

LEGAL UPDATES

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# Clean Water Act (CWA) Series: What's up with WOTUS?

The pandemic may be slowing down commerce, but there has been no slowdown on critical developments affecting core issues in interpreting the jurisdiction of the Clean Water Act (CWA). In just over one week, there have been three extremely important developments. First, the U.S. Supreme Court finally weighed in on an issue undetermined since the Act was passed in the 1970s. The Supreme Court ruled that discharges to groundwater that are the “**functional equivalent**” of a direct discharge of pollutants from a point source require a permit. Second, the Trump administration issued its final Navigable Waters Protection Rule (85 FR 22252) defining what waters are “waters of the U.S.” (WOTUS) and subject to jurisdiction of the Clean Water Act—step two in the two-step process for replacing the Obama-era Clean Water Rule. Third, a Federal District Court in Montana held that the Army Corps of Engineers violated the Endangered Species Act (ESA) by not consulting with the U.S. Fish and Wildlife Service prior to reissuing Nationwide Permit 12, a permit widely used for utility work impacting waters under jurisdiction of the Act.

## Background

The CWA prohibits the discharge of pollutants to navigable waters without an applicable permit, defining navigable waters as “waters of the U.S.” (WOTUS). Even though the CWA permit program has been operating for over 40 years, fundamental issues of when its jurisdiction begins and, therefore, what discharges require a permit remain partially unresolved. The recent activity addresses discharges to groundwater and discharges to waters with a tenuous connection to waters traditionally regulated by the Federal government.

## Discharges to Groundwater May Require a Permit

On April 23, 2020, the U.S. Supreme Court held that the Clean Water Act requires a permit for discharges to groundwater that is the “**functional equivalent**” of a direct discharge of pollutants from a point source. *Cty. of Maui, Hawaii v. Hawaii Wildlife Fund*, No. 18-260, 2020 WL 1941966 (U.S. Apr. 23, 2020).

The *Maui* decision addressed whether a discharge must be directly into surface water before a permit is required or whether a permit can be required if a discharge is to groundwater which subsequently travels to and discharges into surface water. The *Maui* decision arose out of a conflict among three Circuit Courts of Appeals, each with a different interpretation of when discharges to groundwater require a permit. In 2019, the U.S. Environmental Protection Agency (EPA) issued an interpretive statement, explicitly excluding discharges to groundwater from the CWA’s permitting requirements. In addition, the Navigable Waters Protection Rule (described below), published in the *Federal Register* by EPA just two days before the Supreme Court’s decision, expressly excludes discharges to groundwater from CWA permit requirements.

In *Maui*, the Court specified that discharges that are the functional equivalent of a direct discharge to waters of the U.S. fall under the CWA’s permitting requirement. The Court provided several factors to be used in making this determination, the most important being transit time and distance traveled, but also several others: nature of the material being traversed, dilution or chemical changes to the pollutant, amount of pollutant entering the navigable waters compared to the amount discharged, manner by or area the pollutant enters the navigable waters, and degree the pollution maintains its specific identity upon reaching WOTUS.

This decision will impact operations discharging to groundwater, including those now in compliance with EPA’s more narrow interpretation, and could have implications for the Navigable Waters Protection Rule set to go into effect June 22, 2020. For now, there is plenty of room for interpretation of the above factors depending on the circumstances.

### **New Regulatory Definition of WOTUS**

On April 21, 2020, the Trump administration issued its final Navigable Waters Protection Rule (85 FR 22252) redefining WOTUS—step two in the two-step process for replacing the Obama-era Clean Water Rule. This rule is one of many redefinitions of WOTUS, with the primary disagreements pertaining to surface waters that have a limited or tenuous connection to traditional navigable waters. This new rule goes into effect on June 22, 2020, and includes four main categories of waters within the definition of WOTUS:

Territorial seas and traditional navigable waters

Perennial and intermittent tributaries that contribute surface flow to the above waters

Certain lakes, ponds, and impoundments of the above waters

Wetlands adjacent to jurisdictional waters

Under this new rule, the agencies will use the “typical year” to help establish the surface water connection between a relatively permanent body of water and traditional navigable waters, and between certain wetlands and other jurisdictional waters. To be included in the WOTUS definition, tributaries must run year-round or consistently during certain times of year, based on a 30-year rolling average. The definition of typical year seeks to avoid using times of drought or extreme flooding in determining jurisdiction.

The new rule also includes a list of expressly excluded features:

Non-jurisdictional waters

Groundwater

Ephemeral features flowing only in direct response to precipitation

Prior converted cropland

Certain ditches and artificial features

Waste treatment systems

The Navigable Waters Protection Rule likely will not be the final determination of CWA jurisdiction. We expect this newest rule to be challenged in court, as have previous rule-makings on this subject. The new litigation is likely to add additional complexity to an already confusing patchwork of applicable rules caused by different court decisions.

The Obama administration issued its WOTUS definition in 2015, The Clean Water Rule (80 FR 37054), which was challenged and stayed in certain states. The Trump administration repealed the Clean Water Rule on October 22, 2019, effective December 23, 2019, to re-establish the pre-2015 WOTUS definition throughout the country (84 FR 56626). The appeal rule is also being challenged; however, at this time it has not been stayed. Over time, the WOTUS definition in a given state will likely depend on where and when stays are granted for the Navigable Waters Protection Rule. If a stay is granted, then whether other litigation will affect the previous WOTUS definition will be relevant in determining the rule applicable in the stayed jurisdiction.

## **Nationwide Permit 12 Vacated**

On April 15, 2020, a District Court in Montana ruled against the U.S. Army Corps of Engineers (the Corps) on its 2017 reissuance of the Nationwide Permit 12 (NWP 12). *N. Plains Res. Council v. U.S. Army Corps of Engineers*, No. CV-19-44-GF-BMM, 2020 WL 1875455 (D. Mont. Apr. 15, 2020). The court held that the Corps violated the Endangered Species Act (ESA) by not consulting with the U.S. Fish and Wildlife Service prior to reissuing NWP 12. The Corps issues NWPs to cover dredge and fill activities that have minimal impact on waters of the U.S. usually permitted by the Corps under Section 404 of the Clean Water Act. NWP 12 is used for activities surrounding maintenance and construction of utility lines, such as pipelines, wire cable lines, transmission lines, etc., disturbing less than a half-acre of WOTUS for each crossing. If more than 1/10 of an acre is going to be disturbed, the project developer must submit a notification to the Corps prior to beginning construction, called a Preconstruction Notification (PCN), which then requires the Corps to verify NWP coverage. In the April 15 order, the court enjoined the Corps from issuing any more verification letters allowing NWP 12 coverage for projects requiring PCNs. However, the court's ruling does not make clear the effect this will have on projects where utility line construction has already commenced and that are currently relying on coverage under NWP 12, nor whether projects not requiring PCN verification may proceed under NWP 12. The most likely reality, however, is that NWP 12 is not available under any circumstances, until or unless the court order is reversed or the Corps re-issues NWP 12.

### **What This Means for You**

These most recent changes to the CWA's jurisdictional reach and permitting requirements are just the latest in what has been somewhat of a WOTUS roller-coaster ride since 2015. We are planning an upcoming webinar to be held in June to discuss these and other developments in water resources policy and regulation. We'll send info on that webinar soon, so "stay tuned."

With these three recent developments, there is already some effect, such as for permitting under NWP 12. Impacts arising from implementation of the Maui "functional equivalent" standard are forthcoming and an increase in CWA permitting for discharges to groundwater anticipated, possibly through the filing of citizen suits challenging non-permitted discharges. While the Navigable Waters Protection rule is set to go into effect June 22, 2020, various challenges were already in the works before the Supreme Court ruled on groundwater in Maui. With that decision now on the books, the agencies will, at a minimum, have to revisit and revise the guidance being developed for implementation of the new WOTUS definition under the rule.

If you have discharges to groundwater or to surface water with a tenuous connection to surface water (i.e., intermittent waters, ditches, upstream tributaries), now is a good time to relook at those discharges to determine if a permit is needed. Our Environmental team is monitoring new decisions

coming out of the courts and guidance issued by the agencies, and can provide up-to-date information. Legal challenges will undoubtedly result in changes during implementation of the Navigable Waters Protection Rule, and could once again result in different rules being applied in various states.

## **Contact Us**

For more information about these decisions, EPA's rule-makings or the CWA, please contact a member of Husch Blackwell's Environmental team, several of whom regularly work on WOTUS matters, including: jurisdictional determinations, permitting requirements, compliance and more. Jason Flower, Amy Wachs, Karin Jacoby, Coty Hopinks-Baul, Megan McLean and Daniel Fanning.

To catch up on the CWA series see [Part 1](#), [Part 2](#), [Part 3](#), [Part 4](#), and [Part 5](#).