

# The SANDBAR

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Legal Reporter for the National Sea Grant College Program

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## Maui's Wastewater Discharges into Groundwater Violate the Clean Water Act

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*Also,*

Free Lolita? Court Rules on Fate of Killer Whale

Circuit Split over Availability of Punitive Damages for Unseaworthiness

Change to Minnesota's Wild Rice Standard Rejected

The Waters of the United States Get Muddier: Supreme Court Rules that WOTUS Litigation Must Begin at the District Court Level

# Our Staff

**Editor:**

Terra Bowling

**Production & Design:**

Barry Barnes

**Contributors:**

William Bedwell

Marc Fialkoff

Morgan L. Stringer

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Sea Grant Law Center, Kinard Hall, Wing E, Room 258, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: [tmharget@olemiss.edu](mailto:tmharget@olemiss.edu). We welcome suggestions for topics you would like to see covered in *THE SANDBAR*.

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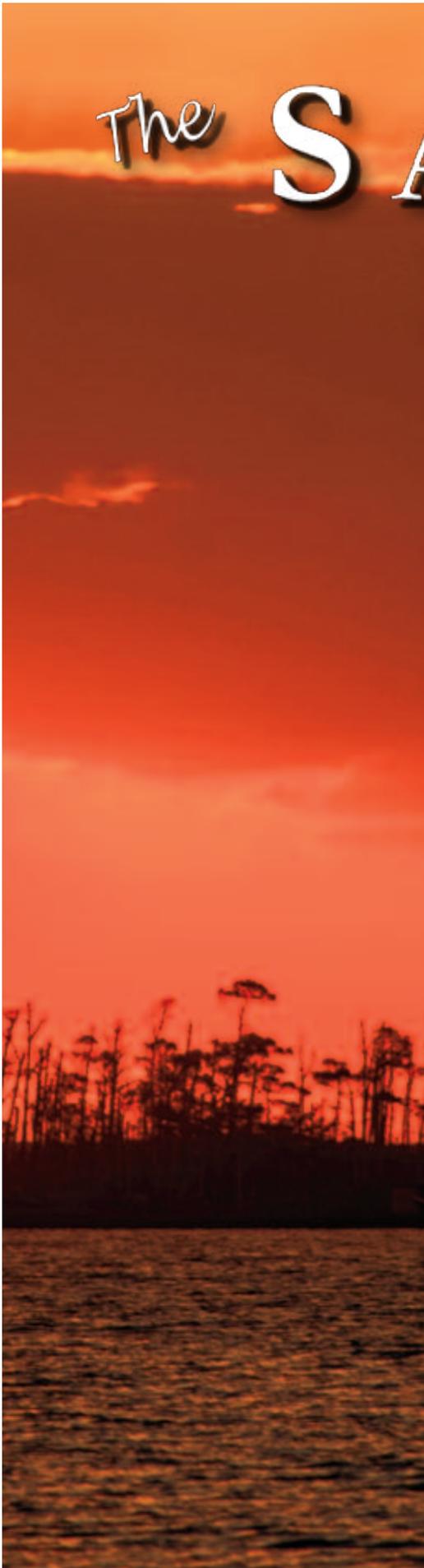
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# MAUI'S WASTEWATER DISCHARGES INTO GROUNDWATER VIOLATE THE CLEAN WATER ACT

Morgan L. Stringer<sup>1</sup>



Photograph of coral reef in Maui, Hawaii courtesy of Brian Greul.

**W**astewater is harmful to the coastal sea, because it can lead to algal blooms and coral reef deterioration. Typically, the Clean Water Act (CWA) regulates any wastewater discharged directly into the sea. In February, a panel of the Ninth Circuit Court of Appeals ruled on whether wastewater discharged by Maui County that indirectly reaches the Pacific Ocean through groundwater falls within the purview of the CWA.

## **Background**

Western Maui County is home to several popular beach resorts, resulting in a large amount of wastewater. The Lahanai Wastewater Reclamation Facility, which handles Western Maui's wastewater, receives 4 million gallons of raw sewage per day and serves 40,000 people. After the sewage is treated, some of the treated water is sold for irrigation purposes but most is discharged into four wells

for disposal. These wells discharge the treated wastewater into groundwater, which then travels to the Pacific Ocean.

When 2.8 million gallons of effluent are discharged, it is the equivalent to installing a permanent running garden hose at every meter of coastline for 800 meters. To understand the impact of this discharge on the coastal waters, the University of Hawaii and government agencies conducted a study.<sup>2</sup> The researcher used a tracer dye to track wastewater pollutants from three of the wells. The study found that wastewater from the wells had a direct hydrological connection to the Pacific Ocean.<sup>3</sup>

In response to the study, the Hawaii Wildlife Fund filed a lawsuit claiming that Maui County violated the CWA by discharging wastewater into the Pacific Ocean without the proper permit. The U.S. District Court for the District of Hawaii held the county liable under the CWA. The county appealed to the Ninth Circuit.<sup>4</sup>

## CWA

The CWA's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>5</sup> To accomplish this goal, the CWA prohibits discharges of pollutants via a point source into navigable waters without a permit.<sup>6</sup> A point source is any "discernable, confined, and discrete conveyance...from which pollutants may be discharged."<sup>7</sup> An example of non-point source pollution is pollution from millions of cars onto roadways, which is then washed away by rain into a navigable water.<sup>8</sup> The Ninth Circuit noted that courts have found runoff pollution to be nonpoint source pollution "unless it is later collected, channeled, and discharged through a point source."<sup>9</sup>

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## THE NINTH CIRCUIT NOTED THAT COURTS HAVE FOUND RUNOFF POLLUTION TO BE NONPOINT SOURCE POLLUTION "UNLESS IT IS LATER COLLECTED, CHanneled, AND DISCHARGED THROUGH A POINT SOURCE."

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### The "Fairly Traceable" Standard

The Ninth Circuit agreed that the wells are a point source, because they are "discernable, confined, and discrete conveyances" from which pollutants are discharged. The primary question before the court was whether the wastewater leaving a point source and entering groundwater, usually classified as a non-point source, that flows to a

navigable water should be regulated by the CWA. The court first looked at a recent Ninth Circuit case, *Greater Yellowstone*, in which the court held that rainwater travelling to pits of newly extracted waste rock, then filtered hundreds of feet underground, and then flowing into surface water constituted non-point source pollution.<sup>10</sup> In this instance, there was no containment of the polluted water before it entered navigable waters; therefore, it was not discharged from a point source.

The court noted other circuit court rulings that have found "indirect discharge" sufficient to establish CWA liability. The Second Circuit held that liquid manure waste confined in tanks, then sprayed on fields, then flowing into navigable water established CWA liability.<sup>11</sup> The Fifth Circuit held that the "ultimate question" in ascertaining CWA liability is whether the pollutants were discharged from a "discernable, confined, and discreet conveyance" and that it did not matter if the pollutants were then carried away by gravity flow or rain water to the navigable water.<sup>12</sup>

The Ninth Circuit also cited U.S. Supreme Court Justice Scalia's plurality opinion in *Rapanos*. Scalia noted that the CWA forbade "addition of any pollutant to navigable waters," but the phrase "directly add" is not present in the statute.<sup>13</sup>

The Ninth Circuit concluded that if a person or entity discharges a pollutant from a point source, those pollutants travel to a navigable water, and those pollutants are "fairly traceable" to the point source and beyond minimal amounts, then the CWA applies.<sup>14</sup> The court stated that this case was about preventing Maui County from doing indirectly what it cannot do directly. The county could not build a pipe to carry wastewater directly to the ocean, so discharging wastewater into groundwater that flows to the ocean cannot be done to avoid liability. "To hold otherwise would make a mockery of the CWA's prohibitions."<sup>15</sup>

### Implications

The controversy will not end with this ruling. Maui County filed a petition requesting the entire Ninth Circuit court to hear the case.<sup>16</sup> In support of Maui County, eighteen states filed an amicus brief. The brief criticizes the Ninth Circuit's decision to establish CWA liability via "indirect hydrological connections." The case could possibly be heard *en banc* or even eventually by the U.S. Supreme Court to resolve the confusion surrounding the Clean Water Act and groundwater.

The EPA is also making efforts to clarify the CWA's applicability to groundwater. The agency is currently seeking comments on its stance that "pollutants discharged from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct



Photograph of Charley Young Beach in Maui, Hawaii courtesy of Ruediger Gros.

hydrologic connection to the jurisdictional water may be subject to Clean Water Act permitting requirements.<sup>217</sup> The comment period ends May 21, 2018. 🐼

### Endnotes

- <sup>1</sup> 2018 J.D. Candidate, University of Mississippi School of Law.
- <sup>2</sup> Marcie Grabowski, *UH Researchers Link Quality of Coastal Groundwater with Reef Degradation on Maui*, UNIV. OF HAW. NEWS (Nov. 15, 2016).
- <sup>3</sup> *Hawai'i Wildlife Fund. v. County of Maui*, 881 F.3d 754, 758-759 (9th Cir. 2018).
- <sup>4</sup> *Hawai'i Wildlife Fund. v. County of Maui*, No. 12-00198 SOM/BMK, 2015 WL 328227 (D. Haw. Jan. 23, 2015).
- <sup>5</sup> 33 U.S.C. §1251(a).
- <sup>6</sup> *Id.* §1362(12).
- <sup>7</sup> *Id.* §1362(14).
- <sup>8</sup> *Hawai'i Wildlife Fund*, 881 F.3d at 761 (*citing* Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 508 (9th Cir. 2013)).
- <sup>9</sup> *Id.* at 761.
- <sup>10</sup> *Id.* at 762 (*citing* Greater Yellowstone Coalition v. Lewis, 628 F.3d 1143, 1147, 1153 (9th Cir. 2010)).
- <sup>11</sup> *Id.* at 763, (*citing* Concerned Area Residents for Environment v. Southview Farm, 34 F.3d 114, 119 (2d. Cir. 1994)).
- <sup>12</sup> *Id.* (*citing* Sierra Club v. Abston Construction, 620 F.2d 41, 45 (5th Cir. 1980)).
- <sup>13</sup> *Id.* at 764 (*citing* Rapanos v. United States, 547 U.S. 715, 743 (2006) (plurality opinion)).
- <sup>14</sup> *Id.* at 765.
- <sup>15</sup> *Id.* at 768.
- <sup>16</sup> County of Maui, Petition for En Banc Rehearing, *Hawai'i Wildlife Fund. v. County of Maui*, No. 15-17447 (9th Cir. Mar. 1, 2018).
- <sup>17</sup> Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7126 (proposed Feb. 20, 2018) (to be codified 40 C.F.R. § 122).

# FREE LOLITA? COURT RULES ON FATE OF KILLER WHALE

Terra Bowling



Photograph of Lolita at the Miami Seaquarium  
courtesy of Juan Pablo González Barragán.

**T**he Miami Seaquarium has housed Lolita, an approximately 8,000 pound, twenty-five foot long Southern Resident Killer Whale (SRKW), for nearly fifty years. A movement to return Lolita to waters off the Pacific Northwest coast where she was captured (*a la* “Free Willy”) has gained traction in recent years. In January, the U.S. Court of Appeals for the Eleventh Circuit ruled that Lolita will stay put for now.<sup>1</sup>

## **Lolita**

Lolita was legally captured in 1970 when she was approximately five years old. She has lived at the Seaquarium since shortly after her capture, and, at over fifty years old, she’s exceeded the average thirty eight-year life expectancy of an SRKW. Lolita is housed in an oblong tank that is eighty feet across and twenty feet deep. She shared the tank with Hugo, another SRKW, until he died in 1980. For the last

twenty years, Lolita has shared her tank with Pacific white-sided dolphins, a biologically related species.

In 2017, the Miami Beach Commission unanimously passed a resolution asking the Seaquarium to release Lolita to a nonprofit that has developed a proposal to return Lolita to her native habitat in the Pacific Northwest.<sup>2</sup> Although the resolution has no legal effect, the Commission hoped to pressure the Seaquarium to release Lolita. The Seaquarium contends that the stress of release could be fatal to an animal that has spent so many years in captivity.<sup>3</sup>

## ESA

The National Marine Fisheries Service (NMFS) administers the Endangered Species Act (ESA) with respect to marine mammals. In 2005, NMFS listed the SRKW as an endangered species but excluded “captive members” from the designation. At the request of People for the Ethical Treatment of Animals (PETA), NMFS removed the exclusion in 2013. In May 2015, NMFS recognized Lolita as an SRKW covered by the ESA. PETA brought suit two months later, claiming the Miami Seaquarium harmed and harassed Lolita in violation of § 9 of the ESA and sought to have her released.

Section 9 of the ESA makes it unlawful to “take” species listed in the ESA.<sup>4</sup> The definition of “take” is “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>5</sup> PETA alleged that Seaquarium subjected Lolita to harm or harassment, resulting in a “take” under the ESA.

The U.S. District Court for the Southern District of Florida was unconvinced that the ESA applied to the case.<sup>6</sup> The court reasoned that the regulation of captive animals fell under the Animal Welfare Act (AWA).<sup>7</sup> Ultimately, the court granted summary judgment for the Seaquarium, finding that “a licensed exhibitor ‘take[s]’ a captive animal . . . only when its conduct gravely threatens or has the potential to gravely threaten the animal’s survival.”<sup>8</sup>

## Harm and Harass

On appeal, PETA again claimed that the Seaquarium harmed and harassed Lolita in violation of § 9 of the ESA. The group cited thirteen separate injuries caused by either the design of Lolita’s tank, the dolphins with which Lolita shares her tank, sun exposure, or a combination of these factors.

The ESA defines neither “harm” nor “harass.” The court noted that “harm” is defined by Webster’s dictionary as “to cause hurt or damage to: injure.”<sup>9</sup> The dictionary definition of “harass” is “to vex, trouble, or annoy

continually or chronically.”<sup>10</sup> The Eleventh Circuit concluded that these definitions did not adequately describe the degree of harm or harassment actionable under the ESA.

Using statutory construction, the court noted that the terms “harm” and “harass” should have a meaning on par with other words used in the statute: pursue, hunt, shoot, wound, kill, trap, capture, and collect. “Each of the terms accompanying ‘harm’ and ‘harass’ refers to conduct that poses a threat of serious harm to an endangered animal.”<sup>11</sup> Therefore, the court reasoned that to “harm” or “harass” a captive endangered species means to pose “a threat of serious harm.”

The court noted that NMFS and the Fish and Wildlife Service’s definitions of the terms harm and harass, respectively, support this finding. The court also stated that interpreting the terms more broadly could undermine the authority of the AWA to regulate captive animals. For example, actions deemed to be permissible under the AWA, such as tank conditions, could be found to be harm or harassment under the ESA.

## Conclusion

The Eleventh Circuit concluded that to “harm” or “harass” a captive endangered species means to pose “a threat of serious harm.” The court found none of the thirteen injuries Lolita sustained during her captivity constituted harm or harassment; therefore, the court affirmed the district court’s summary judgment. PETA says it may appeal the decision.<sup>12</sup> ❧

## Endnotes

<sup>1</sup> People for Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 879 F.3d 1142 (11th Cir. 2018).

<sup>2</sup> Chabeli Herrera, *Miami Beach Commission Votes Unanimously to Free Lolita – but It’s Not Happening Yet*, MIAMI HERALD, Oct. 24, 2017.

<sup>3</sup> *Id.*

<sup>4</sup> 16 U.S.C. § 1538(a)(1)(b).

<sup>5</sup> *Id.* § 1532(19).

<sup>6</sup> 189 F. Supp. 3d 1327.

<sup>7</sup> *Id.* at 1354.

<sup>8</sup> *Id.* at 1355.

<sup>9</sup> *People for Ethical Treatment of Animals, Inc.*, 879 F.3d 1142, 1146.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1147.

<sup>12</sup> Jonathan Stempel, *Captive Orca Lolita Can Stay at Miami Aquarium: U.S. Appeals Court*, REUTERS, Jan. 12, 2018.

# CIRCUIT SPLIT OVER AVAILABILITY OF PUNITIVE DAMAGES FOR UNSEAWORTHINESS

Marc Fialkoff<sup>1</sup>



Photograph of a ship in the Gulf of Mexico courtesy of Louis Vest.

A circuit split recently emerged over the availability of punitive damages in unseaworthiness cases. In January, the Ninth Circuit held that unseaworthiness claims fall within the class of general maritime claims that provide for punitive damages.<sup>2</sup> While pecuniary, or monetary, in nature, punitive damages are not compensation for loss, but rather a punishment for “callously disregarding the safety of seaman.”<sup>3</sup> This ruling departs from the Fifth Circuit’s holding in *McBride v. Estis Well Service*, which found that punitive damages are not available for unseaworthiness claims.

## Background

Under U.S. law, workers injured in the course of maritime employment may seek compensation for injuries under the Jones Act or general maritime law. The Jones Act provides a remedy for workers injured while engaged in maritime activity when the vessel owner is found negligent. General maritime law provides a remedy for injured seamen if the vessel is deemed “unseaworthy.” Generally, unseaworthiness claims arise when an individual injured while working on a vessel claims that the equipment or other fixtures on the vessel are not safe for their intended use.

While working as a deckhand on a vessel owned and operated by the Dutra Group (Dutra), a hatch cover blew open, crushing Christopher Batterton's left hand. The hatch blew open due to pressurized air being pumped into a compartment below with no exhaust mechanism to relieve the pressure when it got too high. Batterton claimed that the lack of exhaust mechanism made the vessel unseaworthy and resulted in his permanent disability.

During trial, the district court denied Dutra's motion to strike Batterton's request for punitive damages. Unlike compensatory damages, which compensate the plaintiff for damages and injuries, punitive damages serve to punish and deter further "bad" behavior from the defendant. On appeal, Dutra argued that punitive damages are not available in general maritime claims. Because of differing interpretations by district courts and circuit courts as to the availability of punitive damages in general maritime claims, the Ninth Circuit granted the appeal.

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## UNLIKE COMPENSATORY DAMAGES, WHICH COMPENSATE THE PLAINTIFF FOR DAMAGES AND INJURIES, PUNITIVE DAMAGES SERVE TO PUNISH AND DETER FURTHER "BAD" BEHAVIOR FROM THE DEFENDANT.

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### **Punitive Damages for Unseaworthiness Claims**

The sole question before the Ninth Circuit was whether punitive damages are an available remedy for unseaworthiness claims. Previously, in *Evich v. Morris*, the Ninth Circuit held that punitive damages are available under general maritime claims, including those of unseaworthiness.<sup>5</sup> Dutra argued that recent decisions by the U.S. Supreme Court and the Fifth Circuit overrule *Evich*.

First, Dutra argued that the U.S. Supreme Court overruled *Evich* in *Miles v. Apex Marine Corp.*<sup>6</sup> In *Miles*, the Supreme Court held that "loss of society" claims, such as those involving compensation for loss of affection, companionship, or love, are a non-pecuniary claim and are not available under general maritime law; however, that case did not discuss whether punitive damages were available. In the alternative, Dutra argued that the court should follow the Fifth Circuit's decision in *McBride*.

In *McBride*, a divided en banc court held that punitive damages are considered "non-pecuniary losses" and therefore are not recoverable either under the Jones Act or general maritime law.

The Ninth Circuit determined that the holding in *Miles* never addressed the availability of punitive damages and based its decision on another U.S. Supreme Court decision, *Atlantic Sounding v. Townsend*, in which the Court held that punitive damages are available for a general maritime law claim.<sup>7</sup> Citing *Townsend*, the Ninth Circuit noted that punitive damages have been available and awarded in maritime claims and that the exclusion of punitive damages for other claims is based on statutes such as the Jones Act or the Federal Employers Liability Act (FELA). Unseaworthiness is a general maritime claim that predates both the Jones Act and FELA.

In contrast to the Fifth Circuit's approach, the Ninth Circuit contrasted punitive damages with other claims, such as wrongful death or loss of future earnings. The purpose of punitive damages is to be a punishment and deterrence, to prevent callous behavior resulting in harm to seamen.<sup>8</sup> Punitive damages are not a compensation for loss, rather to prevent the callous disregard of human life.

### **Conclusion**

The Ninth Circuit affirmed the district court's denial of Dutra's motion to strike the request for punitive damages. With this decision in the Ninth Circuit, those seamen injured in the course of employment and make a claim for unseaworthiness can seek punitive damages against the vessel owners, making these claims more expensive. Given that the Ninth and Fifth Circuits are magnets for maritime cases, the likelihood of the Supreme Court hearing a case on the availability of punitive damages in these types of cases is increased. ❧

### **Endnotes**

- <sup>1</sup> J.D., Roger Williams University School of Law; PhD, Virginia Polytechnic Institute and State University.
- <sup>2</sup> *Batterton v. Dutra Group*, No. 15-56775, D.C. No. 2:14-cv-07667-PJW (9th Cir. Jan. 23, 2018).
- <sup>3</sup> *Batterton*, No. 15-56775 at 13.
- <sup>4</sup> 768 F.3d 382 (5th Cir. 2014).
- <sup>5</sup> 819 F.2d 256 (9th Cir. 1987).
- <sup>6</sup> 498 U.S. 19 (1990).
- <sup>7</sup> 557 U.S. 404 (2009).
- <sup>8</sup> *Batterton*, No. 15-56775 at 16.

# CHANGE TO MINNESOTA'S WILD RICE STANDARD REJECTED

William Bedwell<sup>1</sup>

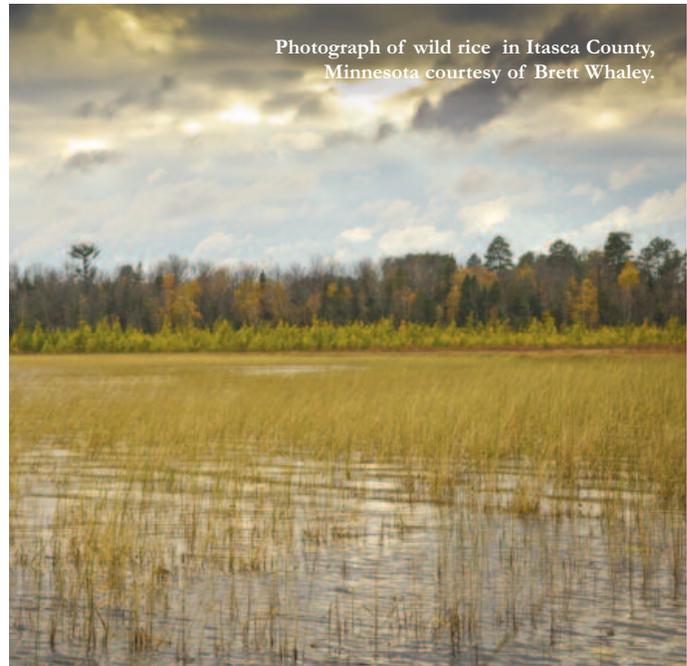
Last month, a Minnesota state administrative law judge disapproved the Minnesota Pollution Control Agency's (MPCA) proposed changes to the state's water quality sulfate standard aimed at protecting wild rice.<sup>2</sup> The judge ruled that the MPCA failed to affirmatively demonstrate how the proposed changes to the sulfate standard would better protect the state's wild rice and were therefore unjustified. Environmental groups and Indian tribes praised the judge's ruling, as did industry groups.<sup>3</sup> Environmental groups and Indian tribes do not want the current rule repealed, while industry groups generally oppose both the current rule and the proposed rule, claiming compliance with either is cost prohibitive.<sup>4</sup>

## Background

Wild rice is not technically a rice, but a grass, known to scientists as *Zizania palustris* and to the local Ojibwa tribe as manoomin.<sup>5</sup> The aquatic plant is native to the Great Lakes basin and is one of only two grains native to the U.S. consumed by humans (the other being corn).<sup>6</sup> Wild rice is culturally and nutritionally significant to local Native Americans and Minnesotans in general, with Minnesota having the only state standard protecting wild rice from excessive sulfate.<sup>7</sup>

Sulfate is a pollutant released by iron mines, paper mills, and even wastewater treatment plants.<sup>8</sup> The existing 1973 sulfate standard limits sulfate levels to 10 milligrams per liter in water used for the production of wild rice. This standard was based in part on research from the University of Minnesota during the 1930s and 40s that determined wild rice does not grow well in water with high levels of sulfate.<sup>9</sup>

In 2011, the Minnesota Legislature required the MPCA to complete significant research on water quality and other environmental impacts on the growth of wild rice. The legislature tasked the agency with: 1) addressing water quality standards for waters containing natural beds of wild rice; 2) designating each body of water, or specific portion thereof, to which wild rice water quality standards apply; and 3) designating specific times of year during which the standard applies.



Photograph of wild rice in Itasca County, Minnesota courtesy of Brett Whaley.

The MPCA proposed a formula that would determine a specific protective level of sulfate in each wild rice water based on the concentration of the iron and organic carbon in the sediment. The standard would also have a 120 micrograms per liter upper limit on sulfide in the sediment of a wild rice water. The standard would additionally identify approximately 1,300 lakes, rivers, and streams as current wild rice waters and establish a process for future identification of additional wild rice waters.

## The Proposed Standard

The judge ruled the MPCA failed to provide the adequate regulatory analyses for this new rule as required by Minnesota law. Specifically, the judge found the MPCA failed to affirmatively demonstrate that repealing and replacing the current standard would be equally or more protective of wild rice. She explained the MPCA failed to show how increasing sulfate levels would be “protecting the public health or welfare, enhancing the quality of the water” or “ensuring [...] attainment and maintenance of the water

quality standards of downstream waters, as required by federal and state law.”<sup>10</sup> Under the proposed formula, the max volume of sulfate in a wild rice water would be 838 milligrams per liter, over 80 times higher than the current 10 milligram per liter standard.

The judge also ruled that the proposed standard was not rationally related to the MPCA’s objective of updating standards protecting wild rice for human consumption. Because the formula has not been used on any wild rice water, the necessary iron and organic compound values necessary to run the equation that would create each water’s standard do not exist. Thus, because the standard cannot be calculated, it does not technically update the standard.

Additionally, the judge disapproved the rule for unconstitutional vagueness because “it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and fails to provide sufficient standards for enforcement.” Dischargers will not know what levels of sulfate are permissible for some time after the regulation would come into effect. The judge explained that the only way to cure this defect would be for MPCA to conduct the sampling process for each wild rice water and then provide the entire formula values for each, otherwise the MPCA is merely attempting to repeal the current rule while continuing to formulate the new standards.

The judge also found the MPCA failed to recognize the proposed rule’s burden on the Native American community in its required analysis of classes of people who will be burdened by the proposed rule. She explained that “the volume and nature of the comments from the Native American community demonstrated that the Agency has not succeeded in building an atmosphere of trust” and that the comments reveal the Minnesota Indian tribes “are compelled to continue to challenge the rule because they believe the long-term survival of the wild rice is in peril and do not believe that the Agency understands the importance of wild rice in Native American culture and life.”<sup>11</sup>

Finally, the judge addressed the problems with the proposed 1,300 wild rice waters list. The judge found the list defective because it failed to include all waters previously recognized by the Minnesota Department of Natural Resources and federally recognized Indian tribes’ waters as waters where wild rice cultivation was an existing use. Federal law prohibits removing an existing use for wildlife unless more stringent criteria are applied.

### Conclusion

In response to the proposed standard’s rejection, Minnesota state legislators have drafted legislation that would nullify the current standard and require the MPCA to begin another rulemaking process to create a new standard.<sup>12</sup> For now, the 1973 standard will remain in place. 🐾

### Endnotes

- <sup>1</sup> 2018 J.D. Candidate, University of Mississippi School of Law.
- <sup>2</sup> *In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice River*, Minn. Office of Admin. Hearings, 80-9003-34519 (Jan. 9, 2018).
- <sup>3</sup> Dan Kraker, *Judge Rejects Change to Minnesota’s Wild Rice Water Standard*, MPR NEWS, Jan. 11, 2018.
- <sup>4</sup> *Id.*
- <sup>5</sup> Emily Kolodge, et al., *Wild About Wild Rice*, MINN. SEA GRANT (Dec. 2015).
- <sup>6</sup> *Id.*
- <sup>7</sup> *Id.*
- <sup>8</sup> Kraker, *supra* note 3.
- <sup>9</sup> *Id.*
- <sup>10</sup> *In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Rivers*, OHA 80-9003-34519 at 313.
- <sup>11</sup> *Id.* at ¶ 61.
- <sup>12</sup> Michael Strasburg, *Lawmakers Seek Wild Rice Water Standard That Satisfies Industry, Environmentalists*, March 8, 2018.

## SPECIAL PROJECTS ANNOUNCEMENT

The NOAA National Sea Grant Office is holding a competition in support of NOAA’s Office of Coastal Management’s Manoomin Restoration in Lake Superior initiative, open to the Michigan Sea Grant, Minnesota Sea Grant, and Wisconsin Sea Grant. The competition seeks proposals for toolkits or other outreach and educational products that inform tribal community members in the Lake Superior watershed about how actions impact water quality and availability and that will result in enhanced community members understanding of Lake superior watershed functions and the ecosystem services that wild rice provide that support communities and economies.



For more information visit:  
<http://bit.ly/manoomin>

# THE WATERS OF THE UNITED STATES GET MUDDIER: SUPREME COURT RULES THAT WOTUS LITIGATION MUST BEGIN AT THE DISTRICT COURT LEVEL

Morgan L. Stringer<sup>1</sup>



Photograph of wetlands in Mississippi courtesy of Patti Redagain.

Pursuant to the Clean Water Act (CWA), “waters of the United States” fall under federal jurisdiction; however, the meaning of the phrase is unclear. During the Obama Administration, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers issued the “Clean Water Rule” to provide more guidance over which waters are included in “waters of the United States” (WOTUS). The Rule included large bodies of water, such as lakes and rivers, wetlands adjacent to those waters, and tributaries of the protected water bodies and wetlands among the water bodies federally protected.<sup>2</sup> This interpretation sparked multiple lawsuits over both the merits of the rule and which courts have jurisdiction to hear the matter.

## Jurisdiction

In 2016, the National Association of Manufacturers (NAM) sued over the Obama Administration’s Clean Water Rule, and it moved to dismiss the case from the Sixth Circuit Court of Appeals for lack of jurisdiction. The Court of Appeals for the Sixth Circuit denied the motion, stating that that it had proper jurisdiction.<sup>3</sup> NAM appealed this decision to the U.S. Supreme Court.

Usually when a federal lawsuit is filed, the proper jurisdiction is in the appropriate federal district court, the lowest level of the federal court system. From there, the ruling can be appealed to the federal court of appeals, and eventually to the U.S. Supreme Court. However, there are some exceptions where a higher-level court has initial jurisdiction.



Photograph of wetlands in Alabama courtesy of Fan Guo.

The CWA includes seven provisions where the proper venue for a challenge is the federal court of appeals, not at the district court level. In this case, the government argued that this litigation fell under two of those CWA provisions. First, EPA “actions in approving or promulgating any effluent limitation or other limitation under this provision.”<sup>74</sup> Second, the government argued that WOTUS litigation involved an “EPA action in issuing or denying any permit under Section 1342.”<sup>75</sup>

#### **Common Sense Cannot Overcome Statutory Text**

In deciding which courts have original jurisdiction over Clean Water Rule lawsuits, the U.S. Supreme Court first rejected the government’s argument that the Clean Water Rule fell under an “action in approving or promulgating any effluent limitation or other limitation under this provision.” Effluent limitations are defined as “any restriction...on quantities, rates, and concentrations of certain pollutants “which are discharged from point sources into navigable waters.”<sup>76</sup> The Court reasoned that the Clean Water Rule was a definition, and it did not impose any kind of restriction, instead it simply defines a statutory term.

Secondly, the government argued that the courts of appeal had jurisdiction to review EPA actions “in issuing or denying any permit under Section 1342.” The Court pointed out that the Clean Water Rule did not deal with

issuing or denying permits. However, the government argued that the court should follow a prior case, *Crown Simpson*, in which the Court ruled there was original appellate court jurisdiction over an EPA veto of a state-issued permit.<sup>77</sup> The government claimed that the Clean Water Rule fell under the permit exception because the “waters of the United States” definition includes actions “functionally similar” to permit issuances and denials.<sup>78</sup> In other words, the Clean Water Rule established jurisdiction of the CWA; therefore, it would be a factor in whether permits were issued or denied.

The Court disagreed. While the Clean Water Rule may define the jurisdiction of the EPA’s authority to approve or deny permits, the Rule itself does not make any decision regarding individual permits, unlike in *Crown Simpson*. Additionally, Congress could have written the statute to say that subparagraph (F) included EPA actions, “relating to whether a permit is issued or denied,” or “establishing the boundaries of EPA’s permitting authority.”<sup>79</sup> The subparagraph as written is not broad enough to touch on any issue that may relate to permitting authority, it only deals with individual permits.

Finally, the Court addressed practical considerations. The Court acknowledged that it seems illogical for the Court of Appeals to have original jurisdiction over issues regarding individual permits, while the district court level

has original jurisdiction over nationwide rules and interpretations. However, the Court pointed out that its job is to interpret statute, not to write the statute to prevent odd outcomes. Even though the government pointed out that this outcome could lead to multiple differing district court rulings and a lack of uniformity in national policy, that cannot overcome the statutory text or legislative intent. This ruling reversed the Sixth Circuit's stay of the Clean Water Rule because that court did not have proper jurisdiction to hear the dispute. The court held that disputes must be heard by district courts first.

### The Waters Get Muddier

Not only has the judicial system complicated the Clean Water Rule, but the administrative process surrounding a possible repeal and the eventual delay of the rule is rather unorthodox. Reports claim that EPA Administrator Scott Pruitt ordered key data that supported the rule to be removed, is advised heavily by industry representatives in secret, and exaggerates the implications of the Clean Water Rule.<sup>10</sup> After the Supreme Court's ruling, Pruitt announced that the EPA would delay the implementation of the Clean Water Rule by another two years, so it will not be implemented until February 6, 2020.<sup>11</sup> The Corps and the EPA announced that until that date, the previous definition of "waters of the United States," will apply.<sup>12</sup>

After the delay announcement, a group of ten attorneys general filed a brief in the Eleventh Circuit Court of Appeals requesting an expedited mandate to send the litigation there back to federal district court, so they may obtain a nationwide stay of the Clean Water Rule while the challenges to the rule itself are pending. However, the EPA opposed this mandate, because it believes that the delay it announced is sufficient to prevent the Rule from going into effect. Texas, Louisiana, and Mississippi challenged the Rule in two cases in federal district court, requesting the court issue a nationwide stay of the Rule.<sup>13</sup>

The Trump Administration's decision to delay the Clean Water Rule created a new series of litigation. Eleven democratic attorneys general sued the Trump Administration over its decision to delay the rule. The lawsuit claims that the Administration cannot keep the Rule from going into effect while the Administration looks for alternatives or ways to repeal the rule.<sup>14</sup> The lawsuit claims that the government failed to give adequate notice period and time for comment and that Pruitt was biased in his decision-making, especially evidenced by an advocacy video in which he supported repealing the rule and the fact that he sued to repeal the Clean Water Rule as attorney general for Oklahoma. Furthermore, the administration had little evidence on the record to

support the delay. The lawsuit claims that the Trump Administration "illegally suspended a rule that became effective more than 2 years ago."<sup>15</sup> Two coalitions of environmental groups have also filed suit against the Trump Administration for delaying the Clean Water Rule. The lawsuits largely make the same claims as the states: that the EPA violated federal rulemaking procedure by delaying implementation of the Rule.<sup>16</sup> The attorneys general and environmental groups are also concerned about the repeal or delay's impact on drinking water. One in three Americans' drinking water is linked to these smaller water bodies.<sup>17</sup> Under pre-Clean Water Rule standards, these smaller water bodies will have no federal protection under the CWA.

Now the district courts are grappling with the merits of the Clean Water Rule, requests for nationwide stays, and the Trump Administration's decision to delay implementation. As multiple, and possibly conflicting, decisions are made regarding several issues, it is not likely that "waters of the United States" will be clarified anytime soon. ❧

### Endnotes

<sup>1</sup> 2018 J.D. Candidate, University of Mississippi School of Law.

<sup>2</sup> 33 C.F.R. § 328.3 (2015).

<sup>3</sup> *In re Dep't of Def.*, 817 F.3d 261, (6th Cir. 2016).

<sup>4</sup> *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 628 (2018) (*quoting* 33 U.S.C. § 1369(b)(1)(E)).

<sup>5</sup> *Id.* at 630 (*quoting* 33 U.S.C. § 1369(b)(1)(F)).

<sup>6</sup> *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 625 (*quoting* 33 U.S.C. § 1362(11)).

<sup>7</sup> *Id.* at 631 (*citing* *Crown Simpson Pulp Co. v. Castle*, 445 U.S. 193, 196 (1980)).

<sup>8</sup> *Id.* (*quoting* Brief for Federal Respondents 33).

<sup>9</sup> *Id.* at 632.

<sup>10</sup> Evan Halper, *EPA Chief's Clean-Water Rollback Shaped by Secrecy, Luxury Travel, and Handpicked Audiences*, L.A. TIMES (Mar. 2, 2018).

<sup>11</sup> Definition of "Waters of the United States"-Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018).

<sup>12</sup> *Id.*

<sup>13</sup> ABA, SECTION OF ENV'T, ENERGY, & RESOURCES, *Water of the U.S. Rule: Current Status* (Feb. 7, 2018).

<sup>14</sup> Verena Dobnik, *Attorneys General Sue Trump Over Water Rule*, WASHINGTON POST (Feb. 6, 2018).

<sup>15</sup> *New York v. Pruitt*, No. 1:18-cv-1030, Comp., 2 (S.D.N.Y. Feb. 6, 2018).

<sup>16</sup> ABA, *supra* note 12.

<sup>17</sup> Halper, *supra* note 10.



*The University of Mississippi*

**THE SANDBAR**

Sea Grant Law Center  
Kinard Hall, Wing E, Room 258  
University, MS 38677-1848



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# Littoral Events

## **National Working Waterfronts & Waterways Symposium**

*May 14-17, 2018*  
Grand Rapids, MI

For more information, visit: <http://www.nationalworkingwaterfronts.com>

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## **Universities Council on Water Resources & National Institutes of Water Resources Conference**

*June 26-28, 2018*  
Pittsburgh, PA

For more information, visit: <http://ucowr.org/conferences/2018-ucowr-conference>

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## **American Fisheries Society Annual Meeting**

*August 19-23, 2018*  
Atlantic City, NJ

For more information, visit: <https://afsannualmeeting.fisheries.org>