Construction Industry Round Table

"to be a force for positive chance in the design / construction industry"

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Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

ATTN: **Docket ID No. EPA-HQ-OW-2011-0880**

RE: Definition of "Waters of the United States" Under the Clean Water Act [79 Fed. Reg. 22,187 (April 21, 2014)] Proposed Rule by U.S. Army Corps of Engineers and the Environmental Protection Agency.

Dear EPA/USACE:

On behalf of the Construction Industry Round Table (CIRT)[1], we wish to have our opposition included in the official record of comments regarding the above captioned proposed rule defining the scope of waters protected under the Clean Water Act (CWA)[2] as published in the Federal Register by the Environmental Protection Agency (EPA) and the Department of the Army Corps of Engineers (Corps). [Hereinafter referred to as the: "Waters of the U.S." rule-making proposal].

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[1] The Construction Industry Round Table (CIRT) strives to create one voice to meet the interest and needs of the design *and* construction community. CIRT supports its members by actively representing the industry on public policy issues, by improving the image and presence of its leading members, and by providing a forum for enhancing and/or developing strong management approaches in an ever changing environment through networking and peer interaction.

The Round Table is composed of approximately 110 CEOs from the leading architectural, engineering, and construction firms in the United States. Together these firms deliver on billions of dollars of public and private sector infrastructure projects that enhance the quality of life of all Americans while directly employing half-million workers.

[2] Congress passed the Clean Water Act (CWA) in 1972, with the goal of improving water quality across the nation. CWA established a system of federalism that preserves primary state authority over land and water uses, but prohibits certain "discharges" into "navigable waters" from a "point source" (i.e., a pipe or other conveyance) unless authorized by federal permit. The law says that "navigable waters" are "waters of the U.S." Over the years, the U.S. Supreme Court has established that this includes interstate waters, plus waters that are navigable, wetlands adjacent to navigable waters and other waters with a substantial connection to navigable waters. State and local governments have jurisdiction over smaller, more-remote waters, such as many ponds and isolated wetlands. [See, *Waters of the U.S. Proposed Rule*; paper at www.gfb.org/ditchtherule/WOTUS_information_toolkit.pdf]

The member firms represented by CIRT have traditionally provided design and construction services to both private and public sector clients. These services must take into account the various jurisdictional rules, regulations, and laws, as well as the federal mandates and requirements. Over the years, the design/construction community has become very familiar with EPA and the Corps rules as well as how and when they must be applied to their clients' projects. As a result, *the community is not automatically opposed to clear, concise, balanced rules that achieve a specific well defined and scientific justified purpose*.[3] However at the same time, the community has also experienced the recent acceleration of federal mandates/rules that when taken together have become burdensome, redundant, and exhibit an overreaching by the federal government.

It is this later concern that both is troubling and disconcerting when applied to the new "Waters of the U.S." rule making proposal [*see* footnote 13 for details]. *Simply stated, the federal agencies have not shown the inclination, willingness, nor restraint to limit their reach or to construe their mandate in a narrow least intrusive manner, but rather they too often "exploit" loosely defined words or phrases that can be manipulated to justify wider reaching results.*

This is true even when the agencies contend during the rulemaking such interpretations are beyond what is being sought and outside a reasonable understanding of their intent[4] -- or even the statutory construct of the law being used as the jurisdictional grant for the proposed rule.

One need not look any further than EPA's interpretation of the Clean Water Act itself (the very statutory basis for the current rule-making) to find evidence of agency regulations that "read" into the Act authority or definitions *not* in the original law.[5] Without debating the validity of the EPA actions with respect to large "wetlands," it nonetheless creates a track-record or experience/proclivity which places this proposal in context.

DISCUSSION

As noted above, this proposed rule-making invocates both technical facets of how to define a phrase like "navigable waters of the U.S." and larger concerns regarding the federal government's seemingly endless appetite to reach (some would argue correctly, "over reach") every day aspects of American lives, lands, lifestyles, and livelihoods.

EPA and the Corps have ***failed*** to meet the fundamental test of any rule-making: concise, specific, language that reaches only those matters justified by the science and laws intended to safeguard the citizens against unintended or extended impacts. [*See* footnote 3 for details].

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[3] "Since the proposed rule was issued on April 21, 2014, the Agencies have continued to issue new documents, blog posts, Q&A documents, and webinars, offering new explanations of key terms in the proposed rule and new reasoning to support the proposed assertions of CWA jurisdiction. Much of this *ad hoc* information is inconsistent with material provided in the official rulemaking docket". [Water Advocacy Coalition Letter to EPA/Corps commenting on rulemaking, dated (09/29/2014); *See at:* www.fb.org/tmp/uploads/wacletter092914.pdf].

[4] Reports have circulated that: "some [EPA] administrators **have expressed exasperation with** what they see as willful misinterpretation that has undermined efforts to craft sound policy." (Emphasis in the original) [See, *Trench Warfare* by Boer Deng, at www.slat.com/articles/health_science/2014/09/waters_of_the_united_states (9/26/14)].

[5] It has been noted that some fear EPA's potential interpretation: "because the proposed rule states that water found in wetlands next to larger bodies are "waters of the United States," farmers fear they will no longer be exempt ([Given:] It is already standard EPA practice to consider wetland waters "waters of the United States," [even though] they are not explicitly defined as such in the text.)" [Bracketed items added; Id. at footnote 4].

(1) Rule-Making Beyond Court Mandate[6]: The agencies above captioned contend that their rule-making is justified if not mandated by U.S. Supreme Court rulings. Interestingly, many have interpreted those *same* cases as being an out-growth of EPA and the Corps "over reaching" under the CWA – thereby requiring the Court to step-in and attempt to put some constraints or parameters around the federal agencies activities. Critics have contended that the federal agencies have slowly increased the scope of their jurisdiction, pushing the limit through guidance documents and/or regulatory enforcement actions based on ever-broader interpretations of "waters of the U.S."[7]

To that end, many would contend that the 2006 *Rapanos* ruling went against EPA's assertion of jurisdiction, albeit the decision was not clear-cut.[8] The justice casting the "swing vote" wrote that jurisdiction might exist where there is a "significant nexus" between non-navigable water (such as a wetland or small stream) and traditional navigable water. BUT Justice Kennedy did not define significant nexus in detail, although he did say that "remote and insubstantial" waters that "eventually may flow" into navigable waters ***would not qualify***.[9]

So, it is a stretch at best and an over statement at minimum for the EPA and Corps to point to the U.S. Supreme Court cases as they do for this rule-making to contend that the decisions mandate/require the extensive all-inclusive, wide ranging reinterpretation or definition of "navigable waters" that can easily be "exploited" by this proposal. If anything, it would be fairer to contend the Supreme Court was seeking a clear, concise, well defined and defensible definition that respected the state-federal balance as well as the rights of ordinary citizens. *This proposal FAILS in all respects to meet such an objective.*

(2) Rule-Making Before the Science: In the official announcement of April 21, 2014, EPA and Corps contended that the rule-making (and its extensive conclusions) was supported by or buttressed to some extent by scientific literature and findings – more specifically, an EPA "Report" on the subject matter.[10] [At the time of the proposed rule's publication in the Federal Registry, the final "Report" had NOT been fully reviewed or even "completed."]

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[6] The rule-making claims to be proposed "in light of" the *U.S. Supreme Court cases in U.S. v. Riverside Bayview; Rapanos v. United States; and Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*. [79 Fed. Reg. at 22,188 (April 21, 2014)]

[7] For example, in 1986 EPA and the Corps used the "migratory bird rule" to assert authority over isolated waters by saying those waters that are or could be used by migratory birds, which cross state lines, are "waters of the U.S." The regulated community, including agriculture, has pushed back, resulting in Supreme Court decisions clarifying and limiting the scope of the agencies' jurisdiction. In two cases—*Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, in 2001, and *Rapanos v. United States*, in 2006—the Supreme Court rendered decisions that reaffirmed the CWA's limit on federal jurisdiction, reminding the agencies that Congress used the word "navigable" for a reason. [Id.at footnote 2].

[8] Eight justices divided evenly between supporting broad federal jurisdiction over any waters with any connection to navigable waters, or a much narrower jurisdiction over waters with relatively permanent flow into navigable waters. [Id. at footnote 2]

[9] [Id. at footnote 2]

[10] U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Washington, DC; U.S. Environmental Protection Agency, 2013). [Hereinafter referred to as "Report"] [79 Fed. Reg. 22,190 (April 21, 2014)]

The Water Advocacy Coalition (WAC) has been critical of the "Report" noting that it never considers which water connections are significant or meaningful – in other words, the *draft* never goes beyond the obvious conclusion that water flows into each other.[11]

UNDERSTAND the full import of the EPA admission in the announcement: Essential decisions incorporated into the proposed rule were based on or relied upon a "Report" that had not been fully completed, reviewed, or vetted – EPA proceeded to make judgments and findings using the *draft* as a basis. Even more breath-taking is EPA's assumption that it can simply offer its *own* "Report" to be the basis of its *own* findings! [This raises serious questions especially since the very nature of the "Report" is a "synthesis of scientific evidence" – which can be "cherry picked" to simply reinforce pre-determined assumptions and agency conclusions]. *As such, the EPA/Corps have FAILED to provide compelling scientific evidence that warrants their expansive conclusions (and none other) as to this proposal on "waters of the U.S."*

(3) Rule-Making Without Fulfilling Statutory Obligations: It is widely known that Congressional members, with jurisdiction over these matters, have been extremely critical, if not cynical of the rule-making; especially given it has failed to conduct statutorily required assessments.

Simply stated, the agencies have failed to properly assess the economic impact on small businesses; neglecting to fulfill their obligations under the Regulatory Flexibility Act (RFA).[12] These statutes are in place to constrain unreasonable and overly broad expansion of regulatory authority by federal agencies – *FAILURE to comply with statutory requirements undercuts and invalidates the proposed rule-making*

CONCLUSION

As discussed, the *lack of clarity* about what additional bodies of water would be subject to the new proposed rule (i.e., waters adjacent or those exhibiting "significant nexus"), failure to meet the statutory requirements to assess the economic impact on small business, dubious science to justify the steps proposed, and finally debatable Supreme Court direction as to justification for the rule-making – lead to one conclusion: the agencies *FAIL* to make a compelling case for their proposed expansive jurisdictional reach.[13]

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[11] WAC points-out that "on September 2, 2014, the SAB [i.e., the Science Advisory Board] panel released comments on the adequacy of the scientific and technical basis of the proposed rule" [Footnoted as: Memorandum from Dr. Amanda D. Rodewald, Chair, Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report, to Dr. David Allen, Chair, EPA Science Advisory Board, Comments to the chartered SAB on the adequacy of the scientific and technical basis of the proposed rule titled "definition of 'waters of the United States' under the Clean Water Act," (Sept. 2, 2014), [See, http://yosemite.epa.gov/sab/sabproduct.nsf/F6E197AC88A38CCD85257D49004D9EDC/$File/Rodewald_Memorandum_WOUS+Rule_9_2_14.pdf]

[12] See, House Small Business Committee, Chairman Sam Graves letter to EPA Administrator Gina McCarthy (May 2014).

[13] Notwithstanding their denials of "over-reaching" to the contrary, EPA estimates the proposed rule would expand federal jurisdiction by some "60 percent of stream miles in the U.S." because right now they "only flow seasonally or after rain" but would be subject to federal regulation under the proposal. [*See*, 79 Fed. Reg. 22,190 (April 21, 2014)]

Given the serious and significant flaws in the proposed rule,[14] CIRT strongly urges EPA and Corps to abandon the current proposal and instead turn to developing a more narrowly focused, clear, concise, and defensible rule; that respects the state-federal balance as well as the rights of ordinary citizens. In short, a rule that can be agreed upon with input from the affected parties as being a legitimate and proper grant of authority to the federal agencies.

Sincerely,

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President
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[14] The law firm Vinson & Elkins, LLP concludes: "In their proposal, the agencies define "waters of the United States" to include several large categories of waters previously ***unregulated*** under the CWA." Moreover, "the agencies would ***expand their jurisdiction*** to categorically include *all* waters and wetlands adjacent to a traditional navigable water, impoundment, or tributary. . . [and] "other waters" determined to have a significant nexus to traditional navigable waters would also be considered "waters of the United States." Finally, the categories excluded in the rule "generally confirm existing exclusions, ***and they hardly narrow the scope of the agencies' purported jurisdiction***." [Bracketed and underlined emphasis added]. *See*, *Proposed EPA, Corps Rule Would Expand Federal Jurisdiction Over Waters, Wetlands; V&E Environmental Law Update E-communication (March 31, 2014) at* www.velaw.com