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Already? Conflicting Rulings on 2020 WOTUS Rule

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The silence you are hearing is no one being surprised.

The limits of the phrase “waters of the United States” within the Clean Water Act (CWA) have been the subject of conflicting, confusing, and often divergent case law for decades, and the efforts of the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (USACE) to issue new rulemakings beginning in the Obama administration have only led to a deeper legal quagmire. The most recent effort to redefine the term, the Navigable Waters Protection Rule (2020 WOTUS Rule) is already subject to conflicting court decisions, and split implementation.

The contrary decisions were both handed down on June 19, 2020 in the United States District Court for the District of Colorado and in the United States District Court for the Northern District of California. The Colorado decision granted the state’s request for a preliminary injunction preventing the implementation of the 2020 WOTUS Rule in Colorado. The California decision considered and rejected a similar request for nationwide injunction by seventeen states.

Colorado’s decision turned on an analysis of the U.S. Supreme Court Decision in Rapanos v. United States, 547 U.S. 715 (2006). Noting that is difficult to ascertain what the 4-1-4 Rapanos decision actually stands **for**, the Colorado district court looked at what it stands **against**. Five justices in Rapanos were expressly opposed to the categorical exclusion of intermittent and ephemeral streams from Clean Water Act protection that was proposed by the plurality opinion of Justice Scalia. Because the 2020 WOTUS Rule attempts to codify what the Supreme Court has already rejected as “inconsistent with the [CWA’s] text, structure, and purpose” (see Rapanos at 776), the judge concluded that Colorado is likely to succeed on the merits, and granted the requested injunction.

The California decision came to the opposite conclusion, relying heavily on the inherent ambiguity of the term “navigable waters” within the CWA. Citing Chevron U.S.A. v. NRDC, Inc. 467 U.S. 837 (1984), the court believed

deference was due to the agencies when implementing ambiguous terms in a statute. The district court also noted that under National Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S. 967 (2005), an agency reversing itself regarding the interpretation of an ambiguous term is not automatically cause for denying Chevron deference. Moreover, the district court noted that a "court's prior judicial construction of a statute [read: Rapanos] trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." Brand X at 982. The court could not construe any proposition from the fractured Rapanos opinions as following unambiguously from the terms of the CWA, and thus concluded that the plaintiffs had not carried their burden of showing a likelihood of success on the merits. The broader injunction requested by the plaintiffs was denied.

The 2020 WOTUS Rule excludes a number of categories of waters from Clean Water Act protections that were either expressly or implicitly protected under the more expansive 2015 WOTUS Rule. Among the exclusions in the 2020 WOTUS Rule are: groundwater; ephemeral water features including rills, swales and ephemeral streams; artificial lakes and ponds that are not jurisdictional impoundments and are constructed in uplands; stormwater control features; and ditches that are not traditional navigable waters. The 2020 WOTUS Rule became effective (everywhere but Colorado) on June 22, 2020, and is subject to numerous ongoing legal challenges. The smart money is on the "waters of the United States" remaining muddy for the foreseeable future.