



MEMORANDUM FOR THE RECORD

DATE: January 30, 2018

SUBJECT: Consideration of Potential Economic Impacts for the Final Rule Pursuant to Executive Orders 12866 and 13563: *Definition of "Waters of the United States"* – *Addition of an Applicability Date to 2015 Clean Water Rule*

Regulatory Action

The Environmental Protection Agency and the Department of the Army ("the agencies") are publishing a final rule adding an applicability date to the "Clean Water Rule: Definition of 'Waters of the United States'" (the "2015 Rule") that is two years after this final rule is published in the Federal Register. On August 27, 2015, the U.S. District Court for the District of North Dakota enjoined the applicability of the 2015 Rule in the 13 states challenging the 2015 Rule in that court. On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) stayed the 2015 Rule nationwide pending further action of the court. On January 22, 2018, the Supreme Court of the United States (Supreme Court) held that the courts of appeals do not have original jurisdiction to review challenges to the 2015 Rule. With this final rule, the agencies intend to maintain the *status quo* by adding an applicability date to the 2015 Rule and thus providing continuity and regulatory certainty for regulated entities, the states and tribes, and the public while the agencies continue to consider possible revisions to the 2015 Rule. The purpose of this memorandum is to address potential economic impacts for the final rule pursuant to Executive Orders 12866 and 13563, as well as to explain how the agencies are complying with the Regulatory Flexibility Act.

Related Actions

The agencies are pursuing a two-step process to implement the guidance in Executive Order (E.O.) 13778.

- Step 1: Publication of a proposed rule to rescind the 2015 Rule and recodify the prior regulation. On July 27, 2017, the agencies published a proposed rule to rescind the definition of "waters of the United States" (WOTUS) promulgated by the agencies in 2015 in the *Code of Federal Regulations* and revert to the previous definition of "waters of the United States" in place before the 2015 Rule, which defines the scope of the Clean Water Act (CWA). The public comment period on this proposed rule closed on September 27, 2017.
- Step 2: Development of a new definition. The agencies intend to pursue a public notice-and-comment rulemaking in which the agencies would conduct a substantive re-evaluation of the definition of "waters of the United States."

With the current final rule adding an applicability date to the 2015 Rule, the agencies intend to provide clarity and certainty about the applicability of the definition of “waters of the United States” for an interim period while they continue to work on the two-step rulemaking process.

Summary of and Response to Comments on Economic Impacts Memo at Proposal

The agencies received more than 4,600 public comments on this proposed rule, of which fewer than 50 contained comments specific to economics. Those relevant comments are addressed in this memorandum (see the preamble for responses to public comments more generally). Some economics commenters supported the proposed rulemaking. Several commenters submitted comments on economics pertaining to the substantive re-evaluation of the definition of “waters of the United States,” which is the second step of the rulemaking effort. The agencies will consider those comments as part of the Step 2 rulemaking. A few economics commenters appeared to have commented on the proposed rule as if it was not a separate action that is related to the two-step process WOTUS definition as described above. The agencies’ response to these comments is to remind commenters of the two-step process to re-evaluate the definition of “waters of the United States” including the analyses of the associated potential economic impacts. The agencies believe that the analysis in this memorandum for the record conducted for this rule is sufficient to address the limited impact of a two-year postponement of when the 2015 Rule takes effect.

Several economics commenters suggested that the proposed rulemaking would increase regulatory uncertainty instead of limiting it. The agencies disagree that the final rule will increase regulatory uncertainty. By maintaining the *status quo* for an interim period, the agencies ensure that the scope of the Clean Water Act jurisdiction will be administered nationwide the same way it is now and has been notwithstanding the Supreme Court’s decision on January 22, 2018, which held the courts of appeals do not have original jurisdiction to review the 2015 Rule, and, therefore, do not have original jurisdiction to issue a nationwide stay of the 2015 Rule. Without this rule, the 2015 rule could go into effect in different places at different times because it is subject to multiple lawsuits brought by a wide group of litigants in many areas of the country, and some litigants have requested stays of the rule. One district court has already enjoined the rule as to the multiple States in that case prior to the rule ever taking effect. Therefore, the ultimate purpose and effect of this rule is to increase regulatory certainty while the agencies re-evaluate the definition of the “waters of the United States.”

Some economics commenters argued that removing waters from federal jurisdiction would mean that waters would not be protected. The agencies note that this final rule does not change which waters are currently considered jurisdictional, and instead simply maintains the legal *status quo* for a set period, approximately 2 years. Some economics commenters stated that the proposed rule would result in substantial forgone net benefits, but the agencies disagree, as articulated more fully below, because these commenters’ conclusion depends on a baseline of the 2015 Rule being implemented. Given the agencies’ conclusion that the appropriate baseline is the legal *status quo*, and that adding an applicability date leaves that *status quo* in place, the rule has no economic costs and no quantifiable benefits, and therefore the agencies have not ignored any categories of costs or benefits.

Economics commenters also noted that state agencies may lack funding to compensate for the postponement of the effective date of the 2015 Rule, but that rule is not in effect so there is no change for which to compensate. The regulatory status quo resulting from the 2015 Rule being

both enjoined in multiple states before the effective date of the Rule and stayed nationwide shortly thereafter means that state funding needs should also remain status quo, recognizing of course that states have flexibility to expand or contract state funding under Clean Water Act delegated programs as long as minimum federal standards are achieved. Other economics commenters expressed concerns that delaying the effective date of the 2015 Rule postpones implementation of money-saving exclusions in that Rule. The agencies consider the advantages of regulatory certainty as more beneficial than immediate implementation of specific exclusion provisions in the 2015 Rule.

The largest category of economics comments suggests that the agencies violated the Administrative Procedure Act, or acted contrary to case law (including citations from specific court decisions), either by not analyzing costs or benefits of the proposed rule, or not adopting the 2015 Rule as the baseline for analyzing the economic impacts of this rule. The agencies disagree. While certain statutes require cost benefit analysis under certain circumstances (but not the Clean Water Act, in this instance), the Administrative Procedure Act does not require federal agencies to conduct economic analyses; rather, as is the case here, most such analyses are conducted pursuant to E.O.s 12866 and 13563.

Finally, one economics commenter suggested that the agencies incorrectly interpreted the conclusions of Engau and Hoffman (2009). The agencies disagree with the commenter's interpretation. The Engau and Hoffman (2009) article concludes that "...policy makers should strive to reduce *the uncertainties firms are exposed to*. This would allow firms to more effectively deploy their resources toward their commercial and, possibly, environmental objectives, remove distractions for the policy making process, and thus expedite regulations coming into effect" (Section 6.2, page 774, emphasis added). The authors demonstrate that regulatory uncertainty results in firms increasing "strategic flexibility," which may require considerable resources to implement, as well as possible postponement of investments. These responses have the potential to result in unfavorable effects for firms.

Discussion of Economic Baselines

A necessary step to describing or quantifying the economic impacts is to clearly establish the baseline for the analysis (US EPA 2010, *Guidelines for Preparing Economic Analyses*). There are two approaches to defining the baseline for this rule, discussed in turn below.

The first approach to the baseline at proposal was based on the current legal landscape (current, pending additional action on the part of the Sixth Circuit). The pre-2015 Rule regulatory regime was in effect as a result of the Sixth Circuit's nationwide stay of the 2015 Rule, which followed a preliminary injunction, affecting 13 states, that was issued by a district court the day before the rule's original effective date. Although this regulatory regime could change as a result of the January 22, 2018, Supreme Court decision and based on subsequent actions taken by the Sixth Circuit or by multiple district courts, to incorporate that in the baseline would require predicting future district court decisions and actions, and when they might occur. The second approach to the baseline is based on the current *Code of Federal Regulations*, which contains the 2015 Rule regulatory text, even though the applicability of that text was enjoined from going into effect in 13 states before the Rule's effective date and was stayed nationwide shortly thereafter.

The first approach to the baseline is based on maintaining the legal *status quo* of the pre-2015 interpretation of the Clean Water Act and regulations, as they are currently being implemented,

consistent with earlier Supreme Court decisions and practice, and as informed by applicable agency guidance documents (the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters). Using this approach, there are no immediate effects of this final rule on the scope of the Clean Water Act and its implementing regulations. The regulatory regime both with and without this rule is the pre-2015 Rule regulatory regime. Therefore, there would be no costs, no quantifiable benefits, or other potential impacts under this assumed baseline. The unquantifiable benefits arise because this final rule could reduce uncertainty about the regulatory regime in effect between the time this rule is final and a point that is no farther than two years into the future (it could be sooner if completion of the substantive replacement of the definition of “waters of the United States” takes less than two years).

Changes in interpretation and implementation of which waters are jurisdictional under the Clean Water Act create an uncertain regulatory environment for states, tribes, landowners, and the regulated community. Such uncertainty can have a chilling effect on investment and cause individuals and firms to make strategic decisions that are inefficient from both a private and social standpoint. Specifically, regulatory uncertainty can result in increased participation in the policy making process, increased strategic flexibility, and the postponement of investment. All of these responses have the potential to cause unfavorable effects for firms. Increased participation in the policy making process requires the deployment of additional resources and the complicated development of a credible reputation with policy makers. Increased strategic flexibility requires firms to commit considerable resources to hold ready alternative strategic options. Postponement of investments delays investment that would have been made in the absence of uncertainty. (Engau and Hoffmann 2009).¹ These activities are due to regulatory uncertainty, and thus by removing some regulatory uncertainty, firms may reallocate resources that would be taken up by these activities to more productive ends. By adding an applicability date to the 2015 Rule, the agencies will improve the consistency and stability of the definition of “waters of the United States.” Important goals of this action are for the regulated community to have increased certainty about the regulatory environment and for their decisions to proceed with greater certainty, reducing the need to devote resources to maintaining operational flexibility. The agencies note, however, that uncertainty about the outcome of the forthcoming substantive re-evaluation of the definition of “waters of the United States” may persist.

Furthermore, the Supreme Court’s January 22, 2018, decision that the district courts have original jurisdiction over challenges to the 2015 Rule will impact the Sixth Circuit’s exercise of jurisdiction and its stay. In time, the Sixth Circuit case will be dismissed and its nationwide stay will expire, re-animating litigation in several other district courts where parties are challenging, and requesting stays of, the 2015 Rule. The rule was enjoined from going into effect by the United States District Court for the District of North Dakota for the 13 states litigating the rule before the court at that time, and that preliminary injunction remains in place. The current and future litigation could lead to inconsistencies, uncertainty, and confusion as to the regulatory regime that would be in effect pending substantive rulemaking under E.O. 13778. The potential patchwork could lead to a significant increase in regulatory uncertainty, even if for a short period of time, and this regulatory uncertainty is not without cost. Absent a great deal more data

¹ Engau and Hoffman (2009) found that in the case of regulatory uncertainty following the Kyoto Protocol, some firms responded by increasing their strategic flexibility but not postponing decisions, which they hypothesize might have been an effort to add credibility to lobbying activities directed at influencing future regulation.

concerning how various land developers, facility owner/operators, and other regulated entities make decisions about new projects and in light of remaining jurisdictional uncertainty, the agencies are unable to quantify the avoided costs of the reduced regulatory uncertainty. However, this final rule allows the current legal *status quo* to remain in place nationwide. Thus, the agencies' best estimate of the avoided costs and foregone benefits of the final rule under this baseline is effectively zero. The agencies therefore disagree with commenters who stated that the final rule forgoes net benefits presented in the 2015 Rule.

The analysis of this rule under a baseline of the 2015 Rule (the second baseline approach mentioned above) would be a slight variation on the economic analysis conducted for the Step 1 proposed rule. Under this interpretation, the world without this final rule would have the 2015 Rule taking effect into perpetuity, while the world with this rule would differ in that the 2015 Rule would not be in effect for the next two years. Thus, the annualized costs savings and foregone benefits would be simply two years' worth; these avoided costs and foregone benefits would be summed after expressing them in present value terms. Note however, that maintaining this baseline ignores the effect of litigation surrounding the 2015 Rule. In light of the specific limited time frame of this action, and for the reasons discussed further below, the agencies do not consider this baseline, or such a calculation, to be the most reasonable or useful to decision-makers and the public.

The agencies' preferred baseline is the first baseline, based on wanting to maintain the legal *status quo* during the process of additional rulemaking. Since this baseline would simply maintain the *status quo*, the agencies conclude that the final rule would not be economically significant. A significant reason for choosing this baseline is that the impact of this final rule is limited to a relatively short period of time (i.e., two years). Further, in light of the ongoing, complex litigation challenging the 2015 Rule, this baseline is a reasonable one because there is uncertainty whether the 2015 Rule would be in effect, even for part of the nation, for an extended period of time, if at all. Moreover, some stakeholders raised concerns about the economic analysis used to support the 2015 Rule, potentially calling into question the baseline data underlying this and future analyses. Finally, with this baseline, the agencies avoid any possibility of double-counting the avoided costs of this rule and future rules on the definition of "waters of the United States."

In addition, the agencies will strive to produce the several analyses of economic impacts – taken as a whole – in support of WOTUS rulemakings that neither account twice for the same costs or benefits (double-count) nor allow important categories of costs or benefits to be ignored. The agencies acknowledge that each step and its economic analysis has the potential to affect the baseline for the next step and its analysis, but also note that following agency and OMB guidance on economic analyses will result in a fulsome treatment of the potential economic impacts.

In light of the reduction in uncertainty and the baseline chosen for this analysis, this action is expected to result in no costs and unquantifiable benefits. An action that has no significant costs and unquantifiable benefits also has no significant economic impacts, and therefore, cannot have a significant impact on a substantial number of small entities.