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The Tenth Circuit Reverses Injunction Against Implementation of Federal Navigable Waters Protection Rule

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The circuit court held that Colorado had not shown sufficient irreparable injury and vacated the preliminary injunction.

In *State v. U.S. Environmental Protection Agency*, 989 F.3d 874, 879 (10th Cir. 2021), the Tenth Circuit reversed the district court's decision to enjoin implementation of the EPA's and Army Corps of Engineer's Navigable Waters Protection Rule (NWPR). At the district court, Colorado obtained a preliminary injunction against the NWPR's implementation. On appeal, without reaching the merits of Colorado's APA challenge, the circuit court held that Colorado had not shown sufficient irreparable injury and vacated the preliminary injunction.

Clean Water Act

“Congress passed the Clean Water Act in 1972 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' To that end, the Act prohibits 'the discharge of any pollutant by any person' without a permit into 'navigable waters,' which it defines as 'waters of the United States.'” Id. at 879-80 (citing 33 U.S.C. §§1251(a), 1311(a), 1362(7), (12)). Id. There is no clear definition of “waters of the United States,” leaving the EPA and the Corps (the “agencies”) with the authority to regulate, but not without risk of legal challenges. Id. (“Rather than provide a reasonably clear rule regarding the scope of the Clean Water Act, Congress delegated that duty to the EPA and the Corps.”).

Over the years, the agencies have adopted various regulations under the Clean Water Act in which they attempted to define “waters of the United States.” But these regulations have often been challenged and litigated all the way to the Supreme Court.

For example, in 1985, the Supreme Court upheld a regulation “that extended the Corps' jurisdiction … to wetlands 'adjacent to navigable or interstate waters and their tributaries'” and “signaled that the term 'waters of the United States' includes something more than traditional navigable-in-fact waters.” Id. (quoting *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985)).

Later, in 2001, the Supreme Court “rejected the Corps' assertion of regulatory jurisdiction over an abandoned sand and gravel pit that 'seasonally ponded' but was not adjacent to open water.” Id. at 881 (quoting *Solid Waste Agency of Northern Cook County v. U.S. Army Corps*

of Engineers, 531 U.S. 159 (2001)). “The Court held that the Clean Water Act could not be interpreted to cover 'nonnavigable, isolated, intrastate waters' because the term 'navigable' must be given meaning within the context and application of the statute.” Id.

And most recently, in 2006, “the Court attempted to shed light on when wetlands not adjacent to navigable-in-fact waters are waters of the United States.” Id. (citing *Rapanos v. United States*, 547 U.S. 715 (2006)). But the court did not issue any majority opinion, leaving no authority “'on precisely how to read Congress' limits on the reach of the Clean Water Act' and left interested parties 'to feel their way on a case-by-case basis.'” Id. (quoting *Rapanos*, 547 U.S. at 758).

Since *Rapanos* in 2006, the agencies have attempted to publish guidance regarding how they would interpret “waters of the United States” in their rulemaking, but this only resulted in “prompt overhaul and myriad legal challenges.” Id.

On April 21, 2020, the agencies published a final rule, defining “waters of the United States” under the Clean Water Act to include: (1) “'The territorial seas' and traditional navigable waters; (2) 'Tributaries' of those waters; (3) 'Lakes and ponds, and impoundments of jurisdictional waters;' and (4) 'Adjacent wetlands.'” Id. at 881-82 (quoting 33 C.F.R. §328.3(a) (2020)). “Although it's unclear precisely how many miles of waterways and acres of wetlands the NWPR puts outside the reach of the Clean Water Act, the rule undisputedly represents a significant reduction in the scope of jurisdiction the Agencies have asserted in the past.” Id.

Colorado's Challenge to NWPR

Further complicating the regulatory scheme over water, states also regulate their state waters. “Colorado's 'state waters' are defined more broadly than waters of the United States. Its state waters encompass 'any and all surface and subsurface waters which are contained in or flow in or through' Colorado, with minor exceptions not relevant here.” Id. (citing Colo. Rev. Stat. §25-8-103(19)). As part of its regulation, though, Colorado relies on the Corps to issue permits under the Clean Water Act, which are then effective for state-law purposes. Id.

Because Colorado relies on the federal agencies for permitting purposes, it was concerned that NWPR's narrow definition of “waters of the United States” would leave many state waters unregulated and subject to potential harm. “After publication of the NWPR, Colorado filed a lawsuit challenging the rule. Its complaint alleged the Agencies violated the [APA] because the NWPR (1) is not in accordance with law, (2) is arbitrary and capricious, and (3) suffers from procedural flaws.” Id. at 882-83. “According to Colorado, the Corps also violated the National Environmental Protection Act because it promulgated the NWPR without preparing an Environmental Impact Statement.” Id. at 883.

Colorado moved to preliminarily enjoin implementation of the NWPR. The district court granted the motion without holding a hearing. Id. “On June 19, 2020, three days before the NWPR was scheduled to take effect, the

district court stayed the effective date of the rule and enjoined the Agencies to continue administering Section 404 of the Clean Water Act in Colorado under the then-current regulations." Id.

Appeal of Preliminary Injunction

The agencies appealed the district court's decision to preliminarily enjoin NWPR, arguing that the district court had abused its discretion.

Critical to any grant of preliminary injunctive relief is a finding that the movant will suffer irreparable harm if the injunction is denied. "Before the district court, Colorado proffered several reasons why it would be irreparably harmed by the NWPR's narrowing of federal jurisdiction. Colorado claimed the NWPR would create a 'permitting gap' where projects involving the dredging or filling of state waters must halt because it relies exclusively on federal permits to authorize those activities in compliance with state law." Id. at 885. "At the same time, Colorado asserted the removal of federal protections would cause significant environmental harm to its waters because developers would disregard state law and illegally move forward with unregulated dredge and fill projects." Id.

But in granting the preliminary injunction, the district court didn't find either of those sufficient. Id. Instead, "it found Colorado established irreparable injury by showing the NWPR would force it to undertake enforcement action in place of the federal government to protect the quality of its waterbodies." Id.

The Tenth Circuit rejected both the district court's reason for finding irreparable harm and the two other reasons offered by Colorado. The circuit court concluded that there was insufficient evidence to support the district court's finding that Colorado's increased regulatory burden constituted immediate and irreparable harm. "The record evidence raises, at most, the mere possibility of the potential for a small increase in Colorado's enforcement burden at some point in the future." Id. at 887. That wasn't enough. The circuit court also rejected Colorado's two other irreparable harm theories, concluding that the district court had already correctly determined that neither actually constituted irreparable harm because they were both too speculative. As a result, the Tenth Circuit reversed the preliminary injunction and remanded to the district court for proceedings on the merits.

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