

Review Comments on *Economic Analysis of the EPA-Army Clean Water Rule (April 27, 2015)*

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The comments presented below are limited to the 2015 report estimation of CWA Section 404 permit application costs and compensatory mitigation benefits, and how these calculations changed from the 2014 report that was released for public comment. The comments are organized in two parts that address: 1) major revisions from the 2014 report, and 2) what did not significantly change from the 2014 report.

Major Revisions from 2014 Report

1. Revised estimate of increase in jurisdictional determinations.

The 2015 report calculates that the rule will result in a 4.65% overall increase in positive jurisdictional determinations, while the 2014 report calculated the increase as 2.7%. The difference is due to different jurisdictional determination datasets used to produce the estimates—the 2015 report used a dataset corresponding to fiscal years 2013-2014, while the 2014 report used a dataset correspond to fiscal years 2009-2010. Use of 2013-2014 data in the 2015 report purports to respond to public comments expressing concern that the 2009-2010 dataset reflected a period of significant economic distress, and thus a relatively low level of Section 404 permitting.

2. Revised estimates of increase in Section 404 permits, average impact acreage, increase in total impact acreage, and increase in total permit application costs.

These changes are driven by the revised estimate of increased jurisdictional determinations (4.65%) as well as a different permit datasets to which the revised estimate are applied. The 2014 report based this analysis on the total number of (and average impact acreage for) permits issued in FY2010, while the 2015 report relied on permit data from FY2009-2014. Specifically, the 2015 report used the highest number of individual permits and general permits issued in any one year over this five year period, and average impact acreage for permits issued in FY2013 (it is not clear why year 2013 was chosen to calculate average impact acreage for permits).

The result of these revisions was to change the estimates of total additional individual and general permits and total additional impact acreage for those permits. For individual permits, the estimated number of added permits increased from 75 to 217, but the average impact acreage fell from 12.131 to 5.94, resulting in a net increase in added impacts due to the rule from 960 to 1290 acres. For general permits, the estimated number of added permits and average impact acreage both roughly doubled, resulting in an increase in added impacts due to the rule from 372 to 1200 acres.

These revisions, when combined with the unit cost estimates and cost formulas for permit application (which did not change from 2014 report), result in an increase in estimated total annual

permit application costs. From the 2014 report to the 2015 report, the "high" estimate for annual permitting costs increased from \$52.9 million to \$80.3 million.

3. Representation of USACE views

For the 2014 report, USACE made a point of telling EPA to delineate which sections of the analysis USACE did and did not contribute to, and to characterize the entire report as an EPA analysis. In the 2015 report, by contrast, EPA seems to go out of its way to link report responsibility to USACE. While it is true that USACE cannot run from this rulemaking or this report, some of things in the report that seem overblown might be addressed at the margin. One example is the strange report title. Other examples involve assertions in the narrative about what the "agencies believe." For example, the last sentence of the second full paragraph on page 6 state, "For these and similar reasons, the agencies believe that positive jurisdictional determinations under the final rule will be less than assumed for the purpose of this economic analysis." These statements should be identified, revised, and modified as deemed necessary to accurately reflect USACE views.

What Did Not Significantly Change from 2014 Report

1. Section 404 dominates estimated rule costs and benefits

In both the 2014 report and the 2015 report, estimated effects for Section 404 drive the estimates of rule costs and benefits. In the 2015 report, the "high" estimate for Section 404 compliance costs (sum of permit application and mitigation costs) represents 70% of total rule costs, and estimated Section 404 benefits accounts for 87% of total rule benefits. Note that the 2015 report did not include estimates of increase in USACE costs for administering the Section 404 program; revised estimates apparently were not yet available for inclusion in this draft.

2. Proportionality of estimated Section 404 benefits to costs

In both the 2014 and 2015 reports, estimated Section 404 benefits, which are based on compensatory mitigation for permitted impacts, outweigh estimated Section 404 compliance costs. This is because unit (mitigation) benefits are greater than unit (compliance) costs for a "typical" Section 404 permit, where both are based on unit impact acreage. So even though the 2015 report significantly increased estimated positive jurisdictional determinations and permitted impacts, this did not (could not) change the overall relationship between estimated benefits and costs for Section 404, and thus for the rule as a whole.

3. Section 404 benefits analysis

USACE has always recognized that the Section 404 benefits analysis is meaningless. However, agencies are required by Administrative policy to develop benefits estimates for rulemakings whenever possible. The OMB representative for this rulemaking encouraged and appears comfortable with the benefits transfer approach applied for Section 404 benefits analysis, and from the beginning EPA was intent on including a benefits analysis that would show that rule benefits outweigh costs (even though the CWA

does not require such a showing). There is nothing more to say or do relating to this benefits analysis, however. USACE is just going to have to live with it and leave responsibility for defending it to EPA and OMB.

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