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PUBLIC INTEREST COMMENT

DEFINITION OF "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT

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

Ryan Yonk
Assistant Professor of Economics, Utah State University

Ken Sim
Policy Analyst, Strata

Josh DeFriez
Student, Utah State University

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INTRODUCTION

The Regulatory Studies Program of the Mercatus Center at George Mason University is dedicated to advancing knowledge about the effects of regulation on society. As part of its mission, the program conducts careful and independent analyses that employ contemporary economic scholarship to assess rulemaking proposals and their effects on the economic opportunities and social well-being available to all members of American society.

This comment addresses the efficiency and efficacy of this proposed rule from an economic point of view. Specifically, it examines how the proposed rule may be improved by more closely examining the societal goals the rule intends to achieve and whether this proposed regulation will successfully achieve those goals. In many instances, regulations can be substantially improved by choosing more effective regulatory options or more carefully assessing the actual societal problem.

SUMMARY

The Environmental Protection Agency and Army Corps of Engineers have proposed a rule changing the definition of "waters of the United States" under the Clean Water Act (CWA). Under the status quo, whether or not a water body qualifies as jurisdictional "waters of the United States" is determined case-by-case and based on precedence,

For more information, contact
Robin Bowen, (703) 993-8582, rbowen@mercatus.gmu.edu
Mercatus Center at George Mason University
3434 Washington Boulevard, 4th Floor, Arlington, VA 22201

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science, and case law. The proposed rule seeks to add clarity to this process by providing a more robust definition for "waters of the United States". The rule, however, is a hasty step that leads to expansion of the agencies' jurisdiction and higher costs for those that must comply with the CWA.

While the intent behind the rule to add clarity and decrease uncertainty for regulators and economic actors is a worthwhile goal, the increase in the agencies' de facto jurisdiction and the expansion into new areas actually creates additional uncertainty that will incur substantial economic costs while not improving environmental outcomes. We urge the agencies to reconsider this rule for the following reasons:

- The rule actually increases areas of uncertainty for those that must comply with CWA;
- The agencies have underestimated or failed to accurately describe their proposed increase in jurisdiction;
- The agencies have failed to analyze the costs of delayed and forgone development;
- The agencies have failed to adequately analyze the costs to local governments; and
- The definitions utilize a one-size-fits-all approach that ignores the variety of environmental and economic realities across the nation.

In addition to this proposed rule, the agencies promulgated an associated rule interpretation in a manner that may allow important elements to slip under the radar in terms of analysis. The agencies should fully comply with Executive Order 12866 and prepare a regulatory impact analysis for all significant regulatory actions.

Increased Areas of Uncertainty from the Rule Change

The agencies acknowledge that the status quo interpretation of "waters of the United States" "results in significant resources being allocated to . . . determinations by Federal and State regulators."[1] Uncertainty, however, has affected not only the agencies; it has also affected the decisions private landowners, small businesses, and local governments make about how to use their land. The time and capital costs of the permitting process, especially when case-by-case determinations of jurisdiction are necessary, impose deadweight losses on the economy, which are borne by developers, landowners, local governments, and the federal government.[2]

Under this rule, the agencies would bring clarity to this process by expanding definitions. While the expansion clarifies some areas, it produces new areas of ambiguity. The proposed definition of "tributary," for example, is so broad that a home's rain gutter could very well qualify and be deemed jurisdictional by the agencies. Rain gutters are manmade and have a bed, a high water mark, and intermittent flows that may provide a significant nexus to other water bodies during rainstorms. As leaves and detritus decompose in rain gutters, riparian vegetation has even been known to germinate. According to the new rule, the Corps of Engineers could potentially regulate these rain gutters.

This ad absurdum example illustrates the problem with the definition as proposed. The new definition increases uncertainty because it leaves no clear answer to as to where jurisdiction stops and where it begins. The only way this definition adds clarity would be if it is interpreted to expand the agencies' jurisdiction to almost everything.

In addition to "tributaries," the definitions for "flood plains" and "riparian areas" in the proposed rule are equally problematic. They extend the agencies' jurisdiction beyond traditional wet areas into lowlands and transitional zones between open waters and upland areas without clarifying exactly how far the jurisdiction extends.

For example, Provo City, Utah, has over 14,000 people living in the 100-year floodplain of Utah Lake, with more development underway. By claiming jurisdiction over floodplains, the Corps will be required to have homeowners

1. Environmental Protection Agency, "Definition of 'Waters of the United States' Under the Clean Water Act," 79 Fed. Reg. 22187 (April 21, 2014).
2. David Sundig and David Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," *Natural Resources Journal* 42 (Winter 2002), http://areweb.berkeley.edu/~sunding/Economcs%20of%20Environmental%20Regulation.pdf.

submit CWA 404 permit applications when they dredge or fill areas of the floodplain. This means 14,000 people would be required to hire consultants and go through a costly and time-consuming permitting process to pour concrete, plant a garden, or landscape a yard.

Inclusion of floodplains, tributaries, and riparian areas as jurisdictional would have dramatic effects on local economies as the agencies systematically increase their jurisdiction by broadening the definition of jurisdictional areas. Will the entire city of New Orleans be claimed jurisdictional because it is in the Mississippi River floodplain? What about Pittsburgh and St. Louis?

These new areas of jurisdiction are areas where people live now and have lived for centuries. Civilization itself started in river valleys where vegetation was lush, plants would germinate, and there was natural beauty. In dry regions, particularly, people seek to live in areas with water. Perhaps regulators see these areas as vacant or only inhabited from time to time, but the proposed definitions are so broad and encompassing that they may include the homes of a good portion of our country's citizens. This new rule leads to uncertainty for local governments and every inhabitant of these areas.

Expanded Jurisdiction

The agencies present the proposed definition primarily as a means to determine over which waters the agencies have jurisdictions under the CWA. The ambiguity of the current understanding of "waters of the United States" under the CWA has led to a costly case-by-case system of jurisdictional determination. At times, these determinations have led to protracted litigation in cases such as *Rapanos v. United States*[3] and *Solid Waste Agency of North Cook County (SWANCC) v. US Army Corps of Engineers*.[4] In these cases, the Supreme Court found that the agencies had expanded their jurisdiction beyond the original intent of the CWA.[5]

The proposed definitions appear to be an attempt by the agencies to reestablish jurisdiction over areas lost in the *Rapanos* and *SWANCC* cases through definitional reinterpretation. The result would extend the agencies' reach beyond any rational application of the term "navigable waters" or "waters of the United States," which is why the courts reduced their jurisdiction in the first place.

The Regulatory Impact Analysis (RIA) prepared by the agencies claims that the proposed rule would only increase de facto jurisdiction by three percent over the status quo nationwide.[6] The RIA, however, provides neither the methodology nor the reasoning behind this conclusion. We encourage the agencies to release their methodology for public scrutiny prior to any final decisions.

Environmental lawyer Joseph Koncelik notes that the definition of tributary in particular is so broad that "it is difficult to come up with a stream or wetland that would likely not fit in the definition . . . ."[7] Furthermore, he notes that the rule includes a "catch-all provision" that allows the agencies to assert jurisdiction on a case-by-case basis to regulate streams and wetlands that might not meet the already expansive definition.[8]

This expands the agencies' jurisdiction to an array of formations that share little in common with "navigable waters." In combination with the uncertain meaning of "significant nexus" and the new definitions of "flood plain" and "riparian area," the rule empowers the agencies to establish jurisdiction over virtually any water formation nationwide, saving for the clear exemptions delineated in the proposed rule. This functionally restores the agencies' jurisdiction over waters judged outside the scope of the CWA by the *SWANCC* and *Rapanos* cases.

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3. Rapanos v. United States, 547 U.S. 715 (2006).
4. Solid Waste Agency of Northern Cook City v. Army Corps of Engineers, 531 U.S. 159 (2001) (99–1178), 191 F.3d 845, reversed.
5. *SWANCC*, 531 U.S. 159.
6. US Environmental Protection Agency and US Army Corps of Engineers, *Economic Analysis of Proposed Revised Definition of Waters of the United States*, March 2014.
7. Jon Koncelik, "EPA and Corps Release Proposed Rule Defining 'Waters of the U.S.,'" *Ohio Environmental Law Blog* (blog), April 1, 2014, http://www.ohioenvironmentallawblog.com/tags/navigable-waters..
8. Ibid.

The Costs of Delayed and Forgone Development

The agencies' economic analysis vastly oversimplifies economic costs. To measure impact, the agencies simply measure the dollar cost of the permitting process against the projected dollars saved by conservation. This approach ignores current and potential economic activity. It also fails to account for other costs imposed by the new rule, such as community infrastructure maintenance, storm water control costs, local water supply management costs, impacts on water reuse facilities, the costs of mapping and determining floodplain and riparian areas, the costs of increased permit applications, and especially the costs of delayed and forgone development.

A detailed survey of wetlands permit applications and the Army Corps of Engineers' own statistics found that the agencies "significantly underestimate" the time required for applicants to finish permitting processes, thus underestimating the economic costs imposed by delay.[9] Indeed, our own experience with permitting consulting has shown that even small projects are significantly delayed by CWA compliance. On a recent project, we estimate that CWA compliance cost an additional 3.5 years of delay and over $2.5 million in direct costs.

In addition, our consulting experience with the agencies and the CWA has shown a particular lack of resources devoted to the EPA and Corps regulatory offices. There are many projects and insufficient staff. Project costs and timeframes are routinely exceeded as the EPA and Corps personnel maximize timeframes and request more time to complete even rudimentary tasks because of insufficient resources. Private groups are then forced to pay consultants to have regulatory matters handled in a timely manner because agency personnel are unable to provide their services in a reasonable timeframe. Consultants can be expensive, especially for private citizens seeking only to make small changes in land use. For example, a small CWA 404 permit application through a consultant often costs $5,000. Larger and more complex permits can cost millions of dollars.

In addition to increased costs, delays of months and years are common. The wheels of federal bureaucracy turn slowly, and there is no better example of that than CWA compliance with the Corps of Engineers. Increasing the agencies' jurisdiction when they are already unable to cope with current demand will only lead to greater costs and delays, transferring the largest burdens of regulatory cost to citizens.

The Costs to Local Governments

While the proposed rule claims that it "does not affect Congressional policy to preserve the primary responsibilities and rights of the states to prevent, reduce, and eliminate pollution . . . "[10] the realities of expanded jurisdiction and increased uncertainty would necessitate more involvement by the agencies in state and local affairs. Not only will this erode local jurisdictional authority, but it will also incur great costs on state and local governments.

The categorical classification of flood plains, riparian areas, and intermittent and ephemeral streams as "waters of the United States" will especially increase these costs. According to the Senate Committee on Environment and Public Works, "almost every city and county in the United States contains floodplain and riparian areas."[11]

The new rule will necessitate the use of local resources in mapping and determining the boundaries of flood plains, a costly and time-consuming process.[12] Under the CWA Section 404, it is the responsibility of the CWA applicant to demonstrate that "waters of the United States" are not impacted by a project.[13] Thus, cities in floodplains or with streams and rivers must spend time and money to prove to the agencies that they are not affecting jurisdictional waters. As noted previously with the back-of-the-envelope calculation for Provo, Utah, these uncounted costs can add up quickly. As areas of CWA jurisdiction increase, so will the costs of compliance to local governments.

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9. Sundig and Zilbeman, "Economics of Environmental Regulation by Licensing."
10. EPA, *Economic Analysis*.
11. US Senate Committee on Environment and Public Works, *How the Obama Administration's Clean Water Act Abuse Impacts Local Governments*, May 22, 2014, 30, http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.Blogs&ContentRecord_id=7928f692-977b-d12d-3b91-aec526c9ce40.
12. Ibid.
13. 40 C.F.R. 230 § 404(b)(1).

The Danger of the "One-Size-Fits-All" Approach

A danger of increased federal jurisdiction is one-size-fits-all rulings that ignore the realities of vastly different ecosystems across the United States. To produce a comprehensive economic and environmental benefit-cost analysis for each different ecosystem within the United States, An example of this difference is the common occurrence of ephemeral and intermittent streams in desert areas in the western United States. For example, 94 percent of Arizona's and 88 percent of New Mexico's waterways are intermittent or ephemeral in nature. Often, a variety of environmental factors create waterways during rainstorms where none existed previously. As such, this jurisdictional increase may disproportionately affect development in the Desert Southwest. The agencies' own study of ephemeral and intermittent streams noted that such formations are prominent in areas of high economic growth in Nevada and Arizona.[14] Extending de facto jurisdiction to these areas would require that much of this development be subject to lengthy, costly permitting processes. The agencies have yet to show thoroughly that the environmental benefits would outweigh the economic costs.

Checks and Balances

Along with this regulation, the agencies issued an interpretive rule regarding the applicability of the exemption from permitting under the Clean Water Act. We remind the agencies here that significant regulatory actions as defined under Executive Order 12866 are required to undergo review by the Office of Information and Regulatory Affairs within the Office of Management and Budget, and they often must also be accompanied by a Regulatory Impact Analysis.[15] Actions such as interpretive rules can have significant economic impacts, just as regulations do. Agencies should not use interpretive rules to avoid standard procedures in the regulatory process that ensure basic levels of sound decision-making.[16] This is problematic in a US system that is intended to comprise checks and balances.

CONCLUSION

By simply claiming jurisdiction, the proposed definition would solve the current ambiguity over the agencies' jurisdictional authority regarding ephemeral washes. While this increases clarity, it is not in accord with the intent of the CWA as interpreted in the *SWANCC* and *Rapanos* decisions, where the Supreme Court found that the agencies were overstepping the limits of "navigable waters." For all the reasons provided in this comment, the rule will likely cause more economic harm than disclosed in the RIA.

We have significantly departed from the original intent of the CWA and the "navigable waterways" jurisdictional definition. The definitions of "flood plain," "riparian area," and "significant nexus" in this rulemaking leave room for such broad interpretation as to be all encompassing. More importantly, the broad definitions expand jurisdiction in such a way that timeframes and costs are increased without any appreciable gains in environmental quality.

We support narrowing the scope of definitions to provide clear delineations of what is not in the agencies' jurisdiction, following the limitations set in place by the *SWANCC* and *Rapanos* decisions. The agencies must recognize their own legal limits.

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14. EPA, *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and semi-Arid American Southwest*, November 2008, http://www.epa.gov/esd/land-sci/pdf/EPHEMERAL_STREAMS_REPORT_Final_508-Kepner.pdf.
15. Exec. Order No. 12866, 3 C.F.R. 76 (1993).
16. For more discussion of agency attempts to evade cost-benefit requirements, see John D. Graham and James Broughel, "Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act," *Harvard Journal of Law and Public Policy: Federalist Edition* 1, no. 1 (June 4, 2014): 30–54; Nina A. Mendelson and Jonathan B. Wiener, "Responding to Agency Avoidance of OIRA," *Harvard Journal of Law and Public Policy* 37, no. 2 (Spring 2014): 447–521; John D. Graham and Cory R. Liu, "Regulatory and Quasi-Regulatory Activity without OMB and Benefit-Cost Review," *Harvard Journal of Law and Public Policy* 37, no. 2 (Spring 2014).