CLIENT ALERT

North Dakota Court Issues Eleventh Hour Halt to Besieged WOTUS Rule

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The U.S. District Court for the District of North Dakota (Erickson, J.) yesterday preliminarily enjoined the rule redefining the scope of federal jurisdiction under the Clean Water Act (CWA)—the "Clean Water Rule" or "Waters of the United States (WOTUS) rule." The State of North Dakota and a coalition of other states and state agencies successfully obtained that injunction one day before the rule—which they claim would upset the Act's balance of cooperative federalism and infringe on the States' sovereign authority to regulate land and water use within their borders—was poised to take effect. Although the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers insist that the agencies intended their joint rulemaking to clarify, not expand, the scope of federal jurisdiction under the CWA, the rule has been widely criticized as an expansion of jurisdiction to waters that lack a significant nexus to traditionally navigable waters. Multiple legal challenges to the WOTUS rule have been filed since its June 29, 2015, publication. As discussed in greater detail below, motions for a preliminary injunction have been filed in several of those cases, but with no success until yesterday's ruling from Judge Erickson.

After finding that the district court has jurisdiction over challenges to the WOTUS rule, Judge Erickson held that it "appears likely" that EPA exceeded its statutory authority under the CWA and failed to comply with the Administrative Procedure Act (APA) in what internal agency documents have revealed to be "a [rulemaking] process that is inexplicable, arbitrary, and devoid of a reasoned process."[1] To avoid irreparable harm to the states, and to serve the public interest in ensuring that federal agencies do not exceed their statutory authority, Judge Erickson granted the States' motion to enjoin the rule.

The District Court's Decision

Jurisdictional Holding

Judge Erickson addressed the threshold jurisdictional question first, holding that original jurisdiction vested in the district court. The agencies contend that jurisdiction over challenges to the rule lies exclusively in the courts of appeals under CWA Section 509(b)(1).[2] Although in other challenges to the WOTUS rule, the Southern District of Georgia and the Northern District of West Virginia have ruled that jurisdiction lies in the courts of appeals under CWA Section 509(b),[3] Judge Erickson held that the WOTUS rule does not fall within the scope of Section 509(b) because it does not constitute an "effluent limitation," "other limitation," or have the same effect as a permit issuance or denial.[4]

Section 509(b)(1)(E) grants exclusive jurisdiction to the courts of appeals where the EPA Administrator has approved or promulgated "any effluent limitation or other limitation under section 301, 302, 306, or 405 [33 U.S.C. § 1311, 1312, 1316, or 1345]." The court reasoned that "[t]he Rule itself imposes no 'effluent limitation.' It merely redefines what constitutes 'waters of the United States.' This is made plain by the specific language of the Rule itself, as it unequivocally states that it 'imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments."[5]

The court also found the agencies' claim that the WOTUS rule was an "other limitation" under Section 509(b)(1)(E) to be unavailing because it does not qualify as a restriction on States' discretion with respect to discharges or discharge-related processes. At the evidentiary hearing on the states' motion, EPA had argued that the WOTUS rule placed no new burden or requirements on states, which have the same discretion to dispose of pollutants as before the rule, but merely changed what constitutes jurisdictional waters of the United States.

Similarly, the court held that the WOTUS rule did not effectively issue or deny a permit under Section 509(b)(1)(F), which grants jurisdiction to the courts of appeals in cases involving the "issuing or denying [of] any permit under section 1342 of this title."[6] Rather, the court explained, "the Rule has at best an attenuated connection to any permitting process. It simply defines what waters are within the purview of the 'waters of the United States.'"[7] In fact, the court noted that if the agencies' "exceptionally expansive" view of Section 509(b) prevailed, "it would encompass virtually all EPA actions under the Clean Water Act" because "[i]t is difficult to imagine any action the EPA might take in the promulgation of a rule that is not either definitional or regulatory."[8] Such a result would be contrary to Congress' intent in assigning the appellate courts limited jurisdiction under Section 509(b).

Preliminary Injunction Holding

After resolving the jurisdictional issue, Judge Erickson analyzed the well-established four-factor balancing test for a preliminary injunction, weighing (1) the threat of irreparable harm to the movant absent an injunction, (2) the balance of harms to the parties to the litigation, (3) the movant's likelihood of success on the merits, and (4) the public interest. Those factors, the court concluded, all weighed in the states' favor.

Likelihood of Success on the Merits:The court concluded that the states are likely to succeed on the merits of their claim that EPA violated its authority under the CWA and APA. Because EPA and the Corps trace their authority for the WOTUS rule to Justice Kennedy's concurring opinion in *Rapanos v. United States*,[9] the court applied Justice Kennedy's "significant nexus" test and found the rule lacking. Under the significant nexus analysis, "[i]n order to establish the requisite significant nexus, the Agencies must determine whether the waters in question do in fact affect the chemical, physical, and biological integrity of those waters."[10] Waters that are not actually navigable under the CWA are nevertheless jurisdictional if their effect on the water quality in navigable waters is more than speculative or insubstantial due to their proximity, adjacency, effect on important aquatic system functions, or other relevant considerations.

The court determined that the WOTUS rule likely fails to meet the significant nexus test because it "allows EPA regulation of waters that do not bear any effect on the 'chemical, physical, and biological integrity' of any navigable-in-fact water."[11] The court identified a "fatal defect" in the rule's extension of jurisdiction over any trace amount of water as a jurisdictional "tributary" so long as that water has physical indicators of a bed, bank, and ordinary high water mark.[12] That definition, the court held, is so broad as to "include[] vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of the term."[13] The court was not persuaded otherwise by the agencies' attempt to narrow the definition of tributary somewhat by defining ditches that are excluded from jurisdiction as WOTUS.

The court also found that the states were likely to prevail on their claim that the WOTUS rule is arbitrary and capricious in violation of the APA. The court held that "[t]he Rule asserts jurisdiction over waters that are remote and intermittent … No evidence actually points to how these intermittent and remote wetlands have any nexus to a navigable-in-fact water."[14] In addition, the court held that the agencies had likely arbitrarily adopted the 4,000 foot distance test to determine what waters

could be deemed similarly situated under a case-specific significant nexus analysis. The court was unable to determine the scientific basis for that distance cut-off based on the evidence before it.[15]

The court also determined that the rule violated the APA because it was likely not a "logical outgrowth" of the proposed rule since the final rule greatly expanded the definition of neighboring under the definition of jurisdictional adjacent waters.[16]

Irreparable harm. Moving to the second factor in the preliminary injunction test, the court held that the States had demonstrated that they would face irreparable harm in the absence of an injunction because "[i]mmediately upon the Rule taking effect, the Rule will irreparably diminish the States' power over their waters."[17] The court concluded that the states would lose sovereignty over their waters and would incur unrecoverable monetary harm. For example, North Dakota would have to undertake costly jurisdictional studies of every proposed natural gas, oil, or water pipeline project. Wyoming, in turn, would have to bear the costs of additional CWA Section 401 certifications. Those costs would be unrecoverable from the United States, and the court saw no way to avoid the increased expenses, thus finding irreparable harm in the absence of a preliminary injunction.

Balance of Harms and the Public Interest. The court further held that the balance of harms to the parties in the litigation favors the states—the risk of irreparable harm to the states is both imminent and likely, in Judge Erickson's view. More importantly, the court found that delaying the implementation of the WOTUS rule would cause the agencies "no appreciable harm," but would "allow a full and final resolution on the merits" in the best interests of the public.[18] Judge Erickson also concluded that a broader segment of the public would benefit from enjoining the rule than would benefit from the increased certainty the rule would provide "because [an injunction] would ensure that federal agencies do not extend their power beyond the express delegation from Congress."[19]

On that basis, Judge Erickson granted the States' motion to enjoin the WOTUS Rule.

What happens next?

Yesterday's decision raises several important questions involving the scope of the preliminary injunction, the district court's jurisdiction to issue it in the first instance, and the implications for the plethora of ongoing cases at both the district and circuit court levels challenging the WOTUS rule. Before exploring any of those questions, it bears emphasis that the United States is likely to immediately appeal the order granting the preliminary injunction to the U.S. Court of Appeals for the Eighth Circuit, and it may also seek a stay of that order pending appeal.

Regarding the scope of the injunction, Judge Erickson's order grants the States' "motion for preliminary injunction, enjoining Fed. Reg. 37,054-127."[20] This language begs the question of whether the injunction is nationwide in scope. EPA has taken the position that the injunction is limited to the States that requested it and that, elsewhere, the rule takes effect on August 28.[21] This argument comes as no surprise given EPA's history of declining to follow lower court rulings outside of the jurisdiction in question—a practice commonly referred to as inter-circuit non-acquiescence.[22]

Geographic scope aside, the court's ruling yesterday stands in sharp contrast with two other district court rulings this week dismissing challenges to the WOTUS rule for lack of jurisdiction and dismissing motions for preliminary injunction as moot.[23] In both of those cases, the courts held that the WOTUS rule is subject to direct review by a court of appeals under Clean Water Act Section 509(b), 33 U.S.C. § 1369(b). Notably, in so holding, the Northern District of West Virginia emphasized the Eighth Circuit's

holding in *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), which adopted an expansive view of the scope of 509(b) jurisdiction. By contrast, Judge Erickson declined to follow the *Iowa League of Cities* decision after finding that the WOTUS rule does not fit within any of the Section 509(b) categories. Assuming the Government appeals Judge Erickson's preliminary injunction, there is a possibility that the Eighth Circuit could again adopt an expansive view of Section 509(b) jurisdiction and dissolve the injunction.

Numerous other suits challenging the WOTUS rule remain pending in numerous courts at this time. At the circuit court level, the Sixth Circuit has been chosen to hear all petitions for review of the WOTUS rule that were filed under Section 509(b). That court has not yet addressed whether it has jurisdiction under Section 509(b) over the WOTUS rule, but it will have to do so in the future. If the Sixth Circuit ultimately resolves the jurisdictional issue in EPA's favor, such a ruling would effectively dissolve the preliminary injunction, assuming it remains in effect at that time. At the district court level, the majority of the cases have been stayed pending EPA's request to the Judicial Panel on Multidistrict Litigation (JPML) to transfer and consolidate all district court matters in a single court. Thus, with the exception of the states of Ohio, Michigan, and Tennessee,[24] no state or industry plaintiffs can even try to replicate the result in *North Dakota v. EPA* while those stays remain in place. The JPML is scheduled to address EPA's transfer and consolidation request in October.

In short, the scope of Judge Erickson's preliminary injunction and how long it will remain in effect are topics that are likely to be rigorously debated and litigated (in multiple venues) in the weeks ahead. Aside from those procedural issues, Judge Erickson's opinion is the first judicial signal on the substantive vulnerabilities of the rule when put through close analysis with Justice Kennedy's *Rapanos* opinion. Regulated parties with water features that bear similarities to the tributaries and adjacent waters (whether remote or "neighboring") described in Judge Erickson's opinion can consider building on the court's analysis in an as-applied challenge to the WOTUS rule.

For a copy of the court's decision, click here.

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[1] Mem. Op. & Order at 9, *North Dakota v. U.S. Environmental Protection Agency*, No. 3:15-cv-00059 (D.N.D. Aug. 27, 2015).

[2] 33 U.S.C. § 1369(b)(1).

[3] *See Georgia v. McCarthy*, No. 15-cv-79, Dkt. No. 77 (S.D. Ga. Aug. 27, 2015); *Murray Energy Corp. v. EPA*, No. 15-cv-110, Dkt. No. 32 (N.D. W. Va. Aug. 26, 2015). Those rulings are discussed further below.

[4] Mem. Op. & Order at 1, 3-6, *North Dakota*,No. 3:15-cv-00059.

[5] *Id.* at 3.

[6] 33 U.S.C. § 1369(b)(1)(F).

[7] Mem. Op. & Order at 5, *North Dakota*,No. 3:15-cv-00059.

[8] *Id.*

[9] *Rapanos v. United States*, 547 U.S. 715, 779 (2006) (Kennedy, J., concurring).

[10] Mem. Op. & Order at 10, *North Dakota*,No. 3:15-cv-00059.

[11] *Id.* at 11.

[12] *Id*.

[13] *Id.*

[14] *Id.* at 13.

[15] In analyzing the APA claim, the court reviewed agency memoranda and letters in the absence of the final administrative record, noting that "the footing of the case leaves no other effective way to exercise judicial review in a timely manner. At this point, the Rule's effective date looms, the administrative record has not been produced, and the States assert irreparable harm." *Id*. at 8. The court also reviewed the agencies' Technical Support and Economic Analysis Documents.

[16] The states also asserted a NEPA violation, which the court determined was not necessary to address in light of its conclusion that the agencies likely violated the CWA and APA.

[17] *Id.* at 16.

[18] *Id*.

[19] *Id*. at 18.

[20] *Id*.

[21] *See, e.g.*, Reply in Support of the Motion of the United States for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Consolidation of Pretrial Proceedings, *In re Clean Water Rule: Definition of "Waters of the United States*," MDL No. 2663 (Aug. 26, 2015).

[22] *See, e.g.*, Interpretive Statement and Guidance Addressing Effect of Ninth Circuit's Decision in *League of Wilderness Defenders v. Forsgren* on Application of Pesticides and Fire Retardants (Sept. 3,2003); Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *United States v. James J. Wilson* (May 29, 1998); Applicability of the Summit Decision to EPA Title V and NSR Source Determinations (Dec. 21, 2012), vacated by *NEDACAP v. EPA*, 752 F.3d 999 (D.C. Cir. 2014).

[23] *See Georgia v. McCarthy*, No. 15-cv-79, Dkt. No. 77 (S.D. Ga. Aug. 27, 2015); *Murray Energy Corp. v. EPA*, No. 15-cv-110, Dkt. No. 32 (N.D. W. Va. Aug. 26, 2015).

[24] These three states filed suit in the Southern District of Ohio. That court has not yet ruled on EPA's stay request. *See Ohio v. EPA*, No. 15-cv-2467 (S.D. Ohio).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Kirsten L. Nathanson
Partner – Washington, D.C.
Phone: +1 202.624.2887
Email: knathanson@crowell.com

David Chung
Partner – Washington, D.C.
Phone: +1 202.624.2587
Email: dchung@crowell.com

Sherrie Armstrong Davis
Counsel – Washington, D.C.
Phone: +1 202.624.2846
Email: sarmstrongdavis@crowell.com