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THE WATER CYCLE BOOGIE: CLEAN WATER ACT JURISDICTION, HOME RULE, AND WATER LAW

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Making big news in legal circles and on Capitol Hill was the approval of the EPA and US Army Corps of Engineers' new agency rule regarding the definition of "Waters of the United States" under the Clean Water Act (CWA).[1] In a nutshell, these government agencies can regulate development or industrial activity that impacts the "Waters of the United States."[2] Allegedly new science shows that there are significant hydrological connections between small streams and wetlands, also known as tributaries, areas *around* those tributaries, and larger bodies of water; this creates more "categorical assertions of CWA jurisdiction," and allegedly increases CWA jurisdictional assertions by as much as 5%, which is still many millions of acres of land.[3] The EPA has even provided a handsome graphic with fun facts to demonstrate this hydrological connection as established under the new rule.[4]

So what's the big deal about the new rule? Why are a myriad of business, agriculture, and generally concerned groups pushing for Congress to stop this new rule? The answer lies in the U.S. Constitution and our basic principle of Home Rule. If you read the Constitution, you will notice that the regulation of real property is not included as a power of the federal government and is left to the several states.[5] This is a big deal. Remember, real property was, by far, the most valuable asset American colonists could own in the eit1700s.[6] This is why the regulation of land use, zoning, and inland waters has always been the province of the individual states. This critical concept of American society and jurisprudence

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[1] Claudia Copeland, *EPA and the Army Corps' Rule to Define "Waters of the United States,"* CONGRESSIONAL RESEARCH SERVICE, 1 (June 29, 2015) *available at* https://www.fas.org/sgp/crs/misc/R43455.pdf.
[2] *Id.*
[3] *Id.* at 10.
[4] U.S. EPA, *Why Clean Water Rules* (last visited September 10, 2015) http://www2.epa.gov/cleanwaterrule/why-clean-water-rules.
[5] U.S. CONST. Amend. V; U.S. CONST. Amend. X *available at* http://www.senate.gov/civics/constitution_item/constitution.htm#amdt_5_1791 (In fact, the Bill of Rights features one notable phrase on property generally in the Fifth Amendment: "…nor shall private property be taken for public use, without just compensation." You may recognize this as the "Takings Clause.")
[6] Alvin Rabushka, *The Colonial Roots of American Taxation, 1607-1700*, HOOVER INSTITUTION: POLICY REVIEW (August 1, 2002) *available at* http://www.hoover.org/research/colonial-roots-american-taxation-1607-1700.

is often referred to as "Home Rule." Basically, state and local governments, along with their citizens, decide how their land is used.

There are exceptions. For instance, the federal government has long maintained the power to regulate ports for international trade purposes, and this extended to discharges into ports which impeded navigation.[7] Federal jurisdiction expanded over the years to cover numerous ports and navigable waters – the Mississippi River serving as a prime example – and while the concept of discharges or pollution blocking navigability waned, the federal jurisdiction of such waters was always couched in navigable waters.[8] This traditional federal power served as the basis for the CWA. Since the CWA's passage, litigation has occurred regarding whether the federal government had jurisdiction under the CWA in certain areas, especially those areas "adjacent to" navigable waters of the United States.[9]

The issue was and remains very polarizing. After all, many property owners were not sure whether they required a federal permit to develop because the land in question was under the jurisdiction of the CWA.[10] Remember, individual states have essentially unlimited jurisdiction to regulate environmental issues. For instance, Michigan's version of the CWA includes definitions of jurisdiction which covers every inch of the state which state officials feel is essential to the preservation of the state's natural resources.[11] Therefore, the carefully-reasoned development decisions of a state and local government can be overridden, or at least be subject to a significant permitting fees, for the sake of the CWA. Perhaps not surprisingly, this came to a head in a 2006 Supreme Court case which originated in Michigan – *Rapanos v. U.S.* The issue in the case was relatively straight forward: is land around Midland, which lay many miles from a navigable water of the U.S., nonetheless subject to CWA jurisdiction?[12] The Opinion of the Court was complex and split. Justice Kennedy's test provided the best guidance; CWA jurisdiction could only be established when there was a "significant nexus" between the property and a navigable water of the U.S., as determined through a hydrological analysis.[13]

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[7] An excellent summary of how the Rivers and Harbors Act of 1899 ultimately turned into the Clean Water Act of 1972 is available through the following research paper. *See generally* N. William Hines, *History of the 1972 Clean Water Act The Story Behind How the 1972 Act Became the Capstone of a Decade of Extraordinary Environmental Reform,* UNIVERSITY OF IOWA – COLLEGE OF LAW (May 5, 2012) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045069.

[8] *Id*.

[9] *See Rapanos v. United States,* 547 U.S. 715, 742 (2006)

[10] *Id.*

[11] Michigan Department of Environmental Quality, A *Property Owner's Guide to Wetland Protection in Michigan*, (Sept. 2007) http://www.michigan.gov/documents/deq/Wetland_Protection_brochure_241100_7.pdf .

[12] *Rapanos,* 547 U.S. at 547.

[13] *Id*. at 742.

Rapanos was considered a major blow to CWA jurisdiction. In essence, the federal government was not necessarily able to regulate the development of land, which happened to have water on it, unless they could establish a connection to a navigable water of the U.S. But then, someone, presumably at the EPA or US Army Corps of Engineers, had an idea: what if you could prove that most water is significantly connected? After all, almost all water that falls from the sky will one day end up in a navigable water of the U.S. This leads us back to the EPA's hydrological connection graphic, which starts with a rain cloud.[14] Significant studies were funded and undertaken to prove what is essentially second grade science – water is connected to other water because water is everywhere.[15] While the stated goal of the new rule is to alleviate jurisdictional ambiguity and solidify the power of the CWA,[16] the new rule solidifies this power to an infinite level that is constitutionally inappropriate.

Here is where the scientific justification of the new CWA rule turns into a leap in constitutional logic.. I call it second grade science because my amazing second grade teacher in Wilmette, Illinois taught us how this works through a little song and dance number called "The Water Cycle Boogie." It's really quite simple and totally catchy:

> *Evaporation! (fingers trickling up)*
> *Condensation! (hands making circular clouds)*
> *Precipitation! (rain-like motion with fingers)*
> *The Water Cycle Boogie goes up and down! (jump followed by squat)*
> *The Water Cycle Boogies goes round and round! (circular motions with arms)*

In fairness, there has been significant research on the connection between groundwater and surface water. Furthermore, some direct jurisdictional connections are more logically defined under the new CWA rule.[17] But the basic premise that water sources have *a hydrological connection* is readily apparent to an eight year old.

The existence of such a connection does not mean that this connection establishes a significant and legitimate Constitutional connection between ports, major waterways, and rain fall or trickling streams in the hills. If that were the case, then there would not only be a Constitutional connection between the trickling stream and the large body of water, but there would also be a Constitutional connection between the water leaving that large body of water and ultimately arriving back at

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[14] WHY CLEAN WATER RULES, *supra* note 4.
[15] COPELAND, *supra* note 1, at 2-3.
[16] *Id*. at 10
[17] *Id.* at 4-5

that trickling stream or wet soil (through the EPA's rain cloud[18]). That would mean the CWA would have jurisdiction over the very air we breathe, which is partly comprised of evaporated water. Taken to its logical, albeit extreme, end, it would also mean that the CWA could have jurisdiction over the air in my lungs, plus the water which I ingest and then unceremoniously deposit into a water treatment system, which in turn ends up in my local river.

This is not what was meant by a "significant nexus" between a property and a navigable water of the U.S.[19] If unchecked or unchallenged, the new CWA rule could expand or retract power as its administrators please.[20] This would give the federal government essentially unfettered authority and discretion to control water use and development, if it chose to do so. Unchecked, this is federal takeover of Home Rule and would allow the federal government to stop or profit from whatever project or activity it pleases in whatever state has water in it (which is all of them). Therefore, this rule has farmers and developers, plus many business owners, very uneasy. This is why a bill to stop the new CWA passed the House quickly and now rests in the Senate.[21] Additionally, 27 states filed suit against the EPA to block the new CWA jurisdiction rule.[22] Earlier this month, the U.S. Court of Appeals for the Sixth Circuit issued a nation-wide stay of the new CWA rule.[23] Therefore, the Supreme Court of the United States may look at this issue sooner rather than later.

With issues like this new CWA rule, the drought conditions in the Western U.S., and international concerns regarding fresh water, water law is a critical area which intersects with real estate law, municipal law, administrative law, and constitutional law. It is important that the public have some understanding of water law issues and interact with their elected representatives when critical issues like this arise.

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[18] WHY CLEAN WATER RULES, *supra* note 4.
[19] *.Rapanos v. United States,* 547 U.S at 742.
[20] COPELAND, *supra* note 1, at 3 ("science cannot in all cases provide "bright lines" to interpret and implement policy… the agencies must rely… on their technical expertise and practical experience in implementing the CWA…"
[21] Samantha Page, *House Passes Bill to Block EPA Proposal that Would Protect Millions of Miles of Streams,* THINK PROGRESS (May 14, 2015) http://thinkprogress.org/climate/2015/05/14/3658290/house-bill-blocks-waters-of-us-rule/ (Note: the title that Think Progress, a group in favor of the new rule, chose for its article seems to undermine the idea that the new CWA rule would constitute a minor change to the breadth of jurisdiction).
[22] Timothy Cama, *27 states challenge Obama water rule in court,* THE HILL (June 30, 2015) http://thehill.com/policy/energy-environment/246539-27-states-challenge-obama-water-rule-in-court.
[23] *In re* Environmental Protection Agency and Department of Defense Final Rule; "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015), Nos. 15-3799/3822/3853/3887 (6th Cir. Oct. 9, 2015)).