Questions for the Record for the Honorable Bob Perciasepe
House Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment
June 11, 2014

Questions from the Honorable Tim Bishop (D-NY)

1. Does anything in the proposed rule, or the accompanying documents, limit the existing statutory or regulatory exemptions that apply today for agricultural or ranching related activities, such as those related to normal farming activities or those related to agricultural return flows?

Response: No. The U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' (hereafter, "the agencies") proposed rule retains all existing Clean Water Act (CWA) exemptions for agriculture and ranching activities. It also maintains all existing regulatory exclusions from the definition of "waters of the United States," including for prior converted cropland. The agencies also proposed to codify for the first time longstanding practices that have generally considered certain features and types of waters not to be "waters of the United States." Codifying these longstanding practices supports the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public and the regulators. Under the proposal, the waters identified in section (b) as excluded would not be "waters of the United States," even if they would otherwise fall within one of the categories in (a)(1) through (a)(7). The exclusion includes certain waters on farmland, including artificially created farm ponds or lakes created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing, and artificially irrigated areas that would revert to upland should application of irrigation water to that area cease.

2. Can you distinguish between normal farming activities, which are permitted under section 404(f)(1) and "conversion" activities, which are specifically excluded under section 404(f)(2)? Does anything in the proposed rule, or the accompanying documents, change this distinction?

Response: CWA section 404(f)(1) provides permitting exemptions for normal farming activities listed in the Act include plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices that are part of an established (i.e., on-going) farming, silviculture, or ranching operation. As provided by the CWA, where the purpose of an activity is to bring waters into a use to which they were not previously subject and where the flow or circulation of those waters may be impaired or the reach of those waters reduced, the discharge of dredged or fill material incidental to that activity would be recaptured under section 404(f)(2) and would require a permit.

Neither the proposed rule nor the 404(f)(1)(A) Interpretive Rule would eliminate or limit any of the 404(f)(1) exceptions or change the application of the "recapture provision" under 404(f)(2). The Interpretive Rule would clarify that certain specific Natural Resources Conservation Service (NRCS) conservation practices fall within the 404(f)(1) exemptions.

3. There was some debate in the Subcommittee hearing about whether the normal farming activities exemption only applied to specific individuals who have been engaged in these activities since 1977. Therefore, with respect to the continuity of normal farming activities for the purposes of section 404(f)(1), does the same person need to be carry out these activities for the exemption to apply, or does the exemption apply if the same type of activities occur at the site (i.e., not converting the land to a use to which it was not previously subject)? Does anything in the proposed rule, or the accompanying documents, change the application of this exemption?

Response: There is no set date for a producer to have begun operations (*i.e.* 1977) to be considered "established" for the exemptions in section 404(f)(1) to apply. Further, because section 404(f)(1) is an activity-based exemption, there is no requirement that the same producer continue the operations. Activities which convert a wetland which has not been used for farming or forestry into such uses are not considered part of an established operation, and are not exempt.

Nothing in the proposed rule or its accompanying documents would change the application of these exemptions. The Interpretive Rule would clarify that certain specific NRCS conservation practices fall within the 404(f)(1) exemptions.

4. With respect to the interpretative rule, it was suggested during Q&A that if a specific agricultural conservation practice is not included as part of the March 2014 Interpretive Rule and Memorandum of Understanding, that these practices would, by inference, be excluded from coverage as a normal farming practice under section 404(f). Is this the case?

Response: The agencies' interpretive rule clarifies section 404(f)(1)(A) of the CWA by providing guidance that specific NRCS conservation practices that discharge dredged and/or fill material into waters of the United States and that are designed and implemented to protect and enhance water quality are exempt from permitting requirements under CWA section 404 because they are part of normal farming operations. It is critical to emphasize that this list is in addition to those practices specifically named in the CWA, in addition to "other activities of essentially the same character as named" (44 FR 34264).

5. Can you clarify whether the draining of a waterbody requires a Clean Water Act permit? Does anything in the proposed rule, or the accompanying documents, change this distinction?

Response: Draining of a waterbody, without any accompanying discharges of pollutants, would not require a Clean Water Act permit. Such an activity would only require a permit if it results in a point-source discharge of pollutants into a "water of the U.S." The proposed rule does not change the current applicability of the CWA to such an action.

6. How is the proposed rule helpful to American farmers? Will the rule reduce regulatory burdens on the nation's agriculture producers?

Response: The agencies' proposed rule will help provide further clarity for America's farmers and ranchers regarding where the CWA applies, and where it does not. The proposed rule provides clearer categories of waters that would be jurisdictional, as well as a clearer list of the waters and features that

are not jurisdictional. Providing a clearer regulatory definition will streamline the process of making jurisdictional determinations and provide additional clarity and predictability to this process.

The agencies' propose, for the first time by rule, to exclude some waters and features that the agencies have by longstanding practice generally considered not to be "waters of the United States." With respect to farming and ranching, these practices that would be exempted by rule include, for example:

- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow;
- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or impoundment;
- Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease; and
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

The agencies met extensively with farmers and ranchers and their representatives during the public comment period, which closed on November 14, 2014. This dialogue has been helpful in identifying additional areas for the agencies to consider for providing further clarity to American farmers as the agencies develop a final rule.

Questions from the Honorable Lois Frankel (D-FL)

1. MS4 permittees are currently responsible for direct discharges from their stormwater management systems into Waters of the United States (WOTUS). MS4 stormwater systems include canals, ditches, structures, pump stations, lakes, ponds, wetlands, pipes, swales, and roadways that provide retention, treatment and conveyance of stormwater. Under the proposed rule these facilities will arguably become WOTUS, resulting in the broadening of the number of county maintained facilities that would subject to federal permitting. Under this scenario, MS4 permittees will have their jurisdictional facilities reduced to only the pipe system associated with road drainage. As a result, the number of MS4 permittees, the number of applicable storm water management programs and the size of the MS4 contributing drainage area will be reduced, along with the ability to implement effective restoration programs associated with traditional MS4 programs. The treatment systems constructed to meet NPDES permit requirements will effectively be eliminated. Was it the intent of the EPA and the US Army Corps of Engineers to shrink the size of the MS4 program and, if not, do the agencies intend to propose revisions to the rule to exempt MS4 permitted stormwater systems and associated facilities from the definition of WOTUS? If the agencies do intend storm/surface water management systems to fall under the scope of the rule, where do the federal agencies propose local governments construct treatment systems, particularly in a region such as South Florida where the population is wholly dependent on surface water management and flood control?

Response: The agencies did not intend to change the jurisdictional status of stormwater systems as a result of their proposed rule, which is currently addressed on a case-specific basis, taking into account the specific characteristics of each system. During the public comment period, the agencies received many comments from representatives of cities, counties, and other entities concerned about how the proposed rule may affect stormwater systems, and the agencies commit to carefully reviewing these comments and considering them to provide maximum clarity in this area.

2. The Florida Department of Environmental Protection currently regulates surface water management systems under statewide environmental resource permitting programs that additionally provide certification under Section 401 of the Clean Water Act that the systems comply with the applicable provisions of the Clean Water Act. While the proposed rule preserves the existing exemption for wastewater treatment systems from being considered WOTUS, currently permitted surface water management systems could arguably fall within the definitions articulated under the proposed rule. Will the agencies explicitly exempt surface water management systems that are permitted under state law and meet state water quality standards from being considered WOTUS? If not, why not?

Response: The agencies' proposed rule does not specifically exempt such state-permitted surface water management systems from CWA jurisdiction, and the agencies did not intend with their proposed rule to change the status quo with respect to such systems. The agencies look forward to carefully considering comments from Florida municipalities and agencies and all stakeholders to provide clarity in this area in the final rule.

3. The proposed rule will additionally require dredge and fill permitting for maintenance activities performed within manmade canals, ditches, stormwater treatment ponds and created stormwater treatment wetlands that already have environmental resource permits issued by the state permitting agencies. In many cases, the maintenance of a storm water management system must be performed in a timely manner to minimize flooding and water quality impacts. The result of requiring additional permitting for maintenance projects will be to increase costs and the amount of time necessary to complete required maintenance projects for local governments. Additionally, the increased permit requirements will increase the number of permits that will require handling and processing by the US Army Corps of Engineers. A local government is liable for maintaining the integrity of its stormwater management system even if federal permits are not approved by federal agencies in a timely manner. Is it the intent of the federal agencies to increase the permitting burden on local governments and are the agencies prepared to handle and process the number of permit applications in a timely manner?

Response: The agencies do not intend for the proposed rule to change the jurisdictional status of stormwater control features within an MS4, and therefore do not intend to increase the permitting burden on local governments. Parts of an MS4 drainage network that transport stormwater may contain currently jurisdictional waters under existing regulations and guidance, and other parts of the MS4 may not be jurisdictional waters. When a 404 permit is necessary for discharges of dredged and fill material into jurisdictional waters, it might be eligible for coverage under a nationwide 404 permit when such discharges result in minimal adverse effects to the aquatic environment. As noted above, the agencies are aware of this concern and will carefully consider all public comments in determining how to provide greater clarity in the final rule.

4. A majority of wastewater utilities in Florida have implemented water reuse (recycling) as part of a broader statewide water policy to reduce the impacts on traditional water resources and to "expand" the water pie. Many of those utilities implement their water reuse programs through

the construction of infrastructure that directly discharges reclaimed water into the existing permitted storm water management systems of golf courses or residential developments. The reclaimed water supplements the existing surface water that is then utilized for irrigation of the golf courses and common areas. The Florida Department of Environmental Protection regulates the reclaimed water network and the utilities are responsible for monitoring intermittent wet weather discharges from the onsite storm water management systems during wet weather events. The continued beneficial expansion of water reuse programs would be significantly curtailed were the receiving storm water management systems to be considered "Waters of the United States." How do the agencies intend to revise the proposed rule to exempt water reuse projects?

Response: The agencies recognize the importance of water reuse projects for addressing water supply challenges in Florida and other states across America. The agencies did not intend to affect the jurisdictional status of such activities through the proposed rule. However, during the public comment period, the agencies heard concerns from many stakeholders regarding water supply and water reuse projects, and the agencies will consider these comments as they work to develop a final rule. Because the agencies have not yet fully reviewed the comments we received on the proposed rule, it would be premature to speculate on the contents of any final rule.

5. If the agencies feel as though the above concerns currently fit under the existing waste treatment exemption to the "Waters of the United States" rule, please provide citations to existing regulations, guidance documents or other sources to support such a proposition.

Response: Please see response to Question 4.

Questions from the Honorable Grace Napolitano (D-CA)

1. How will the proposed rule apply to western streams which are ephemeral in nature and which may flow only one or two times a year? Will they have to go through the same permitting process as [activities in non-ephemeral streams]?

Response: In their proposed rule, the agencies seek to provide additional clarity regarding where the CWA applies, and where it does not. With respect to streams, the agencies proposed to define the term "tributary" for the first time in the proposed rule as a water feature that includes a bed and banks and an ordinary high water mark, which are characteristics that are produced by flowing water of sufficient volume and frequency. Water features that meet this definition of "tributary" would be jurisdictional under the CWA when they contribute flow directly or through another water to a navigable water, interstate water, or the territorial seas. In contrast, water features that do not exhibit these characteristics would not be jurisdictional as tributaries. During the public comment period, the agencies welcomed public comments on these proposed definitions to ensure they are as clear as possible for communities across the country, including in the arid West.

The CWA provides states with the lead role in setting water quality standards for their waters. For those non-perennial streams that are jurisdictional, states could set appropriate water quality standards that reflect the characteristics of these waters, which may differ from the standards that states may set for perennial waters.

Streams that only flow seasonally or after rain have been protected by the CWA since it was enacted in 1972. More than 60 percent of streams nationwide do not flow year-round, yet they contribute to the drinking water supply for approximately 117 million Americans. Peer-reviewed science strongly supports the ecological importance of these types of streams.

If the proposed rule were finalized in the form in which it was proposed, activities which discharge pollutants from a point source into jurisdictional waters of the U.S., including ephemeral streams that meet the definition of tributary under the proposed rule, would require authorization, unless they are an exempt activity under section 404(f) of the CWA or otherwise exempted from permitting.

2. How will storm water drains be addressed in the proposed rule, especially those that feed into ephemeral rivers and streams?

Response: The agencies did not intend to change the jurisdictional status of stormwater systems as a result of their proposed rule. The jurisdictional status of such systems involves a case-by-case assessment, taking into account the specific characteristics of each system. During the public comment period, the agencies received many comments from representatives of cities, counties, and other entities concerned about how the proposed rule may affect stormwater systems, and the agencies commit to carefully reviewing these comments and consider them to provide maximum clarity in this area.

3. How will water recycling and reuse programs be addressed in the proposed rule? Will they be subject to permitting requirements? If so, what level or detail? Of particular interest are water recycling programs that result in water that is directed to groundwater recharge areas.

Response: The agencies recognize the importance of water reuse projects for addressing water supply challenges in California and other states across America. The agencies did not intend to affect the jurisdictional status of such activities through the proposed rule. However, during the public comment period, the agencies heard concerns from many stakeholders regarding water supply and water reuse projects, and the agencies will consider these comments as they work to develop a final rule. Because the agencies have not yet fully reviewed the comments we received on the proposed rule, it would be premature to speculate on the contents of any final rule.

4. In the West we taking every opportunity to collect rainwater, slow runoff, or direct runoff into groundwater retention basins or groundwater recharge areas. Often these may be flood control reservoirs that are retrofitted or operated to slow down or redirect the flow of runoff. Will these efforts to collect, capture and reuse runoff be subject to the requirements of the proposed rule?

Response: Please see response to Question 3 above.

Questions from the Honorable Dina Titus (D-NV)

1. Having access to a clean water source is vital to our region's continued economic growth. More than two million area residents and 42 million visitors who frequent our world-class hotels, casinos, restaurants, shows, and shops annually are dependent on our limited water resources.

This necessity is all the more challenged by the fact that 90% of our water comes from one source, Lake Mead, which is fed by the Colorado River and in is adversely affected by a extreme drought.

Response: We agree with you that clean water is both critical for human health and a necessity for sustaining our economy.

2. Accordingly, I appreciate the hard work of the Administration on proposing a rule to do just that. I applaud the intent of the Administration to protect the waters of the United States, but do have some concerns about your proposed rule and how it will impact communities like mine in the desert Southwest. It is imperative that we get this rule right so there is predictability moving forward.

Response: We agree that clarifying the scope of the CWA can help promote predictability, and this is one of the primary goals of our rulemaking effort. The EPA and the Corps are committed to reviewing the comments provided by all stakeholders, including those in the desert Southwest, to ensure that we provide such clarity and predictability in the final rule.

3. The proposed rule (Definition of "Waters of the United States" Under the Clean Water Act), includes for the first time a regulatory definition of "tributary." This language references "sedimentary tributaries" expanding coverage to systems that were not covered under the Clean Water Act before. Can you clarify the intent of this new definition and how systems, in particular ephemeral streams that are common in the desert Southwest, will be impacted?

Response: In their proposed rule, the agencies are seeking to provide additional clarity regarding where the CWA applies, and where it does not. With respect to streams, the agencies proposed to define the term “tributary” for the first time in the proposed rule as a water feature that includes a bed and banks and an ordinary high water mark, which are characteristics that are produced by flowing water of sufficient volume and frequency. Water features that meet this definition of “tributary” would be jurisdictional under the CWA when they contribute flow directly or through another water to a navigable water, interstate water, or the territorial seas. In contrast, water features that do not exhibit these characteristics would not be jurisdictional as tributaries. During the public comment period, we sought and received public comments on these proposed definitions to ensure they are as clear as possible for communities across the country, including in the desert Southwest.

The CWA provides states with the lead role in setting water quality standards for their waters. For those non-perennial streams that are jurisdictional, states could set appropriate water quality standards that reflect the characteristics of these waters, which may differ from the standards that states may set for perennial waters.

Streams that only flow seasonally or after rain have been protected by the CWA since it was enacted in 1972. More than 60 percent of streams nationwide do not flow year-round, yet they contribute to the drinking water supply for approximately 117 million Americans. Peer-reviewed science strongly supports the ecological importance of these types of streams.

4. In addition, the rule relies on data from a scientific study that remains preliminary ("Connectivity of Streams and Wetlands to Downstream Water: A review and Synthesis of the Scientific Evidence"). Will the EPA finalize this study and then allow stakeholders to submit public comments on the Proposed Rule prior to the final rule being released?

Response: The agencies are committed to a rulemaking built on the best-available, peer-reviewed science, and the agencies recognized the importance of ensuring that this supporting science was available to the public as they reviewed and commented on the proposed rule. In order to afford the public greater opportunity to benefit from the EPA Science Advisory Board's reports on the proposed jurisdictional rule and on the EPA's draft connectivity report, and to respond to requests from the public for additional time to provide comments on the proposed rule, the agencies extended the public comment period on the proposed rule to November 14, 2014. The SAB completed its review of the scientific basis of the proposed rule on September 30, and the SAB completed its review of the EPA's draft connectivity report on October 17.