

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2020

PHILADELPHIA, TUESDAY, JULY 28, 2020

VOL 262 • NO. 19

An **ALM** Publication

ENERGY AND ENVIRONMENTAL LAW

The Changing Landscape of Water Regulation in the US

BY PETE KEAYS

Special to the Legal

Since March, the United States has experienced unparalleled upheaval on seemingly countless fronts. One area that, quite understandably, has flown relatively under the radar during this time is water regulation. However, in the past few months the landscape of water regulation has experienced its own significant upheaval, punctuated by several key developments.

This article explores these developments, which, taken individually and collectively, are likely to spur significant litigation and precipitate substantial shifts in what activities, areas, entities, and substances are—and are not—subject to regulation.

THE NAVIGABLE WATERS PROTECTION RULE

The federal Clean Water Act (CWA) applies to “navigable waters”, which the statute defines as “waters of the United States ...” However, in a move that has helped a generation of environmental



PETE KEAYS is an attorney in the environmental law practice group at Hangley Aronchick Segal Pudlin & Schiller. He previously served as a law clerk to judges on the U.S.

Court of Appeals for the Second Circuit and the U.S. District Court for the District of Montana. Pete can be reached at 215-496-7034 or pkeays@hangley.com.

lawyers put their kids through college, Congress did not define “waters of the United States”—the very term that dictated what “waters” the CWA covers (hereinafter referred to as jurisdictional waters). Since the CWA was passed, federal and state agencies, farmers, businesses, utilities, and industry and interest groups of all stripes have fought over—and courts have struggled to pin down—the meaning of that critical term. The most recent salvo in the ongoing battle was fired in April, when EPA and the Army Corps of Engineers (the agencies) promulgated the Navigable Waters Protection Rule (Navigable Waters

“ The regulations may present a significant challenge for many utilities and other dischargers, as the regulation of PFAS has largely outpaced the development of effective and inexpensive methods and systems for treating PFAS, which is still a work in progress.

Rule) which set new parameters for what constitutes jurisdictional waters. The Navigable Waters Rule is the Trump administration’s response to, and replacement for, the Clean Water Rule (commonly referred to as the Waters of the United States Rule) promulgated by the Obama administration in 2015 for the same purpose. Not

surprisingly, the two rules are quite different.

The Clean Water Rule established a case-specific and data-driven approach for determining what waters are jurisdictional based whether the “water” in question had a “significant nexus” to traditional navigable waters such as rivers, lakes and oceans. The Navigable Waters Rule employs a far more categorical and less data-driven approach; on the whole, it defines jurisdictional waters far more narrowly than did its predecessor. Specifically, the Navigable Waters Rule excludes all waters and other areas that do not fall into one of four categories: traditional navigable waters (TNW); tributaries to TNWs; lakes, ponds, and impoundments that contribute surface flow to TNWs; and wetlands that directly abut or have a hydrological surface connection to jurisdictional waters. Expressly excluded under the Navigable Waters Rule are many features that were covered by the Clean Water Rule, such as artificial lakes and ponds, streams that only flow in direct response to rain or snowfall, and certain roadside and agricultural ditches.

If it survives the tidal wave of litigation that has already commenced against it, the impact of the Navigable Waters Rule will be to significantly reduce jurisdictional waters; by one estimate, it may reduce jurisdictional waters by as much as 60%. This will

allow agriculture, industry, and other landowners a freer hand to discharge, fill, and conduct other activities in a wide range of areas that had previously been subject to the CWA.

THE CLEAN WATER ACT AND DISCHARGES TO GROUNDWATER

In April, the U.S. Supreme Court issued its opinion in *County of Maui v. Hawaii Wildlife Fund*. The question before the court was whether a party must obtain a CWA discharge permit in order to inject a pollutant (in this case, wastewater) into groundwater when the pollutant is ultimately transmitted via the groundwater to a jurisdictional water. The court rejected the position (recently-adopted by EPA) that permits are not required for *any* discharge into groundwater, but it did not provide a bright-line rule as to when permits are required for such discharges. Rather, the Court held that a permit is required “if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from [a] point source into navigable waters.”

The new “functional equivalent” test must be conducted on a case-by-case basis. Illustrating the two extreme ends of the “functional equivalent” spectrum, the court wrote that a pollutant discharged a few feet from a navigable water would clearly require a permit, whereas a pollutant that travels 50 miles over a period of many years likely would not. To help fill in the

middle ground in situations in which the answer is not so clear, the court identified several factors that may be relevant when applying the functional equivalent test, including the time and distance over which the pollutant travels to the navigable water, and the amount of the pollutant originally discharged that reaches the navigable water.

The court’s ruling is noteworthy for several reasons. First, it changes the landscape of groundwater discharge regulation by firmly establishing that some discharges to groundwater are regulated. Second, it establishes a new test that parties, regulators, and courts will wrestle with for years to come. Third, the court’s ruling could easily broaden the range of activities for which CWA permitting must at least be considered, if not pursued. It is quite possible that various wells, lagoons, and even septic systems may be deemed the functional equivalent of a direct discharge and thus be subject to the CWA’s permitting requirement. Indeed, in the short time since *Maui* was decided, litigants have tried to use the opinion to argue that coal ash ponds and spills from a pipeline require CWA discharge permits. Finally, the *Maui* ruling shows the Court’s willingness to push back when it believes the administration has overstepped in its attempt to narrow the scope of the CWA. *Maui* may thus impact both the way in which the administration crafts future water policies and regulations, and the way in

which actions it has already taken—including the Navigable Waters Rule—will be implemented, challenged, and interpreted.

EPA RESTRICTS STATES' AND TRIBES' ABILITY TO VETO INFRASTRUCTURE PROJECTS

In early June, the EPA finalized the “Clean Water Act Section 401 Certification Rule” (Certification Rule), which dramatically curbs the states’ (and eligible tribes’) authority to block federal permits for infrastructure projects, such as dams and pipelines within their boundaries. Under Section 401 of the CWA, the federal government may not issue a license or permit to conduct any activity that may result in a discharge to jurisdictional waters unless the state in which the discharge would occur certifies that the activity complies with applicable water quality standards. In justifying the Certification Rule, the EPA claimed that states were abusing the certification process in order to stop or delay energy infrastructure projects for reasons unrelated to water quality.

One key aspect of the Certification Rule is to limit the type of impact that states may use to deny certifications. Whereas states could previously deny certifications based on a variety of considerations, including a project’s potential impact on wildlife, flow characteristics or water quantity, they will now be limited to assessing only the actual impact of a discharge of pollutants.

Significantly, the Certification Rule also limits states’ ability to extend their one-year review period established by the CWA (after which a state is deemed to have waived its right to certify), and provides an avenue for federal agencies to shorten that period under certain circumstances.

NEW JERSEY REGULATES EMERGING CONTAMINANTS IN WATER

The past months have seen significant developments on the regional level as well. In recent years, a class of compounds known as Per-fluoroalkyl and Poly-fluoroalkyl Acid (PFAS) have come under intense scrutiny from federal and state lawmakers and environmental regulators due to potential adverse health impacts. PFAS are manmade chemicals that, thanks to numerous highly desirable characteristics, have been widely used in countless products and applications since the 1950s.

In early June, the New Jersey Department of Environmental Protection (NJDEP) finalized regulations pertaining to two of the most common PFAS compounds: PFOA and PFOS. The regulations set enforceable drinking water limits, known as maximum contaminating levels (MCLs), for these compounds at 14 parts per trillion (PPT) and 13 PPT, respectively, which are among the lowest PFAS MCLs in the country. Under the new regulations, all public water utilities in

the state must begin testing for PFOA and PFOS in early 2021; if either substance is found to exceed the applicable MCL, the utility must take measures to bring levels below the MCL. The new regulations also set the MCL levels as formal standards applicable to groundwater discharges and groundwater remediation, but they stop short of applying the MCL levels to surface discharges.

Complicating this development is the fact that testing for PFAS at such low levels is difficult, and as result, there are few laboratories currently certified to conduct the required testing. Moreover, the regulations may present a significant challenge for many utilities and other dischargers, as the regulation of PFAS has largely outpaced the development of effective and inexpensive methods and systems for treating PFAS, which is still a work in progress. ●