

LITIGATION/WATER QUALITY

California v. Wheeler/Colorado v. EPA/Clean Water Act/WOTUS

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On June 19, U.S. District Courts in Northern California and Colorado issued opposite rulings on motions seeking preliminary injunctions on the Navigable Waters Protection Rule, defining “waters of the United States” (WOTUS). In *California v. Wheeler* (#20-cv-3005) the court denied the request for a nationwide preliminary injunction. In *Colorado v. EPA* (#20-cv-1461), the court granted the preliminary injunction, applicable only to Colorado. The Navigable Waters Protection Rule (2020 Rule) went into effect on June 22.

In *California v. Wheeler*, the court noted that “...the validity of the 2020 Rule presents an entirely new question. In the prior cases, the issue was always whether the agencies had gone too far in extending the scope of federal regulation. Now the question is whether the agencies have not gone far enough. So, while some guiding principles may be distilled from existing precedents, this is largely a blank slate.” The court went on to say that all the parties and Supreme Court opinions agree that “navigable waters” means something more than traditional navigable waters, but there must be some limitations. “The phrase, therefore, is indisputably ambiguous. As a result, the court is compelled to apply Chevron deference when evaluating whether the Agencies’ interpretation is lawful.” The court was not persuaded at this stage of the litigation that the fractured ruling in *Rapanos* could be used to require the agencies to construe the scope of WOTUS more broadly than the 2020 Rule.

Noting that the 2015 rule was rejected by courts and that a new rule was needed, the court said the agencies’ different approach to state and federal responsibilities “...does not mean they have disregarded the primary objective of the statute in an arbitrary or capricious manner that is likely to warrant setting aside the Rule.” The court pointed out that agencies are not precluded from reversing course, even due to a change in administrations. The only APA requirement is that the agencies must explain the basis for their change. “In the absence of precedent construing what must be included as [WOTUS], plaintiffs are left with little more than policy arguments that the narrowness of the 2020 Rule serves poorly to carry out the objectives of the CWA. As compelling as those arguments may be, they do not provide a sufficient basis for a court to substitute its judgment for the policy choices of the Agency. Had Congress chosen to speak more clearly about how broadly CWA jurisdiction was to extend, or if the CWA did not contemplate the balancing of interests in pursuit of its ultimate goals, it might be possible to characterize the 2020 Rule as an ‘unreasonable’ interpretation. At least at this juncture and on the current record, however, plaintiffs have not shown they are likely to succeed in making that claim.”

In *Colorado v. EPA*, the court found that “Colorado advances an unusual and partly self-contradictory theory of harm, but...has nonetheless satisfied the elements required to obtain preliminary relief.” The effective date of the 2020 Rule was stayed under 5 USC §705, and the agencies were enjoined to continue administering CWA §404 in Colorado under the pre-2020 Rule guidelines for now.

The court pointed out that Colorado has jurisdiction over state waters, and that federal law allows a state to enforce its own standards. However, Colorado law prohibits filling state waters unless project sponsors have a federal CWA §404 permit. “Thus, federal permits are essential to Colorado’s ability to overcome its own ban on dredging and filling.” State administrators have been working with the Colorado legislature since January “to amend the relevant statute to provide state authority equivalent to Section 404” but this was disrupted by the COVID-19 pandemic, and the legislature adjourned on June 15, leaving a regulatory gap.

Additionally, the court held that a preliminary injunction is appropriate because “...EPA has historically completed between three and five enforcement cases in Colorado per year for 404 permit violations...” and at least some of that enforcement burden will fall in Colorado’s lap under the 2020 Rule. Colorado cannot recover its economic losses against the federal government for that diversion of state resources even if it wins its lawsuit, because the APA does not waive sovereign immunity.

Finally, the court determined that Colorado was likely to succeed in proving that the 2020 Rule is “not in accordance with the law.” Unlike the Northern California U.S. District Court, the Colorado U.S. District Court found that “...Rapanos is unambiguously against the construction offered in the plurality opinion, on which the [2020 Rule] is modeled. So, although nothing in Rapanos forecloses reinterpretation of [WOTUS], that

decision does foreclose the reinterpretation at issue here.” In footnote 11, the court said: “The problem for the Agencies, unfortunately, is that Rapanos arguably forecloses every formulation of [WOTUS] proposed in Rapanos, or proposed by the Agencies thus far. For example, eight justices rejected Justice Kennedy’s case-by-case “significant nexus” approach. And the plurality and Justice Kennedy (totaling five justices) rejected the categorically broad approach espoused by the dissenters and the Agencies. In short, the Agencies will get sued – such as by Colorado, twice now – regardless of what they try. But that is a problem for the Supreme Court to resolve. For present purposes, it remains unavoidable that five justices in Rapanos rejected the Agencies’ current approach.” (Internal citations omitted.)

WOTUS/NWPR

On June 22, two new lawsuits challenging the Navigable Waters Protection Rule (NWPR) were filed by Earthjustice on behalf of: (1) the tribal nations of the Pascua Yaqui Tribe, Quinault Indian Nation, Menominee Indian Tribe of Wisconsin, Fond du Lac Band of Lake Superior Chippewa, Tohono O’odham Nation and Bad River Band of Lake Superior Chippewa (*Puget Soundkeeper Alliance et al. v EPA et al.*, U.S. District Court for the District of Arizona at Tucson); and (2) nonprofit organizations Puget Soundkeeper Alliance, Sierra Club, Idaho Conservation League and Mi Familia Vota (*Pasqua Yaqui Tribe et al. v EPA et al.*, U.S. District Court for the Western District of Washington at Seattle). The lawsuits name as defendants the Environmental Protection Agency (EPA) and EPA Administrator Andrew Wheeler, and the Army Corps of Engineers (Corps) and R.D. James in his capacity as Assistant Secretary of the Army for Civil Works.

Both lawsuits are based on five causes of action including: (1) [NWPR] is contrary to the Clean Water Act; (2) [NWPR] is arbitrary and capricious and an abuse of discretion; (3) [NWPR]’s waste treatment exclusion is arbitrary and capricious and contrary to law; (4) [EPA and the Corps] adopted the [NWPR]’s waste treatment exclusion without complying with notice and comment requirements; and (5) the Repeal Rule is arbitrary and capricious, an abuse of discretion and contrary to the Clean Water Act. The Repeal Rule refers to the rule adopted in 2019 that repealed the 2015 “Clean Water Rule.”

The first case highlights that “[a]ll of the tribes maintain a deep personal, cultural, and spiritual relationship to water both within their reservation boundaries but also throughout their ancestral lands.” It goes into detail about how each tribe could be affected. It also states, “Members of the Tribes use and rely on wetlands, ephemeral streams, and other upstream waters that may or have lost Clean Water Act protections under the Repeal Rule and the Navigable Waters Rule.” They argue the Tribes have standing because the two agency actions have “made it more difficult for the Tribes to achieve their institutional objectives in protecting their members, and aquatic environments from the harms associated with unpermitted activities that harm or destroy waters.” This is due to the fact that many tribes do not have delegated authority from EPA to regulate their own waters, and those that do have the authority do not have the resources to fill the regulatory gaps the NWPR creates.

The second case states, “Members of the Plaintiff organizations, for example, routinely enjoy bird watching, taking photographs, and searching for other wildlife and wildflowers both in and along wetlands, ephemeral streams, and other upstream waters that have lost Clean Water Act protections under the Repeal Rule and the Navigable Waters Rule.” It goes on to describe the long-standing educational and advocacy efforts of the organizations that have been focused on protecting “waters of the United States” for environmental, public health, scientific, recreational, cultural and commercial purposes, and their interest in “preserving the full protections of the Clean Water Act.”