

EPA in Wonderland: A Journey Down the Waters of the U.S. Rabbit Hole

BY LOWELL ROTHSCHILD

“Alice started to her feet, for it flashed across her mind that she had never before seen a rabbit with either a waistcoat-pocket, or a watch to take out of it, and burning with curiosity, she ran across the field after it, and fortunately was just in time to see it pop down a large rabbit-hole under the hedge. In another moment down went Alice after it, never once considering how in the world she was to get out again.”

— LEWIS CARROLL, *ALICE IN WONDERLAND*

In 2001, the U.S. Supreme Court started us on a journey down the rabbit hole in search of the limits of Clean Water Act jurisdiction; to some, it feels as if we have been falling ever since.

Before the Rabbit Hole. The waters subject to the Clean Water Act are “navigable waters,” defined as “the waters of the United States, including the territorial seas.” For the 15 years prior to 2001, under the Clean Water Act regulations, almost all wetlands and other waters were subject to federal jurisdiction.

Beginning in 1986, the Environmental Protection Agency and the U.S. Army Corps of Engineers extended the coverage of the act to the reaches of the Commerce Clause, covering, among other things, all waters that “are or would be used as habitat by birds protected by Migratory Bird Treaties” or “other migratory birds which cross state lines.”

This interpretation covered most waters anywhere in the country, and the legal responsibilities and rights of the regulated community were relatively clear.

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Rejection of the Migratory Bird Rule. Legal clarity evaporated in 2001 with a U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* (531 U.S. 159, 51 ERC 1833 (2001)).

In *SWANCC*, the Supreme Court reversed a corps determination that a particular site was a water of the U.S. as a result of its use as habitat by migratory birds. In so doing, it struck down the migratory bird rule, rejecting “respondents’ invitation” to hold “that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)’s definition of ‘navigable waters’ because they serve as habitat for migratory birds.”

The court’s rationale, in part, was that “such a ruling would assume that ‘the use of the word navigable in the statute . . . does not have any independent significance.’ ”

In short, the court ruled that the limits of the Clean Water Act do not extend to the full limit of Congress’ Commerce Clause power.

“We cannot agree,” said the Supreme Court, “that Congress’ separate definitional use of the phrase ‘waters of the United States’ constitutes a basis for reading the term ‘navigable waters’ out of the statute.”

Following *SWANCC*, EPA and the corps removed the migratory bird rule from the regulations and turned to another basis to prove jurisdiction. Most significantly, they started following traditionally navigable and interstate waters as far upstream as they could.

Limits on the Reach of Tributaries. EPA and the corps sought to trace jurisdiction all the way from the beginning—up from the traditionally navigable waters below—to the upper reaches of tributaries.

While this approach was successful in many lower courts, in 2006, the Supreme Court again rejected the agencies’ approach to establishing jurisdiction. Unfortunately, the decision in two consolidated cases titled *Rapanos v. U.S.* did not elucidate exactly why (*Rapanos v. United States*, 547 U.S. 715, 62 ERC 1481 (2006)).

A plurality of the court would have included as waters of the U.S. only “relatively permanent” bodies of water, not “channels through which water flows inter-

mittently or ephemerally, or channels that periodically provide drainage for rainfall.”

Justice Anthony Kennedy’s separate concurring opinion established a different standard, defining waters of the U.S. as those that have a “significant nexus” with a traditionally navigable water.

Following *Rapanos*, the EPA and the corps released guidance on Clean Water Act jurisdictional determinations in light of the decision. The guidance maintained federal jurisdiction over traditional navigable and interstate waters and wetlands adjacent to such waters, as well as wetlands adjacent to relatively permanent non-navigable tributaries of such waters.

It then elucidated the scope of waters with a “significant nexus” and asserted jurisdiction over them. The agencies described the significant nexus test as an “Assess[ment of] the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they [alone or in combination with other similarly situated wetlands adjacent to the tributary] significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.”

The Resulting Uncertainty. The *Rapanos* decision and subsequent agency guidance attempting to clarify the agencies’ view of the opinion have created much uncertainty.

“Speak English!” said the Eaglet. “I don’t know the meaning of half those long words, and, what’s more, I don’t believe you do either!”

— ALICE IN WONDERLAND

Most relevant here is the uncertainty around the significant nexus test. Because the test relies on case-specific factors, it has had to be applied on a case-by-case basis. The factors examined—physical, chemical and biological connectivity—are so heavily scientific that with regard to some waters—particularly those on the line between jurisdictional and not—laypersons cannot know simply by looking at it whether a water is jurisdictional or not.

Thus, many of these “closer” determinations require significant time, money and scientific study to determine their jurisdictional status, increasing cost and uncertainty.

It is this uncertainty and lack of clarity that the newly proposed rule attempts to resolve.

The Proposed Rule. In short, the proposed rule does two things: It adopts in regulation the agency’s case-by-case significant nexus test and it identifies classes of waters that are deemed to always have a significant nexus. On almost every level, as compared to the most recent agency guidance, the proposed rules would expand the set of waters viewed as jurisdictional. And in so doing, it unfortunately does not provide much additional clarity.

The proposal would identify the following waters as always jurisdictional:

- The “core waters” (navigable and interstate waters and the territorial seas);
- impoundments of these waters;
- tributaries of those waters; and
- waters adjacent to all of the above.

This is similar to the test currently being applied by the agencies, but several proposed new definitions result in this test being significantly more expansive even than the currently-used test.

New Definitions. *Tributary* is to be defined as any feature with a bed and bank that contributes flow to any water on the initial list. Many features, such as dry arroyos and mountain channels, have a bed and bank even though they only flow when it rains or the snow melts. Manmade ditches can also exhibit these features.

■ *Adjacent* waters are those that are “bordering, contiguous or neighboring.”

■ *Neighboring* is to be defined for the first time to include any water in the *floodplain* or a *riparian area* of the initial waters and their tributaries.

These also get new definitions:

■ *Floodplain* will be an area along a water, formed by sediment deposition and inundated during moderate to high flows.

■ *Riparian area* is one bordering any water where surface or groundwater “directly influence the ecological processes and plant and animal community structure in that area.”

The result is that areas are jurisdictional, as far upstream as one can identify a bed and bank, and as far outward from that bed and bank as a water has “direct influence” on the area’s ecology or is located in a sediment formation that is inundated by high flows.

The Significant Nexus Test. The agencies then propose to memorialize the significant nexus test, covering, on a case-by-case basis, “water[s], including wetlands, [that] either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest [core] water. . .) significantly affect[] the chemical, physical, or biological integrity of a [core] water. . . . Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a ‘water of the United States’ so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a [core] water.”

Inherently ambiguous in this test are the terms “similarly situated” and, as they have been since 2006, “chemical, physical, [and] biological integrity.”

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This ambiguity is compounded by the preamble to the proposed rule, which reflects the possibility that the agencies may subsume the definition of “region” to that of “similarly situated.”

This is seen where the agencies specifically seek comment on what wetlands should be viewed as “similarly situated.”

Under one method, they could “identify ecological regions (ecoregions) which contain ‘other waters’ that are ‘similarly situated.’”

“The agencies expect that determining all ‘other waters’ within an ecoregion to be similarly situated would result in these ‘other waters’ being determined to have a significant nexus and being found jurisdictional.”

One approach would use Level III ecoregions, of which there are only 105 in the United States. In other words, notwithstanding the definition of “region” as the watershed that drains to the nearest core water, the agencies could still carve the country into only 105 areas, in which almost all the waters would be “similarly situated.”

The Resulting Confusion. As a result of the proposal, jurisdiction is expanded, but little clarity results. The case-by-case significant nexus test remains—it will just be applied in fewer circumstances. When applied, it will be just as nebulous and hard to divine in advance whether a particular water is jurisdictional.

As for the “clarified” portion of the test (the always-significant waters), the test is largely based on two new definitions—of *floodplain* and *riparian area*. If a water is in one of these two areas, it is considered *adjacent* and therefore jurisdictional. The definition of floodplain is somewhat confusing and that of riparian area is completely opaque.

The agencies’ description of floodplains that exist in “moderate to high water flows” is not common floodplain parlance.

The Federal Emergency Management Agency maps 100-year floods, five-year floods and the like, but in the preamble, the agencies expressly reject such definitions as too prescriptive. Instead, the agencies confirm in the preamble that they have intentionally selected a malleable standard.

Alice sighed wearily. “I think you might do something better with the time,” she said, “Than waste it in asking riddles that have no answers.”

— ALICE IN WONDERLAND

“There is, however, variability in the size of the floodplain, which is dependent on factors such as the flooding frequency being considered, size of the tributary, and topography. As a general matter, large tributaries in low gradient topography will generally have large floodplains . . . whereas small headwater streams located in steep gradients will have the smallest floodplains. It may thus be appropriate for the agencies to consider a floodplain associated with a lower frequency flood when determining adjacency for a smaller stream, and to consider a floodplain associated with a higher frequency flood when determining adjacency for a larger stream.”

Riparian Area. The meaning of the term *riparian area* is even harder to divine. The agencies define it as “an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.”

Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.”

None of the associated terms, such as “ecological processes,” “plant and animal community structure” or “exchange of energy and materials” is defined.

Perhaps more unfortunate, this test is no more clear or more expeditious than the “significant nexus” test. Identifying an area whose hydrology “directly influences the ecological processes and plant and animal community structure” in an area will have to be done case-by-case, just like the current significant nexus test.

And how to do so is no more obvious than how to identify an area under the significant nexus test that has “chemical, physical and biological impacts” on a downstream water.

Significant Nexus. Similarly, the significant nexus test would remain as impenetrable as it has been for eight years; indeed, it may be even more so, given its retention in the face of the new term *tributary* and the newly robust term *adjacent*.

To provide meaning to the significant nexus test in this light, these other jurisdictional waters must “significantly affect[] the chemical, physical, or biological integrity” of a downstream water but, by exclusion, don’t contribute flow to it, aren’t in the water’s floodplain and aren’t in the riparian area of the water.

It is completely unclear how a water can *significantly* affect the biological integrity of a water without directly influencing the ecological processes and plant and animal community structure in the area or chemical or physical integrity of a water without contributing flow to it or being proximate enough to it that it is in its floodplain.

But the water must do so to have a “significant nexus” under the proposed test.

The result is that, in retaining the significant nexus test in light of the expansive definition of *tributary* and the newly robust term *adjacent*, the agencies have created confusion as to what other waters may have a “significant nexus.” The term must exist for some waters, but it is unclear which ones they are.

Adjacent Lakes and Ponds. The rule for the first time applies the term “adjacent” to lakes and ponds, not just wetlands.

It also declares these adjacent waters to be tributaries, rather than just adjacent waters. This allows the agency to avoid the traditionally difficult question of whether wetlands adjacent to adjacent wetlands are jurisdictional. Because adjacent wetlands are now deemed to be “tributaries,” the question no longer need be asked.

However, the conclusion that these adjacent waters are jurisdictional occurs without description as to what features those lakes and ponds must have. They need not have a bed and bank and ordinary high water mark.

“Wetlands, lakes, and ponds are tributaries even if they lack a bed and banks or ordinary high water mark.”

And they don’t need wetland vegetation, or they would be wetlands.

So the question is, do they need to always have water? The preamble notes that “[t]he flow in the tributary may be ephemeral, intermittent or perennial.”

Because *lakes* and *ponds* are tributaries, it appears that under the rule, lakes and ponds might be jurisdictional even if they are ephemeral, meaning they only contain water when there is nearby rain or snow melt.

Water That Isn't Wet. The implications of this part of the definition of *tributary* are unclear. All water flows downhill. The preamble states that “non-jurisdictional geographic features (e.g., non-wetland swales, ephemeral upland ditches) may still serve as a confined surface hydrologic connection between an adjacent wetland or water and a traditional navigable water, interstate water or the territorial sea.” Many uphill areas are connected to downstream waters by surface water. Are all of these upstream areas lakes or ponds?

“Well! I’ve often seen a cat without a grin,” thought Alice; “but a grin without a cat! It’s the most curious thing I ever saw in my life!”

— ALICE IN WONDERLAND

In addition, there is no clarity as to whether ground-water connectivity is sufficient to be the type of “direct contribution of flow” needed under the rule for a pond or lake to be a tributary. The preamble suggests that it may be, so long as the flow isn’t “lost to deep ground-water.”

In short, it is unclear how lakes and ponds will be identified if they need not have a bed or bank, may not have to be wet much of the year, and can be connected to downstream waters by swales or other featureless forms (or possibly even underground flow).

This absence of clarity has two broad implications. First, it makes it difficult, if not impossible, for the regulated community to identify questionable waters—those close to the line between jurisdictional and not—without specialized scientific expertise.

Identifying areas formed by sediment deposition, those with ecological influence, those with an ordinary high water mark or dry areas with a shallow subsurface connection, requires technical knowledge and expertise far beyond the capabilities of the average citizen. Indeed, not even one scientist may have sufficient expertise—one might need a geologist, a biologist, and a hydrologist just to confirm the absence of an “always jurisdictional water,” let alone conclude an analysis of the significant nexus test.

The other, and perhaps larger, problem with this ambiguity is its combination with the Clean Water Act’s citizen suit provision, which allows private citizens to directly sue alleged violators.

As a result of this provision, numerous courts will be required to interpret these ambiguous terms in all manner of cases. Some will inevitably interpret these terms broadly, and those interpretations will be cited to other courts in other citizen suits, creating a situation in which the rules may end up being broader—and more variable—than even the agencies intend.

The Question at Hand. Notwithstanding the specifics of the proposed rule, there has been much discussion in the news media and from the agencies and proponents of the proposal about the importance of the rule to the health of waters and ecosystems. Certainly, healthy waters and ecosystems are vital.

But to a large degree, whether they are or aren’t is not the question. Indeed, we’ve fallen so far down the

rabbit hole that these discussions have lost sight of the actual question.

The question is not whether healthy waters are important, whether clean water regulation is needed for healthy waters or even what level of government should regulate these waters. These are important policy questions which can be, and are being, debated.

The question to be answered is simply what Congress meant when its stated that the Clean Water Act regulates the “waters of the U.S.” The rule should be answering that question and leave the policy debate to Congress, where significant questions of this magnitude are to be decided.

So the question is, does the proposed rule reasonably interpret the term “waters of the U.S.?”

Supreme Court precedent and congressional intent suggest it does not.

Supreme Court Precedent. On close inspection, the proposed rule looks a lot like what the government argued, and lost, in *Rapanos*.

In its *Rapanos* brief, the government argued that “[t]he connection between traditional navigable waters and their tributaries is significant in practical terms, because pollution of the tributary has the potential to degrade the quality of the traditional navigable waters downstream.” The government rejected the notion “that some tributaries may have such an attenuated connection to traditional navigable waters that federal protection of those tributaries would be unwarranted.” The Supreme Court, and Justice Kennedy in particular, ruled against the government, specifically rejecting one of the key assertions underpinning the proposed rule. In particular, Justice Kennedy stated that “[T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark. . . .

“The breadth of this standard—which seems to 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—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.

“Would you tell me, please, which way I ought to go from here?”

“That depends a good deal on where you want to get to,” said the Cat.

— ALICE IN WONDERLAND

“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*.”

In short, Justice Kennedy ruled that one cannot definitively state that a wetland has a significant nexus (and is therefore jurisdictional) solely because it is adjacent to an ordinary-high-water-mark tributary. Yet, in the proposed rule, the agencies have done just that; they have even gone one step further, describing adjacent lakes and ponds as jurisdictional.

Similarly, while not expressly relying on the Commerce Clause, the proposed rule would sweep within its purview most of the waters in the United States, mov-

ing far beyond those that are traditionally navigable in any way.

This, too, seems contrary to Supreme Court precedent, which stated in *SWANCC*, “We cannot agree that Congress’ separate definitional use of the phrase ‘waters of the United States’ constitutes a basis for reading the term ‘navigable waters’ out of the statute.”

What Did Congress Intend? So this leaves us with Congressional intent.

There is much that could be said regarding the “traditional” indicators of congressional intent.

Did Congress intend to sweepingly protect the nation’s waters?

“*Curiouser and curiouser!*”

— *ALICE IN WONDERLAND*

Did Congress intend to preserve for the states their general authority to regulate land use? But there is another, less traditional question regarding Congress’ intent—not whether the rule achieves the protection of the waters Congress sought to protect, but whether it does so in a way Congress intended.

Did Congress intend, when it passed the Clean Water Act, that regular citizens would need a cadre of scientists to determine if a water is regulated?

Did it intend that reaching the conclusion of the permitting process would require individualized, case-by-case analysis for every permittee?

Did it intend that regulatory language would be so opaque that lawyers and judges would be needed to divine its meaning?

In the end, by focusing so intently on assuring the proper expanse of its regulation, the agencies have completely lost sight of the method of their regulation.

Under the proposal, because waters of the U.S. don’t need water, permitting determinations require case-by-case scientific analysis from multiple disciplines. It is implausible that Congress intended it to be this way.

My primary hope for this rule—which has been over a decade in the making—was that it would increase regulatory clarity, efficiency and intuitiveness.

Determining jurisdiction—for wetlands in particular—has become so obtuse that there is little innate correlation between downstream traditionally navigable waters and upstream jurisdictional ones. The agency’s jurisdictional determinations have become case-by-case analyses, each examined and defined by a cadre of scientists, none referring to the former.

Like the tax code, the law of wetland jurisdiction has become so complex that it requires experts to interpret and parse.

Alice’s escape from Wonderland was as simple as waking from her long sleep. I’m afraid that the complexity and confusion maintained and further created by this rulemaking will, for some time to come, keep us dreaming of a simple and efficient liberation from our own rabbit hole.