
ENVIRONMENTAL LAW & PROPERTY RIGHTS

REDEFINING “WATERS OF THE UNITED STATES”: IS EPA UNDERMINING

COOPERATIVE FEDERALISM?

By Karen Bennett* & John Henson**

Note from the Editor:

This article discusses the Environmental Protection Agency’s “Waters of the United States” Rule under the Clean Water Act. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. Generally the Federalist Society refrains from publishing pieces that advocate for or against particular policies. However, in some cases, such as with this article, we will do so because of some aspect of the specific issue. In the spirit of debate, whenever we do that we will offer links to other perspectives on the issue, including ones in opposition to the arguments put forth in the article. We also invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- U.S. Environmental Protection Agency, Clean Water Rule, Ditch the Myth: Let’s Get Serious About Protecting Clean Water: http://www2.epa.gov/sites/production/files/2014-07/documents/ditch_the_myth_wotus.pdf
 - Jon Devine, Natural Resources Defense Council, *Phony Objections to Clean Water Protection Rule: Myths and Facts about Agriculture and the Proposal*, SWITCHBOARD (May 6, 2014): http://switchboard.nrdc.org/blogs/jdevine/phony_objections_to_clean_wate.html
 - Jon Devine, Natural Resources Defense Council, *Everything You Wanted to Know About the EPA/Army Corps Proposed Clean Water Rules but Were Too Afraid to Ask*, SWITCHBOARD (Mar. 24, 2014): http://switchboard.nrdc.org/blogs/jdevine/everything_you_wanted_to_know.html
 - ENVIRONMENTAL PROTECTION AGENCY, CONNECTIVITY OF STREAMS & WETLANDS TO DOWNSTREAM WATERS: A REVIEW & SYNTHESIS OF THE SCIENTIFIC EVIDENCE (Jan. 2015): <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414#Download>
 - DAREN BAKST, HERITAGE FOUNDATION, WHAT YOU NEED TO KNOW ABOUT THE EPA/CORPS WATER RULE: IT’S A POWER GRAB AND AN ATTACK ON PROPERTY RIGHTS, Apr. 29, 2015: <http://www.heritage.org/research/reports/2015/04/what-you-need-to-know-about-the-epacorps-water-rule-its-a-power-grab-and-an-attack-on-property-rights>
-

On April 21, 2014, without formally consulting with the States, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) proposed to redefine the term “waters of the United States” for all Clean Water Act (CWA) programs.¹ The proposed rule generated a purported 1,081,817 public comments.² The comments of governors, attorneys general, and various state agencies and departments are nestled among over 1,055,000 mass mail comments, 11,800 generally non-substantive individual comments, 4,500 anonymous comments, and comments from a broad spectrum of businesses, industries, and environmental groups. As the State of Kansas declared, the States were “relegated to the status of interested party, indistinguishable from the myriad” of other commenters.³ EPA Administrator Gina McCarthy recently stated to Congress that “[T]here is no question, I don’t think, that the docket will reflect that we have done significant outreach to the states on this. We have reached out to them through our regions, through headquarters, and we will continue that discussion.”⁴ Despite Administrator McCarthy’s assurances, many state comments in the docket

describe almost no consultation with states prior to issuing the proposed definition, a rush to finalize the proposal, misleading and confusing outreach to the states after-the-fact and, as a result, a flawed rulemaking.

I. CONGRESS INTENDED A ROBUST CLEAN WATER ACT ROLE FOR THE STATES

The CWA and relevant Executive Orders describe a robust system of cooperative federalism. The CWA provides that it “is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.”⁵ The Act further provides that “Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.”⁶ Executive Order 13132 reinforces the need for state consultation for rulemakings that have federalism implications.⁷

II. THE AGENCIES DID NOT CONSULT PRIOR TO PROPOSING THE DEFINITION

Despite these requirements, consultation was “certainly lacking prior to the publication of the proposed rule.”⁸ The agencies did not believe that they needed to consult, certifying

*Karen Bennett is Environmental Counsel with Hunton & Williams, LLP, in Washington, D.C. **John Henson is an associate with Hunton & Williams, LLP, in Washington, D.C. (admitted only in Tennessee, work supervised by a member of the D.C. Bar).

that the rule “will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.”⁹ Not surprisingly, most states do not agree with EPA.¹⁰ Oklahoma submitted a comment, for example, stating that EPA and the Corps “downplay the rule’s substantial effects on the relationship between the national government and states.”¹¹ The Pennsylvania Department of Agriculture stated that “[e]ven a cursory analysis indicates that the revised definition will have a significant economic impact on a substantial number of small entities and on the States.”¹² The New Mexico Environment Department noted that “the Agencies have failed to fully evaluate state and local level implementation” which “has direct impact on required staffing levels, legislative funding requests, and general agency planning.”¹³

In other settings, EPA has offered even less convincing arguments for their failure to consult. Asked why EPA did not go to the states until after the fact, Administrator McCarthy responded that “These are issues that EPA and the States have been working on literally for decades . . .”¹⁴ This echoes what EPA officials have stated elsewhere. The Governor of Wyoming, for example, stated that “On September 12, 2014, Administrator McCarthy hosted a meeting in Washington, D.C. During that meeting, EPA staff acknowledged that little was done to solicit input from policy makers in state government on the proposed rule. The EPA indicated it viewed public comments related to previously proposed and withdrawn guidance documents as sufficient input to move forward.”¹⁵

III. THE LACK OF CONSULTATION DEMONSTRATED A RUSH TO FINALIZE THE RULE AND DISADVANTAGED THE STATES

In fact, many states implied that the agencies might have been in a hurry to propose and finalize the definition—leaving the states to suffer the consequences. Oklahoma stated that “there was no reason for EPA and the Corps to avoid formal and meaningful consultation with the states over the many years that have transpired since the agencies embarked upon this process.”¹⁶ The West Virginia Department of Environmental Protection agreed stating that “[t]his is quite extraordinary, given that it is undertaking to entirely redefine the scope of a decades old enactment.”¹⁷ The lack of prior consultation resulted in insufficient time for states to “assess how the reach of proposed jurisdiction may change under state law”¹⁸ and “an inadequate period” for states “to develop comprehensive comments.”¹⁹ In doing so, the agencies “missed an opportunity to build consensus with the primary implementing entities and prevent controversy.”²⁰ Failing to consult, EPA created “misunderstandings regarding the intent of the proposal [that] could have been avoided.”²¹ Instead, the rule resulted in “mass confusion among the very State partners that have worked with [the] Agencies for decades to accomplish all the water quality gains made thus far.”²² Worse still, in their rush the agencies finalized the proposed rule before finalizing the connectivity report, allowing “no ability for the public or other stakeholders to review and comment on” any changes.²³ As a result, the state of Michigan, likely among others, suffered a “loss of confidence in the process and the legitimacy of the end result.”²⁴

IV. THE OUTREACH AFTER THE PROPOSAL WAS MISLEADING, CONFUSING, AND INSUFFICIENT

Yet, Administrator McCarthy states that EPA has “reached out to [states] through our regions, through headquarters, and we will continue that discussion.”²⁵ Apart from the fact that consultation described as “after the fact”²⁶ cannot fulfill the agencies’ consultation requirement, the docket reflects a flawed outreach effort. First, “[i]ncluding the states with all other stakeholders and interested parties in the opportunity for public comment . . . is decidedly not the robust and meaningful[] state-federal ‘consult and cooperate’ partnership that Congress clearly had in mind.”²⁷ Second, meaningful state engagement and consultation cannot be boiled down to a “series of meetings, speeches, and webinars seeking to explain the proposed rule and answer questions.”²⁸ This is especially so given that at least some of these meetings were “not recorded, not for official comment, and only to provide information.”²⁹ Third, meaningful state engagement and consultation cannot be met by stonewalling. Apparently, “agencies’ staff frequently answer[ed] questions with ‘We don’t know’ and ‘We’ll have to figure that out.’”³⁰ Montana repeatedly reached out to the Corps for “a representative to discuss the agency’s view of any change in scope of jurisdiction under the rule” and was “met with one response, ‘we cannot discuss the USACE’s view of how the rule will be applied, please submit comments.’”³¹ On a related note, meaningful state consultation cannot occur when the Corps is either “silent”³² or completely absent from the rulemaking process.³³ Finally, meaningful consultation cannot occur in a context where the agencies make the kinds of contradictory and misleading statements that would lead the Governor of Wyoming to declare:

Different messages for different audiences. It is one thing to propose a rule that is excessive, onerous, and in derogation of states; it is another entirely to assure the public that they have misunderstood the proposal and then saddle those same people with the burden of a rule the content and intent of which was misrepresented by the agencies.³⁴

V. THE FAULTY CONSULTATION, AMONG OTHER DEFICIENCIES, LED TO WIDESPREAD STATE OPPOSITION AND SIGNIFICANT IMPLEMENTATION CONCERNS

“Unfortunately, the lack of state engagement is evident.”³⁵ This faulty process led to a flawed proposed rule that the majority of states directly oppose. Florida’s Attorney General describes the proposed definition as a “raw exercise of a general federal police power.”³⁶ Many states documented significant “concerns related to the legal rationale for the proposal and implications of that rationale on state programs.”³⁷ For example, the North Carolina Department of Environment and Natural Resources stated that the “rule has significant implications for federalism, affects the State’s traditional authority to regulate land and water use, impacts the federal-state framework under the Act, and is unlawful under the Act and the Constitution.”³⁸ Practically, states were concerned that the proposed definition, inter alia:

- “changes [the] balance to lessen the burden on the federal government marginally, while creating significant additional unnecessary requirements for both state agencies

and individual landowners”³⁹

- creates “the potential that the states will have to classify the uses of newly jurisdictional waters for application of State water quality standards”⁴⁰
- creates “the potential for a federal veto of State economic development projects” through federal permitting⁴¹
- “will undoubtedly lead to increased litigation and burdensome resource constraints on our agencies”⁴²
- “potentially impacts the stability of Michigan’s wetland program,”⁴³
- “could significantly impact the administration of [clean water] programs,”⁴⁴
- “increases uncertainty for many landowners, advances a severe disconnect between permitting and water conservation, and dramatically underestimates the costs”⁴⁵
- “is counter to our statewide vision and current strategic plan of locally derived management”⁴⁶

The West Virginia Department of Environmental Protection concluded, “As might be expected with a centrally-dictated product that previously had not seen the light of day...the proposed definition presents severe problems in implementation.”⁴⁷

VI. CONCLUSION

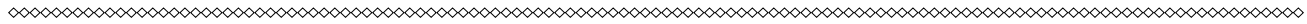
The agencies, the Office of Management and Budget (OMB), and Congress are at a crossroads. The docket clearly and forcefully describes agency actions that “undermined the cooperative federalism at the heart of the CWA and ignored the substantial direct effects on state governments . . .”⁴⁸ The agencies effectively “ignore[d] the role States play as co-regulators,”⁴⁹ “encroach[ed] on . . . sovereignty,”⁵⁰ and “undeniably excluded” the states’ “CWA co-regulating agencies.”⁵¹ Relegating states “to the status of interested party...dilute[d] their input on the repercussions and consequences of the proposed rule.”⁵² The proposed definition is under review by the OMB, and the agencies have indicated that the proposed definition will be finalized.⁵³ Both the OMB and Congress have one last opportunity to send EPA back to the drawing board before the proposed definition is finalized. Perhaps one or the other will hear and act on the cry of states like Oklahoma that:

[T]he States and the Agencies could have been allies in the effort to clarify WOTUS jurisdiction to the benefit of all who implement the CWA’s many facets. As it stands now, we’ve lost faith in the process and believe that the myriad flaws and points of confusion cannot be resolved satisfactorily through a series of public comment period extensions. The kind of input that our agencies and other State co-regulators seek, not to mention deserve as a matter of mutual respect and as required by law, can only be accomplished through halting the current effort, rolling up our sleeves, and developing regulatory language through a meaningful exchange of ideas and drafts.⁵⁴

Such an approach could “lead to a more successful outcome than the protracted litigation that would result from adoption of the current rule.”⁵⁵ After consultation, “the Agencies should propose a very different rule, which respects the States’ primary responsibility over the lands and waters within their borders and gives farmers, developers and homeowners clear guidance as to when the CWA’s requirements apply.”⁵⁶

Endnotes

- 1 79 Fed. Reg. 22,188 (Apr. 21, 2014).
- 2 EPA-HQ-OW-2011-0880. For the sake of brevity, all references to individual comments will include only the name of the commenter and the comment specific docket ID number.
- 3 State of Kansas at 2, Docket ID No. 16636.
- 4 Testimony of Gina McCarthy, Administrator of the U.S. Environmental Protection Agency, before the Joint Committee of Environment and Public Works and Committee on Transportation and Infrastructure (Feb. 4, 2014), Session I at 2:49, *video available at* <http://transportation.house.gov/calendar/eventsingle.aspx?eventid=398554>, (last visited Mar. 24, 2015).
- 5 33 U.S.C. § 1251(b).
- 6 33 U.S.C. § 1251(g).
- 7 *See, e.g.*, Executive Order 13132 at Sections 1(a), 2(i), 3(b), and 6.
- 8 Tennessee Department of Environment and Conservation; Agriculture at 2, Docket ID No. 17074.
- 9 79 Fed. Reg. at 22,220.
- 10 *See, e.g.*, Maine Department of Environmental Protection at 3, Docket ID No. 14624 (“This 3% expansion of jurisdiction encroaches upon Maine’s traditional and primary authority over land and water use.”); Missouri Attorney General at 2, Docket ID No. 15091 (“Congress intended to preserve the States’ historical primacy over the management and regulation of intrastate water and land management. . . . The Proposed Rule is inconsistent with Congressional intent and should be revised...”); Texas Attorney General at 6, Docket ID No. 5595 (declaring that the rulemaking, if not withdrawn, “will effectively read out and subrogate any notion of federalism in the Clean Water Act.”).
- 11 State of Oklahoma at 8,, Testimony of J.D. Strong, Docket ID No. 16560.
- 12 Pennsylvania Department of Agriculture at 5, Docket ID No. 14465.
- 13 New Mexico Environment Department at 11, Docket ID No. 16552.
- 14 Testimony of Gina McCarthy, Administrator of the U.S. Environmental Protection Agency, before the Joint Committee of Environment and Public Works and Committee on Transportation and Infrastructure (Feb. 4, 2014), Session I at 2:49, *video available at* <http://transportation.house.gov/calendar/eventsingle.aspx?eventid=398554>, (last visited Mar. 24, 2015).
- 15 Governor of Wyoming at 2, Docket ID No. 14584.
- 16 State of Oklahoma at 8, Docket ID No. 16560.
- 17 West Virginia Department of Environmental Protection at 15, Docket ID No. 15415.
- 18 *See* Virginia DEQ, Docket ID No. 18760.
- 19 New Mexico Environment Department at 11, Docket ID No. 16552.
- 20 Idaho Governor and Attorney General at 1, Docket ID No. 9834.
- 21 Indiana Department of Environmental Management at 3, Docket ID No. 16440; *see also, e.g.*, Wisconsin Department of Natural Resources at 1, Docket ID No. 15141 (“[A]dequate consultation could have addressed many of the concerns of our state and its elected leaders.”).
- 22 Oklahoma at 2, Docket ID No. 16560.
- 23 Michigan Attorney General at 6, Docket ID No. 16469.
- 24 *Id* at 6.
- 25 McCarthy Testimony, *supra* note 4, at 2:49.
- 26 Nevada Department of Conservation and Natural Resources et al. at 2,



Docket ID No. 16932.

- 27 State of Alaska at 9, Docket ID No. 19609.
- 28 Kentucky DEP at 2, Docket ID No. 16535; State of Alaska at 9, Docket ID No. 19609; State of North Dakota (Governor and departments) at 13, Docket ID No. 15365.
- 29 Wyoming Governor at 2, Docket ID No. 14584.
- 30 Indiana Department of Environmental Management at 2, Docket ID No. 16440.
- 31 Montana Governor at 3, Docket ID No. 16694.
- 32 South Dakota Governor at 3, Docket ID No. 18008.
- 33 Tennessee Department of Environment and Conservation; Agriculture at 1, Docket ID No. 17074; North Dakota Governor and Departments, Docket ID No. 15365.
- 34 Governor of Wyoming, Docket ID No. 7181.
- 35 New Mexico Environment Department at 11, Docket ID No. 16552.
- 36 Florida Attorney General at 3, Docket ID No. 15429.
- 37 *See, e.g.*, Alabama DEM et al. at 1, Docket ID No. 16435.
- 38 North Carolina Department of Environment and Natural Resources at 6, Docket ID No. 17072.
- 39 Kansas at 1, Docket ID No. 14794.
- 40 State of Alaska at 15, Docket ID No. 19609.
- 41 Alabama Department of Environmental Management, et al at 6, Docket ID No. 16435.
- 42 Oklahoma at 3, Docket ID No. 16560.
- 43 Michigan Attorney General at 6, Docket ID No. 5462.
- 44 Pennsylvania DEP at 5, Docket ID No. 14845.
- 45 Utah at 2, Docket ID No. 16534.
- 46 Nevada Conservation Commission at 2, Docket ID No. 14998.
- 47 West Virginia DEP at 15, Docket No. 15415.
- 48 Utah at 15, Docket ID No. 16534.
- 49 Comments of Environmental Agencies from Six States at 1, Docket ID No. 16435 (AI DEM).
- 50 Governor of Alabama at 1, Docket ID No. 14969.
- 51 Oklahoma at 8, Testimony of J.D. Strong, Docket ID No. 16560.
- 52 Kansas at 2, Docket ID No. 16636.
- 53 McCarthy Testimony, *supra* note 4, at 2:17.
- 54 State of Oklahoma at 2, Docket ID No. 16560.
- 55 Colorado Attorney General, Docket ID No. 15191.
- 56 Attorneys General of West Virginia, Nebraska, Oklahoma, Alaska, Arkansas, Georgia, Kansas, Louisiana, North Dakota, South Carolina, and South Dakota; Governors of Iowa, Nebraska, Kansas, North Carolina, South Carolina, and Mississippi at 12, Docket ID No. 7988.

