

WOTUS Encore: The Fate of the Navigable Waters Protection Rule and Implications for Groundwater

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It seems like yesterday, but it was actually last summer when the United States Environmental Protection Agency and Army Corps of Engineers published the Navigable Waters Protection Rule, effective June 22, 2020 (the 'Rule').

The Rule's publication completed the two-step process to repeal and replace the 2015 Clean Water Rule. The Rule replaced the Clean Water Rule's definition of "waters of the United States" with one that provides an arguably smaller scope of protections for these waters. As expected, several states (including North Carolina) raised legal challenges to the Rule during the second half of 2020. Colorado, however, was the only state that obtained a stay of the Rule.

Although not uniformly supported, the Rule—through its level of defined terms— provides clarity not seen since before the United States Supreme Court's 2006 *Rapanos* decision. According to the Rule, "waters of the United States" (widely known as "WOTUS") are: (i) the territorial seas and traditional navigable waters (which long ago were expanded beyond commercially navigable-in-fact waters); (ii) perennial and intermittent tributaries of traditional navigable waters; (iii) lakes, ponds, and impoundments of jurisdictional waters; and (iv) wetlands adjacent to other jurisdictional waters. The Rule's definition of WOTUS excludes 12 specific features, including groundwater. And, for the first time in nearly 15 years, the case-by-case "significant nexus" analysis under *Rapanos* is *not* necessary to prove or disprove connectivity for a permit from the Corps to impact WOTUS under Section 404 of the Clean Water Act. The Rule purports to eliminate that analysis with its categorical bright lines. Implementing the Rule in the field therefore could become more predictable and more efficient as the regulators and the regulated "sing off the same song sheet."

With respect to groundwater, however, the Rule is *not* the end of the analysis. After the Rule was drafted to exclude groundwater from jurisdiction but before its June 2020 effective date, the United States Supreme Court decided *County of Maui, Hawaii v. Hawaii Wildlife Fund*. That opinion holds that Section 402 of the Clean Water Act (the National Pollutant Discharge Elimination System ("NPDES") permit program) applies when there is the "functional equivalent" of a direct discharge from a point source *through* groundwater into navigable waters. The Supreme Court declined to issue a bright line rule on whether a regulated discharge occurs and applied a more nuanced "functional equivalency" test to the circumstances; it held that Section

402 requires an NPDES permit for a discharge "if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from a point source" into a water of the United States. To identify a "functional equivalent," the Court set forth seven non-exclusive considerations to apply to the pollutants travelling from the discharge: transit time; distance traveled; nature of the material through which the pollutant travels; the extent to which the pollutant is diluted or chemically changed as it travels; the amount of pollutant entering the navigable water relative to amount of pollutant that leaves the point source; the manner by, or area in which, the pollutant enters navigable waters; and the degree to which the pollutant has maintained its specific identity or characteristics. Whether a functional equivalent of a direct discharge exists, and therefore requires an NPDES Permit, depends on the application of these considerations to discharges to groundwater.

Faced with implementing the *Maui* "functional equivalent" analysis on a case-by-case basis, the EPA released a Guidance Memorandum on January 14, 2021 for the regulated community and permitting authorities across the country. Although it does not have the force and effect of law, the Memorandum attempts to provide clarity on how to apply the *Maui* factors when determining whether a discharge of pollutants to groundwater requires an NPDES Permit. The Memorandum finds that only (i) an actual, not potential, discharge of pollutant to groundwater (ii) from an actual point source, not a nonpoint source (such as stormwater sheetflow) (iii) that reaches a WOTUS can be the "functional equivalent" of a direct discharge. Relying on its scientific expertise and experience administering the NPDES permit program, EPA added an eighth factor that should be considered when performing the "functional equivalent" analysis: the design and performance of the system or facility from which the pollutant is discharged. Its rationale is that the design and performance of the discharge system can affect or inform each of the *Maui* factors, thus resulting in a more complete analysis.

To be clear, the *Maui* Court did not decide that groundwater itself is the functional equivalent of WOTUS. However, whiplash may be just around the corner. A week after the Guidance Memorandum was released, President Joseph R. Biden signed his Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. This Order revokes former President Trump's 2017 Executive Order leading to the Rule. It also directs the heads of all agencies, including the EPA, to immediately review existing regulations, orders, guidance documents, policies, and other agency actions promulgated, issued, or adopted between January 20, 2017 and January 20, 2021 that may be inconsistent or present obstacles to the policy set forth in the Order. For any actions so identified, the agency heads are to consider suspending, revising, or rescinding the agency actions. President Biden's nominee to head the EPA, North Carolina Department of Environmental Quality Secretary Michael Regan, has not yet been confirmed, but testified before the Senate on February 3, 2021. When asked if he would rescind the Rule, he responded that, if confirmed, he would review the Rule and look for a legal remedy that would allow a path forward on WOTUS.

If confirmed, Mr. Regan would join the Biden administration after several years of consensus building to balance North Carolina's economic health with environmental protection. And any legal challenges to the EPA's decisions ultimately will be decided by a different Supreme Court than when *Maui* was issued, with Justice Barrett replacing Justice Ginsberg. The lesson here—as much as a regulated community may yearn for predictability and certainty, it may never last for longer than four years at a time.

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