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Environmental LAW

Defining U.S. waters: an environmental odyssey

A generation ago, Congress enacted the Federal Water Pollution Control Act Amendment of 1972, known ever since as the Clean Water Act. A foundation of present day environmental regulation, the Clean Water Act has been a resounding success story. The nation's rivers, lakes and streams are not by any measure pristine, but they are cleaner and better cared for today than at any time since industrialization came to America.

By RONALD G. HULL
Daily Record Columnist

At the core of the Clean Water Act is the notion that all waters of the United States should be governed by a common standard. But federal power is limited, and Congress respected those constitutional limitations by authorizing federal jurisdiction over "navigable waters" and defining only navigable waters as "waters of the United States."

Initially, the Environmental Protection Agency limited its jurisdiction to waters that are navigable-in-fact. That rule was successfully challenged as too narrow, leading to a series of rulemakings finalized in the mid-1980s that defined waters of the United States as including water bodies that are navigable-in-fact, or are interstate, or are tributaries of such waters, or are wetlands adjacent to such waters and tributaries. Those regulations remained essentially unchanged until this year, but were examined and re-interpreted several times by the U. S. Supreme Court, most recently in 2006 in *Rapanos v. United States*, 547 U.S. 715.

In *Rapanos*, which set off the quest to adopt a new and clearer definition of waters of the United States, the court, without a majority opinion, rejected EPA's theory that Congress intended federal jurisdiction to attach to any water or wetland from which water could flow and ultimately reach a navigable-in-fact body of water. A four-justice plurality argued that federal jurisdiction does not extend to ephemeral ditches or streams or wetlands that are clearly separated from jurisdictional waters.

The swing vote, however, came from Justice Anthony Kennedy, concurring in the judgment, but on a different ground. He wrote that the appropriate test should be whether the water or wetland in question has a "significant nexus" to navigable waters, i.e., significantly affects the chemical, physical and biological integrity of that downstream water.

Capturing the essence of that "significant nexus" and translating it into a written rule became the "Holy Grail" quest of the EPA and the Army Corps of Engineers, and based on congressional and judicial reaction to the new rule, that goal may be as elusive as the grail itself.

Since *Rapanos* was decided in 2006, EPA reports it has been deluged with requests for a rulemaking to provide clarity and consistency. It claims that, since Rapanos, making jurisdictional decisions about individual water features or wetlands "has been confusing, complex and time-consuming" and that business and industry have pleaded for a rule that was more precise, more predictable and easier to understand. However, the rule adopted on June 29, and which took effect on Aug. 28, set off a firestorm and has been stayed nationwide by the Sixth Circuit Court of Appeals after only a month.

The new definition of waters of the United States differs from prior law in several key respects. First, the rule asserts federal jurisdiction over all tributaries, drawing a bright-line which appears to substitute a categorical presumption of significant nexus for the factors discussed by Justice Kennedy in *Rapanos*.

Second, the new rule expands jurisdiction over "adjacent" water features and, third, establishes a catch-all provision for "other waters" using significant nexus and a geographic standard if the other water is within 4,000 feet of a jurisdictional tributary.

After the rule was published in the Federal Register, 31 states sued to stop the Rule in federal district courts around the country. Seven district courts raised jurisdictional concerns, concluding that the Court of Appeals is likely the proper venue for a challenge to the rule. In contrast, the District of North Dakota held that jurisdiction lies in the district courts and granted a preliminary injunction staying the rule from applying in 13 states.

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The U.S. Judicial Panel on Multidistrict Litigation stepped in and assigned multiple pending district court cases brought by 18 states to the Sixth Circuit Court of Appeals.

In the Court of Appeals, the state petitioners moved for a stay pending review, which was opposed by EPA and the Corps and by seven states and the District of Columbia, led by New York, who filed papers in support of the Rule.

On Oct. 9, the Sixth Circuit issued a preliminary injunction staying the rule nationwide while it decides whether it actually has subject matter jurisdiction over the litigation. The Circuit Court concluded that opponents of the rule have demonstrated a substantial possibility of success on the merits of their claims in that the rule's treatment of tributaries, adjacent waters and waters having a significant nexus to navigable waters may be at odds with the Supreme Court's rulings in Rapanos and that "it is far from clear" that the rule's distance limitations were adopted properly or are harmonious with Justice Kennedy's instructions on the permissible parameters of waters of the United States.

The Circuit Court also sympathized with the agencies' dilemma, noting that "the clarification that the new rule strives to achieve is long overdue", given that the definition of waters of the United States has "been clouded by uncertainty, in spite of (or exacerbated by)" the Supreme Court. Nevertheless, the Sixth Circuit concluded that "the sheer breadth of the ripple effects caused by the rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being."

A movement is also underway to overturn the rule in Congress under the Congressional Review Act. A resolution of disapproval sponsored by 47 Republican senators is under consideration, but even if passed, faces a presidential veto.

Meanwhile, the rule is stayed, nationwide, pending further instruction from the Sixth Circuit.

Ronald G. Hull is a senior attorney in Underberg & Kessler LLP's Environmental and Litigation practice groups. He has more than 25 years of experience in the areas of environmental and municipal law and litigation.