U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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Washington, DC 20548

B-331531

November 6, 2019

The Honorable John Barraso
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: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*

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 (the agencies) entitled "Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules*"* (RIN: 2040-AF74). We received the rule on September 20, 2019. It was published in the *Federal Register* as a final rule on October 22, 2019. 84 Fed. Reg. 56626. The effective date of the rule is December 23, 2019.

This final rule amends regulations implementing the Clean Water Act. The agencies state that this rule repeals "Clean Water Rule: Definition of 'Waters of the United States.'" 80 Fed. Reg. 37054 (June 29, 2015) (2015 Rule). The agencies state that this final rule restores the regulatory text that existed prior to the 2015 Rule. According to the agencies, the 2015 Rule amended various regulatory provisions that set forth a definition of "waters of the United States." The agencies state that, with the repeal of the 2015 Rule, they will instead implement the pre-2015 Rule regulations informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.

According to the agencies, they are repealing the 2015 Rule for four primary reasons. First, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the Clean Water Act (CWA) as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*. Second, the agencies conclude that in promulgating the 2015 Rule the agencies failed to adequately consider and accord due weight to the policy of the Congress in CWA

section 101(b) to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." 33 U.S.C. 1251(b). Third, the agencies repeal the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional state land use planning authority. Lastly, the agencies conclude that the 2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies find that these reasons, collectively and individually, warrant repealing the 2015 Rule.

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. 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 Janet Temko-Blinder, Assistant General Counsel, at (202) 512-7104.

signed

Shirley A. Jones
Managing Associate General Counsel

Enclosure

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

ENCLOSURE

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
"DEFINITION OF 'WATERS OF THE UNITED STATES'—
RECODIFICATION OF PRE-EXISTING RULES"
(RIN: 2040-AF74)

(i) Cost-benefit analysis

The Environmental Protection Agency and the Department of Defense, Department of the Army, Corps of Engineers (the agencies) developed several scenarios using different assumptions about potential state regulation of waters to provide a range of costs and benefits. The agencies stated that under a scenario that assumes the fewest number of states regulating newly non-jurisdictional water, the final rule would produce an estimated annual avoided cost of $116 million to $174 million and foregone benefits ranging between $69 million to $79 million. When assuming the greatest number of states that are already regulating newly non-jurisdictional waters, the agencies estimate there would be avoided annual costs ranging from $61 million to $104 million and annual forgone benefits are estimated to be approximately $37 million to $39 million. Under the scenario that assumes no states will regulate newly non-jurisdictional waters, an outcome the agencies believe would be unlikely, the agencies estimate the final rule would produce annual avoided costs ranging from $164 million to $345 million and annual forgone benefits ranging from $138 million to $149 million.

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

The agencies certify 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 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 July 27, 2017, the agencies published a notice of proposed rulemaking. 82 Fed. Reg. 34899. The agencies received approximately 770,000 public comments and stated that they reviewed those comments in deciding whether to finalize this rule.

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

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

Statutory authorization for the rule

The agencies promulgated this final rule pursuant to sections 1251 to 1275, 1311, 1314, 1316, 1317, 1321, 1326, 1344, 1361, and 2720 of title 33; and sections 9601 to 9657 of title 42, United States Code. The agencies also cited to parts 1971 to 1975, 1987, 1991, and 2013 of title 3, Code of Federal Regulations; and Executive Orders 11735, 12777, 13626, and 12580.

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

The agencies determined that this final rule is an economically significant regulatory action that was submitted 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 the states, on the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government.