

Legislation and Litigation Update – Tab P



Legislation that passed

- ▶ S. 3021 – **America’s Water Infrastructure Act (AWIA)** – this Congress’ version of WRDA (WRDDA, WIIN); also includes streamlining FERC re-licensing, WIFIA and SRFs and rural technical assistance, and other fun stuff (Columbia River restoration, Snake River flooding, Klamath Project drought) – President signed Tue, Oct 23
- ▶ S. 2850 – White Mountain Apache settlement technical changes (specifying authorized funds used for planning, design and construction of tribe’s rural water project), signed into law, Pub. L. 115-227

Legislation in conference

- ▶ H.R. 2 – **Agriculture and Nutrition Act (Farm Bill)** – conference on Sept 5;
 - ▶ WSWC sent a letter 8/30/18: www.westernstateswater.org/letters/
 - ▶ comparison of bills in WGA letter 8/31/18: http://westgov.org/images/editor/Farm_Bill_Conferee_Letter_FINAL.pdf
 - ▶ House version includes 2015 WOTUS Rule rescission:
 - ▶ SEC. 11617. WATERS OF THE UNITED STATES RULE. The final rule issued by the Administrator of the Environmental Protection Agency and the Secretary of the Army entitled “Clean Water Rule: Definition of ‘Waters of the United States’”, published on June 29, 2015 (80 Fed. Reg. 37054), is repealed, and any regulation or policy revised under, or otherwise affected as a result of, that rule shall be applied as if that rule had not been issued.
 - ▶ Same language included in the House version of the Energy and Water Appropriations bill (H.R. 5895) – but the Senate did not pass

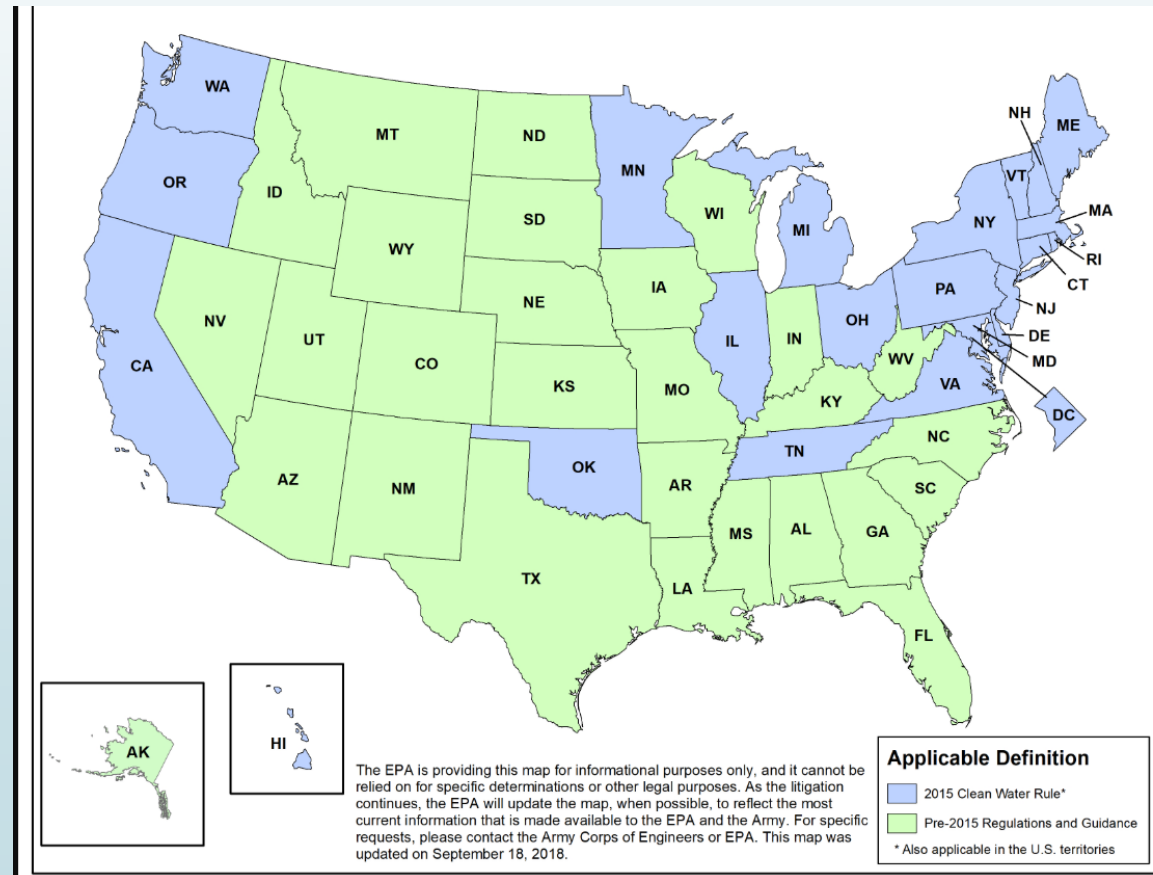


Legislation introduced

- ▶ S. 3303 – proposes to modify the CWA §401 State Certification timing and content (claims that states are “hijacking” and “weaponizing” the water quality certification process)
 - ▶ Tony testified at Senate EWP hearing, and we sent a letter, WGA sent a letter, and we also answered supplemental questions from the committee – Tab M
- ▶ S. 2154/H.R. 7034 - **Kickapoo Tribe in Kansas Water Rights Settlement Act** was reported out of Senate Indian Affairs, and Administration issued the Bishop letter and bill introduced in House
- ▶ S. 664/H.R. 6979 - **Navajo Utah Water Rights Settlement Act** was reported out of Senate Indian Affairs, and Administration issued the Bishop letter and bill introduced in House

Litigation

- 2015 WOTUS Rule – To Stay or Not To Stay, that is the question...
 - EPA's delay-of-implementation invalidated by South Carolina District Court (APA)
 - Stays issued in North Dakota, Georgia, and Texas cases, covering 26 states



Litigation

- ▶ Groundwater as a conduit for the indirect flow of pollutants to navigable waters
 - ▶ 6th Circuit
 - ▶ Kentucky Waterways Alliance v. Kentucky Utilities Company (6th Cir. 2018); Tennessee Clean Water Network v. Tennessee Valley Authority (6th Cir. 2018) (overlapping decisions on coal ash byproduct ponds)
 - ▶ groundwater is diffuse, seeping in all directions, and its precise contours cannot be discerned as with traditional point sources;
 - ▶ groundwater is a nonpoint-source conveyance, and the CWA has no say over that conduct; RCRA does
 - ▶ distinguished Rapanos differently than 4th and 9th Circuits - Scalia was concerned that intermediary point sources not break the chain of CWA liability; "...the opinion says nothing of point-source-to-nonpoint-source dumping like that at issue here."
 - ▶ 4th Circuit
 - ▶ Kinder Morgan Energy Partners et al. v. Upstate Forever et al. (4th Cir. 2018) – **appealed to the Supreme Court (18-268)** – leaking underground petroleum pipeline that was repaired, former spill still contributing pollutants to groundwater – discharge of pollutants reaching navigable waters through hydrologically-connected groundwater falls within the scope of the CWA
 - ▶ Sierra Club v. Virginia Electric and Power Company, (4th Cir. 2018) – distinguished Kinder Morgan – a pipeline is a discrete conveyance, an ash pond is not; made a point that CWA addresses measurable discharges of pollutants that can be limited by permit – without a discrete conveyance, cannot measure/limit/enforce under CWA; falls under RCRA
 - ▶ 9th Circuit
 - ▶ Hawaii Wildlife Fund v. County of Maui (9th Cir. 2018) – **appealed to Supreme Court (18-260)** (permitted injection well under SDWA, Class V UIC for 40 years)

Litigation

- ▶ BLM Rescission (Dec 2017) of its 2015 Fracking Rule
 - ▶ Northern District of California: California v. Bureau of Land Mgmt., No. 18-521; Sierra Club et al. v. Zinke, No. 18-524 (consolidated)
- ▶ Sturgeon v. Frost – scheduled for S. Ct. hearing 11/5/18
- ▶ Arizona Supreme Court
 - ▶ Silver v. Pueblo Del Sol Water Co., CV-16-0294 - ADWR is not required to consider unquantified federal reserved water rights (BLM Conservation Area; claims still in Gila River Adjudication) before issuing a decision on the availability of groundwater for pumping and development (community growth outside AMA)
- ▶ California Court of Appeals
 - ▶ Environmental Law Foundation et al. v. State Water Resources Control Board (C083239) - common law public trust doctrine applies to groundwater connected to a surface stream, and is not preempted by the state's Sustainable Groundwater Management Act (SGMA)