

Ch. 6: Water Pollution Control

P. 673: APPLICATION OF THE CLEAN WATER ACT TO GROUNDWATER - CERT GRANTED IN THE COUNTY OF MAUI CASE, NEW EPA GUIDANCE SAYS §402 PERMITS NOT REQUIRED

As noted in the casebook, it has long been unclear concerning how, if at all, the Clean Water Act applies to discharges of pollutants that flow through groundwater. Groundwater itself generally has not been considered to be part of the navigable waters (defined as “waters of the United States”), but when pollutants travel through groundwater that is hydrologically connected to such waters, some courts have held that an NPDES permit is required.

In two cases U.S. Courts of Appeal have held that NPDES permits are required when pollutant discharges flow through groundwater to “waters of the U.S.” In *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), the Ninth Circuit held that injection wells that discharge wastewater to groundwater hydrologically connected to the ocean require NPDES permits because the wells are point sources and the pollutants in navigable waters are “fairly traceable” to the discharge into the wells. In *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), the Fourth Circuit held that the rupture of an underground pipeline that polluted soil and groundwater violated the Clean Water Act because the pipeline is a point source the pollutants flowed through groundwater to navigable waters through a “direct hydrologic connection.”

In two cases the Fourth and Sixth Circuits have held that pollutants that leak from coal ash impoundments and travel to navigable waters through groundwater do not violate the Clean Water Act because the impoundments are not point sources. In *Sierra Club v. Virginia Electric & Power Co.*, 903 F.3d 403 (4th Cir. 2018), the Fourth Circuit held that arsenic leaking from coal ash piles and settling ponds through groundwater into navigable waters did not violate the Clean Water Act (CWA) because the pollutants did not come from a point source discharge. In *Kentucky Waterways v. Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018), the Sixth Circuit held that seepage of pollutants from coal ash ponds that migrated through groundwater into a lake were not covered by the CWA because the coal ash ponds are not point sources. In *Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436 (6th Cir. 2018), another panel of the Sixth Circuit held that pollutants leaking from ponds of coal ash into do not violate the Act because “[t]he CWA does not extend liability to pollution that reaches surface waters via groundwater.”

As noted in the “Cases to Watch” section of this website, review by the U.S. Supreme Court has been granted in the County of Maui case and the Court likely is holding the Kinder Morgan cert

petition until after it decides the Maui case. This is what the U.S. Solicitor General recommended that it do.

On April 15, 2019 EPA announced that it had issued new guidance concluding that point source discharges that pass through groundwater never require a permit under § 402 of the Clean Water Act even if they later reach the waters of the U.S. EPA based this guidance on its conclusion that Congress did not intend to use the Clean Water Act to protect groundwater, but rather left protection of groundwater to the states or other federal programs such as the Safe Drinking Water Act, CERCLA, or the Resource Conservation and Recovery Act. While this conclusion seems accurate, it does not compel the conclusion that discharges that reach surface waters after passing through groundwater are not regulated under the Clean Water Act. Congress clearly was concerned with protecting surface waters which is why the 9th Circuit in the County of Maui case held that discharges that reach surface waters require a permit even if they pass through groundwater if they are “fairly traceable” to the discharges to groundwater.

Pages 693-696: SUPREME COURT SENDS LITIGATION OVER “WATERS OF THE UNITED STATES” (WOTUS) RULE TO DISTRICT COURTS

As the casebook notes (p. 695), in the wake of conflicting lower court rulings, the Supreme Court agreed to decide whether challenges to the Obama administration’s “waters of the U.S.” (WOTUS) rule, should be brought first in the U.S. Courts of Appeal or federal district courts. The WOTUS rule sought to bring much-needed clarity to the reach of federal jurisdiction under the Clean Water Act in the aftermath of the Court’s 4-1-4 split in *Rapanos v. U.S.*, 547 U.S. 715 (2006). After the WOTUS rule, which was jointly promulgated by EPA and the U.S. Army Corps of Engineers, became final in 2015, 80 Fed. Reg. 37054, lawsuits challenging the rule were filed in several federal district courts and U.S. Courts of Appeals. The challenges filed in the U.S. Courts of Appeal were consolidated in the Sixth Circuit. While expressing some doubts concerning whether it was the proper venue for filing initial challenges to the rule, a panel of the Sixth Circuit refused to dismiss the case for lack of jurisdiction and issued a nationwide stay of the WOTUS rule. *In re Dept. of Defense*, 817 F.3d 261 (6th Cir. 2016).

A week before President Trump took office, the Supreme Court agreed to review the Sixth Circuit’s decision at the behest of petitioner National Association of Manufacturers. Shortly thereafter President Trump issued an executive order directing EPA and the Corps to consider revising or rescinding the WOTUS rule. Exec. Order 13778, 82 Fed. Reg. 12497 (2017). The government then asked the Court to put the case on hold pending its reconsideration of the WOTUS rule. On April 3, 2017, the Supreme Court denied this motion.

On January 22, 2018 the Supreme Court reversed the Sixth Circuit and decided that proper venue for challenges to the “waters of the U.S.” rule lies in the federal district courts and not the U.S. Courts of Appeal. *National Association of Manufacturers v. Department of Defense*, 138 S.Ct. 617 (2018). Justice Sotomayor wrote the opinion for a unanimous Court. The Court held that the plain language of the judicial review and venue provisions in § 509(b) of the Clean Water Act, 33 U.S.C. §1369(b), does not provide for the filing of initial petitions for review in the Courts of Appeal because the rule was not among the categories of actions for which the statute specified such venue. An excerpt from this decision is included in the casebook’s 2018-19 Statutory and Case Supplement, which was published in July 2018.

Prior to the Supreme Court’s decision in *National Association of Manufacturers v. Department of Defense*, 2018 WL 491526 (2018), thirteen states had challenged the WOTUS rule in federal district court in North Dakota. That court in 2015 issued a stay of the rule in the states that had challenged it (North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, South Dakota, and Wyoming). *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (N.D. 2015). Now that the Supreme Court has ruled that legal challenges to the WOTUS rule initially must be brought in federal district courts, additional litigation has commenced in federal district courts in Georgia, New York, Texas and South Carolina. On June 12, 2018 a federal district court in the Southern District of Georgia issued an injunction staying the rule in 11 states (Georgia, Alabama, Florida, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, Wisconsin and Kentucky).

Faced with the dissolution of the Sixth Circuit’s nationwide injunction staying the WOTUS rule, EPA on February 6, 2018, extended the effective date of the rule to February 6, 2020. EPA states that this will give it time to revise or rescind the rule before it takes effect. On August 16, 2018 a federal district court in South Carolina held this extension violated the Administrative Procedure Act because EPA had not solicited public comment on it. *South Carolina Coastal Conservation League v. Wheeler*, No. 2-18-cv-330-DCN (D.S.C. 2018). This decision effectively reinstates the WOTUS rule in the 26 states in which it has not been enjoined. On Sept. 11, 2018, a federal judge in the southern district of Texas enjoined application of the WOTUS rule in the states of Texas, Louisiana, and Mississippi. On December 11, 2018, EPA and the Corps of Engineers proposed a revised definition of “waters of the U.S” that seeks to use Justice Scalia’s narrow interpretation that commanded only four votes in *Rapanos*.