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Environmental Law: Little Streams and Legal Transformations

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In 2015, the United States Army Corps of Engineers (the Corps) and the United States Environmental Protection Agency (EPA) finalized a rule slightly expanding the scope of the phrase "waters of the United States," which establishes the boundaries of federal jurisdiction under the Clean Water Act.[2] In other words, the Clean Water Rule, as the EPA and the Corps labeled it, helps determine which aquatic resources can be protected by the Clean Water Act and which cannot.

In many circles, the immediate reactions were apoplectic. Industry opponents warned of dire consequences.[3] Politicians maligned the Clean Water Rule as, in Congressman John Boehner's words, "a raw and tyrannical power grab that will crush jobs . . . and places landowners, small businesses, farmers, and manufacturers on the road to a regulatory and economic hell."[4] The House of Representatives passed a bill that would set the whole rule aside.[5] Dozens of states, along with a wide variety of industry and advocacy groups, sued to challenge the rule;[6] one set of cases soon generated a nationwide stay and then, two years later, a

1. Summarized and excerpted from Dave Owen, *Little Streams and Legal Transformations*, 2017 UTAH L. REV. 1.

2. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015).

3. *See, e.g.*, Am. Farm Bureau Fed'n, *Clean Water Act, WOTUS*, FARM BUREAU, http://www.fb.org/issues/regulatory-reform/clean-water-act/ [https://perma.cc/B2X9-JM2C]; Justin Sykes, *New Obama EPA Water Rules Set to Drown Property Rights, Economic Growth*, AM. FOR PROSPERITY (June 16, 2014), http://americansforprosperity.org/article/new-obama-epa-water-rules-set-to-drown-property-rights-economic-growth [https://perma.cc/XRG9-QJ2P].

4. Press Release, Speaker Paul Ryan's Press Office, *Speaker Boehner on the Latest EPA Power Grab* (May 27, 2015), http://www.speaker.gov/press-release/speaker-boehner-latest-epa-power-grab [https://perma.c c/MTS6-P8F8]; *see also* Jennifer Yachnin, *House Republican Compares WOTUS to Terrorism, the Plague*, GREENWIRE (Nov. 23, 2015), http://www.eenews.net/greenwire/2015/11/23/stories/1060028451 [https://perma.cc/5WP9-DYP7].

5. Regulatory Integrity Protection Act of 2015, H.R. 1732, 114th Cong. (2015).

6. Timothy Cama, *27 States Challenge Obama Water Rule in Court*, HILL (June 30, 2015, 12:02 PM), http://thehill.com/policy/energy-environment/246539-27-states-challenge-obama-water-rule-in-court [https://per ma.cc/ZTK9-R6VG].

United States Supreme Court opinion.[7] Environmental groups sued as well, on the theory that the new rule is not protective enough.[8]

The opposition now extends to the White House. During his campaign, then-candidate Donald Trump repeatedly maligned the rule, and one of his early acts as President was to issue an executive order for its repeal.[9] Since then, the EPA and the Army Corps have issued one final rule staying the Clean Water Rule's effective date[10] and a second proposed rule repealing it, with a third rulemaking, which presumably would lead to a new standard, also in the works.[11] The stay also provoked legal challenges, as will the additional rulemakings, and litigation addressing the scope of Clean Water Act jurisdiction is now proceeding in federal district courts across the nation. Ironically, the Clean Water Rule itself would not actually change very much; the Army Corps and the EPA predicted "an approximate 3 percent increase in assertion of jurisdiction when compared to 2009-2010 field practice."[12] But the reactions have been intense, and much of the rhetoric has been apocalyptic.

This all may seem rather typical and unsurprising. For years, nearly any federal environmental initiative had provoked a similar reaction. Indeed, just a few months later, the EPA released another major rule, this one governing greenhouse gas emissions, and the same doomsday warnings and press releases all trotted out again, followed nearly immediately by bills and lawsuits.[13] We live, it sometimes seems, in an era when environmental policymaking resembles trench warfare, with

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7. Nat'l Ass'n of Mfrs. v. Dep't of Defense, 138 S. Ct. 617 (2018) (holding that federal district courts have jurisdiction to hear challenges to the Clean Water Rule).

8. Press Release, *Center for Biological Diversity, Lawsuit Challenges Loopholes in New EPA Rule Exempting Wetlands and Streams From Clean Water Act Protections* (July 22, 2015), http://www.biological diversity.org/news/press_releases/2015/clean-water-act-07-22-2015.html [https://perma.cc/4W73-FN8C].

9. Exec. Order No. 13,778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, 82 Fed. Reg. 12,497 (2017).

10. Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5,200 (2018).

11. Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (2017).

12. U.S. EPA & U.S. DEP'T OF THE ARMY, ECONOMIC ANALYSIS OF THE EPA-ARMY CLEAN WATER RULE 2 (2015).

13. *See* Joby Warrick & Steven Mufson, *Foes of Clean-Air Rule Plan Multiple Front Battle*, WASH. POST (Aug. 3, 2015), http://www.washingtonpost.com/national/health-science/opponents-lay-groundwork-for-state-by-state-fight-against-polluton-curbs/2015/08/03/d3418320-3a26-11e5-8e98-115a3cf7d7ae_story.html [https://perma.cc/XL8F-WCAB].

zero-sum legal battles playing out over every major initiative, and with very little apparent movement. Within academic circles, lamenting these circumstances has become almost cliché. Accounts of the increasing polarization of environmental politics, and of gridlock, ossification, and logjams, are common, as are wishful comparisons to the 1970s, a time when environmental legislation emerged from Congress quickly and with bipartisan support.[14] We have been stuck, it seems, and the contrast between an ostensibly modest water quality rule and its outraged reception is just another reminder of the reasons why.

This Article does not dispute the accuracy of that narrative, at least in some circumstances. But in the arenas governed by the Clean Water Rule and by the EPA's more recent initiatives, policy actually never got stuck. It has been evolving in consequential ways. The rules would define the geographic scope of several regulatory programs, one of which governs discharges of dredged or fill material into "waters of the United States."[15] That program—often referred to as "the 404 program," after the statutory section that authorizes it, or as "the wetlands program"—is well known to environmental lawyers. Every major environmental law casebook covers it, and abundant litigation, including multiple Supreme Court cases, has arisen from it.[16] But despite that familiarity, many environmental lawyers do not understand how the 404 program is changing, or how the Clean Water Rule and its successors fit within that evolutionary story.

Instead of wetlands, the most important changes involve little streams.[17] Those streams are now a central focus of regulatory attention after years of falling largely beyond the reach of Clean Water Act regulation. The nature of stream regulation is also changing, with new

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14. *See, e.g.*, Carol A. Casazza Herman *et al.*, *The Breaking The Logjam Project*, 17 N.Y.U. ENVTL. L.J. 1, 1-2 (2008); David W. Case, *The Lost Generation: Environmental Regulatory Reform in the Era of Congressional Abdication*, 25 DUKE ENVTL. L. & POL'Y F. 49, 50-53 (2014); Sandra Zellmer, *Treading Water While Congress Ignores the Nation's Environment*, 88 NOTRE DAME L. REV. 2323, 2323-40 (2013).

15. *See* 33 U.S.C. § 1344 (2016).

16. *See* Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58, 83 (2016).

17. The EPA and scientists often use the phrase "headwater streams," which the EPA defines as "the smallest parts of river and stream networks. . . . They are the part of rivers furthest from the river's endpoint or confluence with another stream." *Research in Action: Headwater Streams Studies*, EPA, https://www.epa.gov/water-research/headwater-streams-studies [https://perma.cc/7HR7-T9D9]. That isn't a particularly precise definition, and in practice, the phrase is often extended to small streams that discharge directly to a river's mainstem, or to lakes or the ocean. "Little streams," though it sounds less scientific, more accurately describes the applicable range of streams.

permitting mechanisms, guidance documents, and techniques for rehabilitating streams all continuing to emerge. The Clean Water Rule reflects that shifted emphasis; clarifying jurisdiction over tributaries is one of its central goals.[18] But despite all the kerfuffle surrounding the rule, it was just an incremental step in a journey that began years earlier, largely unnoticed by legal commentators, and that continued through multiple regulatory decisions and under multiple presidential administrations. That story is partly about the picky terms of regulatory permits and technical guidance documents, but beneath those mundane and somewhat dry details, it holds important lessons about the larger trajectory of American environmental law.

Several key lessons emerge from that story, each of which should inform present deliberations over the legality of the different jurisdictional rules. The first is that streams (and small wetlands) are genuinely important. In much of the rhetoric over Clean Water Act jurisdiction, and in some judicial decisions, critics have suggested that the EPA and the Corps's goal is to expand their empire, and that their regulatory efforts offer no real public benefit. A huge body of scientific research now reaches contrary conclusions, however, showing that water quality in downstream waterways is integrally connected to the preservation and protection of small upstream tributaries.[19] That research puts regulators in a somewhat challenging position, for small streams are not easy resources to protect. Their fragility and abundance often put them in the way of people's plans, and their intermittent or ephemeral nature places them at the legal boundaries of land use and environmental protection, zones where federalism questions have become somewhat fraught.[20] But their environmental importance is now beyond reasonable doubt.

The second lesson is that the drivers of the present controversy are not what most people think they are. In his plurality opinion in *Rapanos v. United States*,[21] Justice Scalia implied that a creeping jurisdictional expansion was the key mechanism through which the agencies had accomplished their alleged regulatory overreach.[22] The present debates over the Clean Water Rule reflect the same emphasis; the battle over

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18. *See* Clean Water Rule, *supra* note 2, at 37,058-59.

19. *See* U.S. EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Knowledge* (2015).

20. *See* Dave Owen, *Urbanization, Water Quality, and the Regulated Landscape*, 82 U. COLO. L. REV. 431, 476-80 (2011).

21. 547 U.S. 715 (2006).

22. *Id.* at 722.

jurisdiction, one would think, is where all the stakes lie. But the reality is quite different. Jurisdiction was already extensive four decades ago. What has changed most, and what matters just as much as the jurisdictional boundary itself, is what agencies *do* within their jurisdiction. For little streams (and some wetlands), in the initial years of Clean Water Act implementation, the EPA and the Corps did not do much, even for aquatic features over which they clearly claimed jurisdiction. But over the past several decades, through Democratic and Republican administrations, the degree of protection for smaller waterways has grown, so that waterways that once could be filled almost at will now receive the protection of permitting programs. That shift, more than any change in the scope of jurisdiction, explains much of the intensity of today's controversies.

The third lesson is broader, encompassing the meaning of stream protections for the larger history of environmental law. Many contemporary accounts of that history portray environmental law as a stagnant field dominated by zero-sum conflicts, with passive, sclerotic, and sometimes captured agencies stuck between the warring environmental and industry camps. Key elements of the stream-protection story are intriguingly inconsistent with these narratives. This is decidedly not a story of stagnation; environmental protection has expanded, dramatically, and is becoming more sophisticated. Nor is it simply a story of heavily politicized policymaking—though the politics of stream protection are intense—or of captured agencies. Many changes in protection emanated from relatively conservative regions of the country, often through agency-led policy innovations, and major developments occurred under Republican presidential administrations. Nor, finally, is it simply a story of zero-sum conflict. While the scope of regulatory protections has expanded, federal agencies used techniques like general permitting and compensatory mitigation to make their expansions more palatable for regulated entities. They also drew upon the growing experience of regulators, regulated entities, mitigation bankers, and consulting firms, to make regulation more efficient even as its scope has grown.

The next turn in this saga is far from clear, and if the present attacks on Clean Water Act jurisdiction succeed, the whole story will look much less rosy. The still-unfolding history of stream regulation, like most history, also is messy, and this is not a story with a single clear moral. Indeed, the clearest lessons that emerge from this story are reminders of how complicated and unpredictable environmental lawmaking can be. Jurists should approach issues of the scope of Clean Water Act

jurisdiction with those lessons—rather than sky-is-falling rhetoric—in mind.