

Waters of the United States Rule/Clean Water Act: U.S. District Court (Colorado) Judge Enjoins June 22nd Effective Date for the State of Colorado



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United States District Court (District of Colorado) Judge William J. Martinez issued a June 19th Order granting the State of Colorado's ("Colorado") request 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 Colorado v. U.S. Environmental Protection Agency, et al.*, Civil Action No. 20-cv-1461-WJM-NRN.

The Judge reached an opposite result from the previously described June 19th Order by the United States District Court (Northern District of California) which denied a number of states request for a preliminary injunction of the June 22nd effective date. (See previous post [here](#).)

Colorado had filed an Amended Motion for a Preliminary Injunction which the Court construed as a motion for a stay of action under 5 U.S.C. § 705 to invalidate 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 Martinez concludes in issuing the Order that:

. . . Colorado advances an unusual and partly self-contradictory theory of harm, but Colorado has nonetheless satisfied the elements required to obtain preliminary relief.

As a result, he enjoined EPA from implementing the new WOTUS definition in Colorado.

The Judge in his analysis of the issue focuses on the Section 404 dredge and fill process. He notes that Colorado asserts jurisdiction over "state waters" which are defined to mean without exception:

. . . any and all surface and subsurface waters which are contained in or flow in or through this state.

Further, Colorado law provides that:

. . . no person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the division. (Referencing the Water Quality Control Division of the Colorado Department of Public Health and Environment)

The Judge states that anyone seeking to fill waters that are in dispute regarding the WOTUS rule will still need a permit from the State of Colorado. Under Colorado law:

. . . no permit shall be issued which allows a discharge that by itself or in combination with other pollution will result in pollution of the receiving waters in excess of the pollution permitted by an applicable water

quality standard unless the permit contains effluent limitations and a schedule of compliance specifying treatment requirements.

The combination of these Colorado statutes and the new WOTUS rule are described by the Judge as a “problem for Colorado.” He states:

. . . Because discharges of large quantities of fill, by their nature, are likely to result in exceedances of state water quality standards and compromise the classified uses of these waters, the [state] could not allow almost any of them under a state discharge permit.

No state water quality standard is in place that “contemplates dumping dirt and rock into water until it becomes dry land.” Filling state waters is stated to be “flatly prohibited under Colorado law.”

The Colorado legislature attempted to amend the relevant state statute to provide authority similar to Section 404 of the Clean Water Act. Because of the pandemic, it is stated to have not been accomplished.

For reasons related to the previous discussion, the Judge finds that Colorado will suffer an injury in fact that is traceable to the WOTUS rule and would be redressed by a favorable ruling in the request for a preliminary injunction. It further determines that Colorado is likely to succeed in proving that the WOTUS rule is not in accordance with law and in balancing the harms and public interest that the “. . . entire approach of the New Rule is contrary to Rapanos.”

Judge Martinez states that it is against the public interest to “create a hybrid Current-New Rule, which would likely even be more confusing and unworkable than allowing the New Rule to take effect and later invalidating it.”

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