

**United States House of Representatives
Committee on Natural Resources
Subcommittee on Water and Power**

Hearing:

“New Federal Schemes to Soak Up Water Authority: Impacts on States, Water Users, Recreation, and Jobs.”

Testimony of

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June 24, 2014

Introduction

Chairman McClintock, Ranking Member Napolitano, and Members of the Subcommittee, my name is Patrick Tyrrell. I am the Wyoming State Engineer. The Wyoming State Engineer’s Office is responsible for the administration, regulation, and adjudication of water rights to surface and groundwater, both of which lay under the ownership and control of the State of Wyoming.

I appreciate the opportunity to first testify today regarding the *Proposed Directive on Groundwater Resources Management, Forest Service Manual 2560*, (hereafter the “Proposed Directive”) noticed in the Federal Register on May 6, 2014. Secondly, I will comment on Wyoming’s perspective regarding the Clean Water Act (CWA) jurisdiction rule the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) proposed on March 25, and published in the Federal Register on April 21.

Forest Service Proposed Directive

Background

The United States Forest Service (USFS) asserts that its Proposed Directive is intended to add federal management responsibilities for groundwater on USFS lands ([79 FR 25815, May 6, 2014](#)). It changes the Forest Service's national policy on water management and challenges Wyoming’s authority over groundwater within our borders, including Wyoming’s primacy in appropriation, allocation and development of groundwater. The USFS states that this Proposed Directive does not harm State rights. This is not accurate. The assumptions, definitions, and new permitting considerations contemplated under the Proposed Directive materially interfere with Wyoming’s authority over surface and groundwater, and will negatively impact the State’s water users.

Concerns

The Proposed Directive challenges state prerogatives.

1. Authority for the Proposed Directive on groundwater management does not exist. The USFS fails to cite any federal statute or court ruling which provides for or describes its authority to manage groundwater because there is no such authority under federal law. In section 2567, the Proposed Directive appears to assert reserved rights to groundwater. However, there is no authority giving National Forests the benefit of a federal reserved right to groundwater.
2. The Proposed Directive seeks to give a role in paragraph 6f for the USFS to insert itself in groundwater permitting away from USFS property. This is an extra-territorial reach beyond USFS authority, and conflicts with Wyoming water law which establishes the Wyoming State Engineer as the exclusive permitting agency. It also places a burden on water users who might have their water source proposal thwarted by USFS action. Under Wyoming law, the burden would lie with the USFS to prove a hydraulic connection sufficient to warrant conjunctive administration, not on individual appropriators as presumed by the Proposed Directive. In many cases, groundwater is not meaningfully connected to surface water, and Wyoming's presumption of non-connection is superior. This is not to concede that there is even a legal basis for a debate on this subject, since Wyoming water law controls the permitting, adjudication, and regulation of water rights on USFS lands within the State. It is entirely inappropriate for the USFS to attempt to extend its administrative reach onto lands they do not manage.
3. Conflict with recent MOU. In January 2012, the USFS and the State of Wyoming entered into a Memorandum of Understanding (MOU) that runs through 2016. In this MOU, the USFS agreed to recognize and respect the laws and Constitution of the State of Wyoming and to honor permitting practices that apply equally to the United States and to water right applications by Wyoming citizens. The Proposed Directive, creating a federal reach into an area where states have been recognized as the exclusive entity for water right permitting, is contrary to the recent MOU. I have attached a copy of the MOU for the Subcommittee's reference.
4. The Proposed Directive puts a burden on Wyoming water users. From the proposed required measurement and reporting of produced groundwater (paragraph 8), to the possible hydrogeologic studies needed to show that an aquifer is not connected to surface waters (paragraph 2), Wyoming appropriators will be faced with a new slate of obligations and costs for water use on these public lands.
5. The Proposed Directive was created without state consultation. By noticing the State of Wyoming along with the general public in the May 6 release, the USFS denied the State an important consultative role. As the primary water manager in an appropriative state like Wyoming, the State Engineer's Office is more than a simple stakeholder – we follow a system of water laws under which the federal agencies are water users like anyone else.

Treating the State as a simple commenter on federal directives ignores the State's primary authority as recognized by Congress dating from the 1800's including the McCarren Amendment (relied upon by the states since 1952), and the United States Supreme Court. Importantly, the notice indicates that USFS has consulted with Indian Tribal Governments in preparation of this document under EO 13175, but for some reason has decided not to enter consultation with the states under EO 13132. This action wrongfully diminishes Wyoming's role.

Time prohibits me from additional comment at this hearing, but I anticipate that Wyoming will prepare additional and thorough comments by the comment deadline established by the USFS. The best action the USFS could take would be to retract the current notice and comment period and thereby honor the law that give the states authority over the adjudication, administration and regulation of water rights within their boundaries.

Waters of the U.S. (WOTUS) Jurisdictional Rule

Background

The Clean Water Act limits the federal jurisdiction over state waters recognizing that the states are better situated to make decisions regarding water, including water quality in minor waters that are not of national significance. The Wyoming Department of Environmental Quality, Water Quality Division is the agency responsible for establishing water quality standards and TMDLs, administering the NPDES discharge permitting program and providing section 401 water quality certifications for federally permitted projects on waters in Wyoming. The proposed rule attempts to erode Wyoming's primary authority over low flow, remote, headwater stream channels and isolated ponds and wetlands by expanding the concept of national significance.

Concerns

1. The proposed WOTUS rule expands federal jurisdiction beyond federal authority. By broadening definitions of existing regulatory categories, such as "tributaries," and regulating new areas that are not jurisdictional under current regulations, the proposed rule provides no limit to federal jurisdiction. Water in a riparian area or a floodplain, a connection through shallow subsurface water or directly or indirectly through other waters, and aggregation of similarly situated waters, are waters that may not be within federal jurisdiction but are waters that the proposed rule attempts to capture.
 - a. The proposed rule's extension of jurisdiction to remote and insubstantial waters runs afoul of both the plurality and Justice Kennedy's standards in *Rapanos*. The plurality in *Rapanos* declined to find jurisdiction beyond "relatively permanent, standing or continuously flowing bodies of water," specifically excluding "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Rapanos v. United States*, 547 U.S. 715, 739-42 (2006). Likewise Justice Kennedy refused to find jurisdiction over "remote and insubstantial" waters that "may flow into traditional navigable waters." *Id.* at 778.

- b. Asserted Jurisdiction over groundwater. The proposed rule does not ensure that Wyoming's groundwater is off limits. While EPA and the Corps have added a specific statement in the proposed rule that excludes groundwater, they continue to assert that shallow subsurface flows could be used to establish jurisdictional nexus. In Wyoming, surface and groundwater quantity are regulated separately unless they are determined to be a single source of supply. That determination is exclusively within the purview of the Wyoming State Engineer. As a practical matter, CWA regulations cannot be applied to distinct surface waters connected only through subsurface waters without expanding jurisdiction over all groundwater in contravention of the Wyoming Constitution and without any authority to do so.
- c. Clean Water Act success depends upon state and local implementation. Expansion of EPA and Corps jurisdiction over any waters not previously considered as WOTUS is not justified by science, fact or law. The states are in the best position to protect and manage these waters.

2. Problem elements of the proposed rule.

- a. Jurisdiction over ditches. The proposed rule defines all ditches with a bed, bank and high water line as tributaries potentially subject to federal jurisdiction. This encompasses roadside, irrigation, and storm water ditches. There remains an exemption for ditches that do not contribute flow, either directly or indirectly, to water identified as navigable, interstate waters, territorial seas, and impoundments. However, the "waters are muddied" which places citizens, governments, and other entities in a position that they can no longer rely on the workable bright line rule categorically excluding ditches. This will disrupt agricultural, governmental and emergency operations.
- b. The rule does not clarify which waters fall under CWA jurisdiction (unless we are to assume that nearly all waters fall under such jurisdiction) and in fact, creates confusion and potential conflict with the Supreme Court's interpretation. Given the expedited review timeline and the glaring lack of state involvement, Wyoming is concerned that EPA and the Corps are attempting to implement a policy decision that all connections between waters are "significant" without regard to how much or how often they actually contain water or influence truly navigable waters.

The proposed rule establishes newly created, far-reaching consequences and key concepts are undefined and subject to agency discretion. The rule fosters subjectivity – a result diametrically opposed to principles of regulation, leaving us to question the authoring agencies' intent. The proposal expands the CWA's regulatory coverage of tributaries and includes broad new categories of waters, such as ditches, adjacent waters, riparian areas and floodplains, making the changes sweeping in nature and negative in consequence.

- c. Vague exemptions. The proposed rule contains confusing list of exemptions, including the narrow ditch exemption. These exemptions apply to a limited set of features applicable wholly on uplands (another critical term left undefined in the proposed rule). It is noteworthy that in the rule's preamble, EPA and the Corps acknowledge the difficulty of distinguishing excluded "gullies and rills" from potentially regulated "ephemeral streams."
 3. Flaws with the Science Advisory Board Report
 - a. The Science Advisory Board Report is void of information from actual Corp Section 404 and 401 determinations or state environmental quality offices. If the draft Report had included this information, it is difficult to conceive that a neutral reviewer would have supported the proposed CWA rulemaking and the conclusions outlined in the Connectivity Report.
 - b. The Science Advisory Board lacked any state representative, even though states like Wyoming specifically requested to have a member of its regulating agency appointed. Conversely, environmental interests were represented on the Board. The states' role would be better protected by state representation on the Board, and more effective CWA policies and regulations would result.
 - c. The Connectivity Report fails to adequately address ephemeral drainages and their impact to downstream waters of the U.S. Ephemeral water bodies may be streams, wetlands, springs, streams, ponds or lakes that only exist for a short period of time following precipitation or snowmelt. Under this rule, ephemeral streams might now be considered tributaries to navigable streams if they exhibit a bed, banks and a high water mark. Jurisdictional determination of these waters would require application of principals announced in *Rapanos*, which cannot be met through sweeping statements which attempt to alter the definition and are unrelated to actual characteristics of the water body.
 - d. The EPA and the Corps expedited submittal of the draft Connectivity Report to the EPA Science Advisory Board and, at the same time, they submitted the proposed rule to OMB. This action cuts off scientific deliberation vital to the fundamental questions underlying this proposed rule.
 4. The proposed WOTUS rule was also created without state consultation. Like other states, the State of Wyoming plays a significant role in ensuring effective implementation of the Clean Water Act. Our co-regulator status elevates the State of Wyoming, and every other state, above the multitude of other stakeholders now engaged in the public review process. It is imperative that with a rulemaking process of this magnitude, which directly impacts the states' implementation of CWA programs, that significant input and review be provided to co-regulator entities on the substance of the proposed rule. However, Wyoming and other states were not included in the WOTUS rulemaking process.

As state co-regulators, we bring a unique perspective on the western environmental issues that we handle day to day. Failing to consult with Wyoming and other states not only

violates Executive and Congressional mandates, but also erodes the very trust and cooperation upon which we co-regulators depend. The process employed here adds insult to the injury inflicted by an illegal and unwise rule.

The Wyoming State Engineer administers water quantity. Questions related specifically to water quality may be best answered by the Wyoming Department of Environmental Quality. If questions arise that I cannot answer, I will provide written answers to the subcommittee after consulting with the appropriate expert.

Thank you for the opportunity to testify here today.