Ramifications of New USEPA Corps Regulations Defining of Jurisdictional Waters

Presented by Scott Doran
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IT’S A MESS!
Reach of Federal Jurisdiction
Ill-defined statutory definition of Waters of the United States
Regularly Challenged
3 Supreme Court Decisions

- Riverside Bayview Homes (1985)
- SWANCC (2001)
- Rapananos (2006)
Justice Kennedy provided deciding vote and established the “significant nexus” test.

Does the aquatic resource have a significant nexus with downstream water quality?

Justice Roberts suggested a formal regulatory definition.
USEPA/Corps proposed

The Clean Water Rule

June 2015

- 2 pages of Federal Register
- Preamble: 70 pages
- Effective: Aug. 28

1M+ comments
Proposed 4/14
USEPA response 10,000 pages
Rule Immediately Challenged

- Exceeds federal authority
- Substantial differences between proposed + final rules
- North Dakota District Court stayed effect of rule in 13 states
Challenged by Environmental Groups

- Arbitrary restrictions on jurisdiction
- Failure to protect endangered species
- Failure to protect watersheds
6th Circuit stays effect of rule nationwide Challenge
Ohio AG
October 9, 2015
Outcome of Challenges Unpredictable

- Science Advisory Board Report (October 2014)
- USEPA “Connectivity of Stream + Wetlands to Downstream Waters” Report (January 2015)
- Lengthy technical document summarizing state of the science
- Both reports strongly support broad jurisdiction to protect water quality
Impact in Ohio
Corps historically regulated “streams” with bed, bank + high water mark

Corps regulated wetlands with minimal nexus to streams + water quality

Other areas of United States will be affected
Biggest Changes

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Ephemeral “Streams” unquestionably jurisdictional
Biggest Changes

Wetlands in 100 year floodplain considered adjacent/neighboring
Biggest Changes

Isolated wetlands farther than 4,000 ft. from stream categorically excluded
Man-made ditches constructed in uplands

Erosional features

Groundwater

Storm water controls constructed in uplands
But that’s not jurisdictional!
Can a JD be challenged?
No judicial review

Belle Decision
Immediate judicial review
Hawke Decision
United States requested the court to consider Hawkes decision

Issue – does a JD constitute “final agency action” which alters owners’ legal obligations?

Permit required with or without JD; JD does not require action
My Soapbox

- Scope of jurisdiction is not the problem
- Need to streamline Section 404 program
- Provide Corps with adequate resources
- Establish meaningful permitting deadlines
- Encourage use of mitigation banks + in-lieu fee options
Thank You!

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