FACT SHEET

S.J. RES. 22, PROVIDING FOR CONGRESSIONAL DISAPPROVAL OF THE CLEAN WATER ACT RULE

Prepared by Committee on Transportation and Infrastructure Democratic Staff

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Next week, the House is scheduled to consider S.J. Res. 22, providing for congressional disapproval of the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) final rule clarifying the definition and scope of "waters of the United States" under the Clean Water Act (CWA). Enactment of S.J. Res. 22 would nullify the Clean Water Act rule and prohibit the agencies from adopting a substantially similar rule in the future without additional action by Congress. As a result, there would continue to be confusion and conflict regarding clean water regulation when our communities and businesses need clarity and certainty.

SUMMARY

Congressional action on this resolution is unwarranted and unnecessary because:

- the Clean Water Act rule is under expedited review by the Federal courts (and is not currently in effect);
- enactment of the resolution (without subsequent action by Congress authorizing a new rule) prevents future administrations from **ever** clarifying the current regulatory confusion related to Clean Water Act jurisdiction (despite the fact that agricultural, development, and environmental groups recommend changes to the current regulatory process);
- enactment of the resolution jeopardizes several new regulatory exemptions and clarifications in the final rule that benefit industry and municipalities (i.e., limiting the scope of the regulation's applicability to ditches and municipal storm sewers, and certain construction and mining activities); and
- the President's advisors recommend that the President veto the resolution, which passed by the Senate with a bare majority (53-44) in November 2015.

CLEAN WATER ACT RULE

On June 29, 2015, EPA and the Corps published the final Clean Water Act rule in the *Federal Register*, and it became effective on August 28, 2015. However, since publication, numerous lawsuits have been filed challenging the regulation.

On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the Clean Water Act rule nationwide pending further action of that Court (expected in February of this year). Accordingly, the Clean Water Act final rule is not in effect today, but the Corps and EPA resumed nationwide use of the agencies' prior regulations (and Bush-era guidance) defining the term "waters of the United States".

IMPLICATIONS OF ENACTMENT OF S.J. RES. 22 UNDER THE CONGRESSIONAL REVIEW ACT

According to the Congressional Research Service (CRS), enactment of a Congressional Review Act (CRA) joint resolution disapproving a rule has two primary effects. First, the rule would not take effect, or if already in effect, would cease to be in effect.

Second, the agency may not reissue the rule in "**substantially the same** form" or issue a "new rule that is **substantially the same**" as the disapproved rule, "unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."

The CRA does not define the term "substantially the same", what criteria should be considered, or who would make such a determination. Enactment of a disapproval resolution related to the Clean Water Act definition of "waters of the United States" could have long-term consequences in perpetuating the current regulatory confusion, uncertainty, and delay related to Clean Water Act jurisdiction – which has been routinely criticized by farmers, industry, and the environmental community, alike. Groups ranging from the American Farm Bureau Federation to the National Association of Home Builders to the National Wildlife Federation have issued public statements criticizing the *ad hoc*, inconsistent, and costly regulatory process put in place by the Bush administration (that remains in effect today). *See* Dissenting Views in House Report 114-93.

In addition, several Clean Water Act clarifications requested by stakeholders and included in the final rule are also in jeopardy. For example, the final rule included language to narrow Clean Water Act jurisdiction over certain **ditches;** provisions that established a first-ever regulatory **definition of a tributary**; and language that established physical and measureable **boundaries on the reach of the Clean Water Act** to nearby waters. These limitations, which place measurable and articulable limits on the Clean Water Act cannot go into effect until the final rule goes into effect.

Similarly, the **final rule established clear regulatory exemptions** for municipal separate storm sewer systems (MS4s); for groundwater; for water-filled depressions created as a result of construction or fill, sand, or gravel mining activities; and for a litany of erosional features (e.g., swales and gullies); artificial ponds; and artificially irrigated areas. **All of these new exemptions and clarifications do not appear in the current regulations defining the term "waters of the United States" and are put in legal jeopardy if the CRA disapproval resolution is enacted.**

Ironically, if the resolution is enacted, the existing regulatory process for determining Clean Water Act jurisdiction, which has been called "arbitrary", "confusing", and "frustrating" by agriculture, industry, and environmental organizations would be locked in time unless Congress were to enact specific language authorizing a reissued or new rule.

PRIOR CONGRESSIONAL ACTION ON CLEAN WATER ACT RULE

On November 4, 2015, the U.S. Senate approved S. J. Res. 22 by a vote of 53-44. However, this bare majority is wholly insufficient to override the threatened Presidential veto of S. J .Res. 22. As a result, regardless of House action, this resolution of disapproval will not take effect.

Moreover, the House has voted on this issue numerous times in recent years. During the last three Congresses, the House has taken at least four votes directly related to the Clean Water Act rule:

- Vote on H.R. 1732, the Regulatory Integrity Protection Act (114th Congress, First Session, Roll Call 219) (Passed 261-155);

- Vote on H.R. 5078, the "Waters of the United States Regulatory Overreach Protection Act" (113th Congress, Second Session, Roll Call 489) (Passed 262-152);

- Vote on the Moran amendment to H.R. 2609, the 2014 Energy and Water Appropriations bill (113th Congress, First Session, Roll Call 311) (Failed 177-236); and

- Vote on the Moran amendment to H.R. 5325, the 2013 Energy and Water Appropriations bill (112th Congress, Second Session, Roll Call 308) (Failed 152-237).