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Alert

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Supreme Court to Decide Soon on Whether to Wade Further Into the "Waters of The United States" Fray

SUMMARY

The split of federal authority between the Sixth Circuit and the Fourth and Ninth Circuits on the scope of regulatory jurisdiction under the Clean Water Act (CWA) caused by the adoption of the revised "Waters of the United States" (WOTUS) rule appears to soon be coming to a head.

On June 29, 2015, the EPA and the Department of Defense/United States Army Corps of Engineers (USACE) adopted a new WOTUS rule that replaced the existing 1980's rule, and for the first time specifically included waters with a "significant nexus" to navigable waters as being subject to the permitting requirements of the CWA. 33 CFR 328.3, 80 Fed. Reg. 37054. After adoption of the rule, there were a number of citizen lawsuits (allowable under the CWA's citizen suit provision) in both federal district and circuit courts, which mainly sought to enjoin continuous or intermittent discharges under the "significant nexus" portion of the new rule. The U.S. Supreme Court clarified in January 2018 that all citizen suits challenging the WOTUS rule must first be filed in federal district courts rather than a direct appeal to circuit courts. *National Association of Manufacturers, Inc. v. Department of Defense/USACE*, 138 S Ct 617 (2018).

The "significant nexus" rule defines non-navigable waters that are intended to be regulated under the Act even though they are not a "point source" of pollution. See, 33 CFR 328.3(a)(7) and 33 CFR 328.3(c)(5). This definition and incorporation of the same into the WOTUS rule is important because it adopts the test set forth in Justice Anthony Kennedy's concurring opinion in *Rapanos v. U.S.*, 547 U.S. 715 (2006), a major decision where a plurality of the Court held that wetlands which have a "significant nexus" or "continuous hydrological or ecological surface connection to navigable waters" fall within the jurisdiction of the CWA (even though wetlands were not defined in the 1980's rule as "waters of the United States"). This test is also known as the "hydrological connection" theory. Justice Antonin Scalia's opinion for the plurality in *Rapanos* expressly rejected the "significant nexus/hydrologic connection" theory for wetlands and held that waters intended to be regulated by the Act are only those Congress specifically named and those to which the "point source" test could apply, namely those wetlands and waterbodies adjacent to navigable waters from which surface water would carry pollutants to navigable waters from a "discernable, defined, and discrete conveyance" (i.e. through a pipe, ditch, drain, creek or similar outfall). See *Rapanos*, at 753-757. It does not appear that Justice Scalia saw federal regulation of groundwater as proper under any reading of the Act. All other discharges of pollution are "non-point source" and were to be regulated by the states. See Sec. 33 U.S.C. 1314(f) and 1362 (12). Justice Kennedy's "hydrological connection" test (which provides the basis for the "significant nexus" definition and rule) versus Justice Scalia's "point source" test distinction is important because it governs which discharges Congress intended to regulate under the Act and which discharges require a permit from EPA or USACE. This distinction also governs what must be alleged in any citizen suit filed in federal district court seeking to enjoin discharges under the CWA. Lastly, because of the plurality nature of the opinion in *Rapanos*, lower courts need guidance regarding which test should apply, if any.

In two recent appellate cases in the Fourth and Ninth Circuits both separate federal circuits upheld the "hydrological connection" theory. The recent Ninth Circuit case, *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737 (Ninth Cir. 2018) held that the migration of pollutants from the county's wells through groundwater to a navigable waterway is actionable under the CWA if the discharges are "fairly traceable" to "navigable waters". A more recent Fourth Circuit case from South Carolina, where suit was filed even though the offending pipe no longer discharged to potential groundwater sources, held that groundwater that is "sufficiently connected" to "navigable waters" will allow for citizen suits under the CWA. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F. 3d 637 (Fourth Cir. 2018).

This is in stark contrast to the Sixth Circuit Court of Appeals, which has expressly rejected the "hydrological connection" theory embraced by the EPA and rejected the use of Kennedy's concurring opinion in *Rapanos* by the Fourth and Ninth Circuits to reach the opposite conclusion. See, *Tennessee Clean Valley Network v. Tennessee Valley Authority* (905 F.3d 436 (USCA Sixth Cir. 9/24/2018) and *Kentucky Waterways Alliance, et al v. Kentucky Utilities Company*, 2018 WL 4559315 (9/24/2018). In both Sixth Circuit cases, the Plaintiffs alleged that the limestone substrate (known as "karst" terrain or topography) underlying a pollutant filled pond allowed the pollution to seep through groundwater to navigable water. The Court opined in both cases that, although pollutants are being discharged to "navigable water" as defined under the Act, neither discharge is from a "discernable, defined, and discrete conveyance" that would qualify as a "point source" discharge intended to be covered by the CWA. See, *Tennessee Clean Valley* at 445; *Kentucky Waterways* at ---.

Kinder Morgan Energy Partners (Fourth Cir.) and the *County of Maui* (Ninth Cir.) filed for US Supreme Court certiorari review of the appellate decisions in August 2018 and briefs in opposition urging the Court to deny certiorari were filed in both appeals on October 23, 2018. It is important to note that groundwater was not specifically mentioned or defined by Congress in either Section 402, regulating point source discharges pursuant to the National Pollution Discharge Elimination System (NPDES), or Section 404 Permit Program regulating the discharge of dredged or fill material into waters of the United States, as contained within the CWA. The old WOTUS rule from the 1980s did not specifically contain a definition of WOTUS that expressly included groundwater; the WOTUS rule adopted in 2015 expressly defined groundwater as "not a water of the United States". 33 CFR 328.3(b)(5).

The question at issue is the legality, interpretation, and application of the Obama-era "Waters of the United States" (WOTUS) rule adopted in 2015 and the intended reach of Congressional regulation under the CWA. As of this writing, the 2015 WOTUS rule is still applicable in 23 states (California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia and Washington), pursuant to an injunction entered by USDC SC on August 16, 2018, which invalidated EPA's efforts to suspend the 2015 rule via adopting a "Suspension Rule" in February of 2018. *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp.359, USDC, S.C (8/16/2018). Simultaneously, application of the 2015 WOTUS is blocked in 24 states due to an early injunction issued in *North Dakota v. US EPA*, 127 F. Supp. 3d, 1047 (USDC N.D. 8/27/2015) (covering Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming), and a recent injunction entered in *State of Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (USDC SD GA 6/24/2018) (covering Alabama, Georgia, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin). An injunction against WOTUS may be pending for the three remaining states of Louisiana, Mississippi, and Texas, but may have been superceded by the injunction entered on 8/16/2018. See, *American Farm Bureau, et al. v. EPA*, USDC SD TX, Case No: 3:15-cv-165 (although no injunction or order from the Texas District appears to have been issued following the 8/16/2018 injunction from USDC SC, the court has a pending motion for injunction before it and has been notified of the nationwide injunction issued by the District of South Carolina). Additionally, the Trump Administration is still proceeding on the repeal of 2015 WOTUS under the procedures of the APA, but they are still in the comment period for the draft rule and the EPA and USACE have moved to stay the injunction issued in the *South Carolina Coastal Conservation League* case. However, by EPA's own estimation, the 2015 Clean Water Rule and guidance memos adopted by federal agencies regarding application of the rule will likely remain applicable for those 22 states where suspending the 2015 WOTUS Rule has been enjoined by a district court injunction. See for example: https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update and https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf.

Courts are being asked to determine whether the WOTUS rule impermissibly expands the definition of "navigable waters" (which are expressly protected under the CWA) to include "groundwater" (which was expressly defined as a "non-navigable water" in the 2015 WOTUS Rule definition) or waters with a "significant nexus" (which has come to mean those "non-point source" waters with a "hydrological connection" to navigable waters) or whether such waters were intended to be protected by Congress at all under the CWA. The courts are also being asked to determine whether federal regulation in the nature of the WOTUS rules by EPA and USACE oversteps the Constitutional boundary reserving rights to states created by the 10th Amendment.

Currently, regulation of groundwater sources is generally reserved to the states under the 10th Amendment, the original CWA, the 1980's WOTUS Rule and even the 2015 WOTUS Rule. But for the plurality opinion in *Rapanos* and federal agencies' efforts to craft a rule at the limits of a non-majority Supreme Court opinion, the confusion surrounding what types of discharges were intended to be regulated under the CWA might be clearer. Therefore, the US Supreme Court's answer to the separate requests for certiorari review from the Fourth and Ninth Circuits and the ultimate interpretation of the CWA's jurisdictional reach will be very important for the people in states like Florida where the substrate of the entire state is essentially a porous karst limestone aquifer system and most, if not all, of its groundwater could be determined to have a 'hydrological connection" to navigable waters under the "significant nexus" definition. Delegated permit authority and state rules which mirror or rely upon the WOTUS rule or federal agency guidance will also be greatly affected. This uncertainty in the interpretation of the CWA, until resolved by the Supreme Court, means there will likely be more state and federal confusion regarding proper application of the Act, increased citizen suits for "non-point source" discharges, increased challenges to existing permits, increased challenges to new permit applications, and an overall increase in the legal activity surrounding permitting of pollution discharges.

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