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# Waters of the United States/Clean Water Act: United States District Judge (District of North Dakota) Enjoins Enforcement of Rule in 24 States (Including Arkansas)

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United States District Judge Daniel L. Hovland (District of North Dakota) issued an April 12th Order granting plaintiffs' Motion for Preliminary Injunction ("Order") addressing a challenge to a final rule issued by the United States Environmental Protection Agency and United States Corps of Engineers (collectively, "EPA") addressing the Clean Water Act definition of Waters of the United States ("WOTUS").

Twenty-four states (including Arkansas) and 19 national trade associations requested that the Court preliminarily enjoin the new WOTUS rule while it considers their consolidated request to vacate and remand.

The definition of WOTUS is arguably one of the three critical jurisdictional terms of the Clean Water Act. Its importance is magnified by the fact that it is also relevant to non-National Pollutant 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

EPA had previously withdrawn the revisions to the Clean Water Act definition of WOTUS promulgated during the Trump Administration. The Trump Administration had previously rescinded an Obama era revision of WOTUS.

The most recent rule put forth by EPA was described by the federal agency as providing jurisdiction over waterbodies that Congress intended to protect under the Clean Water Act. The rule has been challenged by a number of states and trade associations in various federal courts. A number of environmental groups and other states intervened to support the EPA rule.

The states and trade associations (collectively, "Plaintiffs") ask that the rule be enjoined on statutory and constitutional grounds. They allege that the rule violates the Administrative Procedure Act, arguing:

1. The rule is arbitrary and capricious.
2. The rule is contrary to constitutional right, power, privilege, or immunity.
3. The rule exceeds statutory authority.

4. The rule was promulgated without observance of required procedure.

The Plaintiffs also argued that the rule violates the:

1. Commerce Clause.
2. Tenth Amendment.
3. Due Process Clause.
4. Nondelegation Doctrine.

The Court's 45-page Order first addresses the history of WOTUS and includes a discussion of *Rapanos v. United States*. It then rejects EPA's argument that the 24 states do not meet the constitutional minimum for standing.

In determining whether to grant a preliminary injunction, the Court utilizes the Eighth Circuit Court of Appeals four-factor inquiry from *Dataphase Sys., Inc. v. C.L. Sys., Inc.*

The Court in addressing the likelihood of the merits considers to a great extent the decision from the Federal District Court in Texas which held that the State of Texas and Idaho were likely to succeed on the merits in their challenge of the rule.

The District Court in Texas argued that the rule:

- Reads navigability out of the Clean Water Act
- Varied the significant-nexus standard from what the Court perceived was articulated in *Rapanos v. United States*

The North Dakota District Court stated that it found:

. . . the new 2023 rule is neither understandable nor "intelligible," and its boundaries are unlimited.

Concerns expressed included:

- EPA Has Arguably Acted Beyond Statutory Authority
- EPA's Actions Are Arguably Arbitrary and Capricious (citing ambiguity and problems with the cost-benefit analysis)
- Constitutional Concerns (stating that the "navigable waters" requirement of the Clean Water Act was ignored)

The Court found in favor of the Plaintiffs in reviewing the other *Dataphase* factors (i.e., *Dataphase* irreparable harm, balance of harms and the public interest) and enjoins EPA from implementing or enforcing the rule in 24 states (which includes Arkansas).

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