

February 4, 2015

Joint Hearing
on

Impacts of the Proposed Waters of the United States Rule on Local and State Governments

United States House of Representatives
Committee on Transportation and Infrastructure
&
United States Senate
Committee on Environment and Public Works

Statement

by

M. Reed Hopper
Principal Attorney
Pacific Legal Foundation
930 G Street
Sacramento CA 95814
Tel: 916-419-7111

Chairman Shuster, Chairman Inhofe, and honorable committee members, as an attorney with the Pacific Legal Foundation, a nonprofit, public interest organization dedicated to the protection of individual liberties and private property rights, I wish to thank you for this opportunity to provide my analysis of the Army Corps and EPA's proposed rule redefining "waters of the United States" under the Clean Water Act. I had the privilege to represent John Rapanos in the U.S. Supreme Court, in *Rapanos v. United States*, 547 U.S. 715 (2006), that is the impetus for the proposed rule. Unfortunately, the proposed rule is inconsistent with that decision. Contrary to that decision, and others, that have sought to impose limits on federal jurisdiction under the Clean Water Act, The proposed rule is undoubtedly the largest expansion of power ever proposed by a federal agency. It would far exceed any prior statutory interpretation, usurp the power of the States to manage local land and water resources, and nullify constitutional limits on federal authority.

Among other things, the proposed rule misrepresents the judicial standard for "traditional navigable waters" asserting that transport by boat alone is sufficient to establish federal jurisdiction. This standard is incorrect and conflicts with the agencies' prior practice and the case law on which they rely. The proposed rule also asserts jurisdiction over all interstate waters without legal precedent. In addition, the proposed rule distorts the jurisdictional tests under *Rapanos* and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)(*SWANCC*), expanding federal authority over land and water use throughout the Nation. Contrary to explicit Supreme Court directives, and established constitutional limitations, the proposed rule asserts federal control over virtually all waters in the Country as "tributaries," "adjacent" or "other waters." So broad is the putative reach of the government under this proposed rule that the agencies expressly exclude only a handful of water features like ornamental ponds and swimming pools from federal regulation.

On its face, the proposed rule covers virtually every water in the Nation. Under this rule, a prudent legal practitioner would have to advise his client that the only waters not covered are those few that are expressly exempt. If a water body isn't a "traditional navigable water," it is a "tributary." If it isn't a "tributary," it is an "adjacent water." If it isn't an "adjacent water," it is an "other water." All of which are subject to onerous federal regulation. If it isn't a water at all, it is still covered by the fine print in Footnote 3 of the proposed rule that states the terms "waters" and "water bodies" "do not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical and biological features." This seemingly innocuous language is troubling because it can be interpreted to include runoff, dry land, man-made structures, and flora and fauna. What isn't a chemical, physical or biological feature of the aquatic system? Nothing!

Because of the extreme land use restrictions that apply to property that contains "waters of the United States," and the enormous, even punitive, costs for a permit under the Clean Water Act—averaging more than \$270,000 for an individual permit and \$28,000 for a nationwide permit¹—this new rule will grossly expand federal authority over everyday activities at a monumental cost to the national economy. According to the U.S. Supreme Court, sudden and expansive interpretations of long-standing laws are unreasonable and should be met with skepticism.

On June 23, 2014, the Supreme Court decided the case of *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U. S. ____ (2014). In that case, the petitioners challenged EPA's interpretation of the Clean Air Act, to regulate certain greenhouse gas emissions, as over broad. In determining the level of deference due EPA's new rule, the Court held:

EPA's interpretation is [] unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," *Brown & Williamson*, 529 U. S., at 159, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance." *Id.*, at 160; see also *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994); *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U. S. 607, 645–646 (1980) (plurality opinion). The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text

Slip opinion at 19-20.

¹ See *Rapanos*, 547 U.S. at 721.

The proposed rule redefining “waters of the United States” is equally transformative. The Corps and EPA claim to have found authority under the Clean Water Act to regulate virtually all waters in the Country. With absurdly few exceptions, any wet spot may now be subject to federal control requiring tens of thousands of permits and millions of sources. This is contrary to the intent of Congress clearly expressed in the Clean Water Act itself “to recognize, preserve, and protect the primary responsibilities and rights of States” to control local and water use. 33 U.S.C. §1251(b).

Moreover, the Corps and EPA have a history of abusing their power under the Clean Water Act. On more than one occasion, the Supreme Court has chastised these agencies for overreaching. *See SWANCC*, 531 U.S. 159, (holding that regulation of remote ponds exceeds statutory authority and raises constitutional questions.); *Rapanos*, 547 U.S. 715, (plurality holding that the agency’s expansive interpretation of the Clean Water Act is over broad and creates federalism problems.); and *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367, 1375 (2012) (J. Alito concurrence opining that the “reach of the Clean Water Act is notoriously unclear” and that “any piece of land that is wet at least part of the year” may be covered by the Act, putting property owners “at the agency’s mercy.”).

This proposed rule is patently unreasonable and should be amended or withdrawn.

Traditional Navigable Waters

The proposed rule purports to retain its existing definition of “traditional navigable waters” as those waters that “are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce or could be used for commercial navigation.” *See* 79 Fed. Reg. 22200. This emphasis on the use of such channels for commerce is consistent with the long-standing definition of “traditional” or “navigable-in-fact” waters as described by the Supreme Court in *The Daniel Ball*, 77 U.S. 557 (1870), and reiterated by the court in *SWANCC*, 531 U.S. 159, wherein the High Court held that the Corps could not regulate isolated water bodies and that, through the Clean Water Act, Congress intended to exert nothing “more than its commerce power over navigation.” *See id.* fn 3.

However, the proposed rule brazenly declares that “traditional navigable waters” under the Clean Water Act will include any water for which a “Federal Court has determined that the water body is navigable-in-fact under Federal Law.” 79 Fed. Reg. 22200. This would include navigability determinations that have nothing to do with interstate commerce or commercial navigation, as the definition expressly requires. For example, the agencies intend to rely on navigability determinations under the equal footing doctrine designed to determine title in waterways at the time of statehood, even though those determinations do not require a connection to interstate commerce. *See id.* at 22253. The Corps and EPA seem unconcerned that this interpretation of federal jurisdiction under the Clean Water Act directly conflicts with their own regulatory definition of “traditional navigable waters” and Supreme Court precedent. In fact, the proposed rule fails to cite a single case in support of the agencies’ novel interpretation that “navigable waters” under the Clean Water Act are the same as “navigable waters” under any other federal law. There is no law to support this interpretation.

Moreover, the proposed rule states that the “likelihood of future commercial navigation, including commercial waterborne recreation, can be demonstrated by current boating or canoe trips for recreation or other purposes.” 79 Fed. Reg. 22200. In support of this proposition, the proposed rule relies in large part on *FPL Energy Marine Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (emphasis added). See 79 Fed. Reg. 22253. But that case undercuts the proposed rule.

In *FPL*, the D.C. Circuit upheld a FERC determination that a stream was a “traditional navigable water” based, in part, on the fact that the stream had minimal rapids and had been traversed by canoe and therefore could be used for simple forms of transportation. *Id.* at 1158. However the court acknowledged FERC had also determined that streams traversed only by expert kayakers, “or specialized sporting craft designed for river running,” were not “traditional navigable waters.” *Id.* Therefore, the implication in the proposed rule that navigability can be demonstrated by any type of current boating is not supported by this authority..

The agencies’ reliance on *FPL* is misplaced for other reasons as well. The court was clear that, under U.S. Supreme Court precedent, future navigability cannot be based solely on transport by canoe, but must be supported by other factors: “capacity [of a waterway to meet the needs of commerce] may be shown by physical characteristics **and** experimentation as well as by uses to which the streams have been put.” *Id.* at 1157 (citing *United States v. Utah*, 283 U.S. 64, 83 (1931) (emphasis added). Transport by canoe can satisfy the experimentation part of the Supreme Court’s navigability standard, but it does not satisfy the physical characteristics part of the Supreme Court standard. As in *FPL*, so in other cases, the agency must show that the stream is suitable for commercial navigation by its physical characteristics, such as by flow, depth, gradient, and capacity. See *id.* at 1159. But the proposed rule dismisses this requirement.

Also, the proposed rule (p.22200) states that the future navigability of a stream should “be supported by **evidence**,” and implies such evidence may be limited to boating, whereas the court in *FPL* held that both the experimentation and physical characteristics parts of the navigability determination must be supported by **substantial evidence**. *Id.* at 1159-1160.

For these reasons, the proposed rule overstates federal jurisdiction under the Clean Water Act and should be amended or withdrawn. A determination of navigability under some other law is not sufficient to satisfy the Commerce Clause requirements of the Clean Water Act and transport by boat alone is insufficient to establish a “traditional navigable water.”

Interstate Waters

The proposed rule asserts that the Corps and EPA have authority under the Clean Water Act to categorically regulate all interstate waters as if they were “traditional navigable waters,” even if they are not navigable-in-fact and have no connection to interstate commerce. See 79 Fed. Reg. 22254-22259. But these agencies conveniently overlook the obvious; the Clean Water Act is not a general mandate to regulate all waters. Congress does not have that power. The Act is based on Congress’ constitutional power to regulate interstate commerce. See *SWANCC* and *Rapanos*. The

Supreme Court has limited that power to the regulation of channels of interstate commerce (such as navigable-in-fact waters), things in interstate commerce (such as commodities that are bought and sold), and activities that substantially affect interstate commerce. See *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). By definition, anything regulated under the Clean Water Act must have a substantial connection to interstate commerce. That's why the Act prohibits certain discharges to "navigable waters" and not to all waters. Therefore, the proposed regulation of all interstate waters exceeds both statutory and constitutional authority.

Nevertheless, the proposed rule also asserts (79 Fed. Reg. 22254-22259) that the precursor statutes to the Clean Water Act always subjected interstate waters and their tributaries to federal jurisdiction. But this is not so. As the plurality observed in *Rapanos*, "[f]or a century prior to the [Clean Water Act], we had interpreted the phrase 'navigable waters of the United States' in the Act's predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible to being rendered so." *Rapanos*, 547 U.S. at 723 (emphasis added). In fact, "[a]fter the passage of the [Clean Water Act], the Corps initially adopted this traditional judicial definition of the Act's term 'navigable waters.'" *Id.*

Based on this understanding, the Supreme Court set out the contours of the Clean Water Act in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *SWANCC*; and, *Rapanos*. *Riverside Bayview* authorized federal regulation of wetlands "adjacent" to (i.e., physically abutting) "traditional navigable waters." The court did not, however, equate interstate waters with "traditional navigable waters." *SWANCC* prohibited federal regulation of "isolated water bodies" but did not carve out an exception for interstate waters. Likewise, in *Rapanos*, the plurality authorized federal regulation of relatively permanent rivers, lakes and streams (and certain "adjacent" wetlands) connected to "traditional navigable waters." But the plurality did not equate interstate waters with "traditional navigable waters." Nor did Justice Kennedy. In *Rapanos*, Justice Kennedy authorized federal regulation of wetlands that have a "significant nexus" with "traditional navigable waters." But, like the plurality, Justice Kennedy did not equate interstate waters with "traditional navigable waters."

Both the plurality and Justice Kennedy were quite explicit in defining jurisdictional waters under the Clean Water Act. In all cases, the covered water must be or have a connection or nexus to a "traditional navigable water." According to the plurality, "on its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographics features' that are described in ordinary parlance as 'streams[,] ...oceans, rivers [and] lakes.'" *Rapanos*, 547 U.S. at 739. These, in turn, must be "connected to traditional interstate navigable waters." *Id.* at 742.(emphasis added). Under the plurality opinion, therefore, nonnavigable interstate waters may not be deemed "traditional navigable waters." And, according to Justice Kennedy: "In [*SWANCC*], the Court held, under the circumstances presented there, that to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable-in-fact or that could reasonable be so made." *Id.* at 759 (emphasis added). Thus, Supreme Court precedent precludes

categorical regulation of all interstate waters and the treatment of nonnavigable interstate waters as “traditional navigable waters.”

Tributaries

The Corps and EPA’s claim that all tributaries are subject to the Clean Water Act—no matter how remote or inconsequential—defies comprehension. This claim is based on the so-called Connectivity Report that suggests virtually all waters are interconnected and therefore subject to federal regulation under the Clean Water Act. But this is the same argument the agencies made in the *Rapanos* case which was expressly rejected by both the plurality and Justice Kennedy. All five justices concluded that the agencies’ “any hydrological connection” approach could not be sustained.

But rather than narrow the agencies’ definition of tributaries, as *Rapanos* requires, the proposed rule defines tributaries to include not only any water with a bank and ordinary high water mark, somewhere along the line, but any other water that contributes flow to a covered water, directly or indirectly. See 79 Fed. Reg. 22269. Which is to say, the proposed rule authorizes federal regulation of any discrete water that flows downstream. But this goes too far. The plurality limited federal jurisdiction to a limited subset of nonnavigable tributaries and Justice Kennedy did not apply his “significant nexus” test to tributaries, only wetlands. Of equal importance, both the plurality and Justice Kennedy rejected the categorical regulation of drainage ditches and the like. And, the federal regulation of virtually all tributaries with a hydrological connection to downstream navigable waters, authorized by the proposed rule, raises constitutional conflicts that the Supreme Court has cited as a basis for limiting the scope of the Clean Water Act. See *Rapanos* and *SWANCC*.

Under the *Rapanos* plurality opinion, a jurisdictional water “includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] ... oceans, rivers, [and] lakes.’” *Rapanos*, 547 U.S. at 739. The emphasis is on “ordinary parlance,” not on “relatively permanent.” Clearly a ditch or a drain is not a stream. In fact, most man-made conduits would not be characterized, in “ordinary parlance,” as “streams[,] ... oceans, rivers, [and] lakes.” *Id.*

According to the plurality, “Following our decision in *Riverside Bayview*, the Corps adopted increasingly broad interpretations of its own regulations under the Act.” *Rapanos*, 547 U.S. at 725. So broad were these interpretations that they “included ‘ephemeral streams’ and ‘drainage ditches’ as ‘tributaries’ to ‘waters of the United States.’” *Id.* (see also 33 CFR. § 328.3 (a)(5)). And, “[t]his interpretation extended ‘the waters of the United States’ to any land feature over which rainwater or drainage passes and leaves a visible mark--‘even if only the presence of litter or debris’” *Id.* (see also 33 CFR. § 328.3 (e)). Moreover, “[f]ollowing our decision in *SWANCC*, the Corps did not significantly revise its theory of federal jurisdiction under § 1344(a),” including its “sweeping assertions of jurisdiction over ephemeral channels and drains as ‘tributaries.’” *Id.* at 726.

Unfortunately, nothing has changed.

In response to the Corps' assertion that it has jurisdiction over drains and ditches, the plurality stated that the natural definition of "waters," the Court's own prior interpretations, the provisions of the statute, and judicial canons of construction, "all confirm that 'the waters of the United States' in § 1362(7) cannot bear the expansive meaning the Corps would give it." *Id.* at 731-732.

Moreover, similarly to *SWANCC*, the plurality stated that the Corps' regulation of "ditches, channels and conduits" was inconsistent with the congressional objective expressed in the Act to "recognize, preserve and protect the primary responsibilities and rights of States . . . to plan the development and use ... of land and water resources ..." and that such regulation impinged on fundamental States powers and raised significant constitutional questions. *Id.* at 737-738. The plurality concluded, therefore:

In sum, on its only plausible interpretation, the phrase the "waters of the United States" ... does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of "the waters of the United States" is thus not "based on a permissible construction of the statute." [Citing *Chevron*, 467 U.S. at 843].

Id. at 739.

The proposed rule directly conflicts, therefore, with the *Rapanos* plurality. But that is not all. It also conflicts with Justice Kennedy 's opinion.

Although Justice Kennedy presented his "significant nexus" test for determining jurisdictional wetlands, he did not suggest that the same test could or should be applied to determine jurisdictional tributaries. More to the point, Justice Kennedy expressly rejected the agencies' approach to regulating tributaries described in the proposed rule. According to Justice Kennedy, the Corps in *Rapanos* "deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark..." *Id.* at 781. This is the same definition found in the proposed rule. But Justice Kennedy observed that the Corps was incapable of consistent identification of the ordinary high water mark, citing a GAO audit, and concluded that "the breadth of this standard--which seems to leave wide room for the regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it--precludes its adoption" as a standard for determining jurisdictional waters. *Id.* Inexplicably, the proposed rule adopts the very definition of tributaries Justice Kennedy determined the Act precludes.

The simple fact is that the agencies' unrestrained definition of covered tributaries has already been rejected by a majority on the Supreme Court in *Rapanos*. The proposed rule should, therefore, be amended to reflect this fact. The *Rapanos* plurality has even suggested such an amendment:

Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from "navigable waters," by

including them in the definition of “ ‘point source.’ ” The Act defines “ ‘point source’ ” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). It also defines “ ‘discharge of a pollutant’ ” as “any addition of any pollutant *to* navigable waters *from* any point source.” § 1362(12)(A) (emphasis added). The definitions thus conceive of “point sources” and “navigable waters” as separate and distinct categories. The definition of “discharge” would make little sense if the two categories were significantly overlapping. The separate classification of “ditch[es], channel[s], and conduit[s]” —which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow—shows that these are, by and large, *not* “waters of the United States.

Id. at 735-736.

Adjacent Waters

Here too, the agencies propose an unprecedented expansion of federal authority under the Clean Water Act. The proposed rule would replace the limited term “adjacent wetlands” with the unlimited term “adjacent waters” and authorize federal regulation of “adjacent waters” by rule. 79 Fed. Reg. at 22207. According to the proposed rule, the Corps and EPA would regulate not only wetlands abutting traditional navigable waters, as the Supreme Court authorized in *Riverside Bayview*, but any water that is “adjacent” to any other covered water, which the Supreme Court has not authorized. In further disregard for judicial precedent, the proposed rule defines the term “adjacent” to mean “neighboring” which in turn covers “riparian areas,” “floodplains,” and other areas such as water bodies connected by “confined surface” waters or a “shallow subsurface hydrological connection” to other covered waters. *Id.* Even “man-made dikes or barriers, natural river berms, beach dunes and the like” do not cut off federal jurisdiction. *Id.* Therefore, for the first time, the Corps and EPA expressly assert jurisdiction over dry land and shallow groundwater. No court has ever authorized such broad federal jurisdiction under the Clean Water Act and no provision of the Act itself supports such a broad interpretation of agency authority.

The reference to floodplains is particularly odious. The proposed rule leaves it to the agency to decide the requisite frequency of flooding, whether it be 10, 20 or 100 years. And since the floodplain may only contain water during an actual flood, it appears the agencies will assert regulatory authority over the floodplain even when dry, much as they regulate “wetland” areas that are dry but for a few days a year. This alone is the largest land grab in the history of the Nation, encompassing tens of thousands of miles of usually dry land and extending from the lower Mississippi Delta to the smallest streams. The Corps and EPA have already excised the word “navigable” from the term “navigable waters.” They now propose excising the word “waters” from the term as well. This flies in the face of federal law. *See SWANCC*, 531 U.S. at 172 (holding the

word “navigable” has to mean something); and, *Rapanos*, 547 U.S. at 716 (holding the Clean Water Act “authorizes federal jurisdiction only over ‘waters.’”).

Additionally, the term “neighboring” is ambiguous and so broad as to eliminate any certainty as to the scope of jurisdictional waters under the adjacency standard. Although the Corps and EPA claim the term “neighboring” has always been subject to “an element of reasonable proximity,” *id.* at 2207, the obvious purpose of such ambiguity is to afford public officials the greatest discretion in determining “waters of the United States” so as to avoid any facial challenge to federal authority. The proposed rule itself witnesses a total disregard for reasonable limits on federal power. The term “neighboring” cannot be seen, therefore, as providing any meaningful constraint on federal enforcement so much as providing free reign to overzealous bureaucrats to regulate what they see fit to regulate.

But this goes too far. Redefining adjacency in this way is a gross distortion of the term’s plain meaning and has no legal basis. In fact, it directly conflicts with the Supreme Court’s decision in *SWANCC*. In that case, the Court held that isolated, nonnavigable, intrastate water bodies were not adjacent and could not be regulated. That decision was based on the observation that such water bodies had no hydrological connection with any “traditional navigable water” and that the regulation of such water bodies would impinge on state powers and raise constitutional questions.

Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and water use. See, *e.g.*, *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44, 130 L.Ed.2d 245, 115 S. Ct. 394 (1994) ("Regulation of land use [is] a function traditionally performed by local governments"). Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . ." 33 U.S.C. §1251(b). We thus read the [Clean Water Act] as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.

SWANCC, 531 U.S. at 174.

The term “adjacent” is over broad and should be limited to its ordinary meaning (i.e. abutting).

Other Waters

In addition to the virtually unlimited scope of tributaries, impoundments, ditches, wetlands and adjacent waters, regulated by rule, the Corps and EPA propose to regulate “other waters.” 79 Fed. Reg. 22211- 22217. This is a catch-all provision that purports to include only such waters as have a “significant nexus” with waters that are categorically regulated. But the analysis proposed

for determining such waters makes a mockery of the term “significant” and effectively nullifies Supreme Court precedent.

Under the proposed rule, “similarly situated” waters in the region are aggregated to determine their effects on downstream navigable-in-fact waters. Obviously, the larger the region the more likely one is to find a “significant effect.” Therefore, to ensure such an effect is found, the proposed rule aggregates waters over an entire “ecoregion,” covering thousands of square miles, such as the entire California Central Valley and the Central Great Plains. There are over 100 of these ecoregions. The problem with this approach is that when aggregated over such a large area, all waters have a “significant effect” on downstream navigable waters, including isolated water bodies that the Supreme Court determined cannot be regulated without raising serious constitutional conflicts.

On any fair reading of *SWANCC*, isolated water bodies are not subject to federal regulation. *Rapanos* reinforced this conclusion as all nine Justices acknowledged that *SWANCC* limited federal control over “other waters.” According to the plurality, in *SWANCC*, “we held that ‘nonnavigable, isolated, intrastate waters’ . . . were not included as ‘waters of the United States.’” *Rapanos*, 547 U.S. at 726. Justice Kennedy was even clearer:

Asserting jurisdiction pursuant to a regulation called the "Migratory Bird Rule," the Corps argued that these isolated ponds were "waters of the United States" (and thus "navigable waters" under the Act) because they were used as habitat by migratory birds. The Court rejected this theory. "It was the significant nexus between wetlands and 'navigable waters,'" the Court held, "that informed our reading of the [Act] in *Riverside Bayview Homes*." Because such a nexus was lacking with respect to isolated ponds, the Court held that the plain text of the statute did not permit the Corps' action.

Id. at 766-767.

Even the dissent agreed with this assessment of *SWANCC*:

The Corps had asserted jurisdiction over the gravel pit under its 1986 Migratory Bird Rule, which treated isolated waters as within its jurisdiction if migratory birds depended upon these waters. The Court rejected this jurisdictional basis since these isolated pools, unlike the wetlands at issue in *Riverside Bayview*, had no "significant nexus" to traditionally navigable waters.

Id. at 795.

The proposed rule’s inclusion of isolated water bodies is therefore at odds with these decisions. Also, this category is not really a case-by-case analysis at all. It is another per se rule. It is not practical for the Corps and EPA to physically assess any particular water body’s aggregate

affect on navigable waters over thousands, or even millions, of square miles. That is why the agencies have selected such large areas to aggregate. The agencies must assume that the aggregate effect of any similar waters are significant because the area is so big. And, of course, no one can refute the assumption because actual effects over an entire ecoregion can't be assessed.

The Corps and EPA simply ignore the fact that federal authority under the Clean Water Act is defined by the Commerce Clause, not by hydrology. See *SWANCC* fn 3, (finding that Congress did not intend to exercise “anything more than its commerce power over navigation.”). The Supreme Court has expressly rejected this broad approach to aggregating effects because it fails to recognize constitutional limits on agency jurisdiction.

In *Lopez*, 514 U.S. 549, the Supreme Court had to determine whether the federal government could regulate possession of a gun in a school zone. The government argued that it could regulate such activity based on substantial (or significant) effects on interstate commerce because possession of a gun in a school zone may result in violent crime and violent crime interferes with the national economy in two respects: (1) violent crime increases the cost of insurance throughout the nation; and, (2) violent crime deters people from traveling to unsafe areas. The government also argued that guns in school undermine the learning environment producing less productive citizens which hurts the national economy.

The government acknowledged that under its “costs of crime” argument that Congress could regulate any activity that might lead to violent crime no matter how remote the connection to interstate commerce. Likewise, the Court found that under the government’s “national productivity” argument, Congress could regulate anything related to individual economic productivity. If these arguments were accepted, the Court concluded, it would be “hard pressed” to find any individual activity that Congress could not regulate under the commerce power. “Depending on the level of generality,” the Court observed, “any activity can be looked upon as commercial.” *Id.* at 565 This then was the fallacy in the government’s arguments; they provided no logical stopping point to congressional authority and converted the commerce power into a general police power like that enjoyed by the states. Accordingly, the Supreme Court invalidated the Gun Free School Zones Act as an unauthorized Commerce Clause enactment.

Likewise, in *Morrison*, 529 U.S. 598, the High Court invalidated the Violence Against Women Act on the same grounds. That Act made it a federal crime to commit violence against a person motivated by gender but it was based on the same broad aggregation standard the Court rejected in *Lopez*.

Writing for the majority, Chief Justice Rehnquist affirmed that all laws passed by Congress must find authority in the Constitution and that the powers of Congress are limited. As *Lopez* emphasized, Justice Rehnquist stated, “even under our modern, expansive interpretation of the Commerce Clause, Congress’ regulatory authority is not without effective bounds.” *Id.* at 608.

Unlike the situation in *Lopez*, however, the Court did find that the Violence Against Women Act was supported by congressional findings that gender-motivated violence affects interstate commerce. Among others, those effects included deterring victims from traveling interstate or engaging in interstate business. Diminishing national productivity, increased medical costs and a decrease in the supply and demand of interstate goods were also cited. However, the Court did not believe these findings were sufficient to uphold the Act under the Commerce Clause. Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not make it so.

Since Congress followed the but-for causal chain from the original violent act to every remote effect upon interstate commerce, the Supreme Court decided that Congress' findings were faulty and relied on a "method of reasoning" that obliterates the distinction between what is national and what is local and which the Court had already rejected in *Lopez*. *Id.* at 615. The Court was unwilling to allow Congress, therefore, to regulate noneconomic activity, such as gender-motivated acts of violence, based only on that activity's attenuated effects on interstate commerce. Therefore, the Court held that Congress did not have authority to enact such a law.

But the same could be said of the proposed rule. It relies on an overly broad category of "other waters" aggregated within immense areas that allow federal regulation of virtually any water in the Country, obliterating any distinction between federal authority and local authority in direct conflict with Supreme Court case law and the limited reach of the commerce power.

And if that were not enough, the proposed rule suggests that in the unlikely event any waters escape federal jurisdiction under this standard they may still be regulated as point sources. The proposed rule goes too far.

Significant Nexus Analysis²

The proposed rule misrepresents the "significant nexus" analysis in a number of ways. First, it misstates the standard. Throughout, the rule states waters have the requisite significant nexus if they, either alone or in combination with similarly situated waters in the region, significantly affect

² In determining jurisdictional waters, most of the lower courts allow the Corps and EPA to rely on either the *Rapanos* four-justice plurality standard or Justice Kennedy's lone "significant nexus" test. However, this is based on a misreading of Supreme Court case law. In *Marks v. United States*, 430 U.S. 188, 193 (1977), the Supreme Court stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." In *Rapanos*, the Scalia plurality gives the CWA the most limited reading and appears the most narrowly drawn because all nine Justice would agree with the plurality that traditional navigable waters, ordinary rivers, lakes and streams, as well as abutting wetlands would be covered by the Act. *See Rapanos* dissent at n.14. Therefore, the plurality should be viewed as the controlling opinion.

the chemical, physical, **or** biological integrity of waters that drain into traditional navigable waters, interstate waters, or territorial seas. But Justice Kennedy’s jurisdictional test expressly requires the covered water to have a “significant nexus” to traditional navigable waters themselves, and not just to waters that drain into traditional navigable waters. See *Rapanos*, 547 U.S. at 779 (“Consistent with *SWANCC* and *Riverside Bayview* and the need to give the term ‘navigable’ some meaning, the Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.”)(Kennedy, J., concurring). The test does not apply to nonnavigable intrastate waters as the rule asserts.

Second, Justice Kennedy did not use the disjunctive “or” in describing the effects that must be shown to establish a “significant nexus.” According to Justice Kennedy:

Wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, **and** biological integrity of other covered waters more readily understood as “navigable.”

Id. at 780

This test is written in the conjunctive with the word “and.” On its face, the test calls for a demonstration that the subject water have a significant chemical effect, **and** a significant physical effect, **and** a significant biological effect on a traditional navigable water. By its plain terms, all three effects must be shown. A single significant effect is insufficient to establish federal jurisdiction. The proposed rule does not require this and is therefore inconsistent with the Kennedy opinion.

Third, the proposed rule misconstrues the level of significance required to satisfy the Kennedy test. The proposed rule states a “significant nexus” will be found if a chemical, physical, or biological effect is more than “speculative or insubstantial.” This is incorrect. There is a huge gap between a “speculative or insubstantial” effect and the “significant” effect required by the plain terms of the “significant nexus” test. While Justice Kennedy observed that a “speculative or insubstantial” effect was clearly insufficient to establish federal jurisdiction, a fair reading of the Kennedy opinion reveals that the Justice requires a substantial effect to demonstrate the requisite nexus, and not merely anything more than a speculative or insubstantial effect. A substantial effect on traditional navigable waters, like a substantial effect on interstate commerce, is also required by *Lopez* and *Morrison*, as discussed above. “Absent some measure of the significance of the connection for downstream water quality, [the mere presence of a hydrological connection] standard [is] too uncertain.” *Rapanos*.at 784 (J. Kennedy, concurring). Therefore, if the rule is to be true to the Kennedy opinion, it must require a demonstration of a **substantial** chemical, physical **and** biological effect.

And finally, by encouraging reliance on literature, as opposed to onsite analysis, and broad ecosystem impacts, as well as the extrapolation of effects from one water to the next within an ever

increasing area of a watershed, the proposed rule virtually enures that a “significant nexus” will be found. In other words, the rule is so broad it preordains the outcome. As proposed, the “significant nexus” test is too broad.

Waters That Are Not Jurisdictional

The reach of the proposed rule cannot be overstated.. Even under the more limited jurisdictional interpretation the Corps and EPA gave the Act in *Rapanos*, the scope of the Act was breathtaking and encompassed storm drains, roadside ditches and ordinarily dry land:

The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations. In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over “the waters of the United States” to cover 270–to–300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States. And that was just the beginning. The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated “waters of the United States” **include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years.** Because they include the land containing storm sewers and desert washes, the statutory “waters of the United States” engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a “water of the United States.”

Rapanos v. United States, 547 U.S. 715, 722 (emphasis added).

But the proposed rule is even broader as evidenced by the absurdly narrow list of excluded waters. Storm drains, roadside ditches and 100 year flood plains are conspicuously lacking from this list.

Those waters not included as “waters of the United States” are limited to “ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow.” 79 Fed. Reg. 22218. And, “ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas, or impoundment.” *Id.* The problem with this exclusion, is that such ditches probably do not exist. It is a meaningless exclusion. Moreover, the exclusion is made confusing by the caveat that excluded ditches may nevertheless serve

as conduits for other jurisdictional waters, such as wetlands, under the adjacency standard. *See Id.*

Aside from this improbable ditch exclusion, the rule proposes excluding certain artificially irrigated uplands, ponds, pools and ornamental waters so long as they were excavated or diked on dry land. *Id.* This is hardly a concession because it implies that virtually all other waters are covered by the Act.

Finally, the proposed rule would exclude “water-filled depressions created incidental to construction activity” and “groundwater, including groundwater drained through subsurface drainage systems” and “gullies and rills and non-wetland swales.” *Id.* But here again, the message is mixed, even schizophrenic, because the Corps and EPA would regulate “adjacent waters” with “shallow subsurface connections” to other covered waters. *See* 79 Fed. Reg. 22207.

Strangely, the Corps and EPA could not bring themselves to expressly exclude “puddles” claiming the term is too ambiguous. But that didn’t stop the agencies from relying on even more ambiguous terms such as “adjacent,” “wetland,” “riparian,” “floodplain,” “significant nexus,” “neighboring,” “perennial,” “ephemeral,” “impoundment,” “non-wetland swale,” “high water mark,” etc. The exclusions are, therefore, too narrow or too uncertain to provide any meaningful limitation on federal authority.

It is also difficult for the public to rely on these exclusions given the agencies’ hostility towards the other exemptions under the Act. For example, the Corps and EPA have routinely limited the section 4(f) farm exemption to those ordinary farming practices employed on a particular farm rather than those farming practices common to the industry, as a plain reading of the Act requires. And, the agencies have attempted to limit the “prior converted cropland” exemption (which covers approximately 53 million acres)³ through “internal policy changes,” like the so-called Stockton Rules, that the courts have invalidated. *See New Hope Power Company v. Corps of Engineers*, 746 F.Supp. 2d. 1272 (SD Florida, 2010)(Holding change in policy constituted new legislative and substantive rules but are improper because they were not subject to notice and comment). Limiting exemptions and exclusions is standard practice for these agencies, making the exclusions contained in the proposed rule of little value.

Documentation

The proposed rule states that “In the normal course of making jurisdictional determinations, information derived from field observations is not always required in cases where a ‘desktop’ analysis furnishes sufficient information to make the requisite findings.” 79 Fed. Reg. 22195. This is an extraordinary admission because it invites, even encourages, “boilerplate” analysis and “cookie-cutter” decision making in violation of the Administrative Procedure Act and the case-by-case, site specific information called for in Justice Kennedy’s “significant nexus” test. This is the primary

³ U.S. Department of Agriculture, Natural Resources Conservation Service, RCA Issue Brief #8, “Wetlands Programs and Partnerships” (Jan. 1996).

failure of the Connectivity Report—it is a “desktop” analysis that identifies hydrological connections without demonstrating the significance of those connections. A “significant nexus” is presumed, not proved.

The statement should be deleted. On site field observations should be required in all cases. Additionally, because of the errors likely to follow from a “desktop” analysis, the Corps and EPA should support judicial review of formal Jurisdictional Determinations in court.

CONCLUSION

The arrogation of authority occasioned by this proposed rule extends federal authority over local land and water use to an extreme never seen in the history of this Nation. It is contrary to existing federal law and judicial precedent and should be amended or abandoned.

Sincerely,
M. Reed Hopper
Principal Attorney
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Tele: 916-419-7111
Fax: 916-419-7747
e-mail: mrh@pacificlegal.org