In the Courts – What’s Next for the Waters of the United States Rule?

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Federalism Re-envisioned: Exploring Possibilities for Enhanced State and Tribal Roles in Water Resources Protection, Conservation and Management
Roadmap for This Panel

- Legal Background (Statutory History and Regulatory/Litigation History)
- The 2015 Clean Water ("WOTUS") Rule
- What’s happened lately
- Resulting litigation and a glimpse at the horizon
- Related matters
- Discussion
Historic - Rivers and Harbors Act of 1899

- 33 U.S.C. § 403. "Construction of bridges, causeways, dams or dikes generally; exemptions. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited..."
RHA “Navigability” (33 C.F.R. § 329.4)

• “Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.”
Most permits issuance under Clean Water Act Section 404

Section 404(a) “The Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”
Permit Process

LET US HELP YOU FILL OUT A PERMIT APPLICATION

CLICK HERE FOR THE ONLINE TRAINING MODULE
Understanding “Navigable Waters” and the current jurisdiction debate
The Supreme Court on Section 404
Riverside Bayview Homes (unanimous, 1985)

“The significance of Congress’ treatment of the Corps’ § 404 jurisdiction in its consideration of the Clean Water Act of 1977 is twofold. First, the scope of the Corps’ asserted jurisdiction over wetlands was specifically brought to Congress’ attention, and Congress rejected measures designed to curb the Corps’ jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of ‘Navigable waters.’”
SWANCC

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (2001)

“We hold that 33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner’s balefill site pursuant to the ‘Migratory Bird Rule,’ 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under §404(a) of the CWA.”
Rapanos
(much more to come)
2015 Clean Water Rule

Waters of the United States (WOTUS) Rulemaking

EPA and the Army Finalize Rule Adding an Applicability Date to the 2015 Rule

The Environmental Protection Agency and U.S. Department of the Army finalized a rule adding an applicability date to the 2015 Rule defining “waters of the United States.” The 2015 Rule will not be applicable until February 6, 2020. Read the Final Rule.

Recent News
- Press Release: EPA and Army finalize "waters of the United States" applicability date
- EPA and Army post Federalism and tribal consultation comment letters
- Read the Press Release for the Step One
FEDERAL REGISTER

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Part II

Department of Defense

Department of the Army, Corps of Engineers
33 CFR Part 328

Environmental Protection Agency

Definition of “Waters of the United States” Under the Clean Water Act;
Proposed Rule
September 30, 2014

EPA-SAB-14-007

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Subject: Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA’s Proposed Rule titled “Definition of Waters of the United States under the Clean Water Act”

Dear Administrator McCarthy:

As part of its statutory duties, the Science Advisory Board (SAB) may provide advice and comment to you on the adequacy of the scientific and technical basis of certain planned EPA actions. The Environmental Research, Development, and Demonstration Authorization Act of 1978 (ERDDAA) requires the agency to make available to the SAB proposed criteria documents, standards, limitations, or regulations provided to any other Federal agency for formal review and comment, together with relevant scientific and technical information on which the proposed action is based. The SAB may then provide advice and comments on the adequacy of the scientific and technical basis of the proposed action.

This letter documents the SAB’s activities related to the proposed rule “Definition of ‘Waters of the United States’ Under the Clean Water Act” released on March 25, 2014, and provides advice and comments related to that proposal. Briefly, the SAB finds that the available science provides an adequate scientific basis for the key components of the proposed rule. Although water bodies differ in degree of connectivity that affects the extent of influence they exert on downstream waters (i.e., they exist on a “connectivity gradient”), the available science supports the conclusion that the types of water bodies identified as waters of the United States in the proposed rule exert strong influence on the physical, chemical, and biological integrity of downstream waters. Additional comments regarding the Board’s major findings and recommendations to strengthen the science supporting the rule are provided below.
Environmental Protection Agency

Clean Water Rule: Definition of “Waters of the United States”; Final Rule
MEMORANDUM

TO: EPA DEPUTY ASSISTANT ADMINISTRATOR FOR WATER
   EPA REGIONAL ADMINISTRATORS (REGIONS I – X)
   USACE CHIEF OF ENGINEERS
   USACE DIVISION AND DISTRICT ENGINEERS

SUBJECT: Administration of Clean Water Programs in Light of the Stay of the Clean Water Rule; Improving Transparency and Strengthening Coordination

On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the Clean Water Rule nationwide pending further action of the court. The agencies are fully complying with the stay.¹ We look forward to vigorously defending the merits of the Clean Water Rule, which we continue to believe is fully consistent with the law and based on the best available peer-reviewed science. We are confident that, when implemented, the new rule will make the process of identifying waters protected under the Clean Water Act (CWA) easier to understand, more predictable, and more consistent with current science, while protecting the streams and wetlands that form the foundation of our nation’s water resources.

Even as we defend the Clean Water Rule in court, we intend to move forward with measures to improve implementation of the national CWA section 404 program that were announced concurrent with the Rule. It is critical that we capitalize on the momentum already established to improve transparency, strengthen our coordination processes, increase public participation, utilize the best available science and technical data for making case-specific significant nexus determinations, and to promote public health and environmental protection for all Americans who depend on reliable and abundant sources of clean water.

Improving Transparency: A key component of making the agencies’ programs more consistent, predictable, and environmentally effective is to increase the public’s access to information about how our decisions are made. As reflected in our joint memorandum to

¹ See joint EPA/Army memorandum issued October 10, 2015.
Challenges to the 2015 Rule

18 District Court Complaints
• Many complaints dismissed or stayed
• N. Dakota Dist. Ct. injunction – 8/27/15 – applied to 13 States

22 Petitions for Review – Circuit Courts
• Consolidated in the 6th Circuit
• Nationwide stay of the rule ordered by 6th Cir. – 10/9/15

Supreme Court Review of Jurisdiction question (for now)
Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule

EXECUTIVE ORDER

RESTORING THE RULE OF LAW, FEDERALISM, AND ECONOMIC GROWTH BY REVIEWING THE "WATERS OF THE UNITED STATES" RULE

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. It is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.

Sec. 2. Review of the Waters of the United States Rule. (a) The Administrator of the Environmental Protection Agency (Administrator) and the Assistant Secretary of the Army for Civil Works (Assistant Secretary) shall review the final rule entitled "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37054 (June 29, 2015), for consistency with the policy set forth in section 1 of this order and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law.
Section 1 – “It is in the national interest to ensure that the Nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution. “

Section 2 – Review 2015 WOTUS rule for consistency with that policy and rescind or revise as appropriate and consistent with law.

Section 3 – Consider interpreting “navigable waters” consistent with Justice Scalia’s PLURALITY opinion in Rapanos.
So, back to Rapanos…
Upshot of Scalia’s Plurality Opinion in Rapanos

• Relatively permanent waters;
• Wetlands with a continuous surface connection to relatively permanent waters.
Rules Adopted Through Notice and Comment Rulemaking Can Only Be Repealed or Revised Through Notice and Comment Rulemaking. *

* Contrast interpreting regulations with substantively changing regulations
Administrative Law Basics – Limits on Changing Legislative Rules

Required Procedures:
• Notice
• Opportunity for Comment
• Concise General Statement of Basis and Purpose

Potential Pitfalls:
1) Timing of Comment Period
2) Unalterably Closed Mind
3) Scope of commenting solicited
Administrative Law Basics – Limits on Changing Legislative Rules

Substance: Agency must acknowledge changes and rationally explain reasons for changes – change in Administration is not enough justification in and of itself for a change.

Potential Challenges to any legally defensible change:

1. Strong scientific basis for 2015 rule;
2. Strong economic basis for 2015 rule;
3. What has changed?
EPA Rulemaking Two Step

**Step One** – Rescind 2015 rule and re-codify regulatory text from before the 2015 rule (certainty and continuity)

*Brief economic analysis; Narrow scope of comments solicited; 700,000 comments*

**Step Two** – A new rulemaking to define “waters of the United States”

*Stakeholder Dialogues; Definition tied to Scalia opinion*
Effective Date v. Applicability Date

Effective Date for 2015 Rule – 8/28/15 (stayed in 13 states on 8/27/15; stayed nationwide on 10/9/15)

**Compliance dates and applicability dates**

Some rules include a compliance or applicability date in addition to an effective date. The compliance or applicability date is the date that the affected classes must comply with the rule. - *OFR Document Drafting Handbook*

<table>
<thead>
<tr>
<th>Effective Date</th>
<th>Applicability Date</th>
</tr>
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<tbody>
<tr>
<td>Required for all rules</td>
<td>Not required</td>
</tr>
<tr>
<td>Addresses the CFR placement</td>
<td>Addresses the person who must comply; Is the date the person must comply</td>
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</table>
Rule postpones the applicability of the 2015 rule until 2 years after the applicability rule is finalized.

Maintain the “legal” status quo to provide:
- Clarity
- Certainty
- Consistency
Applicability Rulemaking Process

- 21 Day Comment Period
- No Economic Costs or Benefits performed
- Narrow Scope of Comments Solicited

Final rule adopted on February 6, 2018, after fewer than 5000 comments were submitted.

Rule delays applicability of the 2015 rule until February 6, 2020.
Lawsuits, Lawsuits, Everywhere

- Litigating on the 2015 Rule
- Litigating the Applicability Rule
- Litigating the Rescission Rule
- Litigating the Step Two Rule
Litigating the 2015 Rule

- D. N. Dakota – proceeding
- S.D. Texas – Moving for nationwide preliminary injunction
- N.D. Oklahoma – cases administratively closed pending EPA rulemaking
- Re-filing/re-opening other cases – e.g. S.D. Ga.
U.S. “Defense” of the 2015 Rule

- Postponing review on the merits (see S.D. Ga. and D. N. Dak.)
- Position regarding Nationwide Injunctions
- Query: Are intervenors the only hope for a defense on the merits?
Litigating the Applicability Rule

• States – S.D. N.Y.
• NRDC and NWF – S.D. N.Y.
• Environmental Groups – S.D. S.C.
Litigating the Applicability Rule

States:

• No Meaningful Opportunity for Comment (short comment period; scope of comments solicited)
• Arbitrary and Capricious (failing to consider consistency w/CWA; failing to explain change in position – i.e. facts and science of 2015 rule)
Litigating the Applicability Rule

NRDC and NWF:

- Arbitrary and Capricious (Hard look/relevant factors – failure to consider substance of 2015/pre-2015 rules)
- Arbitrary and capricious (no rational explanation for change in position)
- No meaningful opportunity for comment (similar args as States, plus “unalterably closed mind” argument)
Litigating the Applicability Rule

**Relief**: Enjoin / Invalidate the Applicability Rule

U.S. position re: nationwide injunctions shifts back here
Litigating the Rescission Rule

Similar challenges are likely as for Applicability Rule

- No meaningful opportunity for comment (scope of commenting; unalterably closed mind)
- Arbitrary and Capricious – limited scope of commenting; unexplained changes; economic analysis; science
Litigating the Step Two Rule

• Procedural Challenges (Appropriations Rider?)
• Challenges re: agencies’ change in position re: science and economic impacts
• Challenges re: adoption of the Scalia test
Reexamining the Scalia Plurality

- U.S. position in the past – Jurisdiction exists if either the plurality or Kennedy test is met
- No federal appellate court has held that Scalia test, alone, is the test for jurisdiction
- But….potential adoption all comes down to Marks and Hughes
Existing U.S Supreme Court precedent on plurality cases. Held that when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds…” – but left some issues unsolved.
So now we await
Hughes v. United States (2018)

This was a criminal sentencing case (not environmental) with Supreme Court Oral Argument on March 27 (opinion expected in June).

Why relevant to Section 404? U.S. position at oral argument – assertion that controlling law is found by “counting noses” from all opinions (including dissenting opinions) to find narrowest grounds on which a majority of the Justices agree.
Hughes Oral Argument mentioned a relevant concept

“...in the cases interpreting *Rapanos*, the government has consistently taken a position we’ve interpreted here.” - Rachel P. Kovner, Assistant to the Solicitor General, on behalf of the U.S.

**Current administration’s argument to the Court:** Plurality or Kennedy

Contrast the Executive Order and Step Two Rule: Plurality Only
Outcomes from Hughes?

- If holding = should count noses, including dissents – Scalia-only rule hard to defend
- If holding = plurality opinion alone is precedential – Scalia-only rule defensible
- If holding = plurality opinion alone or concurrence alone can be precedential – Scalia-only rule could be defensible
- Other resolutions / narrow resolutions – Hard to predict
And, the answer* is?

*To the question posted in our title: In the Courts – What’s Next for the Waters of the United States Rule?
Other Interesting Pending Issue: Policy Clause in 101(b)
Full Text of Clean Water Act 101(b)

“It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.” Federal Water Pollution Control Act, 33 U.S.C. Sec. 1251(b), Declaration of Goals and Policy
Discussion!
Wetlands Law: A Course Source

https://www.cali.org/books/wetlands-law-course-source