National Cattlemen's Beef Association

PUBLIC LANDS COUNCIL EST. 1968

September 26, 2017

Filed electronically at www.regulations.gov
Docket No. EPA-HQ-OW-2017-0203

Comments on the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers' Proposed Repeal of 2015 "waters of the United States" Rule and Recodification of Preexisting Rules 82 Fed. Reg. Vol.82, No. 143/Thursday July 27, 2017

The National Cattlemen's Beef Association (NCBA) and Public Lands Council (PLC) appreciate the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) (together, "the Agencies") proposal to rescind the 2015 definition of "waters of the United States" (2015 Rule) and to re-codify the pre-2015 definition that currently governs jurisdiction of the Clean Water Act. NCBA and PLC write to provide comment in support of this proposal.

NCBA is the largest and oldest national trade association of U.S. cattle producers, representing more than 25,000 direct members and more than 175,000 cattle producers and feeders through its state affiliates. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions.

PLC represents ranchers who use public lands and preserve the natural resources and unique heritage of the West. Its members consist of state and national cattle, sheep, and grasslands associations. PLC works to maintain a stable business environment for public lands ranchers in the West where roughly half the land is federally owned and many operations have, for generations, depended on public lands for forage. PLC is the only national organization dedicated solely to representing the roughly 22,000 ranchers who hold federal grazing permits and operate on federal lands.

1. **NCBA and PLC support rescinding the 2015 rule because it fails to provide clarity, severely reduces state regulatory power, and is inconsistent with Supreme Court precedent.**

The 2015 Rule fails to provide needed clarity.

In *Rapanos v. United States*, Justice Breyer charged the Agencies "to write new regulations, and speedily so" on the basis that "[i]n the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law," which is "not the system Congress intended." *Rapanos v. United States*, 547 U.S. 715 at 812. The 2015 Rule does not accomplish the task presented by the Supreme Court, but instead further complicates the authority of the Clean Water Act. Regulated parties, including America's farmers and ranchers, are left subject to the discretion of agency employees who make case-by-case determinations based on vague language – determinations that will have detrimental impacts on the future of their livelihood.

In the 2012 *Sackett v. EPA* decision, Justice Alito's concurring opinion in the unanimous Court decision perhaps best summarizes the accumulated ambiguity of the Clean Water Act:

> The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy.

Sackett v. EPA, 566 U.S. 120 at 132. The 2015 Rule provides no clarity or certainty. Instead, through vague and overly broad language such as "tributary," "adjacent," and "significant nexus," the Rule makes it practically impossible for cattle producers to know whether water features on their operations are federally jurisdictional. Perhaps the most obvious example of vague language in the 2015 Rule is in the application of its case-by-case Significant Nexus test. 80 Fed. Reg. at 37,059. At every stage, the test turns on bureaucratic discretion based on subjective observations.

Consider a cattle rancher with a small pond on her property used for watering cattle. To determine whether she needs a federal permit to conduct routine maintenance on the pond (considered a regulated dredge by the Agencies), the cattle rancher must set out looking for traditional navigable waters, interstate waters, and tributaries anywhere within 4,000 feet—*nearly a mile*—of the pond. Setting aside the vagueness of what counts as a "tributary" in the first place, imagine the rancher finds a tributary within the 4,000-foot limit. She must then sort out whether regulators will conclude that the pond, together with "other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of the tributary. 33 C.F.R. 328.3(c)(5). Putting herself into the shoes of the regulator then forces our rancher to consider a litany of criteria listed by the EPA in the 2015 Rule, including the potential for the pond to act as a habitat for species that live in downstream waters, a criterion that is conspicuously akin to the Agencies' Migratory Bird Rule. A rule which, lest we forget, was struck down by the Supreme Court in 2001. This is a monumental task.

The parties subject to jurisdictional determinations under the Clean Water Act, including America's cattle producers, need comprehensive, unambiguous information in order to effectively comply with statutory requirements. The definition of "waters of the United States" in the 2015 Rule does not provide producers with the information they need to determine if a Clean Water Act permit is necessary, adding unwarranted costs to each producer's bottom line, and taking away time and resources that are simply not available.

The 2015 Rule severely reduces state regulatory power.

The Clean Water Act implicitly gives the states regulatory power over those waterbodies that are not "waters of the United States." *See* 82 Fed. Reg. at 34, 902. By claiming more waters than ever before as federal waters, the overly broad 2015 Rule strips states of their ability to govern the waterbodies that impact their residents, economies, watersheds, and aquatic ecosystems.

Federal overreach severely reduces state regulatory power, and directly impacts the cattle industry. States and regions across the country have varying water characteristics, requiring unique regulation and careful administration. For example, ranchers in Florida operate in a state made up almost entirely of land subject

to regulation under the 2015 Rule.[1] Additionally, ranchers in Rocky Mountain states face uncertain federal regulation due to snowmelt runoff, and NCBA members in the Midwest own land containing prairie potholes, determined by the Supreme Court[2] to be explicitly excluded from CWA authority. Yet, the 2015 Rule finds that these isolated waterbodies are subject to regulation. The Clean Water Act was written to regulate navigable waters, with the knowledge that America's landscape and geography vary significantly. Only states have the ability to effectively address the unique natural resource needs posed by each region of the country. No one can rightfully expect a federal rule, indeed a single definition of jurisdictional waters, to properly address the particularized areas of state water regulation.

The 2015 Rule is inconsistent with Supreme Court precedent.

The Supreme Court has addressed Clean Water Act authority in a number of cases since its 1972 enactment. However, the 2015 Rule largely ignores the vast majority of these opinions, basing the Rule on one opinion from one decision. The basis of the Rule is a convoluted interpretation of Justice Kennedy's "significant nexus" standard, as detailed in his *Rapanos* concurrence. 547 U.S. at 759. However, the EPA's interpretation of this standard is not only out of line with Justice Kennedy's original concept, but Supreme Court precedent as a whole.

In *Riverside Bayview*, the Supreme Court considered whether Clean Water Act jurisdiction extends beyond waters traditionally regulated by the federal government to include abutting wetlands. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121. Based on its finding that the Act's definition of "navigable waters" as "waters of the United States" indicated an intent to regulate "at least some waters" that were not navigable in the traditional sense, the Court upheld the Corps' jurisdiction over wetlands that "actually abut[] a navigable waterway." 474 U.S. at 132. In reaching its decision, the Court concluded that Congress, through adoption of the 1977 amendments to the Act, incorporated jurisdiction over abutting wetlands. *Id.* at 134, 138; *SWANCC*, 531 U.S. at 171.

Later, in *SWANCC*, the Supreme Court noted that its *Riverside Bayview* holding was largely based on Congress's approval of the Corps' interpretation of the Clean Water Act to cover adjacent wetlands – *i.e.*, "wetlands inseparably bound up with the 'waters of the United States.'" *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159 at 167 (citing *Riverside Bayview*, 474 U.S. at 134). However, the *SWANCC* Court held that isolated waterbodies (even though used as habitat by migratory birds) were "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.* at 173. The Court concluded that "the text of the statute will not allow" regulation of ponds that "are *not* adjacent to open water," noting that it was the "significant nexus between the wetlands and the 'navigable waters'" to which those wetlands actually abutted that supported Clean Water Act jurisdiction in *Riverside Bayview*. *Id.* at 167.

A majority of the *Rapanos* Court rejected the Corps' assertion of jurisdiction over intrastate wetlands located twenty miles from the nearest navigable water. See 547 U.S. 715, 720-21 (2006). A four-justice plurality held that "waters of the United States" encompasses "only relatively, standing or flowing bodies of water" and "wetlands with a continuous surface connection to" those waters. *Id.* at 732, 739, 742. Justice

[1] http://www.floridafarmbureau.org/wp-content/uploads/2015/10/WOTUS-Florida-Maps.pdf
[2] *Solid Waste Agency of Northern Cook County (SWANNC) v. Army Corps of Engineers*, 531 U.S. 159 (2001)

Kennedy, concurring in the judgment, found that the federal government has jurisdiction over wetlands only if there is a "significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779. Justice Kennedy rejected the possibility that "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it" would meet his "significant nexus" standard. *Id.* at 781, 778.

Finally, *Army Corps of Engineers v. Hawkes* asked the Court to consider whether Jurisdictional Determinations are final agency action reviewable under the Administrative Procedure Act. *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807. However, this 2016 decision provided significant insight into the Justices' views on the 2015 Rule. In his concurring opinion, Justice Kennedy wrote, "The Act […] continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."

Overall, the definition of "significant nexus" contemplated in the 2015 Rule is a far departure from Supreme Court precedent. The significant nexus standard born out of *United States v. Riverside Bayview Homes'* "inseparably bound wetland" and first applied by the Supreme Court to distinguish between an abutting wetland and the isolated waterbody in *SWANCC*[3], resulted in the Supreme Court's finding of no federal jurisdiction. And more recently in *Rapanos*, the Court again rejected the Agencies' assertion of Clean Water Act jurisdiction. In the aftermath of these cases, Justice Kennedy has been notably vocal about his distaste for overly expansive Clean Water Act jurisdiction, suggesting that a broad jurisdictional rule, like the 2015 Rule, is out of sync with the Justice's intent with the nexus test. The 2015 Rule's contemplation of Significant Nexus stretches it beyond recognition, indeed, far beyond Justice Kennedy's own intent.

2. <u>In Rescinding the 2015 Rule, The Agencies Can Codify the Status Quo.</u>

Finding that industry groups' (including NCBA and PLC) and states' legal challenge had "likelihood of success on the merits," the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the 2015 Rule in October 2015. *In re EPA*, 803 F. 3d at 807. The court noted that the stay would "temporarily silence the whirlwind of confusion that springs from [the Rule's] uncertainty." *Id.* at 808. With this stay in effect, the Agencies currently implement the regulations defining the term "waters of the United States" that were in effect immediately before the August 27, 2015 effective date of the Rule, by applying relevant case law and applicable policy. *See* 82 Fed. Reg. at 34,902.

Commenters who assert that rescission of the 2015 rule would scale back regulation of already permitted waterbodies, thus putting our nation's water quality in jeopardy, are simply incorrect. The 2015 Rule was only in effect for 43 days – from August 28 to October 9, 2015 – in 37 states. During that time, 302 approved jurisdictional determinations were issued, and there were no enforcement actions. Of the jurisdictional determinations issued, none applied standards set out in the 2015 Rule. Because its standards are not

[3] "It was the significant nexus between the wetlands and the navigable waters that informed our reading of the CWA in Riverside Bayview Homes […] In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this." *SWANCC v. Army Corps of Engineers*, 531 U.S. at 167 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121.)

currently used to regulate any U.S. waterbody or wetland, its rescission would do no harm to America's water quality or aquatic ecosystems.

3. <u>Promulgation of a New Definition of "Waters of the United States" is Critical.</u>

The Agencies indicate in their proposal that they intend to do a separate rulemaking ("Step 2") to develop a new definition of "waters of the United States." 82 Fed. Reg. at 34,902. NCBA and PLC agree with this approach. Although rescinding the 2015 Rule (and recodifying the pre-existing regulations) is necessary for clarity and regulatory certainty, there are many issues with the current regulations, and a Supreme Court directive to define "waters of the United States" still exists. NCBA and PLC support a rulemaking that will properly delineate between federal and state lines of authority, and provide much needed clarity for America's cattle producers.

Sincerely,

Craig Uden
President
National Cattlemen's Beef Association

David Eliason
President
Public Lands Council

Cc: The Honorable E. Scott Pruitt, Administrator of the US EPA
Douglas W. Lamont, Acting Assistant Secretary of the Army for Civil Works
Sarah Greenwalt, US EPA
Lee Forsgren, US EPA
Samantha Dravis, US EPA
Patrick Traylor, US EPA
Mindy Eisenberg, US EPA