

EPA's Waters of the U.S. Rule

June 2016 Environmental Issues Breakfast

SCOTUS Ruling

Wednesday, June 8, 2016

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“The term ‘navigable waters’ means the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362



The Role of The Courts

- United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)
- Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)
- Rapanos v. United States, 547 U.S. 715 (2006)

Rapanos v. U.S. (2006)

RELATIVELY PERMANENT

- Four vote plurality decision (4-1-4) holds that navigable waters are limited to only those relatively permanent, standing, or continuously flowing bodies of water forming geographic features such as streams, oceans, rivers, and lakes.

SUBSTANTIAL NEXUS

- Justice Kennedy concurred on different grounds – namely, that it was okay to regulate waters with a “*significant nexus*” to a traditional navigable water. Nexus to be determined case-by-case.

Rapanos v. U.S. (2006)

- Contributed to greater uncertainty as to the test used to establish CWA jurisdiction -
 - Relatively permanent water;
 - Significant nexus; or
 - Both?
- Most courts have used the Significant Nexus test



Interesting WOTUS Observations

- 1.2 million public comments
- 20,657 considered (less than 2%)
- Continued unknowns with respect to the arid West
- EPA use of social media – gone too far?
 - NY Times article: May 18, 2015
“Critics Hear E.P.A.’s Voice in ‘Public Comments’”

GAO Report – EPA's Links to External Websites

- EPA's blog post also included hyperlinks to a Natural Resources Defense Council webpage and to a SurfRider foundation blog post.
- EPA blog post explains that communications director likes clean water because he is a surfer and a beer drinker.
- Encourages people to tell Congress to stop interfering with right to clean water.
- Noted that brewers depend on a reliable supply of clean water

GAO Conclusions

- The GAO concluded that EPA's Use of Thunderclap constituted covert propaganda in violation of the publicity or propaganda prohibition. It also concluded that EPA's hyperlinks to the NRDC and SurfRider Foundation constitute prohibited grassroots lobbying.
- Because EPA created a thunderclap message that did not identify the agency as author the GAO concluded it was covert propaganda.
- EPA's choice of hyperlinks formed its own expressive act for which it is responsible. Seeking to direct readers to the NRDC and SurfRider foundation articles. GAO acknowledged that EPA cannot control external websites but certainly can control its own.

EPA Clean Water Rule Litigation Statement

Regulations will be implemented as they were prior to August 27, 2015, by applying relevant case law, applicable policy, and the best science and technical data on a case-by-case basis in determining which waters are protected by the Clean Water Act.

The agencies look forward to vigorously defending the merits of the Clean Water Rule, which the agencies continue to believe is fully consistent with the law and based on the best available peer-reviewed science.

North Dakota Federal Court Grant of Preliminary Injunction

- August 27, 2015 (day before effective date)
- Thirteen states -- ND, AL, AZ, AK, CO, ID, MO, MT, NE, NM, NV, SD, WY
- Substantial likelihood of success because it appears likely:
 1. EPA violated Congressional grant of authority
 2. EPA failed to comply with APA requirements

After August 27, 2015

- WOTUS Rule stayed in 13 Western (mostly) states
- WOTUS Rule to be implemented in other 37 states

Sixth Circuit Decision

- October 9, 2015
- Four actions consolidated representing 18 states:
OH, MI, TN, OK, TX, LA, MS, GA, WV, AL, FL, IN, KS, KY, NC, SC, UT, AND WI
- Divided panel stayed WOTUS Rule nationally
 - Does Sixth Circuit have jurisdiction?
 - States argued that District Courts should hear

Sixth Circuit Claims Jurisdiction

- February 22, 2016
- Challenges to WOTUS are appropriately in Circuit Court
- April 21, 2016
 - Petitions for Rehearing denied
- Sixth Circuit will decide

Congressional Action

- November 4, 2015 – Senate Resolution Passes 55-43 to block WOTUS Rule entirely under the Congressional Review Act
- January 13, 2016 – House Passes 253-166
- January 19, 2016 – In the ninth veto of his presidency, President Obama rejects resolution
- Congress lacks 2/3 majority to override

USACOE v. Hawkes – 5/31/16

- Jurisdictional delineations are appealable.



Hawkes

J.D.'s are Appealable

- 8-0
- Corps had determined that wetlands on land to be developed by three peat-mining companies were WOTUS because of significant nexus to river 120 miles away.
- S. Ct. – J.D.s have “direct and appreciable consequences”
- Kennedy – (Thomas & Alito)
 - Troubling questions about government power to cast doubt on full use and enjoyment of private property throughout the nation.