Water regulation in the United States: background and current major issues

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Introduction

Good morning. I'm Steven Miano. I am an environmental lawyer in Philadelphia in the United States, where I have been practicing for about 30 years. I am also the Chair of the American Bar Association Section of Environment, Energy and Resources ("SEER"). SEER is somewhat equivalent to UKELA, although we are larger, with about 9,000 to 10,000 members. We produce a number of publications; put on several different conferences during the year and we have 28 substantive committees. We also are developing what I think is a terrific relationship with UKELA. Members of UKELA have come to speak at our conferences in the States and I think this is not the first time a SEER lawyer from the States has addressed one of UKELA's conferences. So we really appreciate our work together and we hope to further strengthen our relationship in the years to come.

So, I have the enviable task of addressing you on water law in the US but I have the unenviable task of trying to do it in about 20 minutes. I will do my best. By way of introductory remarks, the Clean Water Act is our main federal statute in the United States.[1] It recently turned 40 years old and, with middle age, things can change! It sometimes appears that the Clean Water Act is under attack on all sides in terms of basic questions like jurisdiction. In other words, basic questions have arisen regarding the jurisdiction of the Clean Water Act. You would think that we would know what the jurisdiction of this law is after 40 years, but it turns out we may not. Other important issues that keep US lawyers busy in the water law area are nutrient pollution and bay and estuary clean-ups. Also, the interplay between the Endangered Species Act[2] and water law, particularly in the western part of the country is a very big issue. Finally, flooding, stormwater, and droughts are urgent matters that need addressing right now in the States.

Clean Water Act: background

I thought that I would start off with a bit of a basic primer on US water law – how we regulate water in the States. To put US water law in context, the main federal water law first passed by Congress was the Federal Water Pollution Control Act (a.k.a. Clean Water Act)[3]. It was passed in 1972. It was also known as the Clean Water Act. It was passed on the heels of what is known as the Cuyahoga River fire, which occurred in 1969 near Cleveland, Ohio. The fire started because many of our rivers back then were used essentially as chemical sewers. It was at a time when there was little prohibition on dumping chemicals into most of the waterways in the U.S. One day, when welders were working on a dock along the Cuyahoga River, which is in a heavily industrialized area of Ohio, a spark hit the water and the river burst into flames and burned for quite some time. It was a huge catastrophe and Congress took notice and decided that something must be done about the pollution.

Reactive legislation is very typical in the States, and many of our federal environmental laws have been triggered by some sort of environmental catastrophe, which is what led to the Clean Water Act. Interestingly, it was initially vetoed by President Richard Nixon, who was not particularly well known for his environmentalist views. Congress overwhelmingly and quickly overrode his veto, but Nixon, being a tricky guy with strident conservative views, decided to impound all of the funds to be used to implement this new law. Eventually the whole mess ended up before the US Supreme Court, which decided in a famous case *Train v. City of NY*[4] that Nixon could not impound the funds. Clearly the Clean Water Act had a rough birth.

Key aspects of regulation under CWA

The original goals set out in the legislation are broad and include the eventual elimination of all discharges to water and the maintenance of fishable and swimmable waters.[5] These are two wonderful goals, although they are somewhat unrealistic as discharges are inevitable, and will continue to be so in our lifetime.

Minimum industrial effluent standards are set out in the Act, together with stringent water quality standards, which may depend on the quality of the receiving water body. Discharges are controlled by a permitting system, although generally it is only surface water discharges that are regulated in the US, at least at the federal level. Permits are typically issued by the states. Most US federal environmental laws provide a framework of basic standards and the program may be delegated to states. States can apply to be the delegated entity under that law and will run the program with oversight from the federal government. That is the case in most states under the Clean Water Act. The Clean Water Act also contains oil spill clean-up provisions (Section 311),[6] which have been used in the *Exxon Valdez*

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1 Clean Water Act 33 U.S.C. §1251 *et seq.*

2 Endangered Species Act 16 U.S.C. §1531 *et seq.*

3 Pub. L. 92-500 (October 18, 1972).

4 Train v. City of N.Y., 420 US 35 (1975).

5 See 33 U.S.C. §1251(a).

6 33 U.S.C. §1321.

case[7] and, more recently, in the BP *Macondo* oil spill.[8] Under that provision the government can take over and conduct the clean-up itself, sue the responsible parties for the cost of the clean-up, and seek civil penalties.

Enacting bodies and permits

The US EPA is responsible for issuing permits for most discharges under Section 402 of the Act except in delegated states.[9] It oversees the delegation to states, and the administration of the delegated programs. It also promulgates standards – including high level technology-based industrial standards for the issuance of discharge permits and maintenance of water quality. The US Army Corps of Engineers (ACOE) is involved with wetlands, and it issues permits for discharges of fill material into wetlands; under Section 404 EPA retains veto authority over such permits.

The National Pollution Discharge Elimination System (NPDES) under Section 402 EPA is the discharge permit program. All dischargers must have a permit for a "discharge of a pollutant" into the "waters of the US" from "point sources." These terms are broadly defined[10] and are still sometimes disputed in the courts – "Discharge of pollutants" means the "addition" of pollutants. "Pollution" is very broadly defined to include virtually all wastes and materials and also heat, so that a plant discharging heat is subject to permitting in the States. "Point sources" are generally defined as discernable, confined and discrete conveyances; not necessarily limited to a pipe, and so may include a gully or something akin to a gully that discharges water. Interestingly, to demonstrate how powerful the farm lobby is in the US, there is a broad exclusion for agricultural stormwater discharges under the CWA.

Effluent standards under Section 402 are based on a variety of different things: the type of pollutant, the source of the pollutant, the body of water into which the pollutant is discharged, the technology available, and so on.

It is important to note that, at the federal level, discharges from nonpoint sources are not regulated under the Clean Water Act. This is often seen as a major failing of this Act. Therefore, runoff from farms, golf courses etc, which are huge sources of pollution, are generally exempt. In some cases, certain agricultural discharges have been defined as point sources under the law – *e.g.*, concentrated animal feeding operations, or "CAFOs" – and there is some regulation of these discharges. However, by and large, nonpoint sources are simply not covered.[11]

Also, states can be more stringent. A delegated state can implement a program that is more stringent and more comprehensive (although not inconsistent) but not all states do. Some just incorporate the federal regulations by reference.[12]

Wetlands under Section 404

A permit is required under Section 404 to discharge what is called "dredge and fill" material to wetlands and the permitting regime is administered by the US Army Corps of Engineers.[13] EPA retains veto power, which is very rarely used. Regulations define wetlands, although jurisdictional issues have arisen over the years.[14] Wetlands are defined based on the types of soils, the hydrology, and the types of vegetation. Permits can be individual or general. General permits are called nationwide permits and cover routine actions such as road crossings.[15]

Groundwater generally is not regulated by the federal government, whereas many states do regulate discharges to groundwater.

Water quantity and uses of water

The regulation of water uses and the development of water resources is a complex area in the US, depending upon the geographic location. In some parts of the eastern US management may be through water basin commissions that have been developed over the years and created by Congress. In the west, the doctrine of prior appropriation prevails whereby water is treated almost as property. For example, if I appropriated water many years ago, I "own" it now, and I can typically sell it to somebody else. And so water transfers take place all over the western part of the country. This can make the legal framework of water use very complex.

Jurisdiction: the new waters of the US Rule

Under the Clean Water Act, jurisdiction is limited in the statutory language to navigable waters, which are defined as "waters of the United States and territorial seas." Initially, this definition appeared to establish limitless jurisdiction. I used to say, "if you can float a paper cup in it, it is jurisdictional." But this is no longer necessarily the case. In a series of US Supreme Court cases, the Court has looked at the breadth of the Act's jurisdiction and questioned it. It also started to limit it. In the *U.S. v. Rapanos* case,[16] the Court took up the question of jurisdiction. Frankly, the case made a complete mess out of jurisdictional issues. Five different decisions were filed by nine justices as almost none of them could agree on the scope of jurisdiction. The EPA attempted over the ensuing years to set out some guidance and draft regulations – but it has always been a very political issue, pitting environmentalists against farmers and energy companies among others.

On May 27, 2015, the EPA and ACOE issued a Final Rule on jurisdiction.[17] The rule tries to define what are and are not jurisdictional waters based on the "significant nexus test" from Justice Kennedy's concurrence in the *Rapanos* case. Here, waters must have a "significant effect on the

7 Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008).
8 http://www.justice.gov/opa/pr/transocean-agrees-plead-guilty-environmental-crime-and-enter-civil-settlement-resolve-us.
9 33 U.S.C. §1342.
10 See 33 U.S.C. §1362.
11 See 40 C.F.R. §122.23.
12 33 U.S.C. §1370.
13 33 U.S.C. §1344.
14 33 C.F.R. §§320-332.
15 33 U.S.C. §1344(e).
16 Rapanos v. U.S., 547 US 715 (2006).
17 Published in the federal register at 80 F.R. 37054 (June 29, 2015).

chemical, biological and physical integrity of truly jurisdictional waters" to be considered jurisdictional. The agency will have considerable discretion under this test. The rule also attempts to define as "jurisdictional" all "traditionally navigable waters" and their tributaries which have a specific bed, bank, and an ordinary high water mark. Certain ditches that drain waters, or discharge directly to waters, or that drain wetlands are also included. Finally, certain adjacent waters, even though they might be separated by a manmade gully, can also be considered jurisdictional. In some cases waters may be considered jurisdictional based on the distance to truly navigable waters.

The rule also contains many new definitions that ought to be reviewed. Prior to issuance of the rule, the Science Advisory Board (SAB) produced a study demonstrating that actual science not only justified the breadth of jurisdiction proposed by the EPA/ACOE under the rule, but also justified much broader jurisdiction.[18]

Challenges to the Rule

Since the rule was published, over half of the states have filed challenges to it and several mining and other industrial and farming interests have filed challenges in both federal district courts and courts of appeal. Many more are expected. Interestingly, an environmental group in New York called the River Keeper – Robert Kennedy, Jr. runs it – has filed a challenge because the rule is not stringent enough. At the moment, the focus is on which courts have jurisdiction to hear the challenge! Thus we have a very controversial but very basic issue in the States over the jurisdiction under the federal Clean Water Act. Perhaps in 10 years we'll better understand jurisdiction; likely after it makes its way through the courts. I am sure it will make its way to the Supreme Court once again.

Groundwater

As already noted, discharges to groundwater are not regulated under the federal CWA, but certain states do regulate discharges to groundwater. However, and interestingly, seven federal district courts have held that federal CWA jurisdiction may extend to groundwater under certain circumstances. On the other hand, two Circuit Courts of Appeal and three district courts have held otherwise. Interestingly, under the rule discussed above, the EPA stated that it is not extending jurisdiction over groundwaters in the US under federal law, so it will be interesting to see whether the environmental groups bring that issue up in their challenges to the rule.

Endangered Species Act and water

The Endangered Species Act (ESA)[19] prohibits the take[20] of any endangered and threatened species and their habitats. Interestingly, questions have arisen over whether the presence of endangered species may affect the classification and use of water bodies. Moreover, because ESA analysis typically arises in the context of permitting, the reduction (or expansion) of the definition of jurisdictional waters under the new CWA rule could impact the ongoing protection of such species. There are numerous cases in the US covering the interplay of the Endangered Species Act and the CWA which are worth reviewing.[21]

Estuary remediation

There are significant issues with bay and estuary degradation and remediation in the States, much of which is based on nutrients. And so we have major programs to develop clean-up strategies for these waters. One is the Chesapeake Bay, which is among the largest estuaries in the US. In fact, if you drove from the bottom to the top of the Chesapeake watershed, it would take you about 10 or 11 hours – a huge geographic area that we are trying to wrestle with. There are many other examples up and down the east coast and on the west coast. Water law practitioners spend a great deal of time on these issues. A great deal is at stake, both in terms of environmental protection and costs of remediation. Consequently, there is a great deal of litigation ongoing.

Stormwater

Stormwater is generally regulated under the NPDES permit program;[22] if stormwater is discharged through a point source it requires a permit. But there are also provisions in the CWA regulations that allow certain discharges to be defined as point sources for the purpose of regulating stormwater. For instance, runoff from industrial activities, factories, and so on are defined as point sources. Municipal storm sewers are also generally classified as point sources. The EPA has produced a large body of guidance on stormwater NPDES permitting.[23] As a consequence of the cost of dealing with such municipal stormwater, many communities are developing "green infrastructure" to reduce pollutants in stormwater runoff. Such prospects include infiltration systems, wetlands creation, rooftop gardens, and similar structures that trap and purify stormwater runoff. EPA has had a National Stormwater Rulemaking in draft for some time. It is currently on hold.

Flooding

Since Hurricane Katrina (2005) and Hurricane Sandy (2012), which caused particularly severe damage in New York and in New Jersey, flooding has become a major concern in the US. The US Army Corps of Engineers has engineered flood defenses over the decades, many of which failed in these floods. Consequently it has been roundly

18 Yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activities/watershed%20connectivity%20Report?Open Document.

19 16 U.S.C. §1531 *et seq.*

20 "Take" includes harass, harm, wound or kill endangered or threatened species, and "significantly modifying habitats." See 16 U.S.C. §1532.

21 See *e.g.* National Association of Homebuilders v. Defenders of Wildlife, 127 S. Ct 2510 (2007).

22 See 40 C.F.R. §§122.21–37.

23 See water.epa.gov/polwaste/npdes/stormwater/.

criticized, although it cannot generally be sued because of sovereign immunity. States and the federal government are struggling to decide what to do about flooding issues due to ever increasing frequency and severity of storms and associated flooding. The national flood insurance program is facing large debts after the floods of the past decade.[24] At the same time, the volatility of water levels – from extreme lows in times of drought to flood waters – creates severe problems with resource management.

Efforts are aimed at trying to identify flood prone areas and developing adaptive strategies and regulations. For example, an Executive Order from the President of the US, issued in January 2015, requires federal agencies to consider rising seas and stronger storms when it builds or when it makes grants for building and infrastructure projects.[25] Also, the Federal Highway Administration Directive of December 2014 was issued to increase preparedness and resilience to extreme weather events by removing regulatory barriers, incentivizing states and local communities, and conducting research.[26]

States are also developing varied new storm control management plans with federal help. New York City has proposed a US$4.1 billion disaster recovery program involving green infrastructure and wetlands restoration, along with massive projects to protect Lower Manhattan from future floods. Other states have developed strategies including Sea Level Rise Task Forces to combat flooding. Insurance companies and lenders are also looking closely at liability for floods and law firms have set up specialized flooding practices to manage risks, property rights, loss, compliance, and liability for infrastructure damage.

There are some very significant cases in litigation over flood issues and flood protection planning. For example, there is a case in New Jersey where a landowner sued over dune protection projects, essentially arguing, "I don't want you to build dunes to protect other properties because I won't be able to see from my ocean front mansion." The New Jersey Supreme Court dismissed that case but did say there might be an element of takings associated with such protections.[27] Case law is developing in the takings area in which courts are balancing losses against actual benefits of flood control projects. Suffice to say, flood cases and takings cases in the flood protection context are both interesting and active.

Conclusion

I appreciate the opportunity to address you on CWA issues in the US. To be sure, water law work in the US is extremely varied and lively.

24 See www.fema.gov/national-flood-insurance-program.

25 https://www.whitehouse.gov/the-press-office/2015/01/30/executive-order-establishing-federal-flood-risk-management-standard-and-.

26 http://www.fhwa.dot.gov/engineering/hydraulics/policymemo/0650asu2.cfm.

27 Borough of Harvey Cedars v. Harvey Karan, Docket No. A-120-111 (July 8, 2013).