

INTRODUCTION

CONTROVERSIES SURROUNDING THE 2015 CLEAN WATER RULE

Congress passed the Clean Water Act¹ in 1972 to restore and maintain the quality of our nation's waters. The statute's regulatory programs apply to "navigable" waters, which Congress defined as "the waters of the United States." Determining which waters fall within this jurisdictional standard has led to significant litigation over the years, creating a confusing and complex body of law. In an attempt to clarify any ambiguities, on June 29, 2015, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers issued a joint rule defining the term "waters of the United States."

Though most agree that a rule clarifying the circumstances in which the agencies have jurisdiction is both necessary and important, the Clean Water Rule has sparked controversy among environmentalists, regulated industries, and states. These stakeholders filed numerous legal challenges to the Rule across the country, and the Sixth Circuit recently issued a nationwide stay enjoining enforcement of the Rule.

With the legality of the Clean Water Rule under scrutiny, Lewis & Clark Law School hosted a symposium to encourage discussion about the contested portions of the Rule. Many of the nation's prominent Clean Water Act scholars attended the symposium and wrote articles for publication in this issue of *Environmental Law*. The articles discuss a wide array of issues regarding the Clean Water Rule, covering everything from whether it properly excluded groundwater to whether jurisdictional determinations are final agency actions.

Professor Erin Ryan examines the Supreme Court's case law surrounding Clean Water Act jurisdiction and explains how the Clean Water Rule reconciles the divergent Supreme Court opinions in *Rapanos v. United States*.² Professor William Funk discusses whether the U.S. Army Corps of Engineers' formal jurisdictional determinations constitute "final agency

¹ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

² 547 U.S. 715 (2006).

actions” under the Administrative Procedure Act,³ and suggests the related case pending before the Supreme Court—*U.S. Army Corps of Engineers v. Hawkes Co.*⁴—should and will find these determinations to be “final agency actions.”

Professors Rachael Salcido and Karrigan Bork analyze the Clean Water Rule’s approach to anthropogenic habitat creation and modification, and propose that an effective rule should regulate anthropogenic nature, such as manmade ditches, to effectively address environmental degradation. Professor Patrick Parenteau argues the use of a bright-line provision categorically excluding all waters lying more than 4,000 feet from a jurisdictional water’s “ordinary high water mark” or “high tide line” is arbitrary and capricious under the Administrative Procedure Act. Professor Michael Blumm and Steven Thiel likewise criticize the Clean Water Rule for its categorical exclusion of groundwater, contending such an exclusion conflicts with the purposes, terms, and judicial interpretations of the Clean Water Act. Finally, Professors Craig Johnston and Gerald Torres consider how the Clean Water Rule addresses agriculture, silviculture, and ranching. In particular, Professors Johnston and Torres analyze the Rule’s exclusion of farmed waters from the definition of “adjacent,” suggesting that this exclusion violates the Clean Water Act.

Environmental Law would like to extend its appreciation and gratitude to the authors who contributed to this issue, the symposium presenters and participants, and all those involved in making the symposium a success. We hope this symposium issue fosters meaningful discussion on the debate surrounding the Clean Water Rule and encourages further discourse on this significant topic as the controversy unfolds in the upcoming years.

Emma Bruden
Symposium Editor

³ 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

⁴ *Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994 (8th Cir.), cert. granted *sub nom.* *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 615 (2015).