

TEXAS LAWYER

Finding the High Ground in The Clean Water Rule

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July 27, 2015

Commenters on the U.S. Environmental Protection Agency's and the U.S. Army Corps of Engineers' joint release of the new Clean Water Rule have mostly pivoted between two extremes—either the rule is an unprecedented and burdensome overreach of federal agency jurisdiction or the rule provides much needed protection of drinking water supplies and wetlands. Beyond the press releases, much can be learned from the rule's history and language that can provide a bit of high ground from which to best assess how the new rule will affect the regulatory landscape.

In 2001, the U.S. Supreme Court struck down a very expansive predecessor regulation, commonly referred to as the Migratory Bird Rule, which had been in effect since 1986, under which the agencies asserted jurisdiction over isolated waterbodies simply because the waters were used by migratory birds crossing state lines. Under this earlier rule, truly isolated intrastate waters with no hydrologic connection to "navigable waters" (the term of art used to define jurisdiction in the Clean Water Act) fell under federal jurisdiction. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the court, in 2001, held that the agencies' reliance on migratory birds fell short of the agencies' statutory authority and ignored the plain language of the act.

In overturning this 15-year old regulation, the court created a regulatory void leading to additional litigation attempting to define the extent of federal Clean Water Act jurisdiction. This follow on litigation focused on the question of under what circumstances should pollution of neighboring, adjacent, or upstream waters, and most especially wetlands, be controlled by federal environmental programs because of impacts to downstream or nearby waters?

The answer turned out to be what is commonly referred to as the "significant nexus test" as outlined in 2006 in Justice Kennedy's concurring opinion in *Rapanos v. U.S.* This test asks whether a water significantly affects the chemical, physical, or biological integrity of waters that are more clearly jurisdictional. Thus, the regulatory landscape has shifted from that of the mid-1980s in which waters were deemed jurisdictional simply due to use by migratory birds, to one developed over the past decade that is driven by a renewed focus on links to navigable waters and the actual language of the act itself. However, debate remains over how significant those links should be.

The Rule

The Clean Water Rule is the agencies' attempt to establish those links by applying the significant nexus test to specific categories of waters in lieu of case-by-case analysis for every project. The rule focuses on three broad categories: 1. those waters with a clear significant nexus and are jurisdictional by rule; 2. those waters that are clearly excluded from jurisdiction by rule; and 3. those waters that still require a case-by-case significant nexus analysis.

Under the new rule, many waters traditionally viewed as jurisdictional are made jurisdictional by rule, such as traditional navigable waters, interstate waters and territorial seas, and their tributaries and impoundments. Under the rule, tributaries must have a bed and banks, ordinary high water mark and contribute direct or indirect flow to jurisdictional waters. The rule also recognizes adjacent waters as jurisdictional by rule which includes waters within 100 feet of the ordinary high water mark, in the 100 year floodplain but not more than 1,500 feet from the ordinary high water mark, and waters within 1,500 feet of the high tide line of the territorial seas or other tidally influenced waters.

Specifically excluded by the rule are some notable exceptions, including certain ditches with intermittent flow, artificial lakes and ponds in dry land, stormwater control features created in dry land, stock ponds in dry land, irrigated areas that would revert to dry land if irrigation ceased, fields flooded for rice growing, and wastewater recycling structures created on dry land, among others.

Waters that are still subject to a case-by-case significant nexus analysis include those that the agencies believe work together in a particular watershed to impact a jurisdictional water (Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands), and those waters that fall within the 100 year floodplain of navigable waters, interstate waters, or territorial seas or within 4,000 feet of the high tide line or ordinary high water mark of such waters, their tributaries and impoundments.

The rule also provides a regulatory framework for conducting a significant nexus analysis by focusing on certain water quality functions that are identified as having a chemical, physical or biological impact. Such functions include sediment trapping, nutrient recycling, pollutant transport, flood water retention, and provision of aquatic habitat, among others.

The Rule Applied

In taking a step back and returning to the hypothetical high ground created by a review of the history and text of the rule, one can envision how the categories established by the rule will overlay the landscape of a hypothetical watershed. The major river to which the watershed drains will be jurisdictional by rule. Tributaries that contribute flow to that river that have a defined bed and banks and an ordinary high water mark will also be jurisdictional by rule. Wetlands within 100 feet of the ordinary high water mark, and wetlands within the 100 year floodplain that are also within 1,500 feet of the ordinary high water mark of the river and its tributaries will be jurisdictional by rule as well. For seemingly isolated waters—such as prairie potholes—that lack a surface connection to the river or its tributaries, the rule will require a specific significant nexus analysis. First, the isolated waters will be grouped by region. Then, the analysis will focus on whether the waters work together to perform water quality functions such as sediment trapping, nutrient recycling, etc. that impact the river's water quality. Similarly, a specific significant nexus analysis will be needed for waters within the 100 year floodplain of the river (that are beyond 1,500 feet [roughly one-quarter mile] of the ordinary high water mark) and within 4,000 feet (approximately three-quarters of a mile) of the ordinary high water mark of the river and its tributaries.

The rule clearly attempts to provide some bright-line parameters to guide jurisdictional decisions that have been lacking in the wake of SWANCC and *Rapanos*. Whether the parameters laid out by the rule are the correct ones will certainly be the subject to ongoing debate and is already the subject of a challenge by the states of Texas, Louisiana, and Mississippi filed in late June 2015; but, for now, practitioners have some specific guidance to go by in determining whether Clean Water Act jurisdiction may apply to a particular project.

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