

E – OUTLOOK

ENVIRONMENTAL HOT TOPICS AND LEGAL UPDATES

Year 2020
Issue 2

Environmental & Natural Resources Law Section
OREGON STATE BAR

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Another "New" Era: WOTUS Rule 2020

[Thomas Griffin](#) & [Elizabeth Howard](#)

Schwabe, Williamson & Wyatt

Following years of discussion, administrative rulemaking, and multi-state litigation, the Army Corps of Engineers ("ACOE") and Environmental Protection Agency ("EPA") have published a new regulatory definition of waters of the United States ("WOTUS"). On April 21, 2020, the EPA published a revised definition of WOTUS, dubbed the "[Navigable Waters Protection Rule](#)" ("2020 Rule"), in the [Federal Register, 85 Fed Reg 22,250](#). The 2020 Rule represents the final version of the 2018 draft rule published on December 11, 2018. Now in its final form, the 2020 Rule went into effect nationwide on June 22, 2020, but a number of states and other local jurisdictions, as well as environmental and agriculture groups, have already filed suit seeking to challenge the 2020 Rule.

Background

We previously discussed the background and significance of the WOTUS definition [here](#). In sum, the Clean Water Act ("CWA") regulations and restrictions apply only to "navigable waters," which the CWA defines to mean "any waters of the United States, including territorial seas." 33 U.S.C. § 1362(7) (emphasis added). The term "waters of the United States" is not further defined in the CWA. Thus, how federal agencies and courts define WOTUS determines the scope of agency jurisdiction under the CWA. The scope of jurisdiction is relevant for farmers, ranchers, timberland owners, homebuilders, developers, and others because if a proposed project or development includes jurisdictional waters or wetlands, the proposed project or development will likely be required to obtain approval from federal agencies before proceeding, adding delays and expense to the proposed project. Enforcement actions by the EPA and ACOE are also based on the scope of their jurisdiction over WOTUS.

The 2020 Rule follows years of uncertainty regarding the definition of WOTUS. In 2015, the Obama administration proposed revisions to the definition of WOTUS ("2015 Rule") that many viewed as an expansion of CWA jurisdiction. In more than half of the states, federal courts issued a

preliminary injunction against the 2015 Rule. Subsequently, the Trump administration delayed and repealed the 2015 Rule, though courts later deemed that effort invalid, leaving a patchwork of different applicable WOTUS rules across the country. In response to these decisions and concerns about the scope of the 2015 Rule, the Trump administration proposed a draft WOTUS revision in 2018. The 2020 Rule represents the final form of this previous draft, with minimal changes.

2020 Rule Provisions

Similar to the draft published in 2018, the 2020 Rule seeks to provide certainty by explicitly describing those waters or features that it seeks to cover, describing those waters or features that are explicitly excluded, and providing guidance for determining jurisdiction of waters or features that are not explicitly covered or excluded. First, the following are explicitly covered by WOTUS under the 2020 Rule:

1. Territorial seas and traditional navigable waters,
2. Perennial and intermittent tributaries to those waters,
3. Lakes, ponds, and impoundments that contribute surface flow to territorial seas and traditional navigable waters, and
4. Wetlands adjacent to jurisdictional waters.

Next, the 2020 Rule explicitly excludes twelve categories of waters and features from the WOTUS definition, including the following:

1. Groundwater, including groundwater drained through subsurface drainage systems,
2. Ephemeral streams and features that flow only in direct response to precipitation,
3. Ditches, including agricultural ditches, that are not traditional navigable waters and are not constructed in adjacent wetlands and do not relocate a tributary of traditional navigable waters,
4. Prior converted cropland, and
5. Artificially irrigated areas that would revert to upland if artificial irrigation ceases.

When determining if a water body or feature meets one of the jurisdictional definitions or exclusions, federal agencies will consider the circumstances during a “typical year.” This definition will be important, especially in places like the Willamette Valley, in determining the division between an ephemeral stream, which only flows due to precipitation, and a perennial or intermittent stream, which flows seasonally or annually. The 2020 Rule defines a “typical year” to mean “when precipitation and other climatic variables are within the normal periodic range for the geographic area ... *based on a rolling thirty-year period.*” Because a typical year is based upon the most recent thirty years, a typical year for a given region, water body, or water feature could change significantly over time because of climate change impacts.

While the 2020 Rule generally follows the 2018 draft rule, one significant change is the scope of jurisdiction over “adjacent wetlands.” The 2018 draft rule sought to define “adjacent” as only those wetlands that physically touch or have a continuous surface connection with jurisdictional waters. The 2020 Rule has a slightly broader definition of “adjacent” and includes those wetlands that “abut” navigable waters. “Abut” is defined to include when the delineated boundary of the wetland touches the delineated boundary of a jurisdictional water, but this definition does not require a direct surface connection. The practical impact of this broader definition is that wetlands that do not have standing or flowing surface water could still be jurisdictional if a delineated boundary borders a jurisdictional water boundary.

While this definition of “adjacent” is now broader compared to the 2018 draft rule, the 2020 Rule’s definition of “adjacent” is still significantly narrower than that of the 2015 Rule. For example, the 2015 Rule was criticized for including as jurisdictional any wetlands or other water features that were situated within the 100-year floodplain of a jurisdictional water, regardless of if a surface connection existed or if a delineated boundary was shared. The 2020 Rule removes any floodplain criterion and instead focuses on a direct surface connection or shared boundary, as discussed above.

Another noteworthy change in the new rules is the explicit exclusion of groundwater given recent contradictory Supreme Court precedent. Just last month, two days after the 2020 Rule was released, the Supreme Court ruled in *County of Maui v. Hawaii Wildlife Fund* that discharges into groundwater may fall under the jurisdiction of the CWA to the extent that they represent the “functional equivalent” of a discharge directly into navigable waters. That is to say, according to the Supreme Court, in at least some cases, groundwater will fall under the jurisdiction of the CWA, whereas the 2020 Rule states that groundwater is completely excluded from CWA jurisdiction. This direct contradiction will need to be further addressed by the EPA, or interested parties will seek to address it through litigation.

Challenges to the 2020 Rule

Challenges to the 2020 Rule have been filed in multiple state district courts, including California, Colorado, Massachusetts, South Carolina, Maryland, Arizona, Washington, New Mexico, and Oregon. On July 19, 2020, the Colorado district court preliminarily enjoined implementation of the 2020 Rule, re-instating the 1986 rule and 2008 agency guidance based on *Rapanos v. United States*, 547 U.S. 715 (2006) as the means for defining the jurisdictional reach of the Clean Water Act in Colorado only. On the same date, the Northern District of California denied a motion for a nationwide injunction filed by California and a number of other states. There, the court found that the term “waters of the United States” is ambiguous, that *Rapanos* did not define the outer scope of the term, that agencies may receive *Chevron* deference for a new rule if the change is reasoned and explained, and that a change in administration does not make the new rule improper so long as the agencies satisfy the *Chevron* test, which the court found they did here. *State of California v. Wheeler*, Case No. 3:20-cv-03005 (N.D. Cal., June 19, 2020). In Washington, the Washington Cattleman’s

Association is challenging the 2020 Rule's definition of intermittent and non-abutting wetlands, arguing that these definitions exceed the limits of the *Rapanos* plurality, which WCA is arguing is the controlling decision in that case. All of these cases will be important to watch, both as they relate to the difficult task of interpreting *Rapanos* and as to which version of the waters of the United States' rule will control in various jurisdictions. It will also be important to see whether they will lead to a future, additional look at the term "waters of the United States" by the newly constructed Supreme Court of the United States.

***Groundwater Under the Clean Water Act:
County of Maui v. Hawai'i Wildlife Fund***
IT'S GROUNDHOG DAY (AGAIN)

Kathy Robb¹
Blue Access LLC

Introduction

The federal Clean Water Act (CWA or Act) requires a permit for "any addition" of any pollutant to navigable waters from "any point source." 33 U.S.C. 1362(12)(A). While there is agreement that the Act does not require a National Pollution Discharge Elimination System (NPDES) permit for a discharge of a pollutant to groundwater, courts have long divided on whether the CWA requires a permit for a discharge of a pollutant from a point source that travels through groundwater to navigable waters (defined as "waters of the United States"). On April 23, 2020, the US Supreme Court in *County of Maui v. Hawai'i Wildlife Fund*, 590 US __ (2020), held that it does — "sometimes."

In a six-to-three decision, Justice Breyer wrote: "We conclude that the statutory provisions at issue require a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters." *Maui, Slip Op.* at 1. The opinion

¹ Reprinted by permission. This article originally appeared in *The Water Report* #196, June 15, 2020 — www.TheWaterReport.com

Kathy Robb is the CEO of Blue Access LLC (New York, NY), a sustainable investment organization working with underserved communities at the intersection of water and finance. Prior to joining Blue Access, Kathy was in private practice focusing on environmental litigation before federal district and appellate courts across the country and in the US Supreme Court, and advising on environmental risk issues in complex transactions from the bid process through closing. Her work in private practice includes litigation on the Colorado, Rio Grande, Guadalupe, San Antonio, Fox, and Kalamazoo Rivers, among others, on issues under NEPA, the Clean Water Act, the ESA, the Migratory Bird Treaty Act, the Grand Canyon Protection Act, CERCLA, RCRA, and other federal and state statutes and common law claims. Kathy is the current president of the Leadership Council for the Environmental Law Institute in Washington, DC and a former board member of ELI, and a co-founder of the National Water Law Forum, among other board service. She was elected as a member of the American College of Environmental Lawyers in 2016.

included a seven-point, non-exclusive list of factors to be applied by the lower courts to define what this new “functional equivalent” standard means, case by case.

Both sides have claimed victory. The result raises this question: Are we doomed to continue to develop water policy in the United States through years of protracted litigation?

Background

Whether the CWA requires a permit for releases from a point source to groundwater that eventually makes its way to navigable waters has been litigated for decades, with differing results.

The federal circuit courts split on the issue. Lower courts confronting the status of discharges to groundwater where the groundwater serves as a conduit to surface water have fallen generally into three different outcomes: 1) the CWA does not cover those discharges because the point source did not discharge directly to surface waters; 2) those discharges are covered by the CWA only when there was a direct hydrological connection between the surface water and groundwater; or 3) those discharges are covered if the pollutant in the eventual discharge to surface water could be traced back to the discharge from the original point source. All these determinations require intensive fact-specific litigation, which often plays out over a period of years.

In *County of Maui*, the County for years injected three to five million gallons of recycled, treated wastewater daily into four injection wells located a half-mile inland from the Pacific Ocean — without an NPDES permit. The injection wells, installed in the 1980s, are long pipes that carry effluent about 200 feet underground into a shallow groundwater aquifer. The wastewater makes its way through groundwater to the Pacific Ocean, a “water of the United States” under the Act. A tracer dye study showed that injected dye was visible in the ocean 84 days after it was injected into the wells. All parties in the case agreed that the wells are a defined “point source” and the groundwater is not. The two sides disagreed about whether the discharges are harming a nearby coral reef.

Hawai’i Wildlife Fund argued that the County’s effluent injections are discharges from a point source (the wells) through groundwater to navigable water without an NPDES permit, causing damage to water reefs and violating the CWA. The County of Maui argued that the discharge from the wells, a point source, to groundwater that subsequently makes its way to the ocean, is not a discharge from a point source regulated under the Act, and therefore no NPDES permit is required.

The Ninth Circuit held that the indirect discharge through groundwater to the Pacific is subject to regulation under the CWA and requires an NPDES permit. *Hawai’i Wildlife Fund et al v. County of Maui*, 886 F.3d 737 (9th Cir. 2018). They found that there was a “fairly traceable” connection established through the tracer dye studies, showing “the functional equivalent of a discharge into navigable waters” by the County. *Id.* at 748. In reaching this decision, the Ninth Circuit considered “for its persuasive value” language from the late Justice Scalia’s plurality opinion in *United States v. Rapanos*, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed2d (2006), that the CWA does not prohibit the

“‘addition of any pollutant *directly* into navigable waters from any point source’ but rather the ‘addition of any pollutant *to* navigable waters.’” *Rapanos* at 723 (emphasis in original); 886 F.3d at 748. Thus, the Ninth Circuit rejected the County’s argument that a point source must discharge directly into navigable waters to trigger permitting requirements under the CWA — holding instead that it is enough for the discharge to come from a point source (here, the wells.) The Ninth Circuit “assumed without deciding” that the groundwater here was not a point source or navigable water under the CWA. (The district court had determined that the groundwater was both). 886 F.3d 746, fn.2.²

Supreme Court Ruling

The US Supreme Court (Court) found the Ninth Circuit “fairly traceable” test too broad, noting that it could result in EPA requiring a permit in unexpected circumstances, such as “the 100-year migration of pollutants through 250 miles of groundwater to a river.” *Maui, Slip Op.* at 6. In describing the new “functional equivalent” test (although the Ninth Circuit also used those words describing the “fairly traceable” test — *see* above), the Court identified a non-exclusive list of seven factors, emphasizing two of them:

“But there here are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language. Consider, for example, just some of the factors that may prove relevant (depending upon the circumstances of a particular case): (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, (7) the degree to which the pollution (at that point) has maintained its specific identity. Time and distance will be the most important factors in most cases, but not necessarily every case.” *Maui, Slip Op.* at 16.

The Court, however, gives little guidance on how the factors are weighted, or how they should be scaled. What distance is too far between a pipe (point source) discharge of a pollutant into groundwater and the entry point of that pollutant into navigable waters? In *County of Maui*, the distance was about half a mile. The Court suggests that a few feet would be considered close enough, but that 50 miles might be too far, depending on the circumstances: “If the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply.” *Maui, Slip Op.* at 16. The same lack of definition applies to the

² For a fuller discussion of the lower court decisions, circuit splits, legislative history and background on indirect discharges and the CWA, see “*Groundwater & the Clean Water Act: Murky Waters — Are Indirect Discharges to Groundwater Regulated Under the Clean Water Act? Hawai’i Wildlife Fund, et al v. County of Maui*” Kathy Robb, TWR #170 (4/15/18), and its update, Water Briefs, TWR #186.

time factor, the second factor emphasized by the Court. In Maui, it took 84 days for the dye to become visible in the Pacific Ocean.

Where does this leave us at, say, discharges from 40 miles, or that take a year to reach navigable waters? And are tracer dye tests and preemptive applications for NPDES permits now going to become the new normal to defend against potential enforcement or citizens suits? Justice Alito, in his dissent, highlighted the uncertainty created in the opinion: “If the Court is going to devise its own legal rules, instead of interpreting those enacted by Congress, it might at least adopt rules that can be applied with a modicum of consistency. Here, however, the Court makes up a rule that provides no clear guidance and invites arbitrary and inconsistent application.” *Maui, Alito Dissent* at 1.

The opinion, like the oral argument in the case, also focused more on prepositions rather than defined statutory terms under the CWA. “Point source,” “pollutant,” and “waters of the United States” got little discussion, as the Court focused on “from” — whether the discharge to the Pacific was “from” the point source, and “to” navigable waters, when it went through groundwater. At oral argument, the justices noted that both sides had strong arguments about the meaning of “from.” *November 6 Transcript* at 17 (*Nov. 6 Tr.* at 17). The justices grappled with identifying a “limiting factor” that would help them interpret “from” in the statute.

Counsel for the County Elbert Lin urged the Court to require a permit only when pollutants are conveyed directly from a point source to navigable waters. The County argued that the releases from Maui’s underground injection wells are already regulated under several existing federal and state programs, including the CWA’s non-point source program. “The question is where the line falls between the CWA’s federal point source program and its state law non-point source program. And the answer is in the text. The text defines a point source as a discernable, confined and discrete conveyance, and it thereby makes clear that the trigger point for point source permitting is not where a pollutant comes from but how it reaches navigable waters.” *Nov. 6 Tr.* at 3.

When asked by the justices to provide “limiting factors” to determine the meaning of “from,” Lin pointed to statutory context as the means to determine interpretation, and emphasized the separate point source and non-point source regulatory framework of the CWA. *Nov. 6 Tr.* at 18-19. He argued that requiring a permit for groundwater delivery from a point source would eliminate any “meaningful role for the non-point source program.” He also pointed to a need for regulatory certainty in advance about who must apply for a permit — which, he noted, the “after-the-fact” application of tracer dye studies cannot provide — and the steep penalties (up to \$55,000 a day per source) that could apply under the CWA for failure to obtain a permit, not only for corporate entities and municipalities but also for “ordinary lay people.”

At oral argument, US Deputy Solicitor General Malcolm Stewart offered an analogy to illustrate the government’s position on the meaning of “from”:

“And, for example, if at my home I pour whiskey from a bottle into a flask and then I bring the flask to a party at a different location and I pour whiskey into the punch bowl there, nobody would say that I had added whiskey to the punch from the bottle. It would be true that the punch — that the whiskey originated in the bottle, its route was fairly traceable from the bottle to the punch bowl, and it wound up in the punch bowl, but you wouldn’t say it was added to the punch from the bottle.” *Nov. 6 Tr.* at 22.

In the opinion, Justice Breyer considers several examples of everyday meanings of “from” — describing immigrants from Finland, travelers from Europe who came from Baltimore and perhaps from the train station, and meat drippings for gravy that came from the meat and from the pan — and concludes that a discharge could come from many places, just like a person or gravy.

While the Ninth Circuit’s “fairly traceable” test was viewed by the Court as too broad, the County’s position that discharges from a point source that travels through groundwater to navigable waters never require a permit was viewed as too narrow. In oral argument, it became clear that the Court was struggling with how a reading of the Clean Water Act precluding any permitting for discharges through groundwater to navigable water (as advocated by the County and EPA), could create a “massive loophole” allowing discharges that violate the fundamental purpose of the Act.

The regulatory bundle commonly referred to as the Clean Water Act is made up of a statute first passed in 1972 and last amended in 1987, with antecedents as far back as the Rivers and Harbors Act of 1899. It is well to remember that prior to the CWA, US rivers were literally on fire. The Cuyahoga River had fires every decade between 1868 and 1972. Iconic photos from 1952 published on the cover of Life magazine at the time of a 1969 fire on the Cuyahoga River horrified the nation, galvanizing political support for passage of the Act three years later. Congress overrode a presidential veto to the initially-named “*Federal Water Pollution Control Act Amendments of 1972*” by 52 to 12 in the Senate and 247 to 23 in the House, with members of both parties casting votes on each side, in a bipartisan atmosphere at which we now can only marvel.

Congress set audacious goals in the CWA in 1972: “To restore and maintain the chemical, physical, and biological integrity of the nation’s waters,” to make waters fishable and swimmable by 1983, and to eliminate the discharge of pollutants by 1985. *See* (33 U.S.C. 1251). Unsurprisingly, these target dates were not met. But by 1998, the United States had doubled the waters clean enough for fishing and swimming; more than doubled the number of people served by modern sewage treatment plants; and drastically reduced wetlands losses. In 1972, less than a third of the nation’s waters met the CWA’s goals; by 2016, it was estimated that over 65 percent did.

Tensions inherent in the CWA from the beginning remain over 47 years later. Three jurisdictional aspects of the Act are still the subject of hotly contested litigation and debate: 1) what are “navigable waters” (which defines the jurisdictional waters under the Act); 2) what does the “cooperative federalism” that is a hallmark of the Act mean for jurisdiction between the federal government and the states; and 3) what is the regulatory scope of the Act for groundwater?

While out of sight, groundwater is certainly no longer out of mind. More than 28 trillion gallons of water a year is pumped from underground in the US. About 78% is used for irrigation; 14% used for public supply systems; and 4% is applied to rural domestic/livestock uses. The recent increase in litigation involving groundwater mirrors a 2017 Gallup poll report that Americans are more concerned about water pollution than they have been since 2001.

The opinion of the Court reflects the concern about adhering to the purpose of the Act: “[W]e conclude that, in light of the statute’s language, structure, and purposes, the interpretations offered by the parties, the Government, and the dissents are too extreme.” *Maui, Slip Op.* at 15.

The States’ Role

Among the 30 amicus briefs filed in the case, 20 state attorneys general and two governors joined in a brief supporting the County’s position, asserting that the Ninth Circuit’s decision drastically expands CWA jurisdiction and would place a huge additional burden on states, most of which administer the NPDES permitting program. The states argue in the brief that the decision “infringes upon the sovereign prerogative of the States to manage their water resources — especially those such as groundwater that are often wholly *intrastate*.” (emphasis in original) *Brief of Amici Curiae State of West Virginia, 17 Other States, and the Governors of Kentucky and Mississippi in Support of Petitioner County of Maui*, Case No. 18-260, at 2.

The Court’s opinion held that “perhaps most important, the structure of the [Clean Water Act] indicates that, as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States. *See, e.g.*, §101(b), 86 Stat. 816 (stating Congress’ purpose in this regard).” *Maui, Slip Op.* at 6.

The impact of this decision is likely to vary by state. Every state has authority to regulate discharges to groundwater, and some have integrated permitting programs that regulate discharges to both surface water and groundwater. Therefore, in many states, even if a discharge like Maui’s had not triggered CWA treatment and permitting requirements, state authorities would have required modern levels of wastewater treatment prior to any discharge, including a discharge to groundwater. Going forward, if EPA fails to adopt rules, states that implement the NPDES program may define new requirements and issue general permits that address how the “functional equivalent” factors will be applied.

Chevron Deference and County of Maui

While some commentators have made much of the fact that the Court determined not to give “*Chevron* deference” to the US Environmental Protection Agency’s (EPA’s) position in *County of Maui*, the Court notes in its opinion that “[n]either the Solicitor General nor any party has asked us to give what the Court has referred to as *Chevron* deference to EPA’s interpretation of the statute. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).” *Maui, Slip Op.* at 12.

The *Chevron* doctrine is a two-part test applied to determine when and whether a court gives deference to an agency's interpretation of the construction of a statute. *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). If the intent of Congress is clear, the court and the agency must give effect to the unambiguous intent of Congress. If the court determines that Congress has not directly addressed the precise issue at hand, and the statute is silent or ambiguous on the issue, the question for the court is whether the agency's answer is a permissible construction of the statute. Before the Ninth Circuit, the government had urged the court to defer to EPA's prior articulation of the scope of the CWA, "direct hydrological connection", as applied to groundwater.

EPA reversed its position mid-case in *County of Maui*, arguing in the lower courts that those groundwater discharges may require a permit if there is a "direct hydrological connection" between the point source and navigable waters — and then arguing before the Supreme Court that all releases to groundwater are excluded from the CWA permitting program, even where pollutants are conveyed to jurisdictional waters (navigable water, or "waters of the United States"). 84 Fed. Reg. at 16,814. EPA and the US Department of Justice had supported the environmental groups in the district court and the Ninth Circuit, arguing that discharges from a point source to navigable water through groundwater sometimes require an NPDES permit. EPA then asked for comments on this position in February 2018. EPA subsequently published an "Interpretive Statement" in April 2019 after the Court granted certiorari in the *Maui* case, stating that discharges from point sources to groundwater are excluded from the NPDES permitting program, and sided with the County's position in briefs and oral argument.

US Deputy Solicitor General Malcolm Stewart urged the Court to adopt the position of the April 23, 2019, "Interpretive Statement on Application of the Clean Water Act National Pollution Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater." 84 Fed. Reg. 16,810, which states that the CWA does not require permits for pollutants released to groundwater that subsequently make their way to navigable waters.

The lack of reliance on *Chevron* deference reflects a Justice Department trend not to argue that an agency's reading of a particular statute is permissible due to agency expertise and therefore entitled to *Chevron* deference, but rather that the reading is the best one and should win the day. Of course, the relative merits and foibles of *Chevron* deference have always depended very much on whose ox is gored by the agency position in a particular case. Nonetheless, in *Maui*, the Court expressly declined to defer to the agency's interpretation, calling it "neither persuasive nor reasonable." *Maui, Slip Op.* at 12. Interestingly, the "functional equivalent" test in *Maui* actually gives EPA broader permitting jurisdiction under the Clean Water Act than it argued for.

Conclusion: Potential Impacts of *Maui*

The undefined, fact-driven factors of the "functional equivalent" test in *Maui* may be narrower, and not any more vague, than the standard the Court points out that EPA previously had sought for decades — requiring permits for "some (but not to all) discharges through groundwater" — and that did not result in an "unmanageable expansion" of the program. But the functional

equivalent test seems much like Justice Kennedy’s 2006 “significant nexus” test, which Justice Kennedy held in 2006 should define jurisdiction waters under the Clean Water Act. District courts despaired of applying that test, and it triggered uncertainty, epic litigation, and several rulemakings (some still under challenge).

The Court suggests, in addition to district court rulings on a case-by-case basis, that EPA might put flesh on the bones of the functional equivalent factors through a rulemaking, akin to efforts to define “Waters of the United States,” or guidance, or general permits. In fact, the latest final Rule, “The Navigable Waters Protection Rule” was published two days before the *Maui* opinion on April 21, 2020, and excludes groundwater from the definition of “Waters of the United States” under the Clean Water Act (*see* previous article, this *TWR*). That Rule becomes effective on June 22, 2020 and replaces the rule published on October 22, 2019. 85 Fed. Reg. 22,250 (2020). It remains to be seen whether EPA would pursue yet another rulemaking, given the difficulty in defining the Court’s functional equivalent factors and the district court litigation that would be sure to follow across the country.

The *Maui* decision sets up the possibility for increased federal permit requirements for those discharging wastewater that moves through groundwater and ultimately reaches navigable waters. Superfund site cleanups, municipalities, golf courses, recreation areas, agriculture, businesses that contain stormwater onsite in unlined ponds, cesspools, septic systems, underground storage tanks, surface impoundments, landfills, and pipelines — all potentially may fall under the CWA if groundwater carries a discharge from a point source to navigable waters.

EPA’s *Interpretive Statement* excluded from permitting pollution sources such as leaks from coal ash ponds, which are large impoundments of power plant waste that often sit adjacent to federally regulated waterways. The *Maui* decision “functional equivalent” factors have potential legal implications for any sort of surface impoundment, including coal ash ponds.

Long-Awaited EPA Rule Overhauls Section 401 of Clean Water Act

[Chuck Sensiba](#), [Angela Levin](#), [Andrea Wortzel](#), [Byron Kirkpatrick](#), [Brooks Smith](#), [Catherine Little](#), [Fitzgerald Veira](#) & [Hallie Meushaw](#)³

Troutman Pepper

On June 1, the Environmental Protection Agency (EPA) released a [final rule](#) clarifying substantive authorities and procedural requirements for water quality certifications under section 401 of the Clean Water Act (CWA). EPA’s August 2019 notice of proposed rulemaking (NPR) (summarized

³ This piece was originally published at Troutman Pepper’s [Environmental Law & Policy Monitor](#), it is reprinted with permission.

in our previous post) articulated the Agency's first-ever statutory interpretation of section 401 since its enactment nearly 50 years ago, and proposed sweeping substantive and procedural changes to its section 401 regulations in conformance with its interpretation. EPA's final rule largely adopts the regulations in its NOPR, but makes important changes in adopting new regulations that preserve authority of states and Native American tribes exercising "Treatment as a State" (TAS) authorization to ensure that discharges from federally licensed and permitted activities meet state and tribal water quality requirements.

According to EPA Administrator Andrew Wheeler, the final rule will "curb abuses of the Clean Water Act that have held our nation's energy infrastructure projects hostage, and put in place clear guidelines that finally give these projects a path forward." Although legal challenges are certain to follow, the final rule, if sustained by the courts, is likely to increase efficiency, consistency, and certainty in federal licensing and permitting activities and focus state and tribal review and decision making on whether proposed projects' discharges from point sources comply with water quality requirements.

Significant components of the final rule are summarized below.

Background

Section 401 of the CWA requires that any applicant for a federal license or permit that may result in a discharge to navigable waters obtain a water quality certification from the appropriate state or tribal authority in which the discharge will originate. Some of the most common examples of licenses or permits that may be subject to section 401 certification are CWA section 404 permits for the discharge of dredged or fill material, Rivers and Harbor Act sections 9 and 10 permits issued by the United States Army Corps of Engineers (Corps), hydropower licenses and natural gas pipeline certificates issued by the Federal Energy Regulatory Commission (FERC), and CWA section 402 National Pollutant Discharge Elimination System (NPDES) permits where EPA administers the permitting program. Although the CWA is a federal statute, section 401 delegates to the states and Native American tribes with TAS status the authority to issue water quality certifications, so that discharges associated with the federally licensed or permitted activity satisfy state or tribal water quality requirements.

The water quality certification process under section 401 has long been a cause of delay and uncertainty for proposed infrastructure projects. To address these delays, on April 10, 2019, the President issued an Executive Order to promote energy infrastructure and economic growth. In keeping with that Executive Order, on June 7, 2019, EPA issued an updated section 401 guidance document that provides an overview of the concepts that later were introduced in its NOPR. On August 9, 2019, EPA released the NOPR.

EPA's NOPR provided an important opportunity for the regulated community to help shape final regulations that have not been amended for nearly 50 years, and to describe the difficulties associated with the federal permitting and licensing of infrastructure projects. For example, the

Edison Electric Institute (EEI) commented that adoption of the NOPR “would provide critical regulatory certainty to the electric sector as EEI’s member companies take steps to modernize and secure the energy grid and provide increasingly clean, affordable, and reliable electricity to American homes and businesses.” The National Hydropower Association (NHA) commented that hydropower projects face a unique challenge that would benefit from further EPA clarity since water flowing into a hydropower project may already be polluted, which may create uncertainty regarding whether water quality problems downstream are properly attributable to the discharge from the project. Further, NHA requested that EPA resolve the scope of the currently undefined meaning of Section 401(d) providing that certifications may include “other appropriate requirement[s] of State law.” The Interstate Natural Gas Association of America commented that the “rule is necessary to restore efficient and consistent implementation of Section 401 reviews,” noting that “while the statute recognizes the distinctive roles of the federal and state governments in the environmental review process, the balance between those roles has recently been disrupted and some states have viewed Section 401 as a means of determining which interstate pipeline projects are in the public interest and which are not.”

Following a two-month comment period during which it received thousands of stakeholder comments on the NOPR, EPA issued its final rule on June 1, 2020. While the final rule comprehensively addresses substantive and procedural requirements for implementing CWA section 401, for federal licensing and permitting applicants, the most significant features of the rule address:

- The substantive scope of state and tribal authority to decide on whether to grant water quality certification, and the scope of any conditions included in any certification;
- The time period allowable under section 401 for a state or tribe to decide on a request for water quality certification;
- Procedural requirements for states and tribes to properly grant, condition, or deny a request for water quality certification;
- The role of the federal licensing or permitting agency in reviewing a conditioned or denied water quality certification;
- The ability of states and tribes to modify the certification or conditions once issued; and
- Enforcement of certification conditions during the term of the federal license or permit.

Scope of Section 401 Review

In the preamble to its final rule, EPA stated that, in its view, the “scope of certification” established in section 121.3 of its new regulations “is the foundation of the final rule.” Section 121.3 of EPA’s final rule provides: “The scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.” Under this new requirement, the breadth of state and tribal authority to certify and condition federal licensing and permitting activities is largely driven by two factors: (1) the

discharge from the licensed or permitted activity; and (2) “water quality requirements,” a defined term under the final rule.

Discharge from the Federally Licensed or Permitted Activity

The final rule defines the term “discharge” as “a discharge from a point source into the water of the United States.” The final rule adopts a conclusion that water quality certification under section 401 “must address water quality concerns from the discharge itself, not the proposed activity as a whole.” In this regard, EPA in the final rule maintains an interpretation of section 401 consistent with Justice Thomas’s dissenting opinion in the Supreme Court of the United States’ landmark 1994 ruling in *Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology*. Explaining that the federal regulations that guided the Court’s *PUD No. 1* ruling were enacted prior to the 1972 CWA, and that the Court in *PUD No. 1* lacked the benefit of EPA’s interpretation of the statute, EPA explained that it interprets section 401 water quality certification as pertaining only to point-source discharges associated with a federally licensed or permitted activity — and not the entire project proposal.

Water Quality Requirements

The final rule defines “water quality requirements” as “applicable provisions of §§ 301, 302, 303, 306, and 307 of the [CWA], and state or tribal regulatory requirements for point source discharges into waters of the United States.” Thus, state and tribal certification can include effluent limitations and standards of performance for new and existing discharge sources (CWA sections 301, 302, and 306); water quality standards under CWA section 303 (including designated uses, numeric criteria and narrative standards); toxic pretreatment effluent standards under CWA section 307; and other state or tribal regulatory requirements that apply to point source discharges.

In the final rule’s preamble, EPA acknowledged that certification conditions that states and tribes have imposed in the past “may be beyond the scope of certification as articulated in this final rule” —including, for example, “building and maintaining fish passages, compensatory mitigation, temporal restrictions on activities to mitigate hazards or protect sensitive species, pre-construction monitoring and assessment of resources, habitat restoration, tree planting along waterways, spill management plans, stormwater management plans, and facilitating public access.” In addition, EPA expressly stated in the preamble that the final rule does *not* “address minimum flow issues.” Rather than drawing a bright line on the types of conditions that exceed the scope of certification, EPA recognized that “there may be unique project-specific facts or circumstances, including the nature of the discharge and applicable water quality standards and related designated uses, that must inform whether a particular condition is within the scope of certification, as defined in this final rule.”

By defining “water quality requirements” in this manner, EPA in the final rule interpreted state and tribal authority under CWA as extending only to water quality concerns. EPA explained:

The imposition of conditions unrelated to water quality is not consistent with the scope of the CWA generally or section 401. There is nothing in the text of the statute or its legislative history that signals that Congress intended to impose, using section 401, federal requirements on licensed or permitted activities beyond those addressing water quality-related impacts. Indeed, Congress knows how to craft statutes to require consideration of multi-media effects (see, e.g., NEPA), and has enacted specific statutes addressing impacts to air (Clean Air Act), wildlife (Endangered Species Act), and cultural resources (National Historic Preservation Act), by way of example.

Based on this interpretation of CWA section 401, EPA determined that state and tribal certifications and conditions cannot address other environmental impacts, such as “air emissions, transportation effects, [and] climate change.”

EPA’s NOPR would have required federal agencies to review a certification action to determine whether it was within the “scope of certification,” and would have permitted the federal permitting agencies to reject certification conditions that, in their view, were beyond the scope of authority under CWA section 401. The final rule, however, clarifies that federal agencies are only to review certification actions for compliance with the procedural requirements of section 401, which are further described below.

Time Period for Section 401 Review

Relying on the plain language of section 401 and the D.C. Circuit’s 2019 decision in *Hoopa Valley Tribe v. FERC*, the final rule establishes that states and tribes have a “reasonable period of time,” but only up to one year to act on a request for water quality certification. In fact, the final rule establishes several procedural safeguards to ensure that the federal permitting agency, the state or tribal certifying agency, and the applicant all are aware of the beginning and ending points of the maximum one-year certification period.

For example, the final rule includes specific contents requirements for a certification request. It requires the applicant to submit the certification request not only to the state or tribal certifying agency, but also to the federal permitting agency. Moreover, the final rule requires the federal agency to establish the reasonable time period for certification—which an agency may do on a categorical or individual basis—and to notify the certifying state or tribe of the applicable time to act on the certification request, specifying “the date upon which waiver will occur if the certifying authority fails or refuses to act on the certification request.

Once the reasonable time period begins, the federal agency may extend the period at the request of the project proponent or the certifying agency, “but in no case shall the reasonable period of time exceed one year from receipt.” In the preamble to the final rule, EPA explains that one year is the “absolute outer bound” for states and tribes to act on requests for water quality certification under section 401.

This one-year, statutory deadline cannot be tolled or extended. EPA's new regulations expressly provide that the certifying state or tribe "is not authorized to request the project proponent to withdraw a certification request and is not authorized to take any action to extend the reasonable period," except up to a total of a one-year certification period.

EPA does recognize that in some circumstances, the project proponent may voluntarily seek to withdraw and resubmit its application; however, EPA expects that these circumstances would be "rare" and only take place if project plans "have been modified such that a new certification request is required, or if the project is no longer planned."

Procedural Requirements for Certifications and Denials of Certification

EPA's final rule gives certifying entities four choices upon receiving a request for certification: grant, grant with conditions, deny, or waive the certification. Except with regard to an express waiver, EPA's new regulations include precise content requirements for each of these choices.

For example, a grant of certification must include a statement that the discharge will comply with water quality requirements. If a certifying authority grants a certification with conditions, the final rule requires that certification must include a statement explaining why that condition is necessary to ensure that the discharge will comply with water quality requirements, together with a citation to federal, state, or tribal law authorizing the condition. If a certifying authority determines that denial of certification is appropriate, the denial must include the specific water quality requirements with which the discharge will not comply, a statement explaining why the discharge will not comply with the requirements, or, if the denial is due to insufficient information, the specific information that would be needed to ensure that the discharge would comply with water quality requirements.

If the certifying agency fails or refuses to act, the federal licensing or permitting agency is required by the final rule to provide written notice to the EPA Administrator, certifying authority, and project proponent, that a waiver has occurred.

Federal Agency Determination of Waiver

The NOPR reaffirmed precedent established by the D.C. Circuit in *City of Tacoma v. FERC* and other cases that the federal permitting agency determines whether a state waiver has occurred. In the NOPR, EPA placed the burden on the state to comply with section 401, and specifically noted that states run the "risk [of] having [a] certification denial be set aside by the permitting federal agency" if the state exceeds the scope of its CWA authority. In a reversal of longstanding judicial precedent, including the Second Circuit's decision in *American Rivers v. FERC*, EPA's NOPR would have allowed the federal licensing or permitting agency to review and reject conditions in a state water quality certification that are beyond the scope of addressing discharges to meet state water quality standards.

The final rule did not adopt this aspect of the NOPR. Instead, and consistent with *City of Tacoma*, *Hoopa Valley Tribe*, and other precedent, EPA in the final review requires the federal permitting

agency only to review procedural compliance of the certification and conditions. So long as the certification and each condition meet procedural requirements of CWA section 401 and EPA's implementing regulations, the federal permitting agency must include the certification condition in any license or permit issued.

Modifications by Certifying Authorities

In light of the statute's one-year time limit for acting on a section 401 certification request, EPA's NOPR solicited comment on whether and to what extent states or tribes should be able to modify a previously issued certification under a variety of circumstances—such as, before or after the “reasonable” time limit expires; before or after the federal license or permit is issued; or to correct an aspect of a certification or its conditions remanded or found unlawful by a federal or state court or administrative body.

In the preamble to the final rule, EPA explained that its interpretation of section 401 does not permit a certifying authority to unilaterally modify a previously issued certification, neither through reopening the certification nor through other mechanisms. In declining to permit modifications, EPA noted that water quality certifications are unique in that their conditions are incorporated into a federal license or permit for implementation and enforcement, and that allowing modifications to certifications would lead to regulatory uncertainty and confusion.

Enforcement of Certification Conditions

The NOPR asserted that the federal permitting agency is solely responsible for enforcing the state or tribal water quality conditions that ultimately become part of the federal approval. In its NOPR, EPA noted that section 401 does not provide an independent regulatory enforcement role for state certifying authorities for conditions included in federal licenses or permits.

The final rule confirms that the federal licensing or permitting agency has the exclusive authority to enforce water quality certification conditions that have been incorporated into a federal license or permit. In the preamble to the final rule, the EPA addresses a comment received on the NOPR regarding section 401's enforcement provision, explaining that “if certification conditions were enforceable independent of the federal license or permit, there would have been no need for Congress to require conditions to become part of the federal license or permit under section 401(d).”

Next Steps

The final rule will become effective 60 days after its publication in the Federal Register. In light of EPA's new interpretation of CWA section 401 and resulting procedural and substantive regulations, litigation challenging the final rule is all but certain. If EPA's rule ultimately is upheld by the courts, the rule may require federal permitting agencies, such as FERC and the Corps, to review and possibly amend their current regulatory programs to accommodate the final rule—for example, to determine the “reasonable” time period for state or tribal certification, and whether that period should be established programmatically or on an individual, case-by-case basis.

In addition, many states and tribes with TAS authority will need to revisit their policies and procedures for processing requests for water quality certification. This may be a particular challenge for states—such as California, New York, and Washington—that have independent environmental review requirements for state action.