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CALIFORNIA AND 16 STATES AND CITIES SUE EPA IN FEDERAL COURT OVER CLEAN WATER ACT 2020 RULE

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Seventeen states and cities (California, Connecticut, Illinois, Maine, Maryland, Michigan, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, Wisconsin, Massachusetts and Virginia, along with the District of Columbia and New York City) filed a complaint in the U.S. District Court for the Northern District of California last week seeking judicial review under the Administrative Procedure Act ("APA") of a rule promulgated by the U.S. Environmental Protection Agency's ("EPA") and the Army Corps of Engineers' ("Corps") April 21, 2020 "The Navigable 11 Waters Protection Rule: Definition of 'Waters of the United States'" (2020 Rule). The Plaintiffs asked that the 2020 Rule be vacated because it is not consistent with the "significant nexus" standard.

The Clean Water Act's central requirement is that pollutants, including dredged and fill materials, may not be discharged into "navigable waters" without a permit. "Navigable waters" are defined as "the waters of the United States, including the territorial seas." The term was further defined in EPA's regulations in the 1980s, then again in 2015, 2019, and finally in 2020. In the 1980s (1977, 1980, 1982, 1986, and 1988), regulations defined "waters of the United States" to cover: (1) waters used or susceptible of use in interstate and foreign commerce, commonly referred to as navigable-in-fact or "traditionally navigable" waters; (2) interstate waters; (3) the territorial seas; and (4) other waters having a nexus with interstate commerce.

The Supreme Court intervened after the 1980s regulations, interpreting "waters of the United States" to include non-navigable waterbodies with a "significant nexus" to navigable waters. *Rapanos v. United States*, 547 U.S. 715 (2006) ("Rapanos") and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167 (2001) ("SWANCC"). Subsequently, EPA issued the Rapanos Guidance, which included the following categories of waters as within the jurisdiction of the Clean Water Act: (1) navigable waters and their adjacent wetlands; (2) non-navigable tributaries of navigable waters that are relatively permanent; and (3) wetlands that directly abut those non-navigable tributaries. Adjacent wetlands were defined in the Guidance to include those with a surface or shallow sub-surface connection to jurisdictional waters, wetlands separated from jurisdictional waters by barriers, and wetlands reasonably close in proximity to jurisdictional waters. The Rapanos Guidance further provided that non-navigable, non-relatively permanent tributaries and their adjacent wetlands would be assessed on a case-by-case basis according to the Agencies' significant nexus analysis, which considered various hydrologic and ecological factors such as flow characteristics and various functions of those waters, "to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters."

Because of concerns about inconsistent application of the "significant nexus" standard on a case-by-case basis, EPA and the Corps promulgated regulations under the Clean Water Act in 2015, 80 Fed. Reg. at 37,055 ("2015 Rule"). Bick Law LLP published several articles and client alerts analyzing the 2015 Rule, and subsequent challenges to the Rule, which can be found here:

1. Ninth Circuit Favors Salmon In California Water Battle;
2. WOTUS Is Rescinded By Executive Order;
3. Environment and Natural Resources Division Announces 2016 As One Of The Most Successful Years In Its History;

4. TODAY: Supreme Court To Hear National Association of Manufacturers' WOTUS Jurisdictional Question;
5. American Farmers Weigh In On WOTUS Jurisdiction Question;
6. Expanding California's Water Resources With Deep Groundwater;
7. California Environmental Lawyers Monitor NAM's Petition for Writ of Cert on WOTUS Jurisdictional Issue and Possible Impacts on California Ag and Property Owners;
8. California WaterFix Water Right Change Petition Status Update;
9. Sixth Circuit Asserts Jurisdiction Over Challenge To EPA's Clean Water Rule;
10. U.S. Branches Battle Over EPA's Clean Power Plan;
11. Untangling 'Waters Of The US' Web In 6th Circ.;
12. Clean Water Rule Definition of Waters of the United States Likely Inconsistent With Supreme Court's Definition in Rapanos - Sixth Circuit Stays Clean Water Rule;
13. EPA Beats Blueberry Farmer – "Buy Local" Not a Priority for Clean Water Rule; and
14. 13 States Block Clean Water Rule (WOTUS) Today – Remaining States Subject to Rule Tomorrow.

The 2020 Rule drastically narrows the 2015 definition of "waters of the United States," limiting it to four categories of waters: (1) the territorial seas and waters that are, were, or may be susceptible to use in interstate or foreign commerce;3 (2) tributaries that meet the definition of "waters of the United States"; (3) lakes and ponds, and impoundments of jurisdictional waters that meet the rule's definition of "waters of the United States"; and (4) wetlands adjacent to those waters. 85 Fed. Reg. at 22,338 (to be codified as 33 C.F.R § 328.3(a)).

To fall within jurisdiction of the Rule, a tributary, lake, pond, or impoundment must contribute flow in a "typical year" directly to traditional navigable waters or indirectly to such waters through other jurisdictional waters (including other tributaries, lakes, ponds, impoundments or adjacent wetlands). Tributaries must be either perennial (continuously flowing all year round) or intermittent (continuously flowing during certain times of the year and not just in direct response to precipitation). "Typical year" is defined to mean "when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period." The 2020 Rule does not identify which "other climatic variables" should be considered, or what is the "geographic area of the applicable aquatic resource."

The 2020 Rule excludes groundwater, ephemeral streams and pools, previously converted cropland, waste treatment systems, interstate waters, and adjacent wetlands that lack a physical or surface hydrological connection to a covered wetland. The Plaintiffs argue that ephemeral streams should be included in the definition of the "waters of the United States" because, the requirement that a tributary be perennial or intermittent and be connected to a traditional navigable water is reasonable and reflects the Rapanos plurality's description of a water of the United States as a "relatively permanent body of water connected to traditional interstate navigable waters." 547 U.S. at 742. Similarly, the Plaintiffs contend that limiting the inclusion of wetlands that are "inseparably bound up with" (i.e., physically connected to) other jurisdictional waters, such as wetlands directly abutting or inundated by flooding from such waters, and excluding wetlands with a shallow sub-surface connection as well as wetlands lacking direct hydrologic surface connection to jurisdictional waters, is inconsistent with Rapanos' "significant nexus" standard.

The Plaintiffs assert that EPA's and the Corps' reliance on the plurality opinion in Rapanos, written by former Justice Anthony Kennedy, instead of the majority opinion, written by former Justice Antonin Scalia, represents an arbitrary and capricious act. The Plaintiffs also argue that the 2020 Rule arbitrarily focuses on physical connectivity, which is limited to surface water connections for determining jurisdiction, rather than chemical and biological connectivity of waters, as in prior rulemaking. The Plaintiffs cite to a Scientific Advisory Board's comments, plus additional public comments, that EPA and the Corps rejected, which pointed out the lack of scientific support for the 2020 Rule.

The Plaintiffs allege harm caused by the 2020 Rule because of water pollution flowing from out-of-state sources which the Plaintiffs lack authority to regulate directly under state or local laws. In addition, they argue that they will be harmed because ephemeral waters and waters that do not meet the "typical year" requirement are significant for downstream waters, especially in arid and semi-arid watersheds (for example, in California) could be impacted by pollutants even though they are not regulated by the 2020 Rule. In states that are not authorized to issue 404 permits, the Corps may now issue permits to dredge and fill wetlands that previously could not be dredged or filled. Finally, the 2020 Rule impairs violates the public trust doctrine; the state holds in trust for the public the fish and other animals within their borders. The discharges of dredge and fill materials into wetlands and other waters that may result from the 2020 Rule could destroy habitat provided by these waters, reducing wildlife populations.

In sum, the Plaintiffs allege three causes of action: (1) violation of the Administrative Procedure Act, because EPA and the Corps acted in an arbitrary and capricious manner and not in accordance with law when it made an impermissible interpretation of "Waters of the United States"; (2) violation of the Administrative Procedure Act, because EPA and the Corps acted in an arbitrary and capricious manner and not in accordance with law when it disregarded scientific evidence, prior agency factual findings and policy and practice ; (3) violation of the Administrative Procedure Act, because EPA and the Corps acted in an arbitrary and capricious manner and not in accordance with law when it failed to consider statutory objective and impacts on water quality.

Other groups, including- have also challenged the 2020 Rule in other courts. The Natural Resources Defense Council Inc., the Conservation Law Foundation and other groups filed a challenge in Massachusetts federal court, while Defenders of Wildlife, the South Carolina Coastal Conservation League and others sued in South Carolina federal court. And Chesapeake Bay Foundation Inc. and Shore Rivers have sued in Maryland federal district court.

The New Mexico Cattle Growers' Association is also pursuing a case in New Mexico's federal court, saying the 2020 Rule goes too far and expands the definition of "waters of the U.S." The Clean Water Act lawyers at Bick Law LLP will post a separate blog analyzing the New Mexico Cattle Growers' Association case. The California Environmental Lawyers at Bick Law LLP will continue to monitor the evolving regulatory landscape pertaining to compliance with the Clean Water Act. In particular, we will monitor and update our blog as the 2020 Rule litigation proceeds and eventually comes head to head with the County of Maui case on remand to the Ninth Circuit.

As a reminder, the Supreme Court ruled in County of Maui v. Hawaii Wildlife Fund that, pursuant to the Clean Water Act, the EPA has jurisdiction to regulate the functional equivalent of a direct discharge from a point source into navigable waters. The County of Maui case involved an alleged hydrologic connection via groundwater, by which means pollutants traveled to the Pacific Ocean. If the 2020 Rule stands, then there will be a conflict between the jurisdiction over groundwater that is connected to "navigable waters" that meets the "functional equivalent" multi-factor test established by Justice Breyer in the County of Maui decision, and the exclusion of groundwater from "navigable waters" in the 2020 Rule. In other words, by excluding groundwater from "navigable waters," EPA and the Corps essentially muted the County of Maui decision that attempted to find a middle ground for the Clean Water Act's jurisdiction over groundwater. For more on the County of Maui case, please see Bick Law LLP's prior post here and last week's CEB article.