TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy
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Will We Ever Get Off of Mr. Toad's WOTUS Ride?

Last week, the Army Corps of Engineers and EPA published the final rule defining the Waters of the United States (WOTUS). That means they decided which waters are protected by the Clean Water Act and which waters are not. As expected in such an important and contentious rulemaking, objections are already bubbling up in the form of lawsuits. The new rule is a serious rollback of what was covered by the Clean Water Act for the past 50 or so years. In our reading, it is an even more restrictive take on Clean Water Act protections than Justice Scalia's plurality opinion from the *Rapanos* decision in 2006 that set a lot of these questions in motion (yes, this has been going on for 14 years and counting).

So, naturally, one of the first complaints filed against the current administration comes from the New Mexico Cattle Growers' Association which feels that it is still too broad (with which we would disagree) and that it doesn't actually do anything to clean up the confusion of the extent of WOTUS that has reigned for the past 14 years (with which we would agree).

Those who find the rollback unreasonable because it undercuts the actual Clean Water Act itself and retreats to a footprint less than what any Supreme Court majority has ever actually ruled in favor of have also filed complaints in federal district courts in South Carolina and Massachusetts.

All this could easily lead to another situation like we have had for the past couple of years where some states function under one WOTUS rule (the new one) and other states, where a judge orders an injunction against the new rule's enforcement, function under an old one (which old one is a whole other issue, as the road between the rollback of the Obama WOTUS rule and the finalization of the Trump WOTUS rule has been long, winding, and filled with more forks than a silverware drawer).

There are so many unanswered questions right now. How will this rollback that excludes the majority of the country's wetlands affect mitigation commitments under already-issued dredge-and-fill permits? How will it affect states' work on point source pollution? How will it affect determination of impaired waters? Was the procedure to institute this new rule even legal? Were the thousands of comments about the proposed rule properly considered? The answers to these questions lie in who-knows-how-many court battles in the year(s) ahead.

There are not a lot of answers on the surface of the finalized rule itself. The agencies changed very little between the proposed rule that was first leaked to the public in December of 2018 and the finalized rule from last week. In fact, the observations about the proposed rule

The **Tulane Institute on Water Resources Law and Policy** is a program of the Tulane University Law School.

The Institute is dedicated to fostering a greater appreciation and understanding of the vital role that water plays in our society and of the importance of the legal and policy framework that shapes the uses and stewardship of water.

Coming up:

Public Comment Deadline for certain CA Groundwater Sustainability Plans; May 4

The Science of Shipwrecks Webinar; May 6

Public Comment Deadline re EPA's Proposed Science Transparency Rule; May 18

EPA Drinking Water Webinar: Drinking Water Microbes 101; May 19

Public Comment deadline re EPA's Proposed 2020 NPDES General Permit for Stormwater Discharges Associated w/ Industrial Activity; May 31

Water jobs:

Rachel Carson Environmental Organizing Fellowship for Students

Attorney Advisor (General); Department of the Interior, Office of the Solicitor; Salt Lake City, UT

Legal Intern; Chesapeake Bay Foundation; Richmond, VA

Environmental Specialist; City & County of San Francisco; San Francisco, CA

Executive Director, Washington Water Trust; Seattle, WA

Climate Change Lead; California State Water Resources Control Board; Sacramento, CA

André Hoffmann Fellow: Ocean Innovations; The World Economic Forum and Stanford University, San Francisco, CA

Water Law Associate Attorney; Young Wooldridge, LLP; Bakersfield, CA

Attorney: Natural Resources & Water Law; Fujitani Consulting; Sacramento, CA

Adjunct Faculty (Environmental Science and Policy Program); Johns Hopkins University; Washington, D.C.

Staff Attorney/Legal Organizer; Legal Internships; Fall Environmental Communications Internships; Center for International Environmental Law; Washington, D.C.

Various Positions & Locations; Earthjustice

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that our shop published in April 2019 still hold for the final rule. So does this look at the rollback that came out before the final rule was published. A dive into the supporting documents that were also published last week will be where many will have to start when looking for answers to these questions and to determine if the agencies actually complied with the law in the rulemaking process. There are only 333 of these supporting documents, and everyone's really being reasonable around all this, so everything should be cleared up in no time.

Oh, No! Wait! The new WOTUS rule eliminates groundwater entirely from the Clean Water Act, and the *County of Maui* decision that came down from the Supreme Court last week seems to indicate something different. In *Maui*, Justice Breyer was joined by five other justices in saying that when pollution injected into groundwater reaches navigable waters in a way that is "functionally equivalent" to discharging directly into navigable waters, that injection does fall under the Clean Water Act's jurisdiction. Now, this isn't exactly the same thing as the WOTUS question (questions?), but it does indicate more of an appetite at the Supreme Court for allowing some scientific common sense into the interpretation of the law. Additionally noteworthy is that the opinion (on page 13) pretty plainly states that the administration's "new interpretation" of the Clean Water Act as not pertaining to groundwater does not agree with the law's "structure, its purposes, or the text of the provisions that actually govern." Finally, in especially bad news for whomever might have to defend this new WOTUS definition in front of the Supreme Court, the decision was 6 to 3 in favor of this "functional equivalent to a direct discharge" opinion. Reading the tea leaves of the past year and a half with this rule would make one think that the administration felt that a definition aimed squarely at what they thought was Scalia's *Rapanos* opinion would carry the day at the Supreme Court that now carries five conservative justices, but two of them just sided against the administration's argument in *Maui*.

All this means that things are, amazingly enough, even more confusing than they were two weeks ago. As one industry attorney bemoaned about the state of things, this will be "devastating" for industries that discharge water pollution and are still no closer to a bright-line rule as to what the Clean Water Act protects and what it does not. Instead, the prediction is for the continued costly battles of consultants and experts over whether a pollution discharge is addressed by the law. Sounds like everyone's ready to agree that it actually covers everything needed to eliminate the discharge of pollutants into navigable waters, like Congress declared its intention to be back in 1972. Right? RIGHT?