



STATE OF SOUTH DAKOTA
DENNIS DAUGAARD, GOVERNOR

November 13, 2014

Ms. Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Ms. Jo Ellen Darcy
Assistant Secretary (Civil Works)
Department of the Army
441 G Street, NW
Washington, DC 20314

Re: Comments on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0880

Dear Ms. McCarthy and Ms. Darcy:

South Dakotans have a proud history of conserving and protecting our state's water resources. We promote a prosperous economy while protecting South Dakota's environment and natural resources for today and tomorrow. Agriculture is South Dakota's number one industry and is a critical component of South Dakota's overall economic well-being. It is vital that we protect our state's water resources in a responsible manner that promotes the health, well-being, and vitality of the citizens and the industries of our state, while at the same time ensuring operating freedom.

Comments

I am concerned that the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) proposed rule published April 21, 2013, to redefine "Waters of the United States" under the federal Clean Water Act (CWA) oversteps federal authority and infringes on rights Congress specifically reserved to the States. I urge EPA and the Corps (the agencies) to withdraw the proposed rule.

The agencies have proposed this rule without engagement with state and local authorities, consideration of their priorities and budgets, and without realistically examining the potential economic and legal impacts on all parties and entities involved. The proposed rule is unworkable and exceeds the legal and statutory boundaries of the CWA. Rather than clarify the intent of Congress and the Supreme Court, the proposed rule would add complexity and uncertainty. By creating confusion and the potential for significant legal liability, the proposed rule would result in costly impacts that have not been adequately considered.

Further, this proposed rule would undermine South Dakota's authority over land and water resources. Congress intended the states and EPA to implement the CWA as a federal-state partnership, delegating authority to the states to administer the CWA as co-regulators with EPA. However, the proposed rule's jurisdictional expansion of federal regulation over minor waters and any water that EPA could determine has "significant nexus" to downstream navigable waters undermines and affects the ability of our state to allocate resources and enact policies

regarding waters within our borders and could encumber agencies and others with unnecessary and expensive burdens of proof regarding such a nexus.

The proposed rule is inconsistent with Supreme Court limits on non-navigable waters jurisdiction. I believe it overlooks the legal and institutional boundaries established by Congress and interpreted by the Supreme Court. In *Rapanos v. United States* (*Rapanos*) and the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*) decision that came before it, the Supreme Court specifically rejected agency policy that “any hydrological connection” is a sufficient basis for federalization of conveyances. In *SWANCC*, the Supreme Court held that Clean Water Act jurisdiction did not extend to isolated “non-navigable” intrastate ponds by virtue of migratory birds using them as habitat.¹ In *Rapanos* the Supreme Court was asked whether wetlands near ditches or man-made drains that eventually connected to traditionally navigable waters were “waters of the United States.” Justice Scalia, writing for the plurality, concluded that *only* those wetlands with a continuous surface connection to bodies that are “waters of the United States” ... are “adjacent to” such waters and covered by the Act.² The plurality opinion also concluded that “waters of the United States” only included “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’” such as streams, rivers, lakes and oceans and does not include channels that flow intermittently, ephemerally, or periodically after rain. Justice Kennedy, while concurring with the plurality judgment in *Rapanos*, added the Corps must establish that a “significant nexus” exists when it asserts jurisdiction over wetlands adjacent to non-navigable tributaries. In his concurrence, Justice Kennedy rejected the agencies’ assertion of jurisdiction over non-navigable waters based on “any hydrological connection” to navigable waters.³ He repeatedly cautioned that “remote,” “insubstantial,” “speculative,” or “minor” flows are insufficient to establish a significant nexus. A significant nexus exists “if the wetlands ... significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as “navigable.”⁴

The proposed rule ignores the plurality opinion and inappropriately infers from Justice Kennedy’s opinion, selecting from Kennedy’s opinion and *Rapanos* those parts that suit the agencies’ interests. A correct interpretation of *Rapanos* would have been to recognize the Supreme Court had soundly rejected the agencies’ claim that the Clean Water Act regulates non-navigable conveyances with “any hydrological connection” to navigable waters. Instead of a rulemaking based on an assumption that science and the goals of the Clean Water Act require protections for all waters (natural or manmade) with “any hydrological connection” to navigable waters, the agencies should have proposed a rule that meets statutory and judicial limitations and only asserts jurisdiction over non-navigable waters if and when the conditions of Justice Kennedy’s opinion and the plurality opinion are satisfied. The agencies’ proposal does not meet this requirement. It would improperly extend Clean Water Act jurisdiction far beyond agency authority and beyond the limits interpreted by the Supreme Court in *SWANCC* and *Rapanos*. The agencies must acknowledge that Congress and the Supreme Court clearly intend the Clean Water Act to have limits. The underlying question of jurisdiction over waters of the United

¹ 531 U.S. 159, 174 (2001).

² 547 U.S. 715, 742 (2006).

³ *Id.* at 784.

⁴ *Id.* at 779.

States is largely a matter of legal authority. “Navigable,” while not limited simply to navigable-in-fact waters, limits federal jurisdiction from including all or nearly all water bodies. In the SWANCC decision, the Court stated the word “navigable” “show[s] us what Congress had in mind as its authority for enacting the CWA – its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”⁵

South Dakota Attorney General Marty Jackley has joined with the Attorneys General of ten other states and six state Governors in a comprehensive examination of the proposed rule that has been submitted to the agencies. That analysis also concludes the proposal suffers from numerous flaws and must be withdrawn. Examples of the identified flaws include:

1. EPA and the Corps, by way of this rulemaking, are infringing on state’s rights to define and regulate their own waters. This right is guaranteed and protected by 101 (b) and 101(g) of the federal Clean Water Act.
2. EPA and the Corps, in their attempt to clarify definitions of Waters of the United States, are significantly expanding the scope or potential scope of regulated waters with their broad definitions of tributaries and adjacent waters. The letter also expresses concern about the catch-all “other waters.” On page 5 of the letter, the Attorneys General state:

The sum total of these provisions is that the Proposed Rule would place virtually every river, creek, stream, along with vast amounts of neighboring lands, under the Agencies’ CWA jurisdiction. Many of these features are dry the vast majority of the time and are already in use by farmers, developers or homeowners.

3. The proposed law is contrary to the two Supreme Court rulings that attempted to define waters of the United States. The letter provides additional analysis and detail on those rulings as compared to the proposed law.

In sum, the Attorneys General who collaborated on this letter believe EPA and the Corps are significantly over reaching their authorities per the Clean Water Act.

In addition, while I appreciate EPA’s efforts to reach out to the agricultural community following the rule’s release, the “Ditch the Myth” campaign appears to be more about selling a proposal than enhancing understanding of a complex rule. The agencies’ proposal has created significant concerns for South Dakota’s farmers and ranchers that these attempted explanations have not eased. I can appreciate that statements made by EPA officials have been intended to clarify the rule; however, these statements provide a new interpretation of key terms that should have been included in the proposed rule itself. Future legal challenges and regulatory decisions will turn on the actual language of the final rule, not an EPA blog post.

Although EPA has attempted to explain the impacts of the proposed rule to concerned stakeholders, the Corps has been largely silent. This is concerning because the initial waters of the United States determination is made by the Corps. Questions regarding the determination of a floodplain, the meaning of “significant nexus,” and the significance of groundwater connectivity are just a few portions of the rule which need additional clarification from the Corps.

⁵ 531 U.S. 159, 172 (2001).

In an EPA blog post dated July 7, 2014, Nancy Stoner, EPA Acting Assistant Administrator for Water, made several claims unsupported by the actual language of the rule. In the post, Ms. Stoner stated, "The proposed Waters of the U.S. rule does not regulate new types of ditches, does not regulate activities on land, and does not apply to groundwater." The rule includes "ephemeral streams," "wetlands," and "seasonal ponds." These are areas that are usually dry but where water channels and flows or ponds when it rains. By categorically designating them as "waters of the United States," any farming or ranching activities which have historically occurred here are now subject to Clean Water Act permitting and/or restrictions. Further, by including "ditches" as part of the definition, the agencies are clearly exceeding the authority granted under the Clean Water Act to regulate "navigable" waters.

Most concerning, Ms. Stoner's blog indicated that, "The proposed rule does not expand jurisdiction." The rule includes non-navigable features that do not contain water most of the time as a part of the categorical definition of waters of the United States. Under current rules, these features meet the definition of waters of the United States only if a case-by-case finding that the area has a significant effect on navigable waters. Moving from a case-by-case determination to a categorical inclusion *is an expansion* of the rule.

The U.S. House Committee on Science, Space, and Technology recently released maps obtained from your agencies that show locations and flow patterns of many of the nation's waterways. It is concerning that these maps have been developed in conjunction with this rulemaking and without any transparency or meaningful explanation. A glance at the maps released for South Dakota show the vast majority of the state is covered in wetlands and intermittent and ephemeral streams – all water features included in the proposed definition. With the maps' release, farmers and ranchers now have the ability to identify the reach of this proposed rule by seeing what types of water features exist on their own land. This has created additional concern for these landowners. While the agencies claim the maps are not for use in identifying waters falling under Clean Water Act jurisdiction as "waters of the United States," the confusion caused by the maps is yet another reason to abandon the proposed rule.

Additional impacts of the proposed rule's expanded definition have also been identified by the South Dakota Department of Transportation (SDDOT). The SDDOT is responsible for the delivery of hundreds of construction, reconstruction, and pavement management projects each year. The time required to deliver projects from conception to satisfy a transportation need to actually letting a construction contract has increased dramatically. While the implementation of the Clean Water Act in 1972 and subsequent modifications to rulemaking and guidance have at times increased project delivery time and cost, SDDOT has realized environmentally sound projects that can withstand compliance with the Act. However, the proposed rulemaking will adversely affect nearly all projects that include ditches with requirements that will decelerate projects and restrict the ability of SDDOT to construct and maintain a functional and safe transportation system for the traveling public.

I asked SDDOT to share specific comments, concerns, and recommendations. They are as follows:

1. Exclusions for Roadside Ditches – SDDOT supports the exclusion of specific types of ditches from jurisdictional status. Under paragraphs (b)(3) and (b)(4), the final rule should clarify that, if a ditch is excavated wholly in uplands, drains only uplands, and has less than perennial flow, the ditch is non-jurisdictional by rule. The final rule should clearly state that "less than perennial" includes ditches with intermittent and ephemeral flow and that ditches with less than perennial

flow qualify for exclusion. It should clearly state that "excavated wholly in uplands" means that the ditch was originally constructed entirely in uplands and that emergence of wetlands vegetation in a ditch following initial construction does not preclude a finding that the ditch was "excavated wholly in uplands." The final rule should also specify that a "speculative or insubstantial" downstream connection does not prevent the exclusion "do not contribute flow, either directly or through another water" to certain jurisdictional waters from being applied for ditches that meet this criteria.

2. Tributaries Determined Jurisdictional-by-Rule – SDDOT recommends modifying the proposed rule to ensure that tributaries are evaluated under the same criteria used in the 2008 Guidance. Tributaries should be deemed jurisdictional by rule only if they have perennial flow, that is typically flow year-round or have continuous flow seasonally. Such tributaries must include the presence of bed and banks with ordinary high water marks. Without this requirement, the universe of tributaries deemed jurisdictional is unreasonably broadened. The final rule should clarify that exclusions take precedence over the jurisdictional-by-rule provisions and, therefore, if a ditch is excluded by paragraphs (b)(3) or (b)(4), the ditch would be non-jurisdictional.
3. Adjacent Waters Deemed Jurisdictional by Rule - While the current definition of "adjacent waters" does not change in the proposed rule, in our view, the addition of the definition of "neighboring" does expand this portion of jurisdiction, especially in conjunction with "riparian area" and "floodplain." The potential for interpreting "neighboring" broadly enough to eliminate the requirements of "reasonable proximity and significant effect" can have staggering effects on project costs and delivery times for SDDOT. Determining subsurface hydrologic connections from relatively remote locations to a true waterway can be incredibly difficult and based upon hydrologic and soils investigations that, even when shown to be insignificant connections, may still be within the purview of this rule. Similarly, the terms riparian and floodplain do not appear to require reasonable proximity to be considered "neighboring." Shallow subsurface connections" should not be a basis for asserting jurisdiction over prairie pothole areas. SDDOT recommends revising the definition of "neighboring" to include reasonable proximity and significant effect, such that waters are deemed "adjacent" and jurisdictional by rule only if they are actually located close to other jurisdictional waters and have a significant effect on the chemical, physical, and biological integrity of those waters.
4. Jurisdictional Standards for "Other Waters" – SDDOT fully supports the use of "significant nexus" standard for determining "other waters" jurisdictional status. However, analyzing other "similarly situated" waters that can be evaluated as a single landscape on a case-by-case basis may require geographic analysis on a scale that is potentially unduly burdensome and costly. SDDOT recommends the application of the "significant nexus" standard to specific categories of waters, per the preamble. Additionally, specificity is needed regarding determining that "other waters" are similarly situated only in certain ecoregions, not other areas with differing landscape components.
5. Jurisdictional Status of Stormwater Management Systems – The proposed rule identifies as non-jurisdictional by rule wastewater treatment systems, including

ponds or lagoons, but it is unclear if this applies to green stormwater management systems. In South Dakota, the SD Department of Environment and Natural Resources has been delegated responsibility for permitting facilities, including transportation projects and facilities covered by the National Pollutant Discharge Elimination System, under Section 402 of the Clean Water Act. SDDOT is interested in whether green infrastructure, such as wetlands constructed specifically to receive and treat stormwater run-off from roads with important ecological benefits, could themselves be deemed jurisdictional waters. If this is a possible scenario, SDDOT could be in the odd position of being required to obtain a Section 404 permit to discharge stormwater into a facility constructed to satisfy stormwater permit requirements under Section 402 of the Clean Water Act. That makes no sense under any scenario. The SDDOT recommends clarification regarding the application of stormwater exclusions, including wetlands and ditches such that this CWA conflict does not have the potential to happen.

6. Exemption for "Maintenance of Ditches" – The agencies do not propose to issue any new guidance regarding the applicability of the exclusion for ditch maintenance under Section 404(f)(1)(C) of the Clean Water Act. Currently, the exemption for ditch maintenance under Section 404(f)(1)(C) is addressed in the Corps' Regulatory Guidance Letter 07-02, "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act." This exemption includes the definition of "drainage ditch", which seems to include roadside ditches. However, the guidance document includes irrigation and drainage ditches and there is no published guidance specifically recognizing the applicability of this exemption to roadside ditches. It could be interpreted to only address agricultural applications. The SDDOT recommends the Corps or EPA issue guidance clarifying the exemption for "maintenance of ditches" in Section 404(f)(1)(C) of the Clean Water Act applies to roadside ditches so that routine ditch maintenance activities can be conducted without undue regulatory burdens.

Summary

Under the proposed rule, EPA and the Corps would have authority over a number of water bodies not currently considered waters of the United States, such as wetlands, intermittent and ephemeral streams, and even areas that are dry most of the time. This expanded and subjective definition will subject landowners to a number of new and significant restrictions and permitting requirements for activities in or around these areas. In addition, the Clean Water Act penalties and citizens' suit provision pose substantial, potential liability for landowners, particularly when conducting activities on land that was never before determined to be a water of the United States. I strongly urge the EPA and the Corps to withdraw the proposed rule.

Sincerely,


Dennis Daugaard

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