PACIFIC LEGAL FOUNDATION

April 14, 2016

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Mr. Art Graham, Co-Vice Chair
Ms. Mary-Anna Holden, Co-Vice Chair
National Association of Regulatory Utility Commissioners
Committee on Water
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VIA E-MAIL: dlomoljo@puc.nv.gov

Dear Chair Burtenshaw, Co-Vice Chair Graham, and Co-Vice Chair Holden:

Thank you for allowing me this opportunity to share my thoughts on the "Waters of the United States" (WOTUS) rule and to respond to NRDC's recent letter regarding the same.

As you may be aware, Pacific Legal Foundation (PLF) has been fighting the federal government's expansive claims of regulatory authority under the Clean Water Act for years. We share the opinion expressed in the draft resolution that the WOTUS rule is an exceptionally flawed example of federal overreach and we are currently challenging the rule in federal court. The draft resolution points out many of the rule's gravest defects and we encourage NARUC to move forward with it.

1. The WOTUS rule significantly expands federal agencies' power.

The WOTUS rule is a significant expansion of federal jurisdiction. It is the latest in a long history of agency efforts to expand federal regulation under the Clean Water Act. The Supreme Court of the United States has repeatedly held that these efforts were unlawful[1] and we believe it

[1] *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

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will do so again with the WOTUS rule. In fact, two federal courts have already held that the rule is likely illegal.[2]

Reviewing the history of Clean Water Act jurisdiction reveals that the WOTUS rule goes beyond anything Congress could have intended. Originally, Clean Water Act jurisdiction was conceived to be quite narrow. In keeping with the constitutional justification that the Clean Water Act regulates rivers and lakes as channels of interstate commerce, the Act's text extends enforcement jurisdiction only to the prohibition of discharges into "navigable waters."[3] Unfortunately, Congress defined "navigable waters" as "the waters of the United States."[4] This vague[5] and unhelpful definition has been the source of four decades of conflict and confusion.

Initially, the agencies hewed close to the Act's constitutional underpinnings and applied the Act's provisions only to those "interstate waters that are capable of being navigated for use in commerce."[6] But this was short-lived. Environmentalists, through the lower courts, demanded a more aggressive federal role.[7]

Subsequently, EPA and the Army Corps drafted regulations extending their power to all tributaries of navigable waters, all wetlands adjacent to such waters and tributaries, and to all waters the use or degradation of which could affect interstate commerce.[8] This broader interpretation of federal authority gave the agencies the flexibility to test the boundaries of their power under the Act—and they have done so repeatedly.

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[2] *In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015); *N. Dakota v. U.S. E.P.A.*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

[3] 33 U.S.C. § 1311(a).

[4] 33 U.S.C. § 1362(7).

[5] In *U.S. Army Corps v. Hawkes Co.*, a Clean Water Act case that PLF is currently litigating before the Supreme Court, Justice Kennedy caused quite a stir when he noted that federal jurisdiction under this statute is "arguably unconstitutionally vague." *See* Jonathan Wood, *What if the Clean Water Act is unconstitutionally vague?*, PLF Liberty Blog (Apr. 4, 2016).

[6] 33 C.F.R. § 209.120(d)(1) (1974).

[7] *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

[8] 33 C.F.R. § 328.3(a) (2014); 40 C.F.R. § 122.2 (2014).

The case for expansive federal authority under the Clean Water Act has not fared well in the Supreme Court, which has repeatedly pushed back against the Army Corps and EPA.[9] In *Solid Waste Agency of Northern Cook County*, for instance, the Court rejected the Corps' assertion that "waters of the United States" includes isolated sand and gravel pits that fill up with water and provide habitat for migratory birds.[10] Only a few years later, in *Rapanos v. United States*, a case litigated by PLF, the Supreme Court rejected the assertion that any wetland is a "water of the United States" so long as it is hydrologically connected to a navigable-in-fact water.[11]

In *Rapanos*, unfortunately, the Court splintered on where to draw the line limiting federal authority. Four of the Justices would have imposed a bright-line rule precluding federal authority over ephemeral streams, ditches, or wetlands clearly isolated from navigable-in-fact waterways.[12] Justice Kennedy, who cast the deciding vote rejecting the Corps' broad claims of jurisdiction, advocated for a fuzzier test. He believed federal jurisdiction comes down to whether there is a "significant nexus" between a particular site and a downstream navigable water, such that the water or wetland in question significantly affects the chemical, physical, and biological integrity of a downstream navigable-in-fact water.[13]

NRDC claims the WOTUS rule merely marks a return to the enforcement strategies of the halcyon days of the Reagan administration, when "the Corps was able to regulate almost any body of water or wetland" so long as it could be habitat for migratory birds. This enforcement approach is precisely what the Supreme Court, in *Solid Waste Agency of Northern Cook County*,[14] ruled was—and always had been—illegal. Although NRDC and the agencies might wish they could overrule the Supreme Court, they can't.

In the wake of *Rapanos*, EPA and the Army Corps have seized on Justice Kennedy's fuzzy test to, once again, extend their reach. In practice, "significant nexus" means, in the agencies view,

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9 *See Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

10 531 U.S. 159 (2001).

11 547 U.S. 715 (2006).

12 *Id.* at 739, 742 (plurality op.).

13 *See id.* at 779-80 (Kennedy, J., concurring in the judgment).

14 531 U.S. 159 (2001).

nothing more than some conceivable nexus. It has declared, for instance, that PLF's clients, Peter and Frankie Smith, violated the statute by removing trash from a dry arroyo in the middle of the New Mexico desert. The government contended that, despite all logic, this dry bit of dirt is a federally regulated water.[15] The Sacketts, another PLF client, had their lot in the middle of a built out residential subdivision declared federal waters.[16] Their case, in which the government was threatening them with fines of up to $75,000 a day, culminated in a recent PLF victory in the Supreme Court.[17] Another PLF client, Wyoming farmer Andy Johnson, was threatened with tens of millions of dollars in fines for constructing an environmentally beneficial stock pond by damming a small, intermittent stream on his property.[18] EPA insists the stream is a jurisdictional "water of the United States," despite the fact that it terminates in a manmade and controlled irrigation canal. According to the administrative record in the case, EPA never bothered to check where the water on his property goes; they adopted a "shoot first, ask questions later" approach instead.

And yet, despite the confusion over the reach of the Clean Water Act[19] that has prompted cases like these, the WOTUS rule makes things worse. The new rule asserts categorical jurisdiction over any tributary that contributes any flow, directly or indirectly, to a navigable water, no matter how miniscule. "Adjacent waters" are covered too. But, under the rule, "adjacent" doesn't mean what you think it means. Instead, it includes anything within 4,000 feet of a jurisdictional water.

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[15] *See* Press Release, PLF, *Santa Fe couple sue over federal land grab that labels their dry land as a "water body"* (Dec. 11, 2012), http://www.pacificlegal.org/releases/Santa-Fe-couple-sue-over-federal-land-grab-that-labels (last visited Apr. 13, 2016); *see also* Jonathan Wood, *Orwellian language in the Clean Water Act*, PLF Liberty Blog (Aug. 31, 2015) (picture of the dry desert arroyo).

[16] *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

[17] *Id.*

[18] *See* PLF, *PLF sues over EPA's illegal compliance order against Wyoming farmer's environmentally friendly stock pond*, https://www.pacificlegal.org/Cases/Case-johnson-1-1494 (last visited Apr. 13, 2016).

[19] Justice Alito called the Act "notoriously unclear" in the 2006 PLF Supreme Court case *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012).

According to the California Farm Bureau, the combination of these two expansive interpretations is a rule that extends federal power to essentially every spot in the state.[20]

Thankfully, federal courts are recognizing the rule's shaky foundation. The Sixth Circuit Court of Appeals has stayed implementation of the rule, in recognition that it likely exceeds the agencies power under the Clean Water Act.[21] As the Sixth Circuit explained: "What is of greater concern to us, in balancing the harms, is the burden—potentially visited nationwide on governmental bodies, state and federal, as well as private parties—and the impact on the public in general, implicated by the Rule's effective redrawing of jurisdictional lines over certain of the nation's waters."[22] The District Court for the Northern District of Dakota agreed, holding that the WOTUS rule "suffers from the same fatal defect" as the agencies' assertion in the *Rapanos* case.[23]

NRDC downplays the significance of the new rule by arguing that it only expands federal authority by an additional 4%. Although this might seem small, small percentages can have big impacts. Consider, for instance, that in 2007's Great Recession, GDP fell by "only" 5%. The current reach of federal authority is excessively broad. By going even further than dry arroyos, residential subdivisions, and isolated streams, the WOTUS rule threatens to substantially increase federal authority, to the detriment of states and property owners. That is why so many of them are challenging it in court.

The excessively broad WOTUS rule also conflicts with Congress' intention "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

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[20] *See* Christine Souza, *'Waters' rule takes effect in California*, AgAlert (Sept. 2, 2015), *available at* http://www.agalert.com/story/?id=8709.

[21] *In re E.P.A.*, 803 F.3d at 807. Contrary to NRDC's assertion, this ruling did require the court to preliminarily consider the merits of the challengers' claim. The court found the challengers to have "demonstrated a substantial possibility of success on the merits of their claims" with regard to "the Rule's treatment of tributaries, 'adjacent waters,' and waters having a 'significant nexus' to navigable waters [being] at odds with the Supreme Court's ruling in *Rapanos*." *Id.*

[22] *Id.* at 808.

[23] *N. Dakota*, 127 F. Supp. 3d at 1056.

enhancement) of land and water resources."[24] The further the agencies push federal jurisdiction up into minor trickles, seasonal ditches, and dry land, the more they eat away at states' ability to serve their citizens and regulate the development and use of land and natural resources according to their citizens' preferences rather than those of unaccountable federal bureaucrats. EPA, the Army Corps, and NRDC present the WOTUS rule as all that protects our rivers and lakes from anarchy and destruction, but that is a false choice. State governments regulate these areas already. Adding duplicative federal regulation on top of state regulation will needlessly increase the costs and delays faced by states, industry, and property owners.

Although certainty is important to regulated entities and property owners, the WOTUS rule doesn't provide a reasoanble bright line rule. Instead, it places a heavy thumb on the scale in favor of federal regulation. Most any area not categorically subject to regulation under the WOTUS rule continue to be subject to the same uncertainty that's existed for years. Although the WOTUS rule increases certainty, in a sense, only the agencies benefit from it, by making it easier for them to assert jurisdiction. Consequently, it's no surprise that such a vast coalition of states, property owners, and regulated businesses are challenging the WOTUS rule.

2. Clean Water Act permitting is a substantial burden

Clean Water Act permitting is a heavy burden for those subjected to it. Even applying, for example, is an extremely expensive endeavor despite there being no guarantee of ever receiving a permit. As the Supreme Court noted in *Rapanos*, the average applicant for an individual permit must spend nearly $300,000 and wait more than two years for the process to conclude.[25] These federal permitting costs only add to the extensive permitting costs and requirements applicable at the state and local levels.

The full costs of the WOTUS rule are not limited to permitting expenses and delays. A likely bigger cost is the abandoning of potential projects and development at an early stage because of the risk that the Clean Water Act will apply. Measuring these unseen costs can be exceedingly difficult, thus there is no reliable estimate for the projects that are stymied by federal regulation. However, given the high cost of applying for a permit (with no guarantee of obtaining one), the unseen costs are likely very high.

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[24] 33 U.S.C. § 1251(b).

[25] 547 U.S. at 721.

NRDC claims that the burden of obtaining permits is really not so bad because the restrictions on property deemed jurisdictional are not extreme, permits are not "unduly burdensome" to obtain, nationwide permits are available to make things easier, and only a small fraction of permits are denied. Needless to say, the states, industries, and property owners that have experienced this process—many of whom are challenging the rule—disagree with NRDC's assessment.

Nationwide permits, for instance, only aide property owners if the agencies choose to honor them. Even if a project is covered by a preexisting permit, the agencies' enforcement powers are so despotic that few would defend themselves from an agency bent on ignoring them. If the government denies that one of these permits applies, it can issue a cease and desist order demanding that property be abandoned, a compliance order threatening $37,500 per day in potential fines, or it can seek civil and criminal penalties (including imprisonment) through the courts. In addition to facing these harsh possibilities, any property owner willing to defend herself would have to overcome the strong deference that federal courts give agencies.

PLF client Andy Johnson is a perfect example of this. He built a stock pond on his private property by placing about 10 cubic yards of fill in a stream. The CWA expressly exempts stock ponds from federal regulations and a nationwide permit authorizes discharges under 25 cubic yards. Yet neither stopped EPA from demanding he rip out the environmentally beneficial pond, on pain of tens of millions of dollars in fines.

The nationwide permit for utility lines and any jurisdictional exclusions intended to benefit utilities are only valuable to the extent they can't be ignored, abused, or tested by agencies that have already proven very poor at recognizing the limits of their authority. Trusting antagonistic environmental regulators to play by the rules is not a sufficient strategy to ensure the smooth execution of infrastructure projects—especially given how much new capacity and infrastructure must be built to comply with the Clean Power Plan.

3. As two federal courts have observed, the public was denied a meaningful opportunity to comment on the WOTUS rule.

Federal law mandates that important rules be subject to public scrutiny before they can be enacted and implemented. Yet, this comment period does no good if proposed regulations don't make it reasonably clear to the public what the final regulation will do and how it will affect them.

The WOTUS rule managed to avoid much of the friction attending meaningful public notice by, more or less, obfuscating as to the breadth of jurisdiction the final rule would claim. Two federal

courts have since held that the WOTUS rule's notice and comment period gave inadequate notice to the public about the effects of the final rule.

NRDC asserts that the comment period was "fair and extensive," citing the five-year long "scientific" process that resulted in the WOTUS rule. The Sixth Circuit disagreed.[26] It found that "[a]lthough the record compiled by respondent agencies is extensive, respondents have failed to identify anything in the record that would substantiate a finding that the public had reasonably specific notice that the distance-based limitations adopted in the Rule were among the range of alternatives being considered."[27] The federal district court for North Dakota felt the same way. "When the Agencies published the final rule, they materially altered the Rule by substituting the ecological and hydrological concepts with geographical distances that are different in degree and kind and wholly removed from the original concepts announced in the proposed rule. Nothing in the call for comment would have given notice to an interested person that the rule could transmogrify from an ecologically and hydrologically based rule to one that finds itself based in geographic distance."[28]

As these courts have recognized, the public was deprived of an opportunity to comment on the WOTUS rule because the rule that was ultimately adopted is very different from what the public was allowed to consider. NRDC appears to argue that this shouldn't trouble NARUC because there were many public comments supportive of the proposed version of the rule. However, this public support is unreliable.

According to a Government Accountability Office report, EPA waged an illegal lobbying campaign to gin up public support for the rule. EPA's "covert propaganda," as the GAO described it, violated several provisions of federal law. EPA used agency funds not only to drum up support for the proposed rule, but also to lobby against a congressional denunciation of it.[29] The report also specifically called out EPA's promotion of NRDC during the campaign as a violation of the federal prohibition against grassroots lobbying by federal agencies.

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[26] *In re E.P.A.*, 803 F.3d at 807.

[27] *Id.*

[28] *N. Dakota*, 127 F. Supp. 3d at 1058.

[29] Government Accountability Office, *Environmental Protection Agency—Application of Publicity or Propaganda and Anti-Lobbying Provisions*, https://www.documentcloud.org/documents/2646341-GAO-Opinion-EPA-Social-Media-121415.html

Conclusion

The WOTUS rule is a significant expansion of federal power, with consequences for states, industry, and individual property owners. NARUC should join the increasingly large chorus criticizing the rule as an unlawful overreach and the byproduct of an inadequate public process.

Thank you for considering my comments. If I can be of any further assistance, please feel free to contact me.

Sincerely,

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