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The Murky Waters of the United States

By James D. Payne

The regulatory reach of the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) under the Clean Water Act (Act) is hotly contested in federal courts. The dispute centers on the meaning of the phrase "waters of the United States" as set forth in the Act. The Act prohibits such activities as the discharge of pollutants from a point source into "navigable waters" and the discharge of dredged or fill material into "navigable waters" without a permit. The Act defines "navigable waters" as "waters of the United States" but does not define what constitutes "waters of the United States." According to the EPA, 22 states are subject to a broad definition of "waters of the United States" (WOTUS) promulgated by President Obama's EPA (the WOTUS Rule). Industry interests claim that the Rule included areas that may not even contain water much of the year, much less being "waters of the United States" as meant in the Act. Enforcement of the Rule has been stayed in the other 28 states, Texas included, primarily on the grounds that the EPA violated its congressional grant of authority in promulgating the Rule. In shore, the Rule is too broad.

Some history is in order to understand the current split in enforcement of the WOTUS Rule. In 2006, the United State Supreme Court attempted to make the "waters" debate a little less murky in *Rapanos v. United States*. *Rapanos* was 4-1-4 decision. Justice Kennedy's concurring opinion provided the "significant nexus" test to determine whether a water is a "water of the United States." Justice Kennedy concluded that a water may be subject to the Act if it possess a "significant nexus" to waters that are navigable in fact. The nexus require must be assessed in terms of the Act's purpose to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." According to Justice Kennedy, wetlands possess the requisite nexus, and are thus a "water of the United States" if the wetlands, alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, the biological integrity of other covered waters understood as navigable in the traditional sense.

With Justice Kennedy's "significant nexus" test as background, the EPA promulgated the WOTUS Rule in 2015. It sought to clarify the scope of the statutory term "waters of the United States" to make "the process of identifying waters protected under the Act easier to understand, more predictable and consistent with peer reviewed science, while protecting the streams and wetlands that form in the foundation of our Nation's water resources." As part of the definition of "waters of the United States," the Rule included "seasonal streams, wetlands, and tributaries." The Rule pit environmental interests against agricultural, oil and gas, and industry interests regarding the scope of the geographic area that would come under the regulatory eye of the EPA and Corps.

The perceived overbreadth of the WOTUS Rule by industry interests may have been articulated best by a North Dakota federal district court which enjoined enforcement of the Rule. "The Rule allows EPA regulation of waters that do not bear any effect on the 'chemical, physical, and biological integrity' of any navigable-in-fact water. . . . [T]he breadth of the definition of a tributary set forth in the Rule allows for regulation of any area that has a trace amount of water so long as 'the physical indicators of a bed and banks and an ordinary high water mark' exist. . . .

[T]he definition of a tributary here includes "vast numbers of waters that are unlikely to have a nexus to navigable waters within any unreasonable understanding of the term." According to that North Dakota court, ephemeral streams might even be covered by the Rule if enforced.

Conversely, environmental interests argue that the WOTUS Rule effectuates the purposes of the Act because peer-reviewed science and experience make it clear that upstream waters significantly affect the chemical, physical and biological integrity of downstream waters. In short, any pollutant discharged to a remote tributary eventually migrates to a "water of the United States," even if that tributary is dry most of the time.

The WOTUS Rule may dry up if the current administration has its way. On February 14, 2019, President Trump's EPA published a revised definition for "waters of the United States" in the Federal Register for public comment. Of course, the revised definition is less broad than the Obama era WOTUS rule and is sure to draw an outpouring of public comment. For now, however, the Rule applies in 22 states. Accordingly, if industry interests are believed, "waters" that may not even contain water much of the year may fit under the grand sounding statutory term "waters of the United States."

James D. Payne is a shareholder at Guida, Slavich & Flores, P.C. and can be reached at payne@guidaslavichflores.com

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