ENVIRONMENTAL PROTECTION AGENCY; DEPARTMENT OF THE ARMY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

[FRL–XXXX–XX–XXX]

Notice of Intention to Review and Rescind or Revise the Clean Water Rule

AGENCY: Environmental Protection Agency; Department of the Army

ACTION: Notice.

SUMMARY: In accordance with a Presidential directive, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) announces its intention to review and rescind or revise the Clean Water Rule found at 40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302 and 401.

FOR FURTHER INFORMATION, CONTACT:

Ms. Donna Downing, Office of Water (4502– T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number 202-566-2428; email CWAwaters@epa.gov, *and Mr. Gib Owen, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, 104 Army Pentagon, Washington, DC 20310-0104; telephone number 703-695-4641; email gib.a.owen.civ@mail.mil*

SUPPLEMENTARY INFORMATION: The Federal Water Pollution Control Act, originally enacted in 1948, most comprehensively amended in 1972, and known as the Clean Water Act (CWA), seeks "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §§ 1251 *et seq.* Among other provisions, the CWA regulates the discharge of pollutants into "navigable waters," defined in the CWA as "the waters of the United States." The question of what is a "water of the United States" is one that has generated substantial interest and uncertainty, especially among states, small businesses, the agricultural communities, and environmental organizations, because it relates to the extent of jurisdiction for federal and relevant state regulations.

The EPA and the Department of the Army (collectively, the agencies) have promulgated a series of regulations defining "waters of the United States." The scope of "waters of the United States" as defined by the prior regulations has been subject to litigation in several U.S. Supreme Court cases, most recently in *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"). In response to that decision, the agencies issued guidance regarding CWA jurisdiction in 2007, and revised it in 2008.

In response to that guidance, Members of Congress, developers, farmers, state and local governments, environmental organizations, energy companies and others asked the agencies to replace the guidance with a regulation. At the conclusion of that rulemaking process, the agencies issued the "Clean Water Rule: Definition of 'Waters of the United States.'" 80 Fed.

Reg. 37,054 ("2015 Rule").

Due to concerns about the potential for continued regulatory uncertainty, as well as the scope and legal authority of the 2015 Rule, 31 states and a number of other parties sought judicial review in multiple actions. Seven states plus the District of Columbia, and an additional number of parties, then intervened in those cases. On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the 2015 Rule nationwide pending further action of the court.

On February 28, 2017, the President of the United States issued an Executive Order directing the EPA and the Army to review and rescind or revise the 2015 Rule. Today, the EPA and the Army announce their intention to review that rule, and provide advanced notice of a forthcoming proposed rulemaking consistent with the Executive Order. In doing so, the agencies will consider interpreting the term "navigable waters," as defined in the CWA in a manner consistent with the opinion of Justice Scalia in *Rapanos*. It is important that stakeholders and the public at large have certainty as to how the CWA applies to their activities.

Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*"); *Motor Vehicle Manufacturers Ass'n of the United States, Inc., et al. v. State Farm Mutual Automobile Insurance Co., et al.* 463 U.S. 29, 42 (1983) ("*State Farm*"). Importantly, such a revised decision need not be based upon a change of facts or circumstances. A revised rulemaking based "on a reevaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *Fox*, 556 U.S. at 514-15; quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)).

Through new rulemaking, the EPA and the Army seek to provide greater clarity and regulatory certainty concerning the definition of "waters of the United States," consistent with the principles outlined in the Executive Order and the agencies' legal authority.

E. Scott Pruitt

Administrator

Dated: February 28, 2017

Douglas W. Lamont

Senior Offical Performing the Duties of the Assistant Secretary of the Army for Civil Works

Dated: February 28, 2017