

CONCURRENT RESOLUTION ON WATERS OF THE UNITED STATES

2016 GENERAL SESSION

STATE OF UTAH

LONG TITLE**General Description:**

This concurrent resolution of the Legislature and the Governor expresses support to Attorney General Sean Reyes in seeking to vacate a federal rule defining "waters of the United States."

Highlighted Provisions:

This resolution:

- ▶ expresses disapproval of the expansion of the term "waters of the United States" to include ephemeral drainages, dry washes, gullies, and arroyos, which only move water after rain; and
- ▶ expresses support for Attorney General Sean Reyes in seeking to vacate this expansive rule.

Special Clauses:

None

Be it resolved by the Legislature of the state of Utah, the Governor concurring therein:

WHEREAS, the scope of federal authority to regulate "navigable waters" under the Clean Water Act is established by the regulatory definition of the term "waters of the United States";

WHEREAS, on June 29, 2015, the Environmental Protection Agency and the United States Army Corps of Engineers (agencies) finalized a new regulation expanding the scope of this definition;

WHEREAS, the rule expands federal jurisdiction over a broad range of dry land and water features found within the state of Utah, such as ephemeral drainages, dry washes, gullies, and arroyos, which only move water after rain;

WHEREAS, the definition of "tributary" is one of the most expansive and problematic terms in the proposed rule;

WHEREAS, a tributary is commonly understood as a "stream" or "river" flowing into a

33 larger stream or river, yet the new rule would include ephemeral drainages in the definition of
34 tributary, even though they channel water only after heavy storms and are dry most of the time;

35 WHEREAS, the rule violates previous United States Supreme Court decisions *Solid*
36 *Waste Agency of Northern Cook County v. United States Army Corps of Engineers*
37 (*SWANCC*), 531 U.S. 159 (2001) and *Rapanos v. United States* (*Rapanos*), 547 U.S. 715, 725
38 (2006), which interprets the scope of federal authority under the Clean Water Act to be more
39 limited than the new rule;

40 WHEREAS, the United States Supreme Court clarified and set limitations in defining
41 "waters of the United States" under the Clean Water Act in the *Rapanos* decision, stating,
42 "waters of the United States" includes only those "relatively permanent, standing or
43 continuously flowing bodies of water 'forming geographic features' that are described in
44 ordinary parlance as 'streams, . . . oceans, rivers, [and] lakes";

45 WHEREAS, the United States Supreme Court defined the relationship between the
46 federal regulatory agencies and the states finding, "Where an administrative interpretation of a
47 statute invokes the outer limits of Congress's power, we expect a clear indication that Congress
48 intended that result. This requirement stems from our prudential desire not to needlessly reach
49 constitutional issues and our assumption that Congress does not casually authorize
50 administrative agencies to interpret a statute to push the limit of congressional authority. This
51 concern is heightened where the administrative interpretation alters the federal-state framework
52 by permitting federal encroachment upon traditional state power. Unless Congress conveys its
53 purpose clearly, it is not deemed to have significantly changed the federal-state balance";

54 WHEREAS, according to the Army Corps of Engineers in certain memoranda, the rule
55 is "inconsistent with *SWANCC* and *Rapanos*. This assertion of Clean Water Act jurisdiction
56 over millions of acres of isolated waters . . . undermines the legal and scientific credibility of
57 the rule";

58 WHEREAS, the Army Corps of Engineers said, "the draft final rule continues to depart
59 significantly from the version provided for public comments, and that the Corps
60 recommendations relation to our serious concerns have gone unaddressed. Specifically, the
61 current draft final rule contradicts long-standing and well-established legal principles
62 undergirding Clean Water Act 404 regulations and regulatory practices, especially the decisive
63 *Rapanos* Supreme Court decision. The rule's contradictions with legal principles generate

64 multiple legal and technical consequences that in the view of the Corps would be fatal to the
65 rule in this current form";

66 WHEREAS, the Corps further states, "The preamble to the proposed rule and the draft
67 preamble to the draft rule state that the rulemaking has been a joint effort of the EPA and the
68 Corps, and that both agencies have jointly made significant findings, reached important
69 conclusions, and stand behind the rule. These statements are not accurate";

70 WHEREAS, the Corps charges the EPA "selectively applied out of context, and mixes
71 terminology and disparate data set. In the Corp's judgment, these documents contain numerous
72 inappropriate assumptions with no connection to the data provided, misapplied data, analytical
73 deficiencies, and logical inconsistencies";

74 WHEREAS, the rule exceeds the powers granted to the agencies by the United States
75 Constitution, Article 1, Section 8, to regulate channels of commerce within the state of Utah;

76 WHEREAS, the rule usurps the rights and powers reserved and granted by the Tenth
77 Amendment to the United States Constitution to the state of Utah to regulate intrastate land use
78 and water resources;

79 WHEREAS, the rule would regulate many irrigation ditches key to Utah agriculture as
80 tributaries, imposing restrictions beyond those required by the state engineer and interfering
81 with water rights;

82 WHEREAS, the rule regulates most wetlands, lakes, seasonally ponded areas, and
83 ponds, including those constructed for stock watering and irrigation;

84 WHEREAS, to avoid the risk of liability from enforcement actions and citizens' suits,
85 farmers and ranchers must ensure that farming and ranching activities do not cause a discharge
86 of any pollutant (including pesticides and fertilizers) into any "waters of the United States" or
87 that the activities are authorized by a federal Clean Water Act permit;

88 WHEREAS, the rule requires farmers and ranchers to seek new federal permits for
89 pesticide and fertilizer applications to these newly defined "waters of the United States";

90 WHEREAS, the rule does not provide landowners with the tools needed to determine
91 whether water features on their property are "waters of the United States"; and

92 WHEREAS, the new rule exceeds the scope of jurisdiction granted by Congress in the
93 Clean Water Act, and thus violates the Administrative Procedure Act;

94 NOW, THEREFORE, BE IT RESOLVED that the Legislature of the state of Utah, the

95 Governor concurring therein, finds the rule defining "waters of the United States" to be an
96 unlawful exercise of federal regulatory authority.

97 BE IT FURTHER RESOLVED that the Legislature and the Governor support the legal
98 challenge brought by Attorney General Sean Reyes to vacate the final rule.

99 BE IT FURTHER RESOLVED that a copy of this resolution be sent to Governor
100 Herbert, Attorney General Sean Reyes, and Utah's congressional delegation.

Legislative Review Note
as of 8-18-15 8:41 AM

Office of Legislative Research and General Counsel