Peering Through Muddy Waters

Update on

“Waters of the United States”
OIL SLICK FIRE RUINS FLATS SHIPYARD

Surly Ohio Pen Rebels Fed at Gunpoint

FLAMES HIT DRY DOCKS, THREE TUGS
Buildings Also Damaged in $1,500,000 Blaze; Bridge Put Out of Order

1948 CASTS A VEIL OVER ‘IKE TO WIN’
G. O. P. Victory Is Outlook, but Memories Discourage Flat Predictions

PRISON GETS FIRST QUIET AFTER RIOTS
Night of Destruction Cost State Close to Million; Walls Still Hot

By Todd Simon and Nate Silverman Staff Correspondents
COLUMBUS, O., Nov. 1.
Feeding some 200 explosive roughneys at gunpoint this afternoon was the first test of the Ohio Penitentiary’s uneasy return to order. Surly but quiet, the inmates of Cell Blocks A and B got their first taste of food in 24 hours after they walked quietly under guard to the dinner tabels from their wrecked, dribble-strewn cells.

Investigation of the Friday riot and fire was being delayed today pending completion of a cleanup program in damaged cell blocks and a series of general shake-downs.

Crowing and feeding were the order of the day, reported Wardho B. Abrs, who said no attempt was made to determine the cause. Trainers and discipline issues were handled until normal routine had been resumed.

HUGE VOTE IS ONLY SAFE NOV. 4 BET

R. O. K.’S PUSH UP KEY HILL, STALL
Withdrawn From Triangle Under Hail of Fire

ENVELOPED IN FLAMES AND SMOKE is the big Atlanta, one of three damaged spruce, today prepared to set fire swept through the shipyards of the Great Lakes Furading Co., on the Cuyahoga River of Jeffreys Atkins A. W. Cutting damage estimated "In return of $8,500,000, the fire started when all on the bank of the river were ignited from an undermined coal.

61,927 at Stadium Seat
Clean Water Act

- 1972
- Goals 33 USC 1251
  - Fishable and swimmable by July 1, 1983
  - Zero discharge of pollutants into navigable waters by 1985
Clean Water Act

- National Pollutant Discharge Elimination System (NPDES) 33 USC 1311, 1342
  Illegal to discharge a pollutant from a point source to a **navigable water** without a permit

- Wetlands 33 USC 1344
  Illegal to discharge dredged or fill material to **navigable water** without a permit

- Jurisdiction is over **navigable water**
Navigable Water
Navigable Water
Navigable Water
Navigable Water

- River & Harbors Act of 1899
- 33 CFR 329.4
  - Waters subject to the ebb and flow of the tide
  - Used to transport interstate or foreign commerce
  - Applies to Corps civil works
  - Does not apply to Clean Water Act
Waters of the US

- Clean Water Act 33 USC 1362(7)
  - “Navigable waters” are “the waters of the US”
- USEPA/Corps define “waters of the US”
  - Jurisdictional waters under Clean Water Act
  - Which waters need permit for discharge?
  - Which waters can federal government regulate?
Waters of the US

  - Struck down Corps definition limited to actual navigable waters
  - By defining “navigable waters” as “waters of the US,” Congress did not intend to limit WOTUS to traditional tests of navigability
Waters of the US

- 1980s USEPA/Corps definitions
  - (1) traditional navigable waters, (2) interstate waters including wetlands, (3) other waters which could affect interstate commerce, (4) impoundments, (5) tributaries, (6) territorial seas, (7) adjacent wetlands
  - NOT waste treatment systems
  - 40 CFR 122.2; 33 CFR 328.3
Along Comes the Supreme Court

- **US v Riverside Bayview Homes (1985)**
  - Marshy land along Black Creek, near Clinton River, Lake St Clair, Michigan
  - Corps can regulate wetland adjacent to traditional navigable water
  - Unanimous
Along Comes the Supreme Court

- **Solid Waste Agency of Northern Cook County (SWANCC) v Army Corps of Engineers (2001)**
  - Proposed landfill, former gravel strip mine, Bartlett, IL
Along Comes the Supreme Court

- **SWANCC**
  - Corps: jurisdiction over abandoned gravel pits
    - Applied migratory bird rule - blue herons using pond in pit, interstate recreation
  - Sup Ct: no federal jurisdiction
    - Needs to be traditional navigable water or have connection to navigable water
    - Here, isolated water used by birds
    - 5 (Rehnquist, Scalia, Kennedy, O’Connor, Thomas)
    - 4 (Stevens, Souter, Ginsburg, Breyer)
Along Comes the Supreme Court

  - Ditches leading to rivers
  - Unclear whether flow continuous or occasional
Along Comes the Supreme Court

- **Rapanos**
  - No federal jurisdiction
  - Scalia, Roberts, Thomas, Alito
    - “Relatively permanent, standing or flowing”
    - Not “ordinarily dry channels . . . occasionally or intermittently flows”
    - Wetlands with a “continuous surface connection”
  - Kennedy
    - “Significant nexus” between wetland and traditional water
    - “chemical, physical, and biological integrity” of traditional water
  - Stevens, Souter, Ginsburg, Breyer
    - Wetlands adjacent to tributaries to navigable water
Post-Rapanos Policy

- Traditional navigable waters & interstate waters & territorial seas
- Adjacent wetlands
- Non-navigable relatively permanent waters (year-round or seasonal flow at least 3 months)
  - Adjacent wetlands
  - Other waters and adjacent wetlands with significant nexus
    - Isolated wetlands

CWA JURISDICTION

NO CWA JURISDICTION
Post-Rapanos Regulation

- **Clean Water Rule**
  - Proposed 79 Fed Reg 22188 (April 21, 2014)
  - Final 80 Fed Reg 37054 (June 29, 2015)
  - Effective August 28, 2015

- **Identify CWA jurisdictional waters**
  - Easier to understand
  - More predictable
  - Consistent with law and science
Post-Rapananos Regulation

#DitchTheRule
MAKE YOUR VOICE HEARD DITCHTHERULE.FB.ORG

The EPA wants to regulate all water, everywhere.

SAY NO TO THE CLEAN WATER ACT EXPANSION

2014 Farm Bureau®

KNOW THE FACTS:
Proposed Rule to Protect Clean Water
Exclusions and exemptions for agriculture will not change.

#ditchthemyth www.epa.gov/ditchthemyth
Clean Water Rule

Jurisdictional by rule
1. Traditional navigable waters
2. Interstate waters
3. Territorial seas
4. Impoundments
5. Tributaries (newly defined)
6. Adjacent waters (newly defined)

Other Waters
Case specific significant nexus
7. Five specified types: prairie potholes, Carolina bays, pocosins, vernal pools, Texas coastal wetlands
8. 100 yr flood plain, 4000 ft ordinary high water mark

Exclusions
1. Waste treatment system
2. Prior converted cropland
3. *Ditches ephemeral/intermittent*
4. Artificial ponds
5. Groundwater
6. Stormwater control
7. Wastewater recycling

Exemptions for normal farming, silviculture, ranching, plowing, seeding, cultivating, farm or stock ponds 33 USC 1344(f)(1)
Clean Water Rule

- Tributary
  - Water that contributes flow, directly or through another water
  - To navigable water, interstate water, territorial sea
  - “Physical indicators” of ordinary high water mark and bed and banks
Clean Water Rule

- **Adjacent**
  - Bordering, contiguous, or neighboring, even if separated by berm

- **Neighboring**
  - Within 100 feet of ordinary high water mark of navigable water, interstate water, territorial sea, impoundment, tributary
  - Within 1500 feet OHWM and 100 year flood plain
Significant Nexus

- Adjacent/neighborhood
- Tributaries
- Case-specific analysis
H. R. 5078

To preserve existing rights and responsibilities with respect to waters of the United States, and for other purposes.

IN THE SENATE OF THE UNITED STATES
September 10, 2014

Received: read the first time

September 11, 2014

Read the second time and placed on the calendar

AN ACT

To preserve existing rights and responsibilities with respect to waters of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Waters of the United States Regulatory Overreach Protection Act of 2014”

Veto Message from the President -- S.J. 22

To the Senate of the United States:

I am returning herewith without my approval S.J. Res. 22, a resolution that would nullify a rule issued by the Environmental Protection Agency and the Department of the Army to clarify the jurisdictional boundaries of the Clean Water Act. The rule, which is a product of extensive public involvement and years of work, is critical to our efforts to protect the Nation’s waters and keep them clean; is responsive to calls for rulemaking from the Congress, industry, and community stakeholders; and is consistent with decisions of the United States Supreme Court.

We must protect the waters that are vital for the health of our communities and the success of our businesses, agriculture, and energy development. As I have noted before, too many of our waters have been left vulnerable. Pollution from upstream sources ends up in the rivers, lakes, reservoirs, and coastal waters near which most Americans live and on which they depend for their drinking water, recreation, and economic development. Clarifying the scope of the Clean Water Act helps to protect these resources and safeguard public health. Because this resolution seeks to block the progress represented by this rule and deny businesses and communities the regulatory certainty and clarity needed to invest in projects that rely on clean water, I cannot support it. I am therefore vetoing this resolution.

Barack Obama
The White House
January 19, 2016
From Preventing Pollution of Navigable and Interstate Waters to Regulating Farm Fields, Puddles and Dry Land:

A Senate Report on the Expansion of Jurisdiction Claimed by the Army Corps of Engineers and the U.S. Environmental Protection Agency under the Clean Water Act

United States Senate Committee on Environment and Public Works

Majority Staff

Released:

September 20, 2016
Nationwide Litigation

- Sixth Circuit (Murray Energy v EPA, No. 15-3751)
  - Oct. 9, 2015 stay
  - Briefing scheduled through February 2017
  - 2-1 opinion retaining jurisdiction
  - NAM filed SCOTUS appeal on jurisdiction
Treading Water . . .

- Did USEPA follow SCOTUS directions?
- Overreach or not protective enough?
- Cuyahoga burning v. filling wetlands
- Far from consensus
Jennifer Burke
312-814-3620
jennifer.burke@illinois.gov