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July 16, 2015

The Honorable Jim Inhofe
Chairman
The Honorable Barbara Boxer
Ranking Member
Committee on Environment and Public Works
United States Senate

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

Subject: *Department of Defense, Department of the Army, Corps of Engineers; Environmental Protection Agency: Clean Water 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 (Corps); Environmental Protection Agency (EPA) (collectively, the agencies) entitled "Clean Water Rule: Definition of 'Waters of the United States'" (RIN: 2040-AF30).¹ We received the rule on June 2, 2015. It was published in the *Federal Register* as a final rule on June 29, 2015, with a stated effective date of August 28, 2015. 80 Fed. Reg. 37,054.

According to the agencies, the final rule does not establish regulatory requirements, but, instead, defines the scope of waters protected under the Clean Water Act (CWA) in light of the statute, science, Supreme Court decisions, and the agencies' experience and technical expertise. Programs established by CWA, such as the section 402 National Pollutant Discharge Elimination System permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and response programs, all rely on the definition of "waters of the United States." Entities currently are, and will continue to be, regulated under these programs that protect "waters of the United States" from pollution and destruction. The agencies report that the scope of jurisdiction in this rule is narrower than that under the existing regulation. Specifically, the agencies state that fewer waters will be defined as "waters of the United States" under this rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

According to the agencies, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states

¹ This report supersedes our report dated July 13, 2015, on this rule.

and tribes with authorized sections 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis. They report that this final rule interprets CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The agencies intend for this rule to make the process of identifying waters protected under CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting the streams and wetlands that form the foundation of the nation's water resources.

Enclosed is our assessment of the agencies' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that the agencies complied with the applicable requirements.

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 Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Nicole Owens
Director, Regulatory Management Division
Environmental Protection Agency

Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
Department of the Army

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
“CLEAN WATER RULE: DEFINITION OF
‘WATERS OF THE UNITED STATES’”
(RIN: 2040-AF30)

(i) Cost-benefit analysis

According to the Department of Defense, Department of the Army, Corps of Engineers, and the Environmental Protection Agency (collectively, the agencies) this rule, by itself, imposes no direct costs. The agencies consider the potential costs and benefits incurred as a result of this rule indirect, because the rule involves a definitional change to a term that is used in the implementation of Clean Water Act (CWA) programs. According to the agencies, entities currently are, and will continue to be, regulated under these programs that protect “waters of the United States” from pollution and destruction. Each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations.

While the agencies found that the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes. In preparing the economic analysis to accompany the final rule, the agencies considered two baselines for comparison. The first baseline was existing regulations and historic practice in implementing them and the second baseline was a comparison to recent field practice following the 2008 guidance. For the second baseline, the agencies considered two scenarios. The agencies prepared illustrative estimates of how the costs and benefits of various CWA programs may change with an increase in positive jurisdictional determinations relative to the baselines. The agencies note that their economic analysis yielded four key conclusions. First, compared to the current regulations and historic practice of making jurisdictional determinations, the scope of jurisdictional waters will decrease, as would the costs and benefits of CWA programs. Second, compared to a baseline of recent practice, the two scenarios result in an estimated increase of between 2.84 and 4.65 percent in positive jurisdictional determinations annually. Third, the agencies’ analysis indicates that for both scenarios, the change in benefits of CWA programs exceed the costs by a ratio of greater than 1:1. Fourth, the economic analysis estimates that incremental annual costs for the first scenario will range from \$158 million to \$307 million and incremental annual benefits will range from \$339 million to \$350 million and, for the second scenario, costs will range from \$237 million to \$465 million and benefits will range from \$555 million to \$572 million.

(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 a 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 does not contain any unfunded mandates under the Act and does not significantly or uniquely affect small governments. The agencies also found that the rule imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might 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 April 21, 2014, the agencies published a proposed rule and solicited comments for 200 days. 79 Fed. Reg. 22,188. They received over 1 million comments. The agencies also received input provided through their public outreach effort, which included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others.

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

The agencies determined that this final rule does not impose any information collection burdens under the Act.

Statutory authorization for the rule

The agencies promulgated this final rule under the authority of the Federal Water Pollution Control Act, including sections 301, 304, 311, 401, 402, 404, and 501. 33 U.S.C. §§ 1311, 1314, 1321, 1341, 1342, 1344, 1361.

Executive Order Nos. 12,866 and 13,563 (Regulatory Planning and Review)

This final rule is a significant regulatory action under the Orders. Accordingly, the agencies submitted this rule to the Office of Management and Budget for review.

Executive Order No. 13,132 (Federalism)

The agencies determined that this rule does not have federalism implications as it will not have a substantial direct effect 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.