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Federal Regulations

Federal Rulemaking – Waters of the United States

The White House signed an Executive Order (EO) on February 28, 2017 that orders Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) to "review the final [Waters of the United States (WOTUS)] rule . . . for consistency with the policy" of the EO, and to "publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law."[1] The policy of the EO is to "ensure the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution."[2] In publishing a new definition, the EO directs EPA and the USACE to interpret the term navigable waters "in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos*."[3]

The EO requires EPA and the USACE to notify the Attorney General (AG) of the pending policy review of the rule, and then gives the AG discretion to take whatever actions in litigation he "deems appropriate."[4]

The direction to follow Scalia's opinion in *Rapanos* would mean shifting the definition away from Kennedy's "significant nexus" test.[5] To discern the details of a Scalia test, commentators have pointed to Scalia's preference for direct surface connections between waters, and for "relatively permanent, standing or continuously flowing bodies of water" as opposed to "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[6]

Since *Rapanos*, Circuit Courts of Appeals find jurisdiction when Kennedy's test is satisfied, or when either Kennedy's or Scalia's test would be satisfied, but no published opinion has ever held Scalia's test alone governs.[7] The discussions in those circuit court opinions are likely a good place to revisit to find concepts the Pruitt team could use in promulgating and later defending a new WOTUS rule.

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[1] Executive Order 13778 (Feb. 28, 2017), 82 Fed. Reg. 12497, 12497 (Mar. 3, 2017).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *See Rapanos v. United States*, 547 U.S. 715, 779–82 (2006) (Kennedy, J., concurring).
[6] *See id.* at 732–34, 739 (2006) (plurality opinion); *see also* Richard Glick, *WOTUS, We Hardly Knew Ye*, AM. C. ENVTL. LAW. (Mar. 2, 2017), http://www.acoel.org/post/2017/03/02/WOTUS-We-Hardly-Knew-Ye.aspx; Donald Shandy, *Channeling Scalia in a New WOTUS Rule*, AM. C. ENVTL. LAW. (Mar. 24, 2017), http://www.acoel.org/post/2017/03/24/Channeling-Scalia-in-a-New-WOTUS-Rule.aspx. .
[7] *See* ROBERT MELTZ & CLAUDIA COPELAND, CONG. RES. SERV., NO. 7-5700, THE WETLANDS COVERAGE OF THE CLEAN WATER ACT (CWA): *RAPANOS* AND BEYOND 7–8 (2015), http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL33263.pdf.

Until there is a new rule, the Eighth Circuit continues to follow *U.S. v. Bailey*[8] and consider jurisdiction valid if it satisfies either the Kennedy significant nexus, or the Scalia direct surface connection test.

- The Seventh and Eleventh Circuits have held that Kennedy's test alone governs.[9]
- The First, Third, and Eighth Circuits have held that jurisdiction is proper if either Kennedy's or Scalia's test is fulfilled.[10]
- The Fourth and Ninth Circuits have applied Kennedy's test, but without ruling whether Scalia's test should be used in the future.[11]
- The Fifth and Sixth Circuits have applied both tests, but without ruling whether one or both should be preferred in the future.[12]

Stream Protection Rule, 81 Fed. Reg. 93066 (December 20, 2016)

The Department of Interior's Office of Surface Mining Reclamation and Enforcement (OSMRE) finalized an update and expansion of a longstanding rule protecting streams from coal mining runoff in December 2016.[13] The expanded stream protection rule was one of a handful that have recently been invalidated under the Congressional Review Act (CRA). The new rule would have required that proposed mining activates collect more data about the immediate and surrounding environment; that active mining operations conduct more comprehensive surface and groundwater monitoring; that additional technologies are used to manage surface runoff; and a higher standard for both restoring the mining site ecosystems and compliance with the endangered species act.[14]

Congress passed the joint resolution required by the CRA to invalidate the rule on February 16, 2017.[15] As a result of the CRA action, OSMRE is barred in the future from promulgating a rule in substantially the same form. OSRME had estimated that the stream rule would create jobs, industry-wide compliance would cost $80 million dollars annually, and wholesale electricity prices would increase by 0.02%.[16]

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[8] United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009).
[9] United States v. Robison, 505 F.3d 1208, 1221–22 (11th Cir. 2007); United States v. Gerke Excavating, Inc., 464 F.3d 723, 724–25 (7th Cir. 2006).
[10] United States v. Donovan, 661 F.3d 174, 180–82 (3d Cir. 2011); *Bailey*, 571 F.3d at 799; United States v. Johnson, 467 F.3d 56, 62–64 (1st Cir. 2006).
[11] N. Cal. River Watch v. Wilcox, 633 F.3d 766, 781 (9th Cir. 2011); Precon Dev. Corp. v. U.S. Army Corps of Eng'rs., 633 F.3d 278, 288 (4th Cir. 2011).
[12] United States v. Cundiff, 555 F.3d 200, 210 (6th Cir. 2009); United States v. Lucas, 516 F.3d 316, 325–27 (5th Cir. 2008).
[13] Stream Protection Rule, 81 Fed. Reg. 93066 (Dec. 20, 2016).
[14] *Id.* at 93068–69.
[15] *See* Disapproving the Rule Submitted by the Department of the Interior Known as the Stream Protection Rule, Pub. L. 115-5, 131 Stat. 10 (Feb. 16, 2017).
[16] *Stream Protection Rule*, OFF. SURFACE MINING RECLAMATION & ENFORCEMENT, https://www.osmre.gov/programs/rcm/streamprotectionrule.shtm (last modified Mar. 27, 2017).

EPA Six-Year Review of Existing Drinking Water Standards

Under the Safe Drinking Water Act, the Environmental Protection Agency (EPA) reviews existing drinking water standards every six years[17] and it began its third review process in December 2016.[18] EPA has identified eight standards that need detailed review and may be changed; those are: chlorite, *Cryptosporidium*, *Giardia lamblia*, haloacetic acids (HAA5), heterotrophic bacteria, *Legionella*, total trihalomethanes (TTHM) and viruses.[19]

There are three drinking water standards that are also currently being developed or revised: Lead and Copper, Lead Free Pipes, and Perchlorate.[20]

Supreme Court Cases

U.S. Army Corps of Engineers v. Hawkes Co., Inc., 136 S.Ct. 1807 (2016)

Is a USACE approved WOTUS jurisdictional determination a final agency action reviewable under the Administrative Procedure Act?

The U.S. Supreme Court affirmed the Eighth Circuit's decision that an U.S. Army Corps of Engineers' (USACE) approved WOTUS jurisdictional determination is a final agency action reviewable under the Administrative Procedure Act § 704[21] because there are no adequate alternatives to in-court review.[22]

In re U.S. Department of Defense and U.S. Environmental Protection Agency Final Rule: Clean Water Rule: Definition of Waters of U.S., 817 F.3d 261 (6th Cir. 2016), cert. granted sub nom. National Association of Manufacturers. v. Department of Defense, No. 16-299 (U.S. Jan. 13, 2017)

Question presented: "whether the Sixth Circuit erred when it held that it has jurisdiction under 33 U.S.C. § 1369(b)(1)(F) to decide petitions to review the waters of the United States rule, even

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[17] 42 U.S.C. § 300g-1(b)(9).
[18] U.S. ENVTL. PROT. AGENCY, 815-F-16-010, FACT SHEET: ANNOUNCEMENT OF COMPLETION OF EPA'S THIRD SIX-YEAR REVIEW OF EXISTING DRINKING WATER STANDARDS (2016), https://www.epa.gov/sites/production/files/2016-12/documents/815f16010.pdf.
[19] 82 Fed. Reg. 3518, 3533 (Jan 11, 2017).
[20] *Drinking Water Regulations Under Development or Review*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/dwstandardsregulations/drinking-water-regulations-under-development-or-review (last visited Mar. 29, 2017).
[21] 5 U.S.C. § 704.
[22] Case link: https://www.supremecourt.gov/opinions/15pdf/15-290_6k37.pdf.

though the rule does not 'issu[e] or den[y] any permit' but instead defines the waters that fall within Clean Water Act jurisdiction."[23]

Review was granted January 13, 2017. Currently, the petitioner's brief is due April 13, 2017 and the respondent's brief is due May 31, 2017. As of March 25 the Court is considering the federal respondent's motion to hold the briefing schedule in abeyance. The case likely will not be heard until the October 2017 Session.

Briefing on the merits of the rule proceedings at the Sixth Circuit were stayed on January 25, 2017.[24]

New Mexico v. Colorado, No. 22O147 ORG, (motion for leave to file June 22, 2016)

A petition is pending from New Mexico to recover costs from responding to the Gold King Mine spill which occurred in Colorado. New Mexico seeks to hold Colorado liable for water pollution entering New Mexico, alleging violations of the Resource Conservation and Recovery Act (RCRA) or duties to cover New Mexico's costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or nuisance.

The Supreme Court asked the acting solicitor general to express the views of the United States on November 28, 2016. The solicitor general has not filed a brief as of March 25, 2017.[25]

Federal Cases

District of Minnesota

Hawkes Co., Inc. v. United States Army Corps of Engineers, No. 13-107 ADM/TNL, 2017 WL 359170 (D. Minn. Jan. 24, 2017)

Does a jurisdictional determination by the Army Corps of Engineers that fails to conduct site-specific factual investigations to support its revised claims of jurisdiction violate the significant nexus test and warrant a finding of arbitrariness and capriciousness?

In *Hawkes* the district court granted plaintiff's motion for summary judgment as to whether the U.S. Army Corps of Engineers' (USACE) revised jurisdictional determination violates the significant nexus test. The district court reconsidered this question following remand from the

[23] Question presented: https://www.supremecourt.gov/qp/16-00299qp.pdf.
[24] *See* Katie Bennett Hobson & Danny G. Worrell, *Sixth Circuit Grants Motion to Pause WOTUS Litigation Pending Supreme Court Review* (Jan. 27, 2017), http://www.lexology.com/library/detail.aspx?g=bec251e0-ed56-4982-8fb5-d483ade460f5.
[25] Case link: https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/22O147.htm.

U.S. Supreme Court, which held that a USACE revised jurisdictional determination is a final agency action subject to review.

The USACE's initial jurisdictional determination was based on water flow across a 591-acre wetland complex that creates a significant nexus between the wetlands in question and the Red River, located 42 aerial miles and 93 river miles away. The determination included flow through an upland man-made ditch without an ordinary high water mark, and a seasonal tributary without observed continuous flow but with a high water mark. An administrative appeal found the record was insufficient for Clean Water Act jurisdiction. The revised jurisdictional determination also found jurisdiction and provided more arguments for finding a significant nexus but relied on the same facts.

On remand, the district court concluded that the revised jurisdictional determination was arbitrary and capricious based on the record. The court begrudgingly granted plaintiff's requested remedy of an injunction against the USACE from ever claiming jurisdiction over the wetlands at issue. The court's discussion indicated that it agreed with the USACE that there could be circumstances or facts where the USACE could establish regulatory jurisdiction. However, the Court strongly criticized the USACE's failure to conduct site-specific factual investigations to support its revised claims of jurisdiction.[26]

DeLanghe v. Archer Daniels Midland Co., No. 13-3429 (MJD/TNL), 2016 WL 2858790 (D. Minn. May 16, 2016)

Does a private landowner have a legal claim of civil theft and conversion for groundwater taken by a corporation?

DeLanghe v. Archer amends a summary judgment order from January 12, 2016[27] in which the court granted summary judgment to plaintiff landowners on civil theft and conversion (under Minnesota state law) of groundwater by Archer Daniels Midland (ADM). ADM sought reconsideration to allege that the landowners did not own the groundwater because under the correlative rights doctrine the State of Minnesota owns groundwater. The *DeLanghe* court agreed and reversed its earlier order, reasoning that while ADM may have taken the water in violation of civil theft and conversion, the theft was not of the landowner's property.[28]

City of Lake Elmo v. 3M Co., CV 16-2557 ADM/SER, 2017 WL 630740 (D. Minn. Feb. 15, 2017)

Does the City of Lake Elmo have standing and valid claims to pursue damages from 3M over its costs securing new drinking water sources?

[26] Case link: https://casetext.com/case/hawkes-co-v-us-army-corps-of-engrs-185/
[27] Delanghe v. Archer Daniels Midland Co., No. 13-3429 (MJD/TNL), 2016 WL 128133 (D. Minn. Jan. 12, 2016).
[28] Case link: https://casetext.com/case/delanghe-v-archer-daniels-midland-co-1.

The district court dismissed the common law trespass claim but is allowing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 107 claim to recover costs,[29] nuisance, well contamination, negligence, and conversion to proceed.

The suit is for recovery of the City of Lake Elmo's costs in establishing an alternative drinking water source after detection of perflourochemicals above health protective levels.[30]

Eighth Circuit Court of Appeals

American Farm Bureau Federation v. U.S. Environmental Protection Agency, 836 F.3d 963 (8th Cir. 2016)

Are names and addresses of potentially regulated parties exempt from Freedom of Information Act (FOIA) requests as "similar files" when the Environmental Protection Agency (EPA) had merely aggregated information on Concentrated Animal Feeding Operations (CAFOs) that were otherwise available by other means?

The Eighth Circuit reversed the district court's ruling in favor of the EPA and environmental groups. The EPA had released information about CAFOs to environmental groups under FOIA. Agricultural trade associations filed a "reverse FOIA" case objecting to EPA's production of information. The information at issue was the names, addresses, telephone numbers, GPS coordinates, and financial status of operations as submitted to states under the National Pollutant Discharge Elimination System (NDPES) general permit regulations for CAFOs.

The court held that farmers do have injury sufficient for standing even though the information sought was available by other means. The court also held that the EPA abused its discretion in concluding that personal information could be released and was not protected by FOIA, 5 U.S.C. § 522(b)(6), which is the exemption from mandatory disclosure for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[31] The EPA argued that exemption 6 did not apply because the information was "well known or widely available within the public domain." The court reasoned that individual privacy interests do not dissolve because information is available through alternative means, and that public availability through a diligent search is different than the EPA's aggregation of the data.[32]

[29] 42 U.S.C. § 9607.
[30] Case link: https://casetext.com/case/city-of-lake-elmo-v-3m-co.
[31] 5 U.S.C. § 522(b)(6).
[32] Case link: https://casetext.com/case/am-farm-bureau-fedn-v-us-envtl-prot-agency-3.

Foster v. Vilsack, 820 F.3d 330 (8th Cir. 2016)

May the USDA rely on an abbreviated form that lists shorthand categories for 10 criteria signatures under the Swampbuster provision of the Clean Water Act to comply with the substantial evidence requirement for making a wetland determination?

A landowner challenged the U.S. Department of Agriculture (USDA) determination of wetlands for purposes of Swampbuster provisions.[33] The USDA used historical aerial photos rather than results from on-site investigation. All parties agreed on the appropriateness of this method under the circumstances, and on the 10 criteria "signatures" of wetlands to be used and actually used. Landowners disputed the use of an abbreviated form that lists four shorthand categories for the 10 signatures, specifically, whether "color tone" is a relevant shorthand for various wetness differences in crops and soil.

The appeals court affirmed the district court finding that the USDA had substantial evidence for making a wetland determination.[34]

Richland/Wilkin Joint Powers Authority v. U.S. Army Corps of Engineers, 826 F.3d 1030 (8th Cir. 2016)

Does a pending MEPA suit on a project provide adequate grounds for issuance of a preliminary injunction against the same project?

The Court of Appeals affirmed the district court issuance of a preliminary injunction against the U.S. Army Corps of Engineers (USACE) and a local construction partner from constructing a river ring levee while power authorities pursued a Minnesota Environmental Protection Act (MEPA) suit on the larger diversion project.

The court engaged in a seemingly novel analysis of applying MEPA extraterritorially either by its terms or against a dormant commerce clause challenge. Success on either would have meant the court could not have applied the statute to the levee ring located in North Dakota.

The Eighth Circuit found no error, ruling that MEPA could be applied in this case. The court ruled that MEPA applies to out-of-state projects that are "connection actions" to the larger in-state project, using MEPA language and declining to read in an "independent utility" analysis from the National Environmental Policy Act (NEPA).[35] The court ruled that the dormant commerce clause was not implicated, finding that the ring levee in North Dakota was not "wholly outside" of Minnesota borders, and thus dormant commerce clause did not apply.[36]

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[33] *See* 16 U.S.C. § 3821.
[34] Case link: https://casetext.com/case/foster-v-vilsack-1.
[35] *See generally* Morongo Band of Mission Indians v. Fed. Aviation Admin., 161 F.3d 569, 580 (9th Cir. 1998) (establishing "independent utility" test for determining when multiple actions require a single review).
[36] Case link: https://casetext.com/case/richlandwilkin-joint-powers-auth-v-us-army-corps-of-engrs-7.

Other Federal Circuit Courts of Appeals

Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA, 846 F.3d 492 (2d Cir. 2017)

Is a water transfer rule a reasonable interpretation of the Clean Water Act that requires no NPDES permit for water transfers?

The Southern District of New York District Court (SDNY) ruled that the Environmental Protection Agency's (EPA) water transfers rule was arbitrary and capricious, setting up a potential circuit split, as the Eleventh Circuit had upheld the rule. The water transfers rule was finalized in 2008 and formalized a long-standing EPA interpretation of the Clean Water Act (CWA) that a National Pollutant Discharge Elimination System (NPDES) permits are not required for transfers of waters from one water body to another. The 2nd Circuit reversed the SDNY's finding, and held that the water transfer rule was a reasonable interpretation of CWA and that no NPDES permit is needed for transfers of water.[37]

Black Warrior Riverkeeper, Inc. v. USACOE, 833 F.3d 1274 (11th Cir. 2016)

Is a finding by USACE that issuance of a general nationwide permit under Clean Water Act §404 would result in minimal effects on the aquatic environment, and a decision to treat new coal mining and previously-authorized coal mining differently, arbitrary and capricious?

The Eleventh Circuit ruled that the U.S. Army Corps of Engineers' (USACE) issuance of a Clean Water Act (CWA) § 404 general nationwide permit 21 (NWP 21)[38] was not arbitrary and capricious. The court held that the USACE's conclusion that NWP 21, which authorizes the discharge of dredge or fill materials to waters from surface coal mining and reclamation operations, would result in minimal individual and cumulative adverse effects on the aquatic environment. The court found that the USACE's decision to treat previously-authorized coal mining differently from new coal mining was not arbitrary and capricious.[39]

In re U.S. Department of Defense and U.S. Environmental Protection Agency Final Rule: Clean Water Rule: Definition of Waters of the United States, 817 F.3d 261 (6th Cir. 2016)

Does Clean Water Act (CWA) section 1369(b)(1) judicial review provision require a definitional rulemaking to be reviewed in the Courts of Appeals or should review lie in the District Courts?

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[37] Case link: https://casetext.com/case/catskill-mountains-chapter-of-trout-unlimited-inc-v-us-envtl-prot-agency.
[38] *See generally* 77 Fed. Reg. 10184, 10203–04 (Feb. 21, 2012) (detailing final update to 2012 general nationwide permit for surface coal mining).
[39] Case link: https://casetext.com/case/black-warrior-riverkeeper-inc-v-us-army-corps-of-engrs-lt-gen-thomas-p-bostick-us-army-corps-of-engrs-col-jon-chytka-us-army-corps-of-engrs-mobile-dist-1.

The Sixth Circuit determined that the Courts of Appeals have jurisdiction over a rulemaking that defines a term under the CWA. While the merits briefs are in on the rule itself, the Supreme Court granted certiorari in January 2017 to hear an appeal of this jurisdictional issue.

Other Federal District Courts

Concerned Pastors for Social Action v. Khouri, 194 F. Supp. 3d 589 (E.D. Mich. 2016) and No. 16-10277, 2016 WL 6647348 (E.D. Mich. Nov. 10, 2016)

The National Resources Defense Council (NRDC) and American Civil Liberties Union (ACLU) of Michigan filed a case on January 27, 2016 against Michigan, the City of Flint, and associated officials alleging violations of Safe Drinking Water Act provisions concerning corrosion, monitoring, reporting, and notification.[40] The suit survived a motion to dismiss on July 7, 2016.[41] Plaintiff's motion for a preliminary injunction was granted on November 10, 2016, which required among other things the provision of bottled water to residents.[42] The case settled on March 28, 2017.[43] In the settlement, the state and city defendants agreed to replace 18,000 pipes by 2020. Michigan will pay $87 million in addition to the $100 million appropriated by Congress in 2016.[44]

Board of Water Works v. Sac County Board of Supervisors, No. 5:15-cv-04020-LTS, 2017 WL 1042072 (N.D. Iowa Mar. 17, 2017)

Do drainage districts within which are located farm lands that discharge agricultural nutrients into waterways have the ability to redress downstream consequences as required of defendants for suits filed under the Clean Water Act?

The district court ruled in favor of defendant counties on all counts. The court did not reach interpretation of the Clean Water Act (CWA) point source definition and its application to tile drains. The court instead ruled on Clean Water Act Article III standing grounds that the drainage districts had no power to redress plaintiff Des Moines Water Works' injuries.

This ruling flows from the Iowa Supreme Court's decision on certified questions about the status of drainage districts under state law. The Iowa Supreme Court determined that the drainage district defendants have limited power and duties under state law and only exist to "restore,"

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[40] Concerned Pastors for Soc. Action v. Khouri, 194 F. Supp. 3d 589, 593 (E.D. Mich. 2016).
[41] *Id.* at 606.
[42] Concerned Pastors for Soc. Action v. Khouri, No. 16-10277, 2016 WL 6647348 (E.D. Mich. Nov. 10, 2016)
[43] *Flint's Lead Pipes Will Be Replaced Under Settlement in Federal Safe Drinking Water Case*, NAT. RES. DEFENSE COUNCIL (Mar. 28, 2017), https://www.nrdc.org/media/2017/170328.
[44] Brady Dennis, *Facing Lawsuit from Residents and Activists, Government Officials Just Agreed to Replace Lead-Tainted Pipes in Flint*, WASH. POST (Mar. 28, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/03/27/michigan-and-flint-just-agreed-to-replace-18000-lead-tainted-pipes/.

"maintain," or "increase" the flow of water through the drainage system.[45] Because of this limitation, the Iowa Supreme Court held that the drainage districts had no liability in tort because they had no control over the issue of pollution and any damages therefrom.[46]

The district court applied the Iowa Supreme Court's interpretation of state law and common law liability to an Article III standing analysis to find that the CWA claims were not redressable by the court. "DMWW may well have suffered an injury, but the drainage districts lack the ability to redress that injury."[47]

Gulf Restoration Network v. EPA, No. 12-677, 2016 WL 7241473 (E.D. La. Dec. 15, 2016)

Will a court uphold an EPA denial of a petition for setting nutrient limitation standards and/or TMDLs for the Mississippi River?

In *Gulf Restoration Network*, the district court reconsidered the case after the Fifth Circuit reversed the initial trial court ruling in favor of environmental groups.[48] The Environmental Protection Agency (EPA) had denied an environmental groups' petition for setting nitrogen and phosphorus standards and/or TMDLs for the Mississippi River. The Fifth Circuit ruled that the EPA has discretion under Clean Water Act § 303(c)(4)(B) to not make a necessity determination.

The district court determined that EPA provided a reasonable explanation as to why federal rulemaking authority was not the most effective or practical means of addressing the nutrient pollution issue in the Mississippi River and the Gulf of Mexico.[49]

Friends of Maha 'Ulepu, Inc. v. Hawai'i Dairy Farms, LLC, No. 15-00205 (LEK/BMK), 2016 WL 7031286 (D. Haw. Dec. 1, 2016)

Does CAFO pre-development site preparation constitute normal agricultural activities under the NPDES permit?

The district court denied cross motions for summary judgement, holding that there are significant issues of material fact regarding the alleged violation of a stormwater construction and

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[45] IOWA CODE § 468.126(4).
[46] Bd. of Water Works Trs. of City of Des Moines v. Sac Cty. Bd. of Supervisors, 890 N.W.2d 50, 57–60 (Iowa 2017) (answering certified questions on drainage district liability under state law).
[47] Bd. of Water Works v. Sac Cty. Bd. of Supervisors, No. 5:15-cv-04020-LTS, 2017 WL 1042072 at *6 (N.D. Iowa Mar. 17, 2017).
Case link: https://casetext.com/case/bd-of-water-works-trs-of-des-moines-v-sac-cnty-bd-of-supervisors-of-drainage-districts-32-42-65-79-81-83-86
[48] *See* Gulf Restoration Network v. McCarthy, 783 F.3d 227, 242–44 (5th Cir. 2015) (determining EPA had discretion to not make a necessity determination on issuing nitrogen and phosphorus water quality standards, and determining EPA's explanation to not issue standards was sufficient).
[49] Case link: https://casetext.com/case/gulf-restoration-network-v-jackson-1.

Concentrated Animal Feeding Operation (CAFO) National Pollution Discharge Elimination System (NPDES) permit.

The defendants argued that construction activities to prepare the site for a CAFO were all within normal agriculture activities, and that no CAFO construction had yet begun. The district court held that even if activities were only developments of land for the purpose of growing crops, they were part of a "common plan of development" for a CAFO and thus the agricultural exemptions do not apply and both the construction and CAFO permit needed to be approved before construction activity began.[50] The court further held that stormwater discharge from the construction site is a point source when water flows to a jurisdictional water through conveyances, including a number of intermittent channels.[51]

Sierra Club v. BNSF Railway Co., No. C13-967-JCC, 2016 WL 6217108 (W.D. Wash. Oct. 25, 2016)

Are coal particles falling off of rail cars discharges requiring an NPDES permit?

The district court held that rail cars moving from Wyoming to Washington are point sources and coal particles falling off of rail cars are discharges requiring a National Pollution Discharge Elimination System (NPDES) permit. While the court found coal particles falling from BNSF rail cars directly into waters to be a discharge from a point source, coal dust falling onto land that is then washed into waters via runoff is not a point source.

The court found material issues on the actual evidence of the violation and thus denied cross-motions for summary judgment. The presented range is from 15,000 to 12,583,440 violations of the Clean Water Act. The court distinguished cases where piles of coal on land were considered not to be point sources for windblown coal dust, noting that *Sierra Club* does not rely on intervening aerial deposition.[52]

Standing Rock Sioux Tribe v. USACOE, No. 16-1534 (JEB), 2016 WL 4734356 (D.D.C. Sept. 9, 2016)

Is a request for preliminary injunction on the grounds that USACE did not comply with NEPA and NHPA in application of the Clean Water Act §404 general nationwide permit that fails to identify harms at specific sites sufficient for issuance of the requested injunction?

The district court denied a motion for a preliminary injunction against the U.S. Army Corp of Engineers' (USACE) permitting of the Dakota Access Pipeline in an Administrative Procedure

[50] Friends of Maha 'Ulepu, Inc. v. Hawai'i Dairy Farms, LLC, No. 15-00205 (LEK/BMK), 2016 WL 7031286, at *10–11 (D. Haw. Dec. 1, 2016).
[51] Case link: https://casetext.com/case/friends-of-mahaulepu-inc-v-haw-dairy-farms-llc.
[52] Case link: https://casetext.com/case/sierra-club-nonprofit-corp-v-bnsf-ry-co-1.

Act (APA) challenge[53] to USACE compliance with the National Environmental Policy Act (NEPA)[54] and the National Historic Preservation Act (NHPA)[55] in application of Clean Water Act §404 general nationwide permit 12 (NWP 12), which authorizes construction of pipelines where activity affects no more than a half-acre of regulated waters at any single water crossing.

Under the general permit, sites that "may have potential to cause effects to any historic properties" receive heightened consideration and require pre-construction notice from permittee and verification (PCN sites) by the USACE. Consideration of a PCN site requires NHPA compliance review, which involves a tribal consultation.

The court held that promulgation of general permit 12 involved adequate consultation; that USACE gave sufficient review of non-PCN crossings; that individual PCN site consultations were adequate; and that it was reasonable for the USACE to consider each water crossing individually rather than aggregate NHPA analysis for the entire pipeline. Generally, the plaintiff tribe failed to identify harms at specific sites for the court to be able to find that the USACE process or determinations were deficient. [56]

Natural Resources Defense Council v. Metropolitan Water Reclamation District of Greater Chicago, 175 F. Supp. 3d. 1041 (N.D. Ill. 2016)

Does a special condition in a permit that incorporates all state water quality standards but otherwise contains no specific phosphorus effluent limit cause all state water quality standards to be incorporated into the permit?

The district court denied cross motions for summary judgment, finding that Chicago area water reclamation plants did not have a permit shield for phosphorus discharges as matter of law, and that disputes of material facts existed as to whether discharges caused or contributed to algal growth or depressed dissolved oxygen water quality standards.

The water reclamation plants had disclosed phosphorus discharges in permitting. While the permits contained no specific phosphorus effluent limit, a special condition in the permits incorporated all Illinois water quality standards, including narrative standards requiring water to be free from "unnatural plant or algal growth" and a numeric standard for dissolved oxygen.[57]

The court held that water quality standards were incorporated as substantive terms of the permits and constituted effluent limitations on phosphorus, making the permit shield inapplicable where the discharges violated those limitations. Due in part to conflicts in the proposed expert

[53] *See* 5 U.S.C. § 702.
[54] *See* 33 C.F.R. pt. 325, app. B (providing procedures for compliance with National Environmental Policy Act in 404 actions).
[55] *See* 33 C.F.R. pt. 325, app. C, § 1(g)(i) (defining area where National Historic Preservation Act procedures must be followed).
[56] Case link: https://casetext.com/case/standing-rock-sioux-tribe-v-us-army-corps-of-engrs.
[57] *See* ILL. ADMIN. CODE, tit. 35, § 302.403; Nat. Res. Defense Council v. Met. Water Reclamation Dist. of Greater Chi., 175 F. Supp. 3d. 1041, 1046 (N.D. Ill. 2016).

testimonies on what constitutes "unnatural" algal growth, the court found disputes of material fact on the causation of the water quality standards violations.[58]

Ohio Valley Environmental Coalition Inc. v. McCarthy, No. 3:15-0271, 2017 WL 600102 (S.D. WV. Feb. 14, 2017)

Can a state that fails to submit a specific TMDL, and that refuses to use existing TMDL assessment methodology and has no plans to continue TMDL development, be found to have constructively submitted no TMDL for a specific pollutant subject to EPA approval?

The district court ruled that West Virginia constructively submitted no Total Maximum Daily Load (TMDL), although a TMDL was necessary to address biologic impairment from ionic pollution, and ordered the Environmental Protection Agency (EPA) to approve or disapprove the state's TMDL within 30 days.

West Virginia included waters impaired for biologic impairment on its §303(d) list and made some progress on TMDL promulgation. However, West Virginia determined that a new state law prevented it from using existing assessment methodology in any new §303(d) listing or TMDL development. Environmentalists and the EPA disagreed that the old methodology could not be used. Environmentalists argued that the state had stopped all TMDL development for biologic impairment form ionic pollution and had no plans to continue TMDL development, which constituted a constructive submission that no TMDL was necessary for a specific pollutant.

The court followed a 2015 decision from a Washington district court holding that the constructive submission theory could be applied for specific TMDLs rather than the whole TMDL program.[59] The court held that West Virginia's refusal to use the old methodology and its lack of plans to create an alternative methodology constituted a constructive submission, and that EPA had a nondiscretionary duty to approve or disapprove the state's specific TMDL.[60]

Minnesota State Court Cases

Kariniemi v. City of Rockford, 882 N.W.2d 593 (Minn. 2016)

Does a private engineering firm that performs functions of a city under its contract qualify for public official immunity protection?

The Minnesota Supreme Court found preserved immunity for a private engineering firm and the City of Rockford from a property owner's nuisance claim. The court determined that the private engineering firm performed functions of the city engineer under contract. The property owner's

[58] Case link: https://casetext.com/case/natural-res-def-council-v-metro-water-reclamation-dist-of-greater-chi-2.
[59] *See* Sierra Club v. McLerran, No. 11-CV-1759-BJR, 2015 WL 1188522, at *4 (W.D. Wash. Mar. 16, 2015).
[60] Case link: https://casetext.com/case/ohio-valley-envtl-coal-inc-v-mccarthy-4.

underlying nuisance action was for allegedly negligent design and operation of the city's stormwater drainage system.

This case presented an issue of first impression as to whether a private engineering firm qualified for public official immunity from nuisance.[61]

In the Matter of Hibbing Taconite Mine and Stockpile Progression, 888 N.W.2d 336 (Minn. Ct. App. 2016)

Does DNR have statutory authority to approve wetland replacement plans in connection with permit to mine? May DNR allow replacement plan reserve credits to apply to future permit to mine activities?

The Minnesota Court of Appeals found that the Minnesota Department of Natural Resources (DNR) has statutory authority to approve wetland replacement plans in connection with permit to mine (PTM) under Minn. Stat. § 103G.222, subd. 1(a). The court rejected Lake of the Woods County's argument that replacement plan jurisdiction lay with the Board of Water and Soil Resources because the replacement plan was properly a wetland banking plan under Minn. Stat. § 103G.2242, subd. 9.

In addition, the court ruled that DNR's longstanding practice of allowing replacement plan reserve credits to apply to future PTM activities exceeded DNR's statutory authority under Minn. Stat. §§103G.221-.2375 and that DNR was impermissibly allowing internal wetland banks. The court ruled that wetlands must go to a state wetland bank, although they may be held in "single-user wetland bank accounts."[62]

Ariola v. City of Stillwater, 889 N.W.2d 340 (Minn. Ct. App. 2017)

Is constructive knowledge—based on existence of newspaper articles and local government testing—of water quality concern sufficient to find city officials liable under the adult trespasser exception to recreational-use immunity?

The Court of Appeals overruled *Noland v. Soo Line R.R.* (Minn. Ct. App. 1991)[63] to hold that a plaintiff who asserts the adult trespasser exception to recreational-use immunity under Minn. Stat. § 466.03, subd. 6(e) must establish a municipality's actual knowledge of an artificial condition likely to cause death or serious bodily harm. The claim at issue in *Ariola* was a wrongful death action brought by the father of a nine-year-old boy killed by an infection caused by an amoeba that the boy developed from swimming in Lily Lake in Stillwater. The plaintiff argued that the City of Stillwater had knowledge of the presence of the amoeba, should have

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[61] Case link: http://mn.gov/law-library-stat/archive/supct/2016/OPA140796-072716.pdf.
[62] MINN. STAT. § 103G.2242, subd. 14(b).
Case link: http://caselaw.findlaw.com/mn-court-of-appeals/1756538.html .
[63] Noland v. Soo Line R.R. Co., 474 N.W.2d 4 (Minn. Ct. App. 1991).

closed the Lily Lake swimming beach, and was liable under tort liability ascribing to a municipality the same duty of care that a private land owner is required to show a trespasser.

The first death in Minnesota from Naegleria fowleri, an amoeba that results in a 99% fatal brain infection, occurred in August 2010. The victim was a seven-year-old Stillwater resident. The Minnesota Department of Health (MDH) determined that Lily Lake contains the amoeba and notified Washington County of the sampling results, and that the likely cause of the child's death was swimming in Lily Lake. In 2011 and 2012, Washington County participated in MDH and Center for Disease Control water sampling of Lily Lake, and knew that the water tested positive for Naegleria fowleri in those samples. The city administrator, city engineer/public works director, and city public works superintendent all testified that the Washington County health department never told them about the water testing results, and that they never saw or read any of the newspaper articles connecting Lily Lake and the child's 2010 death. The *Ariola* court found that these facts could only establish constructive knowledge of the aomeba risk and not actual knowledge of the risk.[64]

In re Appeal from Final Order of Board of Managers of Bois de Sioux Watershed District, 889 N.W.2d 575 (Minn. Ct. App. 2016)

Can a watershed district's redetermination of benefits and damages be limited to the drainage system's originally assessed area?

The Minnesota Court of Appeals held that the Bois de Sioux Watershed District's redetermination of benefits and damages under Minn. Stat. § 103E.351 may not be limited to the drainage system's originally assessed area, and as such is void. The court interpreted Minn. Stat. § 103E.351 to require examination of benefits to all property within the watershed on a redetermination, just as is required for an original determination. The court determined this meaning from the interplay of language in Minn. Stat. §§ 103E.311 and .315.

The court held that costs of conducting the redetermination can be assessed against the specific drainage system's account under §103E.651, subd. 2. The court interpreted Minn. Stat. §§ 103D.905, subd.3 and 103D.011, subd. 21 to preclude using a watershed district general funds to cover the redetermination costs. Even though the redetermination was determined to be void, the watershed district may still charge the costs of conducting the failed redetermination to the Judicial Ditch 14 ditch system beneficiaries.[65]

MCEA v. City of Winsted, 890 N.W.2d 153 (Minn. Ct. App. 2017)

Must MPCA find a violation of eutrophication water quality standards when there is insufficient information to make that determination?

[64] Case link: http://mn.gov/law-library-stat/archive/ctappub/2017/OPa160750-012317.pdf.
[65] Case link: http://mn.gov/law-library-stat/archive/ctappub/2016/opa160488-121916.pdf

The Minnesota Court of Appeals deferred to the Minnesota Pollution Control Agency (MPCA) on what information to consider in determining if a permittee has a reasonable potential to contribute to violation of a water quality standard, thus requiring a Water Quality-Based Effluent Limitation (WQBEL) on their National Pollutant Discharge Elimination System (NPDES) permit. The court deferred to the MPCA's interpretation of the regulations that the agency need not find a violation of eutrophication water quality standards when there is insufficient information to make a determination. The court found substantial evidence to support MPCA's use of a 75 ug/L background concentration of phosphorous in calculating permit WQBEL.[66]

Zimmermann v. Sauk River Watershed, No. A15-0782, 2016 WL 596346 (Minn. Ct. App. February 17, 2016) (unpublished)

Can a watershed district acquire grass buffer strip along a drainage ditch by relating its action back to the original proceeding by the county commission to acquire and compensate for the ditch?

The Minnesota Court of Appeals held that Minn. Stat. § 103E.021, subd. 6 cannot be used by a watershed district to acquire a grass buffer strip along a drainage ditch by relating its action back to the original proceeding by a county commission to acquire and compensate for the ditch under Minn. Stat. § 103D.

The county commission established the *Zimmerman* ditch in 1988 but did not acquire the buffer area. While making repairs to the ditch the watershed district realized it had no title to the buffer around the ditch. The watershed district used Minn. Stat. § 103E.021, subd. 6, to acquire the buffer land. Notwithstanding the plain language of the statute authorizing a repair proceeding for this purpose, the court concluded that the watershed district "did not retain perpetual jurisdiction," and reversed and remanded to the district court with no further instructions.[67]

MCEA v. MPCA, No. A15-1622, 2016 WL 3223177 (Minn. Ct. App. June 13, 2016) (unpublished)

Must MPCA consider actual or anticipated reductions in nonpoint sources when setting Water Quality-based Effluent Limitations (WQBELs)?

The Minnesota Court of Appeals distinguished Clean Water Act (CWA) regulations on Water Quality-based Effluent Limitation (WQBEL) reasonable potential language, holding that MPCA need not consider actual or anticipated reductions in nonpoint sources when setting WQBELs, only when determining if a WQBEL should be included in the NPDES permit.

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[66] Case link: http://mn.gov/law-library-stat/archive/ctappub/2017/opa160854-013017.pdf.

[67] Zimmermann v. Sauk River Watershed, No. A15-0782, 2016 WL 596346, at *4 (Minn. Ct. App. February 17, 2016) (unpublished).
Case link:
http://www.leagle.com/decision/In%20MNCO%2020160217319/ZIMMERMANN%20v.%20SAUK%20RIVER%20WATERSHED%20DISTRICT.

The court applied the *In re Annandale* substantial evidence standard[68] and pointed to the Nutrient Reduction Strategy to find reasonable evidence in the record that "voluntary reductions from nonpoint source have occurred in the past and can be reasonably expected to occur in the future."[69] The court found MPCA's interpretation of its own rules not to be arbitrary or capricious. The state may set site-specific standards using a ten year average, and is not required to set standards each summer.[70]

In re Little Rock Creek, No. A16-0123, 2016 WL 6923602 (Minn. Ct. App. Nov. 28, 2016) (unpublished)

Is it arbitrary and capricious, sufficient to constitute a contested case hearing, for MPCA to interpret CWA regulations and state statutes as not requiring MPCA to separately determine the load allocation for nonpoint and natural background sources when "current research is not sufficient to differentiate"? Do CWA regulations conflict with MNDNR authority over water allocation?

The Minnesota Court of Appeals determined that landowners near Little Rock Creek have standing under writ of certiorari to seek review of Minnesota Pollution Control Agency's (MPCA) submission of a final Total Maximum Daily Load (TMDL) study to EPA because state regulations consider the submission to be a final agency action. However, on review of MPCA's denial of a contested case hearing, the court found that the plaintiffs were not entitled to a contested case hearing.

The court followed the *Minn. Envtl. Sci. & Econ. Rev. Bd. v. MPCA*,[71] standing analysis for whether potential injuries from a not yet implemented standard can be challenged. That case was a declaratory judgment and applied to *In re Little Rock Creek* under writ.
The court held that it was not arbitrary and capricious for the MPCA to interpret Clean Water Act (CWA) regulations and Minnesota Statutes as not requiring the MPCA to determine load allocation from nonpoint versus natural background sources when the MPCA asserts that "current research is not sufficient to differentiate" between those sources.[72] The court held that plain language does not require nonpoint and natural background sources to be separate allocations.

A separate issue allows the MPCA to recommend restrictions on water allocations as part of its TMDL implementation. The court found that CWA regulations do not conflict with Minnesota Department of Natural Resources authority over water allocation.[73]

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[68] In re Cities of Annandale and Maple Lake NPDES/SDS Permit, 731 N.W.2d 502, 525–26 (Minn. 2007).
[69] MCEA v. MPCA, No. A15-1622, 2016 WL 3223177, at *5 (Minn. Ct. App. June 13, 2016) (unpublished)
[70] Case link: http://mn.gov/law-library-stat/archive/ctapun/2016/opa151622-061316.pdf.
[71] Minn. Envtl. Sci. & Econ. Rev. Bd. v. MPCA, 870 N.W.2d 97 (Minn. Ct. App. 2015)
[72] In re Little Rock Creek, No. A16-0123, 2016 WL 6923602, at *6 (Minn. Ct. App. Nov. 28, 2016) (unpublished)
[73] Case link: http://mn.gov/law-library-stat/archive/ctapun/2016/opa160123-112816.pdf.

In the Matter of the Wetland Conservation Act, No. A16-0380, 2017 WL 393565 (Minn. Ct. App. Jan. 30, 2017) (unpublished)

Can BWSR be found to have acted arbitrarily and capriciously in wetland determination when no factual information rebuts BWSR's wetland determination?

The Minnesota Court of Appeals declined to overturn a no-loss wetland determination denied by the Wright County Soil and Water Conservation District, the appeal of which was denied by the Board of Water and Soil Resources (BWSR). BWSR did not act arbitrarily and capriciously because the appellant did not supply factual information to rebut the wetland determinations.[74]

Clino LLC v. City of Lino Lakes, No. A15-0762, 2016 WL 1175044 (Minn. Ct. App. March 28, 2016) (unpublished)

Does uniform taxation require individual properties to be literally the same, and is wetland subtraction a systematic or arbitrary undervaluation in city assessment process?

The Minnesota Court of Appeals held that the assessment of a fee against property owners is based on gross area of parcel minus wetlands for net developable area. The special assessment was to charge property owners for benefits accrued from the City of Lino Lakes' development projects. Appellants argued that wetlands subtraction for some properties made unfair the lesser fee on those properties, thus violating Minn. Const. art. 10 § 1 that "taxes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes."[75] The court rejected appellants' argument, affirming the district court decision that uniform taxation does not require individual properties to be literally the same, and that wetlands subtraction is not systematic or arbitrary undervaluation in the city's assessment process.

Friedrichs v. Lake Washington Sanitary District, No. A15-0965, 2016 WL 1290898 (Minn. Ct. App. April 4, 2016) (unpublished)

Can a county sanitary district assess property owners for the cost of extending the service area?

A Sanitary District can assess property owners for the cost of extending a service area.

[74] Case link: http://mn.gov/law-library-stat/archive/ctapun/2017/opa160380-013017.pdf.
[75] MINN. CONST. art. 10 § 1.

State Legislative and Regulatory Initiatives

Legislation

- **Senate File 695 and House File 702**

Senate File 695 and House File 702 would suspend a number of water quality standards and rules promulgated since 2014, and would add subsections to Minn. Stat. 115.05 and Minn. Stat. 116.07, to make it harder for MPCA to list impaired waters, issue water quality standards, implement TMDLs or WRAPS, or include standards in a permit. The bill would require an administrative law judge to review the MPCA decision do novo in a contested case hearing and provides a number of heightened criteria. The bill requires the administrative law judge to invalidate any final decision by MPCA if the action isn't based on scientific data that is confirmed in peer-reviewed articles made available before public comment periods; if the action uses any test, measurement, or model outside the purpose it was originally designed for consistent with peer-reviewed scientific practice; or if the action is not based on a significant causal relationship between the parameters of concern and the water-quality objective.

The bill also requires an independent three-person "expert review panel" to examine the scientific basis of proposed water quality rules and actions upon a petition from five or more local government units. The panel would be comprised of one expert nominated by MPCA, one nominated by the petitioning local governments, and one nominated by agreement of the two nominated experts or else the office of administrative hearings if there is no agreement. Experts would not be able to be directly or indirectly involved with the work conducted or contracted by MPCA. Local government units are defined to include a variety of municipalities, as well as special districts and commissions.[76]

- **Senate File 672 and House File 766**

Senate File 672 and House File 766 would require MPCA to publish a draft impaired waters list prior to submission to EPA as a final agency action subject to contested case hearing and 60 days public comment. The bill would provide criteria for challenging impaired waters on this list if the agency relies on any measured data that is older than five years or more, or if a water is listed without using data from the last two years.[77]

[76] Senate File 695, https://www.revisor.mn.gov/bills/bill.php?b=senate&f=sf0695&ssn=0&y=2017; House File 702, https://www.revisor.mn.gov/bills/bill.php?b=house&f=HF0702&ssn=0&y=2017.
[77] Senate File 672, https://www.revisor.mn.gov/bills/bill.php?b=senate&f=sf0672&ssn=0&y=2017; House File 766, https://www.revisor.mn.gov/bills/bill.php?b=house&f=HF0766&ssn=0&y=2017.

- **Senate File 769 and House File 1285**

Senate File 769 and House File 1285 would require legislative approval before rules promulgated by agencies can take effect.[78]

- **Senate File 1087 and House File 1291**

Senate File 1087 and House File 1291 would eliminate the Environmental Quality Board.[79]

- **Senate File 726 and House File 893, Senate File 1542 and House File 1752**

Senate File 726 and House File 893 would create a buffer compensation program. The bill would allow landowners who are required to convert tillable land into buffers along public waters to receive $40 annually for tillable acre converted between 2015 and 2018.[80] Senate File 1542 and House File 1752 is the DFL version that would achieve the same.[81]

- **Senate File 1417 and House File 1796**

Senate File 1417 and House File 1796 would create a statewide goal to improve water quality by 25% by 2025. The bill would require state agencies to determine by stakeholder processes what changes need to occur in the state to meet this goal and submit a report by the end of 2017 to the governor and Legislative Water Commission.[82]

- **Senate File 1482 and House File 1807**

Senate File 1482 and House File 1807 would codify statutory interpretation of the Minnesota Court of Appeals from *In the Matter of Hibbing Taconite Mine and Stockpile Progression*[83] to ensure that DNR has authority to allocate surplus wetland credits generated by a mine to offset future wetland impacts at that mine without going into the state fund.[84]

- **Senate File 1693 and House File 1994**

Senate File 1693 and House File 1994 would extend compliance with the buffer law until November 2018 for all waters. The bill would prevent enforcement actions by counties, watershed districts, or the board of

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[78] Senate File 769, https://www.revisor.mn.gov/bills/bill.php?b=senate&f=sf0769&ssn=0&y=2017; House File 1285, https://www.revisor.mn.gov/bills/bill.php?b=house&f=HF1285&ssn=0&y=2017.
[79] Senate File 1693, https://www.revisor.mn.gov/bills/bill.php?b=senate&f=sf1087&ssn=0&y=2017; House File 1994, https://www.revisor.mn.gov/bills/bill.php?b=house&f=HF1291&ssn=0&y=2017.
[80] Senate File 726, https://www.revisor.mn.gov/bills/bill.php?f=SF726&y=2017&ssn=0&b=senate; House File 893, https://www.revisor.mn.gov/bills/bill.php?b=house&f=HF893&ssn=0&y=2017.
[81] Senate File 1542, https://www.revisor.mn.gov/bills/bill.php?b=senate&f=SF1542&ssn=0&y=2017; House File 1752, https://www.revisor.mn.gov/bills/bill.php?f=HF1752&y=2017&ssn=0&b=house.
[82] Senate File 1417, https://www.revisor.mn.gov/bills/bill.php?b=senate&f=sf1417&ssn=0&y=2017; House File 1796, https://www.revisor.mn.gov/bills/bill.php?f=HF1796&y=2017&ssn=0&b=house.
[83] 888 N.W.2d 336 (Minn. Ct. App. 2016).
[84] Senate File 1482, https://www.revisor.mn.gov/bills/bill.php?b=senate&f=sf1482&ssn=0&y=2017; House File 1807, https://www.revisor.mn.gov/bills/bill.php?f=HF1807&y=2017&ssn=0&b=house.

water and soil resources for noncompliance if there is not federal or state assistance to pay the entire cost of establishing buffers.[85]

Regulatory Revisions

- **New Minnesota Water Quality Standards**

Amendments to the antidegradation rule at Minn. R. Ch. 7050 became effective on Nov. 21, 2016. A redline is available at https://www.pca.state.mn.us/sites/default/files/wq-rule3-61f.pdf.

- **Ongoing Minnesota Water Quality Standards**

The current version of the Sulfate Wild Rice Rule was finalized in 1973. A draft proposal and public comment period occurred in 2015. In December 2016, MPCA issued its draft rule language, and regulatory analysis. Formal rulemaking is expected in 2017.[86]

- **New Mississippi River Corridor Critical Area Rules**

DNR finalized a rulemaking to govern development in the Mississippi River Corridor Critical Area. The final rule is not effective until incorporated into the city plans and ordinances in applicable localities. Affected developers and property owners can review the DNR rule to see whether setbacks or regulations on nonconforming structures will be changing as the rule is phased in over the next few years.[87]

- **Buffers**

An amendment to the 2015 buffer law was signed in April 2016 that clarified that buffers were not required on private ditches. Summer and fall 2017 mark the last opportunity to put in buffers along public waters, and must be seeded by November 1, 2017. Buffers on public drainage systems have until November 1, 2018 to be installed and seeded.

DNR published a buffer protection map in July 2016, and released map updates in November 2016 and February 2017. The map shows the public waters and public drainage systems where buffers are required, as well as areas where site-specific conditions need to be verified. The Board of Water and Soil Resources has published model watershed district rules to aid local water implementation and enforcement.[88]

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[85] Senate File 1693, https://www.revisor.mn.gov/bills/bill.php?b=senate&f=sf1693&ssn=0&y=2017; House File 1994, https://www.revisor.mn.gov/bills/bill.php?b=house&f=HF1994&ssn=0&y=2017.
[86] *Protecting Wild Rice Waters*, MINN. POLLUTION CONTROL AGENCY, https://www.pca.state.mn.us/water/protecting-wild-rice-waters#background-c29a977c (last visited Mar. 29, 2017).
[87] *Mississippi River Corridor Area Program*, MINN. DEPT. NAT. RES., http://www.dnr.state.mn.us/waters/watermgmt_section/critical_area/index.html (last visited Mar. 29, 2017).
[88] *Buffer Mapping Project*, MINN. DEPT. NAT. RES., http://www.dnr.state.mn.us/buffers/index.html (last visited Mar. 29, 2017); *Buffer Program*, MINN. BD. WATER & SOIL RES., http://www.bwsr.state.mn.us/buffers/ (last visited Mar. 29, 2017).