

## Water Quality and Wetlands Committee Newsletter

A joint newsletter of the Water Quality and Wetlands Committee, the Water Resources Committee, and the Constitutional Law Committee.

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### THE SHIFTING CHANNELS OF THE WATERS OF THE UNITED STATES RULE CHALLENGE

Sidney F. Ansbacher

*Upchurch, Bailey and Upchurch, P.A.*

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Several committees of the Section on Environment, Energy, and Resources decided to jointly address the U.S. Department of Defense and U.S. Environmental Protection Agency, Final Rule: Clean Water Rule: Definition of “Waters of the United States,” [WOTUS] 80 Fed. Reg. 37, 054 (June 29, 2015). The agencies attempted to clarify existing federal jurisdiction over waters of the United States. The rule challenges have been multitudinous, and the rulings, rapid-fire. Both private parties and states alleged that the rule exceeded agency authority, and illegally attempted to extend federal Clean Water Act (CWA) jurisdiction.

The Sixth Circuit Court of Appeals issued the most recent procedural statement in *Murray Energy Corp. v. U.S. Department of Defense*, 827 F.3d 261 (6th Cir. 2016). The Murray court held that court enjoyed direct circuit review jurisdiction over challenges to EPA or Army Corps of Engineers approval or promulgation of limitations under the CWA, and actions challenges to those agencies’ issuance or denial of any permit. 827 F.3d at 266–70 and 270–73, respectively. As of July 22, 2016, the parties in that Court are in the midst of motion practice concerning the record and briefing schedule.

The first two articles in this joint newsletter try to put the issues into historical context. The first concerns the history of jurisdiction over waters

that led to the rule. The second article discusses the issues in light of the Supreme Court’s federalism decisions. The final two articles explicate and compare how and why trial and appellate courts took up the WOTUS rule. The challenges are rapidly developing. We cannot be absolutely current. But we hope to provide a helpful overview.

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### WATERS OF THE UNITED STATES—THE BACKGROUND

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#### I. Introduction

This joint newsletter addresses the jumbled procedural posture of the judicial review of the June 2015 joint final regulation of the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps), attempting to define “Waters of the United States (WOTUS).” The WOTUS rule sprang from Supreme Court opinions urging the agencies to do just that. See section III, *infra*. Unfortunately, only one member of the Court gave guidance that the underlying statute contained key language, “significant nexus,” without definition or guidance as to what that term meant. The agencies added to their degree of difficulty by focusing on one justice’s concurring opinion that attempted to explain the undefined statutory

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Winston Borkowski, Editor

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term, in determining what constitutes waters with a “significant nexus” to navigable waters.

This brief article traces the history of water regulation from antiquity through the problematic Supreme Court decisions. We do not seek to explain what definition of WOTUS is correct nor how to define WOTUS. Rather, this article attempts to show that the lengthy, meandering course of water regulation led necessarily to an uncertain definition of WOTUS. In fact, few courts agree on a single definition of navigability, or even the constitutional clause that authorizes federal regulation of navigation. Little wonder that courts, agencies, and other informed parties disagree, vehemently, on what constitutes a “significant nexus” to navigable waters.

## **II. Historical Regulation of Navigable Waters**

Water rights arose in antiquity, in Hammurabi’s Code at Section 16 (c. 1700 B.C.). The code required an owner whose irrigation flooded another’s property to give compensatory grain to the owner of the damaged property. Justinian’s Code (c. 534 A.D.) is the most famous ancient water law. It created *jus publicum* as a remote predecessor to the modern Public Trust Doctrine. The *jus publicum* was property that belonged to all. It was most clearly defined in navigable waters. One could use, but not own waters.

Spanish water law originated from colonial Roman standards in Spain; Roman influences from the arid Middle East; and Islamic water law introduced by the Moors. S.F. Ansbacher, *Stop the Beach Renourishment: A Case of MacGuffins and Legal Fictions*, 35 NOVA L. REV. 587, 615 (2011). LAS SIETE PARTIDOS (the SEVEN PARTS (compiled by Alfonso the Wise, King of Castile (1263)) was the seminal Spanish statement of water law. All water belonged to the Crown. Private use required royal grant. *De minimus consumption*

was unregulated. The RECOPIACIÓN DE LAS LEYES DE REINOS DE LAS INDIAS (THE COMPILATION OF THE LAWS OF THE KINGDOMS OF THE INDIES) (Charles of Spain (1520)). It essentially imposed the Seven Parts on colonies, including those in the New World.

The English Public Trust’s predecessors lay in the Magna Carta. Clause 16 prevented the Crown from granting exclusive fisheries. Clause 23 prevented the Crown from impeding fish passage on major navigable rivers. Bracton implemented Justinian into English water law shortly after the Magna Carta; he crucially deleted Justinian’s clause saying that “the ownership of the beaches is in no one.” 2 H. DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 40 (1569). As to prior rights, Bracton implicitly acknowledged then-common private use of the seashore.

The modern Public Trust was created out of nearly whole cloth by Thomas Digges as Queen Elizabeth I’s counsel (see Stuart Moore, *A History of the Foreshore and the Law Relating Thereto* at 182–84 (3d ed. 1888)). Digges asserted that the Crown held lands underlying tidal waters, and the waters themselves, in a public trust superior to private or even royal rights. That authority was of questionable origin, and often ignored. *Id.*

The American law of navigability split into title and regulation issues. Title Navigability applies to all tidal lands and navigable lands under nontidal waters. States are free to alter definitions and extent. See generally, *Arnold v. Mundy*, 6 N.J.L. 1 (1821); *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367 (1842); *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); *Illinois Central v. Illinois*, 146 U.S. 387 (1892); *Appleby v. City of New York*, 271 U.S. 364 (1926); *Oregon v. Corvallis*, 429 U.S. 363 (1977); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); and *PPL Montana, LLC v. Montana*, 565 U.S. \_\_\_\_ (2012).

The regulatory law of navigability establishes a “navigable servitude” in favor of the federal

government over waters that are, that have been rendered, or that affect waters that are navigable. Among various clauses cited in support are the Commerce Clause at U.S. Const. art I, § 8, c1. 3; Treaty Clause at U.S. Const. art II, § 2; War Powers Clause at U.S. Const. art I, § 8; General Warfare Clause at U.S. Const. art I, § 8; and Public Property Clause at U.S. Const. art IV, § 3.

The key regulatory cases include *Mayor of Colchester v. Brooke*, 115 Eng. Rep. 518 (R.B.), 7 Q.B. 533; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824); *Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851); and *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

### **III. Development of the Corps, Then EPA Regulation**

The Army Corps jurisdiction was originally related to navigation. The Rivers and Harbors Act of 1890, ch. 907, 26 Stat. 426, as amended in 1899, established that scope. The Federal Water Pollution Control Act of 1948 (P.L. 80-845) (Act of June 30, 1948), created the modern federal clean water program. This act generally limited direct federal regulation to interstate waters. It provided technical assistance to state and local programs to protect other waters and water supplies. While various amendments over the next two decades expanded federal regulation to navigable intrastate waters, it still delegated most water quality regulation to states and local governments.

*U.S. v. Standard Oil Co.*, 384 U.S. 230 (1966), and *U.S. v. Republic Steel Corp.*, 362 U.S. 482, 489–91 (1960), expanded traditional analysis of the Rivers and Harbors Act, which exclusively addressed impacts solely to navigation. These two decisions held that pollution (respectively, metal tailings and spilled oil) constituted prohibited discharges of “refuse.”

The Water Quality Act in 1965, 79 Stat. 93, 70 Stat. 498, was the first federal act focusing on environmental water quality. Prior statutes

focused on human health. The 1965 act required states to establish water quality standards. While the Water Quality Act retained prior deference to state governments to regulate water quality, it acknowledged that the water cycle affected interstate commerce.

Impacts by pollution on water quality led to denial by the Corps of a dredge and fill project in Boca Ciega Bay. The Fifth Circuit Court of Appeals upheld this denial in *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970). *Zabel* cited environmental bases, not navigation, for denial. *Zabel* buttressed *Standard Oil and Republic Steel* to establish a greater emphasis on environmental regulation of navigable waters.

Congress followed suit in 1972. The congressional background to the jurisdictional expansion is expansive. Senators Edmund Muskie (D. Me.) and Howard Baker (R. Tenn.) pushed to fill a regulatory gap between state tort law and admiralty in combating oil pollution in particular. The Senate overrode a veto by President Nixon, 52-12, followed by the House, by 247-23, to pass the Clean Water Act of 1972, also known as the Water Pollution Control Act Amendments of 1972, S. Rep. No. 1, 93d Cong., 1st Sess. 164 (1973), Pub. L. No. 92-500, October 18, 1972.

The 1972 act used the term “navigable waters,” but also waters that had a “significant nexus” to such waters. That undefined term created controversy and confusion then and since. The oversimplified scope of the 1972 act was regulation of pollutant discharges into “Waters of the United States (WOTUS).” The act authorized federal regulation of pollution control; confirmed water quality standards requirements; required permits for discharges of pollutants from point sources into WOTUS; and assisted planning for protection from nonpoint sources.

The CWA delegated permitting to the Army Corps, but authorized EPA to set guidelines and to exercise oversight. While not binding, at least one Senate report supported expansive interpretation. It

said the CWA had to regulate water to its “source” in “hydrological cycles” to regulate pollutive discharges. S. Rep. No. 92-414 at 77 (1971).

Early EPA interpretations of “WOTUS” regulated by the CWA defined them as virtually all waters that were connected to navigable waters. No surprise that EPA sought to expand the definition as far as possible. USEPA Office of General Counsel, Meaning of the Term “Navigable Waters,” 1973 WL 21937 (1973). Early Corps interpretations of the term limited it to traditional navigable waters. 39 Fed. Reg. 12,115 (Apr. 3, 1974). Again, little surprise.

*U.S. v. Holland*, 373 F. Supp. 667 (M.D. Fla. 1974), held for EPA in expanding the regulation of the CWA above the mean high water line of the subject tidally influenced waters. The judge was the trial court judge whom the Fifth Circuit reversed in *Boca Ciega*, supra. When the Corps refused to follow suit, *NRDC v. Calloway*, 392 F. Supp. 685 (D.D.C. 1975), forced it to do so. The trial court judge struck the Corps’ regulatory limitation of WOTUS to traditionally navigable waters. The Corps responded in 1977 to *Calloway* by amending its regulatory definition from 1975, which regulated only vegetation that “required” saturated soils. 33 C.F.R. 209.120(d)(2)(h) (1976). 1977 regulations loosened the definition to cover vegetation that was “adapted” to life in saturated soils. 33 U.S.C. § 1362(8); 33 C.F.R. § 323.2(c) (1978). Those regulations were replaced by substantially identical language in 1982, which was addressed in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), infra.

The Avoyelles Sportsmen’s League cases addressed significant CWA modifications that engrafted permitting exemptions for “ongoing” agriculture or silviculture. In 1977, Congress created the exemption, codified at 33 U.S.C. § 323.4. This dispute resulted in the Fifth Circuit Court of Appeals’ affirming EPA’s expansive definition of wetlands jurisdiction, which the Corps originally challenged in the trial court. *Avoyelles Sportsmen’s League v. Marsh*, 715 F.2d 897 (5th

Cir. 1983). Prof. Oliver A. Houck, *Rescuing Ophelia: Avoyelles Sportsmen’s League and the Bottomland Hardwoods Controversy*, 81 MISS. L.J. 1473 (2014), is a wonderful summary of this litigation, with a novel’s detail in describing the litigants, litigators, and trial judge. A significant aspect of Avoyelles was confirmation that the ongoing agriculture and silviculture exemption did not allow extension of such activities into previously jurisdictional WOTUS. While Avoyelles was pending, the Army Corps requested the attorney general to issue an opinion on this contentious issue. The attorney general’s opinion supported EPA on both extent of wetlands and limits on the agricultural/silvicultural exemption. 43 Op. Atty. Gen. 197 (1979). The Sixth Circuit Court of Appeals held that conversion of land from silviculture to another agricultural use is not exempt to the extent the conversion changes WOTUS that are not previously impacted. *U.S. v. Larkins*, 852 F.2d 189 (6th Cir. 1988).

*United States v. Riverside Bayview Homes* is arguably the most significant Supreme Court authority on CWA jurisdiction. 474 U.S. 121 (1985). Justice White’s opinion for a unanimous Court held that neither imposition of CWA permitting criteria nor denial of a 404 permit constituted a taking. The Court held CWA jurisdiction extended to wetlands, regardless of whether the contiguous wetlands are inundated or frequently flooded by those navigable waters.

Two recent Supreme Court decisions reduced and muddied federal WOTUS jurisdiction. In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 53 U.S. 159 (2001), the Corps asserted jurisdiction over otherwise isolated waters due to periodic presence of “migratory birds” as defined by a 1986 Corps rule that stated such bird presence conferred Commerce Clause jurisdiction. Chief Justice Rehnquist wrote for a 5-4 majority holding that the rule exceeded the Corps jurisdiction under section 404 of the Clean Water Act. The waters were not contiguous to navigable waters, did not enjoy a significant nexus to such waters, and were not

tributaries to such waters.

*Rapanos v. U.S.*, 547 U.S. 715 (2006), is of confusing precedential value. Its procedural muddle led to the confusion of the WOTUS rule. The opinion of a four-justice plurality was joined by a concurrence by Justice Kennedy. All five of the justices opined that wetlands that lack a hydrological or ecological connection to navigable waters do not constitute WOTUS. Justice Kennedy did not join the plurality because he thought the only issue was whether the subject wetlands “possess a significant nexus with navigable waters.” He focused on the unfortunately undefined key term from the 1972 amendments. Justice Kennedy attempted to define wetlands as WOTUS “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” The plurality additionally held that the CWA extends only to “relatively permanent standing or continuously flowing bodies of water.”

EPA and the Corps initially interpreted this split decision, lacking a mandate to the Sixth Circuit, to establish “controlling legal principles [that] may be derived from those principles espoused by five or more justices.” USEPA & Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States* at 3, f.n. 15 and accompanying text (emphasis added) (Dec. 2, 2008). <http://www.epa.gov/sites/production/files/2016-04/documents/rapanosguidance6507.pdf>. The guidance asserted CWA jurisdiction over (1) traditional navigable waters; and (2) “wetlands adjacent to traditional navigable waters, including adjacent wetlands that do not have a continuous surface connection to traditional navigable waters.” *Id.* at 4.

Additionally, the 2008 publication stated jurisdiction would be asserted against (1) nonnavigable tributaries of navigable waters “that are relatively permanent” where the tributaries typically flow year-round or have continuous flow

at least seasonally (e.g., typically three months); and (2) contiguous wetlands to those tributaries. *Id.* at 6. The agencies would conduct fact-specific analysis over wetlands, and tributaries not defined above. The key issue would be “significant nexus.” *Id.* at 8.

The 2015 regulations attempted to codify and to clarify what the 2008 guidance started. Of course, the agencies instead created a maelstrom. While this newsletter addresses multiple aspects of the imbroglio, it will take a while to resolve the procedure, let alone the merits of the debates over the WOTUS.

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## REHNQUIST, FEDERALISM, AND WATERS OF THE UNITED STATES

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### Introduction

Chief Justice William H. Rehnquist's tenure on the Supreme Court coincided directly with the proliferation of federal environmental statutes, starting with his appointment in 1971. During his term as Chief Justice from 1985 to 2006 the Court addressed important issues in a number of influential environmental cases. See generally Mark Latham, *The Rehnquist Court and the Pollution Control Cases: Anti-Environmental and Pro-Business?* J. CONST. L. 10:1 (2007). The Rehnquist Court had a unique opportunity over 19 years to influence the evolution of environmental law as it considered constitutional issues and applied principles of statutory interpretation in environmental cases.

In many ways Rehnquist's tenure as Chief Justice represents a clear and concerted effort to limit federal regulatory authority while protecting state sovereignty and private property rights. See, e.g., Robert L. Glicksman & James May, *Justice Rehnquist and the Dismantling of Environmental Law*, 36 ENVTL. L. REP. 10, 585 (2006). Scholars have argued convincingly that one overarching agenda of the Rehnquist Court was to the federal authority to regulate protection of the environment. *Id.* Others scholars have been persuasive in demonstrating the Rehnquist Court was not overtly anti-environmental or pro-business. Latham, *supra*, p. 133 at note 1. Regardless of the possible motives underlying environmental decisions during his time as Chief Justice, it is clear that Rehnquist's jurisprudence greatly impacted the development of environmental law in the United States and in many ways helped precipitate the ongoing regulatory quagmire that exists surrounding the proper scope of jurisdiction under the Clean Water Act (CWA) today.

## Commerce Clause and the Revival of Federalism

A renewed focus on the constitutional doctrine of federalism is one of the more influential legacies of the Rehnquist Court. The revival of federalism under Rehnquist cast into doubt the long accepted concept that there were no real limits to Congress' power to regulate under the Commerce Clause, unless the regulation lacked a rational basis. See generally Douglas T. Kendall et al., *REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING "OUR FEDERALISM,"* Environmental Law Institute (2004). For nearly 50 years starting in the 1930s the expansive interpretation of the authority to regulate under the Commerce Clause was well settled. But in 1980 Justice Rehnquist began an effort to retrench the rules for federal jurisdiction that would continue for the remainder of his time on the Court.

Justice Rehnquist's 1981 concurring opinion in *Hodel v. Virginia* asserted that "it would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. . . . [C]ommerce power does not reach activity which merely 'affects' interstate commerce. There must instead be a showing that regulated activity has a substantial effect on that commerce." *Hodel v. Virginia*, 42 U.S. 264, 310-12 (1981).

Rehnquist picked up steam in 1995 and 2000 writing for the majority in two important Commerce Clause cases; *U.S. v. Lopez* and *U.S. v. Morrison*. Rehnquist's opinion in *Lopez* again asserted that the impact on commerce must be "substantial" in concluding that the Gun-Free School Zones Act of 1990 exceeded the bounds of congressional authority under the Commerce Clause. *U.S. v. Lopez*, 514 U.S. 549 (1995). In *U.S. v. Morrison* Rehnquist's opinion struck down the Violence Against Women Act, rejecting "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce . . ." and emphasizing that "[t]

he Constitution requires a distinction between what is truly national and what is truly local.” U.S. v. Morrison, 529 U.S. 598, 617 (2000).

The Rehnquist Court’s effort to more clearly define the scope of federal power under the Commerce Clause greatly impacted the scope and enforcement of environmental laws. Most notable for purposes of the CWA is Rehnquist’s opinion in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, the 2001 decision that preceded *Rapanos v. U.S.* and struck down the Army Corps’ so-called Migratory Bird Rule. 531 U.S. 159 (2001). Although SWANCC did not turn directly on the Commerce Clause issue, Rehnquist’s opinion asserted yet again that “the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited” and that there were “significant constitutional questions raised by respondents’ application of their regulations” that “would result in a significant impingement of the States’ traditional and primary power over land and water use.” SWANCC, 531 U.S. 159 at 173–74 (2001). Ultimately, Rehnquist exercised judicial restraint in not directly addressing the merits of the Commerce Clause issue in SWANCC, but dicta from the opinion clearly demonstrate that he would have been willing to strike down the Migratory Bird Rule as applied in SWANCC on Commerce Clause grounds.

Underlying Rehnquist’s Commerce Clause jurisprudence is his interpretation of the federalism principle embedded in the Constitution—that the federal government enjoys only specific enumerated powers, reserving all other powers to the states. Indeed, Rehnquist’s opinions in cases implicating Commerce Clause authority “demonstrate that he was above all troubled by congressional efforts to regulate in areas traditionally left to states.” Glicksman & May, *supra* note 2, at 10, 594. Justice Scalia clearly shares this view today, and we see, in later cases like *Rapanos*, Scalia continuing the effort to more clearly define the limits to federal regulatory authority under the Commerce Clause. *Rapanos v.*

*United States*, 547 U.S. 715 (2006).

## Principles of Statutory Interpretation

Rehnquist both selectively applied, and alternatively ignored, traditional statutory canons of construction in support of federalism and separation of powers principles in environmental cases. He regularly construed statutory language narrowly, thereby limiting the regulatory authority of environmental statutes. In fact, Rehnquist himself often displayed outright disfavor for broad and complex federal environmental statutes, in one dissent referring to the Clean Air Act as “harsh and draconian” with amendments that “virtually swim before one’s eyes.” *U.S. Steel Corp. v. EPA*, 444 U.S. 1035, 1038–39 (1980).

In seeking to protect state sovereignty in the realm of environmental regulation Rehnquist sometimes eschewed traditional canons of statutory interpretation. For example, in SWANCC, despite the fact that Congress amended the CWA after the Corps issued a 1977 rule defining “navigable waters,” and again in 1987 after the development of the Migratory Bird Rule as agency policy, Rehnquist refused to find congressional acquiescence of agency interpretation. SWANCC, 531 U.S. at 170. Throughout Rehnquist’s tenure as Chief Justice the Court was “notably unwilling to bootstrap what it believe[d] to be erroneous judicial or agency interpretations based on legislative signals of approval or acquiescence.” William N. Eskridge Jr., *Post-Enactment Legislative Signals*, *LAW & CONTEMP. PROBS.* 57: 1 (1994). Rehnquist’s disapproval of arguments based on congressional acquiescence was echoed later by Scalia’s plurality opinion in *Rapanos* with a direct reference to the fact that the SWANCC decision “reasserted in no uncertain terms our oft-expressed skepticism towards reading the tea leaves of congressional inaction.” *Rapanos*, 547 U.S. at 746 (2006).

Although Rehnquist preferred a literalist approach to statutory construction, he did often refer to legislative history when examining the meaning

of ambiguous statutory language. But notably, his majority opinion in *SWANCC* gave no credence to congressional intent as reflected in statutory statements of purpose and legislative history, each of which demonstrated support for the Corps broad interpretation of the jurisdictional scope of the act. *SWANCC*, 531 U.S. at 168 n3. Justice Scalia, perhaps the most outspoken critic against any reliance on legislative history, went one step further in his plurality opinion in *Rapanos* in rejecting the Corps' assertion of jurisdiction without considering legislative history at all. Leigh Ann McDonald, *Role of Legislative History in Statutory Interpretation: A New Era After the Resignation of Justice William Brennan*, *MO. L. REV.* 56: 1 (1991). In many ways Scalia's plurality opinion in *Rapanos* reflects an effort to continue in Rehnquist's legacy of restricting Congress from using the "outer limits" of its Commerce Clause authority in favor of reserving power for the states.

An in-depth look at Rehnquist's analysis in environmental cases like *SWANCC* concludes that his method of statutory interpretation was driven primarily by "his desire to promote federalism." Glicksman & May, *supra* note 2, at 10, 603. In support of his interpretation in *SWANCC* Rehnquist relied heavily on the statutory language from the CWA stating that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution . . ." 33 U.S.C. 1251(b). According to environmental law scholar Oliver Houck, "[n]o phrase in the CWA is so beguiling, and misleading. Reading the Act history, this primacy was exactly what Congress rejected [with the 1972 amendments]. Reading further into the statute, what follows is a thoroughly EPA-driven statute." Oliver A. Houck, *Cooperative Federalism, Nutrients, and the Clean Water Act: Three Cases Revisited*, 44 *ENVTL. L. REP.* at 10, 427 (2014). Yet, that language remained in the final version of the 1972 amendments to the act despite the fact that it in some ways contradicts the statutory scheme set forth by the remainder of the statute.

The *SWANCC* and *Rapanos* decisions resulted directly in the legal confusion over the scope of jurisdiction under the CWA and subsequent legal battle over the EPA/Corps joint rulemaking that sought to clarify jurisdiction. In many ways it is the jurisprudential principles and enduring legacy of the Rehnquist court—most notably the reinvigorated focus on federalism—that put us on this path.

### **Where Does This Leave the States?**

The current scope of the CWA remains firmly up in the air, and it seems clear that the jurisdictional issue will yet again be reviewed by a Supreme Court consisting of at least four justices eager to continue in Rehnquist's legacy by seeking to retrench the rules for jurisdiction and narrowly construe federal power under the Commerce Clause.

Rehnquist's opinion in *SWANCC* (reaffirmed by *Rapanos*) concluded that the Corps' more expansive interpretation of jurisdiction "would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 171. Since the *SWANCC* and *Rapanos* decisions were driven by federalism principles and the desire to protect the "primary responsibilities and rights of States to prevent, reduce and eliminate pollution," it is fair to ask whether and how states might "fill the gap" created by federal uncertainty and protect important waters not within federal jurisdiction? Houck, *supra* note 20.

Although the CWA does provide a role for states, it is a federally dominated statute. Supreme Court jurisprudence in support of protecting state prerogatives has never seemed to be premised on the idea that states are in fact likely to do well at addressing water pollution, but rather that there must be a clear limit to federal power to regulate protection of water resources. Indeed, the 1972 amendments established a federally dominated statute as a response to the fact that states had done

a very poor job of addressing water pollution prior to 1972.

As noted above, scholars like Oliver Houck have long argued that “[the CWA], while providing ample room for state participation, is heavily federal and leaves little about this relationship to chance.” Houck, *supra*, at 10, 426. States may have a circumscribed role under an EPA/Corps dominated statute, but they do have the authority to set water quality standards under the CWA, which is not insignificant. Likewise, 46 of the 50 states have the delegated authority to implement and enforce the CWA’s National Pollutant Discharge Elimination System (NPDES) permitting system.

The Rapanos decision, the resulting split in application by federal circuit courts, and the ongoing litigation over the Clean Water Rule each in no way prevent individual states from acting to protect non-jurisdictional waters. In the absence of clear jurisdictional standards under the CWA, state legislative action is a possible, and perhaps appealing, approach. But, ultimately, if history is any indicator, it seems extremely unlikely that states will work independently and effectively to protect waters that are at this time jurisdictionally suspect under the CWA.

Part of the problem isn’t only the poor track record of states protecting water resources, but that two-thirds of U.S. states have statutes that directly limit the authority of state agencies to protect water resources beyond the scope of federal jurisdiction. “These restrictions take the form of absolute or qualified prohibitions that require state law to be ‘no more stringent than’ federal law; property rights limitations; or a combination of the two.” STATE CONSTRAINTS: STATE-IMPOSED LIMITATIONS ON THE AUTHORITY OF AGENCIES TO REGULATE BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT, Environmental Law Institute, Washington, D.C. (2013). Independent state action is also hampered by the fact that state regulations are often tied to federal statutory definitions. Although state legislatures could vote to amend these rules, they

currently present a significant barrier to meaningful state action.

Moreover, many states may lack the necessary resources to fill the gap due to budgetary concerns. Some states are quite simply opposed to any action that would result in more stringent environmental regulation. In fact, many of the states with the largest isolated wetlands acreages have little to no state-based protections for them. Jon Kusler, *The SWANNC Decision: State Regulation of Wetlands to Fill the Gap*, Ass’n of State Wetlands Managers, Mar. 2004.

Currently 25 states do have regulations on the books that cover to a varied extent “some waters that are either no longer subject to federal coverage following SWANCC and Rapanos, or whose federal coverage has been rendered uncertain.” STATE CONSTRAINTS, *supra* note 19, at 2. This means the other half of the states have no such regulations, and many of those states face significant statutory obstacles if they were to try to regulate waters that the CWA does not. These realities demonstrate that it is extremely unlikely that states will adequately step in to fill the gap created by Supreme Court decisions and the legal uncertainty surrounding the Clean Water Rule.

It is evident that states are generally hesitant, unwilling, or unable to effectively address the current gap in protection under the CWA. With little reason to expect anything more from the states aside from an inconsistent and piecemeal approach to addressing current non-jurisdictional federal waters, it is imperative that clarity come from the federal level soon.

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## STATES CHALLENGE CLEAN WATER RULE IN FEDERAL COURTS

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The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively, “Agencies”) are facing widespread blowback for their final rule establishing federal jurisdiction over certain waters (“Clean Water Rule” or “Rule”). See, Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054–127 (June 29, 2015) (to be codified at 33 C.F.R. 328) [hereinafter Clean Water Rule]. Several states and industry associations challenged the Clean Water Rule, arguing that the Rule is an improper expansion of federal jurisdiction over state waterways. While the Sixth Circuit is currently deciding jurisdictional questions for these cases, a federal district court in North Dakota has served as a microcosm of the successful charge against enforcement of the Clean Water Rule.

### Clean Water Rule Provisions

The Clean Water Rule defines “waters of the United States” (WOTUS) under the Clean Water Act, which prohibits the discharge of pollutants from a point source into navigable waters, i.e., WOTUS, without a permit. U.S. Environmental Protection Agency, Summary of the Clean Water Act, <http://www.epa.gov/laws-regulations/summary-clean-water-act> (last updated Oct. 8, 2015); 33 U.S.C. § 1311(a), 1342(a), 1344(a), 1362(7) (2014). EPA claims that the Rule is intended to provide clarity on the reach of the Agencies’ jurisdiction following the decisions of the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) and *Rapanos v. United States*, 547 U.S. 715 (2006). U.S. Environmental Protection Agency, What the Clean Water Rule Does, <http://www.epa.gov/cleanwaterrule/what-clean-water-rule-does> (last updated May 27, 2015); First Amended Complaint ¶ 51, *North Dakota et al. v. Env’tl. Protection*

*Agency et al.*, No. 3:15-cv-00059-RRE-ARS (D.N.D. Aug. 14, 2015), ECF No. 44 [hereinafter *North Dakota*].

Some of the most contentious provisions relate to the definitions of tributaries, adjacent waters, and waters with a “significant nexus” to federal waters. The Rule defines “tributaries” as any water that contributes flow to WOTUS and is characterized by a bed, banks, and an ordinary high water mark, which could include man-made features (e.g., certain types of ditches). Clean Water Rule, *supra* note 1, at 37,105; see, First Amended Complaint, *supra* note 3, ¶¶ 28–30. “Adjacent” waters are waters, such as ponds or lakes, which lie within a certain distance to WOTUS—a definition which critics believe may encompass a greater set of waters than previous regulations. Clean Water Rule, *supra* note 1, at 37,105; see, First Amended Complaint, *supra* note 3, ¶¶ 32–34. Finally, the Rule also covers waters that are deemed to have a “significant nexus” to a WOTUS, a case-by-case test that may also include isolated intrastate waters that significantly contribute to the integrity of a WOTUS. Clean Water Rule, *supra* note 1, at 37,105–06; First Amended Complaint, *supra* note 3, ¶¶ 35–38.

### Nationwide Opposition to the Rule

Immediately after its publication on June 29, 2015, the Clean Water Rule ignited controversy and became the subject of intense opposition from various parties. Lawmakers held congressional hearings and designed legislation to block the Rule’s enforcement. Shayna Posses, EPA, Corps Slammed over Clean Water Act Expansion, LAW360 (June 29, 2015, 7:57 PM), <http://www.law360.com/articles/673633/epa-corps-slammed-over-clean-water-act-expansion>. The agriculture industry also opposed the Rule out of concerns that the Rule might apply to drainage ditches on farmland. James Macpherson, Judge Blocks Obama Administration’s Rule on Waterways, HUFFINGTON POST (Aug. 27, 2015, 6:01 PM), available at <http://www.huffingtonpost.com/entry/north-dakota-clean->

water-rule\_55df86fce4b0aec9f352bf68. States argued the Rule represented an unfair expansion of the Clean Water Act and interfered with their rights to regulate their own waterways. Posses, *supra* note 7. Attorneys general from 31 states sent a letter requesting that the Agencies delay implementation of the Rule—but this effort was to no avail. Juan Carlos Rodriguez, 13 States Press Judge to Delay EPA's Water Jurisdiction Rule, LAW360 (Aug. 11, 2015, 4:38 PM), <http://www.law360.com/articles/689706/13-states-press-judge-to-delay-epa-s-water-jurisdiction-rule>.

States and other opponents of the Rule then sought relief from federal circuit and district courts across the country. According to the Agencies, approximately 100 parties filed 23 petitions for appellate review and 17 district court complaints challenging the Rule. Appeal of Magistrate Judge Decision at 2 n.1, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 102. The Agencies requested that the U.S. Judicial Panel on Multidistrict Litigation (“MDL Panel”) consolidate the district court cases, but their request was denied, leaving open the portal for conflicting rulings by various district courts. In re: Clean Water Rule: Definition of “Waters of the United States,” MDL No. 2663 (J.P.M.L. Oct. 13, 2015), ECF No. 163; Order Finding as Moot Motion to Stay at 2, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 94. Meanwhile, all circuit court petitions were assigned to the Sixth Circuit Court of Appeals, which found that petitioners had a substantial possibility of success, granted a temporary stay, and blocked implementation of the Rule nationwide. Order of Stay at 4, 6, In re: Env'tl. Protection Agency and Dept. of Defense Final Rule; “Clean Water Rule: Definition of Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015), No. 15-3751 (6th Cir. Oct. 9, 2015), ECF No. 49-2 [hereinafter In re Env'tl. Protection Agency]; Order Denying Motion to Stay at 4, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 55. The Sixth Circuit heard arguments on the issue of whether jurisdiction over this matter lies with the circuit or district courts, and denied the petitioners petitions to dismiss on February 22,

2016. Order Denying Motion to Stay, *supra* note 13, at 5; Cause Argued at 1, In re Env'tl. Protection Agency (No. 15-3751), ECF No. 71; Order on Petitions for Review of Final Rule of the United States Department of Defense and the United States Environmental Protection Agency, In re Env'tl. Protection Agency (Feb. 22, 2016).

## **Spotlight on North Dakota**

While the question of jurisdiction awaited resolution in the Sixth Circuit, several states have succeeded in obtaining an injunction against the Clean Water Rule in *North Dakota et al. v. Environmental Protection Agency et al.* The Agencies have repeatedly sought to stay the proceedings, but the North Dakota court has consistently ruled in favor of the states and blocked implementation of the Rule. This is a noteworthy event. Historically, parties have not been successful in district court challenges to rulemaking. Further legal analysis follows below, but what is significant about the North Dakota case is that the states were successful in persuading the district court that they could be harmed by the implementation of the rule. It is unclear how this will play out in the Sixth and Eighth Circuits, but the North Dakota court took seriously the practical demands of implementation and gave the states a powerful platform from which to negotiate changes to the Rule.

The North Dakota suit generally raises two categories of issues: (1) jurisdictional issues regarding the correct court to hear the challenges and (2) substantive issues regarding the Rule's provisions.

### ***Procedural Controversy: Agencies Challenge Jurisdiction***

On the same day that the Clean Water Rule was published, 13 states filed suit against the Agencies in the federal district court of North Dakota. See generally Complaint, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 1. The New Mexico Environment Department and the New Mexico State Engineer, which regulate land use, water quality, and water resources within New Mexico,

are also plaintiffs in this case. *Id.* at 1 and ¶ 5. The number of plaintiff-states now stands at 14. The Agencies responded to these attacks on the Clean Water Rule by filing three motions to stay the proceedings. The Agencies filed their first motion to stay before the states even filed their motion for a preliminary injunction. See, *Motion to Stay Proceedings Pending a Ruling from the Judicial Panel on Multidistrict Litigation Under 28 U.S.C. § 1407 to Transfer and Consolidate, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 12.* The Agencies argued that the Rule fell within the circuit court’s exclusive jurisdiction under 33 U.S.C. § 1369(b)(1), while the states maintained that that jurisdiction belonged to the district courts. See *Order Denying Motion to Stay, supra note 13, at 5.* The states filed an additional suit in the Eighth Circuit Court of Appeals “out of an abundance of caution,” though they later moved to dismiss their petition for review in the Sixth Circuit based on lack of jurisdiction. *First Amended Complaint, supra note 3, ¶ 3; Order Granting Motion for Scheduling Order and Denying Motion to Stay at 3 n.1, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 98.* With the pending motion for a preliminary injunction in mind, the district court denied the first motion to stay. The court noted that granting the motion to stay would delay consideration of a preliminary injunction until after the effective date of the Rule—which would be tantamount to denying the preliminary injunction. *Order Denying Motion to Stay, supra note 13, at 7, 9.* The court held that the states should have the opportunity to argue for a preliminary injunction because they had shown that a stay would be prejudicial, and the Agencies had failed to show that they would face hardship without a stay. *Id.* at 8–9. The court made no final determination as to jurisdiction at that time, but later held that it had original jurisdiction over the case. See generally *id.*; *Memorandum Opinion and Order Granting Plaintiffs’ Motion for Preliminary Injunction at 5–6, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 70.*

After the court granted a preliminary injunction, the Agencies filed a second motion to stay

the proceedings until the MDL Panel reached a decision on their motion to consolidate all district court actions into a single district court. *Defendants’ Renewed Motion to Stay Proceedings Pending a Ruling from the Judicial Panel on Multidistrict Litigation Under 28 U.S.C. § 1407 to Transfer and Consolidate, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 81.* However, the district court denied the motion to stay as moot after the MDL Panel denied the Agencies’ motion to consolidate. *Order Finding as Moot Motion to Stay, supra note 12.*

The Agencies then filed a third motion to stay the proceedings pending the Sixth Circuit’s ruling on jurisdiction. *Motion to Stay Pending a Ruling from the U.S. Court of Appeals for the Sixth Circuit on Subject-Matter Jurisdiction, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 90.* The court denied the motion to stay, finding that defendants did not prove that starting the process of compiling an administrative record for this case would cause them a hardship or inequity. *Order Granting Motion for Scheduling Order and Denying Motion to Stay, supra note 17, at 5.* The court noted that the Agencies had not appealed the district court’s earlier assertion of original jurisdiction. *Id.* at 3.

The Agencies then filed an appeal requesting that the district court reverse the order denying their motion to stay. *Appeal of Magistrate Judge Decision, supra note 11.* In addition, the states have filed a motion to require the Agencies to complete the administrative record, claiming that the Agencies failed to include certain memoranda that were part of the Agencies’ deliberative process in drafting the Rule and were critical of the Rule. *Motion to Complete Administrative Record, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 104; Memorandum in Support of Motion to Complete Administrative Record at 4–8, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 105; David LaRoss, States Aim to Boost CWA Rule Challenge by Relying on Corps’ Criticisms, INSIDE EPA (Dec. 8, 2015), <http://insideepa.com/daily-news/states-aim-boost-cwa-rule-challenge-relying-corps-criticisms>.* The Agencies, on the

other hand, maintain that the documents sought constitute “deliberative materials” that reflect the Agencies’ internal decision-making process and are not part of the administrative record. Response to Motion to Complete Administrative Record at 8, 13–14, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 110.

The dispute has become even more heated. The states have argued that the Agencies have demonstrated bad faith in promulgating the Rule, as evidenced by a Government Accountability Office (GAO) report that determined EPA violated federal law in using social media to promote the Rule. Reply to Response to Motion to Complete Administrative Record at 7, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 124. However, the Agencies vehemently oppose the charge, claiming the GAO report is not relevant to the motion to complete the administrative record and the states have failed to provide enough evidence to prove bad faith. Surreply to Motion to Complete Administrative Record at 1–2, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 128; see also Bridge DiCosmo, DOJ Fights States’ Claim of ‘Bad Faith’ EPA-Corps CWA Jurisdiction Rule, INSIDE EPA (Jan. 14, 2016), <http://insideepa.com/daily-news/doj-fights-states-claim-bad-faith-epa-corps-cwa-jurisdiction-rule>. At the time of this writing, the motion to complete the administrative record remains pending before the district court.

### ***Substantive Controversy: States Challenge the Rule***

In the midst of the ongoing jurisdictional controversy, the states also continued to challenge the Rule’s provisions. Echoing previous criticisms, the states alleged that the Clean Water Rule unlawfully expands federal jurisdiction over state land and water resources beyond the limits established by Congress and in violation of several provisions of the Constitution and federal law. First Amended Complaint, *supra* note 3, ¶ 2. Specifically, the states argued that the Rule’s definitions of certain waterways effectively “sweep[] within the Agencies’ authority” ephemeral streams, lands that are dry throughout

most of the year, purely intrastate waters related to non-navigable interstate waters, and any waters having a “significant nexus” to a primary water (even if no hydrologic connection exists). *Id.* ¶¶ 26–38, 50, 57, 63.

The states further contended that the Rule would subject their waters and lands to greater federal regulation; increase permitting costs for state-funded infrastructure projects; reduce tax, royalty, and other payments to the states; and tie up state resources in litigation costs associated with increased liability. *Id.* ¶¶ 39–44. Accordingly, the states sought an injunction against enforcement of the Rule and a declaration that the Rule was unlawful and must be vacated. *Id.* ¶¶ A–C.

After hearing arguments on the states’ motion for a preliminary injunction, the district court determined that the states were likely to succeed on their claims because EPA appeared to have violated its authority and failed to comply with federal administrative law in its promulgation of the Rule. Memorandum Opinion and Order Granting Plaintiffs’ Motion for Preliminary Injunction, *supra* note 20, at 1–2. The court noted that “[w]hile the exact amount of land that would be subject to the increase is hotly disputed, the Agencies admit to an increase in control over those traditional state-regulated waters of between 2.84 and 4.65 percent.” *Id.* at 16. Moreover, the court found that the states would undoubtedly face irreparable harm in the form of monetary losses incurred as a result of the unlawful exercise of authority, which they would not be able to recoup. *Id.*

Accordingly, one day before the Rule took effect, the court granted the motion and prohibited the Agencies from enforcing the Rule. See *id.* at 18. When the parties disagreed about the scope of the injunction, the court issued another order clarifying that the injunction applied only to the 13 plaintiff-states. See generally Order Limiting the Scope of Preliminary Injunction to the Plaintiffs, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 79. The district court issued this order weeks before the Sixth Circuit issued a nationwide

stay. The court explained that it limited the scope of the injunction out of respect for other district courts that had denied preliminary injunctions or deferred their decisions pending the MDL's decision regarding the consolidation of the district court cases. *Id.* at 1, 3 (citing *Murray Energy Corp. v. Env'tl. Protection Agency*, No. 1:15-cv-0110 (N.D. W. Va. Aug. 26, 2015), ECF No. 32; *Georgia v. Env'tl. Protection Agency*, No. 2:15-cv-0079 (S.D. Ga. Aug. 27, 2015), ECF No. 77; *Okla. ex rel. Pruitt v. Env'tl. Protection Agency*, Nos. 15-cv-0381, 15-cv-0386, 2015 4607903, at \*4 (N.D. Okla. July 31, 2015)).

Meanwhile, as noted above, the district court has ordered that the case continue despite the Agencies' repeated assertions that the court should wait for a decision from the Sixth Circuit on jurisdictional issues. Further, the battle in North Dakota continues to grow as Iowa recently joined as a plaintiff, while the Sierra Club moved to intervene as a defendant. Order Granting Unopposed Motion to Intervene, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 107; Motion to Intervene as Defendant, North Dakota, No. 3:15-cv-00059-RRE-ARS, ECF No. 111.

## Takeaways

Since the Sixth Circuit stayed the implementation of the Clean Water Rule pending its decision on jurisdiction, the Agencies have enforced the regulations that were in place prior to the Rule. See U.S. Environmental Protection Agency, Clean Water Rule Litigation Statement, <http://www.epa.gov/cleanwaterrule/clean-water-rule-litigation-statement> (last updated Nov. 17, 2015). If the Sixth Circuit decides that it has exclusive jurisdiction over the Rule, then the progress that the states have made in North Dakota may reach an abrupt halt when the Agencies move to dismiss the case. See Order Granting Motion for Scheduling Order and Denying Motion to Stay, *supra* note 17, at 6. At that point, even if the states challenged the Agencies' efforts to dismiss the case based on jurisdiction, it is unclear whether the Eighth Circuit would continue to allow this battle to be fought on

multiple fronts. See Appeal of Magistrate Judge Decision, *supra* note 11, at 7–8 (“The Eighth Circuit and other appellate courts have recognized the harm from having to litigate the same issue on multiple fronts . . . ‘It makes little sense to proscribe district-district duplication but not district-circuit duplication, as both forms require the unnecessary expenditure of scarce federal judicial resources.’”) (quoting *Missouri ex rel. Nixon v. Prudential Health Care Plan, Inc.*, 259 F.3d 949, 954 (8th Cir. 1954)).

However, if the Sixth Circuit determines that jurisdiction lies with the district courts, then the jurisdictional battle may continue throughout various district courts, resulting again in inconsistent stays or enforcements of the Rule. In either case, the intense controversy indicates that the Rule may not survive in its current form.

Update: On February 22, 2016, the Sixth Circuit ruled that it has exclusive jurisdiction to review the Clean Water Rule in the multi-circuit consolidated case. While this decision likely strikes a major blow to all pending suits in various district courts, the ramifications have not yet fully manifested in the North Dakota case as of this article's publication. On May 24, 2016, the North Dakota District Court stayed the case pending further decisions by the Courts of Appeal or Supreme Court.



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## JURISDICTION OVER THE WOTUS RULE, OR, WHOSE INJUNCTION IS VALID?

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In June 2015, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers published their final and joint regulation defining “waters of the United States” for the Clean Water Act (the “WOTUS rule”). Legal challenges to the regulation followed immediately, filed in both federal district courts and federal courts of appeal. On August 28, 2015, the U.S. District Court for the District of North Dakota—one of seven federal district courts (as of October 2015) hearing nine challenges to the WOTUS rule—preliminarily enjoined the rule’s implementation in the 13 states that were parties to that lawsuit (Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming). *North Dakota v. U.S. Environmental Protection Agency*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 5060744 (Aug. 27, 2015). On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit, which was hearing the consolidated courts of appeal challenges as a result of assignment from the Judicial Panel on Multidistrict Litigation, preliminarily enjoined the WOTUS rule nationwide. *In re Environmental Protection Agency*, 803 F.3d 804 (6th Cir. 2015). One of these injunctions was invalid for lack of subject matter jurisdiction. On February 22, 2016, a badly split panel of the Sixth Circuit held that court enjoys original jurisdiction. *In re: U.S.D.O.D.*, 2016 WL 723241 (6th Cir. Feb. 22, 2016). This article discusses why the issue of jurisdiction is unclear.

Unlike the federal Clean Air Act, which sends all challenges to EPA regulations to the U.S. Court of Appeals for the D.C. Circuit, the Clean Water Act’s jurisdictional provision is much more complex. Specifically, section 509(b) of the act sends review of seven types of EPA action to “the Circuit Court of Appeals of the United States for the Federal judicial district in which [the challenger] resides

or transacts business which is directly affected by such action. . . .” 33 U.S.C. § 1369(b)(1). All other challenges, by implication, start in the federal district courts. Specifically, the federal courts of appeal can hear challenges to EPA’s action:

(A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l) of this title. . . .

*Id.* None of these categories clearly gives the Sixth Circuit jurisdiction over the WOTUS rule.

Case law provides some contours for deciding when the federal courts of appeal have jurisdiction to review Clean Water Act regulations and other actions. For example, the courts of appeal clearly have jurisdiction to review regulations promulgating effluent limitations. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977) (relying on section 509(b)(1)(E)). Section 509(b)(1)(E) further includes jurisdiction to review EPA’s interpretation of pretreatment standards, *Modine Manufacturing Corp. v. Kay*, 791 F.2d 267, 271 (3d Cir. 1986) (relying on section 509(b)(1)(C)), but it does not include jurisdiction to review total maximum daily loads. *Friends of the Earth v. U.S. EPA*, 333 F.3d 184, 188–91 (D.C. Cir. 2003); *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312 (9th Cir. 1992).

Nevertheless, discerning the dividing lines between the existence or non-existence of jurisdiction in the courts of appeal can be tricky. For example, section 509(b)(1)(F) clearly gives the courts of appeal jurisdiction to review EPA’s decision to issue or deny a National Pollutant Discharge

Elimination System (NPDES) permit. According to the U.S. Supreme Court, this jurisdiction includes review of EPA's disapproval of effluent limitations contained in state-issued NPDES permits. *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196 (1980) (relying on section 509(b)(1)(F)). However, according to the various courts of appeal, section 509(b)(1)(F) jurisdiction does not extend to review of NPDES permit modifications made solely by state agencies, *Mianus River Preservation Committee v. Administrator, Environmental Protection Agency*, 541 F.2d 899, 909–10 (2d Cir. 1976); denial of variances, *Shell Oil Co. v. Train*, 585 F.2d 408, 414 (9th Cir. 1978); or review of internal EPA memoranda advising that NPDES permits are required in certain factual situations. *Appalachian Energy Group v. EPA*, 33 F.3d 319, 321–22 (4th Cir. 1994); see also *South Holland Metal Finishing Co. v. Browner*, 97 F.3d 932, 936–37 (7th Cir. 1996) (holding that the courts of appeal do not have jurisdiction to review EPA's interpretive rulings regarding permits). Courts split regarding whether the courts of appeal have jurisdiction to review EPA's objection to a proposed state-issued NPDES permit. Compare *American Paper Institute v. U.S. EPA*, 890 F.2d 869, 873 (7th Cir. 1989) (holding that there is no jurisdiction), with *Pennsylvania Municipal Authorities Ass'n v. Horinko*, 292 F. Supp. 2d 95, 107 (D.D.C. 2003) (holding that the courts of appeal have exclusive jurisdiction to review EPA objections to "blending" allowances in state NPDES permits); *Champion International Corp. v. EPA*, 850 F.2d 182, 188 (4th Cir. 1988) (holding that review of EPA objections to state-issued NPDES permits lies in the courts of appeal).

Application of section 509(b)(1) is also complicated by the fact that the various courts take different approaches to interpreting that provision. The U.S. Supreme Court, D.C. Circuit, and Seventh Circuit have all advocated a "practical" approach to interpreting section 509(b)(1) that avoids jurisdiction turning on fortuitous circumstances, such as whether a state has been delegated NPDES permitting authority or whether a discharge limitation is formally labeled an "effluent limitation." *Crown Simpson Pulp*, 445

U.S. at 196–97; see also *American Paper Institute*, 890 F.2d at 873; *Natural Resources Defense Council, Inc. v. U.S. EPA*, 656 F.2d 768, 775–76 (D.C. Cir. 1981) (following *Crown Simpson Pulp* to hold that sewage discharge regulations concern "effluent limitations" and are subject to court of appeal review under section 509(b)(1)(C)). The Second Circuit, in contrast, advocates narrow interpretations of section 509(b)(1) in light of that provision's specificity. *Central Hudson Gas & Electric Corp. v. EPA*, 587 F.2d 549, 555–56 (2d Cir. 1978) (narrowly construing section 509(b)(1)(D) to apply only to EPA's approvals or disapprovals of delegated state NPDES programs); *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2d Cir. 1976) ("Nevertheless, the complexity and specificity of section [1369(b)(1)] in identifying what actions of EPA under the Florida Water Pollution Control Act (Clean Water Act) would be reviewable in the courts of appeals suggests that not all such actions are so reviewable.").

The issue most important to the WOTUS rule is whether the courts of appeal have jurisdiction to review routine interpretive or implementing regulations. Case law indicates that they do not. For example, the Third Circuit held that it lacked jurisdiction to review EPA regulations that set out when effluent limitations in a permit could be adjusted but that did not itself establish effluent limitations. *American Iron & Steel Institute v. EPA*, 543 F.2d 521, 529 (3d Cir. 1976). Similarly, the Ninth Circuit has held that it lacked jurisdiction under section 509(b)(1) to review EPA regulations articulating exemptions from the act. *Northwest Environmental Advocates v. U.S. EPA*, 537 F.3d 1006, 1016–18 (9th Cir. 2008). Perhaps most clearly, the Northern District of California has held that the courts of appeal do not have original jurisdiction to review EPA regulations issued under the agency's general Clean Water Act rulemaking authority under section 501, 33 U.S.C. section 1361(a), or its nonpoint source guidance authority in section 304, 33 U.S.C. section 1314. *Environmental Protection Information Center v. Pacific Lumber Co.*, 266 F. Supp. 2d 1101, 1112 (N.D. Cal. 2003).

In their WOTUS rule, however, EPA and the Army Corps cited multiple sections of the Clean Water Act as authority for the regulation, some of which would support original jurisdiction in the courts of appeal and some of which would not: “The authority for this rule is the Federal Water Pollution Control Act, 33 U.S.C. 1251, et seq., including sections 301, 304, 311, 401, 402, 404 and 501.” 80 Fed. Reg. 37,054, 37,054 (June 29, 2015). Nevertheless, the WOTUS rule is fundamentally an interpretation of a statutory term, “waters of the United States,” that is found in section 502, 33 U.S.C. section 1362, the act’s definition section. EPA and the Army Corps do not cite sections 306 or 307, plausibly eliminating the courts of appeals’ jurisdiction under section 509(b)(1)(A), (B), and (C). They did not approve a state NPDES program or issue or deny an NPDES permit, and it is difficult to plausibly categorize the WOTUS definition to establish jurisdictional waters as either an “effluent limitation” or an individual control strategy to govern discharges into those waters. The North Dakota District Court articulated much the same logic including that the district courts—not the courts of appeal—had jurisdiction to review the WOTUS rule. *North Dakota*, 2015 WL 5060744, at \*2–\*3.

Jurisdiction to review the WOTUS rule would thus seem to be most proper in the district courts. Notably, when the Sixth Circuit issued its nationwide injunction, it did not review its own subject matter jurisdiction, over the dissenting objection of Judge Keith. In *re EPA*, 803 F.3d at 809. Instead, it waited until February 22, 2016, to issue a fractured decision upholding its own jurisdiction—deciding in favor of EPA and Army Corps. *Murray Energy Corp. v. U.S. Department of Defense*, Nos. 15-3751 et al. (6th Cir. Feb. 22, 2016), available at <http://www.ca6.uscourts.gov/opinions.pdf/16a0045p-06.pdf>. In its 2-1 decision, the Sixth Circuit offered three analyses. Judge McKeague noted that subsections (E) and (F) of section 509(b)(1) were the only relevant sections (slip op. at 4), and, following the flexible interpretation of subsection (E)’s “other limitation” from *E.I. du Pont de Nemours Co. v. Train*, 430 U.S. 112, 136 (1977) (slip op. at 7–8), concluding that the WOTUS rule is “a regulation

whose practical effect will be to indirectly produce various limitations on point-source operators and permit issuing authorities” (slip op. at 11). Similarly, following *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196–97 (1980), and *National Cotton Council v. U.S. E.P.A.*, 553 F.3d 927, 933 (6th Cir. 2009), cert. denied sub nom. *Crop Life v. Baykeeper*, 130 S. Ct. 1505 (2010) (slip op. at 12), Judge McKeague concluded that the WOTUS rule is functionally similar to a permit denial and found jurisdiction under subsection (F), as well. Concurring Judge Griffin, however, found jurisdiction only because of the *National Cotton Council* precedent and otherwise would have denied that the Sixth Circuit had jurisdiction (slip op. at 19 (Griffin, J., concurring)). Judge Keith largely agreed with Judge Griffin’s reasoning that no jurisdiction existed but also concluded that *National Cotton Council* did not apply (slip op. at 32 (Keith, J., dissenting)).

Notably, the U.S. Court of Appeals for the Eleventh Circuit a week earlier delayed oral argument on its jurisdiction until the Sixth Circuit had issued an opinion. However, the Eleventh Circuit has already found *National Cotton Council* unpersuasive, suggesting that it may well create a circuit split regarding the propriety of the courts of appeals’ jurisdiction over the WOTUS rule. Given Justice Scalia’s recent death, moreover, a 4-4 split in the U.S. Supreme Court might now leave this critical first issue unresolved.

However, even if the U.S. Supreme Court does eventually establish that jurisdiction is proper in the federal district courts, that decision will solve one source of potential confusion in review of the WOTUS rule but will create another. On October 13, 2015, the U.S. Judicial Panel on Multidistrict Litigation refused to consolidate the federal district court cases challenging the WOTUS rule. In *re Clean Water Rule: “Waters of the United States,”* \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 6080727, at \*1–\*2 (MDL Oct. 13, 2015). As a result, seven federal district courts (and counting) stand poised to issue a variety of decisions on the validity of the WOTUS rule—but at least they will have jurisdiction to do so.