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The Clean Water Act

THE ISSUE IN BRIEF

- The Environmental Protection Agency and the Corps of Engineers' recently released an administrative rule interpreting the phrase "Waters of the United States" under the Clean Water Act of 1972. That Rule ignores the clear language and intent of the statute.
- The WOTUS Rule extends federal jurisdiction far beyond the reach of the Clean Water Act—any area of land that is wet occasionally may be subject to federal jurisdiction.
- This is important because the Clean Water Act's prohibition on "pollutants" extends to ordinary materials like sand, dirt, and backfill. This broad definition of "pollutant" subjects many ordinary farming, residential, and commercial activities to permitting requirements. For example, any time a farmer wants to plow a field in a covered area, she likely must obtain a permit.
- These permits are extremely costly and put an unwarranted burden on farmers, landowners, and businesses.
- Ironically, the WOTUS Rule comes after the Supreme Court's *rejection* of the EPA and Corps of Engineers' broad view of federal jurisdiction.
- Accordingly, states have filed lawsuits around the country, and a number of federal courts have agreed with their argument that the WOTUS Rule is inconsistent with the Clean Water Act.
- The bigger story, however, is that the Clean Water Act has been rendered unrecognizable by a series of expansive federal court and agency interpretations. It is time for Congress to clarify that the Clean Water Act has a more limited application.

EXECUTIVE SUMMARY

In a new rule promulgated by the Environmental Protection Agency and Corps of Engineers, the Obama Administration has asserted federal jurisdiction over hundreds of millions of acres of land in the United States. Experts suggest, for example, that 99% of land in Pennsylvania may be subject to the EPA's jurisdiction. My home state of Missouri is in similar shape: more than 99% of its land may be subject to federal jurisdiction.

The claimed authority for this land grab: The Clean Water Act of 1972. But the text of that statute suggests that federal jurisdiction is limited to waters that are navigable in fact or easily made navigable. Nevertheless, under the new Waters of the U.S. Rule (WOTUS Rule), the EPA and Corps asserts federal jurisdiction over dry streambeds, man-made lakes, better to be man-made lakes and wetlands. In short, nearly any wet area, even if it is wet only seasonally, or during a flood, may be subject to federal jurisdiction. In the agencies' view, these geographic features are subject to federal regulation because they fall within the statutory term "Water of the United States."

The broad definition of "the Waters of the United States" given by the agencies will have a significant impact on homeowners, farmers, and business people as nearly *any* activity on jurisdictional land is prohibited without a permit. The resulting permitting costs (typically $270,000 for an individual permit) and delays will increase the price of doing business for industries nationwide.

The agencies' rule, moreover, intrudes on the states' traditional authority to regulate the land and water within their boundaries. This is directly contrary to the text of the Clean Water Act (CWA), which identifies the states as the primary protectorate of their land and water resources.

However, there is good news: a number of states have filed suit in federal court alleging that the WOTUS Rule violates the Clean Water Act. Courts across the country have agreed. Finding that the states are likely to win their challenge, the Sixth Circuit has imposed a nationwide stay of the WOTUS Rule pending resolution of the lawsuits.

The latest Rule from the agencies should be the last straw. No one seriously argues that the Congress of 1972 intended to subject mundane land use questions to federal regulatory authority, but rather meant for that power to reside with the states. That should be the end of the matter. But federal courts and federal agencies have long taken a broad view of the reach of the CWA, at the expense of the states and private industry. It is time for Congress to step in and to clarify that the CWA covers only interstate waters that are navigable or capable of being made so.

MORE INFORMATION

The principal law governing pollution of the nation's surface waters is the Clean Water Act of 1972 (CWA). The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." To that end, the Clean Water Act places restrictions on discharges of pollutants, stormwater drainage, and nonpoint source pollution (pollution caused by runoff and other nondiscrete sources).

The CWA is what is known as a cooperative federalism statute. In it, Congress recognized and sought to preserve the states' traditional power over land and water use. The statute thus provides that "it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States … to plan the development and use … of land and water resources." Given the states' traditional role in regulating the lands and waters within their own boundaries, Congress was careful to leave them with primary authority over *intra*state waters.

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But the EPA is seeking to change all of that. On May 27, 2015, the EPA released its now-infamous "Waters of the U.S. Rule," which dramatically expanded the agencies reach into waters traditionally left to the states. This rule was scheduled to take effect on August 28, 2015.

The Significance of the Term "the Waters of the United States"

The question whether the EPA and Corps of Engineers have jurisdiction over a particular parcel of land is an important one. If federal jurisdiction exists, then permit approval is required for almost any land improvement activity. This is because the Clean Water Act extends not only to the addition of a traditional pollutant, like a chemical, but also to routine land maintenance and development activities. More specifically, one of the CWA's principle provisions prohibits "the discharge of any pollutant by any person." Pollutant is defined broadly to include not only the usual chemicals but also solids such as "dredged spoil … rock, sand, [and] cellar dirt." §1362(6). Thus, permitting may be required for such mundane activities as plowing a field, cleaning a ditch, or leveling a piece of property in preparation for a home.

Given this extensive power, the term "waters of the United States" is very significant because it determines which waters are governed by the Clean Water Act, and thus when permitting requirements apply. In the Act, federal jurisdiction extends to "navigable waters" which the Act defines as "waters of the United States." This latter term is not itself defined. One clue exists in predecessor legislation where Congress used the term "navigable waters of the United States." The Supreme Court interpreted that phrase to mean interstate waters that were "navigable in fact" or easily made navigable. There is no indication in the CWA that Congress intended to change this definition.

The Burden on Landowners

Federal permits under the Clean Water Act do not come cheap. In 2006, the average applicant for an individual permit spent 788 days and $271,596 per permit. The average applicant for a nationwide permit—nationwide permits are general permits that are preapproved provided certain conditions are met—spent 313 days and $28,915. The public and private sectors spend more than $1.7 billion on permitting requirements every year. These costs are inescapable since the CWA imposes steep civil fines as well as criminal liability "on a broad range of ordinary industrial and commercial activity," if taken without a permit. And the standards governing the awarding of a permit are hopelessly vague—including factors such as "economics," "aesthetics," "recreation," and "in general, the needs and welfare of the People"—leading the late Justice Scalia to note that the agencies exercise the "discretion of an enlightened despot."

As one federal judge commented recently, the Clean Water Act is unique because it can be difficult to know whether your property is covered. "[M]ost laws," she wrote, "do not require the hiring of expert consultants to determine if they even apply to you or your property." But because the burden is on the applicant to show that their land is *not* jurisdictional, a permit-seeking landowner must establish that his or her property does not contain a jurisdictional water or wetland. This will often require the hiring of a botanist and/or hydrologist to determine whether any wet areas of the land meet the definition of a wetland or other covered water.

Consider Justice Alito's description of the situation facing the ordinary homeowner:

> The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to $75,000 per day ($37,500 for violating the Act and another $37,500 for violating the compliance order).

The WOTUS Rule

In 2015, the agencies published their most recent interpretation of the term "the waters of the United States." This new interpretation has been described as creating virtually unlimited federal jurisdiction and expanding the agencies' authority over local land use decisions even more. That the EPA has expanded its jurisdiction is ironic; the new Rule comes after a ***defeat*** of the agency's jurisdiction in the Supreme Court.

The agencies began by defining "waters of the United States" to include so-called primary waters: 1) waters susceptible for use in interstate or foreign commerce; 2) all interstate waters and wetlands; and 3) territorial seas.

More controversially, the WOTUS Rule then establishes three bright line categories of additional waters that the agencies consider to be "waters of the United States" and thus subject to federal regulatory control.

First, the Rule asserts per se jurisdiction over "*all* tributaries" defined as any water that contributes flow (directly or indirectly) to a primary water and has a bed, bank, and ordinary high water mark. Though bed,

bank, and high water mark may sound technical, all that is required is a channel; think land with higher elevation on two sides and lower elevation in the middle, plus any physical marks left by flowing water. If a flood deposits debris on the side of a cow trail, the trail could conceivably qualify as a tributary. Ditches count, too, even man-made ones.

Further, the agencies include normally *dry* channels that provide only intermittent or ephemeral flow. Once again, ephemeral flow sounds technical but in fact means a stream that *only* exists during heavy precipitation. A low spot or depression can count as a tributary if water flows through it during a heavy rain. The contribution of such intermittent water to a primary water can take place through "any number" of links. Finally, the Rule asserts jurisdiction over even tiny tributaries located miles and miles from a primary water.

> "... the Rule asserts per se jurisdiction over all tributaries ... all waters 'adjacent' to primary waters and their tributaries [and] 'other waters' if they have a 'significant nexus' to primary waters."

Second, the WOTUS Rule asserts per se federal jurisdiction over all waters "adjacent" to primary waters *and* their tributaries. Adjacency does not mean what one would think; it does *not* mean waters located laterally to (or next to) a primary water. Rather, adjacent includes "neighboring waters" defined to include: (1) all waters a part of which is within 100 feet of the Ordinary High Water Mark (OHWM) of a primary water; and (2) all waters a portion of which is located within the 100-year floodplain of a primary water and within 1500 feet of the OHWM. The 100-year floodplain is the land area predicted to flood during a 100-year storm, a storm which has only a 1% chance of occurring in any particular year. Under this provision, "waters" also includes wetlands (determined based on soil and vegetative characteristics) and waters that are "separated from" other waters by the likes of man-made barriers, natural river berms, and sand dunes.

Third, the Rule grants agencies authority over "other waters" if they have a "significant nexus" to a primary water. A water's impact is significant if "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a [primary water]." Moreover, the impact can be aggregated in combination with other similarly situated waters in the region. The region means the entire watershed that drains to the nearest primary water. Functions relevant to the significant nexus analysis establish that a hydrological connection is not necessary. For instance, sediment trapping, nutrient recycling, pollutant trapping, runoff storage, retention of flood waters, and provision of life cycle dependent aquatic habitat are all functions that count for purpose of the significant nexus test and can all take place in isolated waters.

The Instant Litigation

Prior to the August 2015 implementation date, states filed several lawsuits around the country. These states point out a number of procedural irregularities with the WOTUS Rule, in particular that affected

individuals and industries had no chance to comment because various aspects of the Rule were not logical outgrowths of the Proposed Rule. For example, the WOTUS Rule includes arbitrary distances to delineate a flood plain, while the Proposed Rule did not contain any geographical scope. Additionally, the states allege that several aspects of the Rule are not supported by sound science.

The states also challenge the substantive provisions of the Rule arguing that it violates the Clean Water Act. In particular, the challengers contend that the Rule's per se coverage of Tributaries, and adjacent waters, is contrary to recent Supreme Court rulings. So too for the agencies' significant nexus test for federal jurisdiction. The states argue that the agencies' significant nexus test bears little resemblance to the more demanding test required by Supreme Court precedent.

In August 2015, the District Court of North Dakota stayed implementation of the Rule in thirteen western states, agreeing with the states on both the procedural and substantive aspects of their challenge. In October 2015, the Sixth Circuit Court of Appeals (where all of the court of appeals cases have been consolidated) stayed the Rule nationwide finding it likely that the challenging states would prevail on the merits. In the Sixth Circuit's view, the new Rule did not comport with recent Supreme Court interpretations of the term "waters of the United States." These cases suggest that there is a good chance that the WOTUS Rule will be pared back—and that is good news.

How Did We Get Here?

The question more pressing even than the legitimacy of the agencies' newest WOTUS Rule is: How did we get here? How did the term "waters of the United States" come to encompass almost any occasionally damp parcel of property? How did we get from the CWA's stated goal of leaving local decisions in the hands of local and state authorities to federal regulation of ordinary building permits?

There's no question: There has been a progressive and dramatic expansion of federal regulation of land use under the Clean Water Act. Often aided by the federal courts, the Corps and EPA have taken every opportunity to expand their jurisdiction to cover routine land-use decisions. Those sorts of decisions used to belong exclusively to state and local governments. And as we saw above, federal regulation does not come cheap.

All of this is even more surprising given that, for a century prior to the enactment of the CWA, the Supreme Court had interpreted a similar phrase, "navigable waters of the United States" in predecessor statutes, to refer ***only*** to interstate waters that were "navigable in fact" or easily made navigable. Most importantly, when Congress passed the CWA, it gave no indication that it intended dramatically to expand the term's definition. Indeed, a former Army Corps official has noted, that "if Congress meant in 1972 … to protect wetlands, it kept that secret to itself."

For that matter, the agencies' have not always taken a broad view of the term "waters of the U.S." In 1972, the Corps of Engineers adopted the traditional definition of "navigable waters"—including only navigable-in-fact waters and waters that were easily made navigable. The Corps did not believe that the CWA extended to wetlands or other types of waters that were not readily susceptible to navigation.

The EPA and environmental groups, however, believed that the regulation of more of the nation's "waters" was necessary in order to preserve and protect them. Shortly after the CWA's passage, the Natural

Resource Defense Council (NRDC) sued the Corps arguing that "waters of the United States" included *all* waters, even wetlands, regardless of whether they were actually navigable. A federal district court agreed, holding that the CWA covered wetlands and extended "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution." Despite the fact that nothing within the text of the CWA suggests such a broad meaning, the government declined to appeal and "acquiesced" to this interpretation of the CWA.

"*Riverside Bayview Homes* emboldened the agencies, which then sought to regulate water to the full extent permissible under the Commerce Clause."

After the NRDC ruling, both the federal courts and federal agencies have been guilty of applying the CWA in an overly broad fashion. First, the agencies changed their regulatory definition of "waters of the U.S." to include some 270 to 300 million acres of land. The definition included all interstate waters, regardless of whether they are navigable, intrastate lakes, mudflats, wetlands, ponds, prairie potholes, intermittent streams and the like. As Justice Scalia describes it:

> [Asserting jurisdiction over 270 to 300 million acres of land] was just the beginning. The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated "waters of the United States" include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory "waters of the United States" engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a "water of the United States."

Ten years later, the Supreme Court considered whether the agencies' interpretation of "waters of the U.S." was permissible in a case called *Riverside Bayview Homes*. In that case, the Court undertook a broad purpose-based analysis. Instead of looking at the terms of the CWA, the Court attempted to divine congressional intent. Ultimately, the Court upheld the agencies' regulation of wetlands that were "adjacent to navigable bodies of waters and their tributaries." In the Court's view, regulation of such wetlands was reasonable because they were "inseparably bound up with the 'waters of the United States.'" The Court did not decide, however, whether federal jurisdiction extended to non-adjacent wetlands.

Riverside Bayview Homes emboldened the agencies, which then sought to regulate water to the full extent permissible under the Commerce Clause. In *Solid Waste Agency of Northern Cook County v. US. Army Corps of Engineers* ("SWANCC"), the agency asserted jurisdiction over isolated, seasonal ponds located in abandoned gravel pits based solely on the possibility that migratory birds might use the ponds as habitat.

The Supreme Court found this a bridge too far. It held that the CWA does not authorize federal jurisdiction over such isolated waters. In order for federal jurisdiction to exist, the waters or wetlands must have a "significant nexus" to navigable waters.

In view of the defeat in *SWANCC*, the agencies declared the "migratory bird" rule unenforceable, but otherwise continued to assert jurisdiction based on a broad interpretation of the CWA. For example, in the Supreme Court's most recent case on the issue, *Rapanos v. United States*, the agencies asserted jurisdiction over a field with sometimes saturated conditions located 11 to 20 miles away from the nearest navigable water and connected only by a man-made drain and series of small tributaries.

In *Rapanos*, the agencies suffered a setback. There, the Supreme Court held that the CWA did *not* reach to include isolated bodies of water or wetlands. Instead, something more than a "hydrological connection" between a wetland and a navigable-in-fact waterway was required for the exercise of federal jurisdiction under the Clean Water Act.

The trouble was that no opinion garnered the five votes required for a majority. In a plurality opinion for four Justices, Justice Scalia wrote that the CWA limited federal authority to those "relatively permanent, standing or continuously flowing bodies of water" such as streams and rivers that are connected to navigable-in-fact waters. Wetlands were subject to federal jurisdiction only if they contained a "continuous surface water connection" such that the wetland and the covered water were "indistinguishable." Ephemeral and insubstantial connections were insufficient to confer federal jurisdiction. To be clear, this plurality opinion would have dramatically cut back on the agencies' broad view of federal authority under the CWA. No longer would minor tributaries with intermittent flow be subject to federal jurisdiction. And wetlands would be covered only if there was a continuous surface water connection.

Given Justice Scalia's dramatic narrowing of the term "waters of the United States," one might wonder where the WOTUS Rule comes from. A separate, concurring opinion from Justice Kennedy provides the background for the agencies' rule. Justice Kennedy agreed with the plurality that a hydrological connection, by itself, was insufficient, but instead of Justice Scalia's demanding test, relied on a significant nexus analysis. In his view, federal authority existed where a wetland or water "significantly affects" a traditional navigable waterway.

There is some debate about whether Justice Kennedy or Justice Scalia's opinion should control. Most courts of appeal have counted votes, and concluded that since the four dissenting Justices would have found jurisdiction under Justice Kennedy's test, that approach governs because 5 votes in favor of federal jurisdiction exist.

The Supreme Court's reversal of the agencies' broad jurisdictional claim in *Rapanos* gave rise to the agencies' new rulemaking process. Given that the agencies' suffered a defeat in that case, one might think that the new Rule would be less ambitious. Not so. The agencies have exploited loose language in Justice Kennedy's concurring opinion to arrive at a broader-than-ever interpretation of the CWA. In short, a series of federal court decisions and subsequent agency interpretations have transmogrified the term "waters of the United States"—and with serious consequences to the states and their citizens.

CONCLUSION

In the WOTUS litigation, the state challengers are surely correct that the agencies' broad view of federal jurisdiction does not comport with the Clean Water Act. The text of that statute is much narrower. But prior Supreme Court cases—and in particular Justice Kennedy's opinion in *Rapanos*—muddy the waters. They provide the background for much of the agencies' asserted jurisdiction. And of course, the composition of the Supreme Court may be very different when this case gets to the highest level. The next President will have the opportunity to appoint at least one Supreme Court Justice and there is no guarantee that any new Justice will elevate text over precedent. *Rapanos* may be as close to a rollback of federal authority as we'll see from the federal courts. And as the new WOTUS Rule proves, the agencies have used even that defeat to expand, rather than contract, federal authority.

The real question is whether Congress will do anything about this new Rule and agency overreach. The EPA and Corps of Engineers have interpreted the phrase "the waters of the United States" as a grant of authority limited only by the Commerce Clause. The uncertainty surrounding the term hamstrings businesses and landowners. For 40 years, Congress has done nothing to clarify the scope of the CWA. The federal courts and the agencies have given us this broad reading of the CWA—but it is Congress which has the authority to set the record straight. It is past time for them to step in and legislate.