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U.S. EPA Challenges Science

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Much of the environmental policy coming out of the White House and U.S. Environmental Protection Agency is contrary to the well-established position of scientists and climate experts who are raising serious alarms about the accelerating pace of global warming, species extinction, drinking water degradation and more. The current leadership of the EPA has defended itself mostly by arguing that policies of prior presidential administrations exceeded environmental statutory authority. Nowhere is the agency's position more clearly on display than the recent rulemaking to limit the types of waterbodies protected by the Clean Water Act (the Rule). The Rule takes effect in late March 2020 and is widely expected to face immediate litigation from state attorneys general and environmental advocates. This article takes a closer look and concludes that by ignoring its own scientists, applying the narrowest reading to the Act and disregarding Clean Water Act case law, EPA has made the Rule extremely vulnerable to legal challenge.

Background on the Clean Water Act

The purpose of the Clean Water Act is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). To that end, the Act prohibits a variety of activities, including discharging pollutants or fill without a permit into "navigable waters," which are further defined as "waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). The reach of various other programs under the Act depend on the breadth of the term waters of the United States. See, e.g., 33 U.S.C. §1329 (Nonpoint Source Program). What is and is not a "water of the United States," and, in turn, the scope of federal regulatory jurisdiction, has been a subject of extensive litigation. Before the Rule was issued, federal agencies had taken an expansive interpretation of jurisdictional waters, informed primarily by the evolving scientific understanding of the interconnected nature of water systems. But in fairness to critics, the U.S. Constitution requires (and Congress clearly intended) some limit on the Clean Water Act's reach. What is it?

The Supreme Court's Non-Decision in 'Rapanos'

The dispute over those Clean Water Act rules reached a peak with the Supreme Court's decisions in *Rapanos v. U.S. Army Corps of Engineers*, 547 U.S. 715 (2008). The court splintered into three camps in that decision, which addressed a Corps decision to enforce the Clean Water Act over wetlands that had unclear surface connections to traditional navigable water bodies. Justices Scalia, Thomas, Alito and Roberts issued a plurality decision ruling that the Clean Water Act requires a physical, surface connection between water and a traditional navigable water body to be considered water of the United States, remanding the case to the lower court to determine whether that direct connection was present in the two cases subject to the appeal. Justices Stevens, Souter, Ginsburg and Breyer dissented, explicitly rejecting a requirement that wetlands and other waters have a "continuous surface connection" to a traditional navigable waterbody in order to be regulated by the Clean Water Act. Justice Kennedy declined to join the plurality decision but concurred in the remand, thus setting up Kennedy's concurring opinion to set the new standard for the Clean Water Act. He explicitly rejected the plurality's requirement for a continuous surface water connection. And he criticized the dissent for failing to articulate a standard that would meet the requirements of the Constitution and the Clean Water Act. Instead,

he ruled that the Act merely requires a waterbody to have a "significant nexus" to a traditional navigable water body in order to be regulated as waters of the United States. He advised the Corps to determine that nexus by considering both physical proximity and hydrological connections between the water at issue and a traditional, navigable water body.

Obama Efforts To Regulate Significant Nexus

In the wake of *Rapanos*, most but not all district and circuit courts embraced the significant nexus standard. The EPA and Army Corps of Engineers finalized rules in 2015 designed to clarify which types of waters (1) are clearly jurisdictional, (2) are clearly excluded and (3) require a case by case analysis (the so-called WOTUS Rule). The federal agencies' decision to categorically include, categorically exclude, and retain case-by-case discretion over specific classes of waterbodies in the WOTUS Rule was extensively supported with scientific evidence indicating which types of waterbodies always, never or sometimes have a significant nexus with downstream waterbodies recognized as indisputably jurisdictional. The WOTUS Rule faced numerous legal challenges and became an early target of the Trump Administration. The legal challenges had mixed results, so the Trump Administration shifted its legal strategy to repealing and replacing the WOTUS Rule.

Trump Efforts To Limit the Act's Reach

In 2019 the EPA and Army Corps of Engineers repealed the WOTUS Rule, and early this year issued a final replacement rule—the "Navigable Waters Protection Rule: Definition of Waters of the United States." The Rule draws a bright line limiting federal jurisdiction by requiring a "direct hydrological surface connection" between a waterbody or wetland and traditional navigable water body. Waterbodies that flow only after rainstorms, groundwater, agricultural irrigation ditches, wetlands without a direct surface connection and other types of surficially isolated waterbodies are excluded from regulation.

In proceeding, the EPA ignored its own Science Advisory Board (SAB), which scathingly criticized the Rule in a January 24, 2020 letter. Congress mandated in 1978 that EPA consult with the SAB in all rule-making under the Clean Water Act. EPA thus submitted the proposed Rule to the SAB for review in early 2019. In its letter, (which the EPA saw in draft form in October 2019), SAB states that the Rule "decreases protection for our Nation's waters and does not provide a scientific basis in support of its consistency with the objective of restoring and maintaining 'the chemical, physical and biological integrity' of these waters." SAB observed that the Rule ignores fundamental concepts in the EPA's own 2015 technical report on the topic (the Connectivity Report), such as the fact that functional connectivity of water bodies is "more than a matter of surface geography," and that shallow groundwater may directly connect wetlands to adjacent major bodies of water, and therefore "functional relationships must be the basis of determining adjacency." The SAB further observed that the Rule "offers no comparable body of peer reviewed evidence, and no scientific justification for disregarding the connectivity of waters accepted by current hydrological science."

Many other commenters echoed the SAB's statements. Rather than contest the science, EPA dismissed the comments by asserting that "science cannot dictate where to draw the line between federal and state waters, as that is a legal question." That statement highlights a flaw in EPA's 300-page rationale for the Rule. The Act clearly (and probably intentionally) does not define where to draw the line between federal and state waters. Instead the Act leaves it to EPA and the Army Corps to make a reasoned determination, based on due consideration of the Constitution, science and the ambitious goals of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Science must be part of any reasoned determination since the integrity of the Nation's waters is ultimately a question of biology, chemistry and physics. Here, the EPA offered no scientific basis as to how the particular lines it drew consistently advanced the goals of the CWA.

Litigation

Various states led by New York have already filed an action challenging the October 2019 repeal of the 2015 WOTUS Rule, and that lawsuit provides substantial clues as to what the inevitable challenge to the Rule will look like. The plaintiffs will likely argue that Justice Kennedy's significant nexus rule, which requires careful inquiries into hydrology and connectivity, is controlling legal precedent. And they will likely argue

that the EPA is acting contrary to law and arbitrarily and capriciously in disregarding its own scientists and failing to offer any alternative science-based rationale as to how the lines drawn in the new rule consistently advance the Act's sole objective of restoring and maintaining the integrity of the Nation's waters.

The conflict with the Science Advisory Board appears to be unprecedented. In a review of 63 reported federal court decisions addressing the role of the Science Advisory Board, no prior conflict was as direct as the present one. Other presidents have been accused of interfering with the EPA scientific process, including George W. Bush and Barack Obama. But no administration has ever disregarded the advice of the SAB so thoroughly—at least if reported court decisions are a guide. It is therefore likely to play a key role in the litigation that will play out in federal courts over the next few years.

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