

Waters of the United States Rule/Clean Water Act: U.S. District Court (California) Judge Rejects Request to Enjoin June 22nd Effective Date



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United States District Court (Northern District of California) (“Court”) Judge Richard Seeborg issued a June 19th Order denying a number of states’ requests for a preliminary injunction of the June 22nd effective date of the new Clean Water Act definition of Waters of the United States (“WOTUS”). See *State of California, et al., v. Andrew Wheeler, et al.*, Case No. 20-cv-03005-RS.

Seventeen state Attorney Generals filed a Complaint for Declaratory and Injunctive Relief challenging the United States Environmental Protection Agency and United States Army Corps of Engineers (collectively “EPA”) final rule published on April 21st addressing the Clean Water Act definition of WOTUS. See 85 Fed. Reg. 22250.

Judge Seeborg’s denial of the request to enjoin the WOTUS rule means that it will presumably become effective today. However, a couple of important points should be noted.

First, the Judge stated in the context of deciding this request:

... Were the court tasked with the question of whether the new rule represents wise environmental policy or the best approach to protecting water resources that could be supported by scientific data, the result might be different.

Instead, its role in evaluating the request for a preliminary injunction was limited to reviewing whether the rule was adopted in compliance with requirements of the Administrative Procedure Act.

Second, additional judicial challenges are proceeding in other federal courts.

The rule addressing WOTUS is denominated the Navigable Waters Protection Rule (“Rule”).

The definition of WOTUS is arguably one of the three key jurisdictional terms of the Clean Water Act. Its importance is magnified by the fact that it is also relevant to non-National Pollution Discharge Elimination System programs such as:

- Section 404 of the Clean Water Act Wetland Permits
- Section 311 Oil/Hazardous Substances Release Requirements
- Clean Water Act Spill Prevention Control and Countermeasure Regulations

As a result, the definition of WOTUS has been the subject of frequent litigation, legislative oversight, rulemakings and public policy debates since the enactment of the modern version of the Clean Water Act in 1972.

Judge Seeborg in his June 22nd Order undertakes a review of both the current WOTUS rule and of the Obama version of the rule that was withdrawn by the Trump Administration. He also outlined the standard for issuing a preliminary injunction noting that it requires that the plaintiff establish:

- It will likely succeed on the merits
- It will likely suffer irreparable harm in the absence of preliminary relief
- The balance of equities tips in plaintiff's favor
- An injunction is in the public interest

The Judge acknowledged the plaintiffs' argument that the WOTUS rule is arbitrary and capricious because in their view EPA:

. . . lacked an adequate scientific and factual basis for changing their policy so dramatically.

He also referenced the plaintiffs' arguments that various aspects of the rule were not rationale or reasonable and it was not in accordance with the law because it is:

. . . inconsistent with the "text, structure, and purpose" of the Clean Water Act.

The Judge concludes that the phrase WOTUS is ambiguous. He further notes that because precedent does not exist in terms of what must be included as "WOTUS," the plaintiffs (i.e., states) are primarily relying on policy arguments. Plaintiffs' policy arguments may be compelling, but Judge Seeborg states he cannot substitute his judgment for policy choices of EPA.

The Order also addresses four arguments raised by the plaintiffs as to why the rule is arbitrary and capricious. They included:

1. EPA did not adequately justify the fundamental change in policy and improperly discounted the scientific evidence it previously used in support of the prior 2015 rule. (Rejected the argument noting that Chevron provides discretion to the agency if a statute is ambiguous.)
2. The rule disregards the primary objective of the Clean Water Act to protect water quality. (Rejected because it is not improper for EPA to choose a different path under these circumstances.)
3. Two aspects of the rule are targeted. (Both of the arguments below are deemed insufficient to enjoin the rule as arbitrary and capricious.)
 1. A non-navigable water source must contribute surface water flow to a jurisdictional water in a typical year, irrationally excludes wetlands that flood in periodic events, and typical year is not defined.
 2. No workable methodology to distinguish between ephemeral streams which are categorically excluded from coverage and intermittent streams which are not.
4. EPA did not address "reliance interests" that may have arisen under their prior policy approach. (Rejected because given the long uncertainty about the permissible scope of federal regulation under the Clean Water Act it is difficult to see how significant cognizable reliance interests would have arisen.)

As to irreparable harm and other factors, the Judge states that if the plaintiffs had made a stronger showing on the merits, the interest in preserving the status quo would count heavily toward providing preliminary relief. The Judge acknowledged that some of the effects of withdrawing federal protection for some waters and wetlands will begin to manifest immediately.

The Order notes:

That said, the agencies and the intervenor states, have raised substantial challenges to the adequacy of the showing of irreparable harm, particularly insofar as it rests on a number of speculative assumptions. Additionally, unless section 705 is read to permit a stay of the rule without regard to particular geographic impacts, plaintiffs likely have failed to show the harms to which they point apply with equal force in all parts of the country, which could have a bearing on the propriety of a so-called “nationwide injunction.”

Consequently, Judge Seeborg rejects the motion for a preliminary injunction of the WOTUS rule.

A copy of the Order can be downloaded [here](#).