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Recent Developments Under the Clean Water Act

June 16, 2022

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Overview

- WOTUS Past, Present and Future
- Section 401 Certification Rule



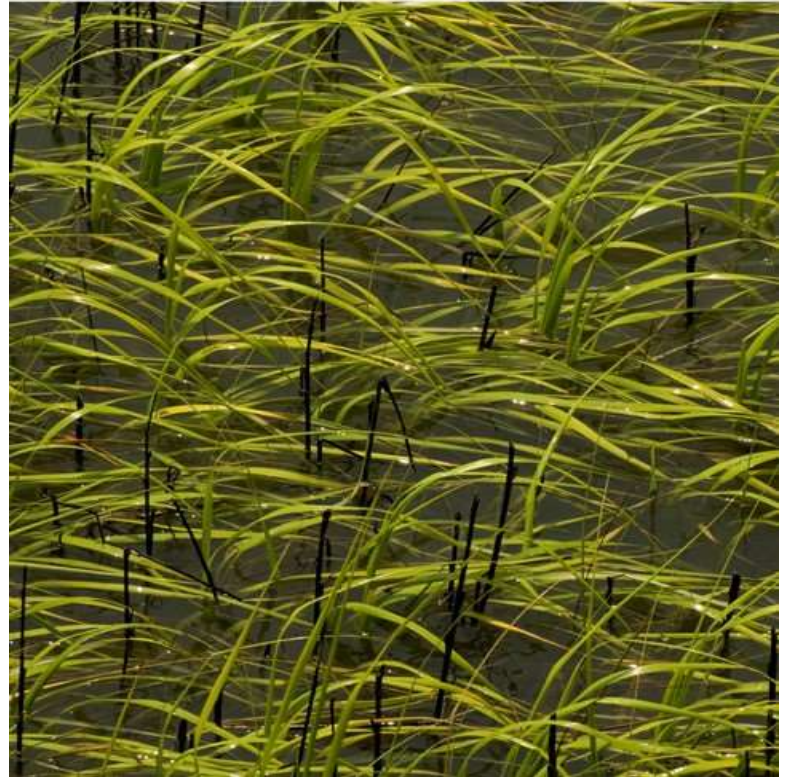
Why “Waters of the U.S.” Matters

- Clean Water Act programs apply to “navigable waters.”
- Congress defined “navigable waters” as “waters of the United States.” 33 U.S.C. § 1442(7).
- “Waters of the United States” establishes scope of federal jurisdiction under Clean Water Act.

Wetlands Matter

- Filter pollutants
- Absorb floodwaters
- Protect against erosion
- Prevent sedimentation
- Provide critical habitat
- Recharge groundwater
- Store carbon

<https://www.epa.gov/wetlands/why-are-wetlands-important>



Streams Matter

- Provide clean drinking water
- Protect against floods and erosion
- Filter pollutants
- Provide wildlife habitat
- Transport to downstream waters

<https://archive.epa.gov/water/archive/web/html/streams.html>



Jurisdictional Determinations

- An “approved jurisdictional determination” (AJD) is the determination of whether “waters of the U.S.” are present.
- AJDs identify the boundaries of “waters of the U.S.”
- AJDs are generally valid for five years.

Timeline

- 1972 - The Clean Water Act is enacted.
- 1974 to 1977 - Corps issues and revises early WOTUS rules.
- 1977 - Congress amends the Clean Water Act.
- 1982 - Corps and EPA refine WOTUS rule.
- 1985 - Supreme Court decides Riverside Bayview Homes.
- 1986 - Corps recodifies WOTUS rule and issues “migratory bird rule.”
- 2001 - Supreme Court decides SWANCC.
- 2003 - Corps and EPA issue joint guidance on SWANCC.
- 2006 - Supreme Court decides Rapanos.
- 2008 - Corps and EPA issue joint guidance on Rapanos.
- 2015 - Clean Water Rule
- 2019 - Repeal of Clean Water Rule
- 2020 - “Navigable Waters Protection Rule” (NWPR)
- 2021 - EPA and Corps announce intention to repeal and replace NWPR.

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Pre-Clean Water Act: Rivers and Harbors Act of 1899

- Navigable waters of the United States: “...waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport in interstate or foreign commerce.”
- Focus on navigation for trade and travel.
- “Traditional Navigable Waters”



Focus on Commerce Connections

- 1974 – Corps issues first “waters of the U.S.” rule.
 - *Includes only traditional navigable waters. 33 C.F.R. § 209.120(d)(1) (1974).*
- 1975 – NRDC v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).
 - *“By defining ‘navigable waters’ . . . to mean “the waters of the United States . . . ,” [Congress] asserted federal jurisdiction over the nation's waters to **the maximum extent permissible under the Commerce Clause** of the Constitution. Accordingly, as used in the [Clean] Water Act, the **term is not limited to the traditional tests of navigability.**”*

Expanded Jurisdiction and Adjacent Wetlands

- 1975, 1977 – Corps revises rules, expanding jurisdiction.
 - *Includes non-navigable waters, including tributaries and wetlands adjacent to other jurisdictional waters. 33 C.F.R. § 209.120(d)(2) (1976); § 323.2(a) (1978).*
- 1977 – Congress amends the Clean Water Act.
- 1982 – Corps refined its regulations but did not significantly expand jurisdiction.

U.S. v. Riverside-Bayview Homes

474 U.S. 121 (1985)

- Deferred to Corps' assertion of jurisdiction over wetlands adjacent to other "waters of the U.S."
- Decision was "compelled" by "the language, policies, and history of the Clean Water Act." 474 U.S. at 139.
 - The term "navigable" as used in the Clean Water Act is of "limited import." *Id.* at 133.
- Corps appropriately extended jurisdiction over waters and wetlands that "have **significant effects on water quality** and the aquatic ecosystem." *Id.* at 135 n.9

“Isolated” Waters and Migratory Bird “Rule”

- 1986 – Corps recodifies “waters of the U.S.” rule at 33 C.F.R. Part 328 (current location).
 - “Waters of the U.S.” include geographically “isolated” intrastate waters that are not traditional navigable waters but that have ties to interstate commerce. 33 C.F.R. 328.3(a)(3).
 - “Waters of the U.S.” also include any waters used:
 - as habitat by birds protected by Migratory Bird Treaties;
 - as habitat by migratory birds which cross state lines;
 - as habitat for endangered species; or
 - to irrigate crops sold in interstate commerce.

See 51 Fed. Reg. at 41,217 (Preamble).

Solid Waste Agency of Northern Cook County v. USACE

531 U.S. 159 (2001)

- Rejected jurisdiction over non-navigable, isolated, intrastate abandoned sand and gravel pit.
- The use of “isolated” pit by migratory birds was not by itself enough.
- “It was the **significant nexus** between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.” 531 U.S. at 167.



2003 SWANCC Guidance

Joint Legal Memorandum,

68 Fed. Reg. 1991, 1995 (Jan. 15, 2003).

- No jurisdiction over isolated, intrastate, non-navigable waters when sole basis is “migratory bird rule.”
- Case-by-case jurisdiction over “isolated waters” if ties to interstate commerce.
- Continue to assert jurisdiction over traditional navigable waters and adjacent wetlands, and generally their tributaries (and adjacent wetlands).

**Focus on Science:
More on “Significant Nexus”**

Rapanos v. United States

547 U.S. 715 (2006)

- Corps asserted jurisdiction over wetlands adjacent to non-navigable ditches/drains that flowed into traditional navigable waters.
- Vacated and remanded for reevaluation.
- Supreme Court split 4-4-1 in deciding the case.
- Two tests:
 - *Plurality (Scalia + 3): Jurisdiction extends only to:*
 - **Relatively permanent bodies of water connected to traditional navigable waters** (those commonly described as oceans, rivers, and lakes). 547 U.S. at 739.
 - **Wetlands with a continuous surface connection to these waters**, such that it is difficult to determine where the “water” ends and the “wetland” begins. Id. at 742.

Rapanos v. United States

547 U.S. 715 (2006)

- Two tests (cont.):
 - *Justice Kennedy’s concurrence:*
 - “[J]urisdiction over wetlands depends upon the existence of a **significant nexus** between the wetlands in question and [traditional] navigable waters.” 547 U.S. at 779.
 - Wetlands adjacent to traditional navigable waters: may rely on adjacency alone.
 - Wetlands adjacent to tributaries: must establish significant nexus.
 - “Wetlands possess the requisite nexus . . . if the wetlands, **either alone or in combination with similarly situated lands in the region, significantly affect** the chemical, physical, and biological integrity of” traditional navigable waters. *Id.* at 779-80.

Rapanos v. United States

547 U.S. 715 (2006)

- Five Justices rejected the plurality's test:
 - Kennedy: It is “inconsistent with the Act’s text, structure, and purpose” and “makes little practical sense in a statute concerned with downstream water quality.” 547 U.S. at 769, 776.
 - Dissent: Its “limitations . . . are without support in the language and purposes of the Act or in our cases interpreting it.” *Id.* at 800.
- Every circuit court of appeals to consider the issue has held that waters that meet the “significant nexus” test are “waters of the U.S.”

2008 Rapanos Guidance

Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States" (Dec. 2, 2008)

“Waters of the U.S.” includes:

- Traditional navigable waters;
- Wetlands adjacent to traditional navigable waters;
- Waters that meet either Rapanos test:
 - Plurality:
 - Tributaries of traditional navigable waters that have relatively permanent flow.
 - Wetlands that directly abut such tributaries.
 - Kennedy:
 - Waters with a significant nexus with a traditional navigable water.

2015 Clean Water Rule

Clean Water Rule: Definition of “Waters of the U.S.,” 80 Fed. Reg. 37,054 (June 29, 2015)

- Based on the science of connectivity.
- “Waters of the U.S.” includes:
 - Traditional navigable waters, territorial seas, interstate waters, and impoundments of “waters of the U.S.”
 - Tributaries:
 - “Bed and banks” and an “ordinary high water mark”; and
 - Contribute flow to traditional navigable water (directly or indirectly).
 - Adjacent waters, including wetlands.
 - Bordering, contiguous, or neighboring.



2015 Clean Water Rule

- “Waters of the U.S.” includes (cont.):
 - Waters with “significant nexus.”
 - Including “similarly situated”:
 - Prairie potholes
 - Carolina Bays and Delmarva Bays
 - Western Vernal Pools in CA
 - Texas coastal prairie wetlands
 - Pocosins



Where We Are Today

Trump Administration

- 2017 Executive Order 13,778
- 2018 Applicability Date Rule
- 2019 Clean Water Rule Repeal (Step 1)
- 2020 “Navigable Waters Protection Rule” (Step 2)

“Navigable Waters Protection Rule”

“The Navigable Waters Protection Rule: Definition of ‘Waters of the U.S.’” 85 Fed. Reg. 22,250 (Apr. 21, 2020)

- Excludes all otherwise jurisdictional waters, including traditional navigable waters, if they also fit within the Rule’s exclusions.
- Expanded “waste treatment system” exclusion.
- Important public lakes are out simply because they were created to provide cooling water for industrial facilities.



“Navigable Waters Protection Rule”

- Tributaries
 - Categorically excludes ephemeral streams.
 - All other tributaries must contribute relatively permanent flow to traditional navigable waters in a typical year.
- The Agencies estimated that up to 70% of the Nation’s streams lose protections.



“Navigable Waters Protection Rule”

- Adjacent Wetlands
 - Wetlands that physically touch another jurisdictional water.
 - Wetlands with manmade structures that allow surface connection to “waters of the U.S.”
 - Wetlands separated from “waters of the U.S.” by a natural berm, bank, or dune.
 - Wetlands that are inundated by flooding from “waters of the U.S.”
- Agencies estimated that over half the Nation’s wetlands lose protections.



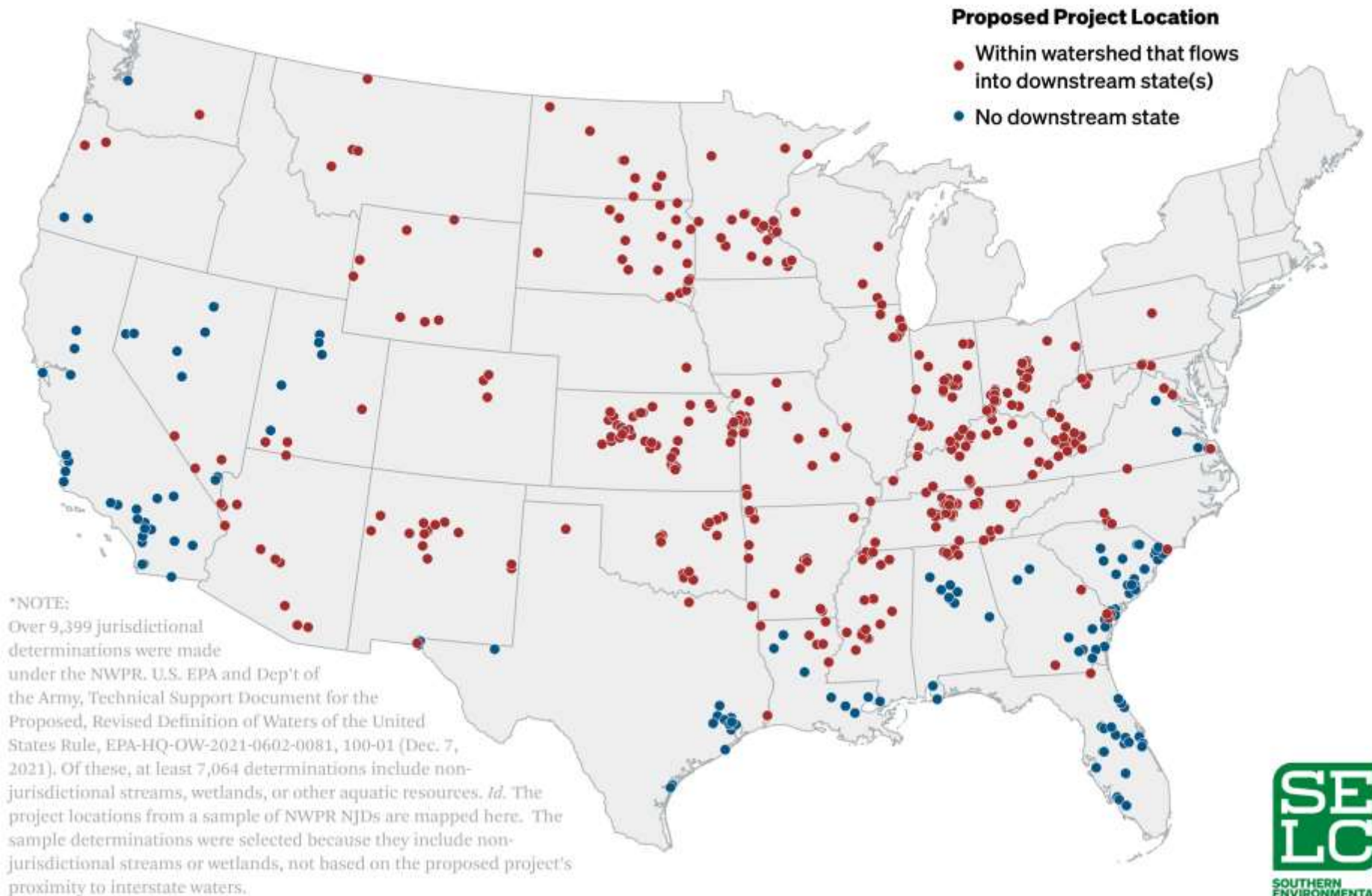
“Navigable Waters Protection Rule”

- Effective June 22, 2020.
- EPA Data: 92% of all waters and wetlands considered under the rule are not jurisdictional.



Sample NWPR Non-Jurisdictional Determinations (NJDs)*

Locations of 563 NWPR NJDs mapped based on flow into intrastate or interstate waters



Lawsuits Challenging the Rule

Lawsuits brought by States

- California v. Regan (N.D. Cal.) – coalition of 18 states, plus D.C. and NYC
- Colorado v. EPA (D. Colo.)

Lawsuits brought by Tribes

- Navajo Nation v. Regan (D.N.M.)
- Pueblo of Laguna v. Regan (D.N.M.)
- Pascua Yaqui Tribe v. Regan (D. Ariz.) – coalition of tribes and environmental groups*

Lawsuits brought by environmental groups

- Chesapeake Bay Foundation v. Regan (D. Md.)
- Conservation Law Foundation v. EPA (D. Mass.)
- Environmental Integrity Project v. Regan (D.D.C.)
- S.C. Coastal Conservation League v. Regan (D.S.C.)
- Puget Soundkeeper Alliance v. EPA (W.D. Wash.)
- Waterkeeper Alliance v. Regan (N.D. Cal.)*

Other lawsuits

- Murray v. Regan (N.D.N.Y.)
- N.M. Cattle Growers' Association v. EPA (D.N.M.)
- Wash. Cattlemen's Association v. EPA (W.D. Wash.)
- Or. Cattlemen's Association v. EPA (D. Or.)

Court vacated NWPR

WOTUS – Biden Edition

- June 9, 2021 - Announced intent to initiate a new rulemaking process that:
 - Restores the protections in place prior to the 2015 Clean Water Rule; and
 - Develops a new definition of “waters of the United States.”
- Agencies determined that “the [NWPR] is significantly reducing clean water protections” and is “leading to significant environmental degradation.”

Step One – Proposed Rule – Dec. 7, 2021

- Returns definition of WOTUS to pre-2015 regime.
- WOTUS means waters as defined in 1986 regs., with amendments based on Sup. Ct. case law.

<https://www.federalregister.gov/documents/2021/12/07/2021-25601/revised-definition-of-waters-of-the-united-states>

Under Proposed Rule, WOTUS includes:

- Traditional navigable waters, interstate waters, and territorial seas;
- Adjacent wetlands;
- Most impoundments of WOTUS;
- Tributaries, wetlands and other waters that meet either: (1) the relatively permanent, or (2) the significant nexus standard.

Status of Proposed Rule:

- Comment period ended Feb. 7, 2022
- Agencies are continuing with roundtable listening sessions
 - Southeast Regional Roundtable:
<https://www.youtube.com/watch?v=6HzsQz2Kvxl>
- We expect new rule this fall

Sackett v. EPA

- Case brought by Pacific Legal Foundation
- Idaho couple tried to build a house near Priest Lake and began filling wetlands
- The wetlands considered jurisdictional under all prior rules except the NWPR
- EPA took administrative action against the Sacketts, and Sacketts sued EPA
- District Court granted summary judgment to EPA and 9th Circuit affirmed
- S. Ct. granted cert. Briefing underway. Argument to occur during fall 2020 term.

Sackett v. EPA

- Sacketts ask the Court to adopt a two-part test:
 - 1. Is the wetland inseparably bound up with a “water” by a continuous surface water connection?
 - 2. Is the “water” subject to Congress’s authority over channels of interstate commerce?

Sackett v. EPA

- Government:
 - No sound basis for imposing a rigid continuous surface connection requirement
 - Significant nexus test is a permissible basis for identifying CWA-protected adjacent wetlands
 - Agencies entitled to deference

401 Certification Rule

- Section 401 of CWA:
 - Federal agency cannot issue a permit or license for an activity that may result in discharge into WOTUS unless a Section 401 certification is issued or waived.
 - Gives states and authorized tribes the authority to issue water quality certifications.
 - Required for projects like dams, oil and gas pipelines, mines, and projects that require a Section 404 dredge or fill permits

Section 401 of CWA

- A certification must include conditions necessary to insure that “any applicant . . . will comply” with enumerated provisions of the CWA and “any other appropriate requirement of State law.” 33 U.S.C. § 1341(d).
- Certifying state must act “within a reasonable period of time (which shall not exceed one year)” *Id.* § 1341(a)(1).

Section 401 Certifications

- Important tool - used by states to protect their aquatic life and natural resources
- A certification can be issued, issued with conditions, denied, or waived.
- Any conditions “shall become a condition on any Federal license or permit.” 33 U.S.C. § 1341(d)
- If state denies the certification, “[n]o license or permit shall be granted. 33 U.S.C. § 1341(a)(1).

2020 CWA Section 401 Certification Rule

- Issued July 13, 2020
 - Restricted the scope of 401 certifications – can only impose conditions on discharge, not activity as a whole
 - Waiver clock starts ticking when bare-bones request is submitted, regardless of whether application is complete
 - Imposes other procedural requirements on states and tribes

401 Litigation Ensues

- Multiple lawsuits filed
- Challenges raised – violates Sup. Ct. precedent
 - ***PUD No. 1***, 511 U.S. 700 (1994):
 - Upheld Washington’s placement of flow restrictions on dam project to protect salmon and steelhead trout spawning habitat.
 - Holding: Section 401(d) empowers states to place “conditions and limitations on the [proposed] activity as a whole,” rather than only on point source discharges of pollutants.

- Lawsuits allege that the rule:
 - places limitations on the 401 certification process not found in statute.
 - Contravenes *PUD 1* decision
 - Wrongfully restricts public's right to participate in certification process.
 - Starts the waiver clock ticking before a complete information is submitted.
 - Violates APA
 - Denies states' rights to protect their groundwater, wetlands, streams, aquatic life
 - Denies states' rights to require compliance with state law

Status of Litigation

- ***Louisiana, et al. v. American Rivers, et al.***
 - N.D. Cal. vacated the 2020 Rule, remanded rule to the agencies, and declined a request for a stay of the vacatur order
 - 9th Circuit declined to stay vacatur order
 - Sup. Ct. stayed the vacatur order via the shadow docket, effectively reinstating the Trump administration's rule. Justice Kagan, joined by 3 other justices (including C.J. Roberts) dissented.
 - Industries' appeal of the vacatur order remains pending in 9th Circuit.
 - Motion for indicative ruling - plaintiffs

Status of the Rule

- Biden Administration moved swiftly to promulgate replacement rule.
- Restores much of state/tribal authority
- Proposed rule published Thursday, June 9th
- Comment deadline August 8th

Proposal

- Clarifies that triggering discharge must be from a point source to WOTUS - but no addition of a pollutant needed (*S.D. Warren*, 547 U.S. 370 (2006))
- Conditions on activity as a whole, including impacts to non-federal waters
- Require submission of draft federal license/permit with application to cert. auth.
- Reasonable period of time: 30-day negotiation period, 60-day default.

A photograph of a pond with numerous lily pads and water lilies. The water is a deep blue, and the lily pads are green with some showing signs of aging or damage. The water lilies have long, thin, reddish-pink stems and white flowers with yellow centers. The scene is brightly lit, suggesting a sunny day.

Questions?

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