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Legal Updates in Water Law: Allan Gates/Jordan Wimpy (Mitchell Williams Law Firm) Arkansas Environmental Federation Water Seminar Presentation

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My Mitchell Williams Law Firm colleagues Allan Gates and Jordan Wimpy undertook a presentation at the April 18th Arkansas Environmental Federation seminar titled:

Legal Updates in Water Law ("Presentation")

The topics addressed in the *Presentation* included:

1. Waters of the United States ("WOTUS") – Discussing how a criminal sentencing case may impact the revision of the WOTUS rule
2. Groundwater – Does a discharge to Groundwater require a Clean Water Act National Pollution Discharge Elimination System ("NPDES") Permit?
3. Anti-Duplication – How the United States Environmental Protection Agency ("EPA") "discretion" to regulate stormwater led to potential Resource Conservation and Recovery Act ("RCRA") enforcement
4. Clean Water Act 401 Certification – March 2018 decisions providing clarity to Section 401 Water Quality Standard ("WQS") certification process

1) Criminal Sentencing Case/WOTUS Rule

The *Presentation* addressed the impact of *Hughes v. United States*, 849 F.3d 1008 (11th Cir. 2017), in relation to the WOTUS rule.

The issue considered was whether the 4-1-4 decision in *Freeman v. United States* should be applied to a "C-Plea" defendant's request for sentence reduction.

Conclusions reached include:

- Confusion persists in how to apply 4-1-4 decisions
- The SCOTUS decision in *Hughes v. United States* may trump the Executive Order directing revision of WOTUS in line with Justice Scalia's opinion in *Rapanos*

2. Groundwater

The Presentation also discusses case law considering whether a discharge to groundwater requires an NPDES Permit. The three cases addressed included:

1. *Hawai'i Wildlife Fund v. County of Maui*, ___ F.3d ___ (9th Cir., Feb. 1, 2018)

Note – a previous post in this blog addressed this decision in some detail ([see previous post](#)).

Further note that the United States Court of Appeals for the 4th Circuit recently issued an opinion addressing this issue. The blog *lawandenvironment* notes in an April 23rd post that:

Last week, the 4th Circuit Court of Appeals . . . – not the most liberal court in the land – joined the 9th Circuit . . . in ruling that discharges from a point source to groundwater can be subject to the Clean Water Act. (see <http://www.lawandenvironment.com/2018/04/18/another-ruling-that-discharges-to-groundwater-are-subject-to-the-clean-water-act/>)

2. *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 2017 WL 6628917 (E.D. Ky, Dec. 28, 2017), *appeal pending*, No. 18-5115 (6th Cir.)
3. *Tennessee Clean Water Network v. TVA*, 273 F. Supp. 3d 775 (M.D. Tenn 2017), *appeal pending*, No. 17-6155 (6th Cir.)

The *Presentation* asked whether a discharge to Groundwater that ultimately affects navigable surface waters require an NPDES permit.

Rulings on the issue from the respective decisions include:

- County of Maui – Yes, groundwater is conduit
- Kentucky Utilities – No, groundwater is not a point source
- Tenn. Clean Water – Yes, groundwater is a point source

The *Presentation* concludes that confusion persists and notes that EPA recently requested comments on the issue.

3. Anti-Duplication

The *Presentation* addressed whether EPA's "discretion" to regulate stormwater led to potential RCRA enforcement.

The case – *Ecological Rights Found. V. Pac. Gas & Elec. Co.*, 874 F3d 1083 (9th Cir. 2017) is discussed.

The decision examines the scope of the RCRA Anti-Duplication Provisions, which states in relevant part:

"Nothing in this chapter shall be construed to apply to . . . any activity or substance which is subject to the Federal Water Pollution Control Act, the Safe Drinking Water Act . . . except to the extent that such application (or regulation) is not inconsistent with the requirements of such Act." RCRA Section 1006(a), 42 USC § 6905(a) and (b).

([See previous post here describing an anti-duplication case from a United States District Court in Oklahoma.](#))

The *Presentation* concludes:

- Fact specific application with fact specific inquiry
- Must show specific contradictory permit conditions

4. 401 Certification

The *Presentation* addresses whether certain March 2018 decisions provide clarity to the Section 401 Clean Water Act WQS process.

The cases discussed include:

- *New York State Dep't of Env'tl. Conservation v. Sarah Burns, et al.* , No. 17-3770-ag, slip opinion (2d Cir. 2018)
- *FEB Missouri 15, LLC*, 162 FERC 61,327 (Mar. 15, 2018)

The Section 401 Waiver Provision was addressed, which states:

“If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements . . . shall be waived with respect to such Federal application.” CWA Section 401, 33 USC § 1341(a)(1).

The *Presentation* concludes that the cases provide clarity to the 401 process but that concerned states could still deny the application without prejudice and request re-application.

A copy of the slides for the [Presentation](#) can be downloaded here.