

## EPA Cribs From High Court To Shield Expansive CWA Rule

By **Sean McLernon**

*Law360, New York (March 26, 2014, 7:14 PM ET)* -- The U.S. Environmental Protection Agency is stretching its water authority as far as possible with its proposal to expand the Clean Water Act, crafting the rule using language directly from U.S. Supreme Court decisions as a preemptive defense against inevitable court challenges.

Issuing a joint proposed rule with the U.S. Army Corps of Engineers that has been years in the making, the EPA is applying Justice Anthony Kennedy's term "significant nexus" to add waters to federal jurisdiction with no additional analysis needed, concluding that most tributaries, ephemeral streams and other bodies have a significant connection to downstream waters.

Lawmakers, property owners and other opponents have already decried the rulemaking as a federal power grab, but the agencies have worked carefully to justify the new policy based on a pair of high court decisions from 2001 and 2006. Those rulings roll back the government's water-permitting authority while providing flexibility for the agency to blaze a new regulatory path.

The EPA and Army Corps seized that opportunity and walked with it, proceeding slowly and carefully before finally issuing a proposal on Tuesday — eight years after the Supreme Court called on it to take action.

"This is what the agencies have been trying to do all along — synthesize these rulings while at the same time maximizing jurisdiction," Mayer Brown LLP partner Kevin Desharnais said. "In some ways, they are redefining the language that they use and putting it in the context of what the court has said in these pivotal decisions."

Casting the deciding vote in the 2006 case *Rapanos v. United States*, Justice Kennedy wrote that there needs to be a "significant nexus" between one water area and another in order for the government to have authority.

The EPA released a draft report from its scientific advisory board in September that provides the foundation for Tuesday's proposal, finding that wetlands and transition areas between terrestrial and aquatic ecosystems are integrated with streams and rivers. The report also finds that streams and other tributary systems are connected to downstream waters, no matter what their size or how frequently they flow.

Justice Kennedy demanded there be a significant connection to justify regulatory jurisdiction, so the EPA

focused on the term "significant," and it can now point to scientific findings backing it up.

"The scientific report defined 'connectivity' in an extremely broad manner," Desharnais said. "When they talk about nexus, the word 'significant' became an important part of it. If you try to put it all together, the definitions are set up in a way that would pretty much include almost every water you could think of, with limited exceptions."

One of those exceptions could be the kind of isolated, man-made wetland that was at issue in the 2001 case *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*. The high court ruled in that case that the use of non-navigable intrastate ponds by migratory birds was not enough to justify a connection under the CWA.

The agencies failed to issue a rulemaking after the case, and the high court weighed in on the "waters of the United States" issue again five years later with *Rapanos*.

Four of the justices in *Rapanos* held that the government only had CWA authority over "relatively permanent, standing or continuously flowing bodies of water," but Justice Kennedy said that there could still be a connection without flow and coined "significant nexus" as the touchstone term for CWA jurisdiction.

Tuesday's proposal includes streams and tributaries that flow only part of the year or after a heavy rainfall. The agencies claim that 60 percent of stream miles in the U.S. are temporary, and about 117 million people get drinking water from public systems relying on those streams.

"They are trying very hard to read the court decisions and the science as accommodating the type of waterways we have in the western United States that flow intermittently," said UCLA law professor Sean Hecht, who serves as executive director of the school's environmental law center.

Concluding that all tributaries are "waters of the United States" under the CWA, the agencies said in the proposed rule that tributaries in a watershed have a significant nexus because they "significantly affect the chemical, physical or biological integrity" of traditional navigable waters, interstate waters or territorial seas.

It is a bold move by the EPA and the Army Corps, taking an issue that many legal experts believe should be considered individually and enacting rules that cover vast areas of water without taking into account distinguishing features.

"We anticipated those would be applied on a case-by-case basis, not with broad categories finding that all tributaries have a significant nexus," said Wayne Whitlock, a former U.S. Department of the Interior attorney and current Pillsbury Winthrop Shaw Pittman LLP partner.

It leads to a major expansion of water authority in the West, according to Whitlock, who estimated that the amount of water bodies that qualify under the proposal could increase by 50 percent.

"I wouldn't consider many of these streams," Whitlock said. "They are ephemeral, only flowing certain times of the year, but if they have a bed and a bank and an ordinary high water mark, that's the trigger."

The EPA and Army Corps are banking on legal precedent and scientific findings to help them beat back inevitable legal challenges.

Outspoken critics of the proposal include senior Republican lawmakers such as Sen. Lisa Murkowski, R-Alaska, who said the rule would cause “serious collateral damage” to the economy. Murkowski also faulted the EPA for failing to complete its scientific review before issuing the proposal.

The agencies have pledged to issue and consider a final scientific report before completing the Clean Water Act rulemaking. It may be the final piece of the puzzle for a policy the government pledges will enhance protection for the nation's water and increase CWA program consistency.

“Assuming that their scientific document actually does support the idea that aquatic ecosystems support each other in ways that underpin the decisions they made in the rulemaking, I think they will be on solid ground,” Hecht said. “After all of these years and all of the work done by their scientists — and they are good scientists — at this point, I'm optimistic that the science will support the decision.”

--Editing by Jeremy Barker and Christine Chun.

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