POTENTIALLY SIGNIFICANT CHANGES TO REGULATION UNDER THE CLEAN WATER ACT

Hodgson Russ Environmental Alert
April 27, 2020

Companies required to comply with the Clean Water Act ("CWA") should brace themselves for potentially significant changes based on two events within the past week. First, on April 21, 2020, the U.S. Army Corps of Engineers ("Army Corps") and the U.S. Environmental Protection Agency ("EPA") published the finalized Navigable Waters Protection Rule in the Federal Register. The new Rule includes notable changes to the definition of "Waters of the United States" ("WOTUS"), which had been expected for some time.

Second, on April 23, 2020, the U.S. Supreme Court ("Supreme Court") issued a decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund et. al.*, Case No. 18-260, holding that pollution traveling through groundwater **is**, indeed, regulated by the CWA in specific circumstances.

The New Navigable Waters Protection Rule (the "Rule")

The EPA and Army Corps' release of the new Rule was not without controversy, after the EPA's own Science Advisory Board refused to support it. In particular, the Rule further relaxed the definition of what qualifies as a "Waters of the United States" under the CWA.

The Rule sets forth four clear categories of federally regulated waters:

- Territorial seas and traditional navigable waters;
- Perennial and intermittent tributaries to those waters;
- Certain lakes, ponds, and impoundments; and,
- Wetlands adjacent to jurisdictional waters.

The Rule also expressly excludes 12 categories from the definition of WOTUS, which is the focus of opponents to the revision to the prior regulatory interpretation. The exclusions include features that only contain water in direct response to rainfall (also called "ephemeral" water features); groundwater; many ditches; prior converted cropland; and, waste treatment systems.

Of particular interest is the change regarding which wetlands come within the jurisdiction of the CWA. Under the Rule, a wetland is only a WOTUS if it abuts or contributes intermittent or perennial flow to another WOTUS, or if it is inundated

Attorneys

Richard Campbell
Joseph Endres
Michael Hecker
Julia Hilliker
Elizabeth Holden
Rick Kennedy
Alan Laurita
Charles Malcomb
Paul Meosky
Aaron Saykin
Daniel Spitzer
Jeffrey Stravino
Henry Zomerfeld

Practices & Industries

Environmental

by flooding from a WOTUS in a typical year. As a result, many prior regulated wetlands, particularly those on significant slopes, may now qualify for a non-jurisdictional determination from the Army Corps.

This development followed the Trump Administration's push to further reduce the waters covered by the Rule in light of significant objection from the business and development community.

Two days after the release of the Rule, the Supreme Court issued the *Maui* decision, which likewise has a major effect on CWA applicability, and interestingly enough, directly contradicts one of the Rule's exclusions for groundwater.

The Supreme Court Rules that the CWA Also Regulates "Functional Equivalents" of Direct Discharges to Navigable Waters

The Court's 6-3 *Maui* decision arises from the County of Maui's wastewater reclamation facility, which treats sewage and then pumps the treated water into the ground through a well system. The discharge, after about a half mile journey through groundwater, reaches the Pacific Ocean. Environmentalist groups brought a citizens' suit under the CWA, alleging that the County's actions constituted an illegal discharge to navigable waters without first obtaining a National Pollution Discharge Elimination System ("NPDES") permit. The District Court agreed, and held that it was "functionally" a discharge into navigable waters. 24 F. Supp. 3d 980, 998. The Ninth Circuit affirmed, finding that the CWA regulates any discharges that are "fairly traceable" to a point source. 886 F. 3d 737, 749.

The Supreme Court agreed that the CWA can be used to regulate pollution that travels through groundwater, but disagreed with the Ninth Circuit's broad reading of the statute, worrying that it would open up unreasonable regulation of discharges such as the "100-year migration of pollutants through 250 miles of groundwater to a river." To avoid such an over-broad result, the Supreme Court determined that a CWA permit is necessary "when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge." The Court believed that this definition accomplishes the goals of the federal government – to regulate point source discharges into navigable waters – without infringing on the states' rights to regulate land and groundwater.

Following this logic, the Court noted that there are a range of cases that lie between a point source whose discharge travels a few feet through groundwater (where a permit is undisputedly required), and where a point source's discharge may take many miles and years to reach a navigable water (where a permit is not necessary, and where the discharge likely mixes with many other substances). In those gray areas, the courts are now instructed to engage in a context-specific evaluation with an eye toward the Congressional intent of the CWA. This involves needing to follow the "functional equivalent" definition previously derived by the Court in its *Rapanos* decision.

Three Justices—Alito, Thomas, and Gorsuch—dissented. Justice Thomas, in particular, cited a 2019 EPA interpretation that the best, and possibly the only, reading of the CWA is that all discharges to groundwater are categorically excluded from the NPDES permitting requirements, "even where pollutants are conveyed to jurisdictional surface waters via groundwater." 84 Fed. Reg. 16810, 16811. The majority of the Court disagreed with this assessment, holding that such a strict reading would only allow regulation of direct discharges with no leeway for traveling any distance, and could potentially open a loophole for easy evasion.

What These Interpretations Mean for You

The "functional equivalent" standard established by the Supreme Court could be read by some to permit the federal regulation of groundwater discharges as much as a half mile from the WOTUS under certain circumstances. When evaluating whether a permit is required, the majority indicates that "just some" of the potentially relevant factors to be consider include: "(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, (7) the degree to which the pollution (at that point) has maintained its specific identity." In response to Justice Alito's concern about possible severe per day penalties for parties who legitimately believe their operations do not require a NPDES permit, the Supreme Court indicated that district judges should exercise discretion in enforcement penalties in these matters as part of a "calibration" process.

The fact that this ruling appears to contradict the recent Rule could lead to inconsistent application and rulings on these issues. Parties will be looking to the Army Corps and EPA in the short-term to understand changes to the Rule that may be coming based on the Maui decision. Regardless, the Supreme Court's decision identifies the potential for significant liability to accrue to contaminated sites very close to jurisdictional waters, and the potential for impacts for regular business operations to implicate new permitting requirements.

Further litigation is inevitable with the Supreme Court returning to the lower courts the work of determining what "functional equivalent" of a direct discharge is, an inherently fact-sensitive scenario. However, even with the ambiguity tied to the groundwater analysis, the Rule will have a positive impact for development projects seeking to avoid more cumbersome impact analyses, and limit the need for future wetland mitigation and/or permitting.

If you have questions related to this alert, CWA compliance, or other environmental matters, more generally, please contact Michael Hecker (716.848.1599), Jennifer Schamberger (716.848.1691), or anyone else in the Hodgson Russ Environmental Practice, and we would be happy to help.

If you received this alert from a third party or from visiting our website, and would like to be added to our Environmental mailing list or any of our other mailing lists, please visit us at: https://forms.hodgsonruss.net/sign-up-for-email-and-other-communications..html.