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Environmental Law

Travis M. Trimble

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by Travis M. Trimble*

Notable cases decided in the United States Court of Appeals for the Eleventh Circuit in 2019 all arose out of disputes that originated under the Clean Water Act (CWA).[1] The Eleventh Circuit held that, in preparing an Environmental Impact Statement (EIS) in connection with its decision to issue a dredge and fill permit under Section 404[2] of the CWA, the Corps of Engineers (Corps) was not required to consider potentially negative environmental effects resulting from activity made possible by the permit where the agency had no authority independently to regulate the effects.[3] The court also held that the Environmental Protection Agency (EPA) had the discretion to decide whether to commence withdrawal proceedings as to Alabama's authority to operate the CWA's National Pollution Discharge Elimination System (NPDES)[4] permitting program even where the agency acknowledged that the state had not at all times fully complied with program requirements.[5] The United States District Court for the Southern District of Georgia, one of several courts in the country taking up challenges to the EPA's and the Corps' 2015 Rule defining the term "Waters of the United States" under the CWA, concluded that the Rule was beyond the scope of the agencies' statutory authority in several respects, including the agencies' use of the term "interstate waters," which had been included in the regulatory definition of the term since 1978.[6] Finally, the United States District Court for the Northern District of Georgia concluded that the proper mechanism for a

* Instructor, University of Georgia School of Law. Mercer University (B.A. 1986); University of North Carolina (M.A. 1988); University of Georgia School of Law (J.D. 1993). Member, State Bar of Georgia.

1. 33 U.S.C. §§ 1251–1388 (2012).

2. 33 U.S.C. § 1344 (2012).

3. Ctr. for Biological Diversity v. U. S. Army Corps of Eng'rs, 941 F.3d 1288, 1296 (11th Cir. 2019).

4. *See* 33 U.S.C. § 1342 (2012).

5. Riverkeeper v. U.S. EPA, 938 F.3d. 1157, 1160 (11th Cir. 2019).

6. Georgia v. Wheeler, 418 F. Supp. 3d 1336, 1343–44 (S.D. Ga. Aug. 21, 2019).

defendant to challenge the sufficiency of the 60-day *ante litem* notice under the CWA's citizen-suit provision was a motion to dismiss for insufficiency of process under Federal Rule of Civil Procedure 12(b)(4),[7] and that the plaintiffs' failure in the notice to reference the specific statutory provision of the CWA which the plaintiffs claimed the defendants violated did not make the notice deficient so as to justify dismissal of the plaintiffs' claim.[8]

In *Center for Biological Diversity v. United States Army Corps of Engineers*,[9] a case addressing the scope of environmental impacts of the Corps' permitting decision the agency was required to consider in preparing an EIS for the permitting decision, the Eleventh Circuit concluded that under the "rule of reason" as applied by the Supreme Court of the United States in *Department of Transportation v. Public Citizen*,[10] the Corps was not required to consider any negative environmental impacts of its decision over which it did not have regulatory authority.[11] Accordingly, the Eleventh Circuit held that the Corps did not act arbitrarily and capriciously when it did not consider the environmental impact of phosphogypsum, a waste byproduct of fertilizer manufacturing, when it prepared an EIS for, and then approved, a CWA § 404 permit allowing the fertilizer manufacturer to discharge dredged or fill material into jurisdictional waters in connection with its proposed phosphate mining operations in Florida.[12]

The permittee, Mosaic Fertilizer, mines phosphate in Florida for the manufacture of fertilizer. In the mining operation, Mosaic excavates sand, clay, and phosphate ore from the earth. In the manufacturing operation, the phosphate ore is separated and then processed into phosphoric acid used to produce fertilizer. A waste byproduct of the manufacturing process is phosphogypsum, which is radioactive. The production of one ton of phosphoric acid from ore produces five tons of waste phosphogypsum. Mosaic's operations produce over thirty million tons of phosphogypsum per year. Because of radioactive uranium and other hazardous metals in the phosphogypsum, it must be allowed to "weather" in open-air stacks that are hundreds of acres wide and hundreds of feet tall.[13]

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7. Fed. R. Civ. P. 12(b)(4).

8. Boring v. Pattillo Indus., ___ F. Supp. 3d ___, 2019 LEXIS 216372, at *5–6 (N.D. Ga. Dec. 11, 2019).

9. 941 F.3d 1288 (11th Cir. 2019).

10. 541 U.S. 752 (2004).

11. *Ctr. for Biological Diversity*, 941 F.3d at 1296.

12. *Ctr. for Biological Diversity*, 941 F.3d at 1301.

13. *Id.* at 1293–94.

In an area in central Florida known as "Bone Valley," where Mosaic's mining and manufacturing operations are located, over a billion tons of phosphogypsum are stored in stacks. To dispose of the phosphogypsum, Mosaic pumps a mixture of phosphogypsum and water into reservoirs on top of the stacks to allow it to dry into a crust. This phosphogypsum-containing wastewater has on occasion spilled from the stacks, contaminating rivers, creeks, wetlands, and aquifers.[14]

Mosaic sought to extend its phosphate mining operations in central Florida. To do so, it needed a permit from the State of Florida allowing it to mine phosphate, and it also needed, and applied for, a § 404 permit from the Corps allowing it to discharge dredged and fill material into waters of the United States in connection with the mining.[15] In compliance with the National Environmental Policy Act (NEPA),[16] the Corps prepared an EIS.[17] In the EIS, the Corps considered "[D]irect effects, such as how the discharge of . . . material into surrounding wetlands might affect the water quality of those wetlands," and "indirect effects, such as how that discharge might through stormwater runoff be carried to and affect the quality of distant waters."[18] However, "The Corps determined that the environmental effects of phosphogypsum production and storage fell outside the scope of its NEPA-[mandated] review."[19]

The plaintiff, Bio-Diversity, filed suit in the United States District Court for the Middle District of Florida, challenging the sufficiency of the EIS under NEPA, among other things. Bio-Diversity contended that the Corps' failure to consider the effects of phosphogypsum as an indirect result of its issuing the 404 permit was arbitrary and capricious.[20] The district court granted summary judgment to the Corps on Bio-Diversity's NEPA claim, and Bio-Diversity appealed.[21]

The Eleventh Circuit affirmed.[22] The court noted that under NEPA, a federal agency considering a "major federal action" must produce an EIS that takes into account the "direct, indirect, and cumulative effects" of the action.[23] Indirect effects are those "[C]aused by the action and are

14. *Id.* at 1306–07 (Martin, J., concurring in part and dissenting in part).
15. *Id.* at 1292 (majority).
16. 42 U.S.C. §§ 4321–4370m-12 (2012).
17. *See* 42 U.S.C. § 4332.
18. *Ctr. for Biological Diversity*, 941 F.3d at 1293.
19. *Id.* at 1294.
20. *Id.*
21. *Id.*
22. *Id.* at 1306.
23. *Id.* at 1293.

later in time or farther removed in distance, but are still reasonably foreseeable" as a result of the agency's action.[24]

The court first noted that the causal connection between the permit allowing for phosphate mining from four of Mosaic's mines and harm caused by runoff from Mosaic's phosphogymsum stacks is tenuous: "[P]hosphogypsum is a byproduct not of dredging and filling—nor even of phosphate mining or beneficiation—but of fertilizer production."[25] But the court relied more heavily on two other bases for its holding, either or both of which seemingly would excuse the Corps from considering the adverse effects of phosphogypsm in its permitting decision.[26] First, the court pointed to the Supreme Court's "rule of reason" analysis in *Public Citizen*: "[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."[27] The court noted that, "The Corps has no ability categorically to prevent fertilizer production or the creation and storage of phosphogypsum."[28] Since the Corps' jurisdiction did not include phosphogypsum, as a matter of law, phosphogypsum could not be an effect of the Corps' § 404 permitting decision.[29] Second, while, "[T]he Corps could in fact mitigate the effects of phosphogypsum by rejecting the . . . permit and choking off Mosaic's supply of phosphate ore . . . the Corps is not statutorily authorized to base its permitting decision on . . . effects that are so indirectly caused by its action."[30] The court explained that the Corps' authority to deny a permit under § 404 is limited to those situations where the discharge of dredged or fill material alone would "have an unacceptable adverse effect" on specified environmental receptors.[31] In other words, for either reason, the Corps is obligated to consider only the effects, including indirect effects, of the discharge of dredged or fill material into waters, and not the effects of the permittee's project, which but for the issuance of the permit would not be possible.[32]

Since the Corps did not have the authority to regulate Mosaic's production and storage of phosphogypsum, and since it did not have the

24. *Id.*
25. *Id.* at 1295.
26. *Id.* at 1292.
27. *Id.* at 1296 (citing *Public Citizen*, 541 U.S. at 767).
28. *Id.* at 1297–98.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*

authority to deny Mosaic's § 404 permit based on the effects of phosphogypsum on the environment, it followed that information regarding those effects would not be useful to the Corps in making its permitting decision, and therefore did not need to be included in the EIS.[33]

In *Cahaba Riverkeeper v. United States Environmental Protection Agency*,[34] in an issue of first impression in the Eleventh Circuit, the Eleventh Circuit held that the EPA has discretion whether to begin proceedings to withdraw a state's authority to administer the CWA's NPDES permit program.[35] Further, the EPA did not abuse its discretion in deciding not to move to withdraw Alabama's authority to administer the NPDES program despite finding that Alabama had not always administered the program in compliance with the CWA.[36]

The petitioners, seven environmental groups that advocated for different river systems in Alabama, had petitioned the EPA to begin proceedings to withdraw Alabama's authority to administer the NPDES program. The petitioners initially identified twenty-six grounds for withdrawal. The EPA issued a final decision declining to begin withdrawal proceedings, and the petitioners appealed on four grounds—specific deficiencies in Alabama's administration of the program—that petitioners claimed warranted withdrawal of Alabama's authority. First, petitioners claimed that Alabama's public notices of pending NPDES permitting decisions violated NPDES regulations because the notices, which must be published in a newspaper in the area affected by the decision, do not give a general description of the location of existing or proposed pollutant discharge points, as they are required to do,[37] but instead refer readers to a government website that provides the locations.[38] Second, the petitioners challenged Alabama's policy of allowing NPDES board members who had conflicts, defined as receiving significant income from a permit applicant, to recuse themselves from the permitting decision, rather than disqualifying the member from membership on the board.[39] Third, the petitioners claimed that by regulation Alabama is required to inspect annually all permittees designated as "major dischargers," and that Alabama does

33. *Id.*
34. 938 F.3d 1157 (11th Cir. 2019).
35. *Id.* at 1165.
36. *Id.* at 1160.
37. 40 C.F.R. § 124.10(d)(viii).
38. *Cahaba Riverkeeper*, 938 F.3d at 1167.
39. *Id.* at 1168.

not do so.[40] Fourth, petitioners argued that Alabama could not enforce a regulation requiring it to be able to sue to recover civil penalties for permit violations as to state agencies because those agencies are protected from lawsuits by sovereign immunity, which the Alabama Constitution prohibits the agencies from waiving.[41]

The petitioners argued that based on these alleged violations of NPDES regulations by Alabama, the EPA was compelled to begin withdrawal proceedings, and that its decision not to do so was arbitrary and capricious.[42]

The EPA's authority to withdraw a state's authority to administer a program under the CWA is governed by 33 U.S.C. § 1342(c)(3):[43]

> Whenever the Administrator *determines* after public hearing that a State is not administering a program approved under this section in accordance with the requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time . . . the Administrator *shall* withdraw approval of any such program . . . .[44]

The court noted that this language contains "[B]oth a discretionary and a nondiscretionary component."[45] The word "shall" creates a nondiscretionary duty on the part of the EPA to withdraw state permit authority on the occurrence of certain conditions, but on the other hand, the provision requires the EPA to "make a judgment" as to whether the state is not administering the program according to the CWA.[46] The court found further support for the discretionary aspect of the EPA's decision in 40 C.F.R. § 123.64(b)(1)[47]: the EPA "[M]ay order the commencement of withdrawal proceedings" on its own or in response to a petition alleging the state's failure to comply with the CWA, and it "[M]ay conduct an informal investigation of the allegations in [a petition to commence withdrawal proceedings] to determine whether cause exists to commence proceedings . . . ."[48]

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40. *Id.* at 1169. The regulation at issue, 40 C.F.R. § 123.26(e)(5), states that "State NPDES compliance evaluation programs shall have procedures and ability for . . . inspecting the facilities of all major dischargers at least annually."

41. *Cahaba Riverkeeper*, 938 F.3d at 1169.

42. *Id.* at 1161.

43. 33 U.S.C § 1342(c)(3) (2020).

44. *Id.* at 1165 (emphasis added) (quoting 33 U.S.C § 1342(c)(3)).

45. *Id.* (quoting Sierra Club v. Johnson, 541 F.3d 1257, 1265 (11th Cir. 2008)).

46. *Cahaba Riverkeeper*, 938 F.3d at 1165 (quoting *Johnson*, 541 F.3d at 1265–66).

47. 40 C.F.R. § 123.64(b)(1) (1998).

48. *Cahaba Riverkeeper*, 938 F.3d at 1166 (quoting 40 C.F.R. § 123.64(b)(1)).

The court held that the EPA had the discretion to decide whether to commence withdrawal proceedings.[49] And although the court acknowledged that the EPA's discretion "is not boundless," the EPA is entitled to deference from the court to determine what "cause" to commence proceedings means under the regulation.[50]

Under this deferential standard, the court concluded that the EPA's decision not to commence withdrawal proceedings against Alabama was not arbitrary and capricious.[51] First, as to the public notice requirement, the EPA determined that the appropriate action was to encourage Alabama to include more specific information in its published notices.[52] The court held that this choice was within the EPA's permissible discretion and was not arbitrary and capricious.[53] As to board members' conflicts, the EPA had adopted a regulation defining the term "board or body" that "clearly allowed for Alabama's recusal policy," and since the CWA did not define "board or body" for conflict purposes, the court held that the EPA's regulation was a reasonable interpretation of the statutory language and entitled to deference.[54] Therefore, its decision to allow Alabama's recusal policy was not arbitrary and capricious.[55] With regard to Alabama's failure to do annual inspections, the EPA adopted a policy recommending inspections once every two years.[56] The court noted that the regulation governing inspections required states to have "procedures and ability" to conduct annual inspections but did not actually require annual inspections.[57] As such, the EPA's recommendation was not arbitrary, nor was its decision to commence withdrawal proceedings against Alabama for not doing so.[58] Finally, with regard to the petitioners' charge that Alabama could not sue agencies of the state to recover civil penalties, as required by 40 C.F.R. § 123.27(a)(3)(i),[59] because the agencies had sovereign immunity under the state constitution, the court accepted the EPA's position that nothing in the CWA or regulations required states to waive sovereign immunity, and further that a conflict

49. *Id.* at 1165–66.
50. *Id.* at 1166.
51. *Id.* at 1168–70.
52. *Id.* at 1167–68.
53. *Id.* at 1168.
54. *Id.*
55. *Id.* at 1168–69.
56. *Id.* at 1169.
57. *Id.*
58. *Id.*
59. 40 C.F.R. § 123.27(a)(3)(i) (1993).

between a federal statutory scheme and a state's sovereign immunity was a conflict that the EPA could not be expected to resolve in any event.[60] The EPA's decision not to commence withdrawal proceedings on this ground was not arbitrary and capricious.[61]

In *Georgia v. Wheeler*,[62] the United States District Court for the Southern District of Georgia again took up the case of the Waters of the United States (WOTUS) Rule (WOTUS Rule or Rule), promulgated by the EPA and the Corps of Engineers (the Agencies) in 2015 to define the term "waters of the United States" in the Clean Water Act.[63] The court concluded that the Agencies exceeded their statutory authority under the CWA in promulgating the Rule.[64] Significantly, as part of this part of its decision, the court ruled that the Agencies' pre-2015 definition of Waters of the United States, which had been in place since 1978,[65] also exceeded the Agencies' statutory authority.[66] Finally, the court concluded that the Agencies violated the Administrative Procedure Act (APA) in promulgating the Rule.[67] Overall, the thrust of the court's opinion is that any rule developed by the Agencies to define the term "waters of the United States" in the CWA must ultimately conform to Justice Kennedy's "significant-nexus" test set out in *Rapanos v. United States*[68] for including nonnavigable-in-fact waters within the definition.[69]

Many of CWA's substantive provisions apply to "navigable waters," which the CWA in turn defines as "waters of the United States."[70] As a result, the Agencies' jurisdiction under much of the CWA is co-extensive with the definition of "waters of the United States."[71] The term was originally defined by regulation in 1978,[72] and the proper scope of the definition had been the subject of much litigation in subsequent years,

60. *Cahaba Riverkeeper*, 938 F.3d at 1169.
61. *Id.* at 1170.
62. 418 F. Supp. 3d 1336 (S.D. Ga. Aug. 21 2019).
63. 33 U.S.C. § 1362(7) (2019).
64. *Wheeler*, 418 F. Supp. 3d at 1351.
65. *See*, *e.g.*, 40 C.F.R. § 122.2 (2019).
66. *Wheeler*, 418 F. Supp. 3d at 1351.
67. *Id.* at 1372.
68. 547 U.S. 715 (2006).
69. *Wheeler*, 418 F. Supp. 3d at 1381.
70. *Id.* at 1344.
71. *Id.*
72. *Id.* at 1356.

including three cases at the Supreme Court.[73] The Agencies promulgated the WOTUS Rule in 2015 to "[P]rovide simpler, clearer, and more consistent approaches for identifying the geographic scope of the [CWA]."[74] The Rule incorporated the existing definition of waters of the United States, including the categories encompassing waters used in interstate or foreign commerce, "interstate waters" including "interstate wetlands," and territorial seas (collectively, primary waters) and added three additional categories: tributaries of primary waters, waters adjacent to primary waters, and waters determined on a case-by-case basis to have a "significant nexus" to a primary water.[75]

Georgia and ten other states[76] challenged the Rule on the grounds that by promulgating the Rule, the Agencies exceeded their authority under the CWA, violated the APA, and violated the Constitution.[77]

The court first considered the appropriate standard of review of the plaintiffs' CWA claim.[78] The court determined that the plaintiffs' CWA challenge was to the Agencies' authority under the CWA to interpret the statutory term "waters of the United States."[79] Noting that a court reviewing an agency's interpretation of its authority under a statute generally must apply the *Chevron* deference standard[80] to the agency's interpretation, the court nevertheless concluded that it was not required to defer to the Agencies as to whether they exceeded their statutory authority in defining "waters of the United States," and further, the Agencies' authority to define the term was itself limited by the holding of the Supreme Court in *Rapanos*.[81] Finally, because the Eleventh Circuit had adopted Justice Kennedy's "significant nexus" test as the governing rule of *Rapanos*, the Agencies' statutory authority to

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73. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006). *See Wheeler*, 418 F. Supp. 3d at 1344.

74. *Wheeler*, 418 F. Supp. 3d at 1344 (citing Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,057 (June 29, 2015).

75. *Id.* at 1345.

76. West Virginia, Alabama, Florida, Kansas, Kentucky, South Carolina, Utah, Wisconsin, North Carolina, and Indiana.

77. *Wheeler*, 418 F. Supp. 3d at 1344–45.

78. *Id.* at 1348.

79. *Id.* at 1348–49.

80. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Under the *Chevron* deference standard, a court must first determine if the statutory language at issue is unambiguous. If so, then the Legislature's intent as expressed in the language controls the court's decision. If the court concludes that the statutory language is ambiguous or silent on the issue, then the court must decide if the agency's interpretation is based on a permissible construction of the statutory language.

81. *Wheeler*, 418 F. Supp. 3d at 1345.

define the term "waters of the United States" was limited by the significant–nexus test.[82] The Court expressed the test as follows: a water can be considered "navigable" under the CWA only if it possesses a significant nexus to waters that are or were navigable in fact or could reasonably be so made.[83] A nonnavigable-in-fact water possesses a significant nexus to a navigable-in-fact water when it, "[E]ither alone or in combination with similarly situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[84]

Applying the significant–nexus test as the limit of the Agencies' authority, the court concluded that the WOTUS Rule exceeded that authority in several respects.[85]

First, the court concluded that the agency rule defining waters of the United States to include interstate waters, which dated from 1978, exceeded the agencies' authority.[86] The court explained that while ordinarily an agency rule could not be challenged after six years from its promulgation, here, the Agencies had "reopened" the original rule by incorporating it in the 2015 WOTUS Rule.[87] As such, it became subject to the significant-nexus test from *Rapanos*.[88] The court went on to conclude that "the inclusion of all interstate waters in the definition of 'waters of the United States,'" without regard to navigability, failed the significant-nexus test because it effectively "reads the term navigability out of the CWA."[89] The court explained that "[u]nder such a broad definition, a mere trickle, an isolated pond, or some other small, non-navigable body of water would be under federal jurisdiction simply because it crosses a state line or lies along a state border."[90]

Next, the court concluded that two of the three additional (beyond those in the original rule) categories of waters the Agencies had included in the Rule exceeded the Agencies' authority to interpret the CWA because they did not pass the significant–nexus test.[91] The Rule defined the first category to be included, tributaries of primary waters, as those characterized by the physical indicators of a bed and banks and

82. *Id.* at 1355 (citing *See*, United States v. Robinson, 505 F.3d 1208 (11th Cir. 2007)).
83. *Id.* at 1353.
84. *Id.* at 1352 (citing *Rapanos*, 547 U.S. at 780).
85. *See generally*, *Wheeler*, 418 F. Supp. 3d 1336.
86. *Id.* at 1355–66.
87. *Id.* at 1355–58.
88. *Id.*
89. *Id.* at 1358.
90. *Id.* at 1359.
91. *See generally*, *id.* at 1360–69.

an ordinary high water mark (OHWM).[92] So far so good. However, the Rule also allowed the presence of a bed and banks and an OHWM to be determined using "computer-based models, historical data, and mapping technology."[93] The court found that standard to be impermissibly broad:

> [O]n one hand, the Agencies rely on these physical indicators as evidence of a significant nexus . . . but on the other, they say that these indicators need not be physically, or currently, present in a certain location so long as they can be found to exist or to have previously existed using computer technology, statistics, and historical data.[94]

This standard "[S]eems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water . . . ."[95] The court also found fault with the applicability of the physical indicators test in the "Arid West," where the court noted that the presence of an OHWM was frequently due to isolated, extreme flooding events and did not demonstrate a regular flow sufficient to show a significant nexus between a nonnavigable and navigable waterway.[96]

The court also concluded that the second category, waters adjacent to primary waters, did not pass muster under the significant-nexus test.[97] The definition of waters adjacent to primary waters included waters adjacent to tributaries of primary waters, waters within 100 feet of a primary water, and waters within the 100-year floodplain of any primary water, impoundment or tributary, and not more than 1,500 feet from the OHWM of any of those bodies of water.[98] The court accepted the 100-foot category of adjacent waters as having a significant nexus to a navigable-in-fact water, but rejected the 100-year floodplain category.[99] The court explained that nothing in the Rule showed why waters within the 100-year floodplain of a primary water or tributary would necessarily have a significant nexus to the primary water.[100]

The court did allow to stand the category of waters that came within the 100-year floodplain of a primary water or within 4,000 feet of a high

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92. *Id.* at 1360.
93. *Id.*
94. *Id.* at 1361.
95. *Id.* (citing *Rapanos*, 547 U.S. at 778).
96. *Id.* at 1362.
97. *Id.* at 1363–67.
98. *Id.*
99. *Id.* at 1365–67.
100. *Id.*

tide line and which also were determined on a case-by-case basis to have a "significant nexus" to a primary water, where "significant nexus" was defined in the Rule in a way that was consistent with Justice Kennedy's definition in *Rapanos*.[101] However, the court excluded from acceptable waters in this category the use of "interstate waters" or "tributaries" as a type of primary water, because the court had concluded that the use of these categories in the Rule exceeded the Agencies' authority under the CWA as limited by *Rapanos*.[102]

The court also concluded that the Agencies exceeded their authority under the CWA with WOTUS Rule in another way: because the Rule expanded the jurisdiction of the Agencies by from 2.84 to 4.65 percent, the Rule constituted a "[S]ubstantial intrusion into lands and waters traditionally left to state authority."[103] The court noted that the CWA stated the intent of Congress to recognize and protect "[T]he primary responsibilities and rights of States to prevent, reduce, and eliminate pollution and to plan the development and use . . . of land and water resources."[104] The court concluded that "an almost two-percent increase in jurisdiction nationwide is a substantial intrusion into lands and waters traditionally left to state authority," and for this reason too, "the WOTUS Rule is unlawful under the CWA."[105]

The court also concluded that the Rule violated the Administrative Procedure Act in two ways.[106] First, "[T]he Final Rule was not the logical outgrowth of the Proposed Rule," because the Proposed Rule did not contain the specific distance limits defining the "adjacent waters" category or the farming exemption for adjacent waters (but not tributaries), and the plaintiffs were not able to foresee those limits or exemptions potentially being in the Final Rule and thus were unable to comment on them during the rulemaking process.[107] Second, portions of the Rule were arbitrary and capricious, because the Rule (1) exempted adjacent waters on farmland but not tributaries on farmland, and (2) set distance limits for including "adjacent waters" without providing a rational basis for doing so.[108]

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101. *Id.* at 1367–69.
102. *Id.*
103. *Id.* at 1371.
104. *Id.* at 1370.
105. *Id.* at 1371–72.
106. *Id.* at 1372.
107. *Id.* at 1372–78.
108. *Id.* at 1379–1381.

In *Boring v. Pattillo Industrial Real Estate*,[109] the United States District Court for the Northern District of Georgia decided that the proper mechanism to challenge the sufficiency of *ante litem* notice under the CWA's citizen-suit provision[110] is Fed. R. Civ. P. 12(b)(4), a challenge to the sufficiency of process, and not 12(b)(1),[111] dismissal for lack of subject matter jurisdiction.[112] The court also concluded that plaintiffs' notice letter met the regulatory requirements for notice despite not identifying the specific statutory provision the plaintiffs contended the defendants had violated.[113]

The defendants were developers engaged in construction activities in an industrial park in Jackson County, Georgia. The plaintiffs, downstream residents and landowners, sued defendants, alleging that silt and other runoff from the defendants' construction site damaged dams, ponds, roads and properties in violation of the CWA.[114] The plaintiffs sent the defendants a pre-suit notice letter sixty days before filing suit, as required by the CWA.[115] The notice letter claimed the defendants' construction activities violated the CWA because they were "[W]ithout valid coverage under a . . . (NPDES) Permit," and failed "to comply with the terms and conditions of NPDES Construction Stormwater General Permits GAR100001 and GAR10003."[116] The letter identified damages associated with the runoff.[117] Subsequently, the plaintiffs filed suit under § 402[118] and § 301[119]of CWA.[120]

The defendants filed a motion to dismiss the plaintiffs' suit for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).[121] The defendants claimed that the plaintiffs' pre-suit notice letter did not comply with the regulatory requirements for notice prior to a citizen-

109. ___ F.Supp. 3d. ____, 2019 LEXIS 216372.

110. 33 U.S.C. § 1365(b)(1) (2018).

111. Fed. R. Civ. P. 12(b)(1).

112. *Boring*, 2019 LEXIS 216372, at *4–6.

113. *Id.* at *7–16.

114. *Id.* at *12.

115. *Id.* at *2.

116. *Id.* at *12.

117. *Id.* at *12–13.

118. 33 U.S.C. § 1342.

119. § 301 of the CWA (33 U.S.C. § 1311 (1995)) provides in relevant part that "the discharge of any pollutant by any person shall be unlawful" unless done so in compliance with a permit issued under § 402.

120. *See, Boring*, 2019 LEXIS 216372, at *4.

121. *Id.* at *4–5.

suit because it did not reference a particular statutory standard that the plaintiffs claimed the defendants were violating.[122]

The court first concluded that a 12(b)(1) motion was not the proper mechanism to challenge the sufficiency of pre-suit notice under the CWA.[123] Rather, the court concluded that the most analogous defense was insufficiency of process under 12(b)(4).[124] The court noted that unlike subject matter jurisdiction, insufficient pre-suit notice could not be challenged at any point during the litigation.[125] Furthermore, pre-suit notice, like process, relates to the type of notice of a lawsuit a defendant must receive.[126] Finally, pre-suit notice concerned the rights of the parties, not the power of the court to hear the case.[127] Accordingly, the court concluded that the defendants' motion must comply with Rule 12(b)(4), meaning that a failure to challenge the sufficiency of notice in one of the ways set out in Fed. R. Civ. P. 12(h) would constitute waiver of the defense.[128] The court also concluded that the plaintiffs would bear the burden of proving the sufficiency of notice.[129]

The court went on to consider the defendants' claim that the notice was deficient because it did not reference a specific statutory section on its merits.[130] The contents of a pre-suit notice under the CWA are governed by regulation, which requires that the notice "[I]nclude sufficient information to permit the recipient to identify" the standard the plaintiff claims the recipient has violated.[131] The court noted that the regulation "does not require a plaintiff to identify the specific standard," and even though the court was required to strictly construe the regulation's language, the court refused to "[R]ead into the text a requirement that does not exist there."[132] As a result, the court "[H]olds that failure to cite to the specific statutory provisions does not render Plaintiffs' Notice categorically deficient" under the regulation.[133]

The court also concluded that the plaintiffs' notice did meet the regulatory requirement of "sufficient information" to allow the

122. *Id.* at *6–7.
123. *Id.* at *4–5.
124. *Id.* at *5–6.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at *6.
129. *Id.*
130. *Id.* at *7–12.
131. *Id.* at *7 (quoting 40 C.F.R. § 135.3(a) (1973)).
132. *Id.*
133. *Id.* at *11–12.

defendants to identify the basis for the plaintiffs' claim.[134] The court noted that the notice referenced NPDES permits, which "[C]an only be referring to the permitting statute § 402 and the associated violation under § 301, the statutes that were in fact the basis for the CWA claim in the Complaint."[135]

134. *Id.* at *12–14.
135. *Id.* at *13.