

Two Pending Developments Re: Clean Water Act Jurisdiction over Discharges to Groundwater

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Background: In previous issues of the Compact, there have been reports on recent cases decided by the federal Circuit Courts of Appeal in which the circuit courts have reached contrary results on the issue of whether unpermitted discharges into groundwater that ultimately reaches jurisdictional waters violate the Clean Water Act (CWA). A February, 2018 decision of the 9th Circuit and an April, 2018 decision of the 4th Circuit concluded the CWA's NPDES jurisdiction applies to such discharges. In September, 2018 two 6th Circuit decisions found the CWA did not apply. Another 4th Circuit decision in September by a different panel of judges than that which decided the case in April concluded there was no CWA jurisdiction but arrived at this result upon a different basis. This panel of 4th Circuit judges examined the issue of whether the origin of the discharges (unlined coal combustion waste piles and ponds) met the CWA definition of "point source" and concluded that it did not.

US Supreme Court: Petitions in the earlier 9th and 4th Circuit decisions are pending before the US Supreme Court. Briefs filed by the federal government, eighteen states (Alabama, Arkansas, Colorado, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Nebraska, Nevada, Oklahoma, South Carolina, Texas, Utah, West Virginia and Wyoming) and two state governors (Matt Bevin of Kentucky and Phil Bryant of Mississippi) urged the court to accept the appeal in the 9th Circuit case. The same group plus a nineteenth state, Wisconsin, urged acceptance of the appeal in the 4th Circuit case.

The online calendar of the Court reflects that the Court was scheduled to take these petitions up in conference on Friday, January 18, 2019. A decision by the Court on whether to accept the appeals and address this issue is imminent.

EPA: The federal government's brief on the petitions does not take a position on the underlying issue of whether there is CWA jurisdiction over these types of discharges. However, it does give reason to believe that EPA will soon weigh in on it. It notes that EPA took comment beginning February 20, 2018 on the issue of whether such discharges may be subject to CWA jurisdiction and goes on to state:

The EPA has informed this Office that it expects to take further action, reflecting the results of its review, within the next several weeks. If the Court grants one or both of the petitions, the parties therefore should have the benefit of the EPA's views before any brief on the merits is due, and the Court can consider those views in deciding the issue on the merits.

County of Maui v. Hawaii Wildlife Fund, et al., Nos. 18-260 and 18- 268, Brief of the United States as Amicus Curiae, p. 14. The federal government's brief was filed January 4, 2019. Accordingly, action by EPA to clarify its position on this issue of CWA jurisdiction may also be imminent.

Upcoming Meetings:

IMCC 2019 Annual Meeting
May 5-8
Ventana Canyon
Tucson, Arizona

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Previously, the EPA's interpretation supported CWA application to discharges that reach jurisdictional waters via a "direct hydrologic connection", including subsurface hydrologic connections.

IMCC Staff Goes to Capitol Hill for Meetings

On December 19, IMCC staff traveled to Capitol Hill to meet with majority committee staff of the House Natural Resources Committee for the new 116th Congress. After 8 years in the minority, the new majority in the House can be expected to devote time to a different set of priorities in the Natural Resources Committee. Significant attention is likely to be given to consideration of climate change and its impacts on various aspects of policy under the committee's jurisdiction, as well as reform of the Mining Law of 1872, hardrock AML, and recovery of critical minerals.

On January 15 and 16, IMCC staff returned to Capitol Hill to meet with staff of four senators, six members of Congress as well as committee staff for both the majority and minority of the Senate Energy and Natural Resources Committee and the minority of the House Natural Resources Committee. IMCC held twelve meetings over the course of the two days, primarily for the purpose of introductions with new committee and member staff and to reconvene with existing contacts. Topics of conversation focused on expectations for the upcoming legislative session, with an emphasis on mining and abandoned mine lands related (AML) priorities. Commonly noted legislative initiatives included issues related to hardrock mining, including 1872 mining law reform, hardrock AML, and good Samaritan protections, and on the coal side, the RECLAIM Act and the pending need for reauthorization of the AML fee. At this early point, and with government funding issues at the forefront of Congress' concern, the legislative calendar remains largely unclear. Committees are still in the process of organizing and members continue to sort out their committee assignments.

Senator Manchin Introduces Bill to Support UMWA Miner's Pension Fund

Senator Manchin (D-WV) recently introduced S.27, the American Miner's Act of 2019. This bill is the latest in a string of legislation from the Senator related to healthcare and pensions for coal miners. Most notably, S.27 would extend the black lung excise tax at current rates (\$1.10/ton for underground, \$.55/ton for surface) by ten years (through December 2028). It would also increase the amount of funding available from the U.S. Treasury under SMCRA Title IV for the purpose of United Mine Workers of America (UMWA) healthcare funds and authorize new payments to the UMWA pension plan fund. The bill also includes a host of new reporting requirements for UMWA related to the various healthcare and pension funds they manage, presumably intended to aid the Department of Interior in reviewing and assessing the status of the UMWA funds.

The bill would increase the funding available for UMWA accounts through two primary means: 1) increasing the cap on Treasury payments authorized through Title IV from \$490M to \$750M, and 2) adding language that requires the Treasury to provide whatever funding is available under the \$750M cap to the UMWA 1974 pension plan after the other obligations under the Title IV authorizations are complete (i.e. AML funding for certified states and tribes (a.k.a. "CIL" funding) and funding for UMWA health plans). Essentially, after the payments required under Title IV for the certified AML programs and existing UMWA healthcare related accounts are complete, whatever potential funding is left over up to the new \$750M cap would be paid to the UMWA pension plan until such time as that plan is %100 funded. It is important to note that this bill would not affect AML grant funding rates or the capital in the AML Trust Fund due to pre-existing language in Title IV.

Latest Developments in Defining “Waters of the United States”

Below is a timeline of significant developments in the effort to define “waters of the United States” (WOTUS). Developments since the last IMCC newsletter are shown in bold.

2015-06-09 - 2015 Rule Finalized by EPA

2015-08-27 - US District Court in North Dakota stayed 2015 rule in 13 states that challenged it in that court – AK, AZ, AR, CO, ID, MO, MT, ND, NE, NM, NV, SD, WY

2015-10-09 - 6th Circuit Court of Appeals stayed 2015 Rule nationwide

2017-02-28 - Executive Order required consideration of rescission/replacement of 2015 Rule

2017-07-27 - Step 1, EPA proposed rescission of 2015 Rule

2017-09-27 - Comment period on Step 1 closed

2017-08-28 - Comment period for public outreach on Step 2 (a replacement rule) opened

2017-11-28 - Comment period for public outreach on Step 2 closed

2018-01-22 - US Supreme Court holds the 6th Circuit of Appeals did not have jurisdiction, eliminating that court’s stay of the 2015 Rule

2018-02-06 - EPA promulgated an effective date of 2020-02-06 for the 2015 Rule, leaving pre-2015 rules in effect until then

2018-06-08 US District Court in Georgia enjoined the 2015 Rule in 11 states which challenged it in that court – AL, FL, GA, IN, KS, KY, NC, SC, UT, WV and WI

2018-07-12 – EPA reopened comment on repeal of the 2015 Waters of the United States (WOTUS) rule and reinstatement of the previous rules. The comment period closed on August 13, 2018

2018-08-16 – US District Court in South Carolina issued a nationwide injunction against the rule EPA promulgated on 2018-02-06 which established an effective date of 2020-02-06 for the 2015 Rule. This put the 2015 Rule into effect in the 26 states for which no injunction of the 2015 Rule has been entered.

2018-09-12 – US District Court in Texas enjoined 2015 rule in 3 states - TX, LA & MS

2018-09-18 – US District Court in North Dakota stays the 2015 rule in Iowa, making the old rules effective in 28 states, and the 2015 Rule effective in 22 states.

2018-12-11 – EPA and the Corps announce a Step 2 Rule for replacement of the 2015 Rule with a new definition based generally on the plurality opinion authored by Justice Scalia in the *Rapanos* case.

Due to the partial government shutdown, a public webcast that was scheduled for January 10, 2019 and a public hearing on this rule that was scheduled to be held in Kansas City on January 23, 2019 were both postponed. A 60 day comment period on this proposed rule will begin when it is published in the Federal Register. It is expected to be published in the coming days. The Western Governors Association has already asked EPA to extend the (yet to begin) comment period on this rule for an additional 60 days.

Ryan Ellis, Named Director of Legislative and Regulatory Affairs

Ryan Ellis has been with the Interstate Mining Compact Commission for 5 years. In that time, Ryan has taken on increasing responsibility. He has advanced from being an intern with a lot of promise to the point of achieving nearly unrivaled expertise on a national level in the subjects that are his focus at IMCC. Ryan has been rewarded with this new title that reflects his value to IMCC.

Please join IMCC in congratulating Ryan Ellis upon being named IMCC’s Director of Legislative and Regulatory Affairs.

IMCC's 2019 Annual Meeting Scheduled for Tucson, Arizona

The Interstate Mining Compact Commission Annual Meeting will take place in Tucson, Arizona at the Ventana Canyon Hotel from Sunday, May 5 to Wednesday, May 8. The meeting itinerary is still being developed, however the registration form for the Annual Meeting is currently available on the website. The itinerary will be available as well when it is finalized.

The Annual Awards Banquet will be held in conjunction with the Annual meeting to recognize the Reclamation, Minerals Education, and Mine Safety and Health Training efforts and achievements within our member states.

For more information, contact IMCC at 703-709-8654 or visit imcc.isa.us.

IMCC's 2018 Mid-Year Meeting Held in Biloxi, Mississippi

The Interstate Mining Compact Commission (IMCC) held its 2018 Mid-Year Meeting October 22-24 at the IP Hotel in Biloxi, Mississippi.

On Monday, October 22, Dr. David Dockery, III, State Geologist of Mississippi began the meeting with a welcoming address highlighting the importance of mining to individuals, communities, and nations. The Compact then heard from the Honorable Joe Balash, Assistant Secretary of Land and Minerals Management in the U.S. Department of Interior who provided the opening remarks. Immediately following, officials from the Office of Surface Mining met with the IMCC member states for a reprise of the Surface Mining Control and Reclamation Act Title IV and Title V Summit.

On Tuesday, October 23 the meeting continued, starting with a joint meeting of the Coal Environmental Affairs Committee and the Abandoned Mine Lands Committee. The Hardrock/Noncoal Environmental Affairs Committee and Mine Safety and Health Committee Joint Meeting followed in the afternoon. The evening closed with a casual reception for all attendees.

IMCC's Mid-Year meeting concluded on Wednesday, October 24 with the Finance and Administrative Committee Joint Meeting with the Resolutions Committee in the morning, followed by the Executive Commission Business Meeting.

Member Survey Results

In December, IMCC sent out a survey for the purpose of revisiting topics discussed during the Mid-Year Meeting in October. The survey received 35 responses from 22 states.

The survey first addressed the credit card processing options with the aim of identifying whether members had a preference for spreading out the credit card processing fee to all registrations in the form of a blanket registration fee increase of \$8 per person or having registrants using credit cards pay a convenience fee of \$15. The resulting answers, as well as the comments, indicated a strong preference for the convenience fee. As a result, IMCC is now set up to be able to accept credit card payments for the upcoming meeting. Registration fees have not changed, and a \$15 fee will be added for those paying with a credit card.

Another goal of the survey was to assess the members' interest in mine tours as a part of the meetings. The members also indicated in the survey how far they were willing to travel from an airport to the meeting location, which will also assist IMCC in meeting planning.

Lastly, the members were asked questions about the quality of the new IMCC website, specifically the ease of use and how well it fits their needs, which were met with positive responses. Suggestions and comments regarding the website are always welcome.

Other News:

- Please join IMCC in welcoming Kathy Love as the new Director for the Alabama Surface Mining Commission.
- Tom Benner will be retiring from the Illinois Department of Natural Resources, Office of Mines and Minerals on Thursday, January 31. Tom's immediate plans are to head south to enjoy warmer weather as he makes plans to travel and otherwise enjoy his life after work. We somewhat enviously wish Tom much happiness in his retirement.

Note: Any other news regarding current delegates to IMCC or its "alumni" is welcome and will be published in future editions of the Compact. Please pass any updates on to Brittany Mills.