Ashley Peck

Partner
801.799.5913
Salt Lake City
aapeck@hollandhart.com

Feeling Underwater? A Brief Look at Recent Clean Water Act Developments

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It is becoming increasingly difficult for the regulated community to stay abreast of state and federal environmental regulatory developments, particularly as they are decided in court. The following alert summarizes some recent Clean Water Act ("CWA") developments with regulatory and legal implications for the energy extractive, construction, real estate, and other regulated industries.

Clean Water Rule and Court Jurisdiction Litigation

On February 6, 2018, the EPA and the U.S. Army Corps of Engineers ("Corps") published a Final Rule that will extend the effective date of the 2015 Clean Water Rule (2015 CWA Rule) for two years. The Agencies' intent is to maintain the legal status quo of the 2015 Rule, which has been stayed nationwide since October 9, 2015, while they reconsider the extent of federal jurisdiction over navigable waters ("waters of the United States"), consistent with new Executive Orders issued by the Trump administration on February 28, 2017. This is the second of two steps the Agencies are conducting to review and revise as appropriate the 2015 CWA Rule. Under the first step, the Agencies proposed rescinding the 2015 CWA rule and replacing it with the regulatory text that governed prior to 2015. The Agencies currently are considering public comment on this proposal. For more detail on the Executive Orders, see our prior client alert.

This move comes on the heels of the United States Supreme Court's January 22nd ruling in *National Ass'n of Mfrs*, holding that the federal district courts, and not the federal circuit courts of appeal, are the proper venue for hearing challenges to the 2015 CWA rule. Delaying the applicability of the 2015 CWA Rule for two years is intended to provide regulatory certainty and avoid a patchwork regulatory scheme that could develop given the numerous district court cases challenging the 2015 CWA Rule.

Meanwhile, when determining whether a given water feature is jurisdictional, the same regulatory scheme that has been in place for decades, as informed by U.S. Supreme Court precedent and 2003 and 2008 agency guidance documents, remains in place. Project proponents need to make decisions about jurisdictional impacts pursuant to these long-standing regulations and guidance documents. Litigation over the Agencies' reconsideration process is all but certain. The regulated community should pay close attention to developments in this area as they have the potential to impact a wide variety of project activities.

Pending Supreme Court Case with Implications for Interpreting the *Rapanos* Decision

The Eleventh Circuit issued a decision in February 2017 in a drug and firearms sentencing case for which the U.S. Supreme Court has granted review, which could result in significant changes in the realm of CWA jurisdiction. The Eleventh Circuit relied on the U.S. Supreme Court's 1977 decision in *Marks v. U.S.*, which held that when lower courts encounter a fragmented Supreme Court opinion, "the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Lower courts have wielded the Marks approach in interpreting the Supreme Court's 2006 ruling in *Rapanos v. U.S.*, which wrestled with the scope of federal jurisdiction under the CWA. The Supreme Court's 4-1-4 split in *Rapanos* has generated substantial confusion and controversy amongst the regulated community, agencies, and courts. In applying the Court's analysis in *Marks*, lower courts rely on Justice Anthony Kennedy's opinion, which establishes a broader jurisdictional framework than the late Justice Antonin Scalia's plurality opinion.

In December 2017, the Supreme Court granted defendant's petition for writ of certiorari in *Hughes v. United States*, and will proceed to analyze *Marks* and the issue of whether any opinion in a split decision is controlling.

The Supreme Court's ultimate decision in both the Elevent Circuit case and the Hughes case will be highly relevant to the ongoing CWA jurisdictional debate.

Ninth Circuit Upholds CWA Jurisdiction for a Groundwater Discharge to Surface Water

The Ninth Circuit recently inserted another dose of uncertainty into the regulatory climate in holding that CWA permitting requirements apply to wastewater discharges that cause pollution to navigable waters via groundwater. The February 1 decision in *Hawaii Wildlife Fund v. County of Maui* is potentially significant for various industries using underground injection wells—ranging from agriculture, to mining, to power generation. For decades, Maui County injected treated sewage into underground wells in an effort to avoid discharging into the ocean. The injection wells, however, leaked into groundwater and subsequently reached the Pacific Ocean. The County took the position it did not require a CWA permit because the statute does not apply to groundwater, and the discharge to the Pacific Ocean was indirect. The lower court sided with environmental groups, who argued that the polluted groundwater reaches the ocean, thus triggering CWA discharge permit requirements. Large trade groups, including the American Farm Bureau Federation, American Petroleum Institute, and National Mining Association, filed amicus briefs in support of the County's position.

In holding that the injection wells constitute "point sources," the Ninth Circuit reasoned that "this case is about preventing the County from doing indirectly that which it cannot do directly." The Ninth Circuit was persuaded by the "conduit theory" described in Justice Scalia's *Rapanos* plurality opinion, which posits that discharges that wash downstream likely violate the CWA even if the pollutants are not discharged directly to navigable waters from a point source. Federal courts have been split on whether to

apply a "conduit theory" to indirect discharges. Given the split of authority, it is likely the issue could reach the Supreme Court, with potentially significant implications for the oil and gas industry and agricultural interests across the country, including in the Rocky Mountain Region.

Recommended Changes to the Nationwide Permit Program

The Corps recently issued recommended changes to its CWA Section 404 Nationwide Permit ("NWP") program, including targeted changes to nine specific NWPs. The recommendations fulfill the Corps' obligations under President Trump's Executive Order 13,783 ("Promoting Energy Independence and Economic Growth," issued on March 28, 2017) to review existing regulations that might burden domestically produced energy resources, with a focus on oil, natural gas, coal, and nuclear resources. The Corps is recommending one broad programmatic change, and modifications to nine individual NWPs. It is important to note that these are recommendations only and do not carry the force or effect of law.

The one programmatic recommendation is to eliminate the 300 linear foot limit for affected NWPs. This would result in removal of this qualification limit for NWPs 21, 39, 50, 51, and 52. The Corps believes the 1/2 acre limit and the pre-construction notification process are sufficient to ensure no more than minimal adverse environmental impacts.

The Corps is also recommending changes to nine NWPs related to domestic energy production and energy use:

- NWP 3, Maintenance
- NWP 12, Utility Line Activities
- NWP 17, Hydropower Projects
- NWP 21, Surface Coal Mining Activities
- NWP 39, Commercial and Institutional Developments
- NWP 49, Coal Remining Activities
- NWP 50, Underground Coal Mining Activities
- NWP 51, Land-Based Renewable Energy Generation Projects
- NWP 52, Water-Based Renewable Energy Generation Pilot Projects

The changes to NWP 12 and 39, in particular, have implications for oil and gas activities and should streamline the use of these NWPs to complete projects.

Although an in depth review of recommended NWP changes is beyond the scope of this alert, energy project proponents will want to review the particular NWP recommendations that could apply to their projects and monitor future rulemaking actions on the recommendations.

Please feel free to reach out to any of the attorneys on Holland and Hart's Environmental Compliance Team if you have any questions about this client alert.