 101(b) of the Federal Water Pollution Control Act.

(2) Adequate consultation is necessary when regulations are developed.

(3) States have robust programs that regulate more water than is covered by federal regulation.

(4) The Administrative Procedure Act requires notice of and an opportunity to comment on scientific information, definitions, exclusions, and standards.

Sec. 3. Definitions

This section defines terms used in the Federal Water Quality Protection Act, including Administrator, body of water, interstate waters, isolated, municipality, normal year, point source, public notice and an opportunity for comment, Secretary, stream, surface hydrologic connection, traditional navigable water, and wetlands.

The definitions of the terms "interstate water" and "traditional navigable water" are based on current regulatory definitions. Adoption of these regulatory definitions should not be construed as legislative acquiescence to the interpretations of these terms set forth in the technical support document located in the record for the final rule.

The definition of the term "normal year" makes it clear that the hydrologic normal is to be determined by the Natural Resources Conservation Service of the Department of Agriculture.

The definition of the term "municipality" is broader that the definition of that term in the Federal Water Pollution Control Act be-

[65] Missouri Department of Natural Resources, Regulatory Impact Report, In Preparation for Proposing, An Amendment to 10 CSR 20-7.031, Missouri Water Quality Standards (June 3, 2011), at 25, 35

cause it includes entities with authority over water distribution, as well as waste disposal.

The term "stream" is defined as a naturally formed channel that has a bed, bank, and ordinary high water mark. S. 1140 recommends that federal jurisdiction over streams be based on flow, so not all streams meeting this definition would be federally regulated.

The definition of the term "surface hydrologic connection" acknowledges that such a connection may exist even when water is not present. S. 1140 recommends that federal jurisdiction over streams be based on flow, so not all streams with a "surface hydrologic connection" would be federally regulated.

Sec. 4. Revised definition; principles, and process

This section requires EPA and the Corp to develop a revised definition of "waters of the United States" following the principles and process set forth in the section.

(a) Revised definition. This subsection states that a revision to or guidance on the definition of the term "navigable waters" or "waters of the United States" shall have no force and effect unless the revision adheres to the principles set forth subsection (b) and the Administrator and the Secretary carry out each action described in subsection (c).

The Committee intends that the final rule published on June 29, 2015, at 80 Fed. Reg. 37054, be set aside. Under this subsection, the agencies are directed to develop a new regulatory definition of "waters of the United States."

(b) Principles. This subsection requires the Secretary and the Administrator to adhere to the following principles in promulgating a revised regulatory definition:

(1) The Federal Water Pollution Control Act is an Act to protect traditional navigable waters from pollution.

This paragraph in no way revises or supersedes the statement in section 101(a) of the Federal Water Pollution Control Act that the objective of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." It reinforces the language in section 101(a)(1)–(7) that establishes water quality and pollution elimination and control goals and policies "to achieve this objective."

The Committee is concerned that the final rule seeks to expand the authority of the Administrator and the Secretary into areas beyond water quality, including habitat, water supply, and flood control.

(2) The definition of waters of the United States should include the following:

(A) Traditional navigable water and interstate waters.

This subparagraph reaffirms regulation of these categories of waters, which are federally regulated under current law.

(B) Reaches of streams identified on maps created using the USGS National Hydrology Dataset Plus at the 1:100,000 scale from Reach Address Database Version 3.1, consistent with the scale and reach address database used by the Administrator during July 2009 in conjunction with information on drinking water source protection areas.

In this subparagraph, S. 1140 addresses EPA's concerns about the burden placed on agencies to prove they have jurisdiction over streams by creating a rebuttable presumption that the same streams that EPA has identified as sources of drinking water are waters of the United States.

EPA relies on the following paper for the proposition that for the proposition that about 58% of all waterways are intermittent, ephemeral, or headwater streams. Nadeau, Tracie-Lynn, and Mark Cable Rains, 2007. "Hydrological Connectivity Between Headwater Streams and Downstream Waters: How Science Can Inform Policy." Journal of the American Water Resources Association (JAWRA) 43(1):118–133. Nadeau and Rains conducted their analysis using the National Hydrography Dataset (NHD) medium resolution data at the 1:100,000 scale. *Id.*, at 120. In 2009, EPA updated that analysis using the "medium" resolution NHD*Plus* at 1:100,000-scale from the Reach Address Database Version 3.1, and compared it to drinking water source water protection areas. Based on this analysis, EPA concluded that 117 million people get their drinking water from intermittent, ephemeral or headwater streams. *See http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_12_28_wetlands_science_surfacedrinking_water_surface_drinking_water_study_summary.pdf*

The Committee agrees that most stream reaches that EPA has identified as drinking water sources, as well as other streams that are visible at the NHD medium resolution, are likely to be streams with actual flow that can carry pollutants to navigable waters. Except in the arid west, most ephemeral streams will not be visible at the NHD medium resolution.

(C) Reaches of streams with surface flow in a normal year of sufficient volume, duration, and frequency that pollutants in that reach of stream would degrade the water quality of a traditional navigable water, based on a quantifiable and statistically valid measure of flow.

The Committee recognizes that the NHD medium resolution dataset is not a perfect tool, and there may be streams that have sufficient flow to carry pollutants to navigable water that are not visible on maps created with that dataset. With this subparagraph, S. 1140 also recommends a final definition of waters of the United States also include other stream reaches with sufficient flow in a normal year that could carry pollutants that would degrade navigable water.

(D) Wetlands next to other waters of the U.S. that in a normal year prevent the movement of pollutants to navigable water.

The Committee recognizes that wetlands next to waters of the United States can filter pollutants and keep them out of navigable water. The wetlands identified in this subparagraph are those that the Supreme Court identified as "inseparably bound up with the 'waters' of the United States." *SWANCC*, 531 U.S. at 167 (quoting *Riverside Bayview*).

(3) The definition of waters of the United States should not include the following:

(A) Water located below the surface of the land, including soil water and groundwater.

This subparagraph makes it clear that jurisdiction under the Federal Water Pollution Control Act applies only to surface water.

This language is necessary because expansion of jurisdiction through evolving administrative interpretations is extending vertically, beneath the ground, as well as laterally across the landscape. For example, there are studies in EPA's Connectivity Report that reference "soil water." As discussed above, the final rule considers groundwater to be a flow path that can create federal jurisdiction. According to the testimony presented to the Committee by Dr. Robert Pierce, on May 19, 2015, some Regional Supplements to the 1987 Wetlands Delineation Manual suggest that water that is water located 12 inches below the surface of the land can be considered to be a wetland even when the soils at the surface of the land are not saturated. Under this interpretation, a high groundwater table and Alaskan permafrost could be considered a water of the United States. For example, in Alaska, permafrost can be located within 12 inches of the surface and also can be a confining layer that traps water in the soil, below the surface. This language forestalls attempts to expand federal jurisdiction to these subsurface waters, where saturation does not reach the surface of the land.

(B) Water not located within a body of water.

(C) Isolated ponds, whether natural or manmade, including a farm pond, fish pond, quarry, mine pit, ornamental pond, swimming pool, construction pit, fire control pond, sediment pond, and any other isolated facility or system that holds water.

(D) Systems used for collecting, conveying, holding or treating stormwater or floodwater (including roadside and agricultural ditches), wastewater, water supplies, and agricultural or silvicultural water.

This subparagraph gives recognition to the general rule that water that is being managed as stormwater, floodwater, wastewater, and domestic, agricultural or silvicultural water supply is subject to an intervening use and is not a water of the United States. As such, the discharge of such water back into a "water of the United States," after the intervening use, may require a permit. *See, e.g.*, 73 Fed. Reg. 33697, 33704 (June 13, 2008) ("For example, if the water is withdrawn to be used as cooling water, drinking water, irrigation, or any other use such that it is no longer a water of the U.S. before being returned to a water of the U.S., the water has been subjected to an intervening use."). The extent to which this exemption applies to systems created in navigable water or, after the date of enactment of the Clean Water Act, in other waters of the United States, is determined pursuant to paragraph (4) below.

(E) Reaches of streams that do not have enough surface flow of volume, duration, and frequency in a normal year to contribute pollutants to and degrade the water quality of a traditional navigable water.

As noted above, S. 1140 creates a presumption that the same streams that EPA has identified as sources of drinking water are "waters of the United States." As is also noted above, the maps EPA used to identify those streams are not perfect, so this is a rebuttable presumption. For example, some ephemeral streams in the arid west may be visible at the NHD medium resolution and yet may not supply water to a navigable water. In paragraph (2)(C), discussed above, S. 1140 recommends that additional streams may be regulated based on actual flow, even if they are not visible on

the NHD medium resolution map. As a corollary to that provision, this subparagraph recommends that the presumption that a stream is regulated because it is visible on the NHD medium resolution map can be rebutted based on evidence of a lack of actual flow.

(F) Prior converted cropland.

Prior converted cropland is not a water of the United States. This subparagraph includes a cross reference to the definition of prior converted cropland in U.S. Department of Agriculture regulations to make it clear that USDA determines what land meets the definition of prior converted cropland.

(G) Water removed from the waters of the United States pursuant to a section 404 or a section 10 permit.

This subparagraph recognizes the fact that the United States can affirmatively surrender jurisdiction over a water of the United States pursuant to a permit.

(4) Unless another exclusion applies, some water management systems described under paragraph (3)(D) may still be waters of the U.S. if they were constructed within waters of the U.S.

(A) Systems or components of systems converted from a water of the United States without a 404 permit after the effective date of regulations that implement section 404 should remain waters of the United States.

With this subparagraph, the Committee recommends that exemptions for water management systems under paragraph (3)(D) above, would not apply to systems created in regulated waters after federal regulations that control dredging and filling of waters of the United States came into effect, unless the creation of the system was authorized under a section 404 permit or the system was exempt from section 404 permitting under exemptions for normal farming, silviculture, and ranching activities, for the construction or maintenance of farm or stock ponds or irrigation ditches, or for the maintenance of drainage ditches; or the system was otherwise exempt from Clean Water Act permitting.

(B) Systems or components of systems converted from a traditional navigable water at any time (including before the enactment of the Federal Water Pollution Control Act) should remain a water of the United States unless the system is identified as a point source in a 402 permit (such as an MS4 permit); the water being managed is exempt irrigation return flow or agricultural stormwater; the construction or use of the system is exempt normal farming, silviculture, and ranching activities, or exempt construction or maintenance of farm or stock ponds or irrigation ditches, or exempt maintenance of drainage ditches; or the system is a waste treatment system.

With this subparagraph, the Committee recognizes that navigable waters remain federally regulated unless the United States affirmatively surrenders jurisdiction. Under this section, surrender of jurisdiction can be memorialized in a section 402 permit (as well as a section 404 permit or section 10 permit as noted in paragraph (3)(G) above). For example, if a navigable river is incorporated into a municipal separate storm sewer system and the permit for that system does not affirmatively surrender jurisdiction over the river, then the river would remain a regulated navigable water of the United States. Certain permitting exemptions also are deemed to be a surrender of jurisdiction.

(5) In promulgating a revised definition of waters of the United States the Corps of Engineers and the Administrator must take into consideration the following:

(A) Use of a body of water by an organism is not a basis for establishing Federal jurisdiction.

In *SWANCC*, the Corps claimed jurisdiction over an isolated pond based on a claim that use of waters used by migratory birds and endangered species affected interstate commerce. The Supreme Court held that, as a matter of statutory interpretation, use of a pond as habitat by 121 species of birds is not grounds for asserting federal jurisdiction over the pond even though some of the birds were migratory. *SWANCC*, at 164, 171–72. The former "Migratory Bird Rule" that was invalidated by the Supreme Court was narrower than the jurisdiction now claimed by EPA and the Corps. Under that so-called rule, the Corps did *not* claim jurisdiction based on the use of water as habitat by birds that are not migratory or species that are not endangered. Yet, the final rule claims this authority. The Committee finds it incredible that the agencies assert that, following *SWANCC*, they can expand jurisdiction beyond the "Migratory Bird Rule" to encompass use of water as habitat by any species other than a migratory bird. This subparagraph prevents the agencies from doing so.

(B) Supplying water to a groundwater aquifer, or storing water in isolated bodies of water is not a basis for establishing Federal jurisdiction.

As discussed above, the Corps of Engineers has never considered the movement of water through a groundwater aquifer to be a basis for creating federal jurisdiction and the Assistant Secretary of the Army, Jo-Ellen Darcy, "the Clean Water Act (CWA) does not provide such authority." This subparagraph precludes EPA and the Corps from expanding federal authority by considering groundwater to be a flow path.

As discussed above, water storage also is not currently a basis for federal jurisdiction. In fact, water storage and water supplies are expressly left to states under the Federal Water Pollution Control Act. This subparagraph precludes EPA and the Corps from considering water storage to be within their authority under the Federal Water Pollution Control Act.

(C) The water cycle connects all water over sufficiently long periods of time and distances, but does not provide a basis for establishing Federal jurisdiction.

Water moves in a cycle that includes rainfall, the sheet flow of rain over land, infiltration into groundwater, and the movement of water through an aquifer, often over long periods of time. If the water cycle was a basis for federal jurisdiction, all water could be regulated. This subparagraph precludes use of this theory as a basis for regulating water.

(6) Waters of the United States should be identified on maps to promote certainty and transparency.

This subparagraph does not say that a map would necessarily establish federal jurisdiction. But, as jurisdictional determinations are made, presenting them on maps would help promote certainty and transparency.

(b) Consultation and Report.

This subsection sets forth the process that EPA and the Corps of Engineers must follow in developing a new definition of "waters of the United States."(1) Federalism.

(A) The Corps of Engineers and EPA must follow the consultation process established in the Federalism Executive Order, whether or not they determine the definition of waters of the U.S. affects other levels of government or implicates federalism concerns.

The Federalism Executive Order applies to all regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The order does not specify who determines that such effects occur. In the WOTUS rulemaking, the Administrator and the Secretary claimed that the rule does not have federalism implications. As noted above, states and local governments strongly disagree, as does the Committee. This section ensures that a new regulation is developed following federalism consultation.

(B) Before a proposal is made, EPA and the Corps must seek input and advice from Governors, state departments with authority over water quality and supply, state departments of agriculture, and local governments. The topics of consultation must include: categories of waters that should be subject to Federal jurisdiction, role of the states, and whether channels in which water is present only during or for a short time after a precipitation event are correctly categorized as geomorphological features rather than hydrologic features.

This section describes the timing and subject matters of the federalism consultation. After proposing a revision to the definition of waters of the United States, EPA conducted many meetings and gave many power point presentations, but such actions do not meet the consultation requirements of the Executive Order or S. 1140. The Committee believes that to be meaningful, consultation must take place before an agency has issued a proposed rule.

(2) Regulatory Flexibility.

The Corps of Engineers and EPA must conduct the economic analyses and Small Business Regulatory Enforcement Fairness Act panels required under the Regulatory Flexibility Act, whether or not they determine the definition of waters of the U.S. has a significant impact on small governments or small businesses, and whether or not they consider the costs to be direct or indirect.

The Regulatory Flexibility Act requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Administrator and the Secretary made such a certification with respect to the waters of the United States rule. However, as noted above, the Small Business Administration Office of Advocacy strongly disagrees with that certification and has commented and testified that EPA and the Corps failed to meet their obligations under the Regulatory Flexibility Act. The Committee agrees with the Small Business Administration and S. 1140 would require the agencies to consider impacts on small busi-

nesses and small local governments of a revised definition of waters of the United States.

(3) Unfunded Mandates.

The Corps of Engineers and EPA must do an unfunded mandates analysis, whether or not they consider the impacts of the definition of waters of the U.S. to be direct or indirect, or determine that expenditures resulting from the regulation would meet the thresholds established under the Unfunded Mandates Reform Act.

Under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), an unfunded mandate includes regulations that impose an enforceable duty on state, local, or tribal governments as well as the private sector. Agencies are required to do an unfunded mandates analysis and develop an effective process to permit elected officers of State, local, and tribal governments to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates. In developing the WOTUS rule, EPA and the Corps did not follow this process. Instead, the agencies claim that the rule imposes no enforceable duties on local governments or any other person. The Committee strongly disagrees. State and local governments are required to implement regulatory programs, provide public services, and maintain public infrastructure. As noted in May 19, 2015 testimony provided by Susan Metzger, representing the State of Kansas, and Mark Pifher, representing Colorado Springs Utilities and the National Water Resources Association, as well as February 4, 2015 testimony provided by Sallie Clark, representing El Paso County, Colorado and the National Association of Counties, the WOTUS rule will impose significant costs on states, who face expanded costs resulting from state water quality programs, and local governments, who manage municipal separate storm sewer systems, roadside ditches, and water supply systems and face increased permitting and maintenance costs. This paragraph requires EPA and the Corps to conduct the analyses and outreach required under the Unfunded Mandates Reform Act.

(4) Improving Regulation and Regulatory Review.

The Corps of Engineers and EPA must follow Executive Orders 12866 and 13563, relating to improving regulation, whether or not they consider a definition of waters of the U.S. is a significant regulatory action or significantly affects state, local and tribal governments.

EPA and the Corps did consider the WOTUS rule to be a major rule that is subject to Executive Orders 12866 and 13563. However, the Committee believes that the agencies failed to meet the requirement of Executive Order 12866 to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the maximum extent practicable, the costs of cumulative regulations; to "act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government;" and to strictly adhere to constitutional principles. In addition, the Committee believes that the agencies failed to meet the public participation requirements of section 2 of Executive Order 13563, which require an opportunity for public comment regarding all pertinent parts of the rulemaking docket, including relevant scientific and technical findings and seeking the

views of those who are likely to be affected before issuing a notice of proposed rulemaking.

(5) Improving performance of Federal permitting and review of infrastructure projects.

The Corps of Engineers and EPA must consider Executive Order 13604, relating to federal permitting and review of infrastructure projects.

The Committee believes that the agencies failed to meet the requirement in Executive Order 13604 to reduce permitting times and regulatory reviews. This paragraph requires consideration of such issues.

(6) Report.—This paragraph requires the Corps of Engineers and EPA to provide to the Committee, not less than 30 days before proposing a regulation, a report that describes how the proposed regulations comply with the requirements in paragraphs (1)–(5).

(7) Timing.—This paragraph requires the Corps of Engineers and EPA to use best efforts to provide not less than 180 days for consultation, 120 days for notice and comment, and to publish a final rule by the end of 2016.

Sec. 5. Measure of flow

This section directs the Corps of Engineers to provide quantifiable and statistically valid measures of the volume, duration, and frequency of flow in streams in different geographic areas that would, in a normal year, allow pollutants in reaches of streams in those geographic areas to flow to and degrade the water quality of a traditional navigable water, after providing notice and an opportunity for comment.

Sec. 6. Report to Congress

This section requires GAO to issue a report on jurisdictional determinations every three years, including an analysis of the interpretations of the regulation by the districts of the Corps of Engineers and the regional offices of the EPA, whether the interpretations are inconsistent, measures to reduce inconsistency, and the impacts of interpretations on Federal permitting and review of infrastructure projects.

Sec. 7. Effect of Act

This section states that the Act does not affect the authority to require a permit to discharge pollutants from a point source to navigable water or to take an enforcement action; the regulation of water transfers; State authority under State law, or the definition of point source.

LEGISLATIVE HISTORY

S. 1140 was introduced on April 30, 2015. The bill was referred to the Committee on Environment and Public Works. The Committee considered the bill in a business meeting on June 10, 2015. An amendment in the nature of a substitute was approved, and the Committee ordered the bill reported to the Senate.

HEARINGS

A joint oversight hearing on “Impacts of the Proposed Waters of the United States Rule on State and Local Governments” was held

with the House Committee on Transportation and Infrastructure on February 4, 2015.

Field hearings on "Impacts of the Proposed Waters of the United States Rule on State and Local Governments and Stakeholders," were held on March 14, 2015, in Lincoln, Nebraska; on April 6, 2015, in Anchorage, Alaska; and on April 8, 2015, in Fairbanks, Alaska.

The Committee held a legislative hearing on S. 1140 on May 19, 2015.

ROLLCALL VOTES

The Committee on Environment and Public Works met to consider S. 1140 on June 10, 2015. An amendment in the nature of a substitute made technical and conforming changes. The Committee considered the amendment in the nature of a substitute as original text and favorably reported the bill, as amended by the substitute, by a roll call vote of 11–9.

Amendments rejected

A total of five amendments to the bill were offered and not approved by the Committee, as follows:

1. Cardin-Boxer Amendment #1—An amendment that would replace the statement that the Federal Water Pollution Control Act is an Act to protect traditional navigable waters from pollution with section 101 of that Act, and would allow the Administrator and the Corps to vitiate an Act of Congress by making a determination relating to exposure to toxic pollutants and risk of illness (rejected by a roll call vote of 9 yeas, 11 nays).

2. Boxer #1—An amendment that would add a savings clause that says nothing affects EPA or the Corps' authority to protect the quality of surface water for public water supplies (rejected by a roll call vote of 9 yeas, 11 nays).

3. Boxer #5—An amendment that would allow the Administrator and the Secretary to vitiate an Act of Congress by making a determination that implementation of the bill is likely to increase costs; lengthen the time to obtain a permit; or perpetuate the lack of regulatory predictability and certainty (rejected by a roll call vote of 9 yeas, 11 nays).

4. Markey #1—An amendment that would allow the Administrator to vitiate an Act of Congress by making a determination that implementation of the bill is likely to increase the probability of toxic exposure to toxic pollutants in amounts that adversely impact public health of people served by drinking water systems (rejected by a roll call vote of 9 yeas, 11 nays).

5. Boxer # 6—An amendment that would allow the Administrator to vitiate an Act of Congress by making a determination that implementation of the bill will increase interstate movement of pollutants, increase costs incurred by States, or cause or contribute to the impairment of a surface or coastal waters of a State (rejected by a roll call vote of 9 yeas, 11 nays).

Final committee vote to report

S. 1140, as amended by the amendment in the nature of a substitute, was approved and ordered to be reported to the full Senate. The roll call vote to report the bill was 11 to 9 in favor (Senators

Inhofe, Vitter, Barrasso, Capito, Crapo, Boozman, Sessions, Wicker, Fischer, Rounds, and Sullivan voted yea, and Senators Boxer, Carper, Cardin, Sanders, Whitehouse, Merkley, Gillibrand, Booker, and Markey voted nay).

REGULATORY IMPACT STATEMENT

In compliance with section 11(b) of rule XXVI of the Standing Rules of the Senate, the committee finds that S. 1140 does not create any additional regulatory burdens, nor will it cause any adverse impact on the personal privacy of individuals.

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act of 1995 (Public Law 104–4), the committee notes that the Congressional Budget Office found, 'S. 1140 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).'

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Control Act requires that a statement of the cost of the reported bill, prepared by the Congressional Budget Office, be included in the report. That statement follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 30, 2015

Hon. JIM INHOFE,
Chairman, Committee on Environment and Public Works,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1140, the Federal Water Quality Protection Act.

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.

Enclosure.

S. 1140—Federal Water Quality Protection Act

Under S. 1140, any rule issued after February 4, 2015, that would redefine the scope of waters protected by the Clean Water Act (CWA) would need to meet certain criteria. Some of the criteria specified in the bill concern the process used by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) when issuing a final rule. Other criteria concern the types of streams and wetlands that could be considered "waters of the United States." (Under the CWA, EPA and the Corps, along with the states, serve as co-regulators of activities affecting the nation's waters.) S. 1140 also would require that EPA and the Corps use their best efforts to issue a final rule by December 31, 2016, that defines "waters of the United States."

According to EPA, enacting this legislation would result in the withdrawal of the proposed rule published in the Federal Register

on April 21, 2014, that defines the scope of waters protected by the CWA (that is, "waters of the United States"). CBO estimates that implementing S. 1140 would cost $5 million over the 2016–2020 period, subject to the availability of appropriations, to develop a new proposed rule. The legislation would affect direct spending because it would reduce fees collected by the Corps for issuing permits under the CWA (such fees are offsetting receipts, which are treated as reductions in direct spending). However, CBO estimates that the change in the amounts collected from those fees would be negligible. Because the legislation would affect direct spending, pay-as-you-go procedures apply. Enacting S. 1140 would not affect revenues.

In developing a new proposed rule under S. 1140, EPA and the Corps would be required to consult with state and local regulatory officials to review alternative approaches for defining "waters of the United States." EPA and the Corps also would be required to prepare a report for the Congress that describes how the proposed new regulation would meet the criteria specified in the bill. In addition, S. 1140 would require the Government Accountability Office to report on the regulations issued by EPA and the Corps every three years. Finally, S. 1140 would require the Corps to establish statistically valid measures of the volume, duration, and frequency of water flow in streams.

Under S. 1140, 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. However, based on EPA's prior experience in developing new regulations, CBO estimates that it would cost an additional $4 million over the 2016–2020 period to conduct extensive outreach efforts to interested parties, address public comments, and prepare a report to the Congress. We also expect that it would cost the Corps about $1 million over the same period to conduct field work and data analysis in coordination with the EPA to develop new rules for issuing permits under an alternative regulatory proposal.

The April 24, 2014, proposed rule would expand the area covered by CWA regulations and lead to an increase in 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 over the next several years. Because the amount charged for those permits is small, CBO estimates enacting S. 1140 would have an insignificant effect on offsetting receipts over the 2016–2025 period.

S. 1140 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.

On April 27, 2015, CBO transmitted a cost estimate for H.R. 1732, the Regulatory Integrity Protection Act of 2015, as ordered reported by the House Committee on Transportation and Infrastructure on April 15, 2015. Both pieces of legislation would require EPA and the Corps to develop a new CWA rule. Although the bills include different requirements throughout the rulemaking process, the estimated costs for the bills are the same.

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

MINORITY VIEWS OF BOXER, CARDIN, SANDERS, WHITEHOUSE, MERKLEY, GILLIBRAND, BOOKER, AND MARICEY ON S. 1140, AS REPORTED BY THE EPW COMMITTEE

Nothing is more important than protecting the lives and livelihoods of the American people. The Clean Water Act prevents the uncontrolled pollution of the streams, rivers, and lakes where our children swim and provide drinking water to millions of Americans. If the Clean Water Act does not apply, polluters can dump raw sewage that would sicken children swimming in contaminated waters. Factories can discharge industrial waste containing heavy metals, such as arsenic, lead, and selenium. Drilling companies can discharge wastewater containing known carcinogens like benzene and chromium-6. We need a strong Clean Water Act to ensure this does not happen.

Decades ago, the United States experienced widespread damage and degradation to our environment—the Cuyahoga River in Cleveland, Ohio, was on fire and our lakes were dying from pollution. The American people demanded action, and in 1972 Congress passed the Clean Water Act by an overwhelming bipartisan majority.

Clean water is vital to a healthy economy. Large, diverse parts of the economy depend on clean water for profitable safe operations, this includes: manufacturing and energy production to agriculture, food service, tourism, and recreation.

Recent events in Toledo, Ohio, remind us of that our drinking water remains vulnerable to pollution. Half a million residents in this major American city went without drinking water for days because nutrient pollution washed into Lake Erie, causing toxic algae to bloom.

There have been three major Supreme Court cases that have taken up the issue of the jurisdictional scope of waters protected by the Clean Water Act (CWA). The two cases decided in 2001 and 2006 created confusion as to what is protected by the CWA.

On March 25, 2014 the EPA and Army Corps jointly released a proposed rule to define the regulatory term "waters of the United States"' under the CWA. 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. Sections 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." The Clean Water Rule, which was finalized on May 27, 2015, protects drinking water for up to 117 million Americans. The rule has been subject to extensive public comment (over 1 million comments received) and stakeholder outreach. EPA made significant changes in the final rule to address issues raised during the comment period.

The rulemaking was in response to Supreme Court cases in 2001 and 2006 that created confusion as to what is protected by the Act. Republican Senators and House Members (through floor statements, hearings, and letters) repeatedly asked the EPA and Corps of Engineers to clarify the jurisdiction of the CWA and conduct a rulemaking on the jurisdiction of the Clean Water Act. As recently as April 2013, Republican Senators sent a letter to EPA asking them to stop processing the proposed guidance and instead focus on a rulemaking. The recent Clean Water Rule clarifies the confusion caused by the Supreme Court decisions, and responds to the Congressional demands for a rule. The rule also provides greater clarity as to which waters are protected by the Clean Water Act (based on over 1200 peer reviewed, and published scientific studies), only protects waters historically protected by the Clean Water Act, does not require any new permits for agricultural practices and explicitly includes all of the previous exemptions and exclusions that agriculture has enjoyed.

This bill prohibits EPA from finalizing any change to its regulations until EPA conducts a new 120-day comment period, carries out a 180-day consultation with state and local governments, conducts analyses under 5 different statutes and executive orders, and reports to Congress. This is a totally unreasonable timeline. While this bill purports to have a new rule completed before the end of 2016, the required comment period and consultation requirement a coupled with review by Office of Management and Budget (OMB) will necessarily delay this new rule into the next Administration. Further, the bill effectively changes the scope of the Clean Water Act by establishing extensive new statutory criteria defining the scope of the Act. Many of these criteria are poorly defined and depart considerably from the historical interpretation and scope of the Act. In addition, this bill would create more confusion for businesses and landowners by taking away new exemptions and sending EPA and the Corps back to square one to try to figure out the confusing new terms and standards in the bill. After years of uncertainty following two Supreme Court decisions, we should not pass legislation that would create more confusion and invite years of new litigation.

That is why the following law professors, scientists, and environmental organizations do not support the bill reported by the EPW Committee, including:

- Over 40 leading law professors that study, teach, and write about the Clean Water Act, who have concluded that "S. 1140 would constitute a massive weakening of the Clean Water Act."
- Over 80 scientists with expertise in the importance of streams and wetlands, as well as the Society for Freshwater Science,
- Numerous Sportsmen groups, including the American Fly Fishing Trade Association, Backcountry Hunters and Anglers, Izaalt Walton League of America, Theodore Roosevelt Conservation Partnership, and Trout Unlimited.

Below is a summary of key concerns with S. 1140.

Unnecessarily Delays Clean Water Act Improvements that People Want:

• Many stakeholder groups have called for this rulemaking, including: representatives from business, agricultural, and environmental organizations; States; Congress; the Courts; and others.
• The overwhelming majority of American citizens (almost 90%) that reviewed the proposed rule commented favorably on it.
• A recent *poll* of small businesses (July, 2014) found that 80% of small business owners support the protections for clean water contained in the proposed Clean Water Rule.
• A recent *poll* by the League of Conservation Voters found that 80% of Americans support the Clean Water Rule.

Postpones or prevents critical protections for our Nation's waters:

• Clear protections for the Nation's tributary system, and adjacent and other waters, is critical to ensuring flood impact reductions, clean drinking water, pollution control, and other functions to all our downstream communities.
• The legislation would remove protections for millions of acres of wetlands, lakes, and streams that have been covered under the Clean Water Act for over 40 years—waters particularly important to sportsmen, commercial and recreational fisherman, wildlife, endangered species.

Wastes time and government resources:

• EPA and the Corps already have carried out the necessary consultations and analyses required by law and executive order—repeating these consultations will waste millions of dollars.
• Benefits of rule are foregone for a minimum of two years and possibly much longer.
• Significant time and expense has been invested in the current rulemaking by Federal agencies, states, local governments, and the public. This legislation would ignore that effort and require that much of it be repeated.

Creates uncertainty for landowners and businesses:

• The final Clean Water Rule makes it much clearer where the Clean Water Act applies, by defining what is subject to the Act and what is not.
• The final Clean Water Rule already clarifies the uncertainty created by two Supreme Court decisions. However, the legislation creates new terms and statutory standards that would create more confusion and less consistency and invite further litigation.
• The final rule would also establish new regulatory exemptions for water types that are not regulated under the Act. The legislation would block implementation of these exemptions, including exemptions for:

- Numerous types of ditches
- Artificial lakes and ponds
- Water-filled depressions associated with mining or construction
- Erosional features, including gullies and rills
- Puddles
- Groundwater
- Features constructed to convey, treat or store stormwater
- Wastewater recycling structures
- Groundwater recharge basins

BARBARA BOXER.
BENJAMIN CARDIN.

SHELDON WHITEHOUSE.
JEF MERKLEY.
BERNARD SANDERS.
KIRSTEN GILLIBRAND.
CORY BOOKER.
EDWARD MARKEY.

CHANGES IN EXISTING LAW

Section 12 of rule XXVI of the Standing Rules of the Senate requires changes in existing law made by the bill as reported to be shown. S. 1140 does not amend existing law.

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