



December 31, 2013

Delivered via e-mail and overnight delivery

Director Howard Shelanski
The Office of Management and Budget
Office of Information and Regulatory Affairs
725 17th Street, NW
Washington, D.C. 20503

Administrator Gina McCarthy
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Lieutenant General Thomas P. Bostick
Headquarters
U.S. Army Corps of Engineers
441 G Street NW
Washington, D.C. 20314-1000

Re: EPA Proposed Rule on Connectivity of Streams and Wetlands to Downstream Waters

Dear Director Shelanski, Administrator McCarthy and Lieutenant General Thomas P. Bostick:

Although not formally issued, what appears to be a copy of the proposed rule on the connectivity of streams and wetlands with respect to downstream waters, jointly issued by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), became available in mid-November. This draft proposed rule has generated significant concern from many different parties because it would greatly expand the scope of regulated waters under the Clean Water Act (CWA). I am writing on behalf of the Western Urban Water Coalition (WUWC) to address the serious ramifications of proceeding with the proposed rule until the agencies have determined the scientific bases they rely upon in asserting their jurisdiction.

Created in June 1992 to address the West's unique water issues, WUWC consists of the largest urban water utilities in the West, serving over 35 million western water consumers in 15 metropolitan areas in five states. The membership of WUWC includes the following urban water utilities: Arizona – Central Arizona Project and City of Phoenix; California – East Bay Municipal Utility District, Eastern Municipal Water District, Los Angeles Department of Water and Power, Metropolitan Water District of Southern California, San Diego County Water Authority, San Francisco Public Utilities Commission, and Santa Clara Valley Water District; Colorado – Aurora Water, Colorado Springs

Utilities, and Denver Water; Nevada – Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority; and Washington – Seattle Public Utilities.

WUWC members have a strong interest in clean water for municipal water supplies and in the regulatory processes protecting water quality. In particular, WUWC members are concerned with the predictability and certainty of whether a water body is subject to the CWA and in reducing costs and delays in obtaining permits. For this reason, WUWC has been very active in legislative and regulatory initiatives to define jurisdictional waters. We have appeared before congressional committees and Members of Congress, met with federal agencies, and commented on guidance documents. Most recently, we submitted comments on November 6, 2013 on the Draft Connectivity Report issued by EPA's Office of Research and Development. Based on this extensive background, WUWC is greatly concerned not only with the expansion of CWA jurisdiction in the draft proposed rule but also the agencies' own recognition of the scientific uncertainty associated with the proposal.

The draft proposed rule would define the scope of waters protected under the CWA, purportedly in light of the U.S. Supreme Court cases in *U.S. v. Riverside Bayview Homes*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, and *Rapanos v. United States*. The preamble to the draft proposed rule indicates a strong reliance upon the Draft Connectivity Report currently under review by EPA's Science Advisory Board (SAB). However, the SAB only just met in mid-December 2013 to consider public comment on the Draft Connectivity Report. When the Report is finalized, the scientific findings it contains will be relevant to how EPA and the Corps answer this question, and thus in how far the agencies will attempt to go in asserting their CWA permitting jurisdiction.

The preamble to the draft proposed rule at II.A. confirms the need for additional information:

Additional data and information will likely become available during the rulemaking process, including that provided during the public comment process, and by additional research, studies and investigations that take place before the rulemaking process is concluded. At the conclusion of the rulemaking process, the agencies will review the entirety of the administrative record and determine at that time whether it supports the conclusions of this proposed rule. The agencies will make any adjustments to the final rule deemed appropriate at that time.

Naturally, the scientific findings will need to be considered in the context of the Act itself and the aforementioned Supreme Court opinions. We have raised this and other concerns regarding the weight and applicability of the findings of the Draft Connectivity Report in prior comments submitted on November 6, 2013 (attached). WUWC does not believe that the technical factors and assumptions set forth in the Draft Report should serve as the basis for a legal definition of the scope of jurisdiction under the CWA for waters of the United States. Any intention to do so must be subject to more detailed public review that specifically confirms the intention to do so and expressly discusses the legal authority for doing so and the objectivity and sufficiency of the underlying technical analysis.

WUWC is deeply concerned that EPA and the Corps would proceed with such an important regulation when its own draft proposed rule indicates that additional data will become available during the rulemaking process and while the Draft Connectivity Report remains under consideration. How can the agencies propose a rule based on science that has yet to be confirmed or finalized by officials

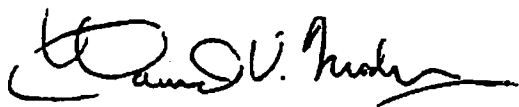
assigned to review it? How can such a proposal be advanced when the agencies' own scientific report remains under review? And, how can responsible comment occur on the rule without the public knowing what science the agencies will rely upon in support of their jurisdictional assertions? Of course, the agencies should not reserve to themselves the ability to determine the appropriate science at the time of the final rule without first making that information available for public comment. All of these concerns argue in favor of not issuing a proposed rule until the scientific basis for doing so has been better determined.

The President has directed federal departments and agencies to ensure that their actions meet the principles of transparency, participation and collaboration. *See* Memorandum for the Heads of Executive Departments and Agencies, Executive Office of the President, Dec. 8, 2008. Proceeding with the proposed rule before public comment on the Draft Connectivity Report can be analyzed would violate this directive. Similarly, the President has stated that "[t]he public must be able to trust the science and scientific process informing public policy decisions. . . . To the extent permitted by law, there should be transparency in the preparation, identification, and use of scientific and technological information in policymaking." *See* Memorandum for the Heads of Executive Departments and Agencies, Executive Office of the President, March 9, 2009. Again, going forward with the draft proposed rule at this time, before the public comments and the scientific need for doing so have been resolved, is premature and counter-productive.

WUWC requests that no proposed rulemaking go forward until the comments on the Connectivity Report have been analyzed and the SAB review completed. At that time, we recommend that the agencies publish an advance notice of proposed rulemaking, instead of a proposed rule, to obtain a better understanding of the consequences that would result from a new definition of the term "waters of the United States." This issue has been debated within the federal government for a lengthy period of time, and affected parties and the public should be given a comparable opportunity to weigh in on this very important issue before a proposed rule is published.

We would be happy to meet with agency officials to discuss our concerns. Please contact our counsel, Donald Baur or Paul Smyth of Perkins Coie, LLP at (202) 654-6200 to arrange such a meeting.

Sincerely,



David Modeer
Chair
Western Urban Water Coalition

Attachment

cc: Perkins Coie LLP
700 Thirteenth St. NW, Suite 600
Washington, D.C. 20005-3960