

The Waters of the United States (WOTUS) and Navigable Waters Protection Rule (NWPR) (pages 609-612)

BIDEN ADMINISTRATION PLAN TO REDEFINE “WATERS OF THE U.S.”

As noted in the casebook, the Trump administration replaced the Obama administration’s 2015 “Waters of the US (WOTUS)” Rule with its Navigable Waters Protection Rule (NWPR), 85 Fed. Reg. 22250 (April 21, 2020), an action that has generated new litigation. As of June 2021, there are 15 cases challenging WOTUS and the NWPR in 12 different federal district courts. Eight of these cases have been put on hold pending Biden administration reconsideration of the NWPR. Seven cases remain active. On June 9, 2021, EPA and the U.S. Army Corps of Engineers announced that they intend to undertake new rulemakings to define the “waters of the U.S.” First the agencies will conduct a rulemaking to “restore the regulations defining WOTUS that were in place for decades until 2015, with updates to be consistent with relevant Supreme Court decision.” This may resuscitate, at least temporarily, the Bush administration’s post-*Rapanos* guidance on the reach of federal jurisdiction. The Biden EPA and Corps also plan a separate rulemaking to “establish an updated and durable definition of ‘waters of the United States’.”

Do Discharges That Pass Through Groundwater Require a Permit (pages 612-619)?

ON REMAND IN COUNTY OF MAUI DISTRICT COURT REQUIRES CWA PERMIT FOR MAUI WASTEWATER DISCHARGES

On remand, federal Judge Susan Mollway of the Hawaii district court ruled on July 15, 2021, that the County of Maui must obtain a Clean Water Act §402 permit for its wastewater discharges that pass through groundwater into the Pacific Ocean. The judge granted summary judgment to the Hawaii Wildlife Fund and three other environmental organizations who had joined it as plaintiffs. She found that the County discharged 3-5 million gallons of treated wastewater daily into injection wells at the Lahaina Wastewater Reclamation Facility half a mile from the ocean. Monitors near the shoreline had measured only 2 percent of the wastewater from two of the four wells, but the parties agreed that all of the wastewater discharges reached the ocean within a few miles of the Facility. Considering the factors outlined in Justice Breyer’s majority opinion in *County of Maui*, Judge Mollway stated:

“The time and distance factors, which are the most important factors, as well as the relative-amount-of-pollution-entering the water and the specific-identity factors weigh in favor of applying the NPDES permit requirements. On the other hand, the nature-of-material and dilution/chemical-change factors favor not requiring a permit. The manner-by-or-area-in-which-the-pollutant-enters-the-water factor is neutral. This court has added to the mix its own raw-volume-of-pollutant factor, which weighs in favor of requiring a permit.”

The judge then concluded that the County’s discharges were the “functional equivalent of a direct discharge” into the ocean and thus triggered the NPDES permit requirement. Judge Mollway stated that she would have reached the same conclusion even without considering the additional raw-volume-of-pollutant factor that she added.

