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Science-Based Definition Of US Waters Won't Pass In Court

By **Jeffrey Porter** (December 2, 2021, 5:56 PM EST)

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On Nov. 18, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers published their most recent proposed definition of "waters of the United States," with an eye toward making that definition law next year in time for the 50th anniversary of the Clean Water Act.

Testifying before Congress last spring, EPA Administrator Michael Regan said that the Biden's administration's attempt to end the longest-running controversy in environmental law would be substantively different from the now dead and buried attempts during the Obama and Trump administrations because, "we have determined that both rules did not necessarily listen to the will of the people."

EPA Assistant Administrator for Water Radhika Fox separately pledged an effort to arrive at the durable definition of "waters of the United States" — and therefore the reach of the federal Clean Water Act — that has eluded the EPA and the Corps for over 35 years.

The EPA's and the Corps' most recent proposed definition of "waters of the United States" — and their extensive justification of it — spans 290 pages and reflects an astounding amount of work in the 10 months since the beginning of the Biden administration. Among other things, the EPA's and the Corps' explanation of its proposal repeats and expands upon the Biden administration's earlier criticisms of the Trump administration's definition.

Despite what Regan said last spring, there are no such criticisms of the Obama administration's definition in the EPA's and the Corps' missive. In fact, any differences between the Obama administration's definition and the Biden administration's definition are small.

Some will recall that the Obama administration's definition was challenged in several federal courts and ended up being the law in only half the states before it was rescinded during the Trump administration.

Now we know that, when it comes to the reach of the Clean Water Act, the Biden administration EPA and the Corps either do not see compromise as essential to durability or that they see some things as being too important to compromise.

In these polarized times it is quite possible there is no meaningful regulatory compromise to be made. But there is no way this proposal will be acceptable to those who opposed the Obama administration's definition and, if it ever gets that far, it faces stiff headwinds in the U.S. Supreme Court.

To be clear, much of what the EPA and the Corps would define as waters of the United States is completely consistent with the application of the Clean Water Act from 1972 until the Obama administration.

But the EPA and the Corps also want to include within the reach of federal law any impoundment, wetland or other waters that are either relatively permanent or have a significant nexus to a water of the United States as they have been defined for decades.

The EPA and the Corps say that this expansive definition is "based on the best available science concerning the functions provided by upstream tributaries, adjacent wetlands and 'other waters' to restore and maintain the water quality of downstream foundational waters."

But a definition based on the best available science isn't necessarily constitutional.

As the Supreme Court has recognized in the very cases the EPA and the Corps discuss in their justification of their proposal, the federal government's environmental law authority derives from, and is limited by Article I, Section 8, of the U.S. Constitution, which grants the federal government, specifically Congress, the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Any other environmental law authority is reserved to the states.

The EPA's and the Corps' attempted expansion of the reach of the Clean Water Act to relatively permanent impoundments, wetlands and other waters that don't have a significant nexus to a water of the United States seems like what former Justice Antonin Scalia, writing for himself and three other justices in 2006 in Rapanos v. United States, concluded was the Corps seeking "to extend its authority to the farthest reaches of the commerce power."

Even if the EPA's and the Corps' proposal is constitutional, there is also cause for concern that the Supreme Court might not agree that Congress intended to authorize the EPA and the Corps to expand the reach of the Clean Water Act in the way they are proposing.

In Rapanos v. United States, Justice Scalia also wrote "a Comprehensive National Wetland Protection Act is not before us, and the 'wis[dom]' of such a statute is beyond our ken. What is clear, however is that Congress did not enact one when it granted the Corps jurisdiction of the 'waters of the United States.'"[1]

The EPA and the Corps make the best case they can that the relatively permanent and significant nexus expansions of the reach of the Clean Water Act they are proposing to codify are consistent with Supreme Court precedent. They could hear the Supreme Court's reactions to these arguments sooner than they would like.

Just days after the EPA's and the Corps' proposal was published, the EPA submitted its opposition to a pending petition for Supreme Court review of the U.S. Court of Appeals for the Ninth Circuit's affirmation that former Justice Anthony Kennedy's significant nexus test that failed to command a majority of the Supreme Court in Rapanos remains the law of the Ninth Circuit.

The petition and opposition are the most recent skirmish between the federal government and the

Sacketts of Idaho in a dispute over the reach of the Clean Water Act that has been going on for more than a decade and has already been to the Supreme Court once.

The Sacketts, almost half the states and several associations say the Supreme Court should drive a stake through the heart of Justice Kennedy's significant nexus test, which is at the core of the EPA's and the Corps' current proposal.

One question the EPA doesn't answer in its opposition to the Sacketts' petition is why the Supreme Court should wait for the EPA to take its most recent swing at the waters of the United States definitional plate when the Ninth Circuit has shown no such restraint.

And the EPA should be more than a little concerned that the Supreme Court justices rejecting Justice Kennedy's test in 2006 — who would presumably do so again — include Chief Justice John Roberts and Justices Samuel Alito and Clarence Thomas, who are all still in their seats. Only Justice Stephen Breyer remains of the justices who took a broader view. Justices Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett sit in seats formerly held by Justice Kennedy and other dissenters.

Based on the current composition of the Supreme Court, it seems unlikely that a majority of the court would be persuaded that the best available science trumps a constitutional or statutory limit on the EPA's and the Corps' authority.

Which brings us to the real question. Do we really need to endure more constitutional and statute-based challenges to a science-based approach to protecting our nation's waters because it isn't clear whether that approach was blessed by members of Congress in 1972? Since the executive and judicial branches of our government have been struggling with the language of Congress' statute for decades, don't we deserve its response to what has transpired in the meantime?

In any event, if the EPA and the Corps continue down this road, more litigation over the reach of the Clean Water Act is certain and whether the most recent proposed definition of "waters of the United States" will be durable is very much in question.

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[1] Internal citation omitted.