Clean Water Rule: Expansion of "Waters of the United States"

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Understanding the Changes to the Clean Water Rule

- I. History of the Clean Water Rule
- II. The Final Clean Water Rule
- III. Challenges to the Final Rule

I. History of the Clean Water Rule

- Clean Water Act prohibits “discharge of any pollutants” into “navigable waters” except as in compliance with the Act (CWA § 301)

- CWA (together with the Rivers and Harbors Act) requires authorization from the US Army Corps of Engineers to construct any structure in or over any “navigable water” in the United States (CWA § 404)

- CWA also requires authorization from EPA or state environmental agency to discharge any “pollutant” into “navigable waters” (CWA § 402)

- Congress vaguely defined “navigable waters” to mean “waters of the United States” (“WOTUS”) and allowed the Corps and EPA to define “the precise bounds of regulable waters . . . .”

Why is this definition so important?

– Definition gives Agencies power to regulate a “water” under the CWA

– If a water is outside this definition, it is not subject to federal jurisdiction or permitting rules

Why Change the Rule?

- Agencies were asked to clarify the Clean Water Rule by Congress, state and local officials, industry leaders, environmental groups, scientists, builders and developers, and the public

- Agencies claimed everyone was confused by the Rule after three Supreme Court decisions rendered the definitions in the Rule unclear

  – As a result, EPA admitted that: *"Protection for many of the nation's streams and wetlands has been confusing, complex, and time-consuming . . ."*

U.S. v. Riverside Bayview Homes (*Riverside*) 474 U.S. 121 (1985)

- Found that adjacent wetlands are ‘‘inseparably bound up’’ with their adjacent waters
  - Allowed adjacent wetlands to be included in WOTUS definition
- Court looked to objective of the CWA and Congressional record to determine waters covered by the Act should be broadly defined
- Existing rule was last codified in 1986
  - (33 CFR § 328.3; 40 CFR § 122.4)

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (*SWANCC*) 531 U.S. 159 (2001)

- Court denied the Corps' authority to regulate ponds created by former sand and gravel operations:
  - Held that CWA does not authorize federal agency jurisdiction over non-navigable, isolated, intrastate waters
  - Introduced the idea that waters had to have a "significant nexus" to adjacent waters in order for the CWA to have jurisdiction

- Decision created uncertainty regarding whether certain waters and wetlands could be seen as interconnected

Rapanos v. U.S. (*Rapanos*), 547 U.S. 715 (2006)

- A developer filled 22 acres of property deemed "wetlands" with sand to construct a commercial development

- *Rapanos* produced a plurality opinion (4-4-1), with no side winning a majority and with Justice Kennedy writing a concurrence
  - This produced two competing tests for determining CWA jurisdiction – the plurality's test and Justice Kennedy's test

Rapanos

- The plurality proposed the **"continuous surface water connection"** test be used to determine jurisdiction:
  - **Non-navigable waters**, *only if* they exhibit a relatively permanent flow, such as a river, lake, or stream, and
  - **Wetlands**, if there is a continuous surface water connection between it and a relatively permanent waterbody.

Rapanos

- Kennedy's **"significant nexus"** test:
  - WOTUS = "a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact"
  - Extended CWA jurisdiction to all wetlands that, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"
  - Application was highly unpredictable

Agencies Step In

- March 2014: Citing this confusion, Agencies proposed to clarify the CWA's jurisdiction and "enhance protections for certain bodies of water"

- The Agencies commissioned a report summarizing more than 1,200 peer-reviewed, published scientific studies

  – The report asserts that small streams and wetlands play an important role in the health of larger downstream waterways like rivers and lakes

Agencies Step In

- EPA and the Corps insisted they did not intend to protect any waters that were not historically covered by the CWA
- Held over 400 meetings with stakeholders across the country as part of a “robust outreach effort”
- Reviewed approximately 1.2 million public comments
- The Proposed Rule was the subject of Congressional hearings in early 2015

Agencies Step In

- EPA and the Corps testified at a joint House and Senate hearing
- They denied any intention to expand their authority or eliminate exemptions
- In response to vocal opposition from states, regulated entities, and legislators that the rule would be a federal power grab, EPA said:

  – *"Our goal in this rule is very straightforward. It's to respond to requests from stakeholders across the country to make the process of identifying waters protected under the Clean Water Act easier to understand, to make it more predictable, and more consistent with the law and peer-reviewed science."*

  - EPA Administrator Gina McCarthy

Agencies Step In

- McCarthy claimed the Rule is widely misunderstood and it will actually *reduce* the amount of federal jurisdiction:
  - Waters must have a “significant nexus” to downstream navigable waters, not just any hydrologic connection.

- McCarthy also said the cost of implementing the rule will be minimal—about $162 million to $278 million

Agencies Step In

- Opponents countered that the vague wording would give federal regulators free rein to claim federal jurisdiction over most any water or wet area

  – *"I am troubled by the fact that for many years, EPA and the Corps have embarked on what seems to be a relentless quest to expand the definition of 'waters of the United States,' and therefore federal authority under the CWA. This agenda has been advanced in individual permit decisions by Corps districts across the country."*

  - Sen. James Inhofe, R-Okla.

II. The Final Clean Water Rule

Timeline

- **May 27, 2015:**
  - EPA and Army issue a pre-publication of the final Clean Water Rule

- **June 29, 2015:**
  - The final Clean Water Rule is published in the Federal Register (80 F.R. 37054)
  - Preamble discussion is 50 pages

- **August 28, 2015:**
  - The Final Rule became effective

The Agencies' Findings

- The Agencies explain the reasoning behind their changes:
  - EPA's Office of Research and Development prepared a comprehensive report:
    - "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence"
    - Synthesizes more than 1,200 available peer-reviewed publications
    - Provides the technical basis for many of the changes

The Agencies' Findings

- Science Report reviewed by EPA's Science Advisory Board ("SAB") and confirmed that:
  - Waters are connected physically and through hydrologic cycle at a range from highly connected to highly isolated;
  - Degree of connectivity is a critical consideration when considering impact to downstream waters;
  - There is a cumulative impact of upstream waters on the chemical, physical, and biological integrity of downstream waters

The Agencies' Findings

- The Agencies' review also confirmed for them that:
  - **Tributary streams** are chemically, physically, and biologically connected to downstream waters, and influence the integrity of downstream waters
    - Includes perennial, intermittent, and ephemeral streams
  - **Wetlands and open waters in floodplains and riparian areas** are chemically, physically, and biologically connected with downstream waters and influence the ecological integrity of such waters.
  - **Non-floodplain wetlands and open waters** benefit downstream water quality and ecological integrity, but their effects on downstream waters are difficult to assess

Major Rule Provisions:

- Define “waters of the United States” to include eight categories of jurisdictional waters
  - (1) Traditional navigable waters,
  - (2) Interstate waters, and
  - (3) Territorial seas,
    - Collectively, “traditional” jurisdictional waters
  - (4) Impoundments of jurisdictional waters
  - (5) “Tributaries”
  - (6) “Adjacent” waters
    - Collectively, “jurisdictional by rule,” as defined
  - (7) Types of water specific to certain areas of the US
  - (8) Waters within a specific distance from TNW
    - Jurisdictional after a case-specific analysis of “significant nexus” to traditional navigable waters

The Final Clean Water Rule

- **"Tributary" Defined**
  - **Before:** Agencies claim that tributaries were jurisdictional without qualification
  - **Now**: A tributary is *per se* jurisdictional if it shares a "significant nexus" to a water of the United States:
    - Any water with a bed and bank and an ordinary high water mark that contributes flow directly or indirectly to a navigable water, interstate water or territorial sea
    - The Agencies claim this limits the type of water that can be defined as a tributary
  - Focus of the assessment is on whether the their waters flow into a water of the United States, not the origin of the flow

Concern:

- **Definition is overbroad and widens scope**

- The Agencies: "[A] hydrologic connection is not necessary to establish a significant nexus" to waters that are similarly situated
  - Claim this gives them authority to regulate isolated wetland sinks and isolated depressional wetlands that impact downstream waters or traditionally navigable waters

- Many fear that the Agencies can now assert jurisdiction over lands that are dry most of the year:
  - Transitional land between a traditional waterbodies and upland and lowland areas that are not wetlands

The Final Clean Water Rule

- **“Adjacent” Waters**

  – The Agencies claim per se jurisdiction over “adjacent” waters that are:
    - “bordering, contiguous, or neighboring” a water of the United States
    - Includes waters that connect or are located at the head of TNW and waters separated by constructed dikes or barriers or natural river berms or beach dunes

The Final Clean Water Rule

- **“Adjacent” Waters Expanded By Redefining “Neighboring”**
  - Definition of “neighboring” attempts to set bright line definition
  - “Neighboring” waters now include:
    - (1) all waters within 100 feet of the ordinary high water mark of a TNW;
    - (2) waters within the 100-year floodplain and not more than 1,500 feet from the ordinary high water mark of a TNW; and
    - (3) all waters within 1,500 feet of the high tide line of a TNW

Concern:

- **Definition is overly broad and expansive**
- This can be read as claiming jurisdiction over all waters near to waters of the Unites States
- This is inconsistent with legal precedent which has said that adjacency is only relevant if the waterbody is a wetland

The Final Clean Water Rule

- **Waters describes in categories 7 and 8:**
- **Now**: Waters are subject to a case-by-case "significant nexus" analysis if:
  - They are located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas;
  - They are located within 4,000 feet of the high tide line or ordinary high water mark; or
  - They fit into one of five categories of waters that will likely impact downstream water:
    - "Prairie potholes," Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands

The Final Clean Water Rule

- **"Significant Nexus"**
  - The Rule defines "significant nexus" independently of the *Rapanos* decision to mean:
    - Water that significantly affects the chemical, physical, or biological integrity of a traditional navigable, interstate water or territorial sea.
      - "Significant effects" must be more than speculative or insubstantial

The Final Clean Water Rule

- **Factors to Consider for "Significant Nexus":**
  - 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;
  - export of food resources; and
  - provision of life cycle-dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning or use as a nursery area) for species located in a traditional navigable water, interstate water or the territorial seas.

Concerns:

- Such a multi-factor test all but ensures that the case-by-case assessments will be inconsistent

- Uses “buzzwords” from Justice Kennedy’s opinion without recognizing any of the caution he expressed

The Final Clean Water Rule

- The Agencies have codified the waters excluded from jurisdiction
  - Most have never been deemed jurisdictional (stock and farm ponds, swimming pools, pits excavated during construction or mining, ditches not constructed in streams)
- **Effect:**
  - Have clarified what principles will be applied to assert their jurisdiction
  - Federal agencies have enlarged the categories of features which will fall into their jurisdiction
  - Have clarified by description and distance what could be jurisdictional

III. Challenges To The Final Rule

Legislative Response

H.R.1732: Regulatory Integrity Protection Act of 2015

- **Summary of Legislation:**
  - Passed the House of Representatives in May 12, 2015 (261-155)
  - Received by the Senate
  - Withdraw the Proposed Rule and any final rule after the enactment of the bill;
  - Develop a new proposed rule, taking into account public comments and regulatory analysis;
  - Consultation with states, localities, and affected entities
  - Requires a report to Congress

S.980: Defense of Environment and Property Act of 2015

- **Summary of Legislation:**
  - Sponsored by Sen. Rand Paul (R-KY)
  - The Agencies must redefine “navigable waters” to exclude from regulation waters that lack a continuous surface water connection to navigable waters, including intermittent or ephemeral streams (utilizes plurality test from *Rapanos*);
  - The Agencies are prohibited from using the “significant nexus” test;
  - The Agencies must retract the Proposed and Final Rule;

S.980: Defense of Environment and Property Act of 2015

- Would amend CWA to clarify: federal official may only enter private property to collect information about navigable waters if property owner:
  - (a) consented to that entry in writing;
  - (b) is notified regarding the date of entry; and
  - (c) given access to any data collected and option to be present for data collection
- Addresses regulatory taking: If regulation causes drop in fair market value or economic viability of property, Agency owes property owner twice the value of the loss

S.1140: Federal Water Quality Protection Act

- **Summary of Legislation:**
  - Sponsored by Sen. John Barrasso (R-WY)
  - Wholesale revision of definitions of waters protected by CWA based on certain criteria expressed by statute and consultation with state and local regulatory officials
  - Agencies and GAO would be required to report to Congress describing how the Proposed Rule would meet the criteria specified in the bill;
  - The Corps would be required to establish statistically valid measures of the volume, duration, and frequency of water flow in streams.
- **President Obama has promised to veto all such legislative attempts.**

Legal Challenges by States

- **Georgia, West Virginia, Alabama, Florida, Kansas, Kentucky, South Carolina, Utah, Wisconsin**
  - Southern District of Georgia (15-cv-00079)
- Complaint accuses Agencies of usurping States' primary responsibility for management, protection, and care of intrastate waters and lands
- The new definitions in the Rule give Agencies "virtually limitless power" over non-navigable waters

Georgia, et al. v. EPA, et al., S.D. Ga. (15-cv-00079)

- Rule is overbroad; exceeds Agencies' authority given in violation of Commerce Clause and authority of States under Tenth Amendment:
  - Tributaries: Rule's per se coverage of all tributaries would allow Agencies to regulate ponds, ephemeral streams, and even channels that are usually dry
  - Adjacent Waters: Rule's per se coverage of all waters "adjacent" to primary waters, impoundment, or tributaries would allow the agencies to regulate large portions of water, wetlands, and even lands that are dry for most of the year
  - Intrastate Waters: Rule defines primary waters to potentially include any intrastate waters and wetlands, including non-navigable intrastate waters

Georgia, et al. v. EPA, et al., S.D. Ga. (15-cv-00079)

- "Other" Waters: Rule allows the Agencies to examine on a case-by-case basis whether to exercise authority over all other waters not covered in the Rule, including:
  - waters partially located within the 100-year floodplain of a primary water that has a significant nexus with a primary water;
  - waters partially located within 4,000 feet of the high tide line or ordinary high water mark of a primary water, impoundment, or tributary that has a significant nexus to a primary water.

Georgia, et al. v. EPA, et al., S.D. Ga. (15-cv-00079)

- **Harms:**
  - **Burden on Individuals:** Places significant burden on homeowners, business owners, and farmers by forcing costly permitting on them, just so they can conduct activities on their lands that have no significant impact on navigable, interstate waters
  - **Burden on States:** States will lose their rights to own and regulate the waters and lands within their State
  - **Costs:** Immediate and high administrative costs on the States that have to create: Water Quality Standards and other pollution limits for "waters of the United States," reports on quality of all navigable waters in State, and permitting issues

Georgia, et al. v. EPA, et al., S.D. Ga. (15-cv-00079)

- **Relief Sought:**
  - Declare the Rule is unlawful
  - Vacate and set aside the Rule
  - Issue preliminary and permanent injunctive relief prohibiting the Agencies from using, applying, enforcing, or otherwise proceeding on the basis of the Rule;
  - Remand the case to the Agencies so they can issue a new rule that complies with the law
- **Ruling:**
  - On August 27, 2015, District Court found lack of jurisdiction

Additional State Cases:

- **Texas, various Texas agencies, Louisiana, Mississippi**
  - Southern District of Texas (15-cv-162)
- **Ohio and Michigan**
  - Southern District of Ohio (15-cv-2467)
- **North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, various New Mexico agencies**
  - District of North Dakota (15-cv-00059)
  - District Court enjoined implementation of the new rule on August 27, 2015
  - On September 4, 2015, the District Court expressly limited its jurisdiction to the 13 states directly before it
- **Oklahoma**
  - Northern District of Oklahoma (15-cv-00381)
- **All contain claims and seek relief expressed in S.D. Ga. case**

Legal Challenges By Regulated Entities

- **Am. Farm Bureau Fed., Am. Petroleum Inst., Am. Road and Transp. Builders Assoc.. Leading Builders Of Am., Matagorda County Farm Bureau, Nat'l Alliance Of Forest Owners, Nat'l Assoc. Of Home Builders, Nat'l Assoc. Of Mfrs., Nat'l Cattlemen's Beef Assoc., Nat'l Corn Growers Assoc., Nat'l Mining Assoc., Nat'l Pork Producers Council, Pub. Lands Council, Texas Farm Bureau v. EPA and US Army Corps of Engineers**
  - Southern District of Texas (15-cv-165)
- **Murray Energy Corp.**
  - Northern District of West Virginia (15-cv-110)
  - Murray's complaint dismissed on August 26, 2015, without prejudice for lack of subject matter jurisdiction

Legal Challenges By Regulated Entities

- **Washington Cattlemen's Assoc.; California Cattlemen's Assoc.; New Mexico Cattle Growers Assoc.; New Mexico Wool Growers, Inc.; New Mexico Fed. Lands Council; Duarte Nursery, Inc.; Pierce Investment Co.; LPF Props., LLC; Hawkes Co.**
  - District of Minnesota (15-cv-3058)
- **Chamber of Commerce, Nat'l Federation of Ind. Bus., Tulsa Reg. Chamber, Portland Cement Assoc.**
  - Northern District of Oklahoma (15-cv-386) (stayed pending MDL)
- US Dept. of Justice has requested that all cases be consolidated into an MDL and moved to the D.C. District Court (MDL No. 2663)
  - On October 1, 2015, JPMDL will consider government's motion to transfer

- **The claims, arguments, and relief sought are similar to the States' suits, but the harms are unique**

- **<u>Harms:</u>**
  - Continuing uncertainty due to vague rules deprives each Plaintiffs' members of notice of what the law requires of them
  - Makes it impossible to make informed decisions concerning the operation, logistics, and finances of their businesses
  - Plaintiffs' members have or will incur costs, including hiring engineers and consultants, to accommodate the possibility that their actions are not in compliance with the Rule
  - Murray Energy suit alleges harms specific to coal industry because of placement of fill in areas now deemed jurisdictional under the Rule

- **WV Attorney General Patrick Morrisey stated:**

  “The way this rule is written creates a series of absurd scenarios for which people can be fined. If you dump a wheelbarrow of dirt in the creek bed behind your house, and you don’t get a permit first, you could be fined, even if that creek was never previously subject to federal regulation. This rule expands a scheme whereby property owners have to ask the EPA for permission to do yardwork – it’s regulatory lunacy.”

Thank you for your interest!

If you would like any additional information, please feel free to contact me.

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