From: Shelanski, Howard
Sent: Monday, April 27, 2015 5:43 PM
To: Dorjets, Vlad; Laity, Jim
Cc: Johnson, Katie B.
Subject: RE: clean water docs from EPA?

Good. Thanks.

From: Dorjets, Vlad
Sent: Monday, April 27, 2015 5:26 PM
To: Shelanski, Howard; Laity, Jim
Cc: Johnson, Katie B.
Subject: RE: clean water docs from EPA?

I just got the WOTUS Economic Analysis but not the Technical Support Document. I'm following up with EPA on its status.

In regards to the EA, I will send it out momentarily to the same senior points of contacts as earlier and give 2 weeks to review. Since those 2 weeks will likely slip to 3 weeks for some agencies (as was the case with the rule and preamble) that takes out to May 15th before we've even submitted comments to the Agencies.

From: Shelanski, Howard
Sent: Monday, April 27, 2015 9:23 AM
To: Dorjets, Vlad; Laity, Jim
Cc: Johnson, Katie B.
Subject: RE: clean water docs from EPA?

thx

From: Dorjets, Vlad
Sent: Monday, April 27, 2015 9:21 AM
To: Shelanski, Howard; Laity, Jim
Cc: Johnson, Katie B.
Subject: RE: clean water docs from EPA?

No, I didn't get any of the docs.

Sent with Good

-----Original Message-----
From: Shelanski, Howard
Sent: Sunday, April 26, 2015 09:30 PM Eastern Standard Time
To: Laity, Jim; Dorjets, Vlad

Cc: Johnson, Katie B.
Subject: clean water docs from EPA?

Did you get what you were expecting from EPA on Friday? Thanks.

From: Fong, Tera L.
Sent: Tuesday, May 12, 2015 1:50 PM
To: Dorjets, Vlad
Subject: RE: Clean Water Rule rollout meeting

Interesting, thanks.

From the mtg today—I think EPA's response to the argument about consultation would be letters a number of cities wrote to EPA and the Corps after the Rapanos decision saying essentially "we weren't consulted on this, we want a full rulemaking and an APA process." Their main overall point is on the final rule (to all groups) is "we've heard you and we've made changes responsive to your comments."

About to type up my notes. Happy to follow up further afterwards too.

From: Dorjets, Vlad
Sent: Tuesday, May 12, 2015 1:10 PM
To: Fong, Tera L.
Subject: RE: Clean Water Rule rollout meeting

The National League of Cities, National Association of Counties, and US Conference of Mayor came in and had some pretty clear and strong comments.

First and foremost, they were very disappointed that EPA and the Corps did not consult with them before issuing the proposed rule (they actually said the rule caught them completely by surprise) as they would have advised the agencies do to certain things differently. Even though they have been assured recently that their concerns have been addressed, they feel slited and do not trust EPA or the Corps. As a result they are asking for the rule to be withdrawn or at least for a 2nd comment period.

In terms of specific concerns, they don't want more roadside ditches and stormwater systems being drawn into scope and feel that the economic analysis understates the costs and burdens. For example, they feel that the economic analysis only reflects the costs of 404 permitting and thus ignores other costs (e.g. admin, MS4, NPDES, WQS, TMDL, etc.), that could have a real impact on them if they must be applied to new waters.

From: Fong, Tera L.
Sent: Tuesday, May 12, 2015 12:58 PM
To: Dorjets, Vlad
Subject: RE: Clean Water Rule rollout meeting

Just that all systems seem to be "go" for the 21st; meeting was nearly all about events and outreach before, during, and after roll-out. Will type up my notes and circulate this afternoon.

Note that the local groups are a key focus of outreach next week, so, yes, very curious what they had to say today.

From: Dorjets, Vlad
Sent: Tuesday, May 12, 2015 12:48 PM
To: Fong, Tera L.
Subject: RE: Clean Water Rule rollout meeting

I have just asked Katie for an update but she is in and ou t of meetings all day today. I understand one of the items on the agenda was next week's deadline. If you could let me know if there were any major decisions, I would really appreciate it. In exchange, I'll let you know the concerns expressed by cities, ma yors and counties at the EO meeting.

From: Fong, Tera L.
Sent: Tuesday, May 12, 2015 12:46 PM
To: Dorjets, Vlad; Laity, Jim
Subject: RE: Clean Water Rule rollout meeting

Hope she could hear things, will try to connect with you later today.

0

-----Original Message-----
From: Dorjets, Vlad
Sent: Tuesday, May 12, 2015 11:25 AM Eastern Standard Time
To: Fong, Tera L.; Laity, Jim
Subject: RE: Clean Water Rule rollout meeting

Tera – Thanks for the heads up. Katie will call in for the meeting.

From: Fong, Tera L.
Sent: Tuesday, May 12, 2015 10:57 AM
To: Laity, Jim; Dorjets, Vlad
Subject: FW: Clean Water Rule rollout meeting

This is at 11:30 today. I know there's a 121866 at this time —and one I'd like to attend, too, but if either of you can make this meeting at CEQ, please join.

Thanks.

From: Fong, Tera L.
Sent: Tuesday, May 12, 2015 10:48 AM
To: Hickey, Mike
Cc: Maisel, Chad P.
Subject: RE: Clean Water Rule rollout meeting

Yes, I can go. Thanks.

From: Hickey, Mike
Sent: Tuesday, May 12, 2015 10:47 AM
To: Fong, Tera L.

Cc: Maisel, Chad P.
Subject: FW: Clean Water Rule rollout meeting

Tera – This is the interagency roll out meeting I mentioned to you yesterday. It is at 11:30 today, can you go? Thanks.

From: Maisel, Chad P.
Sent: Tuesday, May 12, 2015 10:37 AM
To: Hickey, Mike
Subject: FW: Clean Water Rule rollout meeting

Hi Mike,

Might you or Tera be able to make this? Ali can't and nor can I. Seems pretty comms - and outreach-focused. Sorry for the late notice. If you can't make it, I can try and change my sched around.

From: Zaidi, Ali
Sent: Monday, May 11, 2015 12:50 PM
To: Tuss, Taryn L.
Cc: Maisel, Chad P.; Mohtadi, Shara
Subject: RE: Clean Water Rule rollout meeting

Hi

Can I dial in to this?

-----Original Appointment-----
From: Tuss, Taryn L.
Sent: Thursday, May 7, 2015 12:15 PM
To: Tuss, Taryn L.; Goldfuss, Christina; Costa, Kristina; Patel, Rohan; Barranco, Angela; Bauserman, Trent; Zaidi, Ali; Jensen, Jay; Mallory, Brenda; Benenati, Frank; Rowe, Courtney; Crook, Lowry; Elson, Tom; Bond, Brian; [redacted] Moira Kelley, DOD [redacted]; [redacted] Laura Vaught, EPA [redacted]; Todd Batta, USDA [redacted]; [redacted] Micah Ragland, EPA [redacted]; Billingsley, Tara; Anderson, Amanda D.; Reynolds, Thomas ([redacted]); Purchia, Liz [redacted]); Matthew Herrick ([redacted]); Cullen Schwarz [redacted]); Tarquinio, Ellen
Subject: Clean Water Rule rollout meeting
When: Tuesday, May 12, 2015 11:30 AM-12:30 PM (UTC-05:00) Eastern Time (US & Canada).
Where: 722 Jackson Place, 1st floor conference room

Let's get together the agency and EOP comms, leg and outreach teams to talk through the upcoming rollout of the Clean Water Rule. Just ring the bell at the front door; no WAVES needed. Thanks all.

From: Fong, Tera L.
Sent: Tuesday, May 12, 2015 2:58 PM
To: Colyar, Kelly T.; Burke, Erin; Leung, Andrea; Dorjets, Vlad; Laity, Jim
Cc: Hickey, Mike; Irwin, Janet
Subject: Summary of Clean Water Rule Roll-out mtg at CEQ

Water and Power Branch and OIRA, please see the following quick summary of the interagency Clean Water Rule roll -out meeting at CEQ this morning. Please note our recommendations related to the Army Corps and let us know if you have any concerns with us flagging this for Ali.

I've tried to flag the big points first and additional details follow. I'm happy to follow -up on any of these points. Thanks.

Main points:

- **EPA's plan to roll-out the rule is very extensive.** All systems seem to be "go" for the 21st, and EPA indicates they are on-target to meet that. We should begin to see rollout materials (talking points, Q&As, blog posts, etc) as soon as tomorrow. EPA is working with the Corps on coordinating materials, timing, and the overall announcements.

- **However, the Corps seems to be a bit player in this process.** Although all roll-out seems to be joint between EPA and the Corps, the meeting was very EPA -centric. The Corps (Moira Kelley) says they are working with the approach EPA has designed, but that they are still working on the economic analysis and need to make sure none of the comms materials conflict with the final EA. The Corps indicated a need to make sure they have their regions aligned on messaging, and CEQ acknowledged challenges in their ability to do so vs EPA's ability to align its regions. I think it would be helpful if Ali could touch-base at the policy level with CEQ and/or the directly with the Corps to make sure they're fully looped -in and ready for roll-out next week, particularly as there are concerns that immediate questions on implementation will be directed at the Corps, and EPA seems to be struggling to connect with stakeholders in the development sectors such as the homebuilders.

- **USDA has been engaged, but it is unclear how publically supportive they will be.** EPA has been sharing Ag-focused fact sheets, Q&A, and visual aids with representative pictures of covered waters with USDA, and they expect to work with NRCS and Farm Service Agency staff at the local level. However, Secretary Vilsack's public message may be more supportive of the highly consultative process EPA and the Corps have run, rather than outright support for the rule itself. His staff committed to trying to strike the appropriate balance of the two, but additional EOP outreach may be helpful.

- **Top-line roll-out messages:** (paraphrased) We've been listening, we've heard you, and the final rule reflects the significant input we received. Our goal is clean water to protect communities downstream —our drinking water and our economy depend on these protections. All agricultural exemptions continue.
    - CEQ cautioned to be careful not to quickly go to what the rule is not and to keep the focus on what it does do.

- **Additional work is needed around the legislative strategy.** It seems additional meetings are forthcoming and we ran out of time for this discussion, but with the House likely to pass a bill requiring EPA and the Corps to withdraw and re-propose the rule this week, it could be very awkward to follow that with a big roll -out of the rule next week. Timing and strategies on the Senate end are unclear and weren't discussed. I think it is expected that some of the environmental groups and messages from key regional officials will target key Democratic states.

Further details:

- Significant pre-work with stakeholders has been conducted. Coordination is ongoing with federal agencies, and also for groups including locals, sportsmen, and states.
- Ahead of roll-out, the Administrator will call key governors and meet with the head of the National Farmers Union (Roger Johnson) next week. EPA will follow -up with CEQ on the outcome of that discussion, and CEQ may attempt for higher-level engagement within the administration if necessary.
- Details of the actual announcement are still somewhat in flux. It s eems likely it'll be an outdoor photo op with key locals, outdoor groups, and moms and children. EPA's initial plan was for a closed -press joint signing with the Corps, though there was some discussion of pros and cons that plan may change.
- EPA would like CEQ's help with some key stakeholders including the business community, more sportsmen, and other ag interests. EPA and CEQ are coordinating outreach lists.
- EPA has asked key local groups —National Association of Counties, Conference o f Mayors no to send anything out to their members before they've read the rule. EPA plans to highlight letters sent by similar groups following the *Rapanos* guidance that requested a full, APA regulatory process with opportunities to comment, and will continue to highlight the message that we've listened to you and made changes in response to your comments.
- There is some knowledge this is coming soon. At an Energy -Water Nexus meeting last week, utility groups approached ECOS and asked about the re lease next week, and other rumors have been circulating that this will generally happen before Memorial Day. The media seems to say this will happen in a couple months.
- Day-two and later roll-out will happen through key regional staff, op -eds and similar more-local materials. It will be important that the implementation and permitting questions can be answered quickly.

Tera Fong
Program Examiner- Environment Branch
Office of Management and Budget
[redacted]

From: Dennis, Kia [redacted]
Sent: Monday, September 30, 2013 2:18 PM
To: Laity, Jim
Subject: RE: Interagency Review of Joint EPA/Corps Proposed Rule on Clean Water Act Jurisdiction

Jim,

Attached are my in-line comments to the draft rule. We feel strongly that this rule is required to go through the SBREFA panel process. I think we should speak so I can lay out Advocacy's thinking. We should set up a time once the CR stuff is worked out.

Kia Dennis | Assistant Chief Counsel | SBA Office of Advocacy [redacted] | website | listserv | blog | Facebook | twitter |

-----Original Message-----
From: Laity, Jim [redacted]
Sent: Friday, September 27, 2013 10:30 AM
To: Dennis, Kia
Subject: RE: Interagency Review of Joint EPA/Corps Proposed Rule on Clean Water Act Jurisdiction

Thx Kia. You make good pints let me think about this. Agree wit h your last suggestion. I will set it up.

Sent with Good (www.good.com)

-----Original Message-----
From: Dennis, Kia [redacted]
Sent: Friday, September 27, 2013 07:27 AM Eastern Standard Time
To: Laity, Jim
Subject: RE: Interagency Review of Joint EPA/Corps Proposed Rule on Clean Water Act Jurisdiction

Hi Jim,

Thanks for responding. Obviously we believe that this regulation, which defines "Waters of the US" and several other significant terms, does directly regulate small entities; the definition directly impacts when small entities will need to ge t permits under CWA. I'd also point out that EPA/Corps is moving beyond just applying the Supreme Court's Rapanos decision, they are not affirmatively including all adjacent waters, not just adjacent wetlands, as categorical "waters of the U.S.". Thus, they are not j ust proposing a set of principles that require judgment on a case -by-case basis. It is unclear to me, given the extensive list of what qualifies as waters of the U.S. under this proposed rule, what would not qualify as a water of the U.S. (excepting statu tory exclusions). It seems that only wholly intrastate waters might not qualify but only if they aren't adjacent to waters of the U.S., tributaries to waters of the U.S., tributaries to waters adjacent to waters of the U.S. and do not have some other hydr ologic or ecological connect to such waters. That covers

a great deal of water in the U.S. Notwithstanding this expansive definition, EPA/Corp states that fewer waters will be designated waters of the U.S. than are designated under the current regulation . This is unbelievable. Moreover, the baseline should be current practice, meaning the regulation as augmented by the guidance, since significant parts of the current (1982) regulation have been undermined or tossed out by the courts.

I think it may be beneficial for all reviewers to have conference call/meeting with EPA/Corp regarding the rule and its implications.

Regards,

Kia

Kia Dennis | Assistant Chief Counsel | SBA Office of Advocacy [redacted]
[redacted] website <http://www.sba.gov/advocacy> | listserv <http://web.sba.gov/list/> | blog <http://weblog.sba.gov/blog-advo/> | Facebook <http://www.facebook.com/AdvocacySBA> | twitter <http://twitter.com/advocacySBA> |

From: Laity, Ji [redacted]
Sent: Wednesday, September 25, 2013 5:25 PM
To: Dennis, Kia
Subject: RE: Interagency Review of Joint EPA/Corps Proposed Rule on Clean Water Act Jurisdiction

Kia, got your phone message and meant to call back but it's been a hectic day. Very briefly, as you probably realize, EPA will likely argue that several court precedents have established that RFA/SBREFA applies only to rules that directly regulate small entities. I have made the argument in the past that water quality standards rules, which are part of a chain of regulations that collectively impose requirements on small entities, should count. EPA has not accepted this argument, but so far we have agreed to disagree and have not had a water quality rule in recent times where the effects on small entities are likely to rise to a SISNOE. But it's fair to say that this issue remains unresolved.

In the current case, it appears to me that this rule is even one step further removed from imposing requirements directly on small entities than a water quality standards rule. In the case of a WQ stds rule we have a defined new standard applying to a defined set of water bodies which has direct consequences for permitted entities, including small entities, discharging into that water body. Here we have only a set of principles that will still require judgment to be applied on a case-by-case basis to determine if a water body is jurisdictional, and in most cases it may well be that the water body would have been jurisdictional even without the rule. So it is very difficult to point to any specific small entity that will be regulated as a result of the rule.

Having said this, you are welcome to put these concerns forward as part of the review process and I will make sure that they are addressed. Thanks as always for your great work on this. Jim

From: Dennis, Ki [redacted]
Sent: Wednesday, September 25, 2013 2:57 PM
To: Laity, Jim
Subject: RE: Interagency Review of Joint EPA/Corps Proposed Rule on Clean Water Act Jurisdiction

Jim,

I will send you Advocacy's line item comments next week, however, we disagree with the ce rtification of this rule. This rule will increase the number of waters that are subject to CWA and increase costs to small businesses. Per SBREFA EPA is required to conduct a panel before promulgating this rule.

Moreover, even if we were to agree t hat the rule could be certified, EPA/Army Corp has not met the statutory requirements for a certification. They must provide a factual basis for the certification that includes discussion of the small entities that would be affected, the basis for the det ermination that there is no significant economic impact or that an insubstantial number of small business would be affected and any other information that has led to the conclusion that certification is appropriate. The agencies have not done so.

Kia Dennis | Assistant Chief Counsel | SBA Office of Advocacy [redacted] | website <http://www.sba.gov/advocacy> | listserv <http://web.sba.gov/list/> | blog <http://weblog.sba.gov/blog-advo/> | Facebook <http://www.facebook.com/AdvocacySBA> | twitter <http://twitter.com/advocacySBA> |

From: Laity, Ji [redacted]
Sent: Tuesday, September 17, 2013 7:43 PM
T [redacted]
Cc: Mancini, Dominic J.; Comisky, Nicole E.; Fong, Tera L.; Finken, Anne; Rodan, Bruce; Stock, Jim; Hickey, Mike; Irwin, Janet; McConville, Drew; Utech, Dan G.; Higgins, Cortney
Subject: Interagency Review of Joint EPA/Corps Proposed Rule on Clean Water Act Jurisdiction

Interagency Reviewers: Please ignore previous e -mail, I hit send by accident before I had finished preparing.

Attached is the EPA/Corps draft proposed rule on CWA jurisdiction, along with the economic analysis. Please review and provide comments by Friday, October 4, 2013. As you know, the agencies previously submitted draft guidance on this same issue for review. The agencies have decided to proceed with rule making and the draft guidance has been withdrawn.

As a reminder, these documents should not be shared or discussed with anyone outside the executive branch. You may share as appropriate within your agency. If you feel someone outside your agency should review, please let me know and I will forward it to them. Please help ensure the integrity of the interagency review process by respecting these guidelines.

Feel free to call me if you have any questions or concerns.

Jim Laity

OMB/OIRA Desk Officer for CWA

[redacted]

Subject: RE: Intera gency Review of Joint EPA/Corps Proposed Rule on Clean Water Act Jurisdiction

Kia, got your phone message and meant to call back but it's been a hectic day. Very briefly, as you probably realize, EPA will likely argue that several court precedents hav e established that RFA/SBREFA applies only to rules that directly regulate small entities. I have made the argument in the past that water quality standards rules, which are part of a chain of regulations that collectively impose requirements on small ent ities, should count. EPA has not accepted this argument, but so far we have agreed to disagree and have not had a water quality rule in recent times where the effects on small entities are likely to rise to a SISNOE. But it's fair to say that this issue remains unresolved.

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Having said this, you are welcome to put these concerns forward as part of the review process and I will make sure that they are addressed. Thanks as always for your great work on this. Jim

From: Dennis, Ki [redacted]
Sent: Wednesday, September 25, 2013 2:57 PM
To: Laity, Jim
Subject: RE: Interagency Review of Joint EPA/Corps Proposed Rule on Clean Water Act Jurisdiction

Jim,

I will send you Advocacy's line item co mments next week, however, we disagree with the certification of this rule. This rule will increase the number of waters that are subject to CWA and increase costs to small businesses. Per SBREFA EPA is required to conduct a panel before promulgating thi s rule.

Moreover, even if we were to agree that the rule could be certified, EPA/Army Corp has not met the statutory requirements for a certification. They must provide a factual basis for the certification that includes discussion of the small entities that would be affected, the basis for the determination that there is no significant economic impact or that an insubstantial number of small business would be affected and any other information that has led to the conclusion that certification is app ropriate. The agencies have not done so.

From: Strom, Shayna L.
Sent: Friday, March 02, 2012 1:15 PM
To: Sunstein, Cass R.
Subject: FW: Waters of the United States rule
Attachments: CWA Jurisdiction Interagency Comments.pdf

fyi

From: Sargeant, Winslow [redacted]]
Sent: Friday, March 02, 2012 1:06 PM
To: Lu, Chris
Cc: Rodgers, Claudia; Landweber, Michael I.; Strom, Shayna L.
Subject: RE: Waters of the United States rule

Chris

Here is background information on why Advocacy has concerns with the guidance document. I have also included a memo sent to OIRA (January 2011) via the interagency confidential process.

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Advocacy is concerned that the EPA and Army Corps is addressin g the issue of identifying waters of the United States in a guidance rather than a rulemaking that would include the SBREFA panel process. If finalized, this guidance will make substantive changes to the way in which EPA and the Army Corps determine wheth er a water body is subject to the Clean Water Act. The guidance will significantly increase the number of waters that are subject to the Clean Water Act consequently increasing the number of small businesses that have to engage in the lengthy and costly p rocess of permitting.

Use of the statutory rulemaking process has been urged for many years, not only by Advocacy and small businesses but by the Supreme Court as well. In *Rapanos v. U.S.*, Chief Justice Roberts chastises the agencies for failing to pur sue a rulemaking after an earlier Supreme Court decision. Moreover, the agencies themselves clearly recognize the need for a rulemaking in order to pursue changes to the scope of waters covered under the Clean Water Act. On numerous occasions they have stated that they intend to pursue a full rulemaking and they have started the process on two occasions – in 2003 with an advanced notice of proposed rulemaking and most recently in 2011 with an outreach meeting to the small business and state and local gover nment communities.

It is also important to note that the small business community has indicated to Advocacy that should the Agencies finalize this guidance they will be bringing suit to challenge the guidance.
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Thank you for your attention to this ma tter.

Winslow Sargeant, Ph.D. | Chief Counsel for Advocacy | SBA Office of Advocacy | 409 3 rd St. SW, Washington, DC 20416 | p 202/205-6533 | f 202/481-6928 | winslow.sargeant@sba.gov | website | listserv | blog | Facebook | twitter |

From: Lu, Chris [mailt [redacted].
Sent: Thursday, March 01, 2012 9:19 PM
To: Sargeant, Winslow; Strom, Shayna L.

Cc: Rodgers, Claudia; Landweber, Michael I.
Subject: RE: Waters of the United States rule

Winslow –

Thanks for this. I think the confusion is that there was some back and forth about whether this should be a rule or guidance, and the consensus view was guidance. Does that affect your concerns about this?

--Chris

From: Sargeant, Winslow [redacted]
Sent: Thursday, March 01, 2012 1:39 PM
To: Lu, Chris; Strom, Shayna L.
Cc: Rodgers, Claudia; Landweber, Michael I.
Subject: Waters of the United States rule

Chris, Shayna

I have attached a document that list the chronology of events relating to the Waters of the United States rule. According to the information we have received, the rule/guidance document is moving forward.

Any help you can give with the status of this rule would be helpful.

Thanks

Winslow Sargeant, Ph.D. | Chief Counsel for Advocacy | SBA Office of Advocacy | 409 3 rd St. SW, Washington, DC 20416 | p 202/205-6533 | f 202/481-6928 | winslow.sargeant@sba.gov | website | listserv | blog | Facebook | twitter |

TO: Jim Laity, Office of Information and Regulatory Affairs
FROM: Kia Dennis, Office of Advocacy
DATE: January 5, 2011
CC: Charles Maresca, Director of Interagency Affairs, Office of Advocacy
SUBJECT: CONFIDENTIAL INTERAGENCY COMMENTS on the U.S. Army Corps of Engineers' and the Environmental Protection Agency's Draft Guidance on Determining Geographic Jurisdiction Under the Clean Water Act

The following memorandum contains information that falls under the Freedom of Information Act (FOIA) deliberative process provisions and is, therefore, exempt from public disclosure. This report is intended for internal agency review only, and the information is FOIA (b)(5) exempt.

Thank you for providing the Office of Advocacy (Advocacy) with the opportunity to submit interagency comments on the U.S. Army Corps of Engineers' and the Environmental Protection Agency's (together the "Agencies") draft Guidance on Determining Geographic Jurisdiction Under the Clean Water Act (the "Guidance"). Advocacy recommends that the Agencies pursue the goals discussed in the Guidance as a rulemaking.

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Rulemaking Process Provides Important Protections

Advocacy is concerned that the Agencies are choosing to address the very important issue of jurisdiction over waters in guidance rather than through the rulemaking process. Advocacy believes that imposition of the changes the Agencies propose in the Guidance is more properly made through the rulemaking process as governed by the Administrative Procedure Act. Advocacy notes that the Agencies are soliciting comments on the proposed guidance. However, the rulemaking process provides the

public and small businesses with important protections beyond the ability to comment such as the right to a Regulatory Flexibility Analysis.

The Agencies acknowledge that the proposed Guidance will significantly increase the waters that are subject to the provisions of the Clean Water Act and the Agencies' jurisdiction. As a consequence, small businesses such as small agricultural businesses will now have to engage the permitting process in a greater number of their business dealings, resulting in an increase in costs for these small businesses. By publishing this Guidance, the Agencies escape responsibility for analyzing and publishing the effects that will be borne by small businesses as a result of the increase in jurisdictional waters.

Rulemaking Provides For More Detailed Discussions and Comments Regarding Applying the Significant Nexus Test to "Other Waters"

Advocacy is particularly concerned with the Agencies ' proposed methods for determining jurisdiction over "other waters" including intrastate and isolated waters as defined by 33 CFR § 328(a)(3). Advocacy disagrees with the Agencies' determination that "it is clear that Justice Kennedy intends for his significant nexus standard to apply to the other waters of this region." Neither Justice Kennedy nor the plurality opinion reached the issue of whether the significant nexus test should apply to other waters. In the Agencies' *Responses to the Rapanos Decision: Key Questions for Guidance Release*, the Agencies state as much: "*Rapanos* did not address the question of isolated waters and the regulations found at 33 CFR 328.3(a)(3)... The Guidance is focusing only on issues raised in *Rapanos*, and as a result does not address isolated waters." [1]

As a result of *Rapanos v. U.S* [2] and the Agencies' initial interpretation thereof, jurisdictional determinations over isolated waters are currently required to be elevated for an agency headquarters review prior to the district making a final jurisdictional determination.[3] The proposed Guidance inexplicably ignores the Agencies' prior interpretation of *Rapanos*. The proposed Guidance would change current practice by allowing field staff to unilaterally make jurisdictional determinations over isolated

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[1] Corps and EPA Responses to the *Rapanos* Decision: Key Questions for Guidance Release, www.epa.gov/owow/wetlands/pdf/13RapanosQ&As.pdf (last visited January 5, 2011).
[2] 547 US 715 (2006).
[3] Questions and Answers for *Rapanos* and *Carabell* Decision, 18-19 (June 5, 2007); Key Points for *Rapanos* and *Carabell* Decision.

waters. This is a significant change in permitting practice that may lead to a substantial increase in expense for small businesses and should be proposed as a rulemaking.

Rulemaking Has Been Urged By Chief Justice Roberts and the Public

Moreover, Chief Justice Robert's concurrence in *Rapanos* chastises the Agencies for failing to pursue rulemaking and finalize rules after the Court's decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* ("*SWANCC*").[4] After noting that the Agencies' began the rulemaking process, the Chief Justice goes on to say that "[rather] than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency."[5] The Agencies would be repeating the mistake highlighted by Chief Justice Roberts if they pursued Guidance rather than rulemaking in this instance.

Moreover, there is precedent that suggests that the current guidance may be binding on the Agencies thus requiring a rulemaking in order to be changed. At least one federal Appeals Court has held that guidance issued by the Army Corps of Engineers was effectively a legislative rule and was binding on the agency where that document had used mandatory language and was issued after public comment. [6]

Advocacy further notes that the Agencies state that they intend to propose revisions to the regulations in light of *SWANCC* and *Rapanos* in 2011. During the comment period for the guidance issued after the *Rapanos* decision, several commenters requested that the Agencies proceed with a rulemaking. [7] Given the public's requests and the fact that the Agencies have at various times since the *SWANCC* decision considered initiating rulemaking and even published an advanced notice of proposed rulemaking that

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[4] 547 U.S. at 757-758 (2006).
[5] Id. at 758.
[6] *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003), cert denied sub nom. *North Dakota v. Ubbelohde*, 541 U.S. 987 (2004).
[7] Question and Answers Regarding the Revised *Rapanos* & *Carabell* Guidance, http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/rapanos_qa_06-05-07.pdf (December 2, 2008) last visited January 5, 2011.

was not finalized, [8] Advocacy strongly encourages the Agencies to pursue the changes made in the Guidance as a rulemaking.

The proposed Guidance will expand the reach of the Agencies' jurisdiction and have a significant effect on small businesses and the public in general. Advocacy believes that under these circumstances it more appropriate that the changes proposed be made pursuant to the rulemaking process rather than published as guidance.

[8] Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States, 68 F.R. 1991 (2003).

From: Laity, Jim
Sent: Thursday, March 29, 2012 2:12 PM
To: Strom, Shayna L.
Cc: Mancini, Dominic J.; Weiss, Jeff; Neyland, Kevin F.
Subject: HVP for Waters of the US Guidance
Attachments: HVP for Clean Water Act Jurisdictional Guidance Final.docx

Shayna, We are still a few weeks away on this, but I wanted to get into vetting early. This is very big deal. I understand COS has promised enviros it will be done "soon." -- jim

TITLE OF RULE: Identifying Waters Protected by the Clean Water Act

AGENCY: EPA and US Army Corps of Engineers (Joint Guidance)

STAGE: Final Guidance

DAY 90 of REVIEW: 5/21/2012

RECEIVED DATE: 2/21/2012

ECONOMICALLY SIGNIFICANT: Yes

LEGAL DEADLINE OR AGENCY DEADLINE: None.

STATUS OF OIRA REVIEW: OIRA staff can be ready to conclude review by April 20, or perhaps sooner, if necessary. This should be coordinated with other WH offices and CEQ.

SUMMARY OF RULE: Clarifies how Corps and EPA field staff will assert jurisdiction over "waters of the United States" in light of two Supreme Court decisions *(SWANCC*, 2001, and *Rapanos*, 2006) that have created significant uncertainty. While no guidance can establish bright lines, and all determinations must remain site-specific, the guidance sends a strong signal that agencies will assert jurisdiction over virtually all navigable and interstate waters and tributaries, and over wetlands and other waters adjacent to these tributaries, but not (for the time being) over "isolated" waters. This is an expansion over current practice, based on guidance issued in the previous Administration. The new guidance also explains the legal and scientific underpinnings that will be used to support site specific determinations. OIRA staff believes the new guidance is solidly supported by the Court decisions. The final guidance will also attempt to provide additional clarity with regard to the status of ditches, which was a major concern of many commenters.

AFFECTED PARTIES/ENTITES: Environmental and sportsman groups are strongly supportive. Industry and agriculture are strongly opposed. State government is generally supportive with some concerns (they are co-regulators with EPA), local govts are generally opposed (they are usually regulated parties). All parties urge us to do rule making, either following (enviros) or instead of (industry/ local govt) guidance.

POSSIBLE MEDIA OR HILL INTEREST: Extremely high. House Republicans recently introduced a bill to block the agencies from finalizing this guidance.

EOP OFFICES THAT PARTICIPATED IN REVIEW: CEQ, OMB, CEA.

INFORMATION ABOUT THE RULE THAT CAN BE PUBLICLY DISCLOSED: None until released.

DESK OFFICER TO CONTACT IN CASE OF QUESTIONS: Jim Laity, [redacted]

From: Laity, Jim
Sent: Thursday, November 07, 2013 10:36 AM
To: Mancini, Dominic J.; Shelanski, Howard
Cc: Higgins, Cortney; Greenawalt, Andrei
Subject: RE: WOTUS

Good points all. Other examples of rules that we routinely call economically significant where effects could be characterized as "indirect" include NAAQS (require SIPs to implement), Effluent Guidelines (mostly implemented by states through permits), Wate r Quality Standards (implemented through permits).

EPA career staff earlier agreed with the "economically significant" determination for WOTUS. I think EPA's big concern now is not OMB review, but the RFA. They are afraid if they call it economically significant, they will also have to say it has a "significant impact on a substantial number of small entities" (SISNOE) which would mean doing a SBREFA panel (SBA is calling for them to do this). Aside from the issue of whether this might in fact be appropriate, I have pointed out to them that legally the two determinations are distinct and there is no direct connection between our significance determination and the RFA SISNOE determination.

From: Mancini, Dominic J.
Sent: Thursday, November 07, 2013 10:25 AM
To: Laity, Jim; Shelanski, Howard
Cc: Higgins, Cortney; Greenawalt, Andrei
Subject: RE: WOTUS

Thanks Jim, a couple of additional thoughts:

-Even the jurisdictional guidance was designated as economically significant when we were reviewing it, under the theory that if followed, it would lead to a larger number of facilities having to get a permit. That is the whole point.

-There is a history behind calling these effects indirect, and I w ould have concerns with that interpretation. Once they finalize this rule, there is no other regulation that EPA would need to pass before there would be permitting conditions imposed. "The permits, not this rule, would impose the burden" to me is a pre tty weak argument, especially since it is the same agency issuing the permits in at least some cases. I'm also pretty sure the case law on this issue, in this case interpreting the RFA since indirect costs are so important there, is not clear. This issue doesn't have to be resolved fully here but just wanted to clarify the other moving parts in this discussion.

Howard I know you are busy the next couple of days, but if you think it useful I would be happy to discuss with EPA.

Thanks,
Dom

From: Laity, Jim
Sent: Thursday, November 07, 2013 10:04 AM
To: Shelanski, Howard
Cc: Mancini, Dominic J.; Higgins, Cortney; Greenawalt, Andrei
Subject: WOTUS

I understand Gina is concerned about calling it economically significant. Let me know if you need more i nfo.

Short answer is accompanying economic analysis shows costs of $134 to $231 million and benefits of $301 to $398 million. EPA argues that these are "indirect" costs. This is not an important distinction to us. There is a wide variation in exactly how rules work together to impose costs. Many do not impose costs "directly" in the sense that they are implemented through other rules, but we generally look at the practical effects of the rule in question. The costs and benefits here are the extra adm inistrative and control costs (and corresponding benefits) associated with CWA permitting of entities that would not need a permit but for this rule. These are well within the kinds of costs that are appropriate to analyze and be transparent about under t he EOs.

From: Shelanski, Howard
Sent: Thursday, November 07, 2013 4:24 PM
To: Greenawalt, Andrei; Mancini, Dominic J.
Subject: Fw: Lemar Alexander letter

Keep very close hold. Gina is very worked up about this. We will meet with her next week. I want to have a very strong brief for why this was a very normal designation in this case, and why the process was not, as she seems to think, one where staff simply made an unusual call that they should have elevated.

----- Original Message -----
From: [redacted]McCarthy, Gina [redacted]]
Sent: Thursday, November 07, 2013 04:07 PM Eastern Standard Time
To: Shelanski, Howard
Subject: Lemar Alexander letter

Following up on our call this morning, I tracked down the Alexander letter and we can talk about how best to respond. But I wanted to note my concern and disappoint that in the letter, the Senator refers to WOTUS as an eco nomically significant rule. We really need to understand how this change was made without proper authorization and how we put this cat back in the bag. I will check on my end and we can talk early next week. Thanks

From:	Laity, Jim
Sent:	Thursday, November 07, 2013 7:05 PM
To:	Shelanski, Howard
Cc:	Greenawalt, Andrei; Mancini, Dominic J.; Higgins, Cortney
Subject:	Significance Determination for Waters of the US Rule
Attachments:	Waters of the United States NPRM Significance Determination.docx

Howard, The attached memo provides additional background and considerations. I feel very strongly that this rule is economically significant and must be classified as such for the sake of transparency. Also, there was nothing improper in OIRA changing the designation in ROCIS at the time the rule was submitted, after first consulting with senior EPA Office of Water career staff who agreed to the change. Frankly, we thought the non-economically significant designation was simply a mistake and EPA staff di d not suggest otherwise.

Feel free to call if you need further info. Jim

Waters of the United States NPRM

Significance Determination

Background

December 2010

EPA and the Corps (the agencies) jointly submit for OMB review *Draft Guidance on Identifying Waters Protected by the Clean Water Act*. Intent of this guidance is to revise the agencies' interpretation of the *SWANCC* and *Rapanos* Supreme Court decisions in a way that would lead to a broader assertion of Clean Water Act jurisdiction over remote and isolated waters than is currently recommended under final guidance issued in 2007. While the original submission did not include an economic analysis, the guidance was deemed "economically significant" because of the potential for widespread impacts on any economic activity that involves a discharge of pollutants to any wat ers that would be found jurisdictional as a result of the guidance. At OIRA request, the agencies subsequently prepared an economic analysis that showed costs of $87 to $171 million and benefits of $162 to $368 million. The agencies were careful to refe r to these as "indirect" effects, but did not dispute the "economically significant" classification.

April 2011

Review concluded on the draft guidance with a finding of "consistent with change" and a classification of "economically significant."

February 2012

The agencies submit draft final guidance, with a classification of "economically significant." Accompanying economic analysis shows costs of $134 to $232 million and benefits $301 to $398 million. During the public comment period the agencies had received substantial input from stakeholders arguing that the guidance would impose a "significant impact on a substantial number of small entities" (SISNOSE) and EPA should thus convene a SBREFA panel. EPA argued that SBREFA applies only to rules, not guidance, as a legal matter, and in any case the effects were "indirect" and not covered by the RFA. However, to show its concern for small business es, EPA agreed to run a "voluntary, SBREFA like" process. They held one or two outreach meetings to hear the concerns of small entities. I don't believe any "panel-like" report was ever prepared.

September 2013

The agencies submit draft NPRM for OIRA review and concurrently withdraw the draft final guidance. The draft NPRM is accompanied by an economic analysis that is virtually identical to the analysis of the withdrawn guidance and shows the same costs and benefits (both over $100 million). However, the draft NPRM is classified by the agency as "significant," not "economically significant." There is high -level interest in ensuring simultaneous submission of the rule to OMB and submission of EPA's *Connectivity Study* to the SAB for review, including a carefully coordinated rollout. Late in the afternoon of th at day, I called over to senior EPA career staff in the Office of Water and pointed out the inconsisten t significance

classification and indicated my judgment that the rule should be called "economically significant" as the guidance before it had been. I noted that once the rule was "accepted" for review, it would be more difficult to change the classification and doing so could lead to questions from the public. EPA agreed to the change. I changed the classification in ROCIS and accepted the rule for review.

Considerations for Significance Determination

- This rule is economically significant because it is accompanied by an economic analysis (prepared by the agencies) that shows both costs and benefits exceeding $100 million per year. EPA's argument that these are "indirect" effects is irrelevant to the si gnificance determination under EOs 12866 and 13563.
- Many types of rules that are deemed economically significant are not self -implementing and have effects that might also be characterized as "indirect." NAAQs, effluent guidelines, and water quality standards are common examples.
- EPA is concerned that they may be vulnerable to a procedural challenge over their unwillingness to conduct a formal SBREFA panel for this rule. SBA Advocacy believes that they should. This remains an unresolved issue during inte ragency review. It turns on whether the economic impacts are "direct" or "indirect." Courts have found some types of impacts (eg, market effects on upstream suppliers and downstream customers) to be "indirect" and not subject to RFA analysis. It is unclear how a court would classify the effects of this rule, but it is important to EPA to call them "indirect."
- However, the SISNOSE determination under the RFA and the "economically significant" determination under EO 12866 are not connected. The terms "dir ect" and "indirect" are not used in the EO. The SISNOSE determination does not depend on a $100 million threshold. Typically, EPA estimates the number of small entities with costs exceeding 1% and 3% of revenues and then determines whether these numbers are "substantial." There is no bright line threshold for this SISNOSE determination.
- Under the EO, significance determinations are ultimately the responsibility of OIRA, not the rule-writing agency. It would be very awkward for OIRA to defend publicly a determination that this rule is not "economically significant" given the history and accompanying economic analysis. This would not be consistent with OIRA practice and would raise serious precedential issues .

From: Smith, Charles R CIV (US) [redacted]
Sent: Friday, January 23, 2015 12:49 PM
To: Laity, Jim
Subject: Fwd: WoUS Rule - Updated Status Report (UNCLASSIFIED)
Attachments: Way Forward 22 Jan 15 V2.docx

Informally and confidentially. Let me know if you have questions or wish to chat.

Chip Smith

Sent from my Verizon Wireless 4G LTE smartphone

-------- Original message --------
From: "Smith, Charles R CIV (US)"
Date:01/22/2015 11:06 AM (GMT-05:00)
To: "Lee, Let M CIV (US)"
Cc: "Schmauder, Craig R SES (US)" ,"Koenig, Reinhard W COL USARMY HQDA (US)" [redacted],"Turley, Tammy LRN" ,"Belk, Edward E SES MVD" ,"Gaffney-Smith, Margaret E HQ" ,"Moyer, Jennifer A HQ02" ,"Kozlowski, Diane C LRB" ,"Jensen, Stacey M HQ02" ,"Wood, Lance D HQ02" ,"Cooper, David R SES HQ02"
Subject: WoUS Rule - Updated Status Report (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

For info, revised as of today. Coordinated with USACE Regulatory staff to ensure accuracy. Thanks.

Chip

Classification: UNCLASSIFIED
Caveats: NONE

Definition of Waters of the United States Rulemaking
Status & Highlights on 22 January 2015

Schedule Highlights

- Comment period closed 14 Nov 2014
- Goal to submit final draft rule to OMB o/a end of February 2015
- No schedule developed to read, evaluate, respond to ~900,000 comment letters, ~20,000 of which are unique comment letters, of which ~2,000 are substantive comment letters, which generally contain multiple substantive comments.

Tasks Remaining

- Still awaiting most recent EPA draft final rule, definitions, preamble, and options papers if EPA has developed it

- Organization of comments into compendiums by EPA's contractor continues; the last ~1/3 of comments on the docket have not yet been processed by the contractor and these are likely the most "substantive."

- EPA still must produce a new/revised Economic Analysis for the proposed rule (**preliminary indications based on analysis using the proposed rule language are that the expansion of jurisdiction may double overall, and increase from 17% to 70% for isolated/other waters, increasing costs to the local/Tribal/State governments, applicants, and the Nation**)

- Initial data analysis by the USACE JD team to feed into EPA's economic analysis was briefed informally to Army/USACE team 16 Dec 2014 ; these results will be reviewed and approved by USACE leaders, then provided to Army and ultimately EPA for use when revising the Economic Analysis . EPA has indicated that they continue to update the sections of the economic analysis that do not require the specific data from the JD review and that they are waiting to complete their JD analysis until the draft final "other waters" language has been decided.

- EPA (Peck) & Army (Schmauder) will meet with DOJ to see what their views are on the jurisdiction Options, their defensibility, and the way forward

- EA/FONSI versus EIS question still open; issues are: 1) defensibility of NEPA on Corps aspects of the rulemaking only; 2) what level of analysis of the environmental impacts of the various new Definitions and Options is necessary for a defensible NEPA document; 3) whether determining certain categories (vernal pools, prairie potholes, Delmarva/Carolina Bays, etc.) of other waters ***per se*** "similarly situated" for the significant nexus determination requires publication of a revised draft rule for public comment; and, 4) how to address the large number of unique, substantive sophisticated legal, policy, and technical

comments between now, selection of new Definitions and Options, and submission of final rule to OMB

- OASA(CW) to complete the NEPA documentation (404 only). Need all comments evaluated (EPA Contractors summary report) and responded to so the results can be summarized and discussed, then used to inform consideration of Options evaluated and recommendations for the final rule (Spring 2015)

- EPA is drafting the revised Preamble for the draft final rule; Army and the Corps need to review and provide edits/comments

Comment Summary:

As of 22 January 2015:

- ~900,000 comment letters (docket still processing mass mail campaigns); by far, more comments have been submitted on this proposed rule than any action in the history of OASA(CW) and USACE
- ~900,000 comment letters processed into the docket
- ~20,000 unique comment letters which must all be considered and addressed in a "response to comments" document
- Of the ~20,000, predict ~2,000 substantive comment letters which generally contain multiple individual substantive comments to consider for the final rule policy decisions (~10% of the total unique comment letters are substantive)
- As an example, it took the Corps ~8 months to work thro ugh a total of 26,500 comment letters on the Nationwide Permits for 2012, consisting of only 300 unique comment letters containing ~2,000 individual substantive comments
- 75 recent letters (526 individuals) from Congress (members and committees), State officials, and key organizations reveal the following (Sec 6 from EA attached)

Reasons for Opposition (letters are long, complex, meaty)

- 21 letters from Congress oppose the rule a/o ask that it be withdrawn
- 9 letters from Congress request rewriting, additional clarity, more time
- 10 letters from States oppose the rule a/o ask that it be withdrawn
- 10 letters from States request rewriting, additional clarity, more time

Sample of Reasons cited for opposition:

- Expansion of jurisdiction
- Legal questions related to constitution, CWA and SWANCC & Rapanos decisions
- Federalism, infringement on the roles and responsibilities of States
- Adverse impacts to economic development and use of private property

- Adverse & significant impacts on small businesses
- Adverse & significant impacts on agriculture
- Inadequate, inaccurate Economic Analysis
- Concerns about MS4s and jurisdiction, would be tremendous scope and cost change
- Lack of clarity, vague new terms
- Lack of consultation with Tribes, States and the Public BEFORE the rule was drafted

Reasons for Support (very short & general):

- Clean water
- Hunting, fishing, & recreation
- Water quality protection and improvement
- Habitat protection for aquatic species
- Increased flood protection

Selected Past Concerns from OMB

- Clarity, bright lines, describe what is non-jurisdictional as well as what is jurisdictional
- Text spent describing what is jurisdictional without sufficient attention paid to what is not jurisdictional
- How to handle ditches, especially roadside and agricultural
- Economic Analysis
- SBRFA
- What do the agency, public and organization comments say?

Summary of Comments to Date (As of 1/22/15; 100% of comments have been skim-read for sorting only by the Corps, not for evaluation and response; evaluation process just initiated on January 20th)

- 38% unique individual
- 22% agricultural interests
- 20% NGOs
- 13% environmental organizations
- 6% local and state governments
- 1% businesses
- <1% congressmen/governors/Tribes

Substantive Comments Summary:

22% business
21% unique individual
21% local government

11% other NGO
10% state government
5% environmental NGO
3% agricultural interests
3% congressmen/governors
2% academia
2% Tribal

Examples of Key Organizations Providing Comments

- Water Advocacy Coalition – asks for withdrawal
- Western States Water Council – asks for revisions
- National Association of Flood and Stormwater Management Agencies – asks for revisions
- Pacific Legal Foundation – asks for withdrawal
- National Farmers Union – asks for revisions
- American Farm Bureau – asks for withdrawal
- USA Rice Federation – asks for revisions
- National Stone, Sand and Gravel Association – asks for withdrawal
- American Petroleum Institute – asks for revisions
- National Mining Association – asks for revisions
- Ducks Unlimited – supports proposed rule
- Natural Resources Defense Council – supports proposed rule

Overall Support to Date (As of 1/22/15; 70% read and sorted)

- 58% are opposed to the rule
- 37% are in support of the rule
- 5% are neutral

Waters of the US Outstanding Policy Issues

Updated 1/9/14 (updates in redline)

Background

The Clean Water Act includes various programs to protect "navigable water," defined in the Act as "the waters of the United States." The latter term is not defined in the statute. Any water not deemed to be a "water of the US" is excluded from the protections of the CWA, and is instead left to states and local communities to manage and protect as they see fit. Since the Act was passed in 1972, there was a gradual expansion through a series of rulemakings, guidance documents, and court decisions in the EPA's understanding of the scope of waters covered by the Act. This issue also affects the Army Corps of Engineers, which administers one portion of the CWA (the Section 404 program) that regulates the "discharge of dredge or fill materials" and is the primary vehicle for protecting wetlands from being filled in. By 2001, the agencies generally interpreted the term "waters of the US" as covering virtually all water bodies and wetlands.

In 2001 and 2006, the Supreme Court issued two landmark decisions (*SWANCC* and *Rapanos*) that together suggested that the agencies' current jurisdictional regulations w ere broader than Congress intended. At the same time, the Court itself was split and did not actually strike down any portion of the existing regulations, which remain on the books. In the first case, the Court questioned jurisdiction over "isolated, non-navigable, intrastate" waters, while in the second a divided Court offered two overlapping but distinct jurisdictional tests: Justice Kennedy suggested that a water is jurisdictional if it has a "significant nexus" to a traditional navigable water, while Justice Scalia suggested instead that it is jurisdictional if it is "relatively permanent." Neither justice offered much guidance as to what these vague terms mean in practice. Since then the agencies have struggled to interpret the court decisions in a consistent and reasonable way, and have issued several draft and final guidance documents explaining their current thinking. However there remains widespread confusion over the limits of jurisdiction, and widespread disagreement over what Congress and th e courts intended.

In April 2011 the agencies released draft guidance that would replace earlier 2008 guidance and adopt a broader interpretation of the scope of jurisdiction. The 2011 draft guidance would include all tributaries and adjacent wetlands as unambiguously jurisdictional, and offered a path to include some isolated waters as well, on a case-by-case basis. It was strongly supported by environmental and sportsm en groups and strongly opposed by industry, agriculture and developers. State and local governments were split. The only thing that all stakeholders agreed on was that guidance alone would not solve the problem and that rulemaking was needed, as the Court has also said. In February 2012, the agencies submitted draft final guidance for re view that largely mirrored the 2011 draft guidance. This guidance was withdrawn from review concurrently with submission of the draft NPRM, on September 17, 2013.

Proposed Rule

The proposed rule, as submitted to OIRA, would clearly establish jurisdictio n over all tributaries of navigable and interstate waters, including ephemeral streams (only flow when it rains) at the upper limits of the tributary system. It would also include as jurisdictional all wetlands and other waters that are "adjacent" to navigable and interstate waters and their tributaries , and provide an improved, science-based definition of adjacency. These waters would be "categorically" jurisdictional —that is, no case-by-case determination would be needed. This is a huge improvement over earlier guidance documents. Both the 2008 final guidance and the 2011 draft guidance required a resource intensive and vaguely defined case-by-base determination of "significant nexus" and/or "relati vely permanent" for all non-navigable tributaries and their adjacent wetlands. The only substantive difference is that the 2008 guidance required that waters be evaluated one at a time, while the 2011 draft guidance allowed waters in a watershed to be gro uped for the purpose of determining if their connection to navigable waters was "significant." This had the effect of making it more likely to find a "significant nexus" for remote streams and wetlands, but did not remove the need for a case -by-case determination and the resulting regulatory uncertainty. The greater certainty in the proposed rule is generally regarded by other Federal agencies as a positive step forward.

On December 21st, EPA provided OIRA with an "informal" passback that responded to earlier OIRA and other agency comments. This passback was identified as "informal" because it had not yet been reviewed and approved by the Corps, which is jointly issuing the proposed rule with EPA. The Corps is currently reviewing this new draft and ha s committed to work with EPA to provide a "formal" consensus passback by Friday, January 17. In the meantime, we have reviewed the draft passback. It does not include any significant changes to the submitted version of the NPRM, but adds a preamble sectio n requesting comment on four new options regarding the treatment of "isolated waters."

A number of important issues remain unresolved, as discussed below.

Isolated Waters (aka "other waters" – note this is shorthand for "isolated, non -navigable, intrastate" waters, which were specifically addressed in SWANCC; navigable and interstate waters are always jurisdictional regardless of whether they are isolated or not): The proposed rule would continue to require a case-by- case demonstration of a "si gnificant nexus" to navigable or interstate waters to assert jurisdiction over isolated waters. Unlike either the 2008 or 2011 guidance, the proposed rule would also allow some grouping of isolated waters for determining significance, and offers vague cri teria for such grouping. This makes it somewhat more likely that isolated waters could be found jurisdictional, which is a significant policy g oal of environmental and sportsmen groups . However, the scientific and legal basis for asserting jurisdiction o ver many types of isolated waters remains weak, and the proposed rule would do little to resolve regulatory uncertainty regarding such waters. **OIRA staff recommends that EPA establish categorically that isolated waters are not jurisdictional, but remain subject to protection under state and local law.** This would address some concerns raised by other agencies, including USDA, DOT, and DOI. The four new options on which comment is requested are :

1. Disallow grouping of isolated waters for purposes of determi ning "significant nexus" (so that all determinations would be done on one water at a time) and state that this would likely have the effect of making few if any isolated waters jurisdictional. This is the closest of the options to OIRA's recommendation above, but there is a key difference. By not establishing that isolated waters are *categorically* excluded from jurisdiction, this option would not provide regulatory certainty. Regulated entities are distrustful of the agencies and would likely see the ir unwillingness to categorically exclude isolated waters as an indication that the y wish to preserve the option of asserting jurisdiction on a case-by-case basis.
2. Identify some types of isolate d waters (eg, prairie potholes, Carolina and Delmarva bays, vernal pools) as categorically jurisdictional, and others as categorically non -jurisdictional. It appears, however, that some isolated waters would remain undetermined and would be subject to cas e-by-case determinations based on the significant nexus standard. This is a promising step in the right direction. We are not opposed to the agencies identifying some types of isolated waters as jurisdictional if the science supports it, but we strongly recommend that they provide regulatory certainty by affirming categorically in the rule that waters not determined to be categorically jurisdictional are categorically non-jurisdictional. That is, we strongly recommend that they eliminate case-by-case determinations. We also believe that such an approach would be viewed favorably by the Court, which has criticized the agencies in the past for not clarifying jurisdiction through rule making.
3. Identify "eco-regions" where all isolated waters would be aggregated for purposes of case-by-case significant nexus determinations, which would make it likely that they would be found jurisdictional. It is not clear whether the rule would prohibit such aggregation in the remaining areas, or leave it up to the case-by-case judgment of field staff, as in the lead proposal (and the current status quo). This option also does not provide regulatory certainty, and would likely be viewed as a significant expansion of jurisdiction relative to the current status quo.
4. Identify all "isolated" waters as categorically jurisdictional. This is the only one of the EPA options that eliminate s case-by-case determinations and thus provides regulatory certainty regarding isolated waters. However, it would be viewed as a massive expansion of jurisdiction by the regulated community and would likely be rejected by the Court.

OIRA staff continue to believe that the best option would be to identify all isolated waters as categorically non-jurisdictional, and that this should be the lea d option in the regulatory text. While the Court did not explicitly preclude assertion of jurisdiction over at least some isolated waters, there is language in both the decisions suggesting that the Court would generally find it a tou gh case to make that "isolated, non-navigable, intrastate" waters have a significant nexus to navigable waters. While environmental groups would not like this option, a nd regulated entities will not like the assertion of jurisdiction over all tributaries and adjacent w aters, we believe this is a reasonable compromise between these two hardened positions. EPA staff have indicated to us, however, that they do not support, and believe their policy officials do not support , an outcome that would be perceived by environmental grou ps as "less protective than what the Bush Administration did." They argue that by categorically excluding some or all isolated waters, they would be removing at least hypothetical protection for these waters that the Bush administration left in place. Leaving aside the question as to

whether this is an appropriate decision factor, we note that as a practical matter, the agencies have NOT been able to assert jurisdiction using the case-by-case significant nexus standard over ANY isolated waters during the past 13 years since the *SWANCC* decision was issued. To us it seems that providing clear and robust protection for all tributaries and adjacent waters (which the Bush adm inistration did not do), and at the same time providing regulatory certainty that isolated waters over which the agencies are not currently asserting jurisdiction (though they hypothetically could on a case -by-case basis) provides greater, not less, protec tion than the Bush administration status quo, which remains in place.

Ditches: The proposed rule categorically excludes manmade ditches that are excavated holey in uplands (non-waters), provided they only have flow following a rain event. This is scientifically questionable, since ditches are essentially man -made tributaries and have the same potential to affect navigable and interstate waters as natural tributaries. However, the exclusion is intended to address the practical concern that most roadside and agricultural ditches have not been considered jurisdictional in the past, and asserting jurisdiction over them now would lead to a substantial increase in workload for both the Corps and regulated entities (including farmers and state and local DOTs), with questionable environmental benefit. DOT, USDA, and DOI/BLM are supportive of the exclusion, but don't think it goes far enough. **OIRA staff recommends that the agencies consider a broader exclusion for ditches, specifically manmade d itches that flow intermittently but may seasonally intersect groundwater, and thus flow more often than only following a rain event.** This would largely address the other agencies' concerns. EPA staff have indicated informally that they are willing to mak e this change, but it is not reflected in the most recent passback.

Definition of Adjacency: The rule proposes a revised definition of adjacency that is more precise and science-based than the existing regulatory definition. However, the proposed definit ion retains significant ambiguity, which DOJ has suggested makes it vulnerable to legal challenge. One example of this ambiguity is that waters within the "floodplain" of a stream would now be considered adjacent. While this makes sense scientifically, a nd is more precise than simply saying "neighboring" waters are adjacent (as in the current regulations), the proposed rule does not specify what interval flood (10 -year, 25-year, 50-year, or 100-year) should be used to define the floodplain. 100 -year floodplains are most consistently (though not universally) mapped, but the agencies are concerned that this may cover an indefensibly broad area in some cases (eg, the main -stem Mississippi River). Thus, the proposed rule deliberately leaves discretion to the agencies to decide what interval floodplain to use on a case -by-case basis. A second issue is the proper role of surface and shallow subsurface flow in establishing adjacency. **OIRA staff recommends that the rule provide greater clarity on the definition of adjacency.** This is an area where public comment may be especially helpful , so a robust discussion of options and request for comment would be in order. This would also address concerns raised by DOT and DOI. The most recent passback provides little additional clarity in this area, and does not identify a specific flood interval for determining whether adjacent waters are in the "floodplain" of a jurisdictional water. This has been identified by several stakeholder groups as a major concern. They see it as a potentially significant expansion of jurisdiction relative to the status quo , and a continuing source of regulatory uncertainty.

Regulatory Flexibility Act Compliance: The preamble states that the proposed rule will not have a significant impact on a substantial number of small entities (SISNOE) because it does not "directly" regulate any small entity (or anybody else). Rather it simple clarifies the extent of Clean Water Act jurisdiction. SBA does not agree. They believe the r ule expands jurisdiction relative to the status quo (as reflected in the economic analysis accompanying the rule) and that small entities discharging into newly jurisdictional waters will experience a "direct" regulatory impact that at least requires subst antive analysis under the RFA to determine if it is significant. The determination of "direct" v. "indirect" effects is a longstanding point of contention between SBA and EPA, and OIRA staff ha s generally supported SBA in reading the RFA more broadly. Ho wever, the current case is particularly challenging because it is difficult to identify any specific water body that would fail a case -by-case jurisdictional determination under the existing status quo, but would be made jurisdictional by the rule. As not ed above, one of the main advantages (and purposes) of the rule is that it clears up substantial ambiguity regarding jurisdiction, but this very fact makes it hard to determine if the rule has a SISNOSE or not. **OIRA staff recommends that counsel from EPA, the Corps, SBA, and the EOP discuss this issue and try to reach consensus on whether or not the rule requires substantive analysis under the RFA.** If it does, the agencies will need to analyze the impacts of the rule on small entities, and if they cannot d etermine that there is no SISNOSE, will need to conduct a Panel process pursuant to the Small Business Regulatory Enforcement and Fairness Act. This could be done concurrently with the public comment period and the agencies consideration of public comment s, but it would require a significant resource commitment that is not currently planned, and could extend the rulemaking schedule by several months.

We were reminded by EPA that there was an agreement at the time we were reviewing the draft guidance to not convene a SBREFA panel, but rather to convene a "voluntary, SBREFA -like" process including outreach to small entities and a report to the Administrator. SBA was not a party to that agreement, but might be persuaded that it is an acceptable substitute for a full SBREFA process. EPA did convene an outreach meeting to small entities in 2011, which OIRA and SBA also attended, and has now provided a draft report which we are currently reviewing.

Permitting Exemptions: The proposed rule emphasizes repeatedly in the preamble that existing activity - specific permitting exemptions will remain unchanged by the rule. In practice, these exemptions address many of the concerns raised by various regulated entities by providing that certain activities (eg, return flows from irrigated agriculture and routine maintenance of roadside drainage ditches) do not require a CWA permit, even if the water in question is jurisdictional. However, USDA has suggested that EPA craft a broader exemption for "normal farming, silvicultur al, and ranching activities" and include it as part of this rule. **OIRA staff recommends that the rule not include a broader permitting exemption for such activities, which is beyond the intended scope of the rule, whose purpose is to define the extent of Clean Water Act jurisdiction.** However, it would be reasonable for USDA, EPA and the Corps to have side discussion s regarding possible future rule making addressing such an exemption; the agencies may also want to consider including a commitment to such a rulemaking in the rollout for the rule.

EPA and the Corps have been meeting with USDA to develop an "interpretive rule" that would clarify the scope of this permitting exemption in a way that USD A would find acceptable, and would be released

concurrently with the draft WOTUS NPRM . We have indicated to EPA that we might be willing to waive review of such an interpretive rule, but would like to better understand what is in it before we make a final determination. We expect to see a copy of the current draft shortly.

From: Mancini, Dominic J.
Sent: Thursday, November 07, 2013 10:25 AM
To: Laity, Jim; Shelanski, Howard
Cc: Higgins, Cortney; Greenawalt, Andrei
Subject: RE: WOTUS

Thanks Jim, a couple of additional thoughts:

-Even the jurisdictional guidance was designated as economically significant when we were reviewing it, under the theory that if followed, it would lead to a larger number of facilities having to get a permit. That is the whole point.

-There is a history behind calling these effects indirect, and I would have concerns with that interpretation. Once they finalize this rule, there is no other regulation that EPA would need to pass before there would be permitting conditions imposed. "The permits, not this rule, would impose the burden" to me is a pretty weak argument, especially since it is the same agency issuing the permits in at least some cases. I'm also pretty sure the case law on this issue, in this case interpreting the RFA since indirect costs are so important there, is not clear. This issue doesn't have to be resolved fully here but just wanted to clarify the other moving parts in this discussion.

Howard I know you are busy the next couple of days, but if you think it useful I would be happ y to discuss with EPA.

Thanks,
Dom

From: Laity, Jim
Sent: Thursday, November 07, 2013 10:04 AM
To: Shelanski, Howard
Cc: Mancini, Dominic J.; Higgins, Cortney; Greenawalt, Andrei
Subject: WOTUS

I understand Gina is concerned about calling it economically significant. Let me know if you need more info.

Short answer is accompanying economic analysis shows costs of $134 to $231 million and benefits of $301 to $398 million. EPA argues that these are "indirect" costs. This is not an important distinction to us. There is a wide variation in exactly how rules work together to impose costs. Many do not impose costs "directly" in the sense that they are implemented through other rules, but we genera lly look at the practical effects of the rule in question. The costs and benefits here are the extra administrative and control costs (and corresponding benefits) associated with CWA permitting of entities that would not need a permit but for this rule. These are well within the kinds of costs that are appropriate to analyze and be transparent about under the EOs.