Where Water Ends and Land Begins: Course Changes and Clean Water Act

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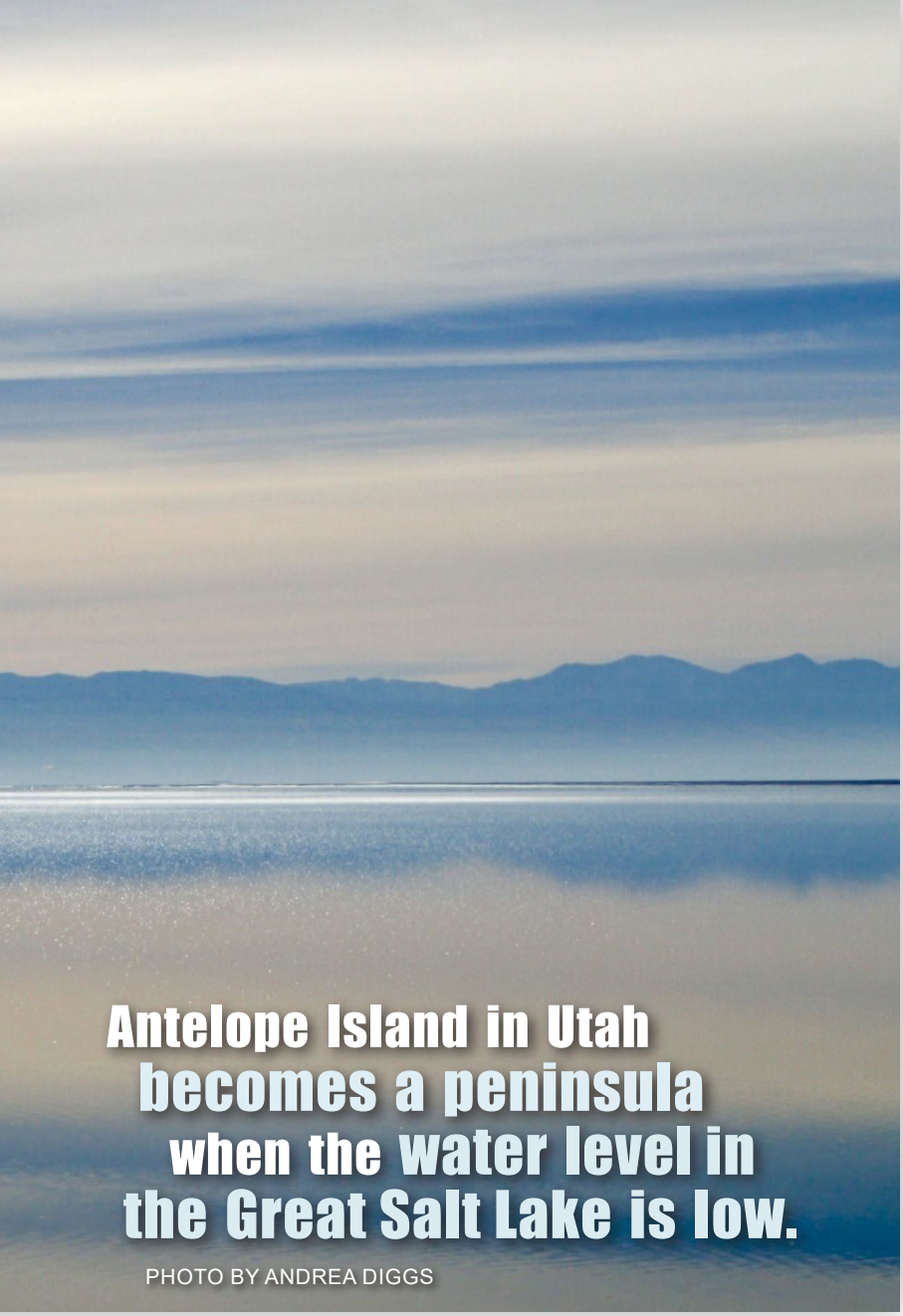
Nowhere is change more certain than when it comes to Clean Water Act (CWA) rulemakings, leaving floundering regulated entities and litigation in their wake. While states like Nevada have gained a modicum of stability by regulating waters of the state (WOTS), the result is a state patchwork of regulations over the quicksand that is waters of the U.S. (WOTUS). Since 2015, there have been no fewer than four WOTUS definitions (and as many as eight, depending on who is doing the counting), not to mention the range of lawsuits that have been filed on every side by parties challenging them. With Congress unable and unwilling to define WOTUS, the rulemakings and subsequent litigation are almost certain to continue, leaving states like Nevada and regulated entities struggling to find stability.

Waters of the United States

In 1972 and 1977, Congress largely established the modern CWA, announcing a policy most often honored in the breach: "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use … of land and water resources." 33 U.S.C. § 1251(b). Unfortunately, Congress (then and now) failed to define which sorts of waters are included as WOTUS and which are left to the states. Since the CWA requires permits for discharging pollutants from a point source[1] into WOTUS or dredging and filling in wetlands, that omission has been responsible for multiple rulemakings and decades of litigation, as courts and the Environmental Protection Agency (EPA) struggle to "choose some point at which water ends and land begins."[2]

On June 9, 2021, the EPA and Army Corps of Engineers (USACE) announced that they would replace the Navigable Waters Protection Rule (NWPR), promulgated under the Trump Administration, which defined WOTUS based on U.S. Supreme Court Justice Antonin Scalia's plurality test in *Rapanos v. United States,* 547 U.S. 715 (2006). The NWPR would have resulted in relatively clear rules that would have excluded, for example, ephemeral waters, which constitute most streams in Nevada.

Then, on December 7, 2021, the agencies stated that they would interpret WOTUS to mean the waters defined in the 1986 (pre-2015) regulations, as informed by Supreme Court precedent.[3] This brings WOTUS back to the nebulous standard



Antelope Island in Utah becomes a peninsula when the water level in the Great Salt Lake is low.

PHOTO BY ANDREA DIGGS

where EPA and the USACE make determinations of jurisdiction based on a water's "significant nexus" to jurisdictional waters. If you are confused at this point, you are in the same boat as many CWA practitioners.

The goal with the latest rulemaking is to create a WOTUS rule that is both (1) familiar and (2) stable. It is doubtful this attempt to craft a lasting WOTUS definition will be successful, as the Supreme Court recently granted cert. in *Sackett v. EPA,* No. 21-454. There, the question presented is whether "the U.S. Court of Appeals for the 9th Circuit set forth the proper test for determining whether wetlands are" WOTUS under the CWA. The safe bet is on continuing litigation unless and until Congress acts to finally do what it should have done decades ago: delineate the boundaries of WOTUS.

In the meantime, it has often been noted that the CWA is a floor and not a ceiling; partially in response to the swinging pendulum at the federal level and the often-murky guidance regarding just what constitutes a WOTUS, many states, including Nevada, have acted to protect their own waters, designated WOTS. For example, Nevada broadly defines (and has for decades) Waters of the State as "all waters situated wholly or partly within or bordering upon this State, including but not limited to 1. All streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems and drainage systems; and 2. All bodies or accumulations of water, surface and underground, natural or artificial." N.R.S. 445A.415.

It is important to remember that Nevada's requirements are broader than the requirements imposed by the Clean Water Act and explicitly protect surface water and groundwater. For this reason, discharges to WOTUS are governed by the National Pollutant Discharge Elimination System (NPDES), while discharges to subsurface waters and other Waters of the State are permitted under Nevada's Water Pollution Control Law and are known as Water Pollution Control (WPC) permits. Consequently, Nevada has pushed back against attempts to federalize state waters.

Section 401 (Certifications)

In the spirit of cooperative federalism that purportedly underlies the CWA, Section 401 prevents federal agencies from issuing permits or licenses for activities that may result in discharges to WOTUS unless the state where the discharge originates has granted or waived water quality certification.

Like the NWPR, the 2020 Clean Water Act Section 401 Certification Rule that was promulgated by the Trump Administration was remanded and vacated nationwide, which reinstated the previous Section 401 rule.[4] The EPA is continuing to develop a new Section 401 rule, which it anticipates proposing in spring 2022. In the meantime, the EPA has returned to the 1971 rule and is processing pending certification requests in accordance with that rule. This broadened rule would allow states more room to impose a range of state conditions on federally issued permits that would be subject to Section 401.

Section 402 (NPDES)

As a baseline matter, the awkwardly named NPDES system requires point sources to obtain a NPDES permit before discharging pollutants into WOTUS. Consequently, changes to the WOTUS definition may have dramatic effects on future permitting, which is one reason that WOTUS rulemakings are so heavily litigated.

The EPA and USACE have stated that they hope that the restoration of the 1986 regulations, as informed by intervening Supreme Court precedent, will provide additional certainty in Section 402 permitting. While federal authority may shift, the Nevada Division of Environmental Protection (NDEP) has responded that Nevada's comprehensive authority will buffer these changes, as well as those that might occur in the future.[5] Further, NDEP's analysis has indicated that "less than a dozen of Nevada's 90 CWA Section 402 permits had the potential to transition to state

CONTINUED ON PAGE 19

CONTINUED FROM PAGE 17

Where Water Ends and Land Begins:

Course Changes and Clean Water Act

permits" under the NWPR, belying concerns that the NWPR would result in a sea change in Section 402 permitting in Nevada.[6]

County of Maui

The Trump Administration's NWPR was released on April 21, 2020; continuing a long tradition, it did not regulate groundwater, which had been seen—for decades—as the province of the states. Two days later, the Supreme Court issued its *County of Maui* decision.[7] The court's "functional equivalence" test stated that if a discharge meets a series of difficult to calculate factors, ultimately reaching the functional equivalence of a point source discharge to a jurisdictional water, then the discharge should be regulated under the CWA. The opinion suggested that its roughly delineated test could allow the regulation of discharges to groundwater up to some indeterminate distance and time period away from a WOTUS. This lack of guidance left Justice Samuel Alito fuming, complaining that the majority "adopts a nebulous standard, enumerates a non-exhaustive list of potentially relevant factors, and washes its hands of the problem."[8]

In trying to provide guidance, the agencies have favored an explanation that renews the "significant nexus" standard articulated in *Rapanos* (which would require a determination of whether the water in question significantly affects the chemical, physical, or biological integrity of jurisdictional waters). This decision was disliked by many regulated entities for being both unclear and overly broad.[9] In the proposed WOTUS rule, the EPA and USACE suggest that the "functional equivalence" and "significant nexus" tests share many characteristics—uncertainty and frequent litigation would certainly be two. Additionally, for states like Nevada that already regulate discharges to groundwater, an imprecise federal test is unwelcome to many.

Section 404 (Dredge and Fill)

Under the CWA, dischargers of dredged and fill material into WOTUS must obtain a Section 404 permit.[10] Because this permitting process can be lengthy and expensive, Congress provided for a streamlined permitting process where WOTUS impacts are minimal. On December 27, 2021, the USACE issued a final nationwide permit rule (NWP) that allows projects with minimal adverse environmental effects to obtain permits for the discharge of dredge and fill materials into WOTUS by obtaining an Army Corps of Engineers NWP. This rulemaking resulted in the reissuance of 40 NWPs, in addition to one new NWP. (The 41 NWPs will be added to the 16 NWPs issued on January 13, 2021.) One important development was the trifurcation of the frequently litigated NWP 12: it was split into a new NWP 12 for oil and natural gas pipelines, NWP 57 for electric utility line and telecommunications activities, and NWP 58 for utility lines that also convey substances like water and sewage.

Every new WOTUS rulemaking has ripple effects; one example of this is the effect on approved jurisdictional determinations (AJDs). These are issued by the USACE and determine whether WOTUS are present in an area. On January 5, 2022, the USACE announced that it will not rely on AJDs issued under the NWPR in making new permit decisions. This process will require regulated entities acting in reliance on those AJDs to proceed based on the current WOTUS definition, whatever it may be. The effect of this, of course, is to inject even more uncertainty into permitting.

Perhaps the Sacketts' second trip to the Supreme Court will finally give them the answer to the question of whether they can build their home on a somewhat soggy 2/3-acre residential lot that has been in dispute for more than 15 years. As Justice Alito wrote, "We should not require regulated parties to 'feel their way on a case-by-case basis' where the costs of uncertainty are so great." *County of Maui v. Hawaii Wildlife Fund,* 140 S. Ct. 1462, 1491-92 (2020) (Alito, J., dissenting).

ENDNOTES:

1. "Point Source" means "any discernible, confined and discrete conveyance[.]" 33 U.S.C. § 1362(14).
2. *United States v. Riverside Bayview Homes,* 474 U.S. 121, 132 (1985).
3. Revised Definition of "Waters of the United States," 86 Fed. Reg. 69372 (Dec. 7, 2021) (to be codified at 40 C.F.R. pt. 120).
4. *In re Clean Water Act Rulemaking,* No. C 20-04636, 2021 WL 4924844, at *1 (N.D. Cal. Oct. 21, 2021).
5. *See* NDEP's comments in response to the agencies' federalism consultation initiated for forthcoming rulemaking(s) on the definition of Waters of the United States (WOTUS) as contained in the Clean Water Act (CWA), dated October 4, 2021, available at https://westernstateswater.org/wp-content/uploads/2021/10/Nevada-WOTUS-Definition-Fed-Consultation-NDEP-Response.pdf.
6. *Id.* at 1.
7. *County of Maui v. Hawaii Wildlife Fund,* 140 S. Ct. 1462 (2020).
8. *Id.* at 1491 (Alito, J., dissenting).
9. *See supra* note 3.
10. *See* 33 U.S.C. § 1344.

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