ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

Monday, August 11, 2014 Share Printer Friendly

Attorney General Abbott Opposes EPA Proposal to Regulate "Ditches"

Attorney General files formal objection to proposed federal regulations that will trample private property rights and dramatically expand EPA's authority

AUSTIN—Texas Attorney General Greg Abbott today released the following statement on proposed federal regulations that unlawfully claim the EPA's Clean Water Act authority extends to stock tanks, small ponds and even dry ditches:

"The EPA has no authority to regulate dry ditches and stock tanks on private property—but that is exactly what the Obama Administration is trying to achieve under new rules proposed by the EPA and the Corps of Engineers. First, the EPA has attempted to regulate 'emissions' from schools, churches and apartment buildings, and now they are claiming they can micromanage dry ditches on private property. So today we are beginning the first step in the process of challenging these proposed regulations, which are unlawful and exceed the EPA's authority to regulate navigable waters."

Texas Attorney General Abbott's letter to the Environmental Protection Agency

Under the Clean Water Act, the EPA only has authority to regulate "navigable waters." Under new regulations proposed by the EPA and the Army Corps of Engineers, the Obama Administration is proposing to dramatically expand the EPA's regulatory authority by claiming that "navigable waters" includes solitary ponds on private property and even what the EPA's own proposal refers to as "ditches." Today Attorney General Abbott submitted formal comments to the EPA and the Corps of Engineers opposing the proposed regulations and explaining that the EPA is attempting to regulate private property that clearly falls outside the agency's jurisdiction.

The following are excerpts from today's letter:

"[T]he proposed rule...would erode private property rights and have devastating effects on the landowners of Texas."

"Under this proposed definition, it is difficult to envision *any* lands—especially those that lie near the coast—that are not potentially within the ambit of federal jurisdiction. This broad and overreaching definition would impose virtually no limit on federal jurisdiction..."

"Perhaps more troubling...is the federal agencies' explicit inclusion of 'ditches' as 'waters of the United States.' Under this untenable and legally baseless definition, any landowner who has a ditch on his or her private property is at risk of having the federal government exert regulation over that ditch and impose burdensome and expensive federal regulations over dry land that does not remotely resemble any common-sense understanding of 'waters of the United States.' At a bare minimum, this will require farmers to pay fees for environmental assessments—just to determine whether their ditch is a 'water of the United States.' These landowners will then be required to obtain permits just to till the soil near gullies, ditches or dry streambeds where water only flows when it rains. It seems inconceivable that this is what Congress intended when it penned the term 'navigable waters.'"

"The federal agencies' expansive definition also runs counter to recent guidance provided by the United States

Supreme Court to the EPA when defining the limits of its authority. In *Utility Air Reg. Group v. EPA*, the Supreme Court cautioned that '[w] hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.'"

"The Clean Water Act was enacted pursuant to Congress's authority to regulate interstate commerce under Article I, section 8 of the Constitution. As a result, regulatory agencies violate the Constitution when their enforcement of the Act extends beyond the regulation of interstate commerce... In other words, there are likely waters—not to mention dry ditches—that the proposed rulemaking purports to subject to Clean Water Act jurisdiction, but that, under a proper commerce clause analysis, would not be subject to federal authority. Regulating these waters falls outside the scope of Congress's—and therefore federal agencies'—constitutional authority."

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August 11, 2014

Water Docket
Environmental Protection Agency,
Attention: Docket ID No. EPA-HQ-OW-2011-0880
1200 Pennsylvania Avenue, N.W.
Mail Code 2822T
Washington, DC 20460

Re: Docket No. EPA-HQ-OW-2011-0880

Dear Sirs and Madams:

The State of Texas urges that the proposed rulemaking "Definition of 'Waters of the United States' Under the Clean Water Act"[1] be withdrawn, as it unlawfully seeks to convey a potentially boundless amount of water and landscape jurisdiction to the federal government. The proposed rule is contrary to Congress's objective in passing the Clean Water Act, inconsistent with U.S. Supreme Court precedent, and devoid of the cooperative federalism that is a hallmark of our federal pollution control laws. Further, the proposed rule is without adequate scientific and economic justification and, if finalized, would erode private property rights and have devastating effects on the landowners of Texas.

The Clean Water Act authorizes the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers ("federal agencies") to exercise jurisdiction over "navigable waters" of the United States. *See, e.g.*, 33 U.S.C. §§ 1251(a), 1342(a), 1344(a). Congress defined navigable waters as "waters of the United States." 33 U.S.C. § 1362(7). Subsequent attempts by federal agencies to define and redefine the phrase have resulted in a myriad of rulemakings since the Act's passage in 1972.

The latest attempt, an 86-page proposed rule, supplemented by a 331-page "Draft Scientific Assessment" and a 66-page "Cost-Benefit Analysis," seeks to expand the scope of the federal agencies' regulatory authority by invoking the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006). The legal issue confronting the Court in *Rapanos* was the meaning of "waters of the United States." In a decision that produced a total of five opinions, the majority held that wetlands adjoining a non-navigable stream did not meet the Clean Water Act's standard for "waters of the United States". A 4-vote plurality held that "navigable waters," as regulated under the Clean Water Act, are limited to only those relatively permanent, standing or continuously flowing bodies of water forming geographic features, such as streams, oceans,

[1] 79 Fed. Reg. 22188 (proposed April 21, 2014) (to be codified at 33 C.F.R. pt. 86 and 40 C.F.R. pts. 110, 112, 116, et al.).

rivers and lakes. *Id.* at 739, 742. Justice Kennedy concurred in the judgment, but in doing so suggested a broader "significant nexus" test, granting federal jurisdiction when there is a case-specific showing of a significant nexus to traditional navigable waters, interstate waters, or territorial seas. *See Id.* at 759-87 (Kennedy, J., concurring in the judgment).

In the proposed rulemaking, the federal agencies rely in large part on the single Justice's concurring opinion in *Rapanos*. In promoting the "significant nexus" test, the proposed rulemaking defines "waters of the United States" as including seven broad categories of waters:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters, including interstate wetlands;
3. The territorial seas;
4. All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
5. All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
6. All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
7. On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.

Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22188, 22198 (proposed April 21, 2014) (to be codified at 33 C.F.R. pt. 86 and 40 C.F.R. pts. 110, 112, 116, et al.).

Under the federal agencies' proposed rubric, the first six categories would effectively establish a set of "waters of the United States" by rule, while the final category would grant the agencies authority to determine all "other waters" by using the highly subjective "significant nexus" analysis on a case-by-case basis. As we noted in our letter to the EPA regarding its 2011 Draft Guidance on Identifying Waters Protected by the Clean Water Act, the result of this ad-hoc analysis will be that landowners will often not know (or even know to consider) whether bodies of water on their private properties—potentially even dry fields and creek beds—are subject to Clean Water Act jurisdiction until a federal field agent arrives to conduct this highly subjective "significant nexus" analysis. The proposed rulemaking makes no mention of—and it appears the federal agencies have not even considered—the rule's potential effect on the market value of land that is clouded by the uncertainty created by the agencies' new approach. Nor do the federal agencies appear to have considered the chilling effect the proposed rulemaking could have on the economic development of private property that, depending on an individual field agent's future determination, may be deemed subject to federal regulation.

Along with a broad new set of categories to define their own jurisdiction, the federal agencies propose a slew of brand new definitions for terms that have *never been defined in statute or*

precedent. These terms include "neighboring," "riparian area," "floodplain," "tributary," and the aforementioned term "significant nexus". Water Rule, 79 Fed. Reg. at 22193.

The Rulemaking Grants the Federal Government Potentially Limitless Jurisdiction under the Act

Under the proposed rulemaking, "adjacent" waters are—by rule—subject to federal Clean Water Act jurisdiction. The federal agencies retain the regulatory definition of "adjacent" as meaning "bordering, contiguous or neighboring." *Id.* at 22199. However, the agencies propose for the first time a regulatory definition of "neighboring" as meaning "waters located within a riparian area or floodplain of [a jurisdictional water]...or waters with shallow subsurface hydrologic connection or confined surface hydrologic connection to such jurisdictional water." *Id.* at 22199.

Under this proposed definition, it is difficult to envision *any* lands—especially those that lie near the coast—that are not potentially within the ambit of federal jurisdiction. This broad and overreaching definition would impose virtually no limit on federal jurisdiction, despite the fact that the *Rapanos* plurality disapproved of the federal agencies' reliance on this sweeping definition as "extended beyond reason to include, *inter alia,* the 100–year floodplain of covered waters." *Rapanos*, 547 U.S. at 746. As a result, States and landowners will be subject to the threat of assertions of federal jurisdiction over their property simply because a lone federal bureaucrat deems them to be.

The Rulemaking Defines New Terms in the Act that Expand Federal Jurisdiction and Deprive Landowners of Clarity, Predictability, and Fairness

The federal agencies' new proposed rule proposes, for the first time, a sweeping definition of the term "tributary," defining it as:

> [A] water physically characterized by the presence of a bed and banks and ***ordinary high water mark***, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3). A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more manmade breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ***ditches*** not excluded in paragraph (b)(3) or (4).

Id. at 22201-22202 (emphasis added).

This definition is problematic for landowners for a number of reasons. From a practical standpoint, determining the "ordinary high water mark" of a bed and bank is a notoriously difficult task—one that both the *Rapanos* plurality and Justice Kennedy admonished. The *Rapanos* plurality stated that the ordinary high water mark standard "extended the waters of the United States to virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only the presence of litter and debris". *Rapanos*, 547 U.S. at 725 (internal quotations omitted). Justice Kennedy disparaged the ordinary high water mark as providing "no such assurance" of a reliable standard for determining a significant nexus. *Id.* at 780-81 (Kennedy, J., concurring in the judgment).

The irony here is that while on one hand embracing Justice Kennedy's vague "significant nexus" test for expanding its own jurisdiction over land and waters, the federal agencies conveniently omit that Justice Kennedy eschewed the "ordinary high water mark" as an appropriate standard for determining that tributaries are "waters of the United States," noting that "the breadth of this standard...leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment).

Perhaps more troubling than this reliance on the "ordinary high water mark" standard is the federal agencies' explicit inclusion of "ditches" as "waters of the United States." Under this untenable and legally baseless definition, any landowner who has a ditch on his or her private property is at risk of having the federal government exert regulation over that ditch and impose burdensome and expensive federal regulations over dry land that does not remotely resemble any common-sense understanding of "waters of the United States". At a bare minimum, this will require farmers to pay fees for environmental assessments—just to determine whether their ditch is a "water of the United States." These landowners will then be required to obtain permits just to till the soil near gullies, ditches or dry streambeds where water only flows when it rains. It seems inconceivable that this is what Congress intended when it penned the term "navigable waters."

The federal agencies argue that this explicit inclusion of "ditches" will result in no additional waters or lands being subject to federal jurisdiction, as "ditches" are still explicitly exempted under Clean Water Act Section 404(f). *See e.g.* 33 U.S.C. § 1344(f)(1)(C). However, the federal agencies fail to take into account that ditches are not similarly and explicitly exempted under the Clean Water Act Section 402 program, which, like the 404 program, will be subject to this new definition of "waters of the United States".

The Rulemaking Adopts a Subjective Test That Will Arrogate to the Federal Government Unheralded Power Over Privately Owned Land

The State of Texas remains perplexed by the federal agencies' continued reliance on Justice Kennedy's "significant nexus" test in asserting Clean Water Act jurisdiction. From a practical standpoint, the test is vague and provides no guidance or certainty to landowners. The federal agencies assert that the goal in passing this proposed rulemaking is to provide predictability, clarity, and consistency; yet, nothing could be further from the truth. The Rule establishes a test for jurisdiction that has no observable qualities and was developed by a single justice in the *concurrence* of one case.

From a legal standpoint, the federal agencies have chosen the wrong test. While it is in the agencies' purview to invoke *Rapanos*, their guide should have been the plurality's narrower hydrographic test, not Justice Kennedy's "significant nexus" test. *See Marks v. U.S.*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)("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 comparing the two theories, it is clear that there are certain waters that would pass Justice Kennedy's significant nexus test—and therefore be included as "waters of the United States"—but would fail the plurality's hydrographic test. For example, an isolated pond in a 100-year flood plain—which would be a water of the United States under the proposed rule—would likely pass Kennedy's test but fail the plurality's narrower construction.

The federal agencies' expansive definition also runs counter to recent guidance provided by the United States Supreme Court to the EPA when defining the limits of its authority. In *Utility Air Reg. Group v. EPA*, the Supreme Court cautioned that "[w] hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *Util. Air Reg. Group v. Environmental Protection Agency*, No. 12-1146, slip op. (U.S. June 23, 2014).

Thus, if anything, the plurality's hydrographic test should have been adopted by the federal agencies, both because it garnered the most support from the Supreme Court and because it represents a narrower interpretation of the federal government's powers.

The Rulemaking Subrogates the Primary Responsibilities and Rights of States under the Act

One of the paramount objectives of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). However, that objective does not grant the federal government carte blanche to achieve those goals by any means necessary. This "ends justifies the means" mentality has never once been accepted as a doctrine of law in the United States. Instead, the federal government must consider an equally-important objective of the Clean Water Act:

> [T]o 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.

33 U.S.C. § 1251(b) (emphasis added).

The *Rapanos* plurality observed that "the Government's expansive interpretation would 'result in a significant impingement of the States' traditional and primary power over land and water use.'" *Rapanos*, 547 U.S. at 738 (quoting *SWANCC)*. The Court stated, further, that only a "clear and manifest" statement from Congress could authorize an unprecedented intrusion into traditional

state authority and that "'waters of the United States' hardly qualifies." *Id* (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)).

The Clean Water Act also states that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter" and that "[f]ederal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution." 33 U.S.C. § 1251(g). In granting the "primary responsibilities and rights" of the Clean Water Act to the States, and in designating allocation authority to the States, Congress made it clear that the goal of pollution prevention must be accomplished though the state. If not withdrawn, this rulemaking will significantly impinge on the States' traditional and primary power over land and water use. Furthermore, it will effectively read out and subrogate any notion of federalism in the Clean Water Act, contradicting the Act's objective in 33 U.S.C. § 1251(b) and bringing to fruition the Supreme Court's concerns in *Rapanos*. *See id.* at 738.

The Rulemaking Exceeds the Federal Agencies' Authority under the Constitution

Despite the *Rapanos* plurality's clear warning that expansive interpretations of Clean Water Act jurisdiction "stretch[] the outer limits of Congress's commerce power," this proposed rulemaking assumes—incorrectly—that its broad view of the Clean Water Act raises no constitutional concerns. *Id.* at 724. As we stated in our letter to the EPA regarding its 2011 Draft Guidance, under the system of dual sovereignty established by the Constitution, the federal government lacks a general police power and may only exercise the powers expressly granted to it by the Constitution. *See United States v. Lopez*, 514 U.S. 549, 566 (1995); U.S. CONST., amend. X.

The Clean Water Act was enacted pursuant to Congress's authority to regulate interstate commerce under Article I, section 8 of the Constitution. As a result, regulatory agencies violate the Constitution when their enforcement of the Act extends beyond the regulation of interstate commerce. Yet, it is by no means clear that all waters with a significant nexus to navigable waters also have a substantial effect on interstate commerce. *See United States v Darby*, 312 U.S. 100, 119-20 (1941) (holding that Congress may regulate intrastate activity only where the activity has a 'substantial effect" on interstate commerce). In other words, there are likely waters—not to mention dry ditches—that the proposed rulemaking purports to subject to Clean Water Act jurisdiction, but that, under a proper commerce clause analysis, would not be subject to federal authority. Regulating these waters falls outside the scope of Congress's—and therefore federal agencies'—constitutional authority. The proposed rulemaking, however, completely fails to take into account the Constitution's limits on federal regulatory authority. A primary inquiry into the constitutional basis for the exercise of federal jurisdiction should be resolved before the secondary question of statutory authority under the Clean Water Act is reached.

The federal government asks for our trust that this proposed rule will provide predictability, clarity, and consistency in the way it asserts its jurisdiction. The federal government asserts, further, that this proposed rulemaking will in no way broaden its jurisdiction or change its Clean Water Act practices. Nothing could be further from the truth. The rulemaking relies chiefly on the last two U.S. Supreme Court cases—*Rapanos* and *SWANCC*—that confronted the meaning of "waters of the United States." Lost in the agencies' analysis, however, is that in both cases,

the Supreme Court attempted to reign in the federal government's perceived jurisdiction under the Act. Regardless of whether this rulemaking—as the agencies claim—asserts no additional jurisdiction, or whether it—as we claim—asserts additional jurisdiction—the Supreme Court has *twice* told the agencies that they must exercise *less* jurisdiction.

In sum, this rulemaking is beyond the scope of the Clean Water Act and the Constitution. The significant nexus test, upon which the proposed rulemaking so heavily relies, is not an appropriate test for jurisdiction. Most importantly, the proposed rulemaking threatens to infringe on private property rights without a clear mandate from Congress and in violation of the U.S. Constitution. Therefore, the State of Texas respectfully objects to the proposed rulemaking "Definition of 'Waters of the United States' Under the Clean Water Act" and urges the federal agencies to withdraw the proposed rule as practically, economically, scientifically, and legally deficient. If the proposed rule is not withdrawn and is made final, then the State of Texas will have no choice but to challenge the rule in federal court—where it will surely be struck down as violating federal law, exceeding the agency's statutory authority, and contravening the U.S. Constitution.

Sincerely,

Greg Abbott
Attorney General of Texas

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