

CONCURRENT RESOLUTION ON WATERS OF THE UNITED STATES

2016 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Michael E. Noel

Senate Sponsor: David P. Hinkins

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, coulees, 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



28 States Army Corps of Engineers (agencies) finalized a new regulation expanding the scope of
29 this definition;

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

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

35 WHEREAS, a tributary is commonly understood as a "stream" or "river" flowing into a
36 larger stream or river, yet the new rule would include ephemeral drainages in the definition of
37 tributary, even though they channel water only after heavy storms and are dry most of the time;

38 WHEREAS, the rule violates previous United States Supreme Court decisions *Solid*
39 *Waste Agency of Northern Cook County v. United States Army Corps of Engineers*
40 *(SWANCC)*, 531 U.S. 159 (2001) and *Rapanos v. United States (Rapanos)*, 547 U.S. 715, 725
41 (2006), which interprets the scope of federal authority under the Clean Water Act to be more
42 limited than the new rule;

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

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

57 WHEREAS, according to the Army Corps of Engineers in certain memoranda, the rule
58 is "inconsistent with SWANCC and *Rapanos*. This assertion of Clean Water Act jurisdiction

59 over millions of acres of isolated waters . . . undermines the legal and scientific credibility of
60 the rule";

61 WHEREAS, the Army Corps of Engineers said, "the draft final rule continues to depart
62 significantly from the version provided for public comments, and that the Corps
63 recommendations relation to our serious concerns have gone unaddressed. Specifically, the
64 current draft final rule contradicts long-standing and well-established legal principles
65 undergirding Clean Water Act 404 regulations and regulatory practices, especially the decisive
66 Rapanos Supreme Court decision. The rule's contradictions with legal principles generate
67 multiple legal and technical consequences that in the view of the Corps would be fatal to the
68 rule in this current form";

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

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

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

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

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

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

87 WHEREAS, to avoid the risk of liability from enforcement actions and citizens' suits,
88 farmers and ranchers must ensure that farming and ranching activities do not cause a discharge
89 of any pollutant (including pesticides and fertilizers) into any "waters of the United States" or

90 that the activities are authorized by a federal Clean Water Act permit;

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

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

95 WHEREAS, the new rule exceeds the scope of jurisdiction granted by Congress in the
96 Clean Water Act, and thus violates the Administrative Procedure Act:

97 NOW, THEREFORE, BE IT RESOLVED that the Legislature of the state of Utah, the
98 Governor concurring therein, finds the rule defining "waters of the United States" to be an
99 unlawful exercise of federal regulatory authority.

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

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

Legislative Review Note
Office of Legislative Research and General Counsel