

Minutes of the
EMPOWER NORTH DAKOTA COMMISSION

November 5th, 2014
ND Department of Commerce
1600 E. Century Avenue Suite 2
Conference Call
Bismarck, ND 58503

Members present:

Al Anderson, Mark Nisbet

Members present via phone:

Dale Niezwaag, Jason Bohrer, David Straley, Terry Goerger, Ron Day, Eric Mack

Ex Officio Members present via phone:

Julie Voeck
Sandi Tabor
Mark Bring

Others present:

Justin Dever, Department of Commerce
Mike Fladeland, Department of Commerce
Sherri Frieze, Department of Commerce

CALL TO ORDER

Chairman Anderson called the special meeting to order at 11:00 a.m. A quorum was declared.

LETTER TO THE EPA

Members approved the letter as amended.

Motion: It was moved by Goerger and seconded by Bohrer to approve Comments on Proposed Rule Regarding Definitions of "Waters of the United States" Under the Clean Waters Act Letter.

Appendix A

Comment from the Public

Ken Hellevang, NDSU commented that the ruling will have a significant impact on farmers with regard to petroleum storage on the farm and the requirement for secondary containment. He commented that the broader interpretation of Waters of the U.S. would require many if not most of the farmers to incur expensive systems that in many if not most cases there is limited need for secondary containment.

DRILL CUTTINGS BILL

Chairman Anderson and Ron Day discussed challenges the Department of Health foresees with recycling and tax credit issues. It was decided to call the Drill Cuttings bill.

Motion: It was moved by Nisbet and seconded by Day to withdraw the Drill Cuttings Bill, 57-51.1-01 & 57-51.1-03, previously approved by the Commission and proposed to the Energy Development and Transmission Interim Committee.

Appendix B

ADJOURNMENT

The meeting was adjourned unanimously at 12:00 p.m.

Al Anderson
Chairman

Date

Sherri Frieze
Recording Secretary

Date



Filed via www.regulations.gov

Attention: Docket ID No. EPA-HQ-OW-2011-0880

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave. NW.
Washington, DC 20460

RE: Comments on Proposed Rule Regarding Definition of "Waters of the United States" Under the Clean Water Act; 79 Fed. Reg. 22187; April 21, 2014

Dear Administrator McCarthy:

The North Dakota EmPower Commission (EmPowerND) respectfully submits these comments in response to the proposed rule regarding the identification of waters protected by the Clean Water Act (CWA) published by the Corps of Engineers (Corps) and the Environmental Protection Agency (EPA). For the reasons stated below, EmPowerND requests that the EPA and Corps withdraw the proposed rule.

North Dakota is one of the only states with a multi-resource energy policy, guided by the efforts of the EmPowerND. In 2007, the North Dakota Legislature formalized energy policy and created the 17-member North Dakota EmPower Commission which includes representatives from across the energy industry.

Background on North Dakota Waters

There are over 5,000 miles of major rivers and tributaries in North Dakota. With a climate characterized as sub-humid continental, precipitation in the state ranges from 13 inches in the northwest to more than 20 inches in the east and southeast. Flow in all streams is seasonally quite variable. Runoff is often the greatest in early spring as a result of snowmelt water and spring rainfall. Many of the smaller streams experience little or no flow for extended periods during drier summer months. Lakes and reservoirs total nearly 863,000 acres with the seven largest comprising 520,000 of the total acres. The state also contains approximately 2.5 million acres classified as wetlands, and 6%

"We lead North Dakota's efforts to attract, retain and expand wealth."

of the state's total acreage is located in floodplain areas.¹

These simple facts highlight our main concern with the attempt by the EPA and Corps to expand their jurisdiction over water currently considered non-jurisdictional in North Dakota. As is noted below, when finalized the proposed rule will serve as a tool for agency staff to deem wetlands and other interstate waters, including many of North Dakota's ephemeral streams, as navigable waters with little or perhaps no justification based in statute. In light of the potential expansion of jurisdiction and the potential cost to North Dakota businesses and property owners, EmPowerND believes the EPA and Corps need to reexamine the scope of the proposed rule.

Traditional Navigable Waters

Traditional navigable waters are not defined in the current regulations. Rather, the term has been used by the United States Supreme Court to refer to the "navigable waters of the United States" as regulated under the Rivers and Harbors Act ("RHA"). The navigable waters regulated by the RHA are generally those waters capable of transporting interstate commerce among states. The proposed rule expands the scope of the term "traditional navigable waters" to include water for which "a Federal court has determined that the water body is 'navigable-in-fact' under Federal law for any purpose"², and to waters that are "currently being used for navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments)."³ This expansive view of traditional navigable waters is not supported by the *SWANCC* or *Rapanos* decisions; rather it was invented by the EPA and Corps to expand their jurisdiction. EmPowerND requests that the agencies make this standard more in line with waters that the Court had in mind with the *Rapanos* decision – waters used for transportation of commercial goods in interstate or foreign commerce – and make such determinations subject to an established public process.

Under the proposed rule, all waters with a significant nexus to traditional navigable waters would be jurisdictional. In addition, all wetlands that are adjacent to traditional navigable waters are jurisdictional based on a showing of adjacency alone.⁴ That is, there is no need to show a significant nexus; an adjacent wetland would be presumed jurisdictional based solely on its location. This expansion of the interpretation of traditional navigable waters will increase the number of waters that will be adjacent to or will have a significant nexus. Given this proposed change in scope, EmPowerND is concerned that virtually all bodies of water in North Dakota will be jurisdictional, including ditches and prairie potholes.

Interstate Waters

The proposed rule also gives new status to interstate waters by allowing for certain

¹ *Water in North Dakota – A Reference Guide*, ND State Water Commission, 2005.

² 79 Fed. Reg. at 22,255

³ 79 Fed. Reg. at 22,200

⁴ 79 Fed. Reg. at 22,204, 22,209-12

features to be jurisdictional based on a relationship to interstate waters. For example, “other waters” can now be jurisdictional if they have a significant nexus to non-navigable interstate waters.⁵ As such, interstate waters do **not** need to be navigable. For the first time interstate waters will be equated to traditional navigable waters for purposes of CWA jurisdiction.

This broad definition of interstate waters will allow the EPA and Corps to include any waters or wetlands with a significant nexus to interstate waters under its jurisdiction. Moreover, waters providing flow to interstate waters will be deemed jurisdictional tributaries. Neither Justices Kennedy nor Scalia discussed interstate waters in *Rapanos*, and there is no support for this definition in *SWANCC*, *Rapanos*, or *Riverside Bayview* cases.⁶ Again, the EPA and Corps seek to expand the universe of waters to which a significant nexus can be made, making it easier for them to establish jurisdiction.

Significant Nexus

Current regulations do not mention significant nexus; rather the term is derived from the *SWANCC* and *Rapanos* decisions. In his *Rapanos* concurrence, Justice Kennedy noted that wetlands having a significant nexus to traditional navigable waters are “waters of the United States” if the *wetlands*, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.⁷ The 2008 *Rapanos* Guidance limited the notion of “similarly situated” to wetlands alone, consistent with Kennedy’s use of that term. This proposed rule applies Kennedy’s significant nexus standard to tributaries, including ditches, wetlands, and non-wetland “physically proximate” other waters.

The 2008 Guidance also limited the significant nexus analysis for tributaries to the tributary “reach.” The reach was defined as the length of the tributary to where it joined a higher order stream. For impacts to an adjacent wetland, the 2008 Guidance evaluated only wetlands within the reach of the tributary to which the wetland was adjacent. The proposed rule eliminates the “reach” concept, and requires all tributaries, wetlands, and proximate other waters in the same watershed to be aggregated and considered together in determining whether the water has a significant nexus.⁸ A watershed is defined by the single point of entry draining into the nearest traditional navigable water or interstate water. This means that all tributaries, wetlands, or proximate other waters in a watershed may be evaluated together for purposes of determining whether the water or wetland in question has a significant nexus to traditional navigable or interstate waters. This has the effect of adding potentially hundreds of tributaries, wetlands, and non-wetland waters to the significant nexus analysis, thus making it easier to find that there is a significant nexus.

⁵ 79 Fed. Reg. at 22,200

⁶ *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121.

⁷ *Rapanos* at 780.

⁸ 79 Fed. Reg. 22,212

In addition a hydrological connection is not necessary to establish a significant nexus. Instead, the EPA and Corps crafted a broad definition of significant nexus, which instructs the field staff to determine whether certain functions such as “sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, and provision of aquatic habitat” are present.⁹ Field staff is also instructed to look for indicators of hydrology, effects on water quality, and physical, chemical, and biological connections or functions.

Moreover, the proposed rule continues to perpetuate the notion from previous guidance documents that any relationship which is more than speculative or insubstantial will qualify as a “significant nexus” instead of requiring that the nexus actually be significant or substantial. The difference is important as even a minor nexus would qualify as “more than speculative” even though a minor nexus is clearly not the same as a significant nexus. The result is yet another way to expand EPA and Corps jurisdiction, and it represents a significant change from previous CWA regulations.

Tributaries

While listed as jurisdictional under current regulations, tributaries are not defined. The proposed rule defines a water as a tributary if it contributes flow to a traditional navigable water or interstate water, either directly or indirectly by means of other tributaries.¹⁰ A tributary is physically defined by the presence of a channel with a bed and bank and an ordinary high water mark (OHWM). The proposed rule notes that a tributary continues as far as a channel (i.e., bed and bank) is present. This extension is important in that channels are everywhere and most channels carry water.

The definition for tributaries proposed by this rule would require regulation of ephemeral drainages, ditches, and conveyances that are not currently considered “waters of the United States.” The agencies’ determination that these features, even if they only flow for hours or days following a rain event, have a significant nexus to waters of the United States expands the concept of tributary to essentially any type of water.

EmPowerND is concerned with this new definition for several reasons. In conducting agricultural, mining, or other land disturbance activities, one encounters many hydrologic and ephemeral connections. This power grab disregards the holding in both the *SWANCC* and *Rapanos* decisions where the Court found that the CWA does not support an expansive meaning of the term “waters of the United States” to include ephemeral channels and drains as tributaries. In *Rapanos*, the Court expressly held that including “ephemeral streams, wet meadows, storm sewers ... within the meaning of ‘waters of the U.S.’ has stretched the term beyond parody.”¹¹ In fact, ephemeral streams are typically dry channels or erosional features that are small and carry water only in response to precipitation, and lack more than an attenuated connection to traditionally navigable waters. The EPA and Corps cannot simply create a regulatory

⁹ 79 Fed. Reg. 22,261

¹⁰ 79 Fed. Reg. at 22,263

¹¹ *Rapanos* at 732.

presumption of jurisdiction over ephemeral waters and impose jurisdiction under the CWA contrary to the Court's decisions.

Ditches as Tributaries

The current regulations do not define "ditches" as a category of jurisdictional waters, and ditches were generally excluded from the 2008 *Rapanos* Guidance. The proposed rule, however, for the first time outlines a number of circumstances under which ditches will become jurisdictional.¹² To be jurisdictional, a ditch must have (1) a bed and bank (anything with a channel appears to meet this requirement) and (2) an ordinary high water mark. The ditch must also connect directly or indirectly to a traditional navigable water or interstate water; and meet one of following five characteristics:

- natural streams that have been altered;
- ditches that have been excavated in waters of the U.S., including wetlands;
- ditches that have relatively permanent flowing or standing water;
- ditches that connect two or more jurisdictional waters of the U.S.; or
- ditches that drain natural water bodies (including wetlands) into the tributary system of a traditional navigable or interstate water."

Most ditches carry flow, contain standing water, and/or drain areas that have water. This standard, while more complicated than before, ultimately amounts to the same standard that was **rejected** by both the plurality and Justice Kennedy in *Rapanos*, namely anything that connects to a navigable water is jurisdictional. As such, EmPowerND urges the EPA and Corps to exclude ditches and revise the proposed rule to be consistent with the *Rapanos* decision.

Although the agencies provide two narrow exemptions for ditches, they are not clear and are not likely to exclude many ditches from jurisdiction. The proposed rule excludes ditches that: 1) are excavated wholly in uplands for their entire length, drain only uplands, and have less than perennial flow; and 2) ditches that do not contribute flow, either directly, or indirectly, to a traditional navigable waterway, interstate water, territorial sea, or tributary¹³.

Under the language of the proposed rule, it is not clear what features will even distinguish a ditch relative to an ephemeral drainage or gully. The agencies have also not provided definitions for what constitutes an "upland" or how the agencies might consider "for the entire length." The ambiguous nature of these narrow exclusions does not provide any assurances that the agencies would not find jurisdiction over the vast majority of ditches.

Finally, since section 402 of the CWA already regulates discharges to navigable waters and storm water management systems, the EPA already has a regulatory system in place to address impacts of ditches to jurisdictional waters of the U.S.

¹² 79 Fed. Reg. at 22,262

¹³ 79 Fed. Reg. at 22,2203

Adjacent Wetlands

Wetlands adjacent to other jurisdictional waters (other than wetlands) are a category of jurisdictional waters under existing regulations. EPA and the Corps will assert CWA jurisdiction over adjacent wetlands that meet either the *Rapanos* plurality standard or the *Rapanos* Kennedy standard, again based on the agencies' interpretation of both standards.

Plurality Standard for Adjacent Wetlands Under the *Rapanos* plurality standard, wetlands are jurisdictional based on the presence of a physical connection between the wetland and a relatively permanent water to which it is adjacent. According to the EPA and Corps, under the plurality standard an adjacent wetland is jurisdictional when (1) the wetland is adjacent to a relatively permanent, non-navigable tributary connected to a downstream traditional navigable water; and (2) a continuous surface connection exists where the wetland directly abuts the relatively permanent water (no separation by dikes, berms, etc.). The proposed rule, however, states that a continuous surface connection does **not** require the presence of water at all times in the connection.¹⁴ In other words, a continuous surface connection does **not** require a continuous surface water connection.

Kennedy Standard for Adjacent Wetlands The agencies recognized that to be an "adjacent wetland" under the Kennedy standard, the wetland must first meet the regulatory definition of "adjacent," *i.e.*, be "bordering, contiguous, or neighboring." The Proposed rule provides that to meet this regulatory definition of adjacency, at least one of the following criteria must be satisfied: (1) there is an unbroken surface or shallow sub-surface hydrologic connection between the wetlands and jurisdictional waters; (2) wetlands are physically separated by man-made dikes or barriers; or (3) where a wetland's physical proximity to a jurisdictional water is reasonably close such that there is a demonstrable ecological interconnection between the wetlands and the jurisdictional water body. For example, a wetland would be considered neighboring and therefore, "reasonably close" if the wetland was within a riparian area or in a floodplain.

If the wetland is adjacent to a traditional navigable water or non-wetland interstate water, it is *per se* jurisdictional and does not require a showing of significant nexus. If the wetland is adjacent to a tributary, lake, reservoir, or other jurisdictional water (other than a wetland), it must be evaluated pursuant to the broad significant nexus analysis set forth in the proposed rule. In light of the substantial number of wetland acres identified in North Dakota, EmPowerND has significant concerns regarding how jurisdiction over wetlands will be determined under the proposed rule.

Furthermore, the proposed rule expands the definition of "neighboring" to include

¹⁴ 79 Fed. Reg. at 22,263

floodplains and riparian areas. With six percent of North Dakota's total acreage categorized as floodplain, this could greatly increase the scope of the proposed rule's jurisdiction in the state.

Other Waters

The agencies' regulation of "other waters" as proposed in the rule is in violation of the Supreme Court's decision in *SWANCC*. In the proposed rule, the agencies would assert CWA jurisdiction to, "[o]n a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly-situated waters, including wetlands located in the same region, have a significant nexus" to traditional navigable waters, interstate waters, or territorial seas.¹⁵

The *SWANCC* Court ruled that "nonnavigable, isolated, intrastate waters" were not jurisdictional under the CWA¹⁶, and further found that asserting jurisdiction over such waters would raise "significant constitutional questions" and "would result in a significant impingement of the States' traditional and primary power over land and water use."¹⁷

The Court's rationale in *SWANCC* for rejecting jurisdiction over non-navigable isolated waters was reaffirmed in Justice Kennedy's *Rapanos* concurrence. Based on this clear guidance from the Court, EmPowerND believes that the agencies' proposed regulation over "other waters" should be excluded from the rule.

Conclusion

The proposed rule seems to violate the very basic constitutional principles of federalism that were clearly intended by Congress and the CWA. The very fact that the preamble has to explain that puddles are considered waters of the U.S.¹⁸ illustrates the broad and overreaching jurisdiction the federal government could assert under this proposed rule.

Presidential Executive Order 12866 that requires each Federal agency to tailor regulations to impose the least burden on individuals and businesses consistent with obtaining the agency's regulatory objectives, taking into account the costs of cumulative regulations. The Proposed rule violates the spirit of the Executive Order in that compliance with the document will bring further gridlock to CWA permitting, waste taxpayer money, cost jobs, decrease state revenues, and threaten energy supplies and private property rights, with no measureable or defined impact on waters of the U.S.

The EPA and Corps claim that the proposed rule will improve CWA program predictability and clarity. In fact, the proposed rule reduces clarity and creates great uncertainty by expanding jurisdiction beyond the scope of the Clean Water Act, current regulations and U.S. Supreme Court decisions. In light of the increased jurisdictional

¹⁵ Id.

¹⁶ 531 U.S. at 168

¹⁷ Id. At 174

¹⁸ 79 Fed. Reg. at 22,218

Introduced by

1 A BILL for an Act to create and enact chapter 23-48, a new subsection to section 57-51.1-01,
2 and a new subsection to section 57-51.1-03 of the North Dakota Century Code, relating to
3 licensing of commercial drill cuttings recyclers and an oil extraction tax reduction for delivery of
4 drill cuttings to a licensed commercial drill cuttings recycler; to amend and reenact subsection 4
5 of section 38-08-04 of the North Dakota Century Code, relating to definitions; to provide an
6 effective date; and to provide an expiration date.

7 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

8 **SECTION 1.** Chapter 23-48 of the North Dakota Century Code is created and enacted as
9 follows:

10 **23-48-01. Licensing of commercial drill cuttings recyclers - Fees.**

11 The state department of health shall license commercial drill cuttings recyclers and
12 recycling facilities and may charge a license fee established by rule commensurate with the
13 cost to the department of licensing and facility inspections.

14 **23-48-02. Rules.**

15 The state department of health shall adopt rules under chapter 28-32 effective not later than
16 October 1, 2015, governing operations of commercial drill cuttings recyclers and recycling
17 facilities. The rules must be adopted to assure compliance with federal and state laws and rules
18 for protection of the state's water and air and public health in the handling and subsequent use
19 of drill cuttings.

20 **23-48-03. Examination of records and property.**

21 Upon presentation of official credentials, an employee authorized by the state department of
22 health may:

- 23 1. Examine the premises and facilities and copy books, papers, records, memoranda, or
24 data of a commercial drill cuttings recycler.

1 2. Enter upon public or private property for the purpose of taking action authorized by this
2 chapter and rules adopted under this chapter, including obtaining information from any
3 person, conducting surveys and investigations, and taking corrective action.

4 **23-48-04. Responsibility for cost.**

5 The owner or operator of a commercial drill cuttings recycling facility is liable for the cost of
6 any inspection and corrective action required by the state department of health.

7 **23-48-05. Causes of action restricted.**

8 Upon delivery of drill cuttings to a licensed commercial drill cuttings recycler or recycling
9 facility and acceptance of the drill cuttings by the recycler or recycling facility, the well operator
10 is not liable for any subsequent disposal or reuse of the drill cuttings or any material contained
11 in the drill cuttings. This chapter does not create any new cause of action for damages on behalf
12 of third parties for any subsequent disposal or reuse of the drill cuttings or any material
13 contained in the drill cuttings.

14 **23-48-06. Commercial drill cuttings recycler bond.**

15 As a condition of licensure, the state department of health may require that a commercial
16 drill cuttings recycler must post a bond payable to the state in a sufficient amount for
17 remediation of any release or disposal of materials in violation of the rules adopted by the
18 department.

19 **SECTION 2. AMENDMENT.** Subsection 4 of section 38-08-04 of the North Dakota Century
20 Code is amended and reenacted as follows:

21 4. To classify wells as oil or gas wells for purposes material to the interpretation or
22 enforcement of this chapter, to classify and determine the status and depth of wells
23 that are stripper well property as defined in ~~subsection 8 of~~ section 57-51.1-01, to
24 certify to the tax commissioner which wells are stripper wells and the depth of those
25 wells, to recertify stripper wells that are reentered and recompleted as horizontal wells,
26 and to certify to the tax commissioner which wells involve secondary or tertiary
27 recovery operations under section 57-51.1-01, and the date of qualification for the
28 reduced rate of oil extraction tax for secondary and tertiary recovery operations.

29 **SECTION 3.** A new subsection to section 57-51.1-01 of the North Dakota Century Code is
30 created and enacted as follows:

1 "Drill cuttings" means earth and rock extracted from the wellbore during oil and gas
2 drilling operations but does not include drilling fluids injected into the wellbore.

3 **SECTION 4.** A new subsection to section 57-51.1-03 of the North Dakota Century Code is
4 created and enacted as follows:

5 If the well operator causes seventy-five percent or more of the drill cuttings from a well
6 drilled and completed after June 30, 2015, to be delivered to a licensed commercial
7 drill cuttings recycler or recycling facility before completion of the well, the first fifty
8 thousand barrels of oil produced during the first eighteen months after completion is
9 subject to a reduced tax rate of five percent of the gross value at the well of the oil
10 extracted under this chapter. If the well operator causes seventy-five percent or more
11 of the drill cuttings from a well drilled and completed after June 30, 2015, to be
12 delivered to a licensed commercial drill cuttings recycler or recycling facility before
13 completion of the well and none of the remaining drill cuttings are deposited in a
14 reserve pit near the well site, the first fifty thousand barrels of oil produced during the
15 first eighteen months after completion is subject to a reduced tax rate of four percent
16 of the gross value at the well of the oil extracted under this chapter. A well eligible for a
17 reduced tax rate under this subsection is eligible for the exemption for horizontal wells
18 under subsection 3, if the exemption under subsection 3 is effective during all or part
19 of the first twenty-four months after completion.

20 **SECTION 5. EFFECTIVE - EXPIRATION DATE.** Section 4 of this Act is effective for taxable
21 events occurring after June 30, 2015, and before July 1, 2019, and is thereafter ineffective.