ATTORNEY GENERAL
STATE OF MONTANA

Tim Fox
Attorney General

Department of Justice
Joseph P. Mazurek Justice Bldg.
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

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Written Testimony of Montana Attorney General Tim Fox

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As Montana's Attorney General, one of my concerns is protecting our State's sovereignty, which is just another way of saying protecting Montanans' ability to exercise our right of self-government under our State's constitution, and to conduct our affairs in the way we think best. That means I believe it is my duty to stand up and push back when I perceive an agency of the federal government overreaching the authority given to it by Congress and proposing actions that infringe on our sovereignty or exceed an agency's authority. In connection with this committee's work, I appear today to convey my concerns with three recent agency actions which I believe to be ill-considered and which affect my State.

The first is the proposal published in the Federal Register April 21, 2014, wherein the EPA, along with the U.S. Army Corps of Engineers, proposes to amend the definition of "Waters of the U.S." in such a way that would extend the reach of the Clean Water Act to virtually all interstate and intrastate waters, and all lands which could potentially affect such waters.

Montana is, for the most part, a headwaters state blessed with waters of exceptional quality, and the people of Montana have taken steps to fully protect that priceless resource for ourselves, our downstream neighbors, and all of our progeny. Those steps begin with our state constitution, which declares "[A]ll surface, underground, flood, and atmospheric waters within the boundaries of the state" to be the property of the state for the use of its people (Mont. Const. art. IX, § 3(3)), and requires the legislature to "provide adequate remedies for the protection of the environmental life support system from degradation" and to "provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." Mont. Const. art. IX, § 1(3). These constitutional safeguards are implemented by means of the Montana Water Quality Act, Mont. Code Ann. § 75-5-101 *et seq.*, a comprehensive water quality protection law enacted in 1971. The Montana Board of Environmental Review has promulgated regulations to

implement the legislation, and the statutes and the regulations are implemented by the Montana Department of Environmental Quality (DEQ).

Montana sought and was granted primacy to implement the National Pollutant Discharge Elimination System (NPDES) permit system in our State, but even beyond the NPDES (MPDES in Montana) permit protections, the Montana DEQ has broad authority to enjoin pollution of state waters or the placement of waste where it will cause pollution, to require cleanup of any material which may pollute state waters, and to inspect and require monitoring to prevent pollution. Mont. Code Ann. § 75-5-601 *et seq*.

The point is that Montana has taken primary responsibility for its land and waters as was assumed by Congress when it enacted the Clean Water Act (33 U.S.C. § 1251(b)). The laws and regulations we implement and enforce assure the protection of the quality of traditional navigable waters in and flowing from our State. There accordingly is no justification, in terms of protection of the nation's navigable waters, for extending the reach of the Clean Water Act.

The agencies' proposal states at least twice (Federal Register, Vol. 79, No. 76, pp. 22189, 22192) that, pursuant to the U.S. Supreme Court decisions in *SWANCC* and *Rapanos*, the scope of regulatory jurisdiction of the Clean Water Act in the proposed rule is narrower than that under the existing regulations. It appears this remarkable assertion is based on the observation, at page 22192, that the proposal would delete the current "all other waters" subsection in the rule. However, the rules which would replace the deleted subsection, including the provisions containing new definitions for "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus," as well as providing for inclusion of "other waters" on a case-by-case basis, appear clearly to extend jurisdiction of the EPA and the Corps of Engineers far more broadly. As I read the proposed rules, Clean Water Act jurisdiction would extend upgradient from traditional navigable waters into the lands of our State, no matter how remote from traditional navigable waters, which host occurrences of water that, due to gravity, could conceivably end up in a traditional navigable water.

The agencies seem to acknowledge the extension when, again at page 22192, they state that "Because Justice Kennedy identified 'significant nexus' as the touchstone for CWA jurisdiction, the agencies determined that it is reasonable and appropriate to apply the 'significant nexus' standard for CWA jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well . . . to determine whether they are subject to CWA jurisdiction."

I cannot agree it is appropriate to apply the "significant nexus" standard to other categories of water bodies. As the majority of the Supreme Court said in the *SWANCC* case: "We said in Riverside Bayview that the word 'navigable' in the statute was of 'limited import,' 474 U.S. at 133 . . . . But it is one thing to give a word limited effect and quite another to give it no effect whatever." This statement was confirmed by Justice Kennedy in his concurring opinion in the Rapanos case: "Congress' choice of words creates difficulties, for the Act contemplates regulation of certain 'navigable waters' that are not in fact navigable . . . . Nevertheless, the word 'navigable' in the Act must be given some effect. See SWANCC, supra, at 172." 547 U.S. 779. I believe that the agencies' proposed regulations would completely untether the scope of the

EPA's and the Corps' jurisdiction from the statutory requirement of navigability, and I think this is proven by comparing the agency proposal to what Justice Kennedy would allow:

> Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.

547 U.S. 780, 781.

While this discussion was about tributaries and adjacent wetlands, it indicates a regulation must contain specific criteria that allow objective identification of jurisdictional waters. But in the agencies' proposal, the definitions of "neighboring," "riparian area," "floodplain," and "significant nexus," lack any such specific limiting or defining criteria as to volume of flow, proximity to navigable waters, or any other parameter. The only definition containing such criteria is the definition of "tributary," in its reference to bed, banks and ordinary high water mark, but after naming those, the definition quickly departs from any objectively identifiable criteria when it says: "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) of this definition."

The overreach of the agencies' proposal is objectionable not for the protections the agencies seek to extend. Montanans long ago decided our waters are worth protecting and acted accordingly. The problem is that the agencies' overreach impinges directly on our state sovereignty. It offends Congress's stated intention in the Clean Water Act to recognize, protect and preserve the primary rights of the States to manage their lands and water resources. It violates, in my opinion, the admonitions of the U.S. Supreme Court that the Act's jurisdiction is and must be limited to waters that have a significant nexus to core waters. In short, the proposal seeks to extend the reach of the Act beyond what is allowed by the Commerce Clause.

As an example of the practical problems caused by the proposal's unwarranted impingement on our sovereignty, our Water Quality Act defines state waters in terms of "a body of water." Mont. Code Ann. § 75-5-103(34(a). The agencies' proposal, on the other hand, extends the requirements and procedures of the Clean Water Act, and the agencies' jurisdiction, to waters "located within" such broad areas as areas "bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal structure in that area . . ." and areas "bordering inland . . . waters that [were] formed by sediment deposition from such water . . . ." Our State, acting pursuant to the authorities I described earlier in this letter, may choose to protect water quality in such broad areas as these in a different fashion than would be imposed on us by the "one size fits all" requirements of the Clean Water Act as implemented by the agencies. Hence, under the proposal, we lose the ability to fashion our own remedies on lands and waters that are truly remote from traditional navigable waters, a result that violates Congress's expressed intent in enacting the Clean Water Act as well as the pronouncements of the U.S. Supreme Court.

Congress declined, in 2007, to enact proposed legislation which would have expressed the intention to extend the reach of the Clean Water Act to all waters in the nation "to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." The fact Congress was unwilling to adopt this expression of intent indicates clearly the Clean Water Act is limited in its jurisdictional reach and that the agencies' proposal is beyond what is authorized by that Act.

The second matter I wish to bring to the Committee's attention is the EPA's June 18, 2014 proposal to create guidelines for carbon dioxide emissions from existing fossil-fueled power plants under section 111(d) of the Clean Air Act. I joined the Attorneys General of sixteen other States in comments on that proposal. In a nutshell, those comments detail six reasons the proposal should be withdrawn, beginning with the fact the proposal is beyond the agency's authority under the Clean Air Act. But I also filed separate comments with Chairman Darrin Old Coyote of the Crow Nation, and I want to draw the Committee's attention to those comments, because they provide a good example of what I believe to be the most significant problem with the way the EPA is doing business.

The Crow Nation encompasses 2.2 million acres of land in southcentral and southeastern Montana. I grew up in Hardin, on the Crow Reservation, and developed a great appreciation both for the Crow people and the problems they faced and continue to face. The Crow Nation has huge undeveloped coal resources, which today host one mine, the Absaloka Mine, which is operated by Westmoreland Resources. That mine produces 3 to 7 million tons of coal a year, providing production taxes and royalties to the Crow Nation--more than $20 million in 2010. This revenue is two-thirds of the Crow Nation's annual non-federal budget. In addition, the mine employs a 70% tribal workforce, with an average annual salary of $66,000, and a total payroll of around $18 million. The Mine is by far the largest private employer within the Reservation.

Unfortunately, one of the very likely effects of the EPA's existing source rule would be to kill the market for the coal produced by the Absaloka Mine, which is nearly all sold to Minnesota utilities, in turn killing the mine, in turn causing drastic hits to the Crow Nation's operating revenues, and causing loss of services and employment on the Crow Reservation.

Given that horrendous consequence, you would think EPA would have gone to the Crow Nation when it was putting together this rule proposal, told them of the potential consequences of the regulatory program the agency was considering, and asked them for their input. As a matter of fact, EPA has a legal duty under Executive Order 13175 to ensure meaningful and timely input by tribal officials in the development of regulatory proposals that affect tribes. To carry out that duty, what EPA did was send the Crow Nation two "Dear Tribal Leader" form letters, one late in 2013, and one in June, 2014, days before publication of the existing source rule proposal. Nobody from the agency contacted the Crow Nation directly in a government to government contact as required by Executive Order 13175 and the Presidential Memo which implements the Order. This despite the fact the Crow Nation is one of only three Tribes, out of 566 federally recognized tribes, for whom the mining of coal burned by electrical generating units is a significant piece of the Tribal economy.

Additionally, and this relates to both the "waters of the U.S." proposal and the existing source proposal, Executive Order 13563 requires federal agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs and to tailor their regulations to impose the least burden on society consistent with regulatory objectives. It requires regulations be based on an open exchange of information and perspectives among State, local and tribal officials. In my view, EPA is not living up to its obligations, and the people of our State may end up paying a steep price for that.

The third matter I wanted to address in this testimony involves EPA's actions relating to a proposed natural resource development in Alaska. The Corps of Engineers has primary responsibility for administering the Clean Water Act's § 404 cut and fill permit program. However, § 404(c), 33 U.S.C. 1344(c), gives the EPA Administrator the authority to prohibit the specification of any defined area as a disposal site (fill site) with respect to section 404 permits. In 1979, the EPA promulgated a rule under this section which provides that "[T]he Administrator may also prohibit the specification of a site under section 404(c) with regard to any existing or potential disposal site before a permit application has been submitted to or approved by the Corps or a state." 40 C.F.R. 231.1(a). This authority, up to now, has never been used to issue a preemptive veto. However, in 2014, the EPA proposed to use the authority to issue a preemptive veto, before any formal application for a 404 permit had even been prepared or filed by the developer. As Montana's chief law enforcement officer, it concerns me greatly that the Administrator of a federal agency could preemptively veto a resource development proposal in our State before our own state agencies had an opportunity to receive, review and comment on an application for permit submitted by a developer. Though the EPA has been enjoined from proceeding with its proposed veto pending further litigation by the Alaska developer, for possible violations of the Federal Advisory Committee Act, the very fact the agency had passed a regulation allowing it to so act, and that it would propose to so act without an application, concerns me greatly, and should concern this Committee.

This concludes my testimony and I thank the Committee for inviting me to testify.