

AGENDA NOTE – HRPDC ANNUAL COMMISSION MEETING

ITEM #11-F: WATERS OF THE U.S. RULEMAKING

SUBJECT:

The HRPDC staff, in coordination with local government staff on the Regional Environmental Committee, has developed the enclosed comments on the proposed rulemaking by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) to define “waters of the U.S.”

BACKGROUND:

The U.S. EPA and the Corps jointly proposed a rule in April 2014 to clarify protection under the Clean Water Act (CWA) for streams and wetlands following confusion created by Supreme Court decisions in 2001 and 2006. The purpose of this rulemaking is to provide clarity on whether or not individual water bodies are jurisdictional and discharges are subject to permitting.

The jurisdictional scope of the CWA is “navigable waters,” defined in section 502(7) as “waters of the United States, including the territorial seas.” Both the legislative history and the case law confirm that “waters of the United States” in the CWA are not limited to the traditional navigable waters. The term “navigable waters” is referenced in several provisions of the CWA; including the National Pollutant Discharge Elimination System (NPDES) permit program (section 402) and total maximum daily load programs (section 303).

The CWA leaves it to EPA and the Corps to define the term “waters of the United States.” Current regulations define “waters of the United States” as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands.

The proposed definition would expand the reach of the referenced provisions to include:

- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- Other waters, on a case-specific basis, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.

Attachment 11-F

RECOMMENDED ACTION:

Authorize the Chairman to sign the letter for staff to submit to EPA.