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Waters of the United States: Clarifying the Clean Water Act's Murky Boundaries

By Jane E. Montgomery and Ryan C. Granholm – November 18, 2016

Landowners often face a vexing question: When must I have regulatory permission to affect a wet—or sometimes wet, or even infrequently wet—area of my property? The issue is a messy knot of questions related to federal and state jurisdiction, technical factors related to the hydrological function and interconnectedness of waters, and the ecological use of waters. While landowners look for certainty, Congress, the Army Corps of Engineers, and the Environmental Protection Agency (EPA) have failed to deliver.

The Clean Water Act (CWA) restricts actions that affect “navigable waters.” 33 U.S.C. § 1251. That term is defined under the CWA as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). This definition has long been understood to include waters that are not in fact navigable. The Army Corps of Engineers and the EPA recently enacted a rule to clarify the meaning of “waters of the United States” (WOTUS). 80 Fed. Reg. 37054 (June 29, 2015). The exact jurisdictional boundaries of the CWA—particularly as applied to wetlands—remain unclear, however, because numerous legal challenges arose after publication of the rule. The Sixth Circuit stayed nationwide implementation of the WOTUS rule in October 2015. Landowners are unlikely to get clarity on this issue until the rule challenges conclude, which will probably take two or more years.

History of “Waters of the United States”

Uncertainty regarding the jurisdictional limits of the CWA is not new. While the Supreme Court has considered the limits of the statute three times in the act's 44-year history, the Court's decisions are confusing.

The Supreme Court first considered the scope of “waters” covered by the CWA in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The case involved Michigan wetlands immediately adjacent to the navigable Clinton River, just upstream of Lake St. Clair. After a housing developer began filling the wetlands, the Army Corps sued it for failing to obtain a section 404 permit. Army Corps regulations at the time applied CWA restrictions to any wetland adjacent to navigable or interstate waters and their tributaries. The district court agreed that

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the wetlands were subject to CWA regulation and enjoined further filling without a permit. The Sixth Circuit reversed, holding that only wetlands created by the flooding of navigable waters are covered by the CWA.

The Supreme Court, however, upheld the Army Corps' definition of "waters of the United States." In a unanimous decision, it confirmed that non-navigable waters *may* be regulated under the CWA where they are "inseparably bound up with the 'waters' of the United States." The Court noted, "Congress chose to define the waters covered by the Act broadly." The word "navigable," it held, "is of limited import" and whether wetlands were created by flooding is irrelevant.

The first Supreme Court case to limit the jurisdiction of the CWA was *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). In that case, the Court struck down the Army Corps' attempt to prevent a municipal agency from filling isolated, intrastate ponds to create a landfill. 531 U.S. at 162. The ponds—abandoned sand and gravel pits that had filled with water—were found to provide habitat for migratory birds. According to Army Corps guidance at the time, any intrastate water providing habitat for migratory birds was a "water of the United States," subject to regulation under the CWA. Therefore, the agency blocked the project.

Though the district court and the Seventh Circuit upheld the Corps' jurisdiction over the ponds, the Supreme Court reversed, striking down the Corps' decision in a 5–4 ruling. The Court held that the CWA does not extend to "ponds that are *not* adjacent to open water," (emphasis added). Otherwise, the Court concluded, the word "navigable" would be read out of the statute. Only waters with a "significant nexus" to waters that are "navigable in fact," it ruled, fall under the CWA's jurisdiction.

By the time the Supreme Court next addressed the issue in *Rapanos v. United States*, 547 U.S. 715 (2006), the Army Corps' definition had grown to include drainage ditches, ephemeral streams, and arroyos. The Corps found wetlands to be WOTUS where they were connected to navigable waters or their tributaries, during storm events, or within the 100-year flood plain of a navigable water or a tributary. This brought nearly half of Alaska and a total area in the lower 48 states equivalent to the size of California under the CWA's jurisdiction.

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Rapanos questioned the Army Corps' and EPA's expansive definition of WOTUS but did little to clarify the CWA's jurisdictional limits. *Rapanos* was consolidated from two Sixth Circuit cases involving several Michigan wetlands, all located at least 10 miles away from the nearest traditionally navigable waters and connected to those waters only by man-made ditches. The Army Corps determined that these wetlands were within the CWA's scope and both the district court and the Sixth Circuit upheld the Corps' interpretation. Specifically, the Sixth Circuit held that the wetlands were covered by the CWA because they had "hydrological connections" to tributaries of navigable waters. *U.S. v. Rapanos*, 376 F.3d at 629, 643 (6th Cir. 2004).

No Supreme Court opinion in the case received a majority, but five justices voted to vacate the Sixth Circuit's decisions and remand for further proceedings. A four-justice plurality, led by Justice Scalia, held that "the waters of the United States' include only relatively permanent, standing or flowing bodies of water." 547 U.S. at 732. Their definition excluded ephemeral streams and drainage ditches, and included only those wetlands with a "continuous surface connection to bodies that are 'waters of the United States' in their own right."

Justice Kennedy concurred, ruling that the Sixth Circuit should reconsider the cases, but he recommended a different standard than that adopted by the Scalia plurality. Justice Kennedy cited language from *SWANCC*, focusing on the amorphous concept of whether a "significant nexus" exists between a wetland and a navigable water. This "significant nexus" Kennedy explained, measures whether the wetland "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" Justice Kennedy rejected the plurality's assertion that to fall within the CWA, waters must be "relatively permanent" and wetlands need to have a continuous surface connection to other covered waters. His test would afford the Army Corps substantially more deference to determine the boundaries of the CWA than the plurality allowed. Kennedy suggested that the properties at issue in *Rapanos* would likely meet the "significant nexus" test.

Rounding out the *Rapanos* opinions, a four-justice dissent written by Justice Stevens advocated deferring to what it described as "more than 30 years of practice by the Army Corps." Citing *Chevron* deference and the Court's unanimous decision in *Riverside Bayview*, the dissent would have upheld the lower courts' rulings and the Army Corps' determination that the wetlands at issue in the case were within the jurisdiction of the CWA. 547 U.S. at 788. Justice Stevens noted that, given the fractured opinions in the case, he expected Justice Kennedy's concurrence to be controlling in most situations, because any facts that met his test would also

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get the four votes of the dissenters. Though Justice Stevens' prediction largely came true, not all courts have agreed on the proper approach.

WOTUS Rule—2014

In April 2014, nearly eight years after the *Rapanos* decision, the EPA and Army Corps proposed a new rule in an attempt to provide some clarity to the definition of “waters of the United States” (WOTUS rule). 79 Fed. Reg. 22188 (Apr. 21, 2014). The rule was finalized in June 2015, creating more bright-line tests to determine which waters and wetlands fall within the jurisdiction of the CWA. 80 Fed. Reg. 37054 (June 29, 2015). The agencies purported to base much of the rule on Justice Kennedy's concurrence in *Rapanos*, using his “significant nexus” test to define “waters of the United States.” Applying this test, the agencies reviewed information from numerous sources to “interpret the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas.” In other words, non-navigable waters are covered under the WOTUS rule where science shows that they “significantly affect . . . waters more readily understood as ‘navigable.’” 547 U.S. at 780.

First, the rule notes four categories of waters that, by their nature, are jurisdictional: (1) navigable waters, (2) impoundments of navigable waters, (3) territorial seas, and (4) interstate waters. Next, the rule describes two categories of waters that are jurisdictional by rule, where specific definitions are met: tributaries and adjacent waters. Tributaries are defined in the rule as waters that are marked by physical indicators of flow and contribute flow to waters in the first four categories. 80 Fed. Reg. at 37058. Adjacent waters are defined as bordering, contiguous, or neighboring waters in the first four categories or within certain specified distances of waters in the first four categories.

Finally, the rule creates two categories of waters for which jurisdiction is determined on a case-by-case basis: waters that have a “significant nexus” to jurisdictional waters on their own, and waters that have such a nexus when considered in combination with all similarly situated waters in the region. To clarify this final category, the rule creates several categories of waters that are always considered in combination with other similarly situated waters, including Delmarva Bays, pocosins, and prairie potholes.

In addition to clarifying the jurisdictional boundaries of the CWA, the rule also codifies longstanding exclusions from CWA jurisdiction for erosional features, stormwater-control

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infrastructure, waste-treatment facilities, and infrastructure related to normal agricultural activities.

Challenges to the Rule

Shortly after the WOTUS rule was finalized, challenges were filed in jurisdictions across the country. Less than two months after the rule was published, the U.S. District Court for North Dakota stayed the rule, effective in the 13 states that brought suit in that court. *North Dakota v. EPA*, No. 3:15-cv-59, 2015 WL 5060744 (D.N.D. Aug. 27, 2015). The disparate challenges were eventually assigned to the Sixth Circuit by the Judicial Panel on Multi-Circuit Litigation.

On October 9, 2015, the Sixth Circuit also stayed the rule, effective nationally. *In re Clean Water Rule: Definition of "Waters of the United States"*, No. 15-3799, et al. (Oct. 9, 2015). The court held that the petitioners had "demonstrated a substantial possibility of success on the merits." It questioned whether the WOTUS rule is "harmonious" with Kennedy's *Rapanos* concurrence and noted that alleged procedural errors committed by the EPA and the Army Corps during the rulemaking process made it "facially suspect." Finally, the court noted that the context of the case, including the fact that the WOTUS rule had already been stayed in a large portion of the country, encouraged the stay pending further review. Despite its willingness to take the rare step of staying the rule, the Sixth Circuit acknowledged that clarification of the definition of "waters of the United States" is "overdue."

Following its decision to stay the WOTUS rule, on February 22, 2016, the court denied several motions to dismiss the challenge on jurisdictional grounds. *In re Clean Water Rule: Definition of "Waters of the United States"*, No. 15-3751, et al. (Feb. 22, 2016). Analyzing the CWA's judicial-review provisions, the court held that the courts of appeals, not the district courts, are the proper place for a challenge to the WOTUS Rule.

The complexity of the issues and interests involved in the Sixth Circuit challenge, *In re Clean Water Rule: Definition of "Waters of the United States,"* is demonstrated by the parties involved. Eighteen states and myriad industry groups are challenging the rule, while eight states and a number of environmental groups have intervened in support of the rule.

Going Forward

Though the Sixth Circuit challenge is moving forward, resolution of the case, the status of the WOTUS rule, or the definition of "waters of the United States" will not occur anytime soon.

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Petitioners' initial briefs were submitted on November 1, 2016. Final briefing in the case is not due until March 2017, with oral argument sometime in the latter part of 2017 or early 2018. With a Supreme Court challenge likely to follow, the definition of WOTUS will remain uncertain until at least the latter part of 2018.

The Army Corps' Case-by-Case Determinations and *Hawkes*

In the meantime, landowners and the Army Corps will be required to continue operating under the uncertain guidance provided by *Rapanos*. In practice, this means that the only way for landowners to determine whether their property contains a "water of the United States" is through the Army Corps' case-by-case jurisdictional determination process. These determinations—both the non-binding "preliminary" and the binding "approved" varieties—cost substantial time and money to complete.

The Supreme Court recently addressed these jurisdictional determinations in *Army Corps of Engineers v. Hawkes*, No. 15-290 (May 31, 2016). Citing the detailed process and definitive nature of approved jurisdictional determinations (AJDs), the Court held that these determinations are "final agency actions," which are subject to judicial review under the Administrative Procedure Act. This ruling offers landowners an opportunity to challenge agency interpretations before the penalties associated with CWA violations are incurred, but consequently the Corps may become much more careful in issuing jurisdictional determinations. In a joint memo issued shortly after the *Hawkes* ruling, the EPA and Army Corps emphasized the importance of creating administrative records for AJDs that are "complete and thorough." So while landowners will no longer be in limbo when they disagree with AJDs, *Hawkes* may lead to more delays and higher costs for landowners. The Army Corps has also issued new guidance addressing the distinction between preliminary and approved jurisdictional determinations. This distinction has now gained significance now that AJDs are subject to judicial review.

Conclusion

Will the WOTUS ever be definitively resolved? Given the vague direction supplied by Congress and the confusion regarding the meaning of existing precedent, courts certainly have their work cut out for them. What is clear, however, is that the ecological and economic value of wetlands is only likely to grow. Until the issue is resolved conclusively, landowners should continue to tread carefully, or their use of wetlands could subject them to Clean Water Act penalties.

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