WATERS ADVOCACY COALITION

WAC

February 3, 2014

The Honorable Howard A. Shelanski
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
725 Seventeenth Street, NW
Washington, DC 20503

Dear Dr. Shelanski:

On September 17, 2013, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) jointly sent a draft proposed rule defining the scope of waters protected under the Clean Water Act (CWA) to the Office of Management and Budget (OMB) for interagency review. The Waters Advocacy Coalition (WAC or Coalition)[1] met with James Laity of OMB's Office of Information and Regulatory Affairs (OIRA) on December 23, 2013, to express our concerns with the draft proposed rule. As explained in our meeting with Mr. Laity and set out in more detail below, the draft proposed rule fails to comply with important regulatory requirements, relies on a flawed economic analysis, and is purportedly based on a scientific report that has not been peer reviewed.

In light of these concerns, OMB should return the draft proposed rule to the agencies and require them to address the substantive issues and procedural flaws before any proposed rule is released for public comment. Publishing a proposed rule that is lacking in so many critical respects would severely limit the public's ability to meaningfully comment or otherwise participate in the rulemaking process. Moreover, and most importantly, any proposed rule should adhere to the two relevant Supreme Court holdings in *SWANCC* and *Rapanos*. Those decisions decisively put the agencies on notice that Congress imposed limits to federal jurisdiction in this area. EPA must respect those limits. Any rule establishing federal jurisdiction that goes beyond those holdings contravenes congressional intent and undermines two distinct rulings by the U.S. Supreme Court.

The Draft Rule Does Not Comply with Executive Order 12866

For years, we have advocated for a rulemaking to clarify how jurisdictional determinations are to be made because the issues are complex and the rulemaking process requires the agencies to comply with important regulatory requirements. Executive Order (EO) 12866 assigns OIRA the responsibility of coordinating interagency review of rulemakings to ensure that proposed regulations are consistent with the EO's principles, which include considering alternative forms of regulation, minimizing the potential for uncertainty, and assessing costs and benefits. So far, EPA and the Corps have ignored these requirements.

[1] The Coalition represents a large cross-section of the nation's construction, housing, mining, agriculture, manufacturing, and energy sectors, all of which are vital to a thriving national economy. Projects and operations in these sectors are regulated in one manner or another by the CWA.

Under EO 12866, "[i]n deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating." Despite this requirement, the agencies appear not to have considered any regulatory alternatives to the approach outlined in the draft proposed rule. The agencies have not considered, for example, whether certain features (*e.g.*, ditches) could be regulated in some manner other than as "waters of the United States." Nor have the agencies considered whether state regulation is sufficient for any of these classes of waterbodies, such that federal regulation is duplicative or unnecessary.[2] These are just some examples of regulatory alternatives that the agencies should assess as part of this rulemaking process.

In addition, EO 12866 provides, "[e]ach agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty." Contrary to this requirement, the draft proposed rule leaves many key concepts unclear or undefined. For example, the draft rule asserts jurisdiction over waters or wetlands located within a "floodplain" area, but it does not provide any specific flood interval (*e.g.*, 10-year, 100-year, or 500-year floodplain) and instead leaves it to the agencies' "best professional judgment" to determine which flood interval should be used. In addition, the rule defines "tributary" as "a waterbody characterized by the presence of a bed and banks and ordinary high water mark, which contributes flow . . .," but does not define "ordinary high water mark," a concept that the Corps has recognized is poorly understood and applied inconsistently in the field.[3] Such vague definitions and concepts will not provide the intended regulatory certainty and will likely result in litigation over their proper meaning.

EPA's Economic Analysis for the Draft Proposed Rule is Highly Flawed

EPA's economic analysis for the draft proposed rule, Economic Analysis of Proposed Revised Definition of Waters of the United States (Sept. 2013), fails to provide a reasonable assessment of costs and benefits as required by EO 12866. Economist David Sunding, the Thomas J. Graff Professor at the University of California-Berkeley's College of Natural Resources, has identified several major flaws with EPA's economic analysis.

First, the EPA analysis relies on a flawed methodology for estimating the extent of newly jurisdictional waters, which systematically underestimates the impact of the draft proposed rule's new definition of "waters of the United States." EPA evaluated FY 2009-2010 requests for jurisdictional determinations, a period of extremely low construction activity due to nation-wide depressed economic investment and activity, as the baseline to estimate the incremental acreage impacted, which results in artificially low numbers of applications and affected acreage that are not representative. Furthermore, EPA's calculation of the percent increase in jurisdiction that would result from the draft proposed rule is based solely on a review of jurisdictional

[2] The Clean Water Act clearly and explicitly contemplates state jurisdiction over waters not included in the Act (*cf.*, 33 USC 1251(b): "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution….")

[3] Matthew K. Mersel, U.S. Army Corps of Engineers, The Ordinary High Water Mark: Concepts, Research, and Applications (March 20, 2013), *available at* http://aswm.org/state_meetings/2013/mersel_matthew.pdf.

determination and permitting requests. But this calculation does not account for situations in which landowners did not request a determination or engage in the regulatory process, and therefore introduces additional bias into the analysis by failing to use an appropriate representative sample of those waters that may be subject to jurisdiction under current regulations.

Second, EPA's calculation of incremental costs is deficient. EPA's analysis is focused on costs associated with the section 404 program and largely ignores the cost impact of the changes for other CWA regulatory programs due to lack of data. It also excludes several important types of costs, such as costs associated with permitting delays, impact avoidance, and minimization. In addition, EPA's analysis of section 404 costs relies on permitting cost data that are nearly 20 years old and are not adjusted for inflation.

Third, EPA uses a flawed methodology for its calculation of benefits. The benefit transfer analysis used to approximate program benefits is not consistent with best practices in environmental economics and is poorly documented. EPA synthesizes 10 previous studies to estimate an average "willingness to pay" figure for each acre of wetland mitigation. These studies are largely irrelevant, do not provide accurate estimates of benefits, and were conducted 10-30 years ago. Several of them were never published in peer-reviewed journals. By adopting the results of these studies, EPA forces a comparison between benefits calculated for different geographies and times. These benefits are scaled up to various wetland regions without considering changes in economic trends, recreational patterns, and stated preferences. The assumption that benefits accrue to all members of the wetland region is unsubstantiated. Moreover, EPA's analysis adopts an all or nothing approach to assessing benefits, assuming that all wetlands affected by the draft rule's definitional change would be filled but for the rule's change in definition or that all would be preserved or subject to mitigation if federal jurisdiction is extended through the draft rule. These unrealistic assumptions contribute to an inflated benefits calculation.

To correct these glaring errors and omissions, the agencies should withdraw the economic analysis and prepare a revised study of the costs and benefits of the draft proposed rule.

<u>The Proposed Rule Should Be Informed by a Final, Peer-Reviewed Connectivity Report</u>

At the same time the agencies sent a draft proposed rule to OMB for interagency review, EPA submitted a draft scientific study, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (Draft Connectivity Report or report), to the EPA Science Advisory Board (SAB) for peer review. Although EPA has stated that the report will serve as the "scientific basis" for the rulemaking on the scope of CWA jurisdiction, the agencies sent the draft proposed rule to OMB before the science has been reviewed.

As OMB's 2004 Information Quality Bulletin for Peer Review explains, "[w]hen an information product is a critical component of rule-making, it is important to obtain peer review *before* the agency announces its regulatory options so that any technical corrections can be made before the agency becomes invested in a specific approach or the positions of interest groups have

hardened."[4] Accordingly, OMB's review of a draft proposed rule is premature until the SAB panel's peer review of the report is complete.

The SAB panel held a public meeting on December 16-18, 2013, in Washington, DC. Over the course of the meeting, the SAB panel suggested several major adjustments be made to the Draft Connectivity Report. The SAB panel will provide a report to the EPA Administrator with these recommendations for revision. OMB should require the agencies to allow for the SAB panel to complete its peer review process and for EPA's Office of Research and Development to revise the report as necessary, before OMB proceeds with interagency review of a draft proposed rule.[5]

OMB Should Return the Draft Proposed Rule to the Agencies

In sum, in light of these significant legal, economic, and scientific deficiencies with the draft proposed rule and its supporting documentation, OMB should return the rule to EPA and the Corps with instructions to address these critical issues.

We appreciate your attention to this important matter. If you wish to discuss any of these concerns, please contact Deidre G. Duncan, counsel for the Coalition, at (202) 955-1919.

Sincerely,

Agricultural Retailers Association
American Farm Bureau Federation
American Forest & Paper Association
American Gas Association
American Petroleum Institute
American Road & Transportation Builders Association
Associated Builders and Contractors, Inc.
The Associated General Contractors of America
CropLife America
Edison Electric Institute
The Fertilizer Institute
Florida Sugar Cane League
Foundation for Environmental and Economic Progress
The Independent Petroleum Association of America
Industrial Minerals Association – North America
International Council of Shopping Centers

[4] Office of Management and Budget, Final Information Quality Bulletin for Peer Review (Dec. 16, 2004), *available at* http://www.cio.noaa.gov/services_programs/pdfs/OMB_Peer_Review_Bulletin_m05-03.pdf (emphasis added).

[5] We do not address here the glaring shortcomings of the report itself. We have, however, submitted extensive comments on the report and draw your attention to those comments, not least of which is that in examining "connectivity," the study draws virtually no distinction between connections that are significant and those that are not. As such, the report is an inadequate and incomplete basis for justifying an expansion of federal jurisdiction under the Clean Water Act.

Irrigation Association
NAIOP, The Commercial Real Estate Development Association
National Association of Home Builders
National Association of Manufacturers
National Cattlemen's Beef Association
National Corn Growers Association
National Council of Farmer Cooperatives
National Industrial Sand Association
National Mining Association
National Milk Producers Federation
National Multifamily Housing Council
National Pork Producers Council
National Rural Electric Cooperative Association
National Stone, Sand & Gravel Association
Portland Cement Association
Public Lands Council
RISE (Responsible Industry for a Sound Environment)
Southern Crop Production Assn
Treated Wood Council
United Egg Producers

cc: Honorable Gina McCarthy, Administrator, U.S. Environmental Protection Agency
Honorable Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works)
Honorable Barbara Boxer, Chairman, Senate Committee on Environment and Public Works
Honorable David Vitter, Ranking Member, Senate Committee on Environment and Public Works
Honorable Bill Shuster, Chairman, House Transportation and Infrastructure Committee
Honorable Nick Rahall, Ranking Member, House Transportation and Infrastructure Committee
Honorable Barbara Mikulski, Chairwoman, Senate Committee on Appropriations
Honorable Richard Shelby, Ranking Member, Senate Committee on Appropriations
Honorable Harold Rogers, Chairman, House Committee on Appropriations
Honorable Nita Lowey, Ranking Member, House Committee on Appropriations
Mr. James Laity, Office of Information and Regulatory Affairs, Office of Management and Budget
Mr. David Evans, Director, Wetlands Division, U.S. Environmental Protection Agency
Ms. Margaret E. Gaffney-Smith, Chief, Regulatory Community of Practice, U.S. Army Corps of Engineers