Untying the Gordian Knot

UPDATE ON THE CLEAN WATER ACT
Overview

- WOTUS
  - Biden Administration WOTUS Rule Rewrite
  - Sackett v. EPA

- Groundwater Discharge

- Proposed Rule: Section 401 Water Quality Certification

- Other Relevant Updates
CWA prohibits discharge of pollutants from a point source into navigable waters without a permit.

“Navigable waters” means the waters of the United States, including the territorial seas. (WOTUS)

“Point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.
WOTUS: Rapanos v. United States

- Scalia’s “Relatively Permanent” Test
  
  “relatively permanent, standing, or continuously flowing bodies of water” like streams, rivers, and lakes. Includes wetlands but only if they have a “continuous surface connection” to other WOTUS.

- Kennedy’s “Significant Nexus” Test
  
  Should be determined on a case-by-case basis whether a water in question possesses a “significant nexus” to waters that are navigable in fact. For wetlands, a “significant nexus” exists when the wetland, either alone or in connection with similarly situated properties, significantly impacts the chemical, physical, and biological integrity of a traditionally navigable water.
WOTUS Rules

- Pre – 2015 Rules and Guidance
- 2015: Waters of the United States Rule
- 2020 Navigable Waters Protection Rule
- Biden Efforts on WOTUS Rule
Pre – 2015 Rules and Guidance
Joint Guidance; Post Rapanos

- (1) Waters that are categorically “waters of the United States,” including navigable-in-fact waters, “relatively permanent” tributaries, and wetlands that have a continuous surface connection or unbroken hydrological connection to jurisdictional waters;

- (2) Waters that may be deemed “waters of the United States” on a case-by-case basis upon a finding of a significant nexus with other jurisdictional waters, such as intermittent and ephemeral streams and wetlands that do not meet the criteria above; and

- (3) Waterbodies that are excluded from “waters of the United States,” including swales or gullies and ditches wholly in and draining only upland that do not carry a relatively permanent flow of water.
Biden Efforts on WOTUS Rule

- December 7, 2021 – Agencies issues new proposed WOTUS rule
- Aims to reinstate Pre-2015 standard
- Part of Two-phased WOTUS Rule change
- February 24, 2022 – Announced selection of regional roundtables
WOTUS Roundtable Organizers

- Amigos Bravos (Southwest)
- Arizona Farm Bureau (Southwest)
- Cahaba Brewing (Southeast)
- California Farm Bureau (West)
- Kansas Livestock Association (Midwest)
- Natural Resources Defense Council (Northeast)
- National Parks Conservation Association (Midwest)
- North Carolina Farm Bureau (Southeast)
- Regenerative Agriculture Foundation (Midwest)
- WY, MT, and ID Association of Counties (West)
Sackett v. EPA

- Question again is: Are certain wetlands “waters of the United States”

- Agencies found jurisdiction using “Significant Nexus” test

- District Court and 9th Circuit ruled in favor of EPA

- January 24, 2022 Supreme Court agreed to review
Sackett’s petitioned Supreme Court to review whether “Significant Nexus” standard should control

Urging the court to adopt “Relatively Permanent” test

Court reworded question presented from petition

“Whether the Ninth Circuit set forth the proper test for determining whether wetlands are waters of the United States under the CWA”
Sackett Cont.

- Sackett’s propose two step test

- Step One - is the wetland inseparably bound up with a “water”—i.e., a stream, ocean, river, lake, or similar hydrogeographic feature that in ordinary parlance would be called a “water”—by means of a continuous surface-water connection, such that it is difficult to tell where the wetland ends and the “water” begins?

- Step Two - is the “water” among “the waters of the United States,” i.e., those waterbodies subject to Congress's authority over the channels of interstate commerce?
Sackett Cont.

- Impact will depend on scope of Court’s ruling
- 3 Justices that joined Scalia remain; Other 6 did not hear Rapanos
- Sackett’s Brief was due April 11th and many amicus briefs filed (29)
- EPA’s brief is due June 10 and oral argument is expected next term
WOTUS: Summary

- Bide step-one rule to return to pre 2015 Regulations
- Biden Administration moving forward with rewrite
- Supreme court may provide some clarity
Groundwater Discharge

- Another Issue of Scope of Authority
- Complicated judicial history with diverging results
- Plain Language and Legislative History v. Hydrological Connection
- Set stage for Supreme Court
County of Maui v. Hawai‘i Wildlife Fund

- County discharge of treated water into deep well
- 9th Circuit used “fairly traceable” test
- Supreme Court rejected “fairly traceable” test
- Opted for “Functional Equivalent” standard
Maui Magnificent 7

1. Transit time
2. Distance traveled
3. The nature of the material through which the pollutant travels
4. The extent to which the pollutant is diluted or chemically changed as it travels
5. The amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source
6. The manner by or area in which the pollutant enters the navigable waters; and
7. The degree to which the pollution has maintained its specific identity
Post Maui

- Settled whether CWA can apply to groundwater discharge
- Did not hold that CWA applies to all groundwater discharges
- On remand, District Court found liability under “functional equivalent” test
- 2021 EPA Guidance
Black Warrior Riverkeeper v. Drummond

- District Court of Alabama
- Acid mine drainage from abandoned mine
- Granted Summary Judgment in favor of CWA jurisdiction
- Based largely on expert opinion
- 100 Ft, over a few weeks, through porous substrate, little change in concentration or chemistry
Big Sky Litigation

Cottonwood Environmental Law Center v. Big Sky Water and Sewer District

- District of Montana
- Water District collects and treats water
- Treated effluent is stored in lined ponds and used for irrigation
- Court denied summary judgment on “functional equivalent”
Groundwater Discharge: Summary

- Maui left a vacuum
- Absent guidance, likely to continue to see it filled with lower court decisions will likely diverge across jurisdictions
- Several potential options available to fill
Section 401 Water Quality Certification

- Pertains to State and Tribal authority to certify federal projects that may result in a discharge into a WOTUS

- 2020 Trump Administration Rule

- June 2nd, EPA announced proposed rule

- 60 Day Comment Period
Other Relevant Updates

- Report: The Clean Water Act At 50; March 2022
- IPDES Program – Transfer of Authority Complete; July 1 2021
- Pesticide General Permit
- Idaho DEQ Negotiated Rulemaking 2023
Conclusion

- WOTUS – ongoing efforts by Biden Administration and possible clarity from Supreme Court

- Groundwater Discharge – figuring out application of “functional equivalent”

- Other efforts are ongoing
THE END

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