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# Turbulent Waters

June 23, 2020

1

1



## Agenda

- Welcome
- History of Regulation of Waters of the U.S.
- CWA Regulatory Update
- Groundwater Update
- NWP 12 & Other Developments
- Questions

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2



## Welcome

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Thank you for joining us today!

- About Us
  - Environmental Practice Group: Offices in Colorado, Missouri, Nebraska, Wisconsin, and Texas
  - Practice Group Leader: Jason Flower, St. Louis, MO
- Today's Presenters:
  - Daniel Fanning, Associate, St. Louis, MO
  - Coty Hopinks-Baul, Senior Counsel, Austin, TX
  - Karin Jacoby, PE, Partner, Kansas City, MO

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3



## Ebb & Flow: A Brief History of Federal Water Regulation

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- *Navigable Waters before the Rivers and Harbors Act*
- *Rivers and Harbors Act*
- *Federal Water Pollution Control Act*
  - Pre-2015: "Waters of the United States"
    - *Riverside Bayview Homes*
    - *SWANNC*
    - *Rapanos*
  - 2015 WOTUS Rule

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## Ebb & Flow: A Brief History of Federal Water Regulation

### Legislation pre-Rivers & Harbors Act of 1899

- 1789: *Waters navigable from the sea*
- 1793: *Navigable rivers*
- 1812: *River or bay of the United States*
- 1838: *Bays, lakes, rivers, or other navigable waters of the United States*

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## Ebb & Flow: A Brief History of Federal Water Regulation

### Early Case Law

- *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829)
  - *Navigable Creek & Tributary of Delaware River: Not jurisdictional*
  - *Congress silent re: Black Bird Creek; therefore, between DE and her citizens*
  - *Chief Justice Marshall: no Dormant Commerce Clause*
- *Penn. v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855)
  - *Navigable River (Ohio River): Jurisdictional*
  - *Congress had spoken re: Ohio River*
- *Gilman v. Philadelphia*, 70 U.S. 713 (1865)
  - *Navigable River & Tributary of Delaware River: Not Jurisdictional*
- *The Daniel Ball*, 77 U.S. 557 (1870)
  - *Navigable River & Tributary of Lake Michigan: Jurisdictional*
  - *Commerce Clause*

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## Used in Interstate Commerce

*The Daniel Ball*: “navigable waters”

- Grand River – Lake Michigan
- Engaged in intrastate commercial activity
- Rejected common law test
- New test for U.S.: Navigable in fact
  - “used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water”
- Nothing to do with water quality

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## Not all Navigable Waters were WOTUS

*Gilman v. Philadelphia* – Power of Congress to Regulate Commerce

- “Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose, they are the public property of the nation, and subject to all the requisite legislation by Congress.”

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## Not all Navigable Waters are WOTUS

*Gilman v. Philadelphia* – Powers Reserved to the States

- States and federal gov't may both regulate in some areas
- Lack of clear delineation in the regulatory power of the states and federal government “but it does not necessarily involve collision or any other evil. None has hitherto been found to ensue. The public good is the end and aim of both.”

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## Not all Navigable Waters are WOTUS

*Gilman v. Philadelphia* – Power of States to Regulate Navigable Waters

- Would Court’s conclusion “arm the states with authority potent for evil and liable to be abused”?
- “The safeguard and remedy are... the virtue and intelligence of the people.”

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## Not all Navigable Waters are WOTUS

*Gilman v. Philadelphia* – Power of States to Regulate Navigable Waters

- State’s unwise use of “the power here in question, the evil consequences will fall chiefly upon her own citizens. They have more at stake than the citizens of any other state.”
- “Hence there is as little danger of the abuse of this power as of any other reserved to the states.”

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## Not all Navigable Waters are WOTUS

*Gilman v. Philadelphia* – Power of States to Regulate Navigable Waters

- Checks against State abuse of power:
  - “The safeguard and remedy are... the virtue and intelligence of the people.”
  - Supreme Court “to interpose with a vigor adequate to the correction of the evil”
  - Also, “Congress may interpose whenever...necessary by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them.”

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## Rivers & Harbors Act of 1899

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- § 9: Prohibited construction of bridges, etc. over navigable waters of the U.S.
- § 10: Prohibited obstructions and dredge/fill of navigable waters of the U.S.

## Oil Pollution Act of 1924

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- Prohibited the discharge of oil “into or upon the coastal navigable waters of the United States”
  - Defined as “all portions of the sea within the territorial jurisdiction of the United States, and all inland waters navigable in fact in which the tide ebbs and flows”



## Federal Water Pollution Control Act of 1948

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- Provided for “comprehensive programs for eliminating or reducing the pollution of interstate waters and tributaries thereof and improving the sanitary condition of surface and underground waters”
- Due regard given to improvements necessary “to conserve such waters for public water supplies, propagation of fish and aquatic life, recreational purposes, and agricultural, industrial, and other legitimate uses”

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## Federal Water Pollution Control Act of 1948

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- “The pollution of interstate waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of persons in a State other than that in which the discharge originates” was declared to be a public nuisance.

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## Federal Water Pollution Control Act of 1948

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- Significant deference to the States but allowed for enforcement by federal government if States failed to act abate the pollution
- “Interstate waters” defined as “all rivers, lakes, and other waters that flow across, or form a part of, State boundaries”

## FWPCA – Amended in 1972

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- Prohibits the discharge of pollutants into navigable waters without a permit
- The term navigable waters was defined simply as “the waters of the United States, including the territorial seas”
  - Territorial seas defined

## Early Rulemaking

1973 - EPA : 40 CFR 125.2(o)

1. All navigable waters of the United States.
2. Tributaries of navigable waters of the United States
3. Interstate waters
4. Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes
5. Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce
6. Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce

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## Early Rulemaking

1974 - Corps

- 33 CFR § 209.120(d)(1): limited to waters that are navigable in fact
  - “[T]hose waters of the United States which are subject to the ebb and flow of the tide
  - “and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce”
- 33 CFR 209.260: provided Corps’ policy, practice, and procedures to be used in determining extent of jurisdiction

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## 1974 Corps Rule Vacated

- 1975: Natural Resources Defense Council challenges Corps' rule as too narrow
- Congress had asserted federal jurisdiction over the nation's waters to the maximum extent possible under the Commerce Clause
  - Yet Corps had limited itself to traditional tests of navigability

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## 1975 – Interim Corps Rule

- 1975: New interim final rules - similar to EPA's 1973 definition
- Added "wetlands, mudflats, swamps, marshes, and shallows" that are "contiguous or adjacent to other navigable waters,"
  - "artificially created channels and canals used for recreational or other navigational purposes that are connected to other navigable waters," and
  - all other waters that a Corps District Engineer "determines necessitate regulation for the protection of water quality."

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## 1977 – Corps’ Final Rule

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### Waters of the United States

- Territorial seas (discharge of fill material)
- Coastal and inland waters, lakes, rivers, and streams that are navigable in fact, including adjacent wetlands
- Tributaries to navigable waters of the U.S.
- Interstate waters & their tributaries, including wetlands
- Others, such as isolated lakes and wetlands, intermittent streams, etc. – destruction of which could affect interstate commerce

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## More Rulemaking

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- Corps tweaks definition but focus remained broad, based on Commerce Clause
- EPA’s 1981 rule - substantially the same as Corps’ 1977 Rule
- 1986 – Corps’ Migratory Bird Rule

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## But Wait, There's More

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- Clean Water Act Law of 1977
  - Carve-outs to 404 Permit Program
- 1979 U.S. A.G. Memoranda re 404 Permit Program
  - EPA makes the call on reach of navigable waters
- Guidance
  - 1987 Wetland Delineation Manual
  - 1989 Federal Wetland Delineation Manual
    - Withdrawn & subsequently nixed by Congress
- Regulatory Guidance Letters

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## Rough Waters

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- *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)
  - Filling of wetlands 1 mile from navigable in fact lake
  - SCOTUS upheld Corps' decision
  - Adjacent wetlands = inseparably bound up w/ WOTUS
  - "Navigability" not that important
- *Solid Waste Agency of Northern Cook County v. USACE*, 531 U.S. 159, 162 (2001)
  - Abandoned gravel pits – forming isolated ponds
  - Not adjacent to open waters; lacking significant nexus to TNWs
  - Vacated Migratory Bird Rule

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## Rough Waters

- Post-SWANNC
  - Joint Memorandum re: significant nexus
  - Rulemaking (abandoned)
- *Rapanos v. United States*, 547 U.S. 715 (2006)
  - **Justice Scalia – Plurality**
  - **Justice Kennedy – Concurrence**
  - Justice Stevens – Dissent (joined by J. Souter, J. Ginsburg, and J. Breyer)
  - Justice Breyer – Separate Dissent

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## *Rapanos* unleashes a Tempest

- Justice Scalia
  - Relatively permanent waters
    - Not ephemeral tributaries
    - Or intermittent streams that do not flow year-round or seasonally
  - Adjacent wetlands
    - Continuous surface connection with relatively permanent, non-navigable tributary
    - Directly abutting, not separated by uplands, berms, dikes

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## ***Rapanos* unleashes a Tempest**

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- Post-*Rapanos*
  - Significant disagreement in the courts re: which test to follow
  - Agency guidance – either test suffices
- Genesis of 2015 Waters of the U.S. Rule
  - Connectivity Report

## **2015 WOTUS Rule**

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- Obama 2015 WOTUS Rule
  - Proper Venue
  - Stays issued
- Trump Applicability Date Rule

## 2015 WOTUS Rule

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- Obama finalized Clean Water Rule in 2015 to provide “certainty” and “clarity” to post-*Rapanos* decisions using “significant nexus” test
- Included tributaries, defined for first time to show physical features of flowing water (bed, banks, OHWM) that contribute flow to a TNW
- Included adjacent waters, up to 1,500 feet from ordinary high water mark and within the floodplain of a traditional jurisdictional water
  - Even if separated by a berm or dike

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## 2015 WOTUS Rule

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- But also those up to 4,000 feet away that have a significant nexus to a traditional jurisdictional determined on a case-by-case basis
- But also those within the 100 year floodplain of certain jurisdictional waters (regardless of distance)
- Very broad and far reaching
- Kept old exclusions and exemptions
- Added groundwater, gullies, rills, non-wetland swales, certain ditches, artificial waters, and certain wastewater structures (and puddles)

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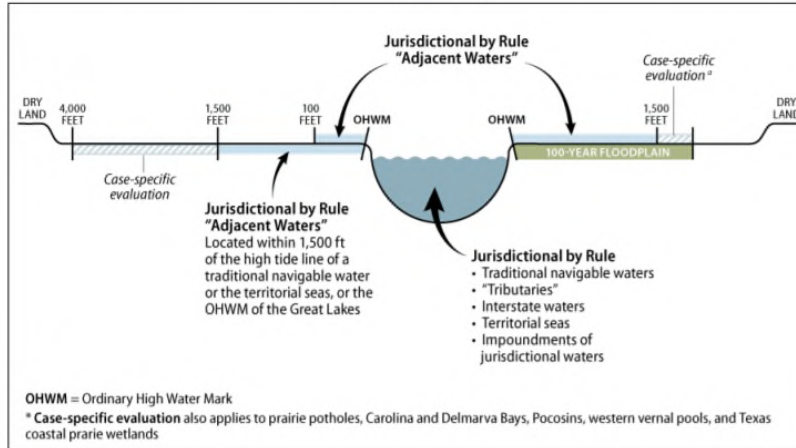
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**Figure 1. Jurisdictional Waters Under the 2015 Clean Water Rule**

(Not drawn to scale)



**Source:** Prepared by CRS, from Army Corps of Engineers and EPA, "Clean Water Rule: Definition of "Waters of the United States"; Final Rule," 80 *Federal Register* 37054, June 29, 2015.

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## 2015 WOTUS Litigation

- Challenged by various states as
  - unduly interfering with the regulatory power left to the States by Congress and
  - unconstitutional extension of the law passed under Congress's commerce power

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## 2015 WOTUS Litigation

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- Challenged in both federal district court and directly to the federal court of appeals
- The CWA expressly reserves jurisdiction in the Federal Courts of Appeals for the review of certain agency actions.
- However, the process for further defining the WOTUS does not fit any of these categories, and thus must be brought in District court.

## 2015 WOTUS Litigation

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- 28 States with injunctions against its enforcement include:
  - North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, Georgia, Alabama, Florida, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, Wisconsin, Kentucky, Texas, Louisiana, Mississippi, and Iowa

## “Suspension Rule”

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- In 2017 Trump issued a rule to suspend the effective date of the 2015 WOTUS rule
- Goal was to give the Trump administration time to promulgate a rule before the Obama rule took effect

## “Suspension Rule”

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- Stayed nationwide and struck down in South Carolina & Washington, putting the 2015 WOTUS rule back into effect
- Appeals were filed, but ultimately were voluntarily dismissed in 4th & 9th Circuits

## Trump's Two-Step Reset

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- Step 1 – Reversion
  - Repeal the 2015 WOTUS rule
  - Revert back to the pre-2015 definition nationwide
- Step 2 – Navigable Waters Protection Rule
  - Promulgate a new WOTUS definition

## Trump's Two-Step Reset

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- Step 1 – Reversion
  - Final rule published on October 22, 2019
  - Became effective December 23, 2019
- No more 2015 WOTUS rule
  - But wait litigation
  - At least 17 states, and some nonprofits, have filed suit against the step 1, seeking to enjoin its effectiveness

## Trump's Two-Step Reset

- Step 2 – Navigable Waters Protection Rule
  - Final rule published on April; 21, 2020
  - Went into effect June 22, 2020
    - (Yesterday)

## Trump's Two-Step Reset

- Step 2 – Navigable Waters Protection Rule redefines “Waters of the United States”
  - “the waters of the United States” =
    - encompass relatively permanent flowing and standing waterbodies
      - that are traditional navigable waters in their own right or
      - that have a specific surface water connection to traditional navigable waters,
      - as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters.



## Step 2- Navigable Waters Protection Rule

Some things have not changed

- What remains within jurisdiction:
  - Territorial seas and traditional navigable waters
  - Perennial and intermittent tributaries that contribute surface flow to the above waters
  - Certain lakes, ponds, and impoundments of the above waters
  - Wetlands adjacent to jurisdictional waters
- Carve-outs:
  - prior converted cropland;
  - certain ditches and artificial features; and
  - waste treatment systems

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## Step 2 – Navigable Waters Protection Rule

- Differences
  - New definitions for:
    - Adjacent wetlands
    - Waste treatment system
    - Prior converted cropland
    - Waters subject to the ebb and flow of the tide
    - Typical year
  - Express exclusions for:
    - Anything not in the 4 jurisdictional categories
    - Groundwater
    - Ephemeral features
    - Diffuse runoff & sheet runoff
    - Certain ditches
    - Artificial impoundments\*

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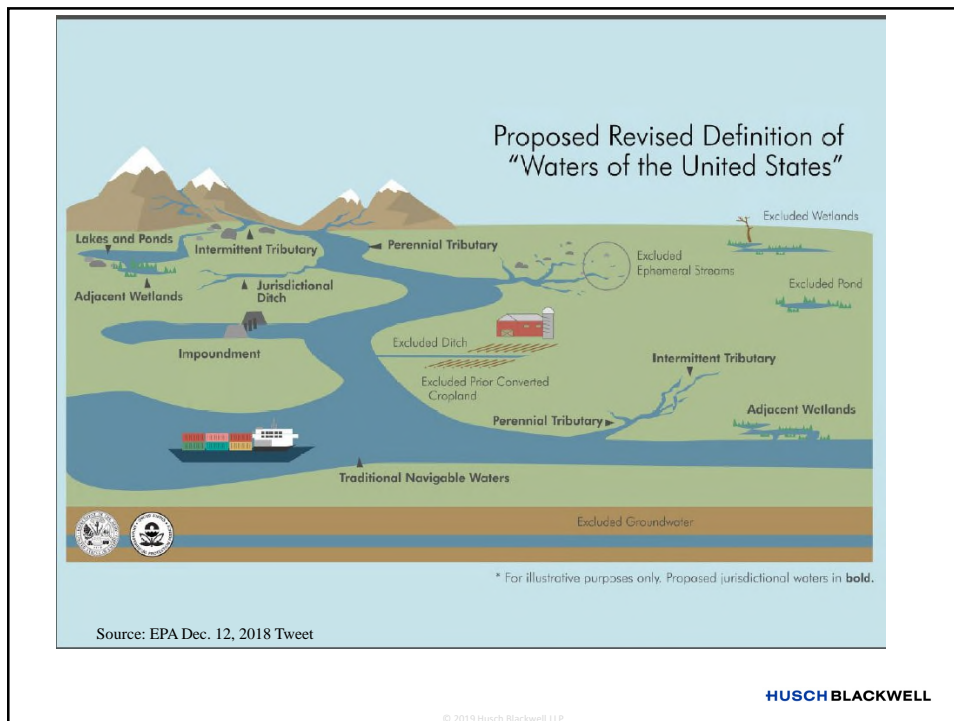
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## Step 2 – Navigable Waters Protection Rule

- Key Concepts & Definitions

- Tributaries – “perennial,” “intermittent,” & “ephemeral”
  - “Typical year”
  - Includes subterranean rivers (≠ groundwater)
- “Adjacent”
  - Abut – touching at least one point or a side of territorial seas, TNWs, tributaries, or lakes, ponds, impoundments of jurisdictional waters
  - Inundated by flooding from the same
  - Physically separated by natural barrier from the same
  - “ “ “ artificial barrier + direct hydrologic surface connection with same





## Step 2 – Navigable Waters Protection Rule

- Significance of Changes
  - Ephemeral streams – arid & semi-arid environments
  - Adjacent wetlands – artificial barriers
  - Ditches

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## Step 2 - Navigable Waters Protection Rule

- Effective on June 22, 2020
- Lawsuits filed in CA, CO, and SC
  - State of California, et al., v. Andrew Wheeler, et al., No. 20-CV-03005-RS, 2020 WL 3403072, at \*8 (N.D. Cal. June 19, 2020) – **preliminary injunction denied**
  - State of Colorado v. Andrew Wheeler, et al., No. 20-cv-1461-WJM-NRN (D. Colo. June 19, 2020) – **stay granted**
  - South Carolina Coastal Conservation League, et al., v. Andrew Wheeler, et al., No. 2:20-cv-01687-DCN

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## Forecasting WOTUS Rules

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- 2015 WOTUS rule litigation led to 28 states under the pre-2015 rule and 22 states under the 2015
- Will further complicate things if injunctions issue
- Today: the NWPR applies everywhere, except in Colorado (under pre-2015 rule)

## Forecasting WOTUS Rules

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- If NWPR is stayed, then pre-2015 rule applies in that state (under the reversion rule)
- If both NWPR and Reversion rule are stayed for a particular state . . . then:

## Forecasting WOTUS Rules

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- Pre-2015 rule: North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, Georgia, Alabama, Florida, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, Wisconsin, Kentucky, Texas, Louisiana, Mississippi, and Iowa
- 2015 WOTUS rule will apply for all others

## Groundwater: *County of Maui v. Hawai'i Wildlife Fund*

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- SCOTUS found that point source discharges to navigable waters through groundwater are regulated under the CWA
- Held that CWA “require[s] a permit if the addition of the pollutants through groundwater is the **functional equivalent** of a direct discharge from the point source into navigable waters.”

## Groundwater: *County of Maui v. Hawai'i Wildlife Fund*

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- Next steps:
  - Lower court to decide whether Maui discharges are the “functional equivalent” of a direct discharge
  - Apply factors identified by SCOTUS
  - Agency guidance / rule for groundwater

## Groundwater – *County of Maui*

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- Justice Breyer:

*Time and distance will be the most important factors in most cases, but other relevant factors may include, e.g., the nature of the material through which the pollutant travels and the extent to which the pollutant is diluted or chemically changed as it travels. Courts will provide additional guidance through decisions in individual cases.*

## Nationwide Permit 12

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- Last reissued in 2017
- Covers dredge and fill activities with a minimal impact on WOTUS usually permitted by the Corps under Section 404 of the Clean Water Act.
- Allows such activities to not require an individual permit

## Nationwide Permit 12

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- Applies to
  - activities surrounding maintenance and construction of utility lines, such as pipelines, wire cable lines, transmission lines, etc.
  - Disturbing less than half an acre for each crossing
- Linear projects

## Nationwide Permit 12

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- On April 15, 2020, Montana district court held that NWP 12's reissuance violated the Endangered Species Act (ESA) by not consulting with the U.S. Fish and Wildlife Service prior to reissuing NWP 12
- Initially vacated their use for everyone

## Nationwide Permit 12

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- However, the parties to the lawsuit together asked Judge Morris to limit the ruling
- He then revised the April 15, 2020 ruling to only include new oil and gas pipelines
- So, all other projects seeking to use NWP 12 may do so for the time being

## Nationwide Permit 12

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- If the vacatur applies to your project you may consider:
  - An individual permit (very time consuming)
  - Working around jurisdictional waters to avoid any impacts
  - Utilizing a different NWP
    - NWP 14 (Linear Transportation Projects)
    - NWP 33 (Temporary Construction, Access, and Dewatering)
    - NWP 51 (Land-Based Renewable Energy Generation Facilities)

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## Nationwide Permit 12

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- NWP 12 is not the only one allowing crossings “at a specific location” to be considered single and discreet projects
  - Failure to undertake programmatic consultation re: endangered & threatened species for many crossings when reviewing PCNs is what caused the court to vacate its use pending further review.
- Looking ahead, other NWPs may also be challenged on similar grounds
- This may also change the conditions of NWPs when they are reviewed by the Corps

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## 2015 MSGP Expiration

- 2015 MSGP expired on June 3
  - Administratively continued until new MSGP issues
    - EPA anticipates issuing by Nov. 20
    - To be effective in late Dec. 2020
- Options for new facilities in the interim:
  - No Exposure Certification
  - Office of Enforcement & Compliance Assurance: No Action Assurance
    - Meet 2015 MSGP Eligibility Criteria & Comply with all Conditions
    - Submit “Intent to Operate” to EPA 30 days prior to commencing discharges

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## Proposed Changes in Draft 2020 MSGP

- **Universal Benchmark Monitoring** for pH, TSS, and COD(?)\*\*
- **Use of coal-tar sealcoat** for paved surfaces = ineligible for MSGP coverage\*\*
- **“Updated” Benchmarks** for certain metals (anti-backsliding issue in Idaho DEQ, others?)\*\*
- **Enhanced pollution prevention measures** for extreme flooding conditions (EPA suggests FEMA flood maps *may* help; but probably not)
- **Additional Implementation Measures (AIM)** – 3 Tiers (yearly averages matter; install additional controls; but - natural background; infiltration requires EPA concurrence) → essentially, Univ. Benchmarks = effluent limits (not “target”)\*\*
- **Discharges to CERCLA sites** – add 30 days
- **Discharges to Impaired Waters w/out TMDLs** – must meet WQS @ point of discharge

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## 401 Certification Rule

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- One year limit really means one year
- Limited to water quality
  - NOT based on
    - air quality or transportation concerns
    - public access to waters
    - energy policy or
    - other multi-media or non-water quality impacts

## Questions?

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