The Land Improvement Contractors of America

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LICA Position Paper on the Proposed & Instructive EPA & USACE Rules to amend the Clean Water Act (CWA).

On April 21st, 2014, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) released a Proposed Rule (PR) that would significantly expand the Clean Water Act (CWA), along with an EPA & USACE, Instructive Rule (IR) clarifying the applicability of the agricultural exemption from CWA section 404 permitting provided by Section 404(f)(1)(A) for discharges to WOTUS associated with certain conservation practices where they are installed as part of an established farming operation. Comments on the Interpretive Rule are due by June 5th, 2014. Comments on the Proposed Rule are due by July 21st, 2014. Comments on the Proposed Rule have been extended until 21 OCT 2014. LICA has commented on the IR, and will send comments on the PR.

The CWA defines the Waters of the United States (WOTUS), and the Supreme Court has reviewed this definition on multiple occasions. Although *U.S. v Riverside Bayview (1985)* gives the EPA broad authority to categorize bodies of water as WOTUS, in its two most recent cases, *SWANCC v. Army Corps of Engineers (2001),* and *Rapanos v. United States (2006),* the definition was narrowed. The narrower reading includes a test for determining whether "other waters" are WOTUS. The Court concluded that Congress intended that the CWA's jurisdiction be limited to navigable waters and non-navigable waters that have a "significant nexus" to navigable waters, including wetlands adjacent to navigable waters. This is the "significant nexus test" brought about in a concurring opinion in *Rapanos* by Justice Kennedy.

The Proposed Rule also includes what is not a WOTUS, including prior converted cropland, ditches that are excavated wholly in "uplands," drain only in uplands, and have less than perennial flow; ditches that do not contribute flow to a navigable water; artificially irrigated areas, and other areas where producers may be concerned. "Uplands" are not defined.

On March 25th, 2014, EPA and the USACE jointly released the Proposed Rule defining the scope of streams and wetlands the agencies claim jurisdiction over for protection under the CWA. Earlier EPA had released a report titled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Syntheses of the Scientific Evidence,* which was to serve as the scientific support for the upcoming release of the new rule. That report was a predictor of the broad and expansive Proposed Rule released on April 21st. In promotional materials released by the EPA, they claim the Proposed Rule;

- Reduces confusion about CWA protection.
- Clarifies the types of waters covered under the CWA.
- Saves businesses time and money.
- Provides more benefits to the public than it costs.
- Helps states to protect their waters.
- Increases CWA program predictability and consistence by increasing clarity as to the scope of WOTUS.
- Minimizes the number of case-specific determinations on whether something is a WOTUS.
- Brings certainty and predictability, including to agriculture.

- Was encouraged by the Supreme Court and the agricultural community.
- Does not add to or expand the scope of waters historically protected under the CWA.

LICA's review of the Proposed Rule leads us to conclude that many of the EPA and USACE's claims are oversimplified or exaggerated. Accepting their definition of what is a tributary would vastly expand their regulatory power. EPA declares that all tributary waters "…have a 'significant nexus' to a traditional navigable water, interstate water, or territorial sea, such that they are 'Waters of the United States' without the need for a separate, case-specific significant nexus analysis." They also say that a 'tributary' may be "… ephemeral, intermittent, or perennial, but the tributary must drain, or be part of a network of tributaries that drain into waters which are currently used, used in the past, or may be susceptible to use in interstate commerce in the future."

Using the term "ephemeral" gives EPA tremendous regulatory power because ephemeral is defined by most people as transitory, transient, fleeting, short lived, momentarily brief, and as Webster says, "lasting one day only." LICA believes EPA and the USACE have concluded that all tributaries are to be considered WOTUS. Not a lot escapes this definition. There is not much left that EPA cannot claim jurisdiction over when it comes to water coming off your property. Many believe these CWA amendments are not about water quality at all, but now make the CWA a land-use control act.

LICA also believes that many of the conservation practices now "exempted" in the Interpretive Rule were never subject to CWA jurisdiction in the first place, and practices that should certainly be exempted are not mentioned in the Interpretive Rule listing provided. EPA and NRCS say the practices "not mentioned" are exempted on other lists or rules. We would like them to be listed in one place so everyone can see them. The exempted practice list also raises the issue of how farmer installed practices that may be effective, but not meet NRCS standards, will be considered, functionally equivalent practices. Rather than lists of exempted practices, why not exempt all practices given in the NRCS Field Office Technical Guide (FOTG)?

We believe these Proposed & Instructive Rules will have a substantial adverse impact on farmers, earthmoving contractors, counties, conservation districts, and watershed districts that serve as public drainage authorities, townships and counties serving as road authorities, and all property owners. They will be particularly significant in that all wetlands in the prairie pothole region of the US (MN, IA, ND, SD, and MT) will now be subject to this new Proposed Rule, a position never taken before by the agency.

LICA believes this CWA Proposed Rule is inconsistent with other Supreme Court rulings establishing limits to federal jurisdiction over isolated wetlands and ephemeral streams. We do not believe this is what Congress intended when enacting the CWA, or what Congress or the Supreme Court told EPA and the USACE to do in clarifying its jurisdictional reach. This Proposed Rule significantly expands federal jurisdiction that will trigger additional expensive and time-consuming permitting and regulatory requirements. The Instructive Rule discourages the use of low-impact or "green" development practices such as rain gardens, swales, and even sediment ponds, as the language about whether developers would have to get a permit before installing these systems in unclear. These rules also exacerbate the current regulatory confusion by adding new, undefined terms that will give regulators automatic federal jurisdiction over properties that contain isolated wetlands, ephemeral streams, or any land features covered under the expansive definition of 'tributary." They also fail to appropriately recognize the states' authority to regulate what have historically been deemed "state waters."

For the reasons provided in this paper, LICA is opposed to the EPA, USACE, and USDA's Proposed Rule and Interpretive Rule Regarding the Applicability of the CWA. There would be no point in offering a clarifying rule unless the intent was to clarify an expanded regulatory role.