COMMENT

Waters Protected by the Clean Water Act: Cutting Through the Rhetoric on the Proposed Rule

by Michael Campbell

Michael Campbell is a Partner at Stoel Rives LLP in Portland, Oregon, where he practices in the firm's Environment, Land Use, and Natural Resources group.

On March 25, 2014, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) proposed to revise their rules defining which water bodies are protected by the Clean Water Act (CWA).[1] As with so much of our public discourse, the reactions from across the political spectrum have included a lot of overheated rhetoric with little regard for the changes that the proposal would actually make. For example, several U.S. senators described the proposal as an attempt "to obtain de facto land use authority over the property of families, neighborhoods and communities," which would "significantly expand federal jurisdiction" under the CWA and "exponentially frustrate economic activity."[2] On the other hand, environmental advocacy organizations have asserted that the proposal is needed to "close loopholes" in the CWA that leave more than one-half of streams unprotected from "unchecked pollution."[3] These statements, and many others like them, wildly mischaracterize both the current law and how the proposal would change it. EPA's press release came closer to the mark in describing the proposal as one that would "not add to or expand the scope of waters historically protected under the Clean Water Act."[4] But the key word in that statement is "historically." Moreover, it is doubtful that anyone would agree with the Agency's further characterization of the proposal as a mere "clarification" that would benefit businesses by giving them more certainty.

When viewed from the perspective of the history and structure of the CWA, the proposed rule would neither expand nor merely clarify the CWA. Rather, in response to two U.S. Supreme Court decisions, the proposal might best be described as an effort by EPA and the Corps to *keep* as many waters within the scope of the Act as the Court will allow. But whether the proposal, if adopted, would go too far for a majority of the Court remains to be seen.

The CWA protects "navigable waters," which it unhelpfully defines as "waters of the United States."[5] Soon after the U.S. Congress enacted the modern version of the Act in 1972, EPA and the Corps adopted regulatory definitions of "navigable waters" to identify which waters were protected. Although EPA adopted a definition nearly as broad as its current definition of "waters of the United States,"[6] the Corps' initial definition was limited to waters that are, were, or could be actually navigable (so-called traditionally navigable waters).[7] In 1975, however, a federal district court held that the Corps' definition was too narrow and ordered the Corps to revoke and replace it.[8] The court reasoned that, by defining "navigable waters" as "waters of the United States," Congress did not intend to limit "navigable waters" to those that met "the traditional tests of navigability."[9] After further revisions to the definitions in the 1970s and early 1980s, EPA and the Corps adopted

1. Although the proposed rules were released on March 25, 2014, they were published in the *Federal Register* on April 21, 2014. Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22187 (proposed Apr. 21, 2014) [hereinafter Proposed WOTUS Rule]; Press Release, U.S. EPA, *EPA and Army Corps of Engineers Clarify Protection for Nation's Streams and Wetlands: Agriculture's Exemptions and Exclusions From Clean Water Act Expanded by Proposal* (Mar. 25, 2014), *at* http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/ae90ded-d9595a02485257ca600557e30 [hereinafter EPA Press Release].
2. Letter and accompanying press release from Republican members of the U.S. Senate Environment and Public Works Committee, to Pres. Barack Obama (Apr. 9, 2014), *at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=cb85c36b-fd2e-a437-b0b6-4a89c7125043.
3. *E.g.*, Press Release, Environment Colorado, *EPA Proposes Biggest Step for Clean Water in a Decade* (Mar. 25, 2014), *at* http://www.environmentcolorado.org/news/coe/epa-proposes-biggest-step-clean-water-decade.
4. *See* U.S. EPA Press Release, *supra* note 1.
5. 33 U.S.C. §§1251-1387, §1362(7), ELR Stat. FWPCA §§101-607, §502(7).
6. *See, e.g.*, 38 Fed. Reg. 13528, 13529 (May 22, 1973) (EPA definition of "navigable waters" for purposes of the CWA §402 National Pollutant Discharge Elimination System (NPDES) permit program).
7. *See* 39 Fed. Reg. 12115, 12119 (Apr. 3, 1974); 33 C.F.R. §209.260 (1973) (Corps definition of "navigable waters" for purposes of the CWA §404 dredged and fill material permit program).
8. Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685, 686, 5 ELR 20285 (D.D.C. 1975).
9. *Id.*

what are essentially their current definitions in 1980 and 1986, respectively.[10]

Both EPA's and the Corps' definitions of "waters of the United States"[11] encompass most surface waters, including traditionally navigable waters and:

- "interstate waters"[12];
- "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, 'wetlands,' sloughs, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce"[13];
- "[a]ll impoundments of waters otherwise defined as waters of the United States"[14];
- "[t]ributaries" of these waters[15];
- the territorial sea (the sea within three nautical miles of shore)[16]; and
- wetlands adjacent to waters of the United States.[17]

Given how broadly courts have construed actions that affect interstate or foreign commerce, there are few surface waters that are not embraced by these categories. In particular, the categories include not only all waters that *could* have an effect on interstate or foreign commerce (which might include, for example, potential use by interstate or foreign travelers for bird watching or other recreation), but also all "tributaries" to such waters and all wetlands adjacent to such waters and their tributaries. Moreover, the legislative history of the CWA includes a statement that Congress intended the statutory term "waters of the United States" to "be given the broadest possible constitutional interpretation."[18] This could suggest that Congress' reference to "waters of the United States" was intentionally vague so as not to leave any waters unprotected that were within Congress' power to protect.

But in 2001 and 2006, the Supreme Court held that the Corps had applied the term "waters of the United States" too expansively.[19] The Court did not invalidate the Corps' regulatory definition of the term, and no member of the Court argued that waters of the United States are limited to traditionally navigable waters. In both cases, however, a five-member majority of the Court reasoned that Congress' use of the term "navigable" requires that waters protected by the CWA must either be traditionally navigable waters or have some substantial relationship to traditionally navigable waters, although the majority could not agree on what that relationship must be.

In the most recent of the decisions, *Rapanos v. United States*, a plurality of four Justices led by Justice Antonin Scalia concluded that the CWA's protection extends only to traditionally navigable waters, to "relatively permanent" bodies of surface water that are "connected to" traditionally navigable waters, and to wetlands that have a "continuous surface connection" to these waters.[20] A fifth Justice, Justice Anthony M. Kennedy, wrote a separate opinion in which he argued that a "significant nexus" to a traditionally navigable water is sufficient even if the water is not relatively permanent and does not have a continuous surface connection to a traditionally navigable water. By "significant nexus" he meant that the water "either alone or in combination with similarly situated [waters] in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[21]

The four dissenting Justices in *Rapanos* would have agreed that any water that satisfies either the plurality's or Justice Kennedy's standard is a water of the United States.[22] A majority of the current members of the Court, then, would hold that any water that meets either standard is protected by the CWA. The nebulousness of the term "significant nexus," however, gives EPA and the Corps far more discretion to determine that a water is protected by the CWA than does the plurality's standard, and for that reason, Justice Kennedy's standard will ordinarily be decisive for any marginal water.

Indeed, the heart of EPA's and the Corps' proposal is a categorical determination that every water that is a "tributary" (as well as wetlands and other waters "adjacent" to the tributary) of a traditionally navigable water, interstate water, or the territorial sea has a "significant nexus" with that water. The proposal broadly defines a "tributary" as

10. *See* 45 Fed. Reg. 33290, 33298, 33424 (May 19, 1980) (EPA's definition of "waters of the United States," codified at 40 C.F.R. §122.2); 51 Fed. Reg. 41206, 41216-17, 41232, 41250-51 (Nov. 13, 1986) (the Corps' definition of "waters of the United States," codified at 33 C.F.R. §328.3). EPA and the Corps revised the definitions in 1993 to exclude "prior converted cropland." *See* 58 Fed. Reg. 45008, 45036-37 (Aug. 25, 1993).
11. EPA's principal definition of "waters of the United States" is codified at 40 C.F.R. §122.2 (CWA NPDES permit program). EPA has also defined "waters of the United States" or "navigable waters" for purposes of the other CWA regulatory programs at 40 C.F.R. §110.1 (discharges of oil) ("navigable waters"); 40 C.F.R. §112.2 (oil pollution prevention) ("navigable waters"); 40 C.F.R. §116.3 (hazardous substances) ("navigable waters"); 40 C.F.R. §117.1(i) (reportable quantities of hazardous substances); 40 C.F.R. §230.3(s)(2) (CWA §404(b)(1) guidelines); 40 C.F.R. §232.2 (CWA §404 program definitions and exemptions); 40 C.F.R. §300.5 (oil and hazardous substances contingency plan) ("navigable waters"); 40 C.F.R. §302.3 (designation of reportable quantities of hazardous substances) ("navigable waters"); and 40 C.F.R. §401.11(l) (general provisions for CWA effluent guidelines) ("navigable waters"). Because these other definitions were adopted at different times, they are not all identical to the definition in 40 C.F.R. §122.2. EPA, however, has generally applied these definitions consistently with the definition in 40 C.F.R. §122.2, and it has proposed to revise the definitions so that they are identical to the definition proposed for 40 C.F.R. §122.2. *See* 79 Fed. Reg. 22263-74 (Apr. 21, 2014). For brevity, these other EPA definitions are not addressed further in this Article.
12. 33 C.F.R. §328.3(a)(2); 40 C.F.R. §122.2.
13. 33 C.F.R. §328.3(a)(3); 40 C.F.R. §122.2.
14. 33 C.F.R. §328.3(a)(4); 40 C.F.R. §122.2.
15. 33 C.F.R. §328.3(a)(5); 40 C.F.R. §122.2.
16. 33 C.F.R. §§328.3(a)(6), 328.4(a); 40 C.F.R. §122.2.
17. 33 C.F.R. §328.3(a)(7); 40 C.F.R. §122.2.
18. S. Conf. Rep. No. 92-1236 at 144 (1972), *quoted in* Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159, 174, 181, 31 ELR 20382 (2001) (Stevens, J., dissenting).
19. *SWANCC*, 531 U.S. 159; Rapanos v. United States, 547 U.S. 715, 36 ELR 20116 (2006).
20. 547 U.S. at 742, 757.
21. *Id.* at 780.
22. *Id.* at 810 (Stevens, J., dissenting).

any water that is "physically characterized by the presence of a bed and banks and ordinary high water mark"—or any wetland, lake, or pond regardless of its physical characteristics—that "contributes flow, either directly or through another water" to a traditionally navigable water, interstate water, or the territorial sea.[23] Furthermore, the proposal would retain EPA's and the Corps' discretion to determine, on a case-by-case basis, that any other water has a "significant nexus" to a traditionally navigable water, interstate water, or the territorial sea.

Viewed from the perspective of EPA's and the Corps' current "waters of the United States" definitions and how the agencies have historically applied them, the proposal would narrow, not expand, the definitions. For example, under the proposal, it is likely that no water within a closed (endorheic) basin that lacks a traditionally navigable water or interstate water could be a water of the United States because all waters of the United States would need to be a traditionally navigable water, an interstate water, or a water with a "significant nexus" to such a water (by contributing flow or otherwise). Under the current definitions, however, any water within such a basin that affects or could affect interstate or foreign commerce (as well as its tributaries) is a water of the United States, regardless of its connection to a traditionally navigable or interstate water. In addition, the proposal not only retains existing exclusions from the definitions, such as the exclusion for "waste treatment systems," but also codifies several exclusions that the agencies have informally applied, such as exclusions for ditches and small artificial lakes and ponds created in upland areas.[24]

But viewed from the perspective of the current state of the law following the Supreme Court's 2001 and 2006 decisions, the proposal would expand the scope of protected waters and may go beyond what the current majority of the Supreme Court would allow. This is especially true of the proposal's provisions regarding tributaries. Under the proposal, any tributary (as well as adjacent wetlands and other waters) would be a water of the United States even if it could be demonstrated that it does not have a significant nexus to a traditionally navigable water. Justice Kennedy's opinion in *Rapanos* recognized that the Corps could choose to identify and protect categories of tributaries that "are likely, in the majority of cases" to have a significant nexus to traditionally navigable waters.[25] The opinion appeared to reject the notion, however, that the CWA protects every discernible water that contributes flow, directly or indirectly, to a traditionally navigable water, no matter how remote or insignificant the contribution—such as an ephemeral stream that might be 100 miles or more upstream of a traditionally navigable water.[26] In response, EPA and the Corps have relied on a not-yet-final technical report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, to bolster their argument that all tributaries as defined by the proposal *do* have a significant nexus.[27]

Another respect in which the proposal may go beyond what the Supreme Court would allow is its treatment of "interstate waters" as the legal equivalent of traditionally navigable waters for purposes of the CWA. The proposal would protect interstate waters, tributaries to interstate waters, and any other waters with a significant nexus to interstate waters. The Supreme Court has not addressed whether or to what extent these waters are protected by the CWA. A majority of the Court, however, has relied on Congress' use of the term "navigable waters" to limit the scope of the CWA to traditionally navigable waters and waters that have some substantial relationship to traditionally navigable waters. Whether that or another majority would accept the proposal's determination that non-navigable interstate waters—as well as waters tributary to those waters or with a significant nexus to those waters—are also protected by the CWA is an unanswered question.

A politically divided federal government will likely continue until at least 2017, which makes any amendment clarifying the scope of the CWA unlikely in the near future. If EPA and the Corps decide to promulgate the proposed rules, the Supreme Court, possibly with a somewhat different membership, would almost certainly decide whether the rules are consistent with the CWA and, if so, might reach the question of whether the CWA exceeds Congress' authority under the Commerce Clause. On the other hand, if the proposed rules are not promulgated, EPA and the Corps would continue to make "significant nexus" decisions for tributaries and other waters on a case-by-case basis—quite possibly with results not so very different from those under the proposal. Either way, the scope of waters protected by the CWA is likely to remain unclear for the foreseeable future.

23. Proposed WOTUS Rule, *supra* note 1, at 22199-206.
24. Some of these exclusions were described by the Corps in the *Federal Register* preamble for its 1986 revisions to its definition of "waters of the United States." *See* 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).
25. *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring).
26. *See id.*
27. U.S. EPA, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, EPA/600/R-11/098B (External Review Draft, Sept. 2013), *available at* http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf.