American Bar Association
Section of Environment, Energy, and Resources

The Scope of the Clean Water Act Remains Unresolved After 45 Years

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Section Fall Meeting
Baltimore, MD
October 19-21, 2017

ABSTRACT

The scope of "waters of the United States," a foundation for jurisdiction under the 1972 Clean Water Act, remains unresolved after 45 years. In the 2006 split decision of the Supreme Court in Rapanos, no opinion commanded a majority, leaving the Agencies, the lower courts and the public without definitive guidance. In 2015, EPA and the Army Corps adopted a rule attempting to clarify the scope of "waters of the United States," which was challenged by numerous parties in federal district and appellate courts. The Sixth Circuit stayed application of the 2015 Rule, and in October the Supreme Court will hear argument in NAM v. Dept. of Defense on the issue of whether courts of appeals or district courts should hear challenges to the 2015 Rule in the first instance. Interested parties will scrutinize the NAM argument and opinion for indications of how the Supreme Court may view the merits of the 2015 Rule. Overlaying these developments, earlier this year the Trump administration stated that it was planning to review and rescind or revise the 2015 Rule, advising that the Agencies will consider interpreting the term "navigable waters" in a manner consistent with the opinion of Justice Scalia in Rapanos.

Introduction

The Clean Water Act, as enacted in 1972, "prohibits 'the discharge of any pollutant' without a permit into 'navigable waters.'" 33 U.S.C. §§1311(a). The term "navigable waters" is defined to mean "the waters of the United States." 33 U.S.C. §§1362(7), 1362(12). As recognized by the Supreme Court in cases noted below, obtaining a permit is costly in time and dollars, and there are civil and criminal penalties for discharging without a permit. The scope of "waters of the United States" also called "WOTUS" is thus of foundational importance for regulated companies and individuals, the government and the public.

Scholars have debated the scope of this term, which has been associated with the power of Congress under the Commerce Clause. However, more than four decades after the passage of the CWA, the fundamental reach of the Clean Water Act still remains the subject of debate and litigation.

Rapanos

In *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) the Supreme Court struck down the Agencies' "Migratory Bird Rule," which purported to extend agency jurisdiction to any waters that are or might be used as habitat for migratory birds, no matter how isolated or remote from navigable waters.

In 2006, the Supreme Court addressed the "navigable waters" issue in the context of judicial review of government enforcement actions. *Rapanos v. United States*, 547 U.S. 715 (2006). The case arose from a civil enforcement action by the United States alleging that developer Rapanos illegally filled protected wetland. The wetlands in question were located near ditches and man-made drains that eventually emptied into traditionally navigable waters; however it was unclear whether flows from these ditches and drains were continuous or intermittent.

A divided court ruled that the Corps exceeded its jurisdiction in both cases, but no rationale commanded a majority. Justice Scalia, joined by Chief Justice Roberts, Justice Alito, and Justice Thomas, wrote the plurality opinion, which found that the Corps' authority to regulate waters of the United States was limited to "only relatively permanent, standing or flowing bodies of water . . . forming geologic features" and not "ordinarily dry channels through which water occasionally or intermittently flows." *Id*. at 732-33. The plurality concluded that the term "navigable waters" refers to continuously present, fixed bodies of water rather than ephemeral, intermittently flowing bodies of water.

Justice Kennedy concurred based on the separate rationale that wetlands adjacent to navigable waterways are waters of the United States if there is a "reasonable inference of ecologic interconnection." *Id*. at 780. With regard to isolated wetlands or wetlands adjacent to a non-navigable tributary, Justice Kennedy stated that the Corps must establish a "significant nexus" to navigable waters in order to classify the wetlands as adjacent. *Id*. at 782. The significant nexus test requires a finding that "wetlands, 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." *Id*. at 780.

Justice Stevens wrote the dissent in *Rapanos*, joined by three other justices (Justice Souter, Justice Ginsburg, and Justice Breyer). The Stevens dissent accused the plurality of failing to respect the "nature of the congressional delegation to the agency and the technical and complex character of the issues at stake." *Id*. at 788. The dissent also faulted Justice Kennedy's concurring opinion for failing to defer sufficiently to the Corps. *Id*. Justice Breyer filed a separate dissent "call[ing] for the Army Corps of Engineers to write new regulations, and speedily so." *Id*. at 812.

Sackett

The Supreme Court issued its unanimous decision in *Sackett v. EPA*, 132 S. Ct. 1367 (2012), a case in which "ordinary Americans" were left "entirely at the mercy" of EPA,

according to Justice Alito. The Court held that the Sacketts may bring a civil action under the Administrative Procedure Act (APA) to challenge an EPA compliance order.

Mr. and Mrs. Sackett purchased a 0.63-acre lot in Priest Lake, Idaho in 2005, to build a new home. The lot was in a residential area, and the Sacketts obtained the necessary local building permits. Early in 2007, rock and gravel were placed on the property to prepare for laying the foundation of the home. In November 2007, EPA issued a Clean Water Act compliance order to the Sacketts. The order stated that the Sacketts had unlawfully filled in wetlands and ordered the Sacketts to remove the dirt and gravel and return the property to its prior wetlands condition. The order also stated that failure to comply was punishable by civil fines of up to $32,500 per day.

The EPA order placed the Sacketts in a bind. If they violated the order, they would be exposed to civil penalties. On the other hand, if they complied they would be spending money to comply with an order that they apparently believed was invalid. The Sacketts responded to the order by requesting an administrative hearing, a request that was denied by EPA. Thereafter, the Sacketts filed a lawsuit in federal district court in Idaho to challenge the compliance order. The Sacketts' complaint alleged that the EPA order was arbitrary and capricious under the APA and that the order violated the due process clause of the Constitution. EPA filed a motion to dismiss the Sackett's lawsuit, arguing that the Clean Water Act precluded pre-enforcement review of EPA compliance orders. EPA argued that such preclusion could be inferred from the statutory scheme because Congress gave EPA discretion to choose among several enforcement options. The district court agreed with EPA's argument that the compliance order is not subject to judicial review and granted EPA's motion to dismiss the Sackett's lawsuit. The Sacketts appealed to the Ninth Circuit, which affirmed the decision below.

The Supreme Court's unanimous opinion written by Justice Scalia concludes that EPA's compliance order has all the hallmarks of finality under 5 U.S.C. §704: it required the Sacketts to restore their property according to an agency-approved plan, exposed the Sacketts to double penalties (for violating both the Clean Water Act and the EPA order) in a future enforcement proceeding, and severely limited their ability to obtain a Section 404 permit from the U.S. Army Corps of Engineers (Corps). *See* 33 U.S.C. §1344; 33 CFR §326.3(e)(1)(iv) (the Corps will not process a permit application, once EPA has issued a compliance order regarding a property, unless doing so is "clearly appropriate").

The Court had little difficulty in disposing of the government's argument that the Clean Water Act should be read as precluding judicial review under the APA, 5 U.S.C. §701(a)(1). The APA creates a presumption favoring judicial review of administrative action, and the Court concluded that nothing in the Clean Water Act's statutory scheme precludes APA review. The Court rejected EPA's argument that the order lacked finality because it invited further "informal" discussion with EPA, noting that the order has legal consequences. 132 S. Ct. at 1372.

The Court similarly rejected the notion that the Sacketts should have submitted a wetlands fill permit application to the Corps and then filed suit if the Corps denied the permit, stating: "The remedy for denial of action that might be sought from one agency does not

ordinarily provide an 'adequate remedy' for action already taken by another agency." *Id*. at 1372.

Justice Scalia's opinion concludes that "there is no reason to think the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review -- even judicial review of the question whether the regulated party is within the EPA's jurisdiction." *Id*.

The *Sackett* opinion also contains commentary on the state of the law regarding the scope of the CWA. Justice Scalia's opinion notes that in *Rapanos v. United States*, 547 U.S. 715 (2006) "no one rationale commanded a majority of the Court." 132 S. Ct. at 1370. Chief Justice Roberts wrote a concurring opinion in *Rapanos* suggesting that the Agencies should issue regulations interpreting the scope of their Clean Water Act authority. In another concurring opinion, Justice Alito, citing a brief filed by the Competitive Enterprise Institute (represented by this author), notes that for forty years Congress has not resolved this ambiguity, and EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition, leaving determinations concerning wetlands to be made on a case-by-case basis by EPA field staff. His opinion states that the combination of the "uncertain reach" of the Clean Water Act and the "draconian penalties" imposed leaves most property owners with "little practical alternative but to dance to the EPA's tune." Justice Alito states that, in "a nation that values due process, not to mention private property, such treatment is unthinkable." 132 S. Ct. at 1375.

The 2015 WOTUS Rulemaking And Its Aftermath

On April 21, 2014, EPA and the Corps ("the Agencies") issued a proposed rule redefining "Waters of the United States" under the Clean Water Act. 79 Fed. Reg. 22188 (proposed April 21, 2014) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116). After receiving public comments, the Agencies issued the "Clean Water Rule: Definition of 'Waters of the United States.'" 80 FR 37054 (codified 40 CFR 110, 112, 116, 117, 122, 230, 232, 300, 302 and 401, and 33 CFR 328). This is commonly referred to as the WOTUS rule.

The WOTUS rule classifies waters in three categories: waters that are categorically jurisdictional, waters that require a case-specific significant nexus evaluation to determine if they are jurisdictional, and waters that are categorically excluded from jurisdiction. The first category covers waters that are categorically jurisdictional, including traditional navigable waters, interstate waters, and territorial seas. 33 C.F.R. §328.3(a). The second category covers waters "that require a case-specific significant nexus evaluation" to decide if they are jurisdictional, including waters within the 100-year floodplain of a traditional navigable water, interstate water, and impoundments of jurisdictional waters. 33 C.F.R. §328.3(a)(8). The third category covers waters always excluded from jurisdiction, including swimming pools, ornamental waters, waste treatment systems, drainage ditches, farmland stock watering ponds, and settling basin. 33 C.F.R. §328.3(b).

The 2015 Rule was controversial, and 31 states and a number of other parties sought judicial review in multiple lawsuits. Seven states and the District of Columbia, and an additional number of parties, intervened in those cases. Various parties argued that the WOTUS rule would

subject companies and individuals to new CWA regulatory jurisdiction, such as CWA §404 permits for discharges of dredged or fill material, for activities on or affecting lands or waters not previously defined as jurisdictional. For example, farmers argue that the WOTUS rule gives the government regulatory control over waters and many land areas that only temporarily hold rainwater, including common farm ditches, ephemeral drainages, agricultural ponds and isolated wetlands. They also argue that the rule defines terms such as "tributary" and "adjacent" in a sufficiently broad and vague manner such that regulated entities cannot know whether specific ditches, ephemeral drains or low areas on their land will be deemed "waters of the U.S." Members of Congress criticized the WOTUS rule on the grounds that it will limit or restrict development near water sources. In January 2016, Congress passed a joint resolution (S.J.Res. 22) disapproving of the WOTUS rule.

On February 28, 2017, President Trump issued an Executive Order directing the EPA and the Army to review and rescind or revise the 2015 Rule. On March 6, 2017, the EPA and the Army announced their intention to review that rule, and provided advanced notice of a forthcoming proposed rulemaking consistent with the Executive Order. 82 Fed. Reg. 12532 (2017). The announcement stated that the Agencies will consider interpreting the term "navigable waters," as defined in the CWA in a manner consistent with the opinion of Justice Scalia in *Rapanos*. *Id.*

The 2015 WOTUS Rule In The Courts

On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the 2015 Rule nationwide pending further action of the court. *In re EPA*, 803 F.3d 804, 806, 808 (6th Cir. 2015). The Sixth Circuit found that petitioners had demonstrated a substantial possibility of success on the merits and that the balance of harms favored preserving the status quo pending judicial review.

The federal court of appeals challenges were consolidated in the Sixth Circuit, which in February 2016 held, in a 2-1 split decision with three separate opinions, that U.S. district courts do not have jurisdiction to review the regulations. *In re U.S. Dept. of Defense Clean Water Rule*, 817 F.3d 261 (6th Cir. 2016).

In September 2016, the National Association of Manufacturers asked the U.S. Supreme Court to review the Sixth Circuit's split ruling that it has jurisdiction to hear challenges to the waters of the United States rule. NAM has a lawsuit pending in the Southern District of Texas, in which other plaintiffs have joined. On January 13, 2017, the Supreme Court granted *certiorari*. *National Ass'n of Manufacturers v. Dep't of Defense*, 137 S. Ct. 811 (No. 16-299 2017).

In March 2017, the United States requested that the Supreme Court hold the briefing schedule in abeyance in light of the President's Executive Order and the notice issued by EPA and the Army and the attendant prospect that the WOTUS rule may be rescinded or revised. Because the Sixth Circuit has issued a nationwide stay of the rule, the United States argued that the rule will not place any burden on regulated entities while the briefing schedule is held in abeyance. The motion was opposed by environmental groups and the State of New York.

On April 3, 2017, the Supreme Court denied the motion. Industry parties filed their opening briefs in April 2017. The federal respondents filed their brief in July 2017. Oral argument is scheduled for October 11, 2017.

It bears keeping in mind the issue before the Supreme Court is not the merits of the rule, but whether the court of appeals has original jurisdiction under 33 U.S.C. 1369(b)(1) over petitions challenging the WOTUS rule. That being said, court watchers will be looking for any comments on the merits from the bench and in the Court's opinion.