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Only Congress Can Fix The Waters Of The US Whirlpool

By **Jeff Porter**

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Surprising no one, late last week the solicitor general of the United States asked the U.S. Supreme Court to answer the question of whether the federal Clean Water Act covers a discharge to groundwater.

The solicitor general told the Supreme Court this question "has the potential to affect federal, state, and tribal regulatory efforts in innumerable circumstances nationwide. The implications for regulated parties are also significant ..." This is the Platonic form of understatement. Today the answer to the question the solicitor general poses is different depending on which federal judicial circuit you live in. And this is just one of the many ways in which we have all been whipsawed by the ebb and flow of federal Clean Water Act jurisdiction for over 30 years.

The floodgates opened in December of 1985 when a unanimous Supreme Court, applying the now-under-siege doctrine of judicial deference to agency decision-making born in the Supreme Court that same very year, concluded "we cannot say the [Army Corps of Engineers] conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States — based as it is on the Corps' and [U.S. Environmental Protection Agency's] technical expertise — is unreasonable."

Since that double-negative exclamation over 30 years ago, two of the three branches of the federal government have gone back and forth on the scope of the Clean Water Act. The Supreme Court has considered the question three more times. The Army Corps of Engineers and EPAs of each presidential administration have each applied their "technical expertise" to arrive at different, sometimes dramatically different, answers to the question.

Today a 1986 definition of "waters of the United States" applies in 28 states. A much broader 2015 definition applies in 22 states, Washington, D.C., and the territories. Which definition applies to you also depends on whether and how federal judges in your federal judicial circuit have addressed challenges to the more recent definition.

Most likely this year we'll have another Supreme Court decision that will affect the waters. And, while it is difficult to make predictions about the executive branch these days, it is also likely that we'll have yet another application of "technical expertise" by the Trump administration's EPA that will erase the 2015 definition of "waters of the United States."

What's missing? Action by the first branch of the federal government, Congress, which could answer the questions that have smoldered for over three decades once and for all. In the second of the three Supreme Court attempts to provide clarity on the scope of the Clean Water Act, the late Justice Antonin Scalia, writing for a plurality of the court, challenged Congress' "failure to express any opinion." If anything is clear in the whirlpool of competing judicial decisions and agency actions of the past 35 years, it is that it is long past time for Congress to do so.

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