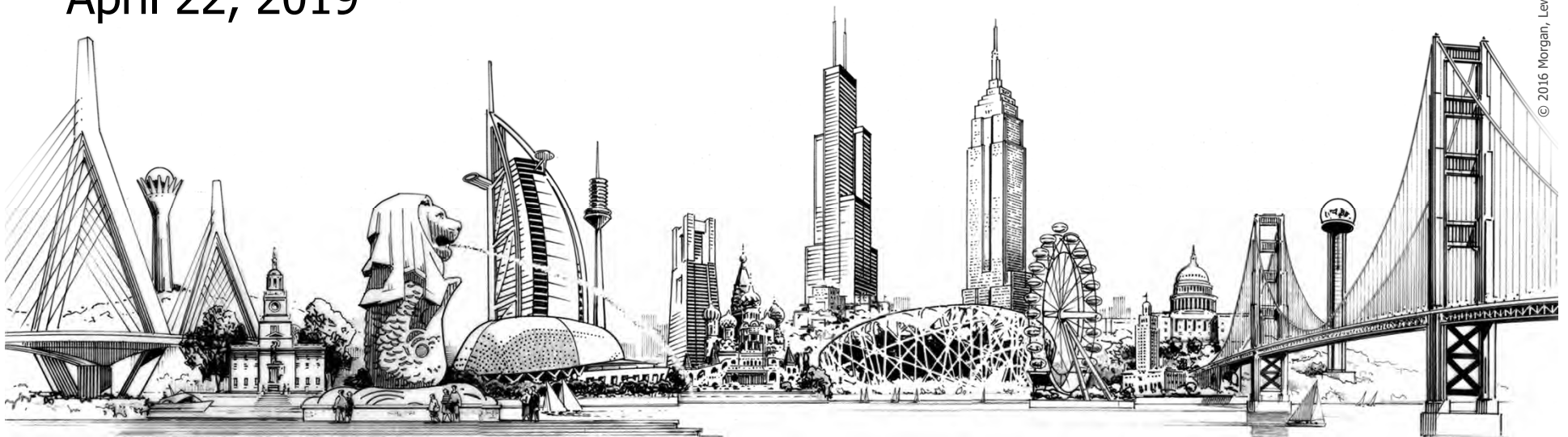


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THE CLEAN WATER ACT: IN A STATE OF FLUIDITY

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April 22, 2019



PART 1

THE CLEAN WATER ACT



Background and Purposes

- The modern CWA began with 1972 amendments to existing water pollution statute
- Objective to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters”
- Interim goal of water quality sufficient for “protection and propagation of fish, shellfish and wildlife” and “recreation in and on the water”

Programs and Elements

- Prohibits all discharges, except those in compliance with the Act



Programs and Elements

- Permit program for discharges in accordance with the Act (402)
- Permit program governing dredge and fill material (404)
- System for preventing and reporting spills (311)

Programs and Elements cont.

- System for determining limitations on authorized discharges
- Cooperative federalism
- Strong enforcement mechanisms

PART 2

WATERS OF THE UNITED STATES



The Statute

- The Clean Water Act prevents discharges into “navigable waters”
- “Navigable waters” is defined as “waters of the United States”
- Disagreement arose over what are waters of the United States (“WOTUS”)
- EPA and the Army Corps of Engineers have endeavored to further define the scope of the Act

The Supreme Court Trilogy

- *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).
- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).
- *Rapanos v. United States*, 547 U.S. 715 (2006).

Rapanos

- 4-1-4 Split
- Scalia Plurality: continuous surface connection
- Kennedy Concurrence: significant nexus
- Most courts have treated the “significant nexus” test as functionally controlling

Post-*Rapanos*

- Existing regulations defined “waters of the United States” to include:
 - waters used in interstate commerce, including waters subject to the tides;
 - interstate waters;
 - intrastate lakes, rivers, streams, wetlands, etc., (a) that are used by inter-state travelers for recreation and other purposes, (b) that are sources of fish or shellfish sold in interstate commerce, or (c) that are used for industrial purposes by industries engaged in interstate commerce;
 - impoundments and tributaries of waters within the first three categories;
 - the territorial seas
 - wetlands adjacent to waters within these categories.
 - EXCLUSIONS for certain man-made features

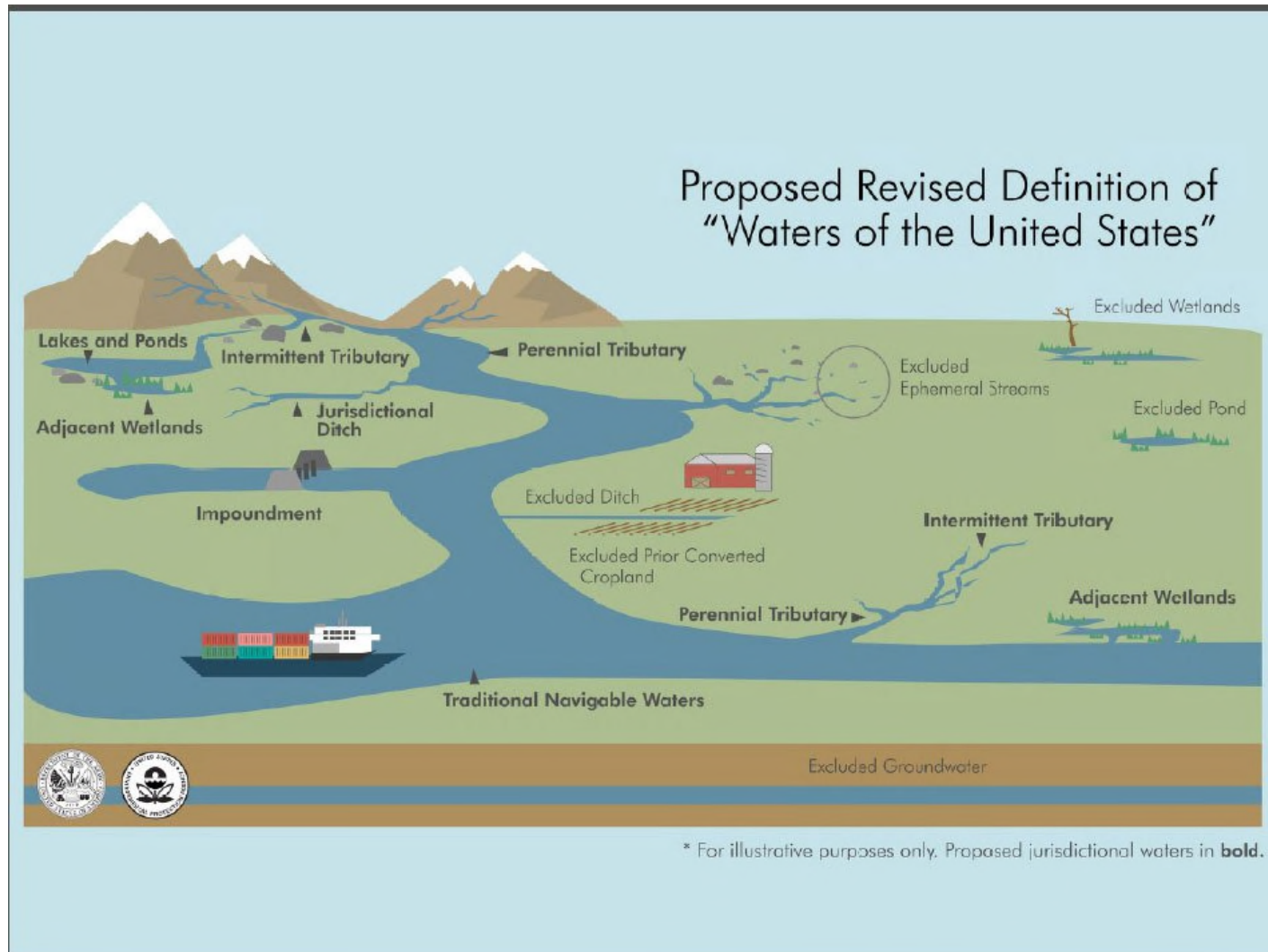
Post-*Rapanos*

- Plus, a guidance memo promulgated post- *Rapanos* gave further direction, including interpretation of “significant nexus”
- The 2008 memo explained that:
 - “A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.”
 - “Significant nexus includes consideration of hydrologic and ecologic factors.”

The 2015 Obama EPA Rule

- Expanded “bright line” categories of waters covered by the Act
 - Defines “tributary” based on features including a bed and banks
 - Adds category for “adjacent waters,” defined broadly to include, e.g., neighboring waters
- Defined “significant nexus”
 - body of water is covered by the Act if it “significantly affects the chemical, physical, or biological integrity” of another jurisdictional water “either alone or in combination with other similarly situated waters in the region”
 - certain limitations on when significant nexus test applies
 - Only applies to certain features (e.g. prairie potholes, pocosins), or (1) waters within the 100-year floodplain of a traditional navigable water, or (2) waters within 4,000 feet of the high tide line or ordinary high water mark of a traditional navigable water

Illustrations



The Trump Executive Order

- Instructs EPA to consider repealing and revising Obama EPA rule
- Asks EPA to consider adopting Scalia's "continuous surface connection" test
- Instructs AG to take "appropriate measures" regarding ongoing litigation

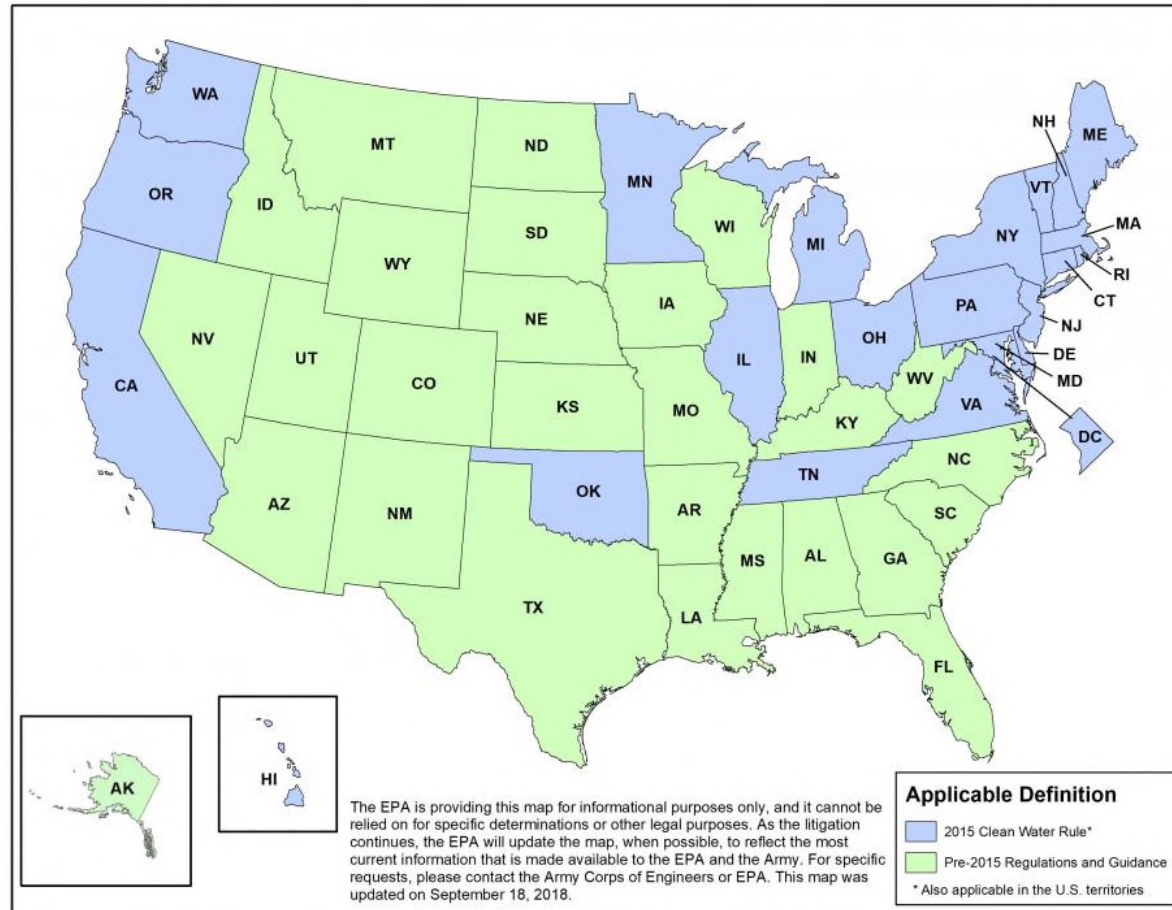
Trump EPA Actions: Step 1

- EPA first delayed the applicability date of the Obama-era WOTUS rule until 2020
- *But*, this action has been enjoined nationwide by the U.S. District Court for the Southern District of South Carolina

Litigation

- Multiple pieces of ongoing litigation have impacted the regulations currently in effect:
 - The Supreme Court held that federal district courts, rather than Courts of Appeals, are the proper forum for challenging the 2015 rule
 - Three district courts have issued preliminary injunctions on the 2015 rule, effectively enjoining its implementation in 28 states
 - The Trump administration's rule shifting the applicability date of the 2015 rule has been enjoined nationwide

Current Status



Trump EPA Actions: Step 2

- In February 2019, EPA proposed a rule that would eliminate the “significant nexus” test, limiting the Act’s reach to certain defined categories
- These defined categories are also more narrow than under the Obama-era rule
 - For example, instead of extending jurisdiction to all “adjacent waters,” the proposed rule includes only “adjacent wetlands.”
 - “Adjacent wetlands” are then defined narrowly as only those “wetlands that abut or have a direct hydrologic surface connection to other ‘waters of the United States’ in a typical year.”

WOTUS under the Proposed 2019 Rule

- Waters of the United States are:
 1. Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;
 2. Tributaries of waters identified in [paragraph 1];
 3. Ditches that satisfy any of the conditions identified in [paragraph 1], ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;
 4. Lakes and ponds that satisfy any of the conditions identified in [paragraph 1] and ponds that contribute perennial or intermittent flow to a water identified in [paragraph 1] in a typical year either directly or indirectly through a water(s) identified in [paragraphs 2 through 6] of this section or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in [paragraphs 1 through 5] in a typical year;
 5. Impoundments of waters identified in [paragraphs 1 through 4 and 6]; and
 6. Adjacent wetlands to waters identified in [paragraphs 1 through 5]
- All other waters are not Waters of the United States

Implications of 2019 Proposed Rule

- Lack of “significant nexus” test is a departure from the broad significant nexus test under the Obama-era rule
 - Also narrower than under Bush-era guidance
- The defined jurisdictional categories are narrower and less dependent on biological and chemical connections than under the Obama-era rule

Hypo #1

- An interstate wetland is located very close to the Mississippi River, but it doesn't have a surface connection. Nonetheless, a significant amount of water flows from the wetland into the Mississippi through groundwater. Additionally, floodwaters from the Mississippi reach the wetland on occasional basis, and amphibians frequently move back and forth between the two.



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Is it jurisdictional under:

- A. Bush-era guidance?**
- B. Obama-era rule?**
- C. Proposed Trump-era rule?**
- D. Bush-era guidance and the Obama-era rule?**
- E. All of the above?**

Hypo #1

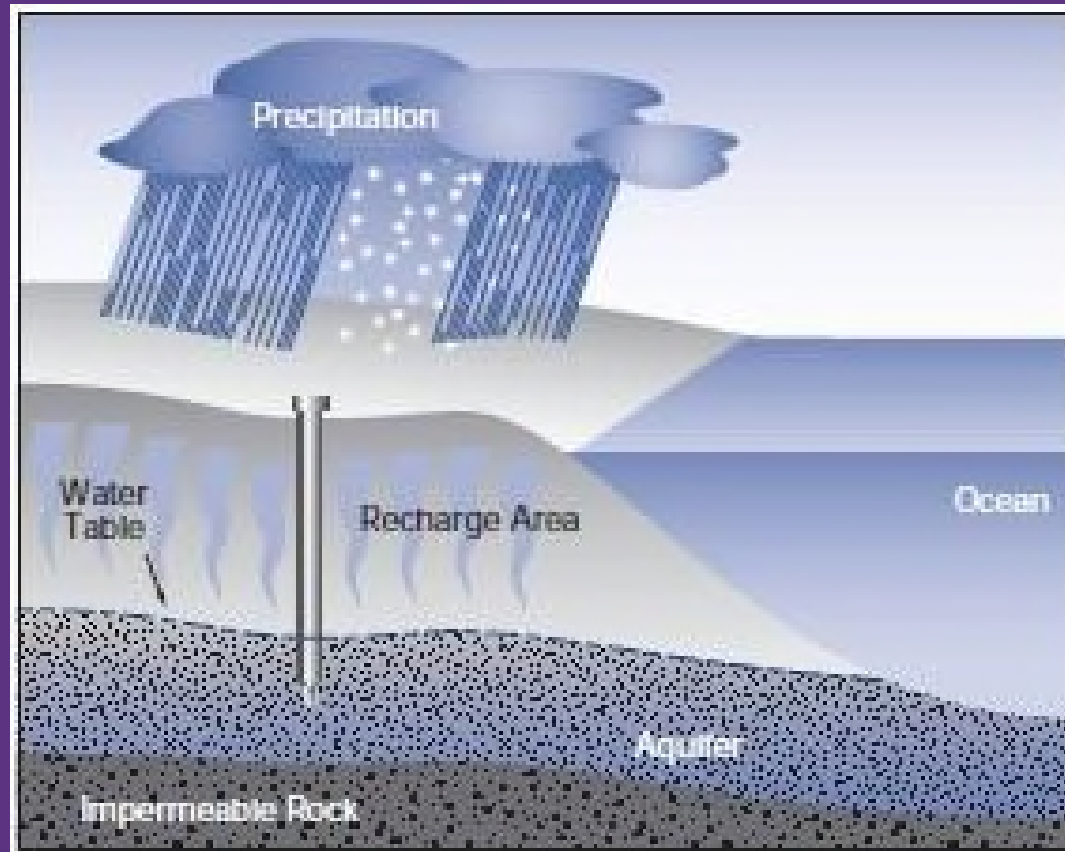
- **Answer: D. Bush-era guidance and the Obama-era rule**
 - Bush-era rule: this wetland, while probably not “adjacent” to the Mississippi, would likely be considered to have a “significant nexus” to the Mississippi based on the water flow and biological mingling
 - Obama-era rule: this wetland would likely have a significant nexus to the Mississippi under the Obama-era rule’s expanded definition, and it might also fall within the expanded definition of “adjacent waters” in that rule, which includes certain “neighboring” waters
 - Trump-era rule: would not be an “adjacent wetland” without a direct surface connection, and there is no “significant nexus” test for other waters.

The Future

- EPA will receive a wide variety of comments on its 2018 proposed rule
- Once finalized, its rule is almost certain to be challenged in court
 - Could potentially wind up in the Supreme Court again

PART 3

GROUNDWATER



Groundwater: the issue

- Groundwater itself is not a water of the United States
- *But:* what about a discharge of a pollutant into groundwater that then makes it way into a water of the United States?

A Circuit Split

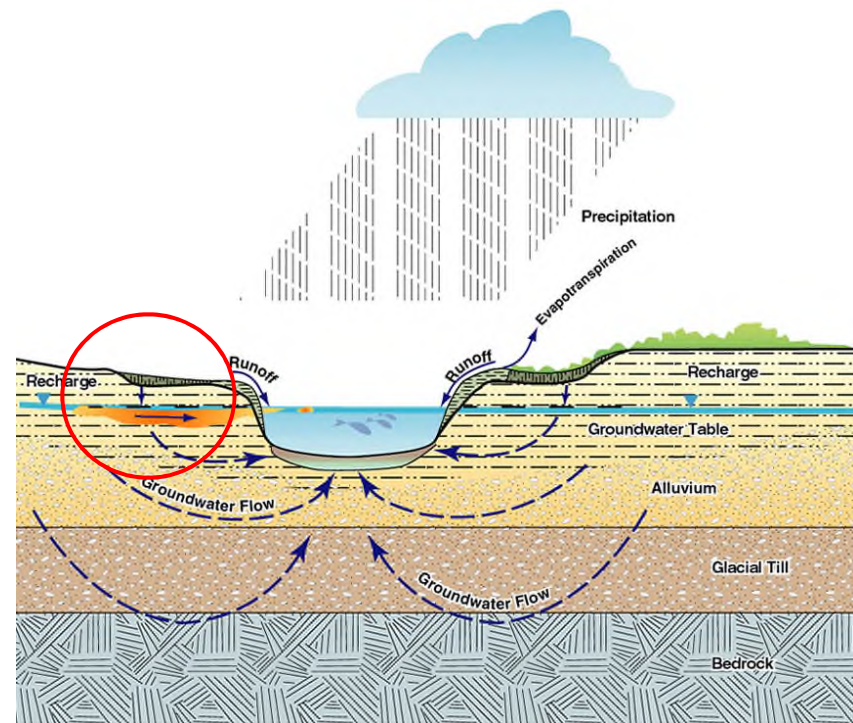
- *Ninth Circuit*: Wastewater injected into wells that made its way into the ocean through groundwater violated the Clean Water Act.
- *Fourth Circuit*: An underground pipeline leak that made its way into through groundwater into a nearby waterway violated the Clean Water Act.
- *Sixth Circuit*: Pollutants from coal ash ponds that may have flown through groundwater into a nearby lake *did not* violate the Clean Water Act.
 - The court found that the Clean Water Act only applies when pollution is added directly to a jurisdictional water from a point-source conveyance.

County of Maui

- The Supreme Court recently granted a petition for certiorari in the Ninth Circuit case
 - The grant was limited only to the groundwater question
- The Solicitor General and others had argued in favor of granting certiorari
 - The plaintiffs had opposed, arguing that any circuit split is minimal because of alternative grounds for the Sixth Circuit's ruling

Hypo #2

- A manufacturing facility disposes of chemicals in a small pit on site that has no surface connection to any other body of water. But substances from the pit flow into groundwater that in turn flows into a navigable stream.
- **Is this a CWA violation under:**
 - **A. the Fourth and Ninth Circuit Approach?**
 - **B. The Sixth Circuit Approach?**
 - **C. Both?**



Hypo #2

- Answer: A. This would likely be a violation under the approach of the Fourth and Ninth Circuits. It would probably not be a violation under the Sixth Circuit's standard, as there was no conveyance directly from a point source into a jurisdictional water.

EPA Interpretive Statement

- EPA recently issued an interpretive statement that interprets the Clean Water Act as *not* covering discharges into groundwater
- That statement thus essentially adopt the 6th Circuit's approach, contradicting previous positions taken by EPA
 - EPA would nonetheless apply the 4th and 9th Circuit approaches in those jurisdictions
- It will be interesting to see how the EPA interpretive statement factors into the *Maui* case proceeding in the Supreme Court

The Future

- *County of Maui* could significantly affect what types of discharges are regulated under the Clean Water Act
- A decision would also shed light on the current Supreme Court's views on Clean Water Act issues

PART 4

REVIEW OF JURISDICTIONAL DETERMINATIONS



Jurisdictional Determinations

- The Army Corps makes “jurisdictional determinations” (JDs) to determine whether particular bodies of water are covered by the Act
- JDs have significant consequences for land owners and project developers
- But some courts had held JDs could not be immediately challenged

U.S. Army Corps of Engineers v. Hawkes

- The Supreme Court unanimously held that JDs are “final agency actions” subject to judicial review
- Ruling allows immediate review of JDs
- Army Corps not *required* to issue JDs; could change practices

Marquette County Road Commission v. EPA

- County Road Commission sought immediate review of a different agency action – EPA objections to a CWA permit application
- District court denied review.
 - Distinguished *Hawkes* in part because objections had lesser consequences: county could continue to seek permit.

Marquette County Road Commission v. EPA cont.

- The county appealed to the Sixth Circuit, which affirmed
 - The Sixth Circuit agreed that EPA's objections were not a "veto"
 - Thus, the county's only means to raise a challenge was to continue to pursue its application until it was granted or denied
- A petition for certiorari to the Supreme Court was denied

The Future

- Other agency actions under the CWA? Actions under other statutes?

PART 5

STATE REGULATION



State Regulation

- Under the cooperative federalism system of the Clean Water Act, states often handle many aspects of the regulatory process
- States can also potentially protect a broader set of waters than the federal government, or can apply additional state restrictions

Example: Waters of California

- California State Water Resources Control Board recently adopted rules providing a new definition of wetlands and state waters
- Rules were based in part on the Obama-era WOTUS rule
 - They also protect certain non-vegetated wetlands
- Also established specific procedures for dredge and fill activities

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