

Bond Case Briefs

Municipal Finance Law Since 1971

Local Governments Divided over New Clean Water Rules.

After court rulings muddled up the law, new federal rules seek to clarify which bodies of water have to abide by the Clean Water Act.

Pittsburgh and Philadelphia back proposed rules put out by the Obama administration in April that would spell out which bodies of water are subject to the federal Clean Water Act. They say the new rules would guarantee clean drinking water and provide sorely needed clarity to a muddy area of law.

Pittsburgh's famous three rivers, which provide drinking water to the city and region, are far cleaner now than they were before the Clean Water Act took effect, said Erika Strassburger, chief of staff to councilman Dan Gilman, who sponsored a measure supporting the federal rules. The improvements come, in part, because of the law's protections for the headwaters and streams that feed those rivers, she said.

"When a smaller water body that one might not consider to be important is not covered under the Clean Water Act ... there's a problem there, because ultimately all of our streams and rivers do connect," Strassburger said.

The National Association of Counties, though, worries that the new rules will add more uncertainty and potentially introduce a new layer of red tape to construction projects. "This proposal does more harm than good and creates more confusion than it seeks to clear up," said Brian Namey, a spokesman for the group.

The split among local governments reflects an even greater divide over the scope of the Clean Water Act. Congress passed the original law in 1972, but a series of court decisions since 2001 left in question which waters were regulated by it.

Everybody agrees that the law applies to navigable rivers and lakes. Beyond that, though, things get trickier. Federal judges, particularly on the U.S. Supreme Court, have trimmed federal authority to regulate isolated waters — such as abandoned quarries now filled with water — and wetlands. But their rulings have often raised as many questions as they answered. Efforts to get Congress to clarify the law have stalled for years, prompting the Obama administration to step in.

In April, the Environmental Protection Agency and the U.S. Corps of Army Engineers spelled out which bodies of water they consider "waters of the U.S.," which are regulated by the Clean Water Act. The [88 pages of rules and explanations](#), though, unleashed a torrent of criticism and debate.

But the controversy goes back to a 2006 decision by the high court in *Rapanos v. U.S.* No majority emerged in the case. Instead, four conservative judges crafted one standard for what qualifies as "waters of the U.S.," which would have largely restricted the law to permanent waterways. Four liberal judges dissented. And Justice Anthony Kennedy agreed with the result of the conservative bloc, but created a looser standard for arriving at his conclusion.

The Obama administration's proposals rely heavily on Kennedy's argument that the Clean Water Act applied to waters that have a "significant nexus" to navigable waters. Opponents of the draft rules argue that they will significantly expand the law's reach with little benefit.

Dusty Williams, the general manager and chief engineer of Riverside County's Flood Control and Water Conservation District in California, said the changes would have a big impact on existing drainage systems as well as a new construction project slated for next year.

Extending the reach of the Clean Water Act, he said, would require the county to get more permits when it built new drainage ditches or fixed its existing ones. "What that means is time and money," Williams said. "We're like a lot of local governments: We haven't got a great deal of money."

Even worse, he said, the added time it takes to comply with new regulations could threaten public safety. "We put in things to safeguard people and safeguard property. If we can't get to them to maintain them on a regular basis, they can deteriorate and not offer the protection they were designed to offer, and people can be put at risk," he said. He argued that under the Clean Water Act his agency would have to spend so much time and money getting permits to comply with the law that it wouldn't be able to keep up maintenance on existing ditches and drainage pipes.

Julie Ufner, who lobbies on land use and environmental issues for the National Association of Counties, is also concerned that, under the proposed rules, municipal storm sewer systems could be considered waters of the U.S., which would change the way they are regulated.

"The concern is that, if the system becomes a water of the U.S., you're not only responsible for the system at the point of discharge, but responsible at the point of the pollutant entering the system anywhere along the line," she said. That would require localities to pass ordinances to control pollution from plastic bags, fertilizer or other litter, she said.

Federal officials and proponents of the draft rules say the regulations would make the permitting process clearer. The updates would show how the EPA and the Army Corps of Engineers decide which waters fell under the Clean Water Act, to reflect the high court's narrowing of its scope, they say.

"There's never been any formal, enforceable response to some Supreme Court decisions. Because of that, you've had all kinds of confusion out in the real world," said Lynn Thorp of Clean Water Action, which supports most of the proposed rules.

The group worked with city officials in Pittsburgh and Pennsylvania to support the federal proposals, arguing that the drinking water of 117 million people could be affected if streams and wetlands were not protected.

"Cities are being very wise and taking a common-sense approach to say, we'd rather not find out what would happen if we leave streams and wetlands vulnerable," Thorp said.

Jan Goldman-Carter of the National Wildlife Federation said the rulemaking process is "the best opportunity in a generation and for the foreseeable future" to use both science and the law to determine the proper scope of the Clean Water Act.

The federal agencies are accepting public comments on the proposed rules until Oct. 20. The agencies will consider those comments before issuing a final rule.

