



DEPARTMENT OF THE ARMY  
 U.S. ARMY CORPS OF ENGINEERS  
 441 G STREET, NW  
 WASHINGTON, D.C. 20314-1000

REPLY TO  
 ATTENTION OF

CECW-CEO

27 April, 2015

MEMORANDUM FOR Assistant Secretary of the Army for Civil Works

SUBJECT: Draft Final Rule on Definition of "Waters of the United States"

1. As we have discussed throughout the rule-making process for "Waters of the United States" over the last several months, the Corps of Engineers has serious concerns about certain aspects of the draft final rule. On 3 April 2015, the Environmental Protection Agency delivered the draft final rule to the Office of Management and Budget to initiate the inter-agency review process by our federal partners. Once we obtained a copy of the draft final rule, I asked USACE legal and regulatory staff to review it to ascertain the extent to which Corps' concerns had been incorporated, and to conduct an analysis of the legal and technical impacts of its language. That just-completed review reveals that the draft final rule continues to depart significantly from the version provided for public comment, and that the Corps' recommendations related to our most serious concerns have gone unaddressed. Specifically, the current draft final rule contradicts long-standing and well-established legal principles underlying Clean Water Act (CWA) Section 404 regulations and regulatory practices, especially the decisive *Rapanos* Supreme Court decision. The rule's contradictions with legal principles generate multiple legal and technical consequences that, in the view of the Corps, would be fatal to the rule in its current form.

2. The preamble to the proposed rule and the draft preamble to the draft final rule state that the rulemaking has been a joint endeavor of the EPA and the Corps and that both agencies have jointly made significant findings, reached important conclusions, and stand behind the final rule. Those statements are not accurate with respect to the draft final rule, as the process followed to develop it greatly limited Corps input -- a practice that has continued thus far in the inter-agency review process. Within these circumstances however, I believe that the Corps has done all that it could do to assist and support the rulemaking. The critical fact remains that the most important concerns regarding the defensibility and implementability of the draft final rule remain unaddressed, although we continue to believe, as we have previously explained, that a relatively few simple "fixes" that the Corps has offered would resolve the problems with the draft final rule.

3. The analysis of and concerns with the draft final rule developed by the Corps professional staff are respectfully forwarded for your consideration. I have reviewed all of the attached documents and have concluded that unless the draft final rule is changed to adopt the Corps' proposed "fixes," or some reasonably close variant of them, then under the National Environmental Policy Act, the Corps would need to prepare an Environmental Impact Statement (EIS) to address the significant adverse effects on the human environment that would result from the adoption of the rule in its current form. Thank you for your consideration of the Corps' serious concerns and recommendations on this issue.

Building Strong!

*John W. Peabody*  
 JOHN W. PEABODY  
 Major General, U.S. Army  
 Deputy Commanding General

for Civil and Emergency Operations

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**House Oversight and Govt Reform  
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