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Commentary

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The public has seen an incredible increase in both frequency and boldness of the United States Environmental Protection Agency's (EPA) overreach that severely impacts local communities, industry, businesses, and in some instances, private citizens who are simply trying to enjoy the fruits of their own private land. The overexertion of federal power rears its head in all shapes and sizes—to the casual farmer enjoying his secluded piece of acreage to the EPA officials that are absolved because of their job title.

David vs. Goliath

Take for an example the oft-publicized account of Andy Johnson, a Wyoming welder who had built a stock pond on his nine-acre farm for a small herd of livestock. Because the pond was filled by a natural stream, the EPA claimed that the Johnsons required the EPA's permission to use the land as they desired. Threatening devastating daily fines of $37,500, the story made headlines and painted the EPA as schoolyard bullies. In the end, the EPA caved to public pressure and settled the case in May 2016. The settlement: planting some willow trees around the pond and building a partial fence to control the livestock.

Do As I Say – Not As I Do

Or consider the Gold King Mine spill — the lesson there being not so much government overreach as pure government hypocrisy. Yet, still overreach in its own right. In August 2015, an abandoned mine in Colorado had been leaking toxic-waste-filled water into the Animas River—a water source for the 17,000 residents of Durango, Colorado, and many more downstream. In attempting to stop the leak, EPA workers caused a plug to break, releasing millions of gallons of contaminated water into the river. The EPA readily took responsibility for the catastrophe, but it was announced last month that the Department of Justice will take no action against the EPA officials.[1] The problem, of course, is that private individuals and entities causing similar calamities would likely be prosecuted criminally and/or subject to staggering monetary fines.[2]

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Clean Water Act – Some Background

The Federal Water Pollution Control Act, enacted in 1948 and later reorganized and expanded in 1972, is known today as The Clean Water Act (CWA). The CWA establishes a structure for regulating discharges of pollutants into the waters of the United States and regulates quality standards for surface waters. When passed in 1972, Congress sought to regulate interstate commerce by prohibiting discharges of pollutants into

the nation's "navigable waters." This was originally understood to include bodies of water that could be used to transport goods from one state to another. Today, "navigable waters" means something completely different.

The original mandate of the CWA was modeled on the idea of "cooperative federalism," the concept being that states and the federal government would address different aspects of the challenges presented by discharges affecting water quality. It was conceived as a partnership of sorts in order to better manage identified pollution sources through a range of pollution control programs. Congress specifically reserved to the states "the primary responsibilities and rights to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his or her authority. . ." 33 U.S.C. § 1251(b). Congress had meant to leave in place "States' traditional and primary power over land and water use." *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001). Included within these states' powers were the development of Total Maximum Daily Loads (TMDLs) to address particular bodies of water experiencing pollution problems, and the issuance and enforcement of permits through the National Pollutant Discharge Elimination System (NPDES), which governs discharges from industrial and municipal point sources. States were also assigned the responsibility of developing and implementing strategies for addressing "nonpoint" sources of pollutant discharges, resulting from local and regional land use choices.[3]

On the other hand, the CWA assigned the executive branch of the federal government — the EPA and the U.S. Army Corps of Engineers — other functions, such as: (i) scientific analysis and standard setting; (ii) development of nationally uniform technology based standards for industrial sectors and municipal discharges; (iii) addressing extreme dangers in specific locations (oil spills, toxic hotspots, and situations posing imminent and substantial endangerment); and (iv) overseeing and funding state programs to ensure consistency with broad policies and requirements.

The small-time farmer in Wyoming and the Gold King Mine pollution are high-profile examples of EPA overreach and hypocrisy. But for those seeking to learn about and prepare for nascent threats to private property rights and the system of federalism, one need look no further than the EPA's new model for TMDLs and its potential new expansive rule—The Clean Water Rule. The CWA was never intended to regulate smaller noncontiguous bodies of water such as streams, ditches, ponds, and creek beds, which would impose an unnecessary burden on economic activity. Between the federal government's newfound TMDL blueprint currently being enforced in the Chesapeake Bay, and an expanded definition of "Waters of the United States," the EPA has explored and harnessed new ways to expand its reach over the last few years. This article serves as a short precautionary primer to what could be a substantial change in the way the EPA and the U.S. Army Corps enforce the CWA in the near future.

TMDLs And Continuing Overreach By The Federal Government

In March 2016, the United States Supreme Court declined to hear a challenge to the EPA's imposing plan to limit the amount of pollutants flowing into the country's largest estuary, the Chesapeake Bay.[4] The court's declination essentially bowed to EPA's expansive complex and burdensome plan to rehabilitate the bay. Perhaps for the first time, the EPA has exercised its authority over vast areas of "nonpoint sources" of pollution—diffuse sources (*e.g.*, water runoff) that are traditionally left to the states to manage. A federal judge put everything in perspective when she singled out in brazen fashion the losers in this controversy: "rural counties with farming operations, nonpoint source polluters, the agricultural industry, and those states that would prefer a lighter touch from the EPA."

In recent years, the EPA has used intricate plans, as it has for the Chesapeake Bay, that measure Total Maximum Daily Load (TMDL): a set amount of acceptable pollution that a body of water can receive legally while still meeting water quality standards. The TMDL for the Chesapeake Bay—a 64,000-square-mile watershed that includes six states and Washington D.C.—divided the body of water into 92 subsections, setting TMDL allocations for each. The EPA set specific limits on the amount of nitrogen, phosphorus, and sediment that can run off into the bay from various sources, which include agriculture, urban runoff, forestry, and septic systems. In unprecedented fashion, the TMDL hijacked state prerogatives. The massive power grab

allows the EPA to determine where farmers can farm, where developers can develop, and where businesses can do business. Although states and local governments retain the authority to enforce the TMDL limits as directed by the EPA, EPA has the authority to interrupt and take over if pollutant limits are not satisfied. Of course, complying for any of these enterprises costs capital, and reducing production to stay in line with the EPA's nutrient limits can have obvious repercussions for businesses and markets.[5] These local human and social impacts are simply not contemplated by the TMDL. Overall, the TMDL's set requirements can paralyze state and local government land use programs with a rigid and complex framework of federal zoning, imposing significant regulatory burdens that impede growth and discourage innovation.

More than 47,000 TMDL plans (most drafted and enforced by states) have been completed within the United States—which can be costly and burdensome for states, municipalities, companies and individuals. And many of those thousands of TMDLs have not yet been implemented and enforced. The Chesapeake Bay TMDL may be the beginning of a new emboldened push by the EPA to regulate other watersheds in the United States, including more and more nonpoint sources of pollution—areas traditionally reserved for state and local regulators. EPA's Chesapeake TMDL blueprint can likely serve as a model for a federal regulatory takeover of local planning and land-use decisions in other watersheds around the nation, such as the Mississippi River—a massive area that comprises approximately 40 percent of the continental United States. With what seems to be a new trend of more dirty water catastrophes, we can believe that more federally created TMDLs are on the horizon. As the Supreme Court in *Rapanos* exhorted 10 years ago, a TMDL under the auspices of the EPA can "function as a de facto regulator of immense stretches of intrastate land."[6]

The Clean Water Rule—More Overreach On The Horizon

The potential new wave of major federal regulation of state and private land, as seen in the Chesapeake Bay TMDL, is not the only expansion of EPA power that is worrisome. There is yet another issue that farms, factories, businesses, and industry may have to prepare for: a clumsy and potentially expansive new EPA Rule—The Clean Water Rule—that seeks to enlarge the definition of "waters of the United States." The rule would enhance EPA's regulatory reach into areas of the country previously untouched by the CWA, further encouraging the EPA and the U.S. Army Corps to more zealously police private land.

On May 27, 2015, the EPA and the Corps jointly announced a rule defining the scope of waters protected under the CWA, effectively revising regulations that had been in place for more than 25 years. Revisions were made in light of 2001 and 2006 Supreme Court rulings that interpreted the regulatory scope of the CWA more narrowly than were the agencies and lower courts.[7] The rule, referred to as The Clean Water Rule, became effective on August 28, 2015, but was later stayed for further study by the U.S. Court of Appeals for the Sixth Circuit. As of this writing, there has been no decision on The Clean Water Rule's future.[8] It also remains to be seen whether President-elect Donald Trump will rescind the rule.

The new rule revised the administrative definition of "waters of the United States." It proposes to categorically assert federal government jurisdiction over interstate waters, territorial seas, impoundments of jurisdictional waters, covered tributaries, and covered adjacent waters. The rule also establishes that Justice Kennedy's "significant nexus" test, as stated in *Rapanos*, will be applied on a case-by-case basis over things like prairie potholes, Carolina and Delmarva bays, pocosins, Western Vernal pools in California, and Texas coastal prairie wetlands. Further, waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, and waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments, or covered tributary, and similarly situated waters are also subject to jurisdiction. For many states, like New York, these new limitations really have no limits at all.[9]

Although the EPA claims that the new definition does not expand the federal government's jurisdiction, a plain reading of the rule and the EPA's own economic analysis seem to bely that argument.[10] The rule establishes a broader definition of "tributaries," which for the first time includes ditches and streams that only flow after rain. The rule also allows the agencies to regulate intermittent and ephemeral drainages, classifying them as tributaries whereas before the agencies required an analysis of their "significant nexus" to traditional

navigable waters. Further, the rule adopts a new definition of "neighboring," which includes areas that were not previously federally regulated. For example, nonwetlands located more than a quarter of a mile from a traditional navigable water or similar features located within a floodplain and up to 1,500 feet from the feature.[11] Among others, the EPA and the U.S. Army Corps retain extensive authority to interpret certain ambiguous definitions as they see fit. What is also troubling, the EPA and the Corps have sought to further erode basic statutory farming exemptions. The EPA has actually claimed that the furrows created by plowing a field are "small mountain ranges" or "mini uplands" that can raise regulatory issues concerning the discharge of pollutants.[12] The fear, as indicated in a recent U.S. Senate Report from the Committee on Environment and Public Works, is that the proposed Clean Water Rule codifies or at least supplements these types of outlandish findings that ignore basic farming and other exemptions.[13]

Among the basic difficulties in enforcing the new proposed rule, inconsistent application by regulators is likely to result. If approved by the judiciary, the rule will likely lead to more litigation, project delays, more applications and adjudication of permits, and thus, higher costs. Under the new rule, there are likely to be more positive jurisdictional determinations as well—a finding by the EPA that a subject piece of land or water falls under the auspices of the EPA's regulatory mission pursuant to the CWA.[14] Jurisdictional determinations are important, but they cost money too: consulting fees, engineering tests, delays in starting or continuing business, among others. Confusion as to these expenditures and permit costs increases financial risk, which only provides disincentive to follow through with a good business idea.

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The last few years have seen a flurry of tainted water controversies—from the Chesapeake Bay to the Mississippi River Basin to the Newark Public School System to hydraulic fracturing in Pennsylvania and Texas to the Flint, Michigan water crisis. Despite what appears to be an increase in water catastrophes within our borders, the issue does not seem to resonate with the media and certainly was not a centerpiece of the recent Presidential campaign. Cynthia Giles, the EPA's assistant administrator for the Office of Enforcement and Compliance Assurance, recently referred to the EPA's Next Generation Compliance Initiative as a way to maintain "tough enforcement" as a pillar of the EPA's compliance efforts, which she expects to remain strong after the current presidency ends.[15] It is perhaps too early to predict how President-elect Donald Trump will pursue water issues and enforce regulation: after all, in a May 2016 speech he indicated he would rescind the Clean Water Rule, but shortly thereafter he stated that he is a "huge believer in clean water and clean air. Crystal clean water and air. I'm a very big believer in that and we have a lot to do with that—keeping our water clean, and keeping our air clean."[16] The last few years have seen potential seismic shifts in water regulation and maybe that all goes away with a Trump presidency. Or maybe it doesn't. Those who cherish federalism, free enterprise, and private property should stand prepared.

Endnotes

1. "DOJ Shows 'Hypocrisy' After No Gold King Charges, Reps Say," October 13, 2016, Law 360.

2. See the Heritage Foundation's article on this controversy, "Sauce for the Goose Should be Sauce for the Gander": Should EPA Officials Be Criminally Liable for the Negligent Discharge of Toxic Waste into the Animas River?". Larkin, Paul J., and Silber, John-Michael. September 10, 2015.

3. There are two types of pollution sources: point sources and nonpoint sources. Point sources are discernible, confined and discrete conveyances, including but not limited to any pipe, ditch, channel, funnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. A nonpoint source is defined as any source of pollution that is not characterized as a point source. 33 U.S.C. § 502(14). Nonpoint sources include agricultural storm water discharges and return flows from irrigated agriculture. Nonpoint sources are often difficult to observe, and vary over time and space based on weather and geographic conditions, making monitoring of such sources costly. There are far more nonpoint sources than point sources.

4. American Farm Bureau Federation v. U.S. Environmental Protection Agency, 792 F.3d 281 (3d Cir. 2015).

5. For example, Pendleton County, West Virginia, was one of eight counties that challenged the EPA's TMDL plan. In Pendleton County's case, it was fearful that "A significant amount of [its] farmland [would] have to be removed from production due to its proximity to waterways and the resulting impact on the Bay TMDL. . ." "Consequently, people who would be displaced from farming would have little to no opportunity to replace their loss."

6. *Rapanos v. United States*, 547 U.S. 715, 738 (2006)(plurality opinion).

7. In 2001, the U.S. Supreme Court ruled that the Army Corps had no authority to assert control over isolated bodies of water, particularly, an abandoned sand and gravel pit. *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001). In 2006, the Court invalidated the government's claim of jurisdiction when it rejected the Army Corps' argument that it could prevent a landowner from doing anything with a pond that was near a ditch that eventually drained into a navigable water. *Rapanos v. United States*, 547 U.S. 715 (2006).

8. In early November 2016, over 50 business and municipal challengers to The Clean Water Rule submitted merit briefs to vacate the proposed rule.

9. An analysis of the geography of New York State conducted by the American Farm Bureau Federation found that 98 percent of New York's land mass was within the 4,000 foot buffer and 78 percent was within the 1,500 foot buffer. Similar studies were conducted for the states of Missouri, Montana, Oklahoma, Pennsylvania, Virginia, and Wisconsin. The analyses can be found at http://www.fb.org/newsroom/news_article/344/.

10. See the EPA's Economic Analysis of the EPA-Army Clean Water Rule, completed on May 20, 2015.

11. For an analysis of potential problems with the new Clean Water Rule, see www.ditchtherule.com and the American Farm Bureau Federation's article titled, "Fact or Fiction? Shedding the light on EPA's "Facts" about the new "waters of the U.S." rule." June 11, 2015.

12. See the United States Senate Report dated September 20, 2016, entitled, "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."

13. *Id.*

14. See the EPA's Economic Analysis of the EPA-Army Clean Water Rule, completed on May 20, 2015

15. "EPA Enforcement Will Stay Tough Post-Obama, Giles Says," by Rodrigues, Juan Carlos. Law360. August 9, 2016.

16. http://www.lcv.org/assets/docs/presidential-candidates-on-water.pdf. ■

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