
Defining “Waters of the United States”: A Mean-Spirited Guide

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Especially in the arid West, where “waters of the United States” are frequently not, well, wet, trying to define jurisdictional waters under the Clean Water Act (the Act) has always been a challenge. Sloppy drafting of the Act in 1972, inconsistent and confusing Supreme Court rulings, and opaque guidance have contributed to years of dysfunction. For many in the regulated community, the biggest frustration is not the need to comply with the Act where it clearly applies, but the time and money it takes to determine if it does. That dysfunction, alas, will not be ended by the release of the final Clean Water Rule (Final Rule) by the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps).

On May 27, 2015, the agencies released their pre-publication version of the Final Rule, which modifies the definition of “waters of the United States” in 40 C.F.R. Part 230.3. That’s the definition that, among other things, governs whether a permit is necessary to build things in washes. The agencies’ proposed rule, published on April 21, 2014, at 79 Fed. Reg. 22,188, had drawn more than 1.2 million public comments. You may freely admit that you didn’t read them all: the agencies deemed only a fraction of them—20,567, to be exact—worthy of individual consideration. Imagine the disappointment of the author of the 20,568th best comment. The final rule and the rest of the docket can be found at www2.epa.gov/cleanwaterrule.

It is a good bet that, by the time you finish reading this sentence, another disgruntled stakeholder will have challenged the rule in the D.C. Circuit Court of Appeals. It appears to strike no one as odd that, more than forty years after passage of an act regulating water pollution, we are still trying to define “water.” Although it falls upon EPA and the Corps to defend their rule, by no means should the agencies be exclusively blamed for this morass. There’s plenty of blame to go around. Author Alice Roosevelt Longfellow once famously said, “If you haven’t anything nice to say about anybody, sit beside me.” In that spirit, this article will summarize how we got us into this regulatory mess, which criticisms of the rule have some merit, and which can be safely ignored as mere authentic frontier gibberish.

Many parts of the Clean Water Act, 33 U.S.C. §§ 1251–1387, can be readily understood, even by lawyers who were political science majors. Among other things, the Act prohibits the discharge of dredged or fill material into “navigable waters” unless authorized by a § 404 permit issued by the Corps. 33 U.S.C. § 1344. (There are, of course, specific exemptions for certain sympathetic and photogenic constituencies

such as farmers, ranchers, and cows, while fancy-pants city folk are completely ignored.) Uncertainty about whether and when a § 404 permit is required has plagued the program for years and was a key driver for the rulemaking. One 2002 study cited by the U.S. Supreme Court in *Rapanos v. United States*, 547 U.S. 715, 721 (2006), found that the average applicant for an individual permit had to spend \$271,596 in transaction costs—not counting mitigation costs—and wait 788 days for a permit. In dicta, the Court suggested that excessive transaction costs are a bad thing. Congress recently concluded that things have only gotten worse. See House Report 113-568, *Waters of the United States Regulatory Overreach Protection Act of 2014* (H.R. 5078), p. 19, n. 6 (after *Rapanos*, the § 404 process “slowed to a crawl”). Indeed, the agencies themselves have joined the critics in order to bolster their argument that the new rule is at least better than the status quo (as it undoubtedly is). In their *Clean Water Rule Factsheet*, the agencies themselves describe the pre-rule situation as dire: “Previously, almost any water could be put through a lengthy case-specific analysis, even if it would not be subject to the Clean Water Act.” For all its flaws, if it survives, the final rule will at least surmount that low bar.

With that brief background, it is now time to turn to the airing of grievances and heaping of scorn. As usual, as good a place as any to start is with the United States Congress. Section 404 invokes the term “navigable waters” ten times, suggesting to the uninitiated that the Act regulates only (1) water that is, at a minimum, wet and (2) capable of supporting a canoe, like Washington crossing the Delaware. *Those fools!* “Navigable waters” need not feature either water or navigability. Having repeatedly used the term “navigable waters” in section 404, like all good draftsmen, many pages later Congress defined “navigable waters” to mean instead “waters of the United States.” 33 U.S.C. § 1362 (7). Although you are right to be suspicious, there is no further statutory definition of “waters of the United States.” That shortcoming was particularly unfortunate, since the Act’s predecessor, the Rivers and Harbors Act, was originally an act regulating disposal of junk into rivers that impeded actual navigation.

Further definition of the term was left to EPA and the Corps, who were empowered to develop “specifications for disposal sites” for dredged and fill material. 33 U.S.C. § 1344. Perhaps because it had failed to read ahead to the definition of “navigable waters,” between 1972 and 1975 the Corps defined “navigable waters” to include only waters navigable in fact. The Corps’ 1974 regulations defined “navigable waters” to mean “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.” 33 C.F.R.

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§ 209.120(d)(1). The Corps further stated that “[i]t is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor.” § 209.260(e)(1). Subsequently both the Corps (because of Court order) and EPA adopted essentially identical definitions that currently define “waters of the U.S.” to include, subject to certain exceptions, “traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands.” 33 C.F.R. § 328.3 (Corps); 40 C.F.R. § 230.3 (s) (EPA). See 79 Fed. Reg. at 22,195. Previously converted cropland and regulated wastewater treatment systems are specifically excluded. Needless to say, the devil is in the details of defining “other waters,” “tributaries,” and “adjacent wetlands.”

After the legislative and executive branches did their best to muddy the issue of which “waters” are regulated under the Act, it was time for the courts to contribute to the confusion. Initially, in *United States v. Riverside Bayview Homes*, the Court upheld the Corps’ decision to include “wetlands adjacent to but not regularly flooded” within the definition of “waters of the United States.” 474 U.S. 121 (1985). Writing for the Court, Justice White did allow that, “On a purely linguistic level, it may appear unreasonable to classify ‘lands,’ wet or otherwise, as ‘waters.’” *Id.* at 132. Nevertheless, the Court held that the Corps had reasonably defined as an “adjacent wetland” subject to regulation under the Act an area made marshy not by surface flow, but by shallow groundwater. The consistently used statutory term “navigable” was deemed to be of “limited import,” given legislative history that Congress had intended to extend regulation to the full extent allowed by the Commerce Clause and not merely to address traditional navigable waters. *Id.* at 133. Justice White deferred to the Corps on where to draw the line between land and water, a task he described as “far from obvious.” *Id.* at 132. Truer words were never spoken.

The Court tried again to distinguish between land and water in 2001 in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001). In SWANCC, a 5–4 majority ruled that the section 404 permit requirement did not apply to “a seasonally ponded, abandoned gravel mining depression” that provided habitat for migratory birds. *Id.* at 171. Since the Court concluded that Congress had not intended to regulate waters with such a remote connection to interstate commerce, the Court did not address whether doing so would have been permitted under the Commerce Clause. *Id.* at 173. Writing for the majority, Justice Rehnquist struggled to explain that the Court was giving effect to the statutory term “navigable,” distinguishing *Riverside Bayview* with the statement “it is one thing to give a word limited effect and quite another to give it no effect whatever.” *Id.* at 173. The Court helpfully explained that the statutory term “navigable” should be given more than no effect, but not more than limited effect. So, that cleared that up. In the course of distinguishing *Riverside Bayview*, Justice Rehnquist noted in passing that the Court had been persuaded in the earlier case by the existence of a “significant nexus” between an actual navigable river and wetlands adjacent to it. Remember that phrase.

The Court’s long twilight struggle to muddy the statutory waters crested in 2006 with its decision in *Rapanos*. Because the Court could not muster a majority opinion, *Rapanos*

produced a pair of competing tests for defining “waters of the United States.” All of the Justices agreed that the statutory term “waters of the United States” was intended to encompass more than traditionally navigable waterways. Justice Scalia, writing for a plurality of four Justices, did caution that the term “navigable” was “not devoid of significance”—which is good to know—and that the term’s “limited effect includes, at a bare minimum, the ordinary presence of water.” *Id.* at 731. His plurality opinion concluded that “waters of the U.S.” should be defined to include only “relatively permanent, standing or continuously flowing bodies of water,” if connected to traditional navigable waters, or wetlands with a continuous surface connection to them. *Id.* at 738. The opinion added that the “relatively permanent” criterion was not intended to preclude regulation of waters that “might dry up in extraordinary circumstances, such as drought” or “seasonal rivers” that do not flow in dry months. *Id.* at 732, n. 5.

Justice Kennedy, concurring in the judgment, stressed that “waters of the U.S.” must also be interpreted to include at least wetlands that have a “significant nexus” to waters that are or were navigable in fact or that could reasonably be so made.” 547 U.S. at 759. This result, Justice Kennedy stated, is “[c]onsistent with SWANCC and *Riverside Bayview* and with the need to give the term ‘navigable’ some meaning.” *Id.* at 779. Justice Kennedy’s “significant nexus” test has been wholly adopted and extended by EPA and the Corps, who invoked the magic phrase several hundred times in their rulemaking docket.

Faced with a crush of comments and political pressure, the agencies did relent on one issue: For the first time, the Final Rule expressly exempts “puddles.”

Skipping a bit ahead, that brings us to April 21, 2014, when EPA and the Corps published their proposed rule. Numerous stakeholders had called for the agencies to update their guidance. Well, as H. L. Mencken said, “Democracy is the theory that the common people know what they want, and deserve to get it good and hard.”

What the final rule has delivered good and hard is a heavy dose of Justice Kennedy’s “significant nexus” test—or at least the agencies’ version of it. The Final Rule and its preamble, for instance, use the phrase “significant nexus” 438 times; the *Rapanos* plurality’s phrase “relatively permanent” merits two mentions. Justice Kennedy himself is referenced twenty-seven times, or twenty-six times more than Justice Scalia, the author of the plurality opinion in *Rapanos*. For good measure, the agencies included another 199 references to Justice Kennedy in their companion *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States*. Doubtless the agencies prepared their administrative record with the

belief that Justice Kennedy might someday be the fifth vote to uphold the rule. But their nonstop appeal eventually sounds like a sales pitch by a particularly ingratiating burial insurance salesman. (“Chris—is it okay if I call you ‘Chris?’ Chris—have you ever thought about what your family will do after you’re gone, Chris?”)

So, what treasures await the reader in the 297-page rule, the 423-page *Technical Support Document*, the 78-page *Economic Analysis of the EPA-Army Clean Water Rule*, the 62-page *Final Environmental Assessment*, and the rest of the docket?

Those comments on the proposed rule fell roughly into three broad categories. The first and most numerous set warned that federal bureaucrats in black helicopters are coming to steal our precious bodily fluids. Comments to that effect did not get much traction, even downwind of the Arizona legislature. More substantively, many commenters asserted that the proposed rule had failed to deliver on its promise of greater clarity. The third group questioned whether the rule runs afoul of either the agencies’ congressional mandate or Congress’ Commerce Clause authority.

The Final Rule gives no quarter on the authority issue but does attempt to address complaints about uncertainty. Like existing guidance and the proposed rule, the Final Rule defines “waters of the United States” to categorically include navigable waters, interstate waters, the territorial seas, and impoundments of the same. It also retains existing exceptions for prior converted crop land and the like. That is and was the easy part.

The hard parts come in the middle. There, the Final Rule’s continued reliance on the “significant nexus” concept makes it difficult to fully understand the, well, significance of the changes from the proposed rule.

Critics of the proposed rule had scoffed at the idea that the test truly provides any certainty and are unlikely to be happy about the Final Rule’s reliance upon it. Then-Texas Attorney General Greg Abbott, now Governor, for instance, commented:

The State of Texas remains perplexed by the federal agencies’ continued reliance on Justice Kennedy’s “significant nexus” test in asserting Clean Water Act jurisdiction. From a practical standpoint, the test is vague and provides no guidance or certainty to landowners. The federal agencies assert that the goal in passing this proposed rulemaking is to provide predictability, clarity, and consistency, yet, nothing could be further than the truth. The Rule establishes a test for jurisdiction that has no observable qualities and was developed by a single justice in the *concurrency* of one case.

Letter of Texas Attorney General Greg Abbott, dated Aug. 11, 2014, to docket. For perhaps the first time involving something written by a Texan, I could not have put it better myself.

The Final Rule most notably tinkers with the language in three areas of major concern: the newly defined universe of “tributaries,” which are categorized as always jurisdictional; “adjacent waters,” which are also jurisdictional per se if they meet certain numeric proximity criteria and qualify as “neighboring”; and “other waters,” whose regulatory status is a bit more difficult to predict.

The agencies contend that the Final Rule “more precisely defines” tributaries to include only those waters that (1) have a bed, bank, and ordinary high water mark; and (2) “contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas.” They also assert, as before, that ephemeral streams are tributaries provided they have a bed, bank, and high water mark. Further, the agency maintains the position that “tributaries” includes man-made ditches, provided they have perennial flow. Ditches with only ephemeral or intermittent flow are excluded, provided they are not a relocated or excavated tributary and meet the flow contribution factor. It is unclear whether the “more precise” tributary definition will placate western irrigation districts, such as the Central Arizona Project, that had expressed concern about their water conveyance systems being defined as tributaries. The agencies did more clearly limit application of the definition to municipal storm sewer systems.

The Final Rule regulates “adjacent waters” if they are either adjacent to or contiguous with, or “neighboring” a navigable-in-fact, interstate water or territorial sea, an impoundment thereof, or a tributary. To be “neighboring,” a water must be either: (1) located at least partly within 100 feet of the high-water mark of one of the foregoing; or (2) located at least partly within the 100-year flood plain and also within 1,500 feet of the high water mark of the foregoing; or (3) located within 1,500 feet of high tide or the high water mark of the Great Lakes. Again, while the addition of numeric criteria at least the illusion of clarity, it is uncertain whether these criteria will affect the reach of the definition.

Finally, the rule’s modified “other waters” provisions subject to regulation on a case-by-case basis certain not-otherwise jurisdictional waters, if they display a “significant nexus.” These case-by-case candidates include prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands—all of which are deemed to be “similarly situated and must be combined for the nexus evaluation—and other waters within the 100-year floodplain or within 4,000 feet of the ordinary high water mark or high tide line of one of the “obvious” waters.

Faced with a crush of comments and political pressure, the agencies did relent on one issue: For the first time, the Final Rule expressly exempts “puddles.” Your kids may now feel free to step in them.

So, how much will all this cost? The agencies’ Economic Analysis estimated indirect costs and benefits under two scenarios, the first assuming an annual increase of positive jurisdictional determinations of 2.84 percent per year and the second assuming an increase of 4.65 percent. Under the former, the estimated low-end costs were \$158.4 million versus low-end benefits of \$338.9 million, with the estimated high-end costs \$306.6 million per year versus estimated benefits of \$349.5 million. Under the second scenario, the low-end estimates were \$236.7 million for costs and \$554.9 million for benefits, with the high-end figures \$465 million for costs and \$572.3 million for estimated benefits.

Against this nearly unblemished record of dysfunction, most would be hard-pressed to think of a way to create even greater uncertainty. Undaunted, Congress has done so. In late 2014, Congress added several riders to the must-pass *Consolidated and Further Continuing Appropriations Act of 2015*, signed by President Obama on December 16 and now Public Law No. 113-59. One rider prohibited the Corps, but not EPA, from

spending money on changing or enforcing its waters of the United States regulations. Obviously the best way to help an agency struggling to fulfill a difficult Congressional mandate is to deprive it of the funds to do so.

The House has now twice passed and sent to the Senate bills that would short-circuit the ongoing rulemaking process. Last session, on September 9, 2014, the House passed H.R. 5078, the *Waters of the United States Regulatory Overreach Protection Act of 2014*. That bill never cleared the Senate, but had it become the law it would have prohibited the Corps and EPA from issuing a final Clean Water Rule, leaving in place the agencies' 2003 and 2008 guidance. *Committee on Transportation and Infrastructure, Report Together With Dissenting Views, Report 113-568*. That is, in order to relieve the regulated community of uncertainty and expense, the House bill would have reinstated outdated guidance that everyone agreed was "causing confusion and added delays in an already burdened and strained decision-making process." *Id.* at p. 37. Now might be a good time for someone in the regulated community to ask the House to stop helping.

The House similarly passed and sent to the Senate on May 12, 2015 H.R. 1732, the *Regulatory Integrity Protection Act of 2015*. This bill would, like its predecessor, require the Corps and EPA to withdraw their rule and try again, after first consulting more rigorously states and industry. Part of that outreach process would oblige the agencies to respond to each comment on the proposed rule—a process that no doubt would delight the otherwise-neglected author of the 20,568th best comment. And I, for one, would love to see how the agencies could gracefully respond to the numerous comments like this: "Leave our farms, ranches, and private property alone. This is not Nazi Germany or communist Russia or China!"

On the Senate side, on April 16, 2015, the fifty or so Senators running for the Republican presidential nomination against each other have cosponsored a bill, S. 98, the *Defense of Environment and Property Act of 2015*. That bill takes the more direct approach of amending the Act to include a definition of "navigable waters," namely navigable-in-fact waters, plus continuously flowing bodies of water. The bill would also expressly rescind agency guidance and the Final Rule, while precluding use of the beloved "significant nexus" test entirely. It would also provide double just compensation for those whose property suffers a diminution in value as a result of a regulatory taking, as determined by "an independent appraiser." What could possibly go wrong with this well-thought-out scheme?

In the unlikely event that either of these bills passes both the House and Senate, of course, they would face an

immediate veto. That means, of course, that this never-ending saga will soon be back to the courts. Oceania had always been at war with Eastasia.

It seems inevitable that this looming round of litigation will address whether the Final Rule exceeds the authority conferred by Congress under the Clean Water Act, Congress' constitutional authority to regulate interstate commerce, or both. As *en fuego* Texas Attorney General Abbott noted in comments on the proposed rule, the agencies seem to have forgotten that, in both SWANCC and *Rapanos*, the Supreme Court told them that they must exercise *less* jurisdiction over iffy waters. And that was without the Court reaching the Commerce Clause issue. Evaluating whether a water has a "significant nexus" to a navigable river does not resolve the constitutional issue, Abbott noted: "it is by no means clear that all waters with a significant nexus to navigable waters also have a substantial effect on interstate commerce." It was clear in 1972 that Congress intended for the Act to regulate "waters of the United States" to the maximum extent allowed under the Commerce Clause. It is far less clear that the Commerce Clause gives Congress authority to regulate waters with such a remote connection to interstate commerce.

The Final Rule and its preamble use the phrase "significant nexus" 438 times.

The Final Rule might be doubly vulnerable to a Commerce Clause challenge because of the agencies' decision to aggregate "similarly situated" waters for purposes of evaluating whether they have a significant nexus to a navigable water. The Supreme Court has expressed reluctance to aggregate noneconomic activity to sustain Congress' Commerce Clause authority. As the ruling in the Obamacare case demonstrates, the Court has recently looked for opportunities to rein in Congress' Commerce Clause authority. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. ___ (2012); (Commerce Clause does not justify regulation of inactivity); *see also United States v. Morrison*, 529 U.S. 598 (2000) (Commerce Clause did not support Congress' enactment of the Violence Against Women Act). A challenge to the constitutionality of this rule might prove to be too hard for the Court to resist. 🌳