CLEAN WATER ACT UPDATE

Kentucky Stormwater Association

Quarterly Meeting

Vine Grove, KY

October 22, 2019

Skipp Kropp

Steptoe & Johnson PLLC

CLEAN WATER ACT UPDATE

Navigable Waters? 1986/1988

- Waters that can or have been used in the past for interstate or foreign commerce
- Interstate waters including interstate wetlands

Waters – the destruction of which may impact interstate commerce

Tributaries of waters

Adjacent wetlands

Territorial sea

Not holding ponds, treatment ponds, lagoons used for purposes of the CWA

CLEAN WATER ACT UPDATE

Rapanos v. United States, 547 US 715 (2006)

- Plurality Decision (4-1-4)
- Justices unable to produce a majority decision
- Typically apply the narrowest common grounds

Justice Scalia – waters of the US should include only relatively permanent, standing or continuously flowing bodies of water because, according to him, that was the definition of and wetlands physically abutting such waters

Justice Kennedy – believed that a wetland or non-navigable waterbody falls within scope of CWA if it bears a "significant nexus" to a traditional navigable waterway. Kennedy argued CWA defines navigable waters as a water or wetland that possesses a significant nexus to waters that are navigable in fact. Also argued that nexus exists where the wetland or waterbody, either by itself or in combination with other similar sites, significantly affects the physical, biological, and chemical integrity of the downstream navigable water

CLEAN WATER ACT UPDATE

2015 Rule styled “Clean Water Rule: Definition of ‘Waters of the United States’,” promulgated June 29, 2015

2015 rule follows Kennedy opinion in Rapanos

Immediately appealed in several jurisdictions by industry groups and half of the states

Jurisdictional conflicts -

- August 27, 2015: U.S District Court for the District of North Dakota enjoined applicability of 2015 WOTUS Rule in 13 States challenging the 2015 Rule in that court.
  - October 9, 2015: U.S. Court of Appeals for Sixth Circuit stayed 2015 WOTUS Rule nationwide pending further action of the court.

CLEAN WATER ACT UPDATE

Rule now effective in 22 states; enjoined in 28 states

February 28, 2017: President Trump issued Executive Order 13778,

"Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule.“

- Required EPA and USCOE to review rule

2018 Rule – changed applicability date to February 2020 (appealed)

2018 Proposed rule – public comment ended on August 15, 2019

September 12, 2019: EPA announces rule called “Definition of ‘Waters of the United States’—Recodification of Pre-Existing Rules”

CLEAN WATER ACT UPDATE

September 12, 2019 rule includes:

Repeal of 2015 Rule

- EPA and Corps finalized repeal rule.
  - Signed by Administrator Wheeler on September 12, 2019
  - Signed by Assistant Secretary of the Army for Civil Works James on September 5, 2019
  - Directs agencies to implement the pre-2015 Regulations and guidance documents
- Environmental Groups say they'll sue

CLEAN WATER ACT UPDATE

What About Groundwater?

This isn't New:

- Idaho Rural Council v. Bosma, 143 F.Supp.2d 1169 (D. Idaho, 2001)
- In 1994, the Defendants ("Bosmas") established a substantial dairy operation ("Grand View Dairy" or "the dairy") in an area near Bliss, Idaho, directly upgradient from farms operated by the Butler and Walker families who are members of Plaintiff Idaho Rural Council ("IRC"), an Idaho non-profit corporation with approximately 500 members throughout Idaho.
- October 7, 1999, IRC sent to Bosmas a 60-day notice of an alleged violation of provisions of the Clean Water Act

CLEAN WATER ACT UPDATE

Idaho Rural Council v. Bosma, 143 F.Supp.2d 1169 (D. Idaho, 2001)

- Subsequently, Bosmas applied for and obtained a NPDES permit
- December 9, 1999, IRC filed its Complaint, alleging that the Bosmas have discharged, and continue to discharge, pollutants into waters of the United States. IRC alleges that these discharges reach the waters of the United States through eight different channels, most of which involved groundwater
- Court found that groundwater which was hydrologically connected to surface waters could be waters of the United States.

CLEAN WATER ACT UPDATE

Circuits Split

Hydrological connection between Groundwater and Surface Water Confers Jurisdiction:

- Hawaii Wildlife Fund v. County of Maui, 881 F.3d 754 (9th Cir. 2018)
  - Lahaina Wastewater Reclamation Facility in Maui County, Hawaii treats wastewater from homes and businesses to reclaimed water and is authorized by EPA and Hawaii Department of Health under SDWA to inject into four Class V wells in the island
  - Because of geology of Hawaii, it's estimated that more than 90% of water enters surrounding ocean through seepage. During planning and subsequent reviews of facility, both EPA and state determined there was no need for a NPDES permit since it was not a point source under the CWA.
  - However, tracer dye studies proved that injections of wastewater from Lahaina reach nearby ocean waters via groundwater, and piezometer studies have indicated heightened levels of nutrients at the site.

CLEAN WATER ACT UPDATE

Circuits Split

Hydrological connection between Groundwater and Surface Water Confers Jurisdiction:

- Hawaii Wildlife Fund v. County of Maui
- In 2012, several environmental activist groups, including the Hawaii Wildlife Fund sued county for lacking appropriate NPDES permits, arguing that injection wells were truly point sources since past EPA studies using dye tracers had shown the discharge from wells went into the ocean. County disputed this with support of EPA, stating that wells were not a direct point source defined from CWA. Suit was filed after environmental groups plead with county on civil grounds to seek an NPDES permit in the years prior.

CLEAN WATER ACT UPDATE

Circuits Split

Hydrological connection between Groundwater and Surface Water Confers Jurisdiction:

- Hawaii Wildlife Fund v. County of Maui
- US District Court for District of Hawaii found for plaintiffs, agreeing that facility needed NPDES permits for injection wells and for facility itself.
- County appealed to Ninth Circuit which also ruled in favor of the plaintiffs. Ninth Circuit came with a novel criteria for whether the wells were point sources, evoking the nature of traceability of pollutants from the wells to ocean that resulted in pollution concentrations above de minimus levels, having rejected two standards proposed by County and EPA.

CLEAN WATER ACT UPDATE

Circuits Split

Hydrological connection between Groundwater and Surface Water Confers Jurisdiction:

- Hawaii Wildlife Fund v. County of Maui
- Ninth Circuit concluded that "at bottom, this case is about preventing the county from doing indirectly that which it cannot do directly." The Ninth Circuit denied to hear case en banc and County appealed to US S. Ct. which granted cert.

- Upstate Forever v. Kinder Morgan Energy Partners, L.P., No. 17-1640 (4th Cir. 2018)

CLEAN WATER ACT UPDATE

Circuits Split

Rejects Hydrological Connection Theory

- Kentucky Waterways Alliance v. Kentucky Utilities Co., No. 18-5115 (6th Cir. Sept. 24, 2018)
- Appellee-defendant Kentucky Utilities Company burns coal to produce energy. It stores the leftover coal ash in two man-made ponds.
- Plaintiffs, two environmental conservation groups, contend that chemicals in coal ash are contaminating surrounding ground water, which in turn contaminate a nearby lake. They argue this conduct violates two separate statutes, CWA and RCRA.
- Court held that "the CWA does not extend liability to pollution that reaches surface water via ground water."

- Tennessee Clean Water Network v. TVA, No. 17-6155 (6th Cir. Sept. 24, 2018) Application of petroleum necessary for construction*

CLEAN WATER ACT UPDATE

Supreme Court Litigation

County of Maui, Hawaii v. Hawaii Wildlife Fund, S. Ct Docket No. 18-260

- Touted as "The Clean Water Case of the Century"
- Dozens of Amicus Curiae Briefs
  - Former EPA Heads
  - 13 States
  - Native American Tribes
  - US Chamber of Commerce
- Oral Argument Set for November 6, 2019 ….BUT
  - Maui County Council voted to settle case on September 21, 2019

CLEAN WATER ACT UPDATE

Supreme Court Litigation

- September 21, 2019: Maui County Council voted to settle case
- October 9, 2019: Petitioner County of Maui Council Chair sent letter to Court requesting that the case be dismissed or postponement of November 6 oral argument
- October 9, 2019, County of Maui Corporation Counsel sent letter to Court apologizing for letter from Council Chair, advising that case can not be settled without approval of Mayor and stating that oral argument is not requested to be postponed nor is the case requested to be dismissed

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Skipp Kropp

Steptoe & Johnson PLLC

Skipp.Kropp@steptoe-johnson.com

(317) 946-9882