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FEATURE ARTICLE

THE STATE OF THE UNION'S WATER LAW—MIDYEAR REPORT

By Karen M. Hansen and W. Parker Moore

Through the first half of 2008, the state of our Union's water law can be described in one word—unsettled. The year began with both great promise and reserved consternation, and unfortunately little has changed over the past six months. Of course, the Supreme Court's splintered opinion in *Rapanos v. U.S.* continues to wreak havoc in the courts, the regulatory arena, and in Congress over the scope of federal jurisdiction under the Clean Water Act (CWA). But *Rapanos* is no longer the only game in town. In March, the U.S. District Court for the District of Columbia issued an opinion in *American Petroleum Institute v. Johnson*, ___F.Supp.2d___, Case No. 02-2247 (D. D.C. Mar. 31, 2008), vacating the Environmental Protection Agency's (EPA) definition of "navigable waters" in the Spill Prevention, Control, and Countermeasure regulations (SPCC Rule), 40 C.F.R. § 112. The decision, though not greatly publicized, has potentially far reaching implications because the SPCC Rule's definition of "navigable waters," which the court struck down as overly broad, was nearly identical to EPA's regulatory definition of that term for the permitting programs under §§ 402 and 404 of the CWA. As a result, the post-*Rapanos* CWA 404 debate, has become further complicated as EPA is sent back to square one to provide adequate legal grounding for yet another important CWA program.

In addition to the ongoing struggle to define federal jurisdiction under the CWA, several other key water law developments have occurred over the past six months. With the arrival of the long-awaited final rule addressing permitting requirements for water-to-water transfers, the uncertainty over EPA's discretionary review of effluent limitation guidelines, and the continuing saga over regulating ballast water discharges, this year promises to be memorable. These are the highlights of 2008 to date.

Federal Jurisdiction over Waters and Wetlands

Ever since *Rapanos v. U.S.* appeared on the legal landscape in 2006, the Supreme Court's 4-1-4 split decision has confounded landowners, lawyers, and water practitioners alike. Rather than reaching a majority consensus on the appropriate standard for determining CWA jurisdiction over wetlands and non-navigable waters, the Court proposed two vastly different tests. Under the Scalia test, federal jurisdiction extends to only "relatively permanent, standing or continuously flowing" waters and wetlands with "a continuous surface connection" to those waters. In contrast, under the Kennedy test, jurisdiction hinges on "the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." In light of these two competing standards, stakeholders nationwide have wrestled with the most basic questions over interpreting the CWA's jurisdictional scope and implementing the § 404 permitting program. In 2008, the confusion and chaos have only grown more acute.

EPA-Army Corps Joint Wetlands Guidance

In the months following *Rapanos*, permit applications piled up as EPA and the U.S. Army Corps of Engineers (Corps) grappled with how to interpret and apply the opinion when making a jurisdictional determination (JD). On June 5, 2007, the agencies issued non-binding joint guidance for implementing *Rapanos* in the field. Unfortunately, it did little to assuage permit applicants or restore order to the § 404 permitting program, which had been set adrift

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by the Supreme Court's opinion. The guidance was simply too little, too late—arriving nearly a year after the controversy began and founded on subjective standards that added confusion to an already chaotic situation. Additional confusion has resulted from the guidance's endorsement of both of the *Rapanos* tests as available avenues for establishing CWA jurisdiction. For these reasons, many stakeholders have argued that the guidance is hindering efforts to carry out the CWA more than it is helping.

In 2008, these concerns have come to the fore. On May 16, Corps representatives confirmed what many stakeholders had suspected since the agencies first issued the joint guidance, namely, that the new guidance has complicated and dramatically slowed the jurisdictional determination and § 404 permitting processes for remote wetlands and non-navigable, impermanent tributaries. The additional complexity and delay stem from evaluating whether these feature maintain a "significant nexus" with traditional navigable waters under Justice Kennedy's jurisdictional test from *Rapanos*, which requires the agencies to evaluate features on a case-by-case basis. Under the guidance, this evaluation involves a number of different hydrological and ecological factors intended to evidence whether a wetland or tributary has an effect that is:

> more than speculative or insubstantial on the chemical, physical, and biological integrity of a traditional navigable water.

Among the factors the agencies take into account are flow characteristics, contextual considerations (location, watershed size), functions of the feature at issue (nutrient transport), and additional contributions of adjacent wetlands.

Not surprisingly, consideration of these objective factors to make a subjective "significant nexus" determination has not been easy. In some cases, it has taken applicants ten times longer to receive a JD than it took before the guidance was in place. Consequently, stakeholders continue pressuring the agencies to initiate formal rulemaking to address the guidance's shortcomings and provide uniform, enforceable jurisdictional standards. For now, however, EPA and the Corps will continue compiling and analyzing the scores of comments submitted on the joint guidance. They expect to complete their review later this year and then decide whether to reissue, revise or recall the guidance and possibly whether to undertake formal rulemaking.

CWA Jurisdiction in the Courts

Just as the agencies struggle to implement *Rapanos* in the field, federal judges struggle to apply it in the courts. After *Rapanos* arrived in 2006, the federal courts quickly divided into three camps, each adopting different views of the opinion and parsing CWA jurisdiction in novel and often times conflicting ways. Some courts, such as the First Circuit, adopted a dual-standard approach under which both the Scalia and Kennedy tests may inform JDs. *See*, *e.g.*, *U.S. v. Johnson*, 467 F.3d 56 (1st Cir. 2006). Other courts, like the Seventh and Ninth Circuits, endorsed relying on only Justice Kennedy's test to analyze 404 jurisdiction. *See*, *e.g.*, *U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006); *N. California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006). Still others believed that *Rapanos* failed to establish an applicable standard and relied on earlier precedent or threw up their hands and refused to rule at all. *U.S. v. Chevron Pipe Line Co.*, 437 F. Supp.2d 605 (N.D. Tex. 2006); *U.S. v. Robison*, 521 F. Supp.2d 1247 (N.D. Ala. 2007). The confusion continues in 2008.

In the last six months alone, six new federal courts have ruled on these issue, each trying to divine some meaning from *Rapanos*. In the same time, the Supreme Court has considered three separate certiorari petitions challenging various interpretations of the opinion. The Court denied the first of these petitions on February 19. *City of Healdsburg v. Northern California River Watch*, Case No. 07-625 (U.S. Feb. 19, 2008). It has yet to decide whether to grant the other two. *Moses v. U.S.*, 496 F.3d 984 (9th Cir. 2007); *Lucas v. U.S.*, 516 F.3d 316 (5th Cir. 2007). Based on recent trends, however, it is unlikely the Court will grant them.

For all the attention on *Rapanos* this year, the D.C. District Court's ruling in *American Petroleum Institute v. Johnson* (*API*) may prove just as important. On March 31, the court vacated EPA's definition of "navigable waters" in the SPCC Rule—a definition remarkably similar to the jurisdictional definitions under the § 404 permitting program. EPA had drafted the definition of "navigable waters" in the SPCC Rule expansively to include all waters that "could affect interstate or foreign commerce," tributaries to

those waters, and adjacent wetlands, and stated that "the case law supports a broad definition of navigable waters, such as the one published today." The court disagreed, finding that EPA's explanation failed to account for recent Supreme Court precedent undercutting this broad definition.

According to the *API* court, EPA's terse explanation for the SPCC Rule definition was irreconcilable with the Supreme Court's 2001 decision in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). *SWANCC* had clarified that, while certain non-navigable waters are subject to CWA jurisdiction, Congress had intended only to exercise its commerce power over navigation under the statute. The CWA does not extend to Congress' full commerce power. Thus, while *SWANCC* never identified every category of jurisdictional waters, it articulated limits on federal regulation of non-navigable features. EPA had overlooked these limits in the SPCC Rule. In short, by defining "navigable waters" to include all waters that "*could affect* interstate or foreign commerce" without establishing a sufficient legal basis, EPA had not exercised reasoned decision-making. The definition was therefore vacated, and the previous version was reinstated while EPA considers how to proceed in light of the *API* decision.

While *API* immediately affects only those who had to update and implement a new SPCC plan under the 2002 SPCC Rule, it has potentially broader implications under the CWA. Because the jurisdictional definitions for the § 404 programs share much of the same language as the definition in the now-vacated SPCC Rule, the ruling could further undermine that program's legality too. Moreover, although the *API* court focused on the legal basis for EPA's definition in light of *SWANCC* and was able to sidestep analyzing the SPCC Rule under *Rapanos*' competing jurisdictional tests, the decision comes just as EPA and the Corps are considering whether to reissue, revise or recall their joint wetlands guidance. Without question, the agencies will need to account for *API* when considering their options and deciding whether to amend their § 404 regulations. EPA's deadline to appeal *API* expired May 31, so the agency apparently has accepted the ruling and will revise the SPCC Rule to define "navigable waters" in line with the court's opinion.

Proposals to Amend the CWA

Continuing post-*Rapanos* confusion over CWA jurisdiction has spurred several lawmakers in Congress to propose amending the statute to extend federal jurisdiction to all waters and wetlands throughout the country. In 2007, Congressman James Oberstar (D-MN) and Senator Russell Feingold (D-WI) introduced HR 2421 and S1870—collectively known as the Clean Water Restoration Act (CWRA). The CWRA would amend the Clean Water Act by replacing the term "navigable waters," which has taken center stage in the controversy over CWA jurisdiction, with the term "waters of the United States." The bills propose to define "waters of the United States" broadly to mean:

> all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.

As the focus of their proposed amendments suggests, Congressman Oberstar and Senator Feingold introduced the CWRA in direct response to *Rapanos*. And although most stakeholders generally support a legislative fix to the confusion emanating from the federal courts, it is hardly surprising that these particular proposals have drawn emphatic praise from the environmental community and sharp derision from the regulated community. Much of the controversy arises from the stated purposes of the amendment (1) "To reaffirm the original intent of Congress in enacting the [CWA] to restore and maintain the chemical, physical, and biological integrity of the waters of the United States," and (2) "To provide protection to the waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution." While supporters contend that the amendment simply restores the CWA to its status before the Supreme Court opined in *Rapanos* and *SWANCC*, critics denounce the proposal as an attempt to rewrite the statute in a way never intended by subjecting

new features, such as isolated wetlands and intrastate ephemeral streams, and "activities affecting these waters," to federal jurisdiction.

Through the first half of 2008, it appears that the CWRA's detractors have gained some ground over its supporters. At an April 16 hearing, EPA and the Corps recommended narrowing the amendment and clarifying the categories of waters and activities subject to federal jurisdiction under the bill to avoid an onslaught of future litigation. The following day, Senator Oberstar sent a letter to EPA's Water Chief, Benjamin Grumbles, recognizing concerns that HR 2421 might extend jurisdiction to new categories of waters and wetlands and requesting "specific legislative suggestions" for revising the bill. Grumbles has gone so far as to question the bill's primary amendment—elimination of the term "navigable waters" from the CWA—and encouraged Oberstar to remove this component of the proposal. It is unlikely that Senator Oberstar or Congressman Feingold will agree to this change in either bill, but it is uncertain what form the final CWRA will take or if it can garner enough support in the House and Senate to become law.

EPA's Final Water Transfer Rule

Section 402 of the CWA prohibits the discharge of pollutants except in accordance with a National Pollution Discharge Elimination System (NPDES). It then defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source," but does not define the term "addition." Over the past decade, this oversight has received significant attention and eventually became a key issue in recent litigation about whether the transfer of pollutant-laden water from one water body to another constitutes an "addition" of pollutants and requires a NPDES permit. *See*, *e.g.*, *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). Yet, the courts have yet to find a uniform approach that is dispositive of the issue and have often sidestepped the question altogether.

On June 9, EPA issued a long-awaited final rule on this issue, declaring that certain water-to-water transfers do not require NPDES permits because they do not result in the addition of a pollutant. Specifically, the new rule exempts water transfers that convey or connect waters of the United States without subjecting the transferred water to any intervening industrial, municipal, or commercial use. To fall within the exemption, however, both the source water and receiving water must qualify as waters of the United States. The final rule relies upon EPA's interpretation that, taken as a whole, the language and regulatory scheme of the CWA (1) do not require permits for water transfers of already polluted water because such actions do not involve any "addition" of pollutants to navigable waters, and (2) signify that Congress intended to leave primary oversight of water transfers to state authorities, not the NPDES program.

EPA's promulgation of the final rule likely marks a new chapter in the controversy over water transfers. According to the agency, thousands of water transfers occur throughout the country each year, making this a hot button issue for both the environmental and regulated communities. Environmental groups, concerned over potential impacts of water transfers on drinking water and water quality, will almost certainly challenge the new rule, which would likely push other interests, such as public water agencies, to seek intervention in any litigation to defend EPA's approach.

EPA's Discretion Over Effluent Limitation Guidelines Review

In May, the U.S. Court of Appeals for the Ninth Circuit surprised many by granting EPA a rehearing of a 2007 watershed ruling addressing the agency's discretion under the CWA when reviewing effluent limitation guidelines (ELGs). In *Our Children's Earth Foundation v. EPA*, 506 F.3d 781 (9th Cir. 2007), the Ninth Circuit originally found that although EPA has a mandatory duty to review ELGs for possible revisions, it has discretion to: (1) control the timing of ELG plan publication, (2) identify potential new categories of pollution sources without developing new ELGs, and (3) establish a schedule for reopening and revising existing ELGs. Initially, the court also held that EPA must use a technology-based approach when determining whether to revise ELGs rather than the hazard-based approach that EPA favors. At the time, the court explained that while EPA has discretion whether to review ELGs, that discretion does not allow EPA to disregard technology-based criteria when deciding whether to revise an ELG during the reviews it conducts. EPA immediately petitioned for a rehearing on this issue.

On May 23, the Ninth Circuit granted EPA's petition for a panel rehearing, withdrew its 2007 opinion, and replaced it with a concurrently filed opinion. *Our Children's Earth Foundation v. EPA*, ___F.3d___, Case No. 05-16214 (9th Cir. May 23, 2008). This time the Ninth Circuit sided with EPA in full. The court reaffirmed its previous rulings supporting EPA's discretion to publish ELG plans, identify new pollution sources, and schedule ELG reviews; more importantly, though, it reversed its ruling that EPA must use technology-based criteria in its ELG reviews. The court explained that:

> while the overall structure of the Act strongly suggests that any *review* to determine whether the revision is appropriate should contemplate the mandatory technology-based factors, the statute does not expressly and unequivocally state as much.

Rather, "[n]othing in the CWA specifically obligates the EPA to *review* the effluent guidelines and limitations using a technology-based approach." Consequently, the Ninth Circuit held that EPA does not have a mandatory duty to use technology-based criteria in its ELG reviews.

Regulation of Ballast Water Discharges

In 2006, the U.S. District Court for the Northern District of California issued a landmark ruling that vacates (effective September 30, 2008) a long-standing EPA regulation exempting ballast water discharges from the NPDES permitting program and orders it to initiate a rulemaking to regulate these discharges as a pollutant under § 402 of the CWA. *Northwest Envt'l Advocates v. EPA*, ___F.Supp.2d___, Cas No. 03-5760 (N.D. Cal. Sept. 18, 2006). According to EPA, the ruling will create an unmanageable regulatory morass under which an estimated 14 million commercial and recreational vessels are subject to the NPDES program for incidental discharges tied to everyday operations. EPA appealed the ruling to the Ninth Circuit in 2007, but the court has yet to rule. If the Ninth Circuit upholds the decision, the practical effect will be that previously exempted vessels owners and operators must obtain NPDES permits for ballast water discharges beginning September 30. In anticipation of the vacature date, EPA reportedly is working on a general permit approach for at least some of the potentially covered vessel discharges.

On March 13, 2008, Senator Bill Nelson (D-Fla.) introduced the Clean Boating Act of 2008 (S 2766), which would amend § 402 of the CWA by clarifying that NPDES permits are not required for recreational vessel discharges of gray water, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines or for any other incidental discharges resulting from the normal operation of recreational vessels. The exemption would apply to any vessel that is leased, rented, or chartered for pleasure or that is manufactured or used primarily for pleasure, but not to vessels subject to Coast Guard inspection and those engaged in commercial use or that carry paying passengers. The bill also would require EPA to develop management practices for recreational vessels to mitigate adverse impacts of incidental discharges if reasonable and practicable to do so and to promulgate federal performance standards for any management practices developed. On May 21, the Senate Committee on Environment and Public Works approved S 2766 by voice vote and ordered it reported favorably. Congressman Steven LaTourrette (R-OH) introduced a companion bill (HR 5949), and it was adopted by the Committee on Transportation and Infrastructure on May 15.

Conclusion and Implications

While the first half of 2008 has been exciting for CWA practitioners, the rest of the year promises to bring other important changes to the water law landscape. EPA and the Corps have much work to do in the post-*Rapanos* and now post-*API* confusion over the scope of CWA jurisdictional waters. The water transfer rule seems likely to head to court, which will once again test the strength of EPA's legal theories on which the Supreme Court largely punted in *Miccosukee*. The ballast water issue could present a CWA "perfect storm" as the Ninth Circuit, EPA and Congress all watch one another's progress as the September 30th vacature date approaches. The ELG plaintiffs have been dogged in their pursuit of this issue and may not rest with the Ninth Circuit's recent self-reversal. Meantime, Congress continues to work on the Sewage Overflow Community Right to Know Act (HR 2452) and (S 2080), while interested parties anxiously await implementation of EPA and the Corps' new regulations for stream and water

resources mitigation. The Farm Bill, once thought to be a done-deal, might also make another appearance due to a clerical error that resulted in Congress voting to override President Bush's veto on only 14 of its 15 provisions. In short, an already busy year for CWA developments holds much promise for further changes.

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