2596 South Lewis Way | Lakewood, CO 80227 | Tel: 303.292.2021

Waters of the United States ("WOTUS") Regulation Comment

Mountain States Legal Foundation, a non-profit, public interest law firm located in Lakewood, Colorado. One of Mountain States' focuses is defending property rights, particularly on behalf of farmers and ranchers. The definition of Waters of the United States ("WOTUS") under the Clean Water Act ("CWA") directly affects our farming and ranching clients.

We write to emphasize principles that should guide the agency throughout the rulemaking process, particularly (1) limits on congressional authority under the United States Constitution and (2) principles of statutory interpretation.

First, we turn to congressional authority. As the agency is no doubt acutely aware, too broad a definition of WOTUS would violate the United States Constitution (or, more precisely, such a definition would render the CWA unconstitutional). The CWA relies on Congress's authority to regulate interstate commerce under Article 1 § 8 of the Constitution, "Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes[.]" U.S. CONST. art. I, § 8, cl. 3.

Undoubtedly, Congress' powers under the Commerce Clause are broad. *See Wickard v. Filburn*, 317 U.S. 111, 127 (1942) (growing wheat for personal consumption was regulated under the Commerce Clause); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258, 261 (1964) (the question of whether "Congress had a rational basis for finding that racial discrimination by motels affected commerce" was answered in the affirmative). There are "three broad categories of activity that Congress may regulate under its commerce power." *United States v. Morrison*, 529 U.S. 598, 608 (2000) (quotation and citation omitted). "First, Congress may regulate the use of the *channels* of interstate commerce." *Id.* at 609 (emphasis added) (quotation and citation omitted). "Second, Congress is empowered to regulate and protect the *instrumentalities* of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id.* (emphasis added) (quotation and citation omitted). "Finally, Congress' commerce authority includes the power to regulate those activities having a *substantial relation to interstate commerce*, . . . *i.e.*, those activities that substantially affect interstate commerce." *Id.* (emphasis added) (quotation and citation omitted).

Congress relied on the first category—its authority over channels of interstate commerce—when it enacted the Clean Water Act and gave the EPA power to regulate navigable waters. *United States v. Deaton*, 332 F.3d 698, 706 (2003) ("The power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce."). However, interpretation of "navigable waters" and "Waters of the United States" has repeatedly gone too far. *See Rapanos v. United*

States, 547 U.S. 715, 722 (2006) (plurality opinion) (noting "the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute"); *Id.* at 738 (plurality) (noting expansive interpretation "stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power," and expecting "a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity"); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001) (noting but not reaching "significant constitutional questions" raised by expansive interpretation of the CWA's reach). Executive agencies should adopt a narrow definition of WOTUS in order to avoid rendering the CWA unconstitutional.

"The 1972 amendments to the Clean Water Act established federal jurisdiction over 'navigable waters[.]'" UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, http://epa.gov/wotus/about-waters-united-states (last visited Jan. 28, 2022). "The term 'navigable waters' means waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). According to the EPA, "'Waters of the United States' is a threshold term in the Clean Water Act and establishes the scope of federal jurisdiction under the Act. . . . The Clean Water Act does not define 'waters of the United States'; rather, it provides discretion for EPA and the U.S. Department of the Army to define 'waters of the United States' in regulations." UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, http://epa.gov/wotus/about-waters-united-states (last visited Jan. 28, 2022).

The EPA's authority is limited not merely by the Constitution, but by the statute it proposes to interpret. The Commerce Clause limits Congress's jurisdiction to interstate commerce, but Congress itself limited agency discretion when it restricted the scope of the CWA to "navigable waters" in the statute's text. In fact, Title 33 under the United States Code is called "Navigation and Navigable Waters," and the Clean Water Act begins at 33 U.S.C. § 1251 et seq, within Title 33. Although navigable waters are defined as "waters of the United States, including the territorial seas[,]" both "navigable" and "waters" function as significant limits on agency authority. 33 U.S.C. § 1362(7). The whole-act rule is defined as "[t]he legal doctrine that a legal text, [] a statute, must be construed as a whole." *Whole-Text Canon*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See Caminetti v. United States*, 242 U.S. 470, 497 (1917) ("It is a peremptory rule of construction that all parts of a statute must be taken into account in ascertaining its meaning . . . [e]ven if it gives only a title to the act, it has especial weight . . . [b]ut it gives more than a title; it makes distinctive the purpose of the statute.").

Accordingly, while the Supreme Court has noted that "navigable waters" in the CWA is defined more broadly than that term's traditional understanding, it "ha[s] also emphasized, however, that the qualifier 'navigable' is not devoid of significance[.]" *Rapanos*, 547 U.S. at 731 (plurality). The Court has also emphasized the limits that "waters" (as opposed to "*water*") places on the agency. *See Rapanos*, 547 U.S. at 732 (plurality) ("The Corps' expansive approach might be arguable if the CWA defined 'navigable waters' as 'water of the United States.' But 'the waters of the United States' is something else.").

Most importantly, however the agency should bear in mind the *reason* for these limits on its authority: the protection of individual liberty. As Justice Powell wrote,

> [t]he harm to the States that results from federal overreaching under the Commerce Clause is not simply a matter of dollars and cents. Nor is it a matter of the wisdom or folly of certain policy choices. Rather, by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 572 (1985) (Powell, J., dissenting) (cleaned up). Every day, our clients must face the consequences of oppressive federal regulatory overreach. The agency's job is not to maximize the challenges they face to the maximum extent possible under its constitutional and statutory authority. Rather, the agency ought to design a rule that, to the greatest extent possible, leaves America's farmers and ranchers alone, as they serve the essential task of feeding the country that all too often tries to regulate them out of business.

Any rule that meets these essential criteria will necessarily be *clear*, and the current proposal continues in the executive branch's inglorious tradition of leaving too much to its own case-by-case discretion. Farmers and ranchers cannot read the current proposal and easily ascertain, for example, whether occasional or intermittent streams or temporary puddles created by rain on their property are federally regulated. The rule as proposed also lacks any exemptions for agricultural uses like stock ponds. It lacks any exclusion for groundwater. Of particular concern is that the rule fails to disclaim authority over anything that is not water. *See Rapanos*, 547 U.S. at 739 (plurality) (noting that waters of the United States "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.).

The agency must put forth a proposal that conforms with the limits placed on it by the Constitution and the CWA, and that further protects individual liberty by making clear to farmers and ranchers what exactly the agency claims falls under its authority. If it does not, Mountain States Legal Foundation expects to challenge the rule on behalf of the farmers and ranchers it wrongs.