Waters of the United States/U.S. Environmental Protection Agency/Army Corps of Engineers Proposed Rule: 117 Democratic Congressmen Request Quick Finalization of the Proposal

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One hundred and seventeen Democratic members of the United States House of Representatives sent a February 7th letter to the Administrator of the United States Environmental Protection Agency ("EPA") and Assistant Secretary of the Army for Civil Works ("Corps of Engineers") stating that they:

. . . applaud the Agencies for taking this concrete and positive step toward restoring the strong clean water protections that our constituents, and all Americans, depend on. Federal protections based on sound science and consistent with the Clean Water Act are essential to ensuring clean water, which is essential for our economy and a healthy environment.

The definition of WOTUS is arguably one of the three critical jurisdictional terms in the Clean Water Act. Its importance is magnified since it is relevant to both National Pollution Discharge Elimination System ("NPDES") permitting and non-NPDES programs such as:

- Section 404 of the Clean Water Act wetland permits
- Section 311 oil/hazardous substances release requirements
- Clean Water Act spill prevention control and countermeasure regulations

As result, the scope of the definition of WOTUS has been the subject of frequent litigation, legislative oversight, rulemakings and public policy debate since the enactment of the modern version of the Clean Water Act in 1972.

EPA and the Corps of Engineers announced on November 19, 2021, a revised definition of WOTUS. They had previously withdrawn the revisions to the Clean Water Act definition promulgated during the Trump Administration.

On December 7, 2021, EPA and the Corps of Engineers proposed a new rule to once again revise the definition of WOTUS.

The Democratic Congressmen in their February 7th letter state that the current rulemaking is "critical to protecting water quality across the nation and the furthering of Congress's intent when it enacted the

Clean Water Act." They take the position that the Trump Administration's Navigable Waters Protection Rule ("NWPR") undercut the Clean Water Act's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

The February 7th letter discusses the recently enacted Infrastructure Investment and Jobs Act and notes that it includes $55 billion to expand access to clean water through initiatives such as:

- Replacement of lead service lines
- Measures to address PFAS contamination
- Enhancement of wastewater infrastructure

Also referenced is $47 billion that is stated to be allocated to:

- Climate resilience
- Measures to help communities prepare for worsening floods

Referenced as key measures to address flooding are healthy wetlands and headwater streams. The protection of such wetlands are deemed important in terms of both guards against flooding and natural carbon sinks.

The Congressmen also characterized clean water protections as playing a key role in what it describes as the Biden Administration's and EPA's commitments to environmental justice. They take the position that the NWPR harmed waters across the United States but that such harm did not fall equally on all populations. Specifically, they argue that the withdrawal of clean water protections was disproportionately felt by low-income communities and communities of color. Finally, they assert that clean water act protections are critical to protecting national, regional, and local economies. However, they single out agricultural operations as particularly benefited by Clean Water Act protections because of the need for clean water. In addition, they take the position that most ordinary agricultural activities do not require permits under the Clean Water Act because:

- Agricultural stormwater discharges are excluded
- Irrigation return flows are excluded
- Normal forming practices like building or maintaining stock ponds or irrigation ditches, building farm roads, maintaining drainage ditches and farming itself are excluded

A copy of the letter can be downloaded here.