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The Future of WOTUS: Examining the Role of States

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Committee on Science, Space, and Technology

Statement
By
M. Reed Hopper
Senior Attorney

Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
916-419-7111
Rhopper@pacificlegal.org

INTRODUCTION

Chairman Biggs and honorable committee members, as an attorney with the Pacific Legal Foundation (PLF), a nonprofit, public interest organization dedicated to the protection of individual liberties and private property rights, I thank you for this opportunity to provide my analysis of the future of WOTUS. I was privileged to represent John Rapanos in the U.S. Supreme Court, in *Rapanos v. United States,*[1] that is the impetus for the 2015 WOTUS rule. And, on behalf of PLF, I represent numerous farmers, ranchers, counties, and other landowners currently challenging the rule. The WOTUS rule authorizes federal regulation of virtually all waters in the Nation and much of the land. On its face, the rule conflicts with the language of the Clean Water Act and Supreme Court cases interpreting the act. The rule also usurps the traditional power of the States to manage local land and water resources and nullifies constitutional limits on federal authority.

BACKGROUND

The Clean Water Act[2] prohibits the discharge of pollutants, including dredged and fill material, into "navigable waters" without a federal permit[3] and

[1] 547 U.S. 715 (2006).
[2] Clean Water Act, 33 U.S.C. §§ 1251, *et seq*.
[3] 33 U.S.C. § 1344(a).

defines the term "navigable waters" as "waters of the United States."[4] In *Rapanos v. United States*, the Army Corps of Engineers ("Corps") claimed the Clean Water Act covered the shallow wetlands on John Rapanos's Michigan lots.[5] When he graded the lots for construction, Corps officials cited Mr. Rapanos for filling "navigable waters" without a permit in violation of the Clean Water Act.[6] The district court found Mr. Rapanos liable because the wetlands on his property bordered a manmade drainage ditch that flowed intermittently through a series of conduits to a navigable-in-fact watercourse miles away.[7] The Sixth Circuit Court of Appeals upheld the district court on the theory that any hydrological connection with a traditional navigable water was sufficient for federal jurisdiction, no matter how slight.[8] The U.S. Supreme Court reversed the Sixth Circuit, however, invalidating this expansive interpretation of the Clean Water Act.[9]

Five of the nine Justices ruled the Corps had gone too far and could not regulate all waters based solely on a hydrological (or tributary) connection to a downstream navigable-in-fact waterway.

Justices Scalia, Thomas, Alito, and Roberts, determined the language, structure, and purpose of the Clean Water Act limited federal authority to "relatively permanent, standing or continuously flowing bodies of water" commonly recognized as "streams, oceans, rivers and lakes" directly connected to traditional or navigable-in-fact waterways.[10] The Scalia plurality would also authorize federal regulation of wetlands physically abutting these water bodies, but only if they have a continuous surface water connection whereby the wetland and water body are literally "indistinguishable."[11]

Although Justice Kennedy joined the four-justice plurality in rejecting federal regulation of any and all tributaries to navigable-in-fact waterways, providing a five-member majority in favor of Mr. Rapanos, he proposed a different standard for determining "waters of the United States" pursuant to the Clean Water Act. Under a "significant nexus" [12] test, Justice Kennedy would allow the federal government to regulate a wetland if it significantly affects a navigable-in-fact waterway.[13] According to Justice Kennedy, this approach would exclude from federal regulation

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[4] 33 U.S.C. § 1362(7).
[5] *Rapanos*, 547 U.S. at 719, 729–30 (2006).
[6] *Id.*
[7] *See United States v. Rapanos*, 190 F.Supp. 2d 1011, 1013 (E.D. Mich. 2002).
[8] *See United States v. Rapanos*, 376 F.3d 629, 642 (6th Cir. 2004). *See id.* at 639.
[9] *Rapanos*, 547 U.S. at 757.
[10] *Id.* at 716, 739.
[11] *Id.* at 755.
[12] *Id.* at 759 (Kennedy, J., concurring).
[13] *Id.* at 780.

remote drains, ditches, and streams (and adjacent wetlands) with insubstantial flows and only speculative evidence of a "significant nexus."[14]

The four Justices in the dissent (Stevens, Souter, Ginsburg, and Breyer) took the view that the Corps could regulate essentially any feature that advanced the statutory goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters."[15] The dissent would therefore authorize federal regulation of the entire hydrological chain on the premise that virtually all waters are interconnected and therefore affect the integrity of the Nation's waters.

The 2015 WOTUS rule was adopted in putative reliance on the Kennedy "significant nexus test," but in effect the rule incorporated the view of the *Rapanos* dissent authorizing the regulation of virtually all waters based on their interconnectedness.[16]

PROBLEMS WITH THE 2015 WOTUS RULE

The 2015 WOTUS rule[17] is unprecedented. Under the guise of redefining the statutory term "waters of the United States" under the Clean Water Act, as interpreted by the Supreme Court in *Rapanos*, the Army Corps of Engineers and the Environmental Protection Agency expanded the scope of their own authority to encompass nearly all waters and huge swaths of land throughout the country. These agencies arrogated to themselves a virtually limitless power to regulate local land and water use in direct opposition to congressional intent, judicial precedent, and constitutional constraints. The implications of this rule for national land-use regulation, executive power, and constitutional norms cannot be overstated.

The 2015 WOTUS rule defines navigable "waters of the United States" expansively to include:

1. All waters which are or were or may be used in interstate or foreign commerce;

2. All interstate waters;

3. The territorial seas;

4. All impoundments of any "waters of the United States;"

5. All tributaries to waters 1-3. A "tributary" means a water that contributes flow directly or through another water

[14] *Id.* at 779–81.
[15] *Id.* at 787. (Stevens, J., dissenting).
[16] *See Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* (May 27, 2015).
[17] *Clean Water Rule: Definition of 'Waters of the United States*. 80 Fed. Reg. 37054 (June 29, 2015).

(including any impoundment), to waters 1-3, that has physical indicators of a bed and bank and an ordinary high water mark. A tributary may be natural or man-made;

6. All waters adjacent to waters 1-5. "Adjacent" means bordering, contiguous, or neighboring. "Neighboring" means within 100 feet of the ordinary high water mark of waters 1-5. And, all waters within the 100-year floodplain of waters 1-5 and not more than 1,500 feet from the ordinary high water mark. Also, all waters within 1,500 feet of the high tide line of waters 1-3;

7. All of the following waters that have been determined on a case-by-case basis to have a significant nexus to waters 1-3: prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands. "Significant nexus" means that a water, alone or in combination with similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of waters 1-3. "Significant" means more than speculative or insubstantial and includes effects on any of nine factors;

8. All waters located within the 100-year floodplain of waters 1-3 and all waters within 4,000 feet of the high tide line or ordinary high water mark of waters 1-5 when they have a significant nexus to waters 1-3; and,

9. Some waters are excluded from federal regulation under the Final Rule.[18]

Attesting to the remarkable sweep of the WOTUS rule, and its onerous effect on the regulated public, the rule was immediately challenged by 31 states and approximately 70 other parties representing industry, landowners, ranchers, farmers, builders, and others. The parties challenged the rule on several grounds, some of which I summarize here.

Illegal Inclusion of All Tributaries

The 2015 WOTUS Rule defines "waters of the United States" to include all tributaries with a bed and bank and ordinary high water mark. In *Rapanos*, however, a majority of the Supreme Court held the term "waters of the United States" does not include all tributaries. *See* plurality opinion, Scalia, J. (Rejecting the regulation of

[18] *Id.* at 37104-37106.

tributaries based on an ordinary high water mark because "[t]his interpretation extended 'the waters of the United States' to virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only 'the presence of litter and debris.'"[19] *See also* Justice Kennedy's concurrence (Rejecting categorical regulation of tributaries with an ordinary high water mark because "the breadth of this standard . . . [would] leave wide room for regulation of drains, ditches and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it . . . .").[20]

Overbroad Definition of Adjacent Waters

It is axiomatic that if the regulation of all tributaries is invalid then the categorical regulation of all waters adjacent to such tributaries is also invalid. *See* Kennedy concurrence (Holding that the overly broad regulation of all tributaries "precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*[21].").[22]

Lack of Scientific Evidence

The distance-based definitions on which the rule relies fail for lack of evidentiary support. The Agencies' only explanation for this approach is that the various distances are "reasonable and practical boundar[ies]," consistent with unspecified "experience" and "the implementation value of drawing clear lines."[23] But the Agencies' own experts specifically *rejected* the Corps and EPA's distance-based approach, explaining that "the available science supports defining adjacency or determination of adjacency on the basis of functional relationships, not on how close an adjacent water is to a navigable water."[24] Nothing in the record explains, for example, why a 1,500 or "a 4,000 foot standard is scientifically supportable."[25] As the District of North Dakota explained, "[w]hile a 'bright line' test is not in itself arbitrary, the Rule must be supported by some evidence why a 4,000 foot standard is scientifically supportable. On the record before the court, it appears that the standard is the right standard [only] because the Agencies say it is."[26]

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[19] *Rapanos*, 547 U.S. at 725.
[20] *Id.* at 781.
[21] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)*(SWANCC)*,
[22] *Rapanos*, 547 U.S. at 781-82.
[23] 80 Fed. Reg. at 37,085-91
[24] Letter from Science Advisory Board to Gina McCarthy, EPA-SAB-14-007, at *2-3 (Sept. 30, 2014).
[25] District of North Dakota Preliminary Injunction at 13.
[26] *Id.*

According to a detailed *Bloomberg* article,[27] top officials at the Corps of Engineers warned the WOTUS rule was shoddy and ill-advised. "To briefly summarize: our technical review . . . indicate[s] the [C]orps data provided to EPA has been selectively applied out of context, and mixes terminology and disparate datasets. In the [C]orps' judgment, the documents contain numerous inappropriate assumptions, with no connection to the data provided, misapplied data, analytical deficiencies, and logistical inconsistencies." Maj. Gen. John Peabody, Deputy Commanding General for Civil and Emergency Operations.

The article concludes with this statement: "The documents reveal a dysfunctional process within and between the agencies, where political officials were making decisions over the vigorous objections and against the findings of agency staff, without taking the time to address the concerns," Don Parrish, the [American Farm Bureau's] senior regulatory relations director, told Bloomberg BNA in an e-mail. "They show an 'ends justify the means—get it done now, no matter what' mentality that is not appropriate for agency rulemaking on such an important issue.[28]

Invalid Inclusion of Isolated Waters

The WOTUS rule purports to regulate all waters within 4,000 feet of another jurisdictional water if it has a "significant nexus" to an interstate water or navigable-in-fact water. This necessarily includes "isolated waters" which the Supreme Court held in SWANCC cannot be regulated under the Clean Water Act.[29] In *Rapanos* all nine justices acknowledged that *SWANCC* precluded the regulation of isolated water bodies. *See*, *e.g.*, Scalia, J., for the plurality (In *SWANCC* "we held that 'nonnavigable, isolated, intrastate waters,' []—which, unlike the wetlands at issue in *Riverside Bayview*, did not 'actually abu[t] on a navigable waterway,' []—were not included as 'waters of the United States.'");[30] (Kennedy, J.: "Congress' choice of words creates difficulties, for the Act contemplates regulation of certain 'navigable waters' that are not in fact navigable. [] Nevertheless, the word 'navigable' in the Act must be given some effect. Thus, in *SWANCC* the Court rejected the Corps' assertion of jurisdiction over isolated ponds and mudflats bearing no evident connection to navigable-in-fact waters.");[31] and, *see* Stevens, J. (dissent, recognizing isolated water bodies are not jurisdictional under *SWANCC*).[32]

[27] "Support Documents for Water Rule 'Flawed:' Corps Memo," dated July 28, 2015.
[28] *Id*.
[29] *SWANCC*, 531 U.S. at 172.
[30] *Rapanos*, 547 U.S. at 726.
[31] *Id.*at 779.
[32] *Id*. at 795.

Failure to Provide Notice and Comment

Federal agencies must conduct rule-making in accordance with the Administrative Procedure Act which requires public notice of substantive rule changes and an opportunity for public comment on those changes.[33]

Among other things, the Final 2015 WOTUS rule substantially changed the category of "adjacent waters" from the Proposed Rule by adding a definition of "neighboring" that includes: (1) all waters located within 100 feet of the ordinary high water mark of certain waters; (2) all waters within the 100-year floodplain and 1,500 feet of the ordinary high water mark of certain waters; and (3), all waters located within 1,500 feet of the high tide line of certain waters.

The WOTUS rule substantially changed the category of "other waters" from the Proposed Rule by aggregating normally isolated waters to determine if they will have a "significant nexus" with downstream navigable-in-fact-waters including: Prairie potholes; Carolina and Delmarva bays; pocosins; western vernal pools in California; and, Texas coastal prairie wetlands.

The WOTUS rule also substantially changed the category of "other waters" from the Proposed Rule by allowing case-by-case analysis of all waters within 4,000 feet of any other covered water.

And, the WOTUS rule substantially changed the case-by-case analysis for determining a "significant nexus" from the Proposed Rule by defining such a nexus based on the effect of any one of nine factors including: (i) sediment trapping; (ii) nutrient recycling; (iii) pollutant trapping, transformation, filtering, and transport; (iv) retention and attenuation of flood waters; (v) runoff storage; (vi) contribution of flow; (vii) export of organic matter; (viii) export of food resources; and, (ix) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in certain waters.

None of these changes were subject to public notice and comment.

Exceeding the Commerce Power

In *SWANCC*,[34] the Supreme Court recognized that federal regulation of small water bodies, such as ponds and mudflats, likely exceeded the scope of the commerce power as limited by that court's decisions in *United States v. Lopez*[35] and *United States v. Morrison*.[36] The Supreme Court raised similar concerns in

[33] 5 U.S.C. § 553(b)&(c).
[34] *SWANCC*, 531 U.S. at 173.
[35] 514 U.S. 549 (1995),
[36] 529 U.S. 598 (2000).

Rapanos over the Corps' broad interpretation of tributaries and adjacent wetlands. "Likewise, just as we noted in *SWANCC*, the Corps' interpretation stretches the outer limits of Congress's commerce power."[37] But the WOTUS rule goes even further than the interpretation of "waters of the United States" advanced in *SWANCC* and *Rapanos* to encompass waters, and even normally dry land (e.g, within the 100-year floodplain), with absolutely no connection to navigable waters or interstate commerce in clear violation of constitutional authority.[38]

Usurpation of State Authority

One of the more egregious problems with the WOTUS rule is its flagrant disregard for principles of federalism inherent in the constitutional structure and expressly acknowledged by Congress in the text of the Clean Water Act.

The WOTUS rule extends federal jurisdiction so far into local land and water resources that it necessarily undermines State power, in violation of the Tenth Amendment. The Tenth Amendment Provides that "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people."[39] Congress did not mince words on the role of the States in maintaining the integrity of the Nation's waters: "It is the policy of the Congress to recognize, **preserve and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources** . . . ."[40] Rather than preserve and protect these rights and responsibilities, the WOTUS Rule eviscerates them.

The Clean Water Act is clear; to achieve the act's objective, Congress intended to rely on the States, not usurp their power. Maintaining the integrity of the Nation's waters would necessarily involve shared responsibilities. The statutory text suggests the Federal Government would regulate downstream navigable waters (as it has historically done) while the States regulate upstream non-navigable waters (as they have historically done). Moreover, Congress would not dictate to the States but would defer to the States to "prevent, reduce, and eliminate pollution" in their land use planning.

This approach to "cooperative federalism" provides an equitable allocation of scarce regulatory resources while preserving and protecting the acknowledged rights and responsibilities of the States to control local land and water resources in

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[37] *Rapanos*, 547 U.S. at 738 (Scalia, J., for the plurality

[38] For a more detailed analysis of this argument, I refer the committee to my testimony at the Joint Hearing on Impacts of the Proposed Waters of the United States Rule on Local and State Governments, House Committee on Transportation and Infrastructure and Senate Committee of Environment and Public Works, dated February 4, 2015.

[39] U.S. Const. amend. X.

[40] 33 U.S.C. § 1215(b)(emphasis added).

furtherance of the balance of power established by the Framers. And, of equal importance, it demonstrates Congress' recognition that it has limited constitutional power to regulate local land and water resources.

However, the 2015 WOTUS rule only gives lip service to this congressional mandate suggesting that the States are adequately protected because they can impose more rigorous standards on pollutant discharges than the federal regulations. But this is an empty power because it still subjects the States' traditional land use authority to federal mandates. This robs the States of any meaningful control over their land and water resources that both Congress and the Framers explicitly sought to protect.

> Permitting respondents to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the States' traditional and primary power over land and water use. See, *e.g.*, Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 44, 130 L.Ed.2d 245, 115 S. Ct. 394 (1994) ("Regulation of land use [is] a function traditionally performed by local governments"). Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." 33 U.S.C. §1251(b). We thus read the [Clean Water Act] as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.[41]

These arguments are not academic. The courts relied on these arguments, and others, to enjoin the rule from active enforcement. They serve as a caution to the Corps and EPA in revising a new WOTUS rule.

THE COURTS STAY THE WOTUS RULE

Many state and private plaintiffs challenged the 2015 WOTUS rule in the federal district and appellate courts. Some of the district court cases are still pending while others were dismissed when the Sixth Circuit Court of Appeals asserted sole jurisdiction to hear any challenges to the WOTUS rule. None of these courts has issued a definitive ruling on the validity of the rule. However, two courts issued stays of the rule pending further litigation on the merits.

The first court to issue a stay was the District Court of North Dakota where 13 States brought suit to overturn the rule.[42] That court issued a stay (or preliminary injunction) within the plaintiff States based on a number of

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[41] *SWANCC*, 531 U.S. at 174.
[42] *North Dakota v. U.S. E.P.A.*, 127 F.Supp.3d 1047 (DND 2015).

factors, including: (1) the likelihood the States will succeed on the merits; (2) the potential for irreparable harm to the States if the rule is not stayed; (3) the balance of harms; and (4), the public interest.

The district court ruled the States are likely to succeed on the merits because the rule appears overbroad and does not satisfy the Kennedy "significant nexus" test as set forth in *Rapanos*.[43] And further, the inclusion of all tributaries and the distance limitations is likely not supported by scientific evidence or authorized by the Clean Water Act.[44] Also, the court held the final rule was not likely a proper outgrowth of the proposed rule thus depriving the States proper notice and opportunity for comment under the rule-making process set forth in the Administrative Procedure Act.[45]

With respect to the second factor, the court held the WOTUS rule will cause the States irreparable harm in two respects. First, if the rule is implemented it will diminish the States' "traditional and primary power over land and water use" resulting in a loss of sovereignty over intrastate waters.[46] Second, the States will suffer uncompensated monetary loss from the increased costs associated with complying with a likely invalid rule.[47]

Finally, the court weighed the balance of harm to the States against the benefit of the rule to the public and concluded that while a small portion of the public would benefit from the greater certainty the WOTUS rule would provide, "[a] far broader segment of the public would benefit from the preliminary injunction because it would ensure that federal agencies do not extend their power beyond the express delegation from Congress."[48] Therefore, "the greater public interest favors issuance of the preliminary injunction."[49]

In the Sixth Circuit, 18 additional states challenged the WOTUS rule calling for the Court to stay the rule and halt its enforcement nationwide.[50] That court applied the same analysis as did the District of North Dakota and with the same result. The court concluded the States would likely prevail on their arguments that the WOTUS rule is not supported by the scientific evidence, the Kennedy "significant nexus" test is not met, and the rule exceeds statutory authority.[51] Moreover, the Sixth Circuit stated: "What is of greater concern to us, in balancing the harms, is the burden—potentially visited nationwide on governmental bodies, state and federal, as

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[43] *Id*. at 1056.
[44] *Id*. at 1056-1057.
[45] *Id*. at 1058.
[46] *Id*. at 1059.
[47] *Id*.
[48] *Id*. at 1060.
[49] *Id*.
[50] *In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015).
[51] *Id*. at 807-808.

well as private parties—and the impact on the public in general, implicated by the Rule's effective redrawing jurisdictional lines over certain of the nation's waters."[52] The court concluded, therefore, that "the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being."

Accordingly, the 2015 WOTUS rule is stayed nationwide.

THE EFFECT OF THE STAY

The Sixth Circuit addressed the effect of its stay by addressing the court's rationale for granting the stay and explaining the necessary result.

> A stay allows for a more deliberate determination whether this exercise of Executive power, enabled by Congress and explicated by the Supreme Court, is proper under the dictates of federal law. A stay temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing. A stay honors the policy of cooperative federalism that informs the Clean Water Act and must attend the shared responsibility for safeguarding the nation's waters. *See* 33 U.S.C. § 1251(b) ("It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution."). In light of the disparate rulings on this very question issued by district courts around the country—enforcement of the Rule having been preliminarily enjoined in thirteen states[4]—a stay will, consistent with Congress's stated purpose of establishing a national policy, 33 U.S.C. § 1251(a), **restore uniformity of regulation under the familiar, if imperfect, pre-Rule regime, pending judicial review.**[53]

The problem with this approach is that the "pre-Rule regime,"which relied on the 1977/1988 regulations and the 2008 Rapanos Guidelines, is not much better than the 2015 WOTUS rule. To the contrary, the "pre-Rule regime" lead to the very excesses and inconsistencies the Corps and EPA claimed would be remedied with the ill-fated WOTUS rule.

The Corps and the EPA have a history of exceeding their authority under the Clean Water Act. Some of this can be attributed to ambiguity in the law, but the primary problem is willful overreach.

According to the General Accountability Office (GAO), local districts of the Corps "differ in how they interpret and apply the federal regulations when

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[52] *Id*.
[53] *Id*. at 808 (emphasis added).

determining what wetlands and other waters fall within the [Clean Water Act's] jurisdiction."[54] But worse than the *inter*-district inconsistencies are the *intra*-district inconsistencies. The GAO reports that even Corps staff working in the same office disagree on the scope of the Act and that "three different district staff" would likely make "three different assessments" as to whether a particular water feature is subject to the Clean Water Act.[55]

But this is by design. The Corps and EPA have not strived for clarity. To the contrary, federal enforcement practices differ from district to district because "'the definitions used to make jurisdictional determinations' are deliberately left 'vague.'"[56] This allows federal officials the freedom to assert the broadest possible interpretation of Clean Water Act jurisdiction, on a case-by-case basis, so as to avoid any facial challenge to their regulatory authority. In fact, the 2008 *Rapanos* Guidelines encourage this sort of ad hoc analysis.

Examples of vague "pre-Rule" regulatory definitions abound. The definition of "wetland" is so broad it encompasses areas that are wet only "for one to two weeks per year."[57] In other words, a "wetland" may be mostly dry land.[58] A more ironic characterization of a wet land would be hard to conceive. Under this definition, approximately 100,000,000 acres of wetlands are located in the lower 48 states—an area the size of California.[59] About 75% of these wetlands are located on private land.[60] Wetlands cover half the State of Alaska.[61] Next to Alaska, the states with the largest wetland acreage are Florida (11 million), Louisiana (8.8 million), Minnesota (8.7 million), and Texas (7.6 million).[62]

Likewise, under the "pre-Rule regime," the Corps and EPA interpret the term "discharge" to include the mere movement of soil in the same area without any addition of material.[63] Contrary to ordinary use and commonsense, "adjacent"

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[54] *U.S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Government Reform, House of Representatives, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (Feb. 2004)(*GAO Report*).
[55] *Id*. at 22.
[56] *Rapanos v. United States*, 547 U.S. 715, 727, 781 (2006) (citing GAO Report).
[57] Gordon M. Brown, *Regulatory Takings and Wetlands: Comments on Public Benefits and Landowner Cost*, 21 Ohio N.U. L. Rev. 527, 529 (1994).
[58] *See United States v. Mills*, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993).
[59] *See* http://water.epa.gov/type/wetlands/vital_status.cfm (last visited Nov. 2, 2011).
[60] *See* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L.1, 26, 52 (1999).
[61] *See* http://water.epa.gov/type/wetlands/vital_status.cfm (last visited Nov. 2, 2011).
[62] *Id*.
[63] *See Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001). *See* also, *Duarte Nursery v. United States Army Corps of Engineers*, 2016 WL4717986 (EDC 2016).

becomes "neighboring"[64]–sometimes miles away–and "tributary" includes "swales" and "storm drains."[65] The 2008 *Rapanos* Guidelines add to the confusion because they are inconsistent with the *Rapanos* decision; unduly expanding the Scalia plurality and Justice Kennedy's "significant nexus" test.

This jurisdictional ambiguity is more than a theoretical concern. Regulatory uncertainty permeates the enforcement decisions of the Corps and EPA. Those decisions become the basis for imposing multimillion dollar penalties and seeking criminal prosecution.

Nevertheless, the Administration appears to endorse this approach. On November 16, 2017, the Corps and EPA issued a joint press release announcing they would soon publish a rule-making in the Federal Register that would delay the effective date of the 2015 WOTUS rule for two years. This would codify the result of the Sixth Circuit stay and reinstate the prior regulatory scheme that has proved so problematic.

THE EFFECT OF THE EXECUTIVE ORDER

The aforementioned two-year delay in the effective date for the 2015 WOTUS rule is to allow the agencies time to revise and reissue the WOTUS rule in accord with the *Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth, by Reviewing the "Waters of the United States: Rule*, dated February 28, 2017. Legally, this is a prudent move. As noted above, although no court has definitively ruled on the validity of the 2015 WOTUS rule, a district court and an appellate court have determination that the rule is likely invalid and cannot stand. This is a sufficient basis for replacing the rule more in keeping with the statute, Supreme Court precedent, and constitutional constraints on federal power.

The key to successfully revising the rule to adhere to the rule-of-law, while protecting economic growth, is to focus the rule on a proper interpretation of the *Rapanos* decision. The 2015 WOTUS rule relied on an exaggerated interpretation of Justice Kennedy's "significant nexus" test which the North Dakota Court and the Sixth Circuit both found suspect. The President's Executive Order properly directs the Corps and EPA to revise the WOTUS rule "in a manner consistent with the opinion of Justice Scalia" in *Rapanos*, which was adopted by four Justices, as opposed to Justice Kennedy's lone concurring opinion. The Scalia plurality is more in keeping with the original intent of Congress to protect and preserve the traditional and primary power of the States to regulate local land and water resources free of the dictates of federal officials. And, it's the only opinion in the *Rapanos* decision consistent with the Supreme Court's standard for interpreting split decisions. In defense of this view, I have written a law review article entitled,

[64] 33 CFR 328.3(c).
[65] *Rapanos,* 547 U.S. 722 (J. Scalia).

Running Down the Controlling Opinion in Rapanos v. United States, which is available for reading at SSRN.com[66] Here is a summary of the article:

> In *Rapanos v. United States*, the Supreme Court sought to define the scope of the Clean Water Act.[67] The Court split on a 4-1-4 vote.[68] Consequently, the lower courts must decide the controlling opinion. In putative reliance on the Supreme Court's standard for interpreting fractured decisions, set forth in *Marks v. United States*,[69] the circuit courts have either adopted the lone Kennedy concurrence or rejected *Marks* as unworkable in favor of an either/or test allowing the government to establish federal jurisdiction under either the Kennedy concurrence or the Scalia plurality in *Rapanos*. In each case, the circuit court either misconstrued *Marks* or misinterpreted *Rapanos*. This article makes the case that *Marks* is readily adaptable to the *Rapanos* decision and the Scalia plurality is controlling. Whenever the plurality would find a jurisdictional water, Justice Kennedy would agree because the plurality test is a logical subset of Justice Kennedy's broader "significant nexus" test. Together, the four Justices in the plurality and Justice Kennedy constitute a five-member majority—in accordance with *Marks*.

THE REVISED WOTUS RULE (A PROPOSAL)

Even if the Corps and EPA draft a WOTUS rule that textually achieves the President's laudable goal of balancing the rule-of-law with economic growth, and satisfies all the appropriate statutory, judicial, and constitutional standards, it will all be for naught if these agencies do not fairly and consistently apply the rule. What's really needed in the short and long term is agency restraint, whatever rule the agencies adopt. The problem doesn't lie only with the regulatory language, but with overzealous enforcement. Government officials should focus on protecting core water resources instead of pushing the envelope on federal power by prosecuting minor or imaginary infractions such as digging a drainage ditch, creating a stock pond, plowing farmland, or building a house in a built-out subdivision, like it does now under the "pre-Rule regime.". I fear these agencies are incapable, institutionally, of reining in abusive agency action.

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[66] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2983915
[67] Rapanos v. United States, 547 U.S. 715, 730–32 (2006).
[68] *Id.* at 718.
[69] *Marks v. United States*, 430 U.S. 188, 193 (1977).

The ultimate remedy for this problem is a clear, unambiguous *statutory* definition of "waters of the United States" that cannot be misunderstood, misinterpreted, or misapplied through subsequent regulation, guidance, or practice.

But, a regulatory "fix' is better than no "fix" at all. After long study of the Scalia opinion and review of many different proposals for a new WOTUS rule, I suggest this simplified approach to defining "waters of the United States" under the Clean Water Act.

Amend 33 C.F.R. § 328.3 to read:

> a. The term "waters of the United States" includes ONLY:
>
> 1. Those waters that are navigable-in-fact and currently used or susceptible to use in interstate or foreign commerce. These waters include the territorial seas.
>
> 2. Permanent, standing or continuously flowing streams, rivers, and lakes directly connected to navigable-in-fact waters described in a.1. Continuously flowing means an uninterrupted flow except in extreme weather conditions such as drought. These waters do not include groundwater or channels through which waters flow intermittently or ephemerally, or channels that provide only periodic drainage, such as from rainfall.
>
> 3. Those wetlands that directly abut and are indistinguishable from the waters described in a.1. and a.2. Wetlands are those areas inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, and bogs. Wetlands are indistinguishable from the waters described in a.1. and a.2. when the wetlands and waters have merged so there is no clear demarcation between the two.

This definition would reduce federal regulation of local waters that the States can and should regulate while providing a measure of certainty to the regulators and regulated public consistent with the Scalia opinion, the text of the Clean Water Act, the President's Executive Order, and constitutional limitations.

WHAT ABOUT JURISDICTION?

It is certain that the new WOTUS rule will be challenged in court as too narrow or too broad. It is essential therefore that affected parties know where to

bring such challenges—in the district courts or the courts of appeals. This is still an open question but one that will soon be answered by the Supreme Court in *National Association of Manufacturers v. DOD* (No. 16-299), to which PLF is party.

One of the most fundamental rights of American citizens is the right to seek redress from illegal government action in a court of law. But the federal government has an arsenal of weapons it wields to deny or curtail this right. Nowhere is this more prevalent than in the government's attempts to stifle landowner suits challenging federal agency action under the Clean Water Act.

When a landowner challenges the federal government's legal authority to regulate local land or water use under the act, the government response is as predictable as night follows day. First, the government attacks the landowner's standing to bring the suit arguing the landowner suffered no unique harm from the agency's illegal conduct. If that does not work, the government argues the landowner has not exhausted all administrative remedies or the case is not yet ripe for judicial review because the agency action is not final. Failing that, the government may argue the courts owe the agency complete deference in its interpretation of the law and its "expert opinions" should not be disturbed.

The EPA employed these tactics against the Sacketts[70] when they sought judicial review of an EPA "compliance order" directing the Sacketts to cease all work on the construction of a modest home they intended to build on an apparently dry half-acre lot in a built-out subdivision that no ordinary person would call a navigable "water of the United States." The Corps of Engineers relied on similar arguments in seeking dismissal of suits brought by Hawkes Company[71] and Kent Recycling[72] when they went to court to overturn blatantly invalid "Jurisdictional Determinations" issued by the Corps that allowed the government to stop their wetland projects the government opposed.

In each of these cases, the landowners sought only one thing--their constitutional right to their day in court. For over forty years, the courthouse doors were closed to landowners who simply wanted a court of law to declare whether the federal government had the power to dictate the use of their land under the Clean Water Act when it was apparent the government had gone too far and exceeded its statutory or constitutional authority. This attempt to stifle citizen access to the courts is a breach of the public trust. It elevates the subjective values of government officials, which are not protected by the constitution, above the rights of American citizens, which are protected by the constitution. In short, when illegal government

[70] *Sackett v. EPA*, 566 U.S. 120 (2012).
[71] *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S.Ct.1807 (2016).
[72] *Kent Recycling Services v. U.S. Army Corps of Engineers*, 136 S.Ct.2427 (2016).

action is exempt from judicial review, government officials become a law unto themselves.

Fortunately, in each of these PLF cases--*Sackett*, *Hawkes*, and *Kent Recycling*--the U.S. Supreme Court unanimously held that landowners could exercise their right to seek redress in the courts in the face of overreaching government actions under the Clean Water Act. But this was not enough to deter the government from seeking to curtail judicial review of the Corps' and EPA's controversial WOTUS rule.

When PLF challenged the rule in district court, representing eleven landowners from seven states, the government sought to have the case dismissed claiming the proper venue for such a challenge is the Court of Appeals. This would have the effect of narrowing the window for challenging the WOTUS rule, and rules like it that define federal jurisdiction under the act, to 120 days, instead of the usual 6 years afforded review in the district courts.

Last month, the Supreme Court heard oral argument on this very issue in *National Association of Manufacturers v. Department of Defense* (Case No. 16-299). The justices appeared to side with National Association of Manufacturers, PLF, the States, and others that the text of the Clean Water Act is clear and does not support the government's interpretation.

Several justices were concerned that the government's interpretation, which relies on a "practical reading" of the act, rather than on an "ordinary reading" of the act, would cause confusion because no one could rely on the plain text to determine when and where they could challenge the WOTUS rule. Chief Justice Roberts expressed the concerns raised by PLF that the government's narrow reading would harm landowners who may not know for several years whether the WOTUS rule even applies to them. They would be cut off from directly challenging the rule, and federal jurisdiction, if they missed the short 120-day window the government urged on the court. The primary reason the government gave for its crabbed reading of the act is that it would be more efficient for the government and the courts if challenges to the WOTUS rule were funneled through a single appeals court rather than multiple district courts throughout the country. However, the Petitioners countered that the Supreme Court held in PLF's *Sackett* case that administrative efficiency and convenience does not trump the People's right to meaningful access to the courts to counter overreaching government.

It is likely the High Court will rule in favor of landowners and that a decision will be issued soon so that the parties are clear about which court has jurisdiction to review the WOTUS rule, new or old.

C**ONCLUSION**

Once again, I thank the committee for the opportunity to comment on the future of the WOTUS rule. The rule affects literally millions of private and public landowners nationwide. I commend the committee for its interest in this important matter.

Sincerely,
M. Reed Hopper
Senior Attorney
Pacific Legal Foundation