CLEAN WATER ACT

Leveraging the ambiguity of the Clean Water Act, the Army Corps of Engineers and the EPA have vastly expanded their regulatory authority in a flagrant power grab. The agencies recently proposed a new regulatory definition of "Waters of the United States" that would cover virtually all waters in the nation and, by extension, much of the land.

MAJOR POINTS

- The Clean Water Act (CWA) was intended to divide regulatory authority over water between states and the federal government, reflecting principles of federalism and constitutional limits on federal powers. The CWA states: "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, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources...."[4]

- The CWA covers "navigable waters," defined in the statute as "the waters of the United States, including the territorial seas." Under this broad and vague definition, the Corps and the EPA have expanded their own regulatory powers. In doing so, they have exceeded their constitutional limits and disrupted the federal–state balance by usurping the statutory "responsibility and rights of States" to protect and control local "land and water resources."[5]

- The Corps and the EPA have consistently abused their power to regulate "navigable waters." The U.S. Supreme Court has twice invalidated federal regulations as overly broad. In another case, *Sackett v. EPA*, Justice Samuel Alito stated: "The reach of the Clean Water Act is notoriously unclear." Under agency regulations, "any piece of land that is wet at least part of the year" may be covered by the act, "putting property owners at the agency's mercy."[6]

- The EPA and the Corps recently issued an interpretive rule that narrows the exemptions for farmers and ranchers under Section 404(f)(1)(A) of the CWA. As a result, farmers and ranchers would have had to secure Section 404 permits for many activities that had not been covered under the law, including routine day-to-day activities, such as building a fence. However, Congress took action in the Consolidated and Further Continuing Appropriations Act, 2015, also known as the CRomnibus bill, which requires the agencies to withdraw the rule.
- The DC Circuit Court of Appeals in *Mingo Logan Coal Co. v. EPA* held that the EPA could retroactively revoke a Section 404 permit under Section 404(c), even if the permit holder is in full compliance with all existing permit conditions. If such a veto process is allowed to stand, permit holders will face indefinite uncertainty, undermining long-term investment and property values.

APPROPRIATIONS

Congress should prohibit agencies from expending any funds for:

- The EPA's and the Corps' "Waters of the United States" rule under the Clean Water Act.

LEGISLATION

To achieve the necessary statutory reforms in order to address the EPA's and Corps' regulations, Congress must:

- Define the waters covered under the CWA, generally limiting federal authority to regulating traditional "navigable waters." A clear congressional definition is critical. In his concurrence in *Sackett v. EPA*, Justice Alito noted, "Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act."
- Prohibit implementation of the EPA's and the Corps' proposed rule redefining "Waters of the United States" or any similar rule.
- Prohibit the EPA and the Corps from implementing or enforcing any rule that narrows the "normal farming" exception.
- Eliminate the retroactive veto power that the EPA has over Section 404 dredge and fill permits under Section 404(c) of the CWA.

- Expand the permit exemptions for farm and ranching activities under CWA Section 404(f)(1)(A). This should include exempting all common farming and ranching activities from Section 404 permit requirements, regardless of when such activities began or how long the activities have been ongoing.
- Establish a high threshold for triggering the "recapture" provision under Section 404(f)(2) or eliminate that provision entirely. The provision now states: "Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit."[7]

OVERSIGHT SUBJECTS

Congress should examine the following:

- Whether the EPA likely violated the Administrative Procedure Act by issuing the "Waters of the United States" proposed rule *before* the agency's report on *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* was finalized.
- How the EPA and Corps have used the EPA's water maps for the proposed "Waters of the United States" rulemaking. These water maps were not made public until after House Science, Space, and Technology Committee investigators discovered their existence and confronted the EPA about them at a hearing.