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Defining "Water of the United States": A Litigious Task

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ABSTRACT

The Clean Water Act is one of the most powerful and far-reaching federal environmental laws. The statute, jointly administered by the United States Environmental Protection Agency and United States Army Corps of Engineers, generally prohibits the unpermitted discharge of pollutants into the "waters of the United States." Whether those waters include some, or most, or all streams, creeks, ponds, and wetlands in the nation is a question that for decades has fueled controversy among property owners, the agencies, and the courts. This paper provides a brief history of how the phrase "waters of the United States" has been interpreted. It next discusses the most recent EPA and Corps rule-making that construes "waters of the United States." It then reviews the lawsuits that have challenged that rule-making. It concludes with brief thoughts about how the debate over the Act's scope will be resolved.

Introduction

The Clean Water Act[1] long has been among the more controversial environmental statutes in the United States Code. The Act was intended as a basic water quality measure to keep the "waters of the United States" from "burning."[2] But it has been converted by the United States Environmental Protection Agency and the United States Army Corps of Engineers—the federal agencies responsible for its administration—into a vigorous federal land-use law.[3] That transformation has been helped by the statute's penalties. The Act "'impose[s] criminal liability,' as well as steep civil fines, 'on a broad range

[1] 33 U.S.C. §§ 1251-1388. The Act's formal title is the Federal Water Pollution Control Act Amendments of 1972. *See* Pub. L. No. 92-500, § 1, 86 Stat. 816, 816 (Oct. 18, 1972).

[2] The 1969 burning of the Cuyahoga River "mobilized the nation and became a rallying point for passage of the Clean Water Act." Jonathan H. Adler, *Fables of Cuyahoga: Reconstructing a History of Environmental Protection*, 14 Fordham Envtl. L.J. 89, 95 (2002) (quoting American Rivers, *Anniversary of Cuyahoga River Burning*, June 21, 1999)). But "[m]uch of the Cuyahoga story . . . is mythology, a fable with powerful symbolic force." Adler, *supra*, at 93.

[3] Rapanos v. United States, 547 U.S. 715, 722 (2006) (plurality op.) ("In the last three decades, the Corps and the . . . EPA . . . have interpreted their jurisdiction over 'the waters of the United States' to cover 270-to-300 million acres of swampy lands in the United States . . . .").

of ordinary industrial and commercial activities.'"[4] Compounding the controversy surrounding the Act is its uncertain scope. As Justice Alito noted in a recent Clean Water Act decision, "[t]he reach of the Clean Water Act is notoriously unclear."[5] And that lack of clarity exacerbates the potential for government abuse because it has enabled the agencies to interpret the Act "as an essentially limitless grant of authority."[6]

Thus, it is not surprising that the EPA and the Corps' recent rule-making interpreting the scope of their authority under the Act has attracted significant attention—and litigation. In this essay, I review the agencies' "Clean Water Rule: Definition of 'Waters of the United States,'"[7] as well as the lawsuits that have challenged it. I conclude with a few thoughts about the Act's future.

Jurisdictional Backgrounder

Through the Clean Water Act, Congress overhauled and expanded the federal government's regulation of water quality. The Act makes unlawful the unpermitted discharge of any pollutant into "navigable waters."[8] Such waters are in turn defined as "the waters of the United States, including the territorial seas."[9] Thus, a key element of liability for an unpermitted discharge of pollutants is the presence of "waters of the United States."[10]

Shortly after the Clean Water Act was passed, the Corps promulgated a regulation interpreting "waters of the United States" to mean waters that are navigable-in-fact.[11] That regulation was successfully challenged as too narrow.[12] The Corps then issued a new regulation that, with some minor changes, remained in force until last year.[13] For EPA's part, the agency's coordinate rules have been substantively

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[4] *Id*. at 721 (quoting Hanousek v. United States, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari)).

[5] Sackett v. EPA, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

[6] *Id*.

[7] 80 Fed. Reg. 37,054 (June 29, 2015).

[8] 33 U.S.C. § 1311(a).

[9] *Id*. § 1362(7). *Cf*. *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring) (noting that "the waters of the United States" is "not a term of art with a known meaning," and that "the words themselves are hopelessly indeterminate").

[10] The Act also imposes duties even in the absence of a discharge. *See, e.g.*, 33 U.S.C. § 1318(a) (imposing various data maintenance and collection obligations on the owner or operator of any "point source," which in turn is defined as a conveyance from which "pollutants are or *may* be discharged," *id*. § 1362(14) (emphasis added)). At least one commentator contends that the Act imposes obligations *before* a discharge occurs. *See* David Drelich, *Restoring the Cornerstone of the Clean Water Act*, 34 Colum. J. Envtl. L. 267, 329 (2009).

[11] *See* 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974) (Corps dredge and fill regulations). EPA's original regulation, although not as broad as the current rule, was nevertheless somewhat broader than the Corps' original rule. *See* 38 Fed. Reg. 13,528, 13,529 (May 22, 1973) (asserting jurisdiction over tributaries of navigable waters, interstate waters, and waters sufficiently connected to interstate commerce). Interestingly, the original *proposed* EPA regulation was limited to "navigable waters." *See* 38 Fed. Reg. 1362, 1363 (Jan. 11, 1973). The preamble to the final original rule did not explain the reason for the significant change. It merely observed that the term had been "clarified by incorporating additional language." 38 Fed. Reg. at 13,528. EPA's regulation did not expressly include wetlands until 1979. *Compare* 40 C.F.R. § 125.1(p) (1978) *with* 44 Fed. Reg. 32,854, 32,901 (June 7, 1979).

[12] NRDC v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).

[13] *See* 42 Fed. Reg. 37,122, 37,124, 37,144 (July 19, 1977); 47 Fed. Reg. 31,794, 31,810-11 (July 22, 1982); 51 Fed. Reg. 41,206, 41,216-17 (Nov. 13, 1986).

identical to the Corps' broader regulations for nearly as long.[14] Pursuant to those regulations, waters of the United States included, in addition to navigable-in-fact and interstate waters: all tributaries of such waters; all wetlands adjacent to such waters and tributaries; and all waters, the use or degradation of which could affect interstate commerce.[15]

Three times the United States Supreme Court has addressed whether portions of the agencies' regulations interpreting "waters of the United States" exceeded their authority. In *United States v. Riverside Bayview Homes*,[16] the Court upheld the agencies' position that "waters of the United States" includes wetlands that immediately abut a navigable-in-fact water.[17] But in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,[18] the Court rejected the agencies' view that "waters of the United States" include otherwise isolated waters that provide habitat for migratory waterfowl. Finally, in *Rapanos v. United States*,[19] the Court declined to accept the agencies' theory that wetlands are "waters of the United States" simply because they are hydrologically connected to a navigable-in-fact water. But the *Rapanos* Court could not agree as to why the aforementioned theory was wrong. A plurality opinion by Justice Scalia argued that the Act does not cover ephemeral streams or ditches, or wetlands that are clearly separated from nearby jurisdictional waters.[20] Providing the critical fifth vote, Justice Anthony Kennedy concurred in the plurality's rejection of the hydrological connection theory. But Justice Kennedy could not agree with the plurality's reasoning. In his view, the plurality did not take seriously enough the Act's water quality goals. Thus, Justice Kennedy advocated an approach that made such goals explicitly part of the jurisdictional analysis. Accordingly, a water or wetland should be numbered among the "waters of the United States" so long as it bears a "significant nexus" to a navigable-in-fact water. Such a nexus exists, according to Justice Kennedy, if the water or wetland significantly affects the chemical, physical, and biological integrity of the downstream navigable-in-fact water.[21]

The New "Waters of the United States" Rule

Last year, the agencies issued their first regulation interpreting "waters of the United States" in a generation.[22] The new rule makes several categorical assertions of jurisdiction, as well as several categorical exemptions. And it provides a few case-by-case directives, in addition to defining several pre-existing and new terms.

Categorical Jurisdiction

Perhaps the most controversial categorical assertion in the new rule concerns tributaries of navigable-in-fact or interstate waters. The new rule asserts jurisdiction over all such tributaries, no matter the quality or quantity of their flow.[23] To be sure, the prior rule did as well.[24] But the *Rapanos* plurality explicitly

[14] *See* 45 Fed. Reg. 33,290, 33,298 (May 19, 1980); 40 C.F.R. § 122.3 (1980).
[15] *See* 33 C.F.R. § 328.3(a) (2014); 40 C.F.R. § 122.2 (2014).
[16] 474 U.S. 121 (1985).
[17] Many lower federal courts, beginning with *United States v. Holland*, 373 F. Supp. 665, 674-76 (M.D. Fla. 1974), already had reached that conclusion. *See* 42 Fed. Reg. at 37,124 (listing cases).
[18] 531 U.S. 159 (2001).
[19] 547 U.S. 715 (2006).
[20] *See id*. at 739, 742 (plurality op.).
[21] *See id*. at 779-80 (Kennedy, J., concurring in the judgment).
[22] *See* 80 Fed. Reg. 37,054 (June 29, 2015).
[23] *See* 33 C.F.R. § 328.3(a)(5) (2015). Citations to the new rule are to the version codified under the Corps' regulations, which is substantively identical to the version codified under EPA's regulations.
[24] 33 C.F.R. § 328.3(a)(5) (2014).

argued,[25] and the Kennedy concurring opinion strongly implied,[26] that such a broad rule for tributaries would exceed the agencies' authority. Hence, the rule's continued allegiance to an "all tributaries are regulable" approach is somewhat difficult to reconcile with *Rapanos*.[27]

The rule carries forward other pre-existing categorical assertions as well. For example, the rule continues to assert jurisdiction over "traditional" navigable waters,[28] interstate waters, territorial seas, and all impoundments of otherwise jurisdictional waters.[29]

Finally, the rule *expands* one pre-existing categorical assertion. Under the prior rule, only a wetland could qualify as jurisdictional by the mere fact of its adjacency to another water. The new rule, however, expands such adjacency jurisdiction to all waters.[30] Moreover, it provides a broader understanding of what qualifies as adjacent. Specifically, the rule defines a water as adjacent if it is "neighboring" another jurisdictional water, *i.e.*, if it lies: (i) within 100 feet of the ordinary high water mark of a traditional navigable water, an interstate water, a tributary, or any impoundment of a jurisdictional water; (ii) within the 100-year flood plain of a traditional navigable water, an interstate water, a tributary, or any impoundment of a jurisdictional water, and within 1,500 feet of the ordinary high water mark of the same; (iii) within 1,500 feet of the high tide line of a traditional navigable water; or (iv) within 1,500 feet of the ordinary high water mark of one of the Great Lakes.[31]

In summary, under the new rule the following waters are jurisdictional without any site-specific determination: "traditional" navigable waters; interstate waters; territorial seas; impoundments and tributaries of "traditional" navigable waters, interstate waters, or territorial seas; and waters adjacent to all previously described waters.[32]

Case-by-Case Jurisdiction

The new rule asserts jurisdiction on a case-by-case basis for two classes of non-adjacent "other waters." One such class is a list of certain regional wetlands that the agencies have determined to be especially important to water quality. These are prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands.[33] Such wetlands are "waters of the United States" under

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[25] *See Rapanos*, 547 U.S. at 739 (plurality op.) (arguing that the Act cannot reach "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall").

[26] *See id*. at 780-81 (Kennedy, J., concurring in the judgment) (suggesting that the agencies may choose to identify *categories* of [jurisdictional] tributaries [based on] their volume of flow . . . , their proximity to navigable waters, or other relevant considerations) (emphasis added).

[27] The agencies contend that every tributary will have a significant nexus with a traditional navigable water based on how "tributary" is defined. For that reason, the agencies believe that the rule's approach to tributary jurisdiction satisfies the Kennedy concurrence test. *See* 80 Fed. Reg. at 37,076-37,080.

[28] Such "traditional" navigable waters are those that are "navigable in fact, or susceptible of being rendered so." *See Rapanos*, 547 U.S. at 730 (plurality op.) (citing *The Daniel Ball*, 77 U.S. 557, 563 (1870)).

[29] *See* 33 C.F.R. § 328.3(a)(1)-(4) (2015).

[30] *See id*. § 328.3(a)(6).

[31] *See id*. § 328.3(c)(2)(i)-(iii).

[32] Note that a water may be jurisdictional by being adjacent to any jurisdictional water, whether determined by categorical rule or case-by-case basis.

[33] *See id*. § 328.3(a)(7)(i)-(v).

the rule so long as they meet, on a case-by-case basis, the significant nexus test.[34] The second class of regulated "other waters" comprises any water that meets the significant nexus test, as well as a geographic test. Thus, in addition to satisfying the requirements for a significant nexus, these waters must lie: within the 100-year flood plain of a traditional navigable water or other interstate water; or within 4,000 feet of the high tide line or ordinary high water mark of a jurisdictional (non-wetland) water.[35]

Exclusions

The rule sets forth a number of exclusions. These exclusions have not been particularly controversial because they largely codify agency practice. They include: artificially irrigated areas that otherwise would be dry land; manmade lakes, ponds, reflecting and swimming pools; ornamental waters; depressions incidental to mining or construction activity; stormwater control features and wastewater recycling structures; puddles; and groundwater.[36]

Perhaps the most complicated exclusion is for "ditches."[37] The rule does not define "ditch," although the rule's preamble provides some hints as to what the agencies would deem a "ditch."[38] A "ditch" is excluded from jurisdiction if it is not hydrologically connected to any other jurisdictional water.[39] If it is so connected, the ditch may still be excluded, but the rule requires that further tests be met. Specifically, a hydrologically connected ditch that contains only ephemeral flow is exempt if it has not been excavated in a tributary and is not a relocated tributary.[40] In contrast, a hydrologically connected ditch that contains intermittent flow is exempt if it meets the standard for an ephemeral ditch, and also does not drain wetlands.[41]

Definitions

The rule sets forth several new definitions. Among these is the already discussed definition of "neighboring." The rule also defines "significant nexus" (a peculiarity, given that the phrase comes from a judicial opinion, not a statute). A "significant nexus" is present, according to the rule, if any one of the following functions of the water (or collection of similarly situated waters in the region) contributes significantly to the chemical, physical, or biological integrity of the nearest traditional navigable water or interstate water: sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering, and transport; retention and attenuation of flood waters; runoff storage; contribution of flow; export of organic matter; and export of food resources and provision of life cycle dependent aquatic habitat for a species dwelling within a traditional navigable water or interstate water.[42]

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[34] *See id*. § 328.3(a)(7).
[35] *See id*. § 328.3(a)(8).
[36] *See id*. § 328.3(b)(1)-(7).
[37] *See id*. § 328.3(b)(3).
[38] *See* 80 Fed. Reg. at 37,098 (noting that a stream or river "altered or modified for purposes as flood control, erosion control, and other reasons" resulting in its being "channelized or straightened" is not a ditch).
[39] *See* 33 C.F.R. § 328.3(b)(3)(iii) (2015).
[40] *See id*. § 328.3(b)(3)(i).
[41] *See id*. § 328.3(b)(3)(ii). The rule does not define "ephemeral" or "intermittent" flow, but the rule's preamble explains that the former occurs "only in response to precipitation events in a typical year," whereas the latter is "continuous[] only during certain times of the year (*e.g.*, during certain seasons such as the rainy season)." 80 Fed. Reg. at 37,076.
[42] *See* 33 C.F.R. § 328.3(c)(5).

The "WOTUS" Litigation

In light of the rule's scope and controversy, it is not surprising that many lawsuits have been filed to challenge it.[43] These cases raise significant procedural and substantive questions.

To date, two courts have ruled that parts of the new rule are probably illegal.[44] In *North Dakota v. United States Environmental Protection Agency*,[45] the district court granted a preliminary injunction to the plaintiffs, a coalition of states.[46] The court concluded that it is likely that several parts of the new rule are illegal—namely: the rule's assertion of jurisdiction over all tributaries; its limitation of jurisdiction for non-adjacent waters to those within 4,000 feet of a jurisdictional water; and its significant departure from the proposed version of the rule, which did not contain any of the latter's distance cut-offs.[47] The Sixth Circuit also has issued a nationwide stay of the rule, having determined that a separate coalition of states would be likely to prevail on its claims that the rule's distance limitations are inconsistent with Justice Kennedy's *Rapanos* concurrence, not supported by adequate evidence, and not a logical outgrowth of the proposed rule.[48]

One important procedural issue in both of these cases is the question of proper forum. The rule's challengers contend that their lawsuits must be brought in the district courts. EPA and the Corps, however, contend that the challenges should be brought directly in the courts of appeals as petitions for review.[49] The agencies rely on the provisions of the Act that require any challenge to (i) an EPA permitting decision or (ii) to a pollutant "limitation" promulgate under certain specified sections of the Act, to be filed as a petition for review in the appellate courts.[50] They also cite case law holding that this grant of jurisdiction extends beyond individual permitting decisions to include rules that generally govern the permitting process.[51]

The agencies' position is peculiar given the procedural history of jurisdictional challenges under the Clean Water Act. Recall that the decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos*—which all address how to interpret "waters of the United States"—were initiated in district court.[52] The Act provides that matters that could have been reviewed through a petition for review "shall not be subject to judicial review in any civil or criminal proceeding for enforcement."[53] Thus, the jurisdictional issue in these cases should have been foreclosed, if the agencies are right. The ongoing Sixth Circuit challenge bears another difficulty for the agencies' view. That case includes the Corps as a respondent. Yet the

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[43] *See* In re Clean Water Act Rule: Definition of "Waters of the United States," 2015 WL 6080727 (MDL No. 2663 Oct. 13, 2015) (noting that nine actions have been filed in seven districts); North Dakota v. U.S. Envtl. Protection Agency, 2015 WL 7422349, at *2 (D.N.D. Nov. 10, 2015) (noting that petitions for review have been filed in three circuit courts).

[44] As of this writing, no court has ruled on the merits in the rule's favor.

[45] 2015 WL 5060744 (D.N.D. Aug. 27, 2015).

[46] The injunction is limited to the plaintiff-states' territories. *See North Dakota*, 2015 WL 7422349, at *1.

[47] 2015 WL 5060744, at *5-*6.

[48] *See* In re E.P.A., 803 F.3d 804, 807 (6th Cir. 2015).

[49] The Sixth Circuit action was a protective filing: the states' motion to dismiss their own petition is pending.

[50] *See* 33 U.S.C. § 1369(b)(1)(E) & (F).

[51] *See In re* E.P.A., 803 F.3d at 807 (citing Nat'l Cotton Council of Am. v. U.S. E.P.A., 553 F.3d 927, 933 (6th Cir. 2009)).

[52] *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 124-25 (1985); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 165 (2001); Rapanos v. United States, 547 U.S. 715, 729 (2006).

[53] 33 U.S.C. § 1369(b)(2).

Clean Water Act authorizes petitions for review only for certain of "the Administrator's action[s]."[54] Thus, even if the claims against EPA were properly brought in the courts of appeals, maintaining the same challenge to the Corps' part of the rule-making in the courts of appeals is difficult to reconcile with the Act.[55] In a recent split decision, the Sixth Circuit ruled that appellate courts *do* have original jurisdiction (and exclusive of the district courts) of challenges to the WOTUS rule. The court's decision, however, does not address the aforementioned difficulties.[56]

Conclusion

The Clean Water Act is a potent law the strength of which stirs its advocates and foes alike.[57] The Supreme Court occasionally has been called upon to police the margins of the agencies' claims of authority under the Act. But the High Court has declined to address definitively the full depth and scope of the law's reach. The recent "waters of the United States" rule, however, may give the Court an opportunity to do so. The rule is arguably the federal government's most ambitious assertion of environmental regulatory authority ever. That very ambition in fact led to the agencies' somewhat arbitrary cabining of the rule's reach. And ironically, these modest concessions to the regulated community may prove to contribute to the rule's downfall.[58]

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[54] *Id*. § 1369(b)(1).

[55] Arguably, one might reconcile the agencies' understanding of the scope of the Clean Water Act's direct appellate review provision with the seemingly contrary Supreme Court precedent on the ground that *Riverside Bayview*, *Solid Waste Agency*, and *Rapanos* all concerned the discharge of dredged or fill material, the permitting for which under the Act falls to the Corps, not to EPA. *See* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 273-74 (2009). The Act's petition for review procedure for actions of the Administrator would not have applied in those dredged-and-fill cases.

[56] *See* In re EPA, Lead Doc. No. 15-3751 (6th Cir. Feb. 22, 2016), slip op. *available at* http://www.ca6.uscourts.gov/opinions.pdf/16a0045p-06.pdf.

[57] *See* Michael Campbell, *Waters Protected by the Clean Water Act: Cutting through the Rhetoric on the Proposed Rule*, 44 Envtl. L. Rep. News & Analysis 10,559 (July 2014).

[58] *See* U.S. Army Corps of Eng'rs, Legal Analysis of Draft Final Rule on Definition of "Waters of the United States" 2 (Apr. 24, 2015), *available at* http://www.agri-pulse.com/Uploaded/WOTUS-2.pdf (last visited Feb. 5, 2016) (criticizing the final rule's "arbitrary . . . 4000-feet cutoff"); *id*. at 4 (observing that "even if such legal authority exists" for the rule's distance limitation, "at present there is no legally adequate administrative record to support such a move").