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US Clean Water Act: Constant challenges despite accomplishments

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Waters were polluted. Lake Erie was reported "dead." Rivers were on fire, and swift regulatory action was essential. In 1972, the Clean Water Act (CWA) was created to regulate pollutants discharged into Waters of the United States (WOTUS) in order to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." Since inception, accomplishments under the CWA have included significant reductions in municipal pollutants, decreases in direct sewage discharges, and reductions in nutrients, pathogens, and metals into US waters.

The success of the CWA is largely due to capital improvements, education, and an aspirational approach to reducing water pollution. The CWA requires the use of "best practicable and best available" technologies to treat industrial discharges, secondary treatment for municipal wastewater discharges, and treatment to the "maximum extent practicable" for urban stormwater runoff discharges. With joint authority, the US Environmental Protection Agency (EPA) and US Army Corps of Engineers (USACOE) regulate discharges. The CWA allows the EPA and USACOE (Agencies) to define WOTUS (last codified in 1986), which includes traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of WOTUS, tributaries, the territorial seas, and adjacent wetlands.

Although accomplishments are many, and US waters are more fishable and swimmable today, protection of water quality is not unchallenged. Routinely litigated, the CWA faces questions predominately related to how WOTUS are defined in various parts of the US. Cases have reached the US Supreme Court such as US v. Riverside Bayview (1985), which ruled that the government has the power to regulate wetlands adjacent to WOTUS; Solid Waste Agency of Northern Cook County (SWANCC) v. USACOE (2001), which ruled that the US Army Core of Engineers (USACOE) overextended its authority by regulating isolated WOTUS based solely on the Migratory Bird Rule; and Rapanos v. US (2006), which focused on wetlands hydrologically connected to ditches and drains that discharged into traditional navigable WOTUS miles away. With a 4-1-4 plurality decision, the Rapanos case escalated the debate by introducing new terms and a recommendation for the Agencies to conduct rulemaking for clarification. Each case has changed the approach to WOTUS as defined, resulting in a moving target.

The challenge? A regulator once said it best: "Here we are in 2015, using 1970s guidance and regulations, based on 1950s science.... [C]hanges are needed through rulemaking or even new laws." After the Rapanos decision, the Agencies released an Instructional Guidebook (2008), which attempted to clarify terms such as WOTUS and other associated terms. The Guidebook added detail without modifying the CWA; however, it has not eliminated ambiguity and confusion of WOTUS.

The Agencies released a Proposed Rule on April 21, 2014, which clarified through bright line rules what constitutes WOTUS. For the first time, clear, quantitative metrics were developed for determining jurisdiction, which generally eliminated the project-by-project review of jurisdiction. Additionally, this rule, called the New Rule, included language to exempt wastewater treatment facilities as well as stormwater treatment facilities, including green infrastructure practices. Some viewed the New Rule as a power grab and expansion of federal jurisdiction, while others welcomed the science-based metrics and clear definitions. The New Rule became effective August 28, 2015. Due to multiple challenges by states, the US Court of Appeals for the Sixth Circuit stayed the New Rule nationwide until further action from the court. It has been on hold since late 2015.

Despite its accomplishments, nearly 45 years after the CWA was enacted, the value of clean water and regulated surface waters remains under debate. On February 28, 2017, President Trump issued an Executive Order (EO) "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the Waters of the United States Rule." It specifically calls out "the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." The EO further requires the Administrator of the EPA (Scott Pruitt) and the Assistant Secretary of the Department of the Army (Douglas Lamont) to review the New Rule for consistency with the EO's policy and "publish for notice and comment a proposed rule rescinding or revising the Rule."

The key item in the EO is the direction that the Administrator and the Assistant Secretary shall consider interpreting the term "navigable waters," in a manner consistent with the opinion of former US Supreme Court Justice Scalia in the Rapanos decision. This case lays a path for narrow interpretation, limiting WOTUS solely to navigable waters and "those relatively-permanent, standing or continuously flowing bodies" of water flowing into navigable waters. The EPA estimates that 59 percent of our surface waters are ephemeral (flowing during and/or immediately after rain events), and although regulated since the CWA began, these WOTUS would not be considered jurisdictional under Scalia's opinion. This sharp drop of regulated WOTUS would leave significant amounts of surface waters unregulated. Since not all states have surface water and wetland regulations, we risk having significant gaps in water quality regulation, especially in the arid Southwest.

The WOTUS definition is critical given the scope of what the CWA covers. Not only does it dictate the CWA Section 404 permit process for dredge and fill material, but it greatly influences other programs such as Section 303 (Water Quality Standards and Total Daily Maximum Loads [TMDL]); Section 311 (Oil Spill Program); Section 401 (State Water Quality Certification); and Section 402 (National Pollutant Discharge Elimination System [NPDES]). These programs do not apply to non-jurisdictional WOTUS, and "delisting" would have profound impacts on wastewater discharges, temporary construction discharges, industrial discharges, and much more.

Scalia's approach will stir controversy, since five of the nine justices disagreed with his opinion. Whatever the debate, the process will be long. We will see continued pressure against the Clean Water Act, either through budgetary cuts or new legislation redefining it.

The Clean Water Act is complex and dynamic; however, its track record is strong – value is high and benefits tangible. For now remains the status quo: identification of WOTUS via the 2008 Guidebook and proactive regulation of discharges. At least until the next court case.

Author's Note

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