A recent article in *The Denver Post* raised the concern that thousands of miles of rivers and streams in Colorado are no longer protected by the Clean Water Act (CWA). Although the CWA may have been softened in recent years, a key US Senate committee recently passed legislation that purports to restore the CWA to its past form. This article reviews the current state of recent CWA jurisprudence and the Senate’s efforts to change the law. The article also raises a variety of issues that if left unaddressed by the Senate legislation, may have dire consequences for efforts to protect the nation’s waters.

**WHAT IS JURISDICTIONAL?**

Before looking at recent events in Congress and the courts, it is important to understand the current state of the CWA. Wetlands and other waters that are subject to federal control are considered “jurisdictional waters” because they are under the regulatory jurisdiction of federal law. The CWA and its implementing regulations attempt to define which geographic features qualify as jurisdictional waters and wetlands. However, the CWA is not clear, and its implementing regulations have faced a variety of legal challenges over the years.

This matters because if a water or wetland is jurisdictional, then a party will need a permit to discharge a pollutant into it or to fill it; if it is not jurisdictional, no permit is necessary and the regulatory scheme of the CWA simply does not apply. This determination is not only germane to wetlands, but also applies to stormwater regulation, spill prevention control and countermeasure regulation, and any other regulatory scheme under the CWA.

So what does the law actually say? The CWA prohibits the discharge of certain pollutants and fill into certain US waters and wetlands without a permit. “Except in compliance with . . . this title, the discharge of any pollutant by any person is unlawful” [33 U.S.C. §1311(a)]. A “pollutant” includes soil, dredged material, solid waste, and chemical waste [33 U.S.C. §1362(6)]. “Discharge of a pollutant” is defined as “. . . [a]ny addition of any pollutant to navigable waters from any point source . . . ” [33 U.S.C. §1362(12)]. “Navigable water,” in turn, is defined as “waters of the United States, including the territorial seas” [33 U.S.C. §1362(7)]. Congress left it up to the US Environmental Protection Agency (USEPA) and the Army Corps of Engineers (COE) to define the scope of what qualifies as “waters of the United States.”

In an effort to define what qualifies as jurisdictional “waters of the United States,” COE and USEPA drafted regulations that applied CWA jurisdiction to waters that are or could be used for navigation, tidal waters, interstate waters, tributaries of jurisdictional waters, and wetlands adjacent to jurisdictional waters [33 C.F.R. §328.3(a), COE, and 40 C.F.R. §230.3(s), USEPA]. Further, the agencies expanded their reach beyond the obvious “navigable waters” to include “All other waters such as intrastate lakes, rivers, streams (including intermittent
streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds), the use, degradation or destruction of which could affect interstate or foreign commerce . . .” 33 C.F.R. §328.3(a)(3) (Corps) and 40 C.F.R. §230.3(s)(3) (USEPA). The CWA does not mention wetlands as part of its jurisdictional scheme. Wetland jurisdiction originally came about through agency regulation. Some of those regulations have been upheld by the Supreme Court, whereas the application of others has been rejected.

**CLEAN WATER ACT JURISDICTION AND THE SUPREME COURT**

Over its history, the jurisdictional scope of the CWA has only reached the high court on three occasions. The three Supreme Court cases partially defining the scope of CWA jurisdiction over discharges into rivers and wetlands are: U.S. v. Riverside Bayview Homes, 474 U.S. 121 (1985); Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers, 531 U.S. 159 (2001); and Rapanos v. United States, 547 U.S. 715 (2006) [consolidated with Carabell v. US Army Corps of Engineers, 391 F.3d 704 (6th Cir. 2004)]. Supporters for a legislative change to the CWA claim that these decisions, particularly the most recent two, have significantly weakened the CWA. A review of the actual holdings of these cases provides an understanding of where the law stands today.

In *Riverside Bayview*, the COE had exercised jurisdiction over certain wetlands in Michigan on the grounds that they were “adjacent wetlands” under the COE’s regulations. A unanimous Supreme Court deferred to COE’s regulations concerning whether certain wetlands are jurisdictional. The Court decided that wetlands “actually abutting a navigable waterway are “adjacent” within COE regulations and properly subject to CWA authority. The Court simply decided that it was reasonable for the agencies interpreting the CWA to extend coverage to adjacent wetlands, noting that the line where the river ended and the wetlands began was not something the Court had the expertise to determine. However, the Court left open the question of whether wetlands that were not adjacent to navigable waters were jurisdictional. This open question led to numerous cases at the federal district and appellate levels, ultimately resulting in the Court considering SWANCC.

In *SWANCC*, the COE asserted jurisdiction over certain isolated, intrastate seasonal ponds at an abandoned sand and gravel pit in Chicago, Ill. The COE claimed that because certain migratory birds used, or may use, the isolated waters (deemed the “Migratory Bird Rule”), they had a sufficient effect on commerce to be considered jurisdictional. The Supreme Court rejected this reasoning. The Court decided that the CWA was clear that some non-navigable, isolated, intrastate ponds fall outside the CWA’s scope. The Court identified the constitutional authority for the CWA as the commerce power of navigation and determined that the COE’s theory in this case essentially removed any significance from the word “navigable” in the CWA (SWANNC, 531 U.S. at 165 n.3).

Further, the Court re-emphasized that there must be an “inseparable” relationship between non-navigable and navigable features for the CWA to apply. In language later followed by Justice Kennedy in *Rapanos*, the Court stated “it was the significant nexus between the wetlands and ‘navigable waters’ that informed” the Court’s earlier analysis in *Riverside Bayview*. Finding no inseparable relationship between the non-navigable, isolated ponds at issue in SWANCC and a navigable water body, the Court deemed that CWA jurisdiction did not apply.

SWANCC confirmed that some isolated, intrastate waters are not subject to CWA jurisdiction at this time. Simply because these waters may host a migratory bird at some point is not sufficient to establish CWA jurisdiction. Further, the Migratory Bird Rule could not be a basis for CWA jurisdiction. As would be expected, after SWANCC there was a vigorous debate and another series of court decisions attempting to address the scope of the CWA’s jurisdiction.

Eleven years after *Riverside Bayview* and five years after SWANCC, the scope of CWA jurisdiction remained unclear. With the Migratory Bird Rule out as a basis for jurisdiction, federal agencies developed a new jurisdictional theory—hydrological connection. Under this theory, the COE asserted CWA jurisdiction over non-navigable features simply if they had a possible aquatic link to jurisdictional waters.

Then came *Rapanos*. The US Department of Justice had filed civil and criminal charges against Rapanos for intentionally filling wetlands. The wetlands in question were between 11 and 20 miles from the nearest actually navigable waterway. The
wetlands were connected to those waterways by man-made structures such as ditches and culverts. The Sixth Circuit Court of Appeals decided that the wetlands filled by Rapanos were, indeed, jurisdictional based on the theory of hydrological connection to navigable waters. Five justices on the Supreme Court rejected the Sixth Circuit’s analysis. Unfortunately, the five justices could not agree on which test should actually be applied, when attempting to determine whether a wetland or other formation is jurisdictional. As a result, the Court produced a 4–1–4 plurality opinion consisting of various tests that may be applied, depending on the facts at hand, to determine whether a water body, wetland, or piece of land is subject to the CWA’s discharge prohibitions.

Justices Scalia, Roberts, Thomas, and Alito decided that CWA coverage only extends to “those relatively permanent, standing, or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams, . . . oceans, rivers [and] lakes’” (Rapanos, 125 S.Ct. at 2225). As for wetlands, “only wetlands with a continuous surface connection to bodies that are waters of the United States in their own right, so that there is no clear demarcation between ‘waters’ and ‘wetlands,’ are ‘adjacent to’ such waters and covered by the CWA” (Id. at 2226).

Further, the plurality stated “By describing ‘waters’ as ‘relatively permanent,’ we do not necessarily exclude streams, rivers, or lakes that might dry up in [a drought]. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months. . . ” (Id at 2221 n.5).

So under the plurality analysis for a wetland to be jurisdictional, it must be (1) adjacent to a water of the United States and (2) have a continuous surface connection with that water. Further, streams or flows that occur only seasonally may still be considered waters of the United States.

Justice Kennedy concurred in the judgment to overturn the Sixth Circuit, but he wrote his own test for whether certain waters should be considered jurisdictional. In his opinion:

“Wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable”(Id. at 2248). “In contrast, [when a] wetlands’ effect on water quality is speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters’” (Id.)

Kennedy further stated, “Consistent with SWANCC and Riverside Bayview and with the need to give ‘navigable’ some meaning, the [COE’s] jurisdiction over wetlands depends on a significant nexus between the wetlands in question and navigable waters in the traditional sense” (Id. at 2249).

He went on to note that “A mere hydrological connection should not suffice in all cases as the connection may be too insubstantial for the hydrologic link to establish the required nexus with navigable waters,” but rather the nexus must be assessed “in terms of the statute’s goals to restore and maintain the chemical, physical, and biological integrity of the nation’s waters” (Id. at 2248). Finally, Kennedy agreed with the plurality that certain rivers or streams with seasonal flows or that dry up because of drought may still be considered jurisdictional. (The dissent would have accepted the hydrological connection theory and upheld the COE’s exercise of jurisdiction in this instance.)

The most significant jurisdictional clarification coming from Rapanos was that CWA jurisdiction does not reach non-navigable features just because they are hydrologically connected to downstream navigable water. But there are other areas of consensus as well. For instance, the justices agreed that

- CWA’s scope is broader than just traditional navigable waters;
- hypothetical, speculative, insubstantial, or eventual water flows do not support CWA jurisdiction;
- CWA jurisdiction is not lost simply because a water body is regularly wet during certain seasons and dry during others; and,
- CWA jurisdiction is not lost as a result of drought conditions. On Dec. 30, 2008, it was announced that Rapanos agreed to pay a $150,000 civil penalty and an estimated $750,000 to mitigate for the 54 acres of wetlands he filled in Michigan. He admitted no wrongdoing.

THE CIRCUIT COURTS

The challenge for the circuit courts since Rapanos has been determining which test to apply to the particular set of facts involved in the case. With the Eighth Circuit’s recent ruling in United States v. Gary Bailey (2009 WL 1953608, 8th Cir. 2009), those circuit courts that have given an opinion on the issue are now evenly split. The eighth, first, and
sixth circuits have decided that either the purality test or the Kennedy test can be applied to establish federal jurisdiction. The seventh, ninth, and eleventh circuits have determined that only Kennedy’s test is applicable.

THE LEGISLATION

The Senate Environment and Public Works Committee approved the Clean Water Restoration Act (S. 787) in June 2009. The legislation purportedly would reinstate the power of the CWA over all waters of the United States, rather than just those waters that are navigable. It defines “waters of the United States” to include any and all interstate and intrastate waters and their tributaries, among other features.

THE FUTURE

Although some would like the CWA to simply cover every water body in the United States, as the legislation in the Senate would seem to provide, there are constitutional issues at play that will surely result in litigation brought by those who believe that federal power does have limits. The Supreme Court has raised at least two major constitutional issues in its previous CWA jurisprudence.

First, the Court has previously stated that Congress’ authority to regulate water pollution stems from the Commerce Clause of the Constitution (e.g., SWANCC, 531 U.S. at 165 n.3). How will the Supreme Court react when asked to consider implementation of a law that is apparently no longer grounded in the Commerce Clause? Will it reject the entire law as unconstitutional, resulting in the evisceration of any water protections under the CWA? In their effort to “restore” the CWA, could well-intentioned advocates actually be moving legislation that could have the opposite effect?

Second, the Court has acknowledged that Federalism is alive and well. Justices have acknowledged that states have a role in water protection and that any effort by Congress to expand its jurisdiction over state waters must at the very least include specific language stating this to be the case (e.g., SWANCC, 531 U.S. at 174). The Senate’s language does not include such a statement. Federalism is a legitimate issue that seems to have been completely ignored by advocates of a legislative fix. In fact, a review of the legislative history of the CWA suggests that although Congress was attempting to expand federal control over certain waters of the United States when it passed the CWA in the early 1970s, it was doing so within the confines of its constitutional power over commerce and within the state–federal power-sharing framework. To suggest that Congress’ intent was to exert control over all waters in the United States appears inaccurate. How will the Court react to an expansion of federal authority over traditional states’ rights?

The COE has published guidance for how it will determine whether a body of water or physical structure falls within federal jurisdiction. Although some water bodies are clearly within the scope of the CWA, others (such as streams in the West that only run for a few months a year) require comprehensive fact-finding to determine whether the stream is jurisdictional. Specifically, what facts must be proven will depend, at least in part, on the federal judicial circuit in which the stream is located. Whether requiring the federal government to undergo fact-intensive analysis in order to determine whether a structure is jurisdictional is actually a “weakening” of the CWA probably depends on which side of the debate you’re on. Regardless, the only thing that can be certain at this point is that no one really knows what’s going to happen to the CWA in the coming months. Advocates of the CWA’s “expansion,” however, should be wary of constitutional issues related to congressional power and states’ rights.

About Brownstein Hyatt Farber Schreck

Founded in 1968, the law firm of Brownstein Hyatt Farber Schreck practices in the areas of real estate, natural resources, public policy, corporate law, and litigation. Although the firm has played an integral role in water issues for the past decade, its recent merger with the California firm of Hatch & Parent has made it a dominant US law firm in the area of water law and policy. For more information about the firm’s water group, contact Mark Mathews at mmathews@bhfs.com or (303) 223-1179 or Stephanie Osler Hastings at shastings@bhfs.com or (805) 882-1412. To visit the firm’s website, go to www.bhfs.com.