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MEMORANDUM

From: **Van Scoyoc Associates**
To: **Charlotte County**
Subject: **Waters of the U.S. EPA Regulation**
Date: **April 2, 2014**

As you may have heard, early last week the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (ACOE) jointly released a proposed rule to clarify protection under the Clean Water Act for streams and wetlands.

A series of decisions by the U.S. Supreme Court over the past decade restricted the scope of wetland regulation governed by Section 404 of the Clean Water Act (CWA) that regulate "dredge and fill" activities in navigable waters and their adjacent wetlands. Opponents of these restrictions urged Congress to redefine waters of the U.S., and apply that definition to all aspects of the CWA.

As legislation along those lines failed to pass previous Congresses, the EPA and ACOE over the past several years developed guidance first, and now a proposed rule, to redefine waters of the U.S. There is concern that their effort may significantly expand the definition of waters of the U.S. to include tributaries, ditches, canals, and all water bodies that can potentially drain into navigable waters, interstate waters, or the territorial seas.

The EPA claims that the proposed rule "does not protect any new types of waters that have not historically been covered under the Clean Water Act." However, they also say that "60 percent of stream miles in the U.S. only flow seasonally or after rain" but that they deserve protection under the CWA and that "other types of waters" will have "protection… evaluated through a case specific analysis of whether the connection is or is not significant."

At the end of 2013, the EPA released a report on the connectivity of water to provide a scientific rationale for concluding that virtually all bodies of water contribute flow to waters will be subject to Federal jurisdiction and should therefore be subject to regulation under the CWA.

Our team is still evaluating the proposed rule, which is 370 pages. Meanwhile, the following analysis is from a copy of the proposed rule that was leaked in late 2013, and was found to propose major changes to the scope and application of the CWA, including:

- All water bodies would be subject to Federal jurisdiction or case-by-case review unless expressly exempted from jurisdiction. This may include:
  - Waste treatment systems
  - Prior converted cropland (as determined by the EPA)
  - Artificially irrigated areas that would revert to upland without irrigation
  - Artificial lakes or ponds created by excavation or by diking dry land (stock watering ponds, irrigation, settling basins, or rice growing)
  - Artificial reflecting or swimming pools
  - Small ornamental waters created in dry land
  - Water-filled depressions incidental to construction

    - Groundwater drained through subsurface drainage systems
    - Gullies, rills, non-wetland swales, and puddles
    - Ditches excavated entirely in upland areas that drain only uplands or non-jurisdictional waters, and have no more than ephemeral flow
    - Ditches that do not contribute flow to otherwise jurisdictional waters
- Under the leaked rule, the term "adjacent" would apply to *all* adjacent waters, not just wetlands, and would include "neighboring" waters located within a riparian area or floodplain to be determined by the EPA.
- All tributaries would be waters of the U.S. and are defined as any water body with a bed, bank and ordinary high-water mark, even if that tributary for any length has a man-made break (bridge, culvert, pipe, dam) or a more natural break (wetland, debris pile, boulder, underground stream). Tributaries can be natural, man-altered, or man-made unless expressly exempted. This includes ephemeral, intermittent, and seasonal streams.
- Federal jurisdiction of "other waters" would be determined on a case-by-case review if they either alone or in combination with other similarly situated waters in the area are determined to have a "significant nexus" (anything more than speculative or insubstantial) to navigable waters, interstate waters, or the territorial seas.

Because this definition of waters of the U.S. under the leaked proposed rule would apply to all aspects of the CWA, its impact will be much broader than expanding the jurisdiction of the Section 404 program. For example, features of municipal separate storm sewer systems could be defined as waters of the U.S., requiring not only the regulation of discharges from the system, but also runoff into the system. Roadside ditches that have more than ephemeral flow and drain into another water body could also be defined as waters of the U.S. and the runoff into the ditch would be regulated. As waters of the U.S., all these water bodies would be subject to use attainability designation and appropriate numeric affluent standards could be imposed on each.

All of this is particularly troubling for Florida given its unique flood control systems throughout the state, all of which may fall under the new definition of waters of the U.S. and could be subject to stringent and expensive new regulation.

Congress has paid some attention to this issue over the past several years and is paying more now that the rule has been proposed. In the House, there have been efforts to attach legislative "riders" to various appropriations bills to stop implementation of the rule. However, these efforts have to this point failed, allowing EPA and other Federal agencies to continue their work. Meanwhile, on the other side of the issue, nearly 100 members of Congress earlier this year wrote to the EPA asking that they release the rule as quickly as possible (although the letter did not outright support the content of the rule).

The rule has not been published in the Federal Register, but when it is (sometime in the next week or so), interested parties will have 90 days to comment.