Background
In 1972, Congress explicitly recognized, preserved, and protected the states’ primary authority and responsibility over local land and resources when it enacted the CWA. Under current law, the CWA regulates navigable waters, which are defined as “the waters of the United States, including the territorial seas.” It does not regulate all water bodies (e.g., ditches, isolated ponds, floodplains, etc.).

The EPA and Corps published their proposed WOTUS rule on April 21st. While the agencies claim the rule is supported by the latest peer-reviewed science, EPA’s own Science Advisory Board (SAB) expert panel has not finalized its review of EPA’s science.

The proposed rule leaves many key concepts unclear, undefined, or subject to agency discretion. For example, the rule asserts jurisdiction over waters or wetlands located within a “floodplain” or “riparian area,” but leaves to the agencies’ “best professional judgment” to determine what flood interval to use or what constitutes the riparian area. Vague definitions and concepts will not provide the intended regulatory certainty and will result in litigation on a case-by-case basis over their proper meaning.

PCA Position
PCA has serious concerns regarding the economic ramifications the rule will have on the building and construction sectors. The interpretative effects of the rule would directly impact domestic cement production as plant operators try to determine the new law’s jurisdiction on their property. At a minimum, this would require hydrological and geological surveys that are costly and time consuming. Cement manufacturers would also be subject to increased layers of regulation under the National Pollutant Discharge Elimination System (NPDES) and section 404 permitting processes. Land developers will likely be more susceptible to citizen law suits challenging local actions based on regulations that are poorly defined. Increased project delays and production costs for infrastructure and commercial development would be severe and damaging to a sector that continues to recover from the severe economic downturn.

PCA Request
America’s cement manufacturers urge lawmakers to communicate industry concerns to the EPA and Corps. PCA supports measures, including legislation, that address industry concerns, including withdrawal of the rule and limitations on funding to implement the rule.

Representative Steve Southerland (R-FL) introduced H.R. 5078, the Waters of the United States Regulatory Overreach Protection Act on July 11, 2014. The bill restricts the EPA and Corps from implementing the proposed changes to CWA and requires those agencies to consult with state and local officials in the development of regulations impacting CWA jurisdiction. PCA fully supports this bipartisan effort to establish necessary safeguards that preserve the important role of federal-state partnerships in protecting our nation’s waterways.
Current Law
Under current law, traditional navigable waters (TNW), interstate waters and wetlands, and intrastate waters impacting interstate or foreign commerce are considered navigable waters. These three categories form the basis for what constitutes a ‘water of the United States’ (WOTUS) and therefore fall within the responsibility of the federal government. As such, their impoundments and tributaries, the territorial seas and the adjacent wetlands to those areas fall under the CWA in order to protect the waters to which they are connected.

Proposed Rule
Given the complexity of the proposed rule, jurisdictional scope under CWA would significantly expand. Under the proposed rule, the basis of the rule is altered to include TNW, interstate waters/wetlands, territorial seas, and their tributaries. Impoundments and adjacent waters (as opposed to wetlands) are covered, as are other waters deemed to have a significant nexus on a case-by-case basis. The proposed rule is more expansive in jurisdictional scope, and the establishment of a significant nexus determination of ‘other waters’ on a case-by-case basis provides no clarity for the regulated community. In the simplest of terms, the changes proposed in the rule released by the EPA and Corps can be compared to current law as follows:

Current Law:

\[ (\text{TNW} + \text{interstate waters/wetlands} \rightarrow \text{intrastate waters of commerce}) \text{ impoundments} + \text{tributaries} + \text{terrestrial seas} + \text{adjacent wetlands} \]

Proposed Rule:

\[ (\text{TNW} + \text{interstate waters/wetlands} \rightarrow \text{territorial seas}) \text{ impoundments} + \text{tributaries} + \text{other waters with a significant nexus determined on a case-by-case basis} \]