



UNSETTLED WATERS: THREE ISSUES CLOUDING THE CLEAN WATER ACT

by Jim Wedeking

In an oft-cited BBC interview, theoretical physicist Dr. Richard Feynman confessed that “I think it’s much more interesting to live not knowing than to have answers which might be wrong.” However, that enthusiasm for the unknown makes for a lousy lawyer. The maxim of “ignorance of the law is no excuse” still governs, making uncertainty an anathema—particularly to those operating in highly regulated environments. Unfortunately, three recent developments will make constructing anything from a backyard swimming pool to a billion-dollar pipeline more uncertain.

The exact definition of “Waters of the United States” under the federal Clean Water Act has been elusive for decades. Although the April 2020 Navigable Waters Protection Rule sought to clarify the definition through a series of (mostly) bright-line rules, it is now being challenged in several different district courts, creating the potential to end the current patchwork of different definitions for different parts of the country. One related aspect of Clean Water Act jurisdiction, the discharge of pollutants to groundwater, was recently before the Supreme Court. Instead of clarity, however, the Court left the lower courts with a baffling multi-factor balancing test that likely will frustrate litigants for years to come. And finally, a Montana district court’s opinion not only invalidated a frequently used nationwide permit but changed the standard for what a plaintiff must show to win a nationwide injunction and when they must show it. But the Ninth Circuit, and possibly other courts, will have their say.

What is a “Water of the United States” and When Will We Know?

In April, the U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“the Corps”) tried again to settle the definition of a “Water of the United States.”¹ The exact outlines of the term, defining which waters and wetlands (and sometimes concrete ditches and dirt lots) are subject to regulation under the Clean Water Act, have been the point of serious dispute since at least 1986, when the Corps adopted a broad interpretation of “Waters of the United States.” Then, in 2006, the Supreme Court issued a contentious 4-4-1 decision in *Rapanos v. United States*, where Justice Kennedy’s lone concurring opinion established the “significant nexus” test for Clean Water Act jurisdiction.² The Obama Administration relied on that concurrence, in part, to expand the scope of Clean Water Act jurisdiction,³ but courts enjoined enforcement of that rule in 28 states as surpassing the agencies’ statutory authority.⁴ Subsequently, nearly half of the country was subject to the Obama Administration’s definition with the other half subject to the then pre-existing rules, as modified by guidance interpreting Justice Kennedy’s significant nexus approach.

¹ The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (Apr. 21, 2020).

² 547 U.S. 715 (2006).

³ 80 Fed. Reg. 37,054 (June 29, 2015).

⁴ *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015); *Georgia v. Wheeler*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); *Texas v. U.S. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019).

That approach was a mess for lower courts. After Clean Water Act convictions were reversed and remanded due to the *Rapanos* “significant nexus” test, one judge directed “the Clerk to reassign this case to another judge for trial” as “I am so perplexed by the way the law applicable to this case has developed that it would be inappropriate for me to try it again.” *United States v. Robinson*, 521 F. Supp. 2d 1247, 1248 (N.D. Ala. 2007). And despite the venerable maxim that “ignorance of the law is no excuse,” one trial judge scolded a defendant providing an affidavit explaining why his property did not contain jurisdictional wetlands because “[h]e obviously lacks the expertise necessary in identifying wetlands” and “has failed to show that any of his observations are relevant to determining to what extent the Site is a wetland.” *United States v. Bailey*, 516 F. Supp. 2d 998, 1009 (D. Minn. 2007). In other words, it was outright foolish for a defendant to attempt understanding whether or not the Clean Water Act applied to his property.

The Navigable Waters Protection Rule looked to rein in the excesses of the Obama Administration’s rulemaking and the “significant nexus” test with a bright-line approach. Regardless of whether it will accomplish this goal, recent challenges to the rule could splinter the definition of Waters of the United States even more than the challenges to the Obama Administration’s Rule. As of this writing, there were eight district court challenges to the Navigable Waters Protection Rule and more may follow. Six of the eight allege unlawful under-regulation of waters and wetlands with two, brought by ranchers’ associations, alleging over-regulation. In the most significant challenge, filed by eighteen attorneys general in the Northern District of California, the judge is now considering a motion for a preliminary injunction.⁵ Should the court grant that motion, different states could again be subject to different rules.

If California, whose attorney general is a lead plaintiff challenging the Navigable Waters Protection Rule, obtains a preliminary injunction, then its residents would be subject to the 1986 regulations. But this is complicated by pending legal challenges to the 2019 rule repealing the Obama Administration’s definition.⁶ Should those challenges prevail, states like California would be subject to the Obama Administration rule. But for North Carolina, also a plaintiff seeking a preliminary injunction against the Navigable Waters Protection Rule, victory would mean that its residents would be subject to the 1986 rules as a court already enjoined the Obama Administration’s rule in that state. For other states that are not challenging the Navigable Waters Protection Rule, they will have to wait and see whether the Northern District of California limits any injunction to just the 18 state plaintiffs or issues a nationwide injunction.

There has been no shortage of nationwide injunctions over the past decade.⁷ The Department of Justice has made no secret that it is itching to take a nationwide injunction to the Supreme Court in an effort to have the practice invalidated.⁸ But even if the district court in this instance declines to issue a broad injunction, and instead limits it to the plaintiff states, the potential for conflicting appellate court decisions and Supreme Court review will likely mean that the most basic question under the Clean Water Act—what is a Water of the United States?—will remain unanswered for some time.

County of Maui and the Balancing Test Bonanza

The Supreme Court had a recent opportunity to settle a significant aspect of Clean Water Act jurisdiction

⁵ The State of Colorado filed a separate suit, *Colorado v. U.S. Environmental Protection Agency*, Case No. 20-cv-01461 (D. Colo.), and moved for its own preliminary injunction.

⁶ The Corps and EPA rescinded the Obama Administration’s rule and re-codified the 1986 regulations prior to issuing the Navigable Waters Protection Rule. 84 Fed. Reg. 56,626 (Oct. 22, 2019).

⁷ See generally Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. LAW. R. 1065 (2018) (providing a partial listing of nationwide injunctions against both Trump and Obama Administration regulations and policies).

⁸ See DOJ, Attorney General William P. Barr Delivers Remarks to the American Law Institute on Nationwide Injunctions (May 21, 2019), <https://bit.ly/3ct3cxs>; Memo from the Attorney General to Heads of Civil Litigating Components, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions (Sept. 13, 2018) at 1 (“The Department consistently has argued against granting relief outside of the parties to a case.”).

in *County of Maui v. Hawai'i Wildlife Fund*.⁹ It declined. The question before the Court was whether the Clean Water Act applies when a source discharges pollutants into groundwater and then those pollutants migrate to a jurisdictional surface water body. In *County of Maui*, the appellant injected partially treated wastewater into wells. That wastewater eventually leaked out and migrated approximately one-half mile from the wells to the Pacific Ocean. Both parties and the United States, participating as *amicus curiae*, offered bright-line rules to the Court. Hawai'i Wildlife Fund relied on the Ninth Circuit's holding that discharges to groundwater were regulated under the Clean Water Act if they could be "fairly traceable" back to their source. The County of Maui and the United States, brandishing EPA's new interpretative statement, argued that any discharge to groundwater cuts off Clean Water Act jurisdiction as the statute leaves groundwater pollution to the States. Both sides lost.

Instead of adopting a bright-line rule, the Court held that discharges to groundwater can be regulated under the Clean Water Act where they are the "functional equivalent" of a discharge directly to navigable waters based on a multi-factored balancing test. The factors include (but are not limited to):

- The Clean Water Act's purpose;
- State regulation of groundwater;
- The time and distance required for pollutants to travel from the source to navigable waters;
- The nature of the material through which the pollutant travels;
- Whether the pollutant is diluted or chemically changed as it travels;
- The volume of the discharged pollutant entering the navigable waters compared to the volume of the pollutant discharged by the point source;
- The manner or area in which the pollutant enters the navigable water; and
- The degree to which the pollutant maintains its specific identity.

How these factors will work in case-specific analyses is unknown. The Court gave no indication as to how many factors or even whether some factors balance for or against jurisdiction. Some factors are difficult to understand. For instance, since the Clean Water Act has many purposes, balancing the reduction of water pollution against the costs and technical limitations of treatment, and distributing different regulatory functions to state and federal governments, how will the statute's purpose guide a district court? Or, if the pollutant degrades from Chemical A to Chemical B while migrating through groundwater, does that mean it is more likely to be regulated under the law or less? And how is this factor different than the factor inquiring into whether the pollutant "has maintained its specific identity?" The Court at least noted that "[t]ime and distance will be the most important factors in most cases" before caveating, "but not necessarily every case."

Despite environmental groups claiming victory, the decision is a loss for everyone. Any source that causes groundwater pollution could now be a potential target for EPA enforcement or a citizen suit, even where that pollution is being addressed under the Resource Conservation and Recovery Act or state groundwater regulation. Further, the site-specific and highly technical nature of the inquiries make it nearly impossible to dispose of a case until each side has mustered its army of expert witnesses and filed for summary judgment. The balancing test leaves substantial discretion in the hands of whichever federal district court judge the parties draw. *County of Maui's* non-exhaustive list of factors amounts to little more than a legal Rorschach test, allowing judges to pick and choose whichever factors may justify their ultimate decision. Judges are likely to interpret the factors' meaning and importance differently, leading to potential circuit splits that could force the Supreme Court to take the issue up once more.

⁹ Case No. 18-260 (2020).

Nationwide Permits in Nationwide Trouble

An environmental group's facial challenge to Nationwide Permit 12 got them what they wanted. The question now is what remedy did they actually want and could a court vacate Nationwide Permit 12 for oil and gas pipelines. Environmental groups sued the Corps in the U.S. District Court of Montana, arguing that it failed to undertake a programmatic consultation under the Endangered Species Act when it re-issued Nationwide Permit 12 ("NWP 12").¹⁰ NWP 12 allows certain "utility line" construction activities that involve discharge of minimal amounts of dredge and fill material in navigable waters and is frequently used by pipeline companies for construction and maintenance purposes. In this case, the environmental groups argued that the Corps' 2017 determination that the NWP 12 program would have no effect on threatened or endangered species or their critical habitat was arbitrary and capricious. The court agreed on the merits, but it was the remedy that caused the uproar.

The court vacated NWP 12 nationwide, notwithstanding plaintiffs' request for a remand and injunction regarding a specific oil pipeline. The Corps moved for reconsideration of the remedy, arguing that the remedy should have been what plaintiffs requested, instead of a remedy that enjoined the nationwide construction of every pipeline, power line, or fiber optic cable relying on NWP 12. Plaintiffs, in opposing the motion for reconsideration, provided additional declarations claiming harm from a smattering of pipeline projects around the country and urged the court to limit its remedy to only oil and gas pipelines. But the plaintiffs provided no evidence supporting their claims that pipelines create a special harm to threatened or endangered species while other uses of NWP 12 do not. Further, by expanding their request for relief *after* prevailing on summary judgment, the environmental groups were effectively filing an entirely new case. Waiving away the plaintiffs' weaknesses with respect to standing, evidence, and procedure, the court barred oil and gas pipelines nationwide from using NWP 12 for stream or wetland crossings except to perform unspecified maintenance activities.

The Corps appealed to the Ninth Circuit and moved to stay the judgement pending appeal. The court denied the motion for a stay in a short order. On the merits, the question regarding Endangered Species Act programmatic consultation is significant. The Montana court's decision makes it virtually impossible for an agency to issue a programmatic "no effect" determination and engage in Endangered Species Act consultation if conditions warrant at the project stage. Further, the Corps' "no effect" decision applied to several nationwide permits re-authorized at the same time as NWP 12.¹¹ Environmental groups could potentially challenge any one of those on the same grounds.

However, the district court's ruling on relief may have a greater impact. As noted above, the Department of Justice is looking to pick a fight on nationwide injunctions, and it now has that fight on its hands. The Ninth Circuit has the opportunity to clarify if or when a district court has the authority to issue a nationwide injunction vacating regulations with national applicability. Certainly, any decision must deal with difficult questions of injury for standing purposes, forum shopping, and the potential for conflicting district court decisions, given that the holdings of one district court do not bind others. This is especially important given that environmental groups opposed to fossil fuel development have promised a new series of lawsuits against pipelines based on the Montana court's order. Unfortunately, the Ninth Circuit may need to move with uncharacteristic speed if it is going to provide any guidance. The Corps must re-issue its nationwide permits in January 2022, potentially mooted the appeal if it is still pending.

¹⁰ *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, Case No. 19-cv-00044 (D. Mont.).

¹¹ See 82 Fed. Reg. 1860 (Jan. 6, 2017).