WATERS OF THE UNITED STATES

Background

The Clean Water Act (CWA) provided the US Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) jurisdiction over "navigable waters," defined as a "water of the United States." Under the CWA, the federal government has jurisdiction over waters that have a substantial impact on interstate commerce, with the states controlling all other waters inside their borders.

Both the federal agencies and the courts have long struggled to find a more workable definition of "waters of the United States," and the Supreme Court has limited EPA and the Corp's jurisdiction on a number of occasions. Supreme Court decisions have determined that CWA jurisdiction cannot be based on a mere connection to a navigable water (Rapanos), nor does it extend to waters far removed from navigable waters (SWANCC).

Due to the confusion surrounding the Rapanos decision in 2006, EPA and the Corps have attempted to clarify jurisdiction through guidance. EPA's is now working to produce a clarifying rule that would greatly expand federal jurisdiction.

Rulemaking

While a proposed rule has not formally been published NAHB believes that it will be a drastic expansion of federal CWA jurisdiction. Under this new rule, any traditional water of the United States, its tributaries, and adjacent waters will be jurisdictional. Tributaries are defined to include, for the first time, man-altered and man-made water bodies, including ditches. Anything with a flow, will be considered a tributary with no examination of frequency or duration of flow. In addition, neighboring or adjacent waters and their tributaries will also be jurisdictional. This includes any water situated inside of a floodplain (potentially unlimited) or riparian areas. If there is anything else that is not considered a tributary or adjacent/neighboring water, agencies can aggregate "other waters" with a "single landscape unit" to find a significant connection.

The proposal creates more confusion than clarity. EPA's uses terms that have yet to be defined, which opens the door to potentially unlimited federal authority, leaving the burden of proof on the landowner.

This rulemaking will distort and ignore CWA Supreme Court decisions. The proposed rule obliterates State authority over land and water, contrary to Rapanos and Congressional intent under the CWA. In Rapanos, Justice Kennedy's key point was that "any" connection is not enough to establish CWA jurisdiction and that there must be some defined limit to where federal jurisdiction ends and State jurisdiction begins. Therefore, the Court rejected the Government's

"any" connection theory and instead required a significant nexus between wetlands in questions and navigable waters. The proposed rule treats any connection as regulable, directly contradicting Justice Kennedy's opinion.

Impact on Construction

Expanding jurisdiction causes delays and increase construction costs. Expanding federal authority over water and land use would greatly increase the number of construction sites required to obtain a federal clean water act permit. This would delay or stop construction projects nationwide and slow economic growth.

A backlog of pending CWA permit requests already exists. The current backlog for permits is between 15,000-20,000 and on average, an individual permit takes two to three years to receive. If this rule is finalized, more projects will require permits thereby increasing the backlog.

Expanding jurisdiction affects the entire CWA. EPA's economic analysis has been limited to costs association with section 404 of the CWA and fails to consider the full costs of implementing expanded jurisdiction. The cost of this expansion will impact all programs of the CWA, including 303, 311, 401, and 402. EPA has significantly underestimated the costs associated with this rule.

Take Action

- Congress - Encourage the EPA to reconsider issuing this draft regulation, and require EPA to respond to industry concerns prior to the issuance of a proposed regulation.

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