EPA Overreach Will Shrink Florida's Economy

by M. Reed Hopper and Mark Miller

Unless you live under a rock—a dry rock upland of any stream, navigable water, swale or puddle—you likely know that the Army Corps of Engineers and the Environmental Protection Agency have proposed a new rule defining "waters of the United States" under the federal Clean Water Act. At the same time, the EPA has proposed a new greenhouse gas rule for existing coal-fired power plants. Both rules would wreak havoc on Florida's economy.

Both of these intrusive efforts reflect a nearly out-of-control executive branch of the federal government demanding changes Florida, and the nation, do not need. Reviewing the two proposed rules through the prism of potential impacts demonstrates why Florida should push for the withdrawal of both proposed rules.

The "Waters of the United States" Rule

The Corps and EPA *newly* claim to have found authority under the Clean Water Act—a 40-year-old law—to regulate virtually all waters, and much of the land, in the United States. With absurdly few exceptions, the feds say they may control almost any wet spot in the nation, requiring thousands of costly permits for ordinary activities affecting "waters of the United States" as defined by a new rule proposed by the Corps and EPA. The proposed rule contradicts the intent of Congress as expressed in the Act itself "to recognize, preserve, and protect the primary responsibilities and rights of States" to control local

land and water use.

The proposed rule would dramatically impact Florida because of Florida's unique topographical and geographic setting. Florida has decades of experience effectively managing its water via ditches, canals and ponds for flood control, irrigation, storm water management and water quality improvement.[1] Additionally, Florida recently approved "numeric nutrient standards designed to keep its waters healthy and clean,"[2] an effort for naught if the federal government simply moves in and re-writes the rules upon which the state depended when it developed its water management programs. These circumstances should make the citizens of Florida particularly skeptical of the Corps and EPA's effort to re-write the Clean Water Act via the proposed rule.

A review of a few of the many changes that the proposed rule seeks to impose on the current regulatory framework demonstrates why Floridians should demand that the Corps and EPA withdraw the proposed rule.

The most obvious power grab involves the agencies' effort to expressly assert jurisdiction over dry land and shallow groundwater. The proposed rule claims newfound authority under the Act to regulate "riparian areas," "floodplains," and other areas such as water bodies connected by "confined surface" waters or a "shallow subsurface hydrological connection" to other covered waters.[3] In other words, for the first time, the Corps and EPA claim they can use the Clean *Water* Act to regulate *dry* land.

This change will profoundly impact Florida. Aquifers sit underneath Florida from top to bottom, and much of the state sits within floodplains. If the EPA and Corps federalize most, if not all, of the State of Florida, individuals, small businesses and local governments will find their worlds turned upside down because discharges to covered waters require an expensive and time consuming federal permit. As the United States Supreme Court explained in its seminal *Rapanos* decision, individuals and businesses will spend upward of $270,000 to obtain an individual permit from the Corps, and $28,000 for general nationwide permits.[4] These are costs that many Florida businesses will find insurmountable, resulting in opportunities lost because of excessive permitting costs.

Likewise, this growth in federal power could prevent financially strapped local governments from addressing other important environmental concerns because they must meet onerous new demands from the EPA and Corps.[5] For example, instead of addressing important local environmental initiatives like rehabilitating the St. Lucie Estuary and Indian River Lagoon, local governments in southeast Florida could find their treasuries encumbered by the proposed "waters of the United States" rule.[6] Bureaucrats legislating from Washington, D.C., should not have the power to trump the local officials who work with these vital bodies of water day-to-day.

Clean Power Rule Will Eviscerate Florida Businesses

In a one-two punch apparently designed to knock out private enterprise altogether, the EPA also released its proposed new greenhouse gas rule last year. Not surprisingly, the rule will have a tremendously negative impact on Floridians.

The proposed rule mandates a 30 percent cut in power plant carbon dioxide emissions by 2030 from 2005 levels. A U.S. Chamber of Commerce study of the impact of this new rule reveals that regulating CO_2 emissions at the thousands of existing fossil fuel-fired electricity generating plants in the United States in this way will give rise to nearly a half *trillion* dollars in total compliance expense, hundreds of thousands of lost jobs, and higher electricity costs for consumers and businesses.[7] Florida's consumers will bear much of these costs, in the form of higher electricity bills.[8]

Interestingly, the EPA even failed to follow federal law in drafting the rule. The rule will implicitly require industry to adopt wind and solar power in order to offset the greenhouse gases in the amounts the rule requires, technologies decades away from possessing the capacity to adequately address large-scale energy needs. Both wind and solar power often have negative impacts on wildlife and habitat, as the EPA has acknowledged.[9] For example, the nation's wind farm kills more than 500,000 birds, many of them ESA-protected species, each year.[10]

Nevertheless, the EPA did not review whether the new greenhouse gas rule will threaten endangered and threatened species here in the Sunshine State like the Florida sandhill crane, brown pelican, piping plover, wood stork or even the ibis that the University of Miami claims as its own. The conscience of all Floridians should be in shock discovering that an agency, which spares no expense to punish private landowners who so much as venture too close to a protected species, would cavalierly brush aside the laws[11] that require the agency to ensure that its actions do not jeopardize the continued existence of protected species, or modify their habits.

Conclusion

There are a variety of mechanisms in place to push the EPA to withdraw these proposed rules before they become final. Florida's congressional members can engage in aggressive oversight of the rulemaking process. They can even use the Congressional Review Act, passed as part of the Contract with America in 1996, to pass a resolution of disapproval in regards to either rule. And finally, if the Corps and EPA do not withdraw the rules as presently drawn, then Floridians should expect groups such as Pacific Legal Foundation to file suit to stop these illegal and unconstitutional arrogations of power.

On behalf of Pacific Legal Foundation (PLF), Mr. Hopper has litigated numerous cases addressing federal jurisdiction under

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located at specific times. Not unlike the previously mentioned industries, the food truck industry also faces problems deriving from other businesses trying to use the power of government to impose unnecessary regulations that would take them out of the market altogether.

If you've ever met an entrepreneur running a food truck, operating a small business, or providing you with a ride as an Uber or Lyft driver, you feel like you are meeting someone who embodies the true spirit of America.

Entrepreneurs create the goods and services and let consumers make the decision on the value proposition. For those with good value propositions, the value they create turns into a profit for them. And that profit is the way that we, as their consumers, celebrate their success, allowing them to financially thrive doing what they are passionate about.

The American spirit of innovation and entrepreneurship is not granted by elected officials or special interest lobbyists. Rather, it is ingrained in the very idea and fabric of our nation. Americans have always believed in the freedom of opportunity and with that comes the freedom to innovate. And with innovation, comes true progress. And with that progress comes prosperity.

The only way to allow this innovation in a free and clear open market is to reduce the size, scope and power of government in the economy. The market is best served when consumers, not government, are in control of deciding winners and losers. This neutralizes the playing field, reduces the influence of the established power players, and allows entrepreneurs the freedom to innovate and bring new value to our lives.

Francisco Gonzalez is the Vice President of Advancement at The James Madison Institute.

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the Clean Water Act, including Rapanos v. United States, 547 U.S. 715 (2006), in the U.S. Supreme Court. Mr. Hopper oversees PLF's environmental practice. Mr. Miller is the managing attorney of PLF's Atlantic Center in Palm Beach Gardens. He is board-certified in appellate practice.

ENDNOTES

[1] Tom Feeney, *EPA Rules Could Batter Florida's Economy*, Associated Industries of Florida (Oct. 14, 2014), available at www.aif.com/information/2014/pr141014a.html (last visited 2/5/15).
[2] *Id.*
[3] 79 Fed. Reg. at 22,207.
[4] *Rapanos v. United States*, 547 U.S. 715, 721 (2006).
[5] See Feeney, supra n.1.
[6] *Id.*
[7] *Assessing the Impact of Potential New Carbon Regulations in the United States at 46, Institute for 21st Century Energy*, U.S. Chamber of Commerce, available at http://heartland.org/sites/default/ files/assessing_the_impact_of_potential_new_carbon_regulations_in_the_united_states.pdf (last visited 2/5/15).
[8] *Id.*
[9] 79 Fed. Reg. at 34,934.
[10] See David Blackmon, "The Endangered Species Act and Wind Power: A Rule, or More of a Guideline?" *Forbes* (May 16, 2013), available at www.forbes.com/sites/davidblackmon/2013/05/16/the-esa-a-rule-or-more-of-a-guideline/ (last visited 2/5/15).
[11] Cf. 16 U.S.C. §1536(a)(2).