



441 G St. N.W.
Washington, DC 20548

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May 5, 2020

The Honorable John Barrasso
Chairman
The Honorable Thomas Carper
Ranking Member
Committee on Environment and Public Works
United States Senate

The Honorable Peter A. DeFazio
Chairman
The Honorable Sam Graves
Ranking Member
Committee on Transportation and Infrastructure
House of Representatives

Subject: *Department of Defense, Department of the Army, Corps of Engineers;
Environmental Protection Agency: The Navigable Waters Protection Rule:
Definition of "Waters of the United States"*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Defense, Department of the Army, Corps of Engineers; Environmental Protection Agency (EPA) (collectively, the agencies) entitled "The Navigable Waters Protection Rule: Definition of 'Waters of the United States'" (RIN: 2040-AF75). We received the rule on February 7, 2020. It was published in the *Federal Register* as a final rule on April 21, 2020. 85 Fed. Reg. 22250. The effective date of the rule is June 22, 2020.

The final rule amends regulations implementing the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387. According to the agencies, the rule defines the scope of waters subject to federal regulation under CWA in light of Supreme Court decisions and consistent with Executive Order 13778, February 28, 2017. Exec. Order No. 13778, *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule*, 82 Fed. Reg. 12497 (Feb. 28, 2017). According to the agencies, the rule interprets the term "waters of the United States"; identifies the four categories of waters that are within the term; identifies those waters and features that are excluded from the term; and defines applicable terms. The agencies identify the following categories of waters of the United States: territorial seas and traditional navigable waters; tributaries; lakes and ponds, and impoundments of jurisdictional waters; and adjacent wetlands.

Enclosed is our assessment of EPA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive, flowing style.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Mary Manibusan
Director, Regulatory Management Division
Environmental Protection Agency

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS;
ENVIRONMENTAL PROTECTION AGENCY
ENTITLED
“THE NAVIGABLE WATERS PROTECTION RULE:
DEFINITION OF ‘WATERS OF THE UNITED STATES’”
(RIN: 2040-AF75)

(i) Cost-benefit analysis

The Department of Defense, Department of the Army, Corps of Engineers; Environmental Protection Agency (collectively, the agencies) prepared an economic analysis of the potential costs and benefits associated with this final rule. The analysis consisted of a series of qualitative analyses, case studies in three major watersheds, and a national analysis of the program under section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344 (section 404 program). The agencies’ summary of analysis in the rule began with the agencies outlining dataset limitations and uncertainties regarding the ways states and tribes might respond following a change in CWA jurisdiction. The agencies decided to discuss qualitatively the potential effects of the rule because of these limitations and uncertainties. For the case studies, the agencies stated that they studied three major watersheds (Ohio River basin, Lower Missouri River basin, and Rio Grande River basin) to provide information for a quantitative assessment of the potential effects of the rule. The agencies described this study as including potential ecological effects and the accompanying potential economic effects. Finally, the agencies stated that, because of data limitations, national-level estimates of costs and benefits only were possible for the section 404 program. The agencies estimated that the rule would produce annual avoided costs ranging from \$109 million to \$264 million and annual forgone benefits ranging from \$55 million to \$63 million. Under the scenario that assumes that no states will regulate dredged and fill activities in newly non-jurisdictional waters, an outcome the agencies believed unlikely, the agencies estimated the final rule would produce annual avoided costs ranging from \$245 million to \$513 million, and annual forgone benefits were estimated at \$173 million. The agencies emphasized that, while the economic analysis is informative in the rulemaking context, the agencies were not relying on the economic analysis as a basis for the final rule.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

The agencies certified that this final rule will not have significant economic impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

The agencies determined that this final rule imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that significantly or uniquely affect small governments.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On December 12, 2018, the agencies signed the proposed rule and the pre-publication proposal was posted on the Environmental Protection Agency (EPA) website. On February 14, 2019, the agencies published the proposed rule. 84 Fed. Reg. 4154. The agencies received approximately 620,000 comments from a broad spectrum of interested parties. The agencies described the stakeholder outreach conducted on the proposed rule. The agencies described holding a public webcast on February 14, 2019, to present key elements of the proposed rule. The agencies described a public hearing in Kansas City, Kansas, on February 27 and 28, 2019, to hear feedback from regulated industry sectors, environmental and conservation organizations, state agencies, tribal governments, and private citizens. The agencies noted continued engagement with states and tribes through a series of in-person meetings with state and tribal representatives in Kansas City, Kansas; Atlanta, Georgia; Albuquerque, New Mexico; and Seattle, Washington. The agencies also stated that, at the request of individual tribes, the agencies continued to hold staff-level and leader-to-leader meetings with tribes. The agencies also described engaging with EPA's Science Advisory Board (SAB) during the development of the rule on several occasions. The agencies stated that a memorandum summarizing the interactions with the SAB is available in the rule docket. The agencies stated that it reviewed and considered comments in developing the rule. The agencies stated that it responded to comments in the rule. The agencies also stated that a complete response to the comments document is available in the rule docket.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

The agencies determined that this final rule contains no information collection requirements under the Act.

Statutory authorization for the rule

The agencies promulgated this final rule pursuant to sections 1251 *et seq.*, 1321, and 1361 of title 33, United States Code.

Executive Order No. 12,866 (Regulatory Planning and Review)

The agencies determined that this final rule is economically significant under the Order and submitted it to the Office of Management and Budget for review.

Executive Order No. 13,132 (Federalism)

The agencies determined that this final rule will not have substantial direct effects on states, on the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. The agencies stated that the rule preserves state authority to choose whether or not to regulate waters that are not waters of the United States under CWA. The agencies asserted that, in any event, the requirements of the Order were satisfied. The agencies stated that they engaged in Federalism consultation meetings with state and local governments as well as associations representing these governments.