Another Round In The Battle Over The Clean Water Act

By **Allyn Stern**

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Two sections of the Clean Water Act perfectly encapsulate the current debate over jurisdiction under that law. Section 101(a) emboldens the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers to restore and maintain the nation's waters. Section 101(b) admonishes the agencies to recognize, preserve and protect state's rights.

In 2015, the Clean Water Rule developed one approach designed to clarify jurisdiction under the law, using the full extent of federal reach to protect our waters. On Sept. 12, that rule was repealed to reduce federal jurisdiction and provide more authority to states. At issue is the appropriate scope of federal government authority, the interplay of science and law, and a confusing U.S. Supreme Court case.

Clean Water Act jurisdiction begins with the act's direction to regulate "waters of the United States'' — but Congress did not helpfully define that term. Large bodies of water traditionally navigated by vessels are clearly covered by the act. These waterways are referred to as traditionally navigable waters. The controversy centers on smaller bodies of water, particularly those that are not wet year-round, or are some distance from a traditionally navigable water including wetlands, and which tend to be a lightning rod for debate and disagreement.

Historical Background

In 1986 and 1988, the EPA and the Corps issued regulations to guide Clean Water Act jurisdiction.[1] Jurisdiction is based on the Commerce Clause and, in its early incarnation, was interpreted very broadly to include even isolated intrastate waters — those waters that were not connected to a traditionally navigable water.

As long as such waters provided habitat for birds that crossed state lines or were protected by federal migratory bird treaties, this gave them a Commerce Clause connection. It wasn't until 2001 when the Supreme Court decided Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,[2] and rejected the Commerce Clause application to isolated waters, that the court put a significant limitation on Clean Water Act jurisdiction.

Farmers, ranchers, developers and others have long been concerned about the discretion allowed to federal agencies and the resulting reach of the Clean Water Act. Hopes were that the Supreme Court would resolve the controversy in Rapanos v. United States,[3] but Rapanos just confirmed how complicated the matter really was. In a 4-1-4 split, the court created two paths that need to be reconciled. Justice Antonin Scalia took the narrow approach, interpreting "waters of the U.S." to primarily cover relatively permanent, standing or continuously flowing bodies of water. Justice Anthony Kennedy had a more nuanced approach, articulating a more flexible test allowing jurisdiction if a waterway had a

"significant nexus" to a traditionally navigable water.

2015 Clean Water Rule

To address the post-Rapanos confusion both within the agencies and the public generally, the EPA and the Corps developed the Clean Water Rule.[4] Among the rule's stated goals was to identify waters more precisely and make jurisdiction more predictable and easier for businesses and industry to understand. The rule also gave form to the significant nexus test set forth by Kennedy, relying on this test to establish jurisdiction for many waters.

Critics of the rule are particularly concerned about the broad inclusion of tributaries, the definition of adjacent waters and waters that can be jurisdictional on a case-by-case basis. An unusual element of the 2015 rule is the inclusion of waters within prescribed distances from traditionally navigable waters. These distance limits can provide some certainty without the need to spend significant time and money on expert analysis to determine jurisdiction.

The 2015 rule generated praise as well as outrage — and the outrage was powerful. Litigation quickly ensued in multiple jurisdictions, with some, but not all, courts upholding the 2015 rule. The litigation history is extensive and confusing, and at this point, not critical to recount. The Sixth Circuit issued a nationwide stay, but on Jan. 22, 2018, the Supreme Court determined that the rule could be reviewed in district courts, and the stay was lifted. Just prior to the repeal, the rule was effective in 22 states, but already stayed in 27.[5]

Repeal of the 2015 Clean Water Rule

The repeal[6] began with an executive order[7] directing the agencies to review the Clean Water Rule and develop a rule more consistent with the Scalia opinion in Rapanos. The agencies expressed four reasons for the repeal.

First, the 2015 rule goes beyond the legal limits set forth in Rapanos, including the Kennedy significant nexus test. Second, the 2015 rule gave too much authority to the federal government without balancing the interests of the states.

The repeal cites to Section 101(b) of the Clean Water Act, 33 U.S.C. Section 1251(b), explaining that the 2015 rule did not give sufficient weight to the Section 101(b) statutory requirement to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use ... of land and water resources."[8] This states' rights argument alleges that the 2015 rule did not give enough consideration to the term "preserve" in Section 101(b) and altered the balance of authority between the state and federal governments.

Third, the repeal "avoids interpretations of the CWA that push the envelope of constitutional and statutory authority" and encroaches on state land-use planning authority. The second and third reasons together essentially argue federal overreach in violation of the Commerce Clause by expanding federal jurisdiction into property that should rightly be managed by the states.

Lastly, the distance-based limitations are alleged to have procedural errors and an insufficient record to support them in violation of the Administrative Procedures Act. To highlight the theme of federal overreach and deference to state authority, EPA administrator Andrew R. Wheeler called the 2015 rule an "egregious land grab."

The repeal is also intended to eliminate the patchwork of regulatory requirements created by litigation. Successful repeal would put in place one national framework for determining jurisdiction.

Kennedy's Significant Nexus Test

It's worth discussing the differing views of the significant nexus test. In 2015, the agencies made substantial effort to scope the parameters of jurisdiction in line with their interpretation of the test. The 2015 rule placed a strong emphasis on science, particularly the Connectivity Report, a scientific literature review, resulting in the inclusion of many waters that might be some distance from a traditionally navigable water but are hydrologically or otherwise connected.

The repeal strongly questions that basis, arguing that Kennedy's test is a limiting one and that he never meant to extend the nexus so far. Kennedy's test, made notable by the Rapanos case, was first briefly mentioned in the earlier Solid Waste Agency of Northern Cook County case, which addressed a sand and gravel pit used as a migratory bird habitat. The repeal analyzes the facts from Solid Waste Agency, using it as a prime example of overreach.

Under the agencies' analysis, that sand and gravel pit, which the court determined to be outside the jurisdiction of the Clean Water Act, could be jurisdictional under the 2015 rule. The agencies also analyze the definition of tributaries, adjacent waters and waters that can be jurisdictional using a case-by-case analysis, finding that the 2015 rule expanded the significant nexus test beyond Kennedy's intention.

Is the Clean Water Rule Dead?

While the pre-2015 regulations will now be the national standard, litigation over the appeal is certain, and a successful challenge to the repeal could result in a renewal of the 2015 rule in some states. Challengers may also seek a stay of the repeal, which would maintain the patchwork.

Even a successful defense of the repeal does not necessarily mean permanence, as a new administration could attempt to repeal the repeal, or propose something completely different. Most importantly, all of this is not nearly as relevant as the outcome of the waters of the U.S. replacement rule,[9] proposed in 2018 and expected to be finalized early in 2020.

2018 Proposed Waters of the U.S. Rule

Like the 2015 rule, the WOTUS rule strives for clarity, predictability and consistency, but takes a different approach. Following the executive order's instructions to tailor a rule more closely to the Scalia opinion, the proposed 2018 rule limits the discretion of the executive branch and focuses the rule around traditionally navigable waters.

Inclusion of tributaries is severely limited, and the new rule excludes those tributaries that are wet only because of rainfall, excludes ephemeral waters, and, in a big change from the 2015 rule, requires that any waters connected to a traditionally navigable water must be through a surface water connection, rather than even a shallow subsurface hydrological connection, as the 2015 rule and pre-2015 regulations allowed.

Adjacent waters must be physically touching other jurisdictional waters and, if separated,

need to have a surface water connection. The proposed rule also tries to limit expansion of jurisdiction by adding explicit exclusions and limiting agency discretion to add waters through case-specific analysis.

Weighty Questions for the Future

The debate over Clean Water Act jurisdiction raises several weighty issues. It calls into question the balance of power between the federal and state governments. While the agencies' repeal limits federal authority in favor of the states, policy and law trend back and forth, creating uncertainty for the future.

The debate questions the constitutional extent of the Commerce Clause and the legal limits of federal authority. The most expansive use of federal authority surely came pre-Solid Waste Agency, when migratory bird habitat alone could create Clean Water Act jurisdiction. Since then, federal jurisdiction has been reduced, but the extent of that reduction has never been as great as under the proposed replacement rule. Whether courts will uphold a similar final rule is also uncertain.

Finally, the debate raises interesting questions about the role of science in agency decision making. The 2015 rule relied heavily on science to interpret a significant nexus. Science played a key role in determining the appropriate connection of a water to traditionally navigable water. The repeal does not ignore the science, but questions the extent that science should drive the decision making, prioritizing instead the legal framework.

What to Expect Now

In the immediate future until litigation requires otherwise, the 1986/1988 regulations are in effect nationwide. The EPA and the Corps issued several documents interpreting the regulations, with the most relevant being the 2008 Rapanos guidance, that analyzed the Supreme Court case and provided direction for implementing the regulations accordingly. The Rapanos guidance allows for a narrower interpretation of jurisdiction than the 2015 rule, but a more expansive interpretation than the proposed replacement rule.

The agencies also address the limbo created by the appeal of the 2015 rule. The repeal advises that approved jurisdictional determinations, or AJD, and preliminary jurisdictional determinations, or PJD, from the USACE issued under the 2015 rule remain valid. Processes are in place to request a new AJD or PJD to conform with the pre-2015 regulations for those who want it.

It's likely the EPA and the Corps will take a conservative approach to implementing the pre-2015 regulations, and generally try to act consistently with the intent of the 2018 proposed rule. Since the pre-2015 regulations were applied in a majority of states even before the repeal was finalized, big changes should not be anticipated — at least for now.

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[1] Final Rules for Regulatory programs of the Corps of Engineers, 51 Fed. Reg. 41206 (Nov. 13, 1986); Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20764 (June 6, 1988). These regulations are codified at 33 CFR Section 323.2 and 40 CFR Section 122.2.

[2] Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).

[3] Rapanos v. United States, 547 U.S. 715 (2006)

[4] Clean Water Rule, https://www.govinfo.gov/content/pkg/FR-2015-06-29/pdf/2015-13435.pdf.

[5] The EPA posts a map of effective regulations in each state online at https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update.

[6] Repeal Rule, https://www.epa.gov/sites/production/files/2019-09/documents/wotus_rin-2040-af74_final_frn_prepub2.pdf.

[7] See https://www.whitehouse.gov/presidential-actions/presidential-executive-order-restoring-rule-law-federalism-economic-growth-reviewing-waters-united-states-rule/.

[8] See 33 U.S.C. 1251(b)

[9] WOTUS Proposed Rule, https://www.epa.gov/sites/production/files/2019-02/documents/revised_definition_of_waters_of_the_united_states.pdf.