

Federal Water Updates

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Waters of the United States (WOTUS)

Post-Arizona Ruling

- ▶ Aug. 30, 2021: Arizona District Court remanded and vacated the NWPR. *Pasqua Yaqui Tribe v. EPA*, No. 20-cv-00266.
- ▶ Confusion and uncertainty over the scope of vacatur – does it apply nationwide?
- ▶ Sept. 3, 2021: EPA and Army Corps announce they will no longer implement the NWPR and will return to pre-2015 regulatory regime.
- ▶ Sept. 15, 2021: Colorado issues guidance “recommending” that project proponents with negative AJDs issued between April 26 and Sept. 3 either get a new AJD or apply for a 404 permit.
- ▶ Sept. 16, 2021: EPA and Army Corps post guidance on website. AJDs completed before Aug. 30 are “safe” under NWPR. AJDs pending on or submitted after Aug. 30 are to be completed under pre-2015 regime. This guidance also reiterated the Corps’ longstanding policy position that AJDs “are generally valid for five years unless new information warrants revision prior to the expiration date.”
- ▶ Sept. 17, 2021: Northern District of California – in two cases, the court remanded the rule without vacatur. No. 20-cv-3005 and 18-cv-3521. In one order, Judge Seeborg accepted NMA coalition’s argument that vacatur requires a merits determination and the U.S. has not confessed legal error, only asserted policy differences.
- ▶ Sept. 27, 2021: New Mexico District Court vacated NWPR. No clarification on whether it is nationwide but presume the agencies will treat it as nationwide. *Navajo Nation v. Michael Regan*, No. 20-cv-602.

Next Steps

- Pre-2015 regulatory regime in place for now (1980s regulations + *Rapanos* guidance)
- Litigation is ongoing
 - Arizona industry coalition still planning to appeal the decision and request a stay pending appeal in the next few weeks.
 - Helpful language from California remand orders.
 - But...New Mexico ruling makes things more complicated. DOJ could (but is probably unlikely to) appeal. No industry intervenors.
- Administrative/Rulemaking
 - Still anticipating a 2-step “repeal and replace” rulemaking process.
 - Proposed Repeal Rule could be out for public comment by end of 2021.
 - Agencies have promised 10 regional roundtables – late 2021 or early 2022?
 - Potential issues to watch in Replacement Rule: expansion of tributary definition, removal of blanket exclusion of ephemerals, broader view of adjacency, resurrection of OHWM, any changes to the waste treatment system exclusion, environmental justice.
 - We will need your help – what do you want to see (or not see) in any new WOTUS Replacement Rule?

CWA Sec. 401 State Certifications

Recent Administrative Activity

- ▶ June 2021: EPA/Army Corps published Notice of Intent to Reconsider and Revise 2020 Rule.
- ▶ Spring 2021 Unified Regulatory Agenda indicated that a new proposed rule expected Feb. 2022.
- ▶ Aug. 19, 2021: EPA/Army Corps Joint Memo implementing the 2020 Rule until a new rule is completed.
 - ▶ No opportunity for public to comment on this guidance memo.
 - ▶ “Maximum flexibility for states and tribes to best govern their water resources”
 - ▶ Extends “reasonable period of time” to the one-year statutory maximum for certification of the remaining 41 Nationwide Permits.
 - ▶ Appears to allow states to “reopen” a 401 certification any time during the one-year period.

Litigation

- ▶ Litigation is ongoing.
- ▶ Two courts have remanded the case to the agencies without vacatur - *Del. Riverkeeper Network v. EPA*, No. 2:20-CV-3412 (E.D. Pa.) and *S.C. Coastal Conservation League v. Wheeler*, No. 2:20-cv-03062 (D.S.C.).
- ▶ Still waiting to see what court will decide in N.D. Cal. (three consolidated cases, consolidated under the caption “*In re Clean Waters Act Rulemaking*” no. 3:20-cv-04636). EPA requested remand without vacatur. Hearing on Sept. 30, 2021 – judge ordered additional briefing on the vacatur issue due Oct. 4, 2021.

Issues to Watch:

- Potential issues to watch in the new rulemaking effort:
 - Overall expansion of states’ and tribes’ say in granting 401 certification, allowing them to delay or block certain projects.
 - Expansion of “reasonable period of time” – to the full one-year statutory period.
 - Expansion of the “scope of review” - could be expanded to the activity as a whole.
 - CWA Section 401(a)(2) “may affect” determination.
- Also watch situation with Polymet/Fond du Lac Band of Lake Superior Chippewa
 - Fond du Lac Band is 70 miles south of proposed mining project.
 - Earlier this year, Army Corps suspended 404 permit after a court found that EPA failed to make “may affect” determination and notify the Band.
 - Next Steps: Contested case hearing - prehearing conference scheduled for Nov. 1, 2021. The hearing will be on the narrow question of whether the bentonite clay lining planned for the mine's waste basin would be sufficient to keep pollution contained.

Groundwater/ *Maui* Functional Equivalent Test

County of Maui v. Hawaii Wildlife Fund

- ▶ April 2020: Supreme Court issued opinion in *County of Maui v. Hawaii Wildlife Fund*.
- ▶ The Court created a multifactor test for determining whether a discharge that travels indirectly from a point source to WOTUS is the “functional equivalent” of a direct discharge.
- ▶ Factors include but are not limited to:
 - 1) transit time,*
 - 2) distance traveled,*
 - 3) the nature of the material through which the pollutant travels,
 - 4) the extent to which the pollutant is diluted or chemically changed as it travels,
 - 5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source,
 - 6) the manner by or area in which the pollutant enters the navigable waters, and
 - 7) the degree to which the pollution (at that point) has maintained its specific identity.
- ▶ “Time and distance will be the most important factors in most cases, but not necessarily every case.”
- ▶ ***Maui* case is making its second trip through the courts. Hearing scheduled for Oct. 12, 2021.**

Administrative/Rulemaking:

- Dec. 2020: EPA solicited public comment on guidance document applying the *Maui* decision in NPDES permitting. Guidance was finalized and published in the Federal Register in Jan. 2021.
 - Three threshold conditions: (1) actual discharge of a pollutant to a WOTUS; (2) discharge of pollutants that reaches or will reach a WOTUS must be from a point source; and (3) only a subset of discharges of pollutants to groundwater that ultimately reach a WOTUS are the “functional equivalent” of a direct discharge to WOTUS.
 - Added an 8th Factor – “system design and performance.”
 - Put thumb slightly on the scale - “Compared with the hundreds of thousands of NPDES permits that have been issued since the inception of the program, the number of NPDES permits issued for discharges through groundwater is extremely low. **EPA anticipates that the issuance of such permits will continue to be a small percentage of the overall number of NPDES permits issued** following application of the Supreme Court’s “functional equivalent” analysis. “
- Sept. 2021: EPA rescinded the guidance in a 2-page memo:
 - EPA’s 2 problems with the guidance: (1) The 8th factor, considering system design and performance, is not consistent with the CWA or Supreme Court’s decision in *Maui* because it inappropriately “introduce an element of intent” that is not consistent with the Supreme Court’s decision; and (2) the guidance was issued “without proper deliberation within EPA or with our federal partners.”
 - EPA also appeared to take aim at industry arguments made in ongoing litigation – stated its view that “the existence of a state groundwater program does not obviate the need for NPDES permitting authorities to apply the factors that the Supreme Court identified in its decision in deciding whether a discharge from a point source through groundwater that reaches jurisdictional surface water requires an NPDES permit.”

Water Quality Criterion

Aluminum

- ▶ EPA's Aluminum Technical Support Document (TSD) for implementing 2016 aquatic life criteria for aluminum in freshwater.
 - ▶ Draft TSD issued in 2018 but not finalized. Will go out for second round of public comment this fall.
 - ▶ Oregon criteria finalized in March 2021.
 - ▶ EPA Region 7 approved Iowa's AI WQC revisions recognizing use of an approved method to analyze bioavailable aluminum.

Selenium

- ▶ EPA's Selenium Implementation Guidance also expected to be issued for public comment this fall.
- ▶ Expected to be a suite of four documents, covering the following:
 - ▶ Adoption of water quality standards
 - ▶ Monitoring of fish tissue
 - ▶ Permitting
 - ▶ Waterbody assessment

Environmental Justice

- ▶ **EJ, equity, and tribal consultation all remain a top priority for the Biden administration**
 - ▶ “Whole of government approach”
 - ▶ Likely will affect siting and permitting of facilities
- ▶ **Expect Heightened Attention on Enforcement**
 - ▶ EPA Administrator Regan directed all EPA offices to “strengthen enforcement of violations of cornerstone environmental statutes in EJ communities”
 - ▶ EPA’s Office of Enforcement and Compliance memos

Other Topics/Activities to Watch:

- White House Environmental Justice Advisory Committee (WHEJAC) and EPA’s National Environmental Justice Advisory Council (NEJAC)
- Justice 40 Initiative
 - Interim implementation guidance for this initiative includes a broad definition of what constitutes a disadvantaged community – could give a glimpse into how broadly this administration will interpret EJ
 - Additional guidance expected this fall.
- New EJ and climate screening tool from CEQ expected this fall.
- Watch state activity (legislation, regulation, and permitting or siting decisions) on EJ
 - As of March 2021, 10 states have already codified EJ in some form, while 13 other states have pending legislation.

Questions?

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Thank you!