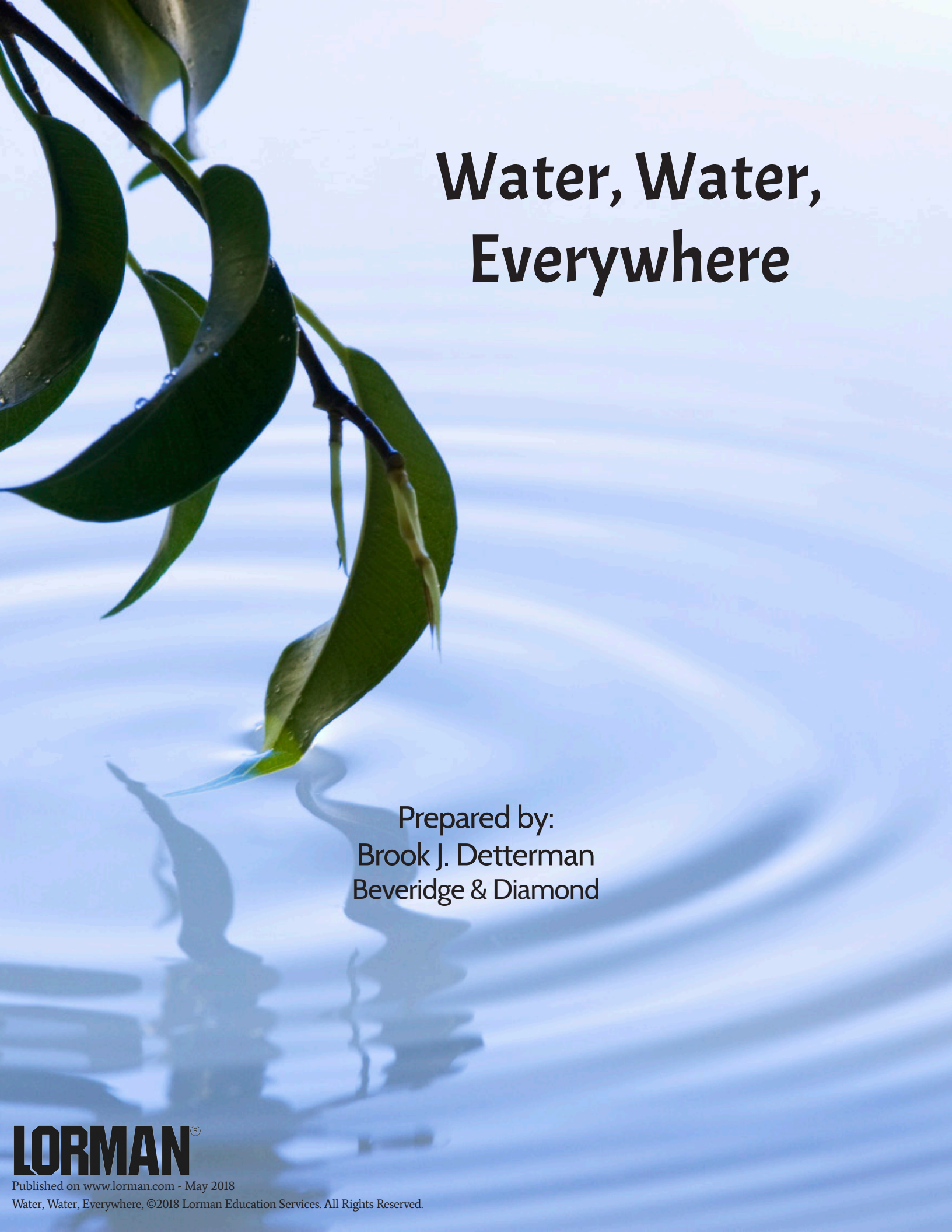

Water, Water, Everywhere

Prepared by:
Brook J. Detterman
Beveridge & Diamond

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Water, Water, Everywhere

Written by Brook J. Detterman – 3/29/18

If it isn't already, water should be on your mind this year. The excitement of **Scituate storm surge** and coastal flooding aside, the region – and the U.S. as a whole – is facing a slew of legal developments that may change how citizens, businesses, and governments operate under the federal Clean Water Act and similar state programs. In particular, the scope of Clean Water Act jurisdiction is in play following a pair of Supreme Court decisions, as is the potential delegation of permitting authority to Massachusetts and New Hampshire, two of only four states in which the EPA administers permitting under the National Pollutant Discharge Elimination System (NPDES).

Clean Water Act Jurisdiction

Since well before Samuel Taylor Coleridge penned those famous lines in the Rime of the Ancient Mariner – "Water, water, everywhere, / Nor any drop to drink" – people have worried about access to clean water. It makes sense, then, that the Clean Water Act is one of our oldest environmental laws, with its origins in the Rivers and Harbors Act of 1899. The Rivers and Harbors Act – the nation's very first environmental law – imposed the first "dredge and fill" requirements, made it illegal to dam rivers without federal approval, and prohibited the discharge of "any refuse matter of any kind or description"

into "any navigable water of the United States, or into any tributary of any navigable water."

The Federal Water Pollution Control Act of 1948, with major amendments in 1961, 1966, 1970, 1972, 1977, and 1987, largely superseded the Rivers and Harbors Act and resulted in what we know today as the federal Clean Water Act (CWA). And although today's statute is very different from its 1899 precursor, one thing has remained constant: an intense and lasting fight over the scope and jurisdiction of federal regulation. Federal CWA jurisdiction is premised on the Commerce Clause of the U.S. Constitution, and prohibits (without a permit) "dredge and fill" activities and the discharge of pollutants into "navigable waters," which the CWA defines as "the waters of the United States." But what, exactly, are "waters of the United States"?

The 1870 Supreme Court decision in *The Daniel Ball* held that waterways were subject to federal jurisdiction if they were "navigable in fact." But what has never been clear is the extent to which non-navigable waters, like certain tributaries to navigable waters or wetlands, constitute "waters of the United States" such that they are subject to federal regulation.

The Supreme Court Punts (Again)

The 2006 Supreme Court decision in *Rapanos v. United States* represented a key turning point in CWA jurisdiction, holding that certain remote wetlands are not subject to CWA jurisdiction. But the decision was badly fractured, with no majority of justices agreeing on a single standard for

determining what, exactly, constitute "waters of the United States" such that the CWA applies. Minor chaos ensued, as regulators and courts applied varying interpretations of *Rapanos* in permitting decisions and enforcement actions.

In 2015, the Obama administration attempted to clarify the scope of CWA jurisdiction by promulgating a rule known as the "Waters of the United States" (or "WOTUS") rule that attempted to define exactly which waters were regulated by the CWA. That rule, which was based on Justice Anthony Kennedy's "significant nexus" test in the *Rapanos* decision, was quickly challenged by 31 states, numerous industries, and landowner groups. At bottom, challengers argued that the WOTUS rule represented significant federal overreach and extended CWA jurisdiction well beyond what the Commerce Clause allows. The numerous appeals were consolidated into a single Sixth Circuit case, *National Association of Manufacturers v. Department of Defense (NAM)*, and in late 2015 the Sixth Circuit stayed the WOTUS rule pending resolution of legal challenges.

But on January 22, 2018, the Supreme Court unanimously held that federal District Courts – not appellate courts – have jurisdiction over challenges to the WOTUS rule. While the CWA generally requires challenges to CWA rules to be brought in district courts, there are seven situations where courts of appeal have jurisdiction. In this case, the government argued that the challenge should be heard in the courts of appeal, under CWA Sections 1369(b)(1)(E)-(F) which allow appellate courts to hear cases related to the approval of certain effluent limits or permits, respectively. Petitioners, on the other hand, maintained that the

case should be heard in federal district court in the first instance. In a procedural victory for the petitioners, the Supreme Court held that the WOTUS rule does not qualify for direct appellate review under CWA Sections 1369(b)(1)(E)-(F). Following this decision, future challenges to the WOTUS rule will be brought in federal district courts, potentially with divergent outcomes around the country. Appeals of those decisions will move to the courts of appeals, where there is yet again the possibility for inconsistency. The upshot is a longer litigation timeline – and continued jurisdictional uncertainty – before the Supreme Court will have another chance to address the appropriate scope of CWA jurisdiction.

In the meantime, the Trump administration is working on a replacement rule for the WOTUS rule that is likely to apply the less expansive jurisdictional test described by Justice Antonin Scalia in *Rapanos*. Under that interpretation, only tributaries that are "relatively permanent, standing or flowing bodies of water," and only wetlands with a continuous surface connection to a "water of the United States" are themselves "waters of the United States" subject to CWA jurisdiction. And on February 6, 2018, EPA and the Army Corps of Engineers promulgated a rule delaying implementation of the WOTUS rule until February, 2020. That action preserves the *Rapanos* status quo (such as it is) until EPA can craft a new rule. Ultimately, it is likely that any WOTUS replacement rule will be challenged, and the Supreme Court will then have a chance to revisit its decision in *Rapanos* and redefine federal jurisdiction under the CWA, a process that could easily extend past 2020.

Defer much?

On February 26, 2018, the Supreme Court weighed in again on the Clean Water Act, this time by refusing to take up a challenge to a 2017 decision by the Second Circuit that rule exempting water transfers from CWA permitting requirements. Water transfers happen when water from one waterbody is diverted into another waterbody, such as diverting a stream into a nearby lake or reservoir. Drinking water systems have conducted water transfers for decades, and EPA has never required NPDES permitting for such transfers. But in 2008, in response to pressure by environmental groups to require NPDES permits for water transfers, EPA adopted the Rule expressly exempting such transfers from NPDES permitting.

Environmentalists and states challenged the Water Transfers Rule, arguing that moving water from one waterbody to another requires a permit if the "donor" water contains pollutants that would have the effect of degrading the receiving water. Both the Obama and Trump administrations defended the rule, arguing that it preserved long-standing practice and was justified by EPA's ability to interpret CWA requirements. Ultimately, the Second Circuit deferred to EPA and allowed the rule to stand. In turn, the February 26 decision by the Supreme Court allows the Second Circuit decision to stand, thereby affirming the validity of the Water Transfers Rule. The case was widely seen as a test for Justice Neil Gorsuch, who has expressed hostility to the deference doctrine and EPA regulations alike. By declining to hear the case, the Court has deferred that test for another day.

Who's in Charge?

Under a process known as "delegation," states may assume permitting and other authority under the CWA. To-date, 46 states have received such delegation from EPA, and all but Massachusetts, New Hampshire, Idaho, and New Mexico now administer their own NPDES permitting programs. In the absence of delegation, EPA manages the Clean Water Act and NPDES program in those four states, which often overlap and may duplicate separate state law requirements.

New Hampshire is currently evaluating whether to seek CWA delegation from EPA, and has established a legislative commission to explore its options. And as we have previously reported, Massachusetts has explored CWA delegation in the past, but those efforts largely fizzled out. But both of these efforts may have new life: the EPA, under Administrator Pruitt, is very focused on "cooperative federalism" and with EPA seeking to slash its budgets, CWA delegation is likely on EPA's radar as an action item over the next several years. And, in late 2017, MassDEP Commissioner Martin Suuberg expressed strong support for CWA delegation, as has Governor Baker. Whether delegation will become a reality for Massachusetts or New Hampshire is anyone's guess, but regardless of the outcome 2018 is shaping up to be an interesting year for water law.

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