

PUBLIC POLICY BRIEF

## Overreaching EPA Water Rule: Utah Property Rights In Peril



### Summary

The EPA has recently adopted a final rule to redefine the term “waters of the United States” in the Clean Water Act in a way that would expand the agency’s regulatory authority to many intrastate waters.

This rule threatens the property rights of Utahns across the state as it would allow federal agencies to impose permit requirements on the most routine industrial or agricultural activities when it concerns even the most insignificant bodies of water.

This rule exceeds the intended limits set by Congress, violates 10th Amendment principles, and is an assault on property rights and Utah’s economy.

Utah should actively oppose this federal bureaucratic overreach by refusing to comply with the EPA’s new rule and also by prohibiting state agencies from cooperating.

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Regulation of non-navigable *intrastate* waters are within the exclusive regulatory jurisdiction of the state of Utah—despite the EPA’s attempt to claim otherwise through a newly approved rule.

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**T**he Environmental Protection Agency (EPA) has adopted<sup>1</sup> a new 297-page rule to redefine “waters of the United States” in order to

clarify which non-navigable *intrastate* waters the EPA has jurisdiction over under their authority from the Clean Water Act. This authority could

extend EPA oversight to small streams and possibly even farmland ditches.

This new regulatory jurisdiction would be in addition to existing EPA authority over traditionally navigable *interstate* waterways. The EPA’s rule could have detrimental impacts for private property owners in Utah, both in agriculture and other industries, whose activities have traditionally fallen under the state’s jurisdiction of *intrastate* waters. The new rule could trigger federal jurisdiction and permitting rules for thousands of new individuals and businesses whose activities would fall under the enforcement of the US Army Corps of Engineers

(USACE)—requiring them to seek this body’s permission prior to using their own land.

Regulation of non-navigable *intrastate* waters are within the exclusive jurisdiction of the state of Utah under both longstanding federal law and fundamental 10th Amendment principles of federalism. The potentially expansive scope of EPA regulation under application of this rule is an extra-constitutional exercise of federal EPA authority.

## Federal Regulation of Water

The Clean Water Act of 1972 (CWA) was designed to regulate pollution in waters

over which the federal government asserted jurisdiction. The Act gives the EPA and USACE the authority to fine polluters and to issue permits for discharges into waters. The Act refers to “navigable waters” and the “waters of the United States.”

Disagreement over the meaning and application of these terms has led to controversy and litigation. A number of landmark cases have created precedent for the interpretation of these terms—interpretations which the EPA disputes and believes still leaves the meaning ambiguous.

Over time, interpretive regulations of the CWA by the EPA have sought to expand jurisdiction to water features beyond traditional navigable waterways. This includes water features like intermittent streams, playa lakes, prairie potholes, sloughs, and wetlands as “waters of the United States.” This progressed until the U.S. Supreme Court ruled in the 2006 decision of *Rapanos v. US* that jurisdictional waters of the US are 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.”<sup>2</sup>

The split decision also created the “significant nexus” test based on Justice Kennedy’s individual concurrence, which holds that a body of water falls within federal jurisdiction if it bears a “significant nexus” to a traditional navigable waterway where the waterbody, by itself or in combination (applying the aggregation principle) with other similar sites, “significantly affects the physical, biological, and chemical integrity of the downstream navigable waterway.” The U.S. Court of Appeals for the 10th Circuit, which encompasses Utah, is one of the federal circuits that adheres to this significant nexus test.

Given the controversy and ambiguity over the definition of the waters of the United States, the EPA has now sought to clarify its jurisdiction with a new, expansive rule. This continues what the majority ruling in the *Rapanos* case was so concerned about—the “immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute.”

The EPA’s rule creates “per se” (or automatic) jurisdiction over intermittent and ephemeral streams and waters adjacent to waters of the United States. Such waters could include any body of water within the same flood plain or riparian area as navigable waters—an approach that would expand federal regulation well beyond traditionally navigable waters. The rule also includes a catch-all provision for waters that are to be decided on a case-by-case basis. This catch-all could easily include geographically isolated wetlands.

The rule has been opposed by nearly all major industrial and agricultural interests in Utah and public comments opposed to the rule were submitted by a number of major Utah stakeholders including Governor Herbert, the Utah Association of Counties, the Utah Mining Association, and the Utah Farm Bureau.

## **EPA’s Attack on Federalism**

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This new rule violates principles of federalism, exceeds Congress’ power under the Commerce Clause of the U.S. Constitution, and

exceeds the regulatory authority delegated by Congress to the EPA.

Historically, Congress has deferred to the states for exclusive jurisdiction over non-navigable waters and has recognized state authority over the appropriation of water use rights for unappropriated waters even when those waters flow over federally managed public lands. This was the legal conclusion in a formal memorandum opinion by the U.S. Department of Justice in 1982 in the wake of the Supreme Court’s decision in *United States v. New Mexico*.<sup>3</sup>

The memo lays out an extensive case for federal deference to state water law and envisions only formal condemnatory takings or explicit congressional action as the way for the federal government to assert water rights over state waters.

Taken together with the Mining Act of 1866 and Desert Land Act of 1877, it is clear that the federal government divested itself of authority over non-navigable waters in the West, leaving that authority with the states. The rule’s attempt to bring these waters under direct federal jurisdiction violates the

10th Amendment's reservation of such authority to the states.

Under previous U.S. Supreme Court decisions interpreting Congress' intent under the CWA, the Court declined to expand federal authority as expansively as was sought by agency rule. In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*, the Court "read the statute [CWA] as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation."<sup>4</sup>



In the SWANCC case, the federal government sought to defend the agency's "Migratory Bird Rule," which asserted CWA jurisdiction over *intrastate* waters as within Congress' power to regulate intrastate activities that

"substantially affect" interstate commerce. The Court disagreed and noted that if Congress intended such a broad reach it would have made it explicit through some "clear statement."

Additionally, the Clean Water Act itself states 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, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources."<sup>5</sup>

This new rule ignores much of this intent and seeks to bring *intrastate* waters under direct federal regulatory jurisdiction.

## **EPA's Attack on Property Rights**

The EPA's new rule not only violates the 10th Amendment and exceeds congressional authority—it also has the potential to create significant consequences for private property owners.

The Court in the *Rapanos* decision noted that the federal agencies exercise their

authority to grant permits with "the discretion of an enlightened despot, relying on such factors as 'economics,' 'aesthetics,' 'recreation,' and 'in general, the needs and welfare of the people.'"<sup>6</sup>

Such discretion gives to bureaucrats and central planners the authority to dictate to private property owners how they can use their own property. The EPA's enforcement record is replete with examples of actions against small farms for common farming activities.

From Lois Alt's poultry farm that was fined for run-off into a nearby grassy, but wet, pasture in West Virginia<sup>7</sup> to David Hamilton's irrigation channel that redirected some water from a nearby creek in Wyoming<sup>8</sup>, the strong arm of federal regulation under EPA authority threatens private property rights in ways unforeseen by the founders of our country.

Private property rights are essential to liberty and their protection form the very purpose for which government was first created. The Fifth Amendment to the U.S. Constitution was ratified in order to ensure that private

property is not “taken for public use, without just compensation.”

This rule, when implemented and enforced, will undermine fundamental constitutional protections and in many cases will constitute regulatory takings for those property owners who fall under the brunt of EPA enforcement.

## Utahns’ Concerns

Before finalizing the proposed rule, EPA took public comment as required under federal statute. Many of the submitted comments complained that the proposed rule was too broad and had such far reaching effects that significantly more time was required before stakeholders could meaningfully weigh in.

Despite this concern, dozens of comments were submitted by Utahns, ranging from individual citizens calling the rule unconstitutional to Governor Herbert calling for the withdrawal of the rule.<sup>9</sup>

The Governor’s office also stated that the “expansive and uncertain application” of the proposed rule “would require significant state and local government time and money

to implement without any evidence that it will improve the state’s system for protecting its water resources.” The fiscal burden on taxpayers for state compliance is only the beginning of a diverse set of obvious and hidden impacts from the expansion of EPA regulation.



Thirteen counties and the Utah Association of Counties also submitted comments opposing the rule. Rural counties expressed concern with how the rule would impact unique circumstances in Utah geography.

Washington County noted that the way in which the rule would expand regulatory jurisdiction over dry washes amounts to a “gross overreach of the agency’s authority.”<sup>10</sup> As existing law does not recognize a significant nexus between dry washes that run intermittently and traditional

jurisdictional waterways, the proposed rule would vastly expand existing EPA authority beyond the limits set by current court interpretation.

Duchesne County laid out a number of problems with the rule in an extensive memo calling the rule an attempt

toward “the federal takeover of land and water use activities across the nation” that would impose “tremendous burdens on the taxpaying public.”<sup>11</sup>

Another comment cited U.S. Supreme Court precedent in *Agins v. City of Tiburon*, reasoning that the new rule would amount to a regulatory taking because it would “prevent a property owner from making ‘economically viable use of his land.’”

The Duchesne County memo concludes by agreeing with the letter from 24 US Senators (including both of Utah's



watersheds as *intrastate* and declare them as under the exclusive jurisdiction of the state.

- State AG protection for non-compliant citizens involved in federal enforcement (WV).
- Require specific approval by the governor and notification of state lawmakers for any use of state resources in the enforcement of this EPA rule (AZ).

These approaches are not new to Utah. In 2010, the legislature passed four measures aimed at resisting federal regulatory overreach:

**Senate Bill 11**, the State-Made Firearms Protection Act, asserted state sovereignty over the exclusive regulation of firearms manufactured and sold within the state and opposed efforts by the federal government to regulate the same.<sup>14</sup>

**House Bill 234**, the Opting Out of the REAL ID Act, prohibited state agencies from implementing the federal REAL ID Act of 2005 which would have forced states to change requirements related to the

issuance of state drivers licenses.<sup>15</sup>

**House Bill 67**, Health System Amendments, set up a framework for the state to opt-out of provisions of Obamacare.<sup>16</sup> The bill prohibited state agencies from implementing provisions of Obamacare without first making specific reports to the legislature about its cost to and impact on Utahns.

**SCR 3**, the State Sovereignty Resolution, reasserted state sovereignty under the 10th Amendment and expressed opposition to overreaching federal regulations.<sup>17</sup> It called on Congress to repeal those federal laws that seek to compel state compliance under the threat of civil or criminal penalty.

These measures were all designed to push back against the extra-constitutional encroachment of federal regulation. The EPA's new rule presents an important opportunity for the state to once again assert—in material fashion—its constitutionally reserved powers.

Utah lawmakers should urgently consider ways to resist EPA overreach and interpose the state's power between this

federal agency and the Utahns whose private property rights are threatened.

Recent efforts in other states are listed on the following page as examples for reference.

## **EPA Nullification Efforts In Other States**

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### **IN—HB 1290 (2015):** Broad EPA Nullification

Nullifies all regulations imposed in Indiana by the EPA. Provides that the department of environmental management shall provide environmental protection for the citizens of Indiana.

### **WV—HB 2593 (2015):** Nullification of EPA waters of the US rule

Declares that the EPA & USACE lack authority to enforce the rule. Expressly asserts state authority and jurisdiction over intrastate waters and places the duty on the state to adopt necessary measures to prevent the rule's effect on property rights of the citizens of WV. Also directs the AG to represent any citizen charged with violation of the rule.

### **AZ—SCR 1015 (2015):** Nullification of EPA waters of the US rule

State constitutional amendment to assert state authority over non-navigable intrastate waters and to prohibit state officers or state resources to be used in enforcing federal actions over non-navigable intrastate waters related to the proposed rule. Passed Senate subcommittee.

### **AZ—HB 2055 (2015):** Resistance to the EPA waters of the US rule

Requires Governor approval and notification of Speaker and Senate President prior to the use of any state resources for the cooperation with EPA or USACE in the enforcement of the new waters of the US rule. —Passed house, held in the senate.

### **AZ—SR 1003 (2014):** Broad EPA Nullification

Senate resolution supporting nullification of all rules imposed by the EPA.—Passed

### **OK—SB 1167 (2014):** Broad EPA Nullification

Declares EPA rule-making authority in OK null. Directs legislature to adopt any measures necessary to prevent enforcement of EPA rules not specifically authorized by Congress.

### **ID—HB 473 (2014):** Broad EPA Nullification

Declares EPA authority in Idaho null and void and directs the state to take any and all measures necessary to prevent enforcement of EPA regulations.

### **VA—HB 1357 (2010 & 2011):** Nullification of EPA greenhouse gas rule (under Clean Air Act)

Prohibits the Air Pollution Control Board and the Department of Environmental Quality from taking any action to restrict the emission of carbon dioxide. Any federal law or regulation that purports to prohibit, limit, or control in any way the emission of carbon dioxide shall be without authority, void, and of no force within the boundaries of the Commonwealth.

## Source Endnotes

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- <sup>1</sup> EPA Clean Water Rule: Definition of “Waters of the United States,” May 26, 2015, [http://www2.epa.gov/sites/production/files/2015-05/documents/rule\\_preamble\\_web\\_version.pdf](http://www2.epa.gov/sites/production/files/2015-05/documents/rule_preamble_web_version.pdf) see also 40 CFR 230.3: [http://www2.epa.gov/sites/production/files/2015-05/documents/clean\\_water\\_rule\\_part\\_230\\_3\\_1.pdf](http://www2.epa.gov/sites/production/files/2015-05/documents/clean_water_rule_part_230_3_1.pdf)
- <sup>2</sup> *Rapanos v. United States*, 547 U.S. 715 (2006).
- <sup>3</sup> Theodore B. Olson, Assistant United States Attorney General, “Federal ‘Non-Reserved’ Water Rights,” June 16, 1982, <http://www.justice.gov/sites/default/files/olc/opinions/1982/06/31/op-olc-v006-p0328.pdf> see also Utah Department of Natural Resources, “Study of Issues Related to State Jurisdiction Over Water Rights,” November 2013, [http://www.waterrights.utah.gov/wrinfo/Brochures/state\\_jurisdiction\\_over\\_water\\_rights.pdf](http://www.waterrights.utah.gov/wrinfo/Brochures/state_jurisdiction_over_water_rights.pdf) [discussing the history of water rights and the progression of federal and state authority].
- <sup>4</sup> *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC).
- <sup>5</sup> 33 USC § 1251(b)
- <sup>6</sup> *Rapanos v. United States*, 547 U.S. 715 (2006).
- <sup>7</sup> *Alt v. EPA*, 979 F. Supp. 2d 701, 704 (N.D. W. Va. 2013)
- <sup>8</sup> *United States v. Hamilton*, 952 F. Supp. 2d 1271, 1272 (D. Wyo. 2013)
- <sup>9</sup> Gary. R. Herbert, Public Comment, November 14, 2014, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-16534>
- <sup>10</sup> James J. Eardley, Chair, Washington County Commission, Public Comment, November 14, 2014, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-15448>
- <sup>11</sup> Duchesne County Commissioners, Public Comment, November 12, 2014, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-14409>
- <sup>12</sup> Don A. Christiansen, Central Utah Water Conservancy District, Public Comment <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-17024>
- <sup>13</sup> Wayne Niederhauser, Senate President, Public Comment, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-12338>
- <sup>14</sup> SB 11: State-Made Firearms Protection Act (2010), <http://le.utah.gov/~2010/bills/static/SB0011.html>
- <sup>15</sup> HB 234: Opting Out of The REAL ID Act (2010), <http://le.utah.gov/~2010/bills/static/HB0234.html>
- <sup>16</sup> HB 67: Health System Amendments (2010), <http://le.utah.gov/~2010/bills/static/HB0067.html>
- <sup>17</sup> SCR 3: State Sovereignty Concurrent Resolution (2010), <http://le.utah.gov/~2010/bills/static/SCR003.html>