Hot Topics in Clean Water Law

March 16, 2016

NACWA

Not To Be Missed

- National Water Policy Forum, Fly-In & Expo, April 11-13, Washington, DC
- April Legal Perspectives
- NACWA Pretreatment & Pollution Prevention Workshop & Training, May 17-20, Long Beach, CA
- Region 4 Utility Leaders Meeting, June 8, Atlanta, GA
- Next Quarterly Hot Topics in Clean Water Law Web Seminar, June 15, 2:00-3:30 pm EDT
- Utility Leadership Conference & 46th Annual Meeting, July 10-13, Denver, CO
- National Clean Water Law Seminar & Wet Weather Workshop, November 1-4, Kansas City, MO

Justice Scalia's Passing: Will it Affect WOTUS at SCOTUS?

A presentation on *US Army Corps of Engineers v. Hawkes Co, Inc.*

for the Nat'l Ass'n of Clean Water Agencies

By Mark Miller 3-16-16

Quick background on speaker

Double Gator after a pit stop at a small Jesuit school called the University of Scranton

UF '93, UF Law '96

Federal clerkship with US District Judge Henry Lee Adams, Jr.

Started own appellate practice, board-certified in 2014.

now Pacific Legal Foundation Managing Atty. – emphasis on property rights and environmental litigation.

I sue the government.

Co-counsel/2nd Chair in *US ACE v. Hawkes Co.*, oral argument on 3/30/16

- So this talk is called Justice Scalia's Absence: Will it Affect WOTUS at SCOTUS?
- We are going talk about the Supreme Court's "water docket," along with the loss of Justice Scalia, with an emphasis on the *Hawkes* case since I have most familiarity with that topic.
- Conversation, not a lecture. Hopefully I share something or two that's insightful.

OA in *Hawkes*: giving the Justices grapes, not cucumbers.

So what is the issue in *Hawkes*?

- The question for this Court is whether an Approved Jurisdictional Determination (JD) – sometimes called an affirmative JD – that finds a parcel contains "waters of the United States" subject to the Clean Water Act constitutes "final agency action for which there is not other adequate remedy in court," and is therefore subject to judicial review under the Administrative Procedure Act.

- That's a mouthful but it's not very complicated. Let me explain the case a bit and then play a short video that's more interesting that me blabbering on.

What's a Jurisdictional Determination?

- Corps issues jurisdictional determinations (JDs) to inform landowners whether the agency believes their property contains "waters of the United States" subject to federal jurisdiction under the CWA
- A JD constitutes the Corps's formal determination of federal authority over the site
- JD effectively requires the owner to pursue a CWA permit in order to use the property
- Permitting process often takes years and hundreds of thousands of dollars; that can be devastating to a family business like Hawkes Company.

The story of the case.

Why do we think Court will affirm?

- Land owners need to know if the property is wetlands that fall within federal jurisdiction. They should know that before they spend the kind of money and time that the permit process requires they spend.

- Even if the Corps decides a federal permit is unnecessary, the land owner does not recoup that money it expended. Some might say that's a cost of doing business, but we're talking anywhere from tens of thousands to hundreds of thousands of dollars a day. And of course they'll never get back the time – sometimes years – it takes to pursue the permit.

- For a small family business like Hawkes, or simple landowners looking to build a home – like Mike and Chantell Sackett in the precedent case *Sackett v. EPA* – that money may stop them from ever building, from even applying for the permit.

- The *Sackett* case is a very good precedent. There, the Court said that the decision to order the Sacketts to repair and replace development they did without a warrant, and to fine them, was a decision they could challenge in court – even though every court to have addressed the question beforehand had said otherwise.

- Although the Hawkes Company hasn't been fined, it may as well have been by the JD. Because the JD means it has to apply for a federal permit from the Corps, to the tune of up to $270,000. If they don't apply for that, and they go forward with development, they could face jail time and fines because they knowingly 'discharged' into wetlands subject to federal jurisdiction.

- Or they do nothing. These are three bad options, options they don't have to face if the Corps is wrong and it turns out there is no connection to, or significant nexus with, a "waters of the United States."

Of course, reversal and a ruling in favor of the Government remains possible. That kind of loss would look something like this.

"Bear in mind that brains and learning, like muscle and physical skill, are articles of commerce. They are bought and sold. You can hire them by the year or by the hour. The only thing in the world not for sale is character."
Justice Antonin Scalia, Commencement Address of William & Mary, 1996.

What does loss of Scalia mean?

- For *Hawkes*, we hope it won't mean too much in that the precedent the Eighth Circuit relied upon – *Sackett* – was a 9-0 decision.
- But otherwise, the SCOTUS ground certainly shook when Scalia passed away earlier this year.
- As Dahlia Lithwick, a SCOTUS expert, noted: "The Supreme Court of March looks nothing like the court … in February. The loss of … Scalia[] has … reshuffled everything. It's the early days yet, and much of the evidence of newish, liberalish outcomes at the court lies in routine housekeeping matters: unsigned orders and withdrawn appeals."

Examples from the Enviro Docket

- Ms. Lithwick, an excellent writer, is sometimes prone to hyperbole in service to a readable column but not this time. Things have changed.
- One Clean Water Act case result that likely reflects the absence of Justice Scalia: the Court's 2/29/16 denial of cert. in the American Farm Bureau's case against the EPA in regards to the Chesapeake Bay litigation. Would Scalia have been the fourth vote for review? We'll never know.
- Another of the more concrete examples of the change came in the form of a stay order and a denial of a stay – a stay released the week before Scalia passed, a denial of stay a few weeks later.

To stay or not to stay?

- In *West Virginia v. EPA*, the Court – split 5-4 – blocked the Administration's Clean Power Plan for the duration of legal challenges against it. February 9, 2016 – a few days before Justice Scalia passed. The Clean Power Plan, as you all know, reflects President Obama's effort to address what he perceives to be the country's effect on climate change.

- Just weeks later, in *Michigan v. EPA*, CJ Roberts – acting alone – denied a stay of a mercury-emissions rule/regulation that affects coal-burning power plants.

- Key: Roberts did not even refer the stay request to the full court. Arguably, he recognized that without Scalia's vote he could not muster a majority of the Court to grant the stay request.

- Bottom line: when it comes to enviro cases, the loss of Scalia will greatly affect results. It already has.

How will that play out in WOTUS cases?

- The new WOTUS rule will – most likely – reach SCOTUS sooner or later. Thus, how the Court addresses the EPA's new definition of waters of the US will affect all of you quite directly.

- We know that in *Rapanos*, the Court plurality (4), including Justice Scalia who wrote the opinion, defined the scope of the Clean Water Act's protection for wetlands as: waters that are "relatively permanent, standing or continuously flowing bodies of water" connected to traditional rivers or streams that can carry navigation, as well as wetlands with "a continuous surface connection to such water bodies."

Rapanos (continued)

- Meanwhile, Justice Kennedy, in his concurrence, said the Clean Water Act only protected wetlands that "possess[ed] a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."
- The dissenters said lower courts could apply either the Scalia or Kennedy approach, although they themselves preferred the gov't definition that protected more wetlands from pollution. Or in other words, if the government said a wetlands was WOTUS, it was WOTUS.
- It's fair to say that the new definition of WOTUS was in danger of being declared unconstitutional by a Court with Scalia on it, and the Sixth Circuit stayed enforcement of the new WOTUS rule – arguably with that result in the back of "its" head.

Under the Scalia plurality...

- A long list of other waters and lands would be excluded from CWA jurisdiction, including:

Non-navigable, isolated, intrastate waters, Channels and streams with intermittent or ephemeral flows, Dry arroyos, coulees and washes, Directional sheet flow, Wet meadows, Storm sewers and culverts, Drain tiles, Man-made drainage ditches, Some point sources like pipes, ditches, channels and conduits, Sewage treatment plants, and 100-year flood plains.

But the new WOTUS rule contemplates much of those examples being subject to the Clean Water Act...

And the Scalia plurality is no longer a plurality. Soo…

- What will the Court say about the new rule? The reach of the new rule is best demonstrated via the map below, which shows that the federal government believes it controls the waters of California. That the CWA says states are primarily responsible for protecting clean land and water does not appear to concern those who wrote the new rule.

The new Court presents new opportunities.

- Justice Alito: "The reach of the CWA is notoriously unclear." – his concurrence in *Sackett*.
- We are about to find out exactly how unclear it is, although I hope we don't find out in *Hawkes*.
- Thank you for inviting me to speak.

Questions?

March 16, 2016

Numeric Nutrient Criteria & EPA Necessity Determinations – Mississippi River Basin Litigation Update

NACWA Legal Hot Topics –March 16, 2016

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Overview

- **Necessity Determinations under CWA**
  - Language and purpose of § 303(c)(4)(B)
- **2008 Petition seeking federal numeric nutrient criteria for 50 states & EPA denial of petition**
- **Nutrients Lawsuits by Gulf Restoration Network and NRDC in March 2012**
  - Over denial of petition that sought for EPA to establish secondary treatment standards to address nutrient removal
  - Over denial of petition that asked EPA to establish numeric nutrient criteria for 50 states or at least all states with adjacent tributary waters to the Mississippi River Basin (MRB) and Gulf of Mexico "dead zone"
- **Key Legal Issues**
- **Status on GRH v. EPA currently on Remand to EDLA**

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Necessity Determinations under CWA

- **CWA § 303(c)(4)(B)**
- **EPA to "promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved…."**
  - "in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter."
- **Water quality programs of CWA balance state lead with federal oversight**
- **What does "necessary to meet the requirements of this chapter" really mean?**

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Petition filed with EPA in 2008

- **Recited numerous studies and statements including by EPA acknowledging serious nitrogen and phosphorus levels in Mississippi River basin and northern Gulf of Mexico including "dead zone"**
  - Criticized lack of numeric nutrient criteria by states whose waters are tributary to the MBR and GOM dead zone
  - Criticized EPA's "hands off" and "voluntary" approach to cooperating and guiding states to establish numeric criteria for nitrogen and phosphorus
  - Asserted the situation triggered EPA action under CWA § 303(c)(4)(B)
- **Sought federal numeric nutrient criteria in all 50 states or at least those which border the Mississippi River and GOM dead zone**

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EPA Denial of Petition

- **Agreed with problem as described by petitioners**
- **Explained cooperative and voluntary approaches emphasized over the years**
- **Disagreed that federal rulemaking authority was the most appropriate response**
  - Not practical
  - "Unprecedented and complex"
  - "Highly resource and time intensive"
  - Would upset state/federal roles
- **Did not conclude that federal NNC were not necessary but did not make necessity determination at the time and did not preclude making one at a later time**

Key Legal Issues – Dist. Court Decision

- **Plaintiffs: EPA's denial violated law because:**
  - Did not rely upon statutory factors, which are limited to scientific reasons
  - Ignored overwhelming evidence of necessity due to lack of progress by states
- **EPA argued:**
  - No federal court jurisdiction because necessity determinations are committed to agency discretion by law
  - Denial was proper based on broad range of statutory factors EPA may rely upon under CWA § 303(c)(4)(B)
- **Application of *Massachusetts v. EPA* (2007) to CWA § 303(c)(4)(B)**
- **Court determined**
  - EPA's denial was judicially reviewable
  - EPA's denial was based on appropriate statutory factors
    - Rejected reading of *Mass. V. EPA* as limiting relevant statutory factors to only scientific ones
  - But said *Mass. v. EPA* did require EPA make a necessity determination not simply decline to do so

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Key Legal Issues – 5th Circuit Decision

- **Upheld district court's jurisdictional ruling**
  - Discussed Mass. v. EPA as providing "insight" into whether Congress made necessity determinations subject to judicial review
  - Found that CWA § 303(c)(4)(B) is sufficiently specific to allow judicial review of EPA action on a necessity determination petition
  - In discussing reviewability issue indicated that EPA's reasons for declining to make a necessity determination must be ground in the statute under 5th Circuit's reading of Mass. v. EPA

Key Legal Issues – 5th Circuit Decision

- **Overturned district court's ruling that EPA lacked discretion not to make a necessity determination**
  - Under *Mass. v. EPA*, EPA can avoid making a necessity determination "if it provides some reasonable explanation as to why it cannot or will not exercise its discretion" to make the requisite statutory determination.
  - "EPA may decline to make a necessity determination if it provides an adequate explanation, grounded in the statute, for why it has elected not to do so."
  - Because EPA has discretion not to make a necessity determination, remanded to district court to determine if EPA's explanation was "legally sufficient"
- **Standard of review is "extremely limited" and "highly deferential"**
- **Limited to whether EPA provided a reasonable explanation grounded in the statute**

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Issues and Status of Remand

- **Key issue on remand is whether EPA in its 2011 petition denial provided a reasonable explanation grounded in the statute for exercising its discretion not to make a necessity determination at that time**
- **How to interpret the 5th Circuit's ruling that:**
  - "EPA may decline to make a necessity determination if it provides an adequate explanation, grounded in the statute, for why it has elected not to do so."
- **Applying a standard of review that is "extremely limited" and "highly deferential"**
- **Since remand is limited to whether EPA's explanation was "legally sufficient", parties' briefs are focused on what it means to be grounded in the statute under CWA § 303(c)(4)(B) given the highly deferential standard of review to be applied by the district court on remand**

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Issues and Status of Remand

- **Since remand is limited to whether EPA's explanation was "legally sufficient", parties' briefs are focused on what it means to be grounded in the statute under CWA § 303(c)(4)(B) given the highly deferential standard of review to be applied by the district court on remand**
  - **District court previously found EPA not limited to scientific factors**
  - **But that finding was in context of ordering EPA to make a necessity determination, up or down**
  - **Now that 5th Circuit has said EPA has discretion not to make an up or down necessity determination, as long as its explanation for doing so is grounded in the statute, will district court view the relevant statutory factors similarly as before?**
  - **How will the deferential standard of review play out?**
  - **Briefing schedule**

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Questions?
Thank you!

NACWA Legal Hot Topics Webinar

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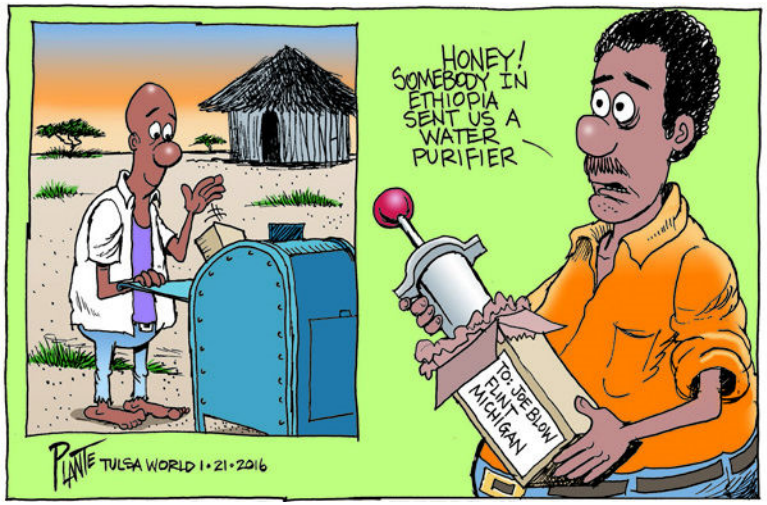
The Failure of Cooperative Federalism in Flint Michigan: Implications for EPA Oversight

NACWA Hot Topic Series

Brent Fewell
March 16, 2016



Unprecedented press coverage – hundreds of domestic and international TV and print coverage

Key Facts

- Population 99,000
- 40% of residents below the poverty level – MHI is $26,339 v. $53,657 national
- Switched water source in 2014 to save $5M yearly
- Est. 6,000 – 12,000 children exposed to dangerous levels of Pb
- Long-term health care costs could exceed $100M
- Highest water rates in the country $75.84/month or 3.5% of MHI.

Timeline

- April 2104 Flint switches water source
- Feb 2015 EPA R5 staff raise concern to MDEQ (one home -104 ppb)
- June 2015 EPA R5 Del Toral memo calls lack of corrosion control "major concern"(shared with MDEQ via third party)
- Aug 2015 Virginia Tech's Marc Edwards begins independent testing
- Sep 2015 Flint issues lead warning
- Nov 2015 EPA Memo finalized/shared with MDEQ
- Jan 2016 Gov. Snyder declares state of emergency and EPA HQs issues emergency order

. . . Michigan did not act as a partner. The state's interactions with us were dismissive, misleading and unresponsive. The EPA's regional office was also provided with confusing, incomplete and incorrect information.

- Gina McCarthy

EPA-MDEQ Communication

After MDEQ was provided a copy of Miguel Del Toral's June 24 memo on high lead levels in Flint by a third party, MDEQ was notified by an EPA R5 staff in an e-mail:

> *I wanted to remind you that Miguel's report had DEQ cc'd. So if the Legislature or who ever (sic) might say you all were cc'd, you can truthfully respond that it was EPA's request that the report not be sent to the cc's. Consequently, you all never received the report from Miguel.*

EPA Emergency Powers – CWA and SDWA

CWA – Section 1364

[T]he Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons . . . may bring suit on behalf of the U.S. in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution **or** to take such other action as may be necessary.

SDWA – Section 300i

[T]he Administrator, upon receipt of information that a contaminant which is present in or is likely to enter a public water system or an underground source of drinking water . . . which may present an imminent and substantial endangerment to the health of persons, **and** that the State and local authorities have not acted to protect the health of such persons, may take such action as he may deem necessary in order to protect the health of such persons. To the extent he determines it to be practicable in light of such imminent endangerment, he shall consult with the State and local authorities in order to confirm the correctness of the information on which action proposed to be taken under this subsection is based and to ascertain the action which such authorities are or will be taking. The action which the Administrator may take may include (1) issuing such orders as my be necessary to protect the health of such persons who are or may be users of such system . . . and (2) commencing a civil action for appropriate relief, including a restraining order or permanent or temporary injunction.

Practical Implications

- Flint impacted psyche of EPA – sentiment is "never again"
- Greater EPA scrutiny + less deference = more aggressive oversight.
  - Next Gen Compliance
  - Filling "gray areas" at the intersection of law and public health
  - Direct enforcement and overfiling
  - Emergency orders
  - Future municipal water supply enforcement initiative
  - More problems and $ = affordability concerns heightened
- EJ water-related issues will drive enforcement decisions (SDWA/CWA)
- More pressure on local governments and leaders (including possibly criminal actions)
- Less trust???

"Take Homes"

- Effective Utility Management

•Product Quality
•Employee and Leadership Development
•Financial Viability
•Operational Resiliency
•Water Resource Adequacy
•Customer Satisfaction
•Operational Optimization
•Infrastructure Stability
•Community Sustainability
•Stakeholder Understanding and Support

- Must summon courage to fill "Gray Areas" with sound policy and best practices
- We can only improve utility management with improved "transparency" and trust between regulated and regulators
- More **CARROTS** to **incent** good behavior and bigger **STICKS** to **disincent** bad behavior (safe harbors, best practices, compliance audits, financial incentives, flexible compliance schedules)

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Thank You

Save the Date for the Next Hot Topics in Clean Water Law

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2:00 – 3:30 pm ET