Why Colo. Stay Of Trump's Water Rule Is Noteworthy

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On June 19, Judge William Martinez of the U.S. District Court for the District of Colorado entered an administrative stay of the recently issued Clean Water Act rule that reduces the ambit of waters within the jurisdictional reach of the federal government. The impact of the stay is that it preserves the status quo in Colorado for the time being, and it previews the potential invalidation of the rule — at least in Colorado.

At issue was the Trump administration's new Navigable Waters Protection Rule, effective June 22, which codified U.S. Supreme Court Justice Antonin Scalia's 2006 four-justice plurality opinion in Rapanos v. United States:
[T]he phrase ["waters of the United States"] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.[1]

The new rule supersedes the previously repealed 2015 Clean Water Rule promulgated by the Obama administration, which codified Justice Anthony Kennedy's concurring opinion in Rapanos: Wetlands are jurisdictional if they possess a "significant nexus" with waters of the United States:
either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable."[2]

The effect of the new rule is that it excludes from CWA jurisdiction certain waters currently regulated. The state of Colorado sought an injunction of the new rule, claiming in part that the "dramatic reduction" in CWA jurisdiction would deprive the state of "effective tools to keep its streams and wetlands clean."

The court granted the stay pursuant to Section 705 of the Administrative Procedures Act, or APA, based on the four injunctive relief factors: the likelihood of irreparable harm in the absence of relief; the likelihood of success on the merits; the balance of equities favoring injunctive relief; and injunctive relief being in the public interest.

With regard to the first factor — the risk of irreparable harm — the court rejected Colorado's contention that the new rule would create a "permitting gap." Colorado argued that developers would be unable to obtain federal 404 permits for dredge-and-fill activities in disputed waters, because Colorado allegedly bans such activities altogether, thus creating the alleged permitting gap.

Colorado's definition of "state waters" is far broader than the new rule's definition of waters

of the United States, encompassing "any and all surface and subsurface waters which are contained in or flow in or through this state."[3] Although it thus confers authority to regulate discharges in such waters, including those resulting from dredge-and-fill activities, Colorado broadly claimed that it could not issue permits for such activity because discharges of fill "are likely to result in exceedances of state water quality standards and compromise the classified uses of these waters" in contravention of the Colorado Water Quality Control Act.[4]

The court held that Colorado failed to provide any evidence to support the claim, and that: Colorado's inability to authorize these projects is the result of nothing other than Colorado's choice in the matter ... because the Colorado Legislature made the questionable decision to enact a clean water statute that provides no exception for filling.[5]

The court likewise rejected Colorado's theory of "direct environmental harm" that previously law-abiding developers would now flout state law and conduct dredge-and-fill activities without mitigation. It found that theory to be "nothing more than attorney argument" because Colorado provided no supporting evidence, and the court cannot rely upon the actions of third parties or the prediction that someone will disobey the law.[6]

The court also dismissed a third theory of injury — additional costs to create and administer a new permitting regime to replace federal 404 permitting — because it would require legislative authorization, and the state legislature already adjourned for the year.[7]

Ultimately, though, the court sympathized with Colorado's claim of injury based on its need to increase enforcement efforts to ensure that dredge-and-fill activities were not being undertaken in disputed waters, which would prompt an uncompensated diversion of resources.[8]

Second, as to the likelihood of success on the merits, the court agreed that the new rule violates the APA. The court rebuffed Colorado's initial argument that the new rule "conflicts with Congress' intent to create a federal-state partnership ... to protect the broadly defined 'waters of the United States'" because Colorado has an "unusual legislative policy" of forbidding dredge-and-fill activities altogether.[9]

But while the court did not agree with the state's interpretation of the CWA's purpose and history, it did favor Colorado's argument that Rapanos prohibits the new rule's interpretation of waters of the United States. In that case, a majority of the justices — one in concurrence and four in dissent — rejected Justice Scalia's categorical exclusion from CWA jurisdiction of "channels containing merely intermittent or ephemeral flow" and, more broadly, it found his plurality opinion to be "inconsistent with the [CWA's] text, structure, and purpose."[10]

Because the new rule features that categorical exclusion, and generally attempts to codify the plurality opinion, the court determined that Colorado was likely to succeed in proving that the new rule contravenes Rapanos, and thus violates the APA.[11]

Third, the court held that the final two factors, balance of harm and public interest, weighed in favor of Colorado. The court noted the apparent inconsistency of Colorado seeking an injunction — based upon environmental claims — for the purpose of enabling additional development "at the expense of the environment."[12]

But it nonetheless generally agreed that the public interest is served by not allowing the new rule to take effect at this time. Otherwise, it would risk creating confusion if (and likely,

when) the court invalidates the new rule.

The injunction is noteworthy for several reasons:

- In Colorado, the waters of the United States regulatory framework reverts back to Rapanos and the U.S. Environmental Protection Agency's 2008 Rapanos guidance, since the 2015 Clean Water Rule was repealed in 2019 by the Step One rule.[13] So at least in Colorado, the U.S. Army Corps of Engineers' Omaha District will continue to process 404 permits for disputed waters — and, for the time being, Colorado's claimed permitting gap does not exist.

- Colorado's brief claimed that about half of state waters previously protected will be unprotected by the new rule. Yet, the Colorado Department of Public Health and Environment's own one-page summary of the proposed legislation to address this gap stated that that the new rule would exclude only 25% of Colorado's waters from federal protections, and Colorado's own fiscal note for the legislation included a range of 15% to 50%. In all likelihood, the disputed waters in Colorado would likely be at the lower range of this estimate, but a significant expenditure of resources will be necessary to accurately assess the new rule's impact. The ultimate number may diminish Colorado's enforcement burden, which was the foundation of the court's irreparable injury analysis.

- On the same day Judge Martinez entered his order, Judge Richard Seeborg denied a nationwide stay request from California, New York and 15 other states in the U.S. District Court for the Northern District of California in State of California et al. v. Andrew Wheeler et al.[14] In analyzing the likelihood of success on the merits, Judge Seeborg found the term "waters of the United States" to be indisputably ambiguous, and thus applied Chevron. Critical to that decision, however, was his view that the state of California attempted to "cobble together a holding from the [Rapanos] concurrence and the dissent." But Judge Martinez noted, in contrast, that Vasquez v. Hillery[15] holds that the "agreement of five justices, even when not joining each other's opinions, 'carr[ies] the force of law.'" Applying this framework, Judge Martinez appears to view the New Rule as violating the opinion of a majority of the Rapanos court.

- Judge Martinez noted that the Colorado General Assembly considered but declined to pass legislation during the 2020 session that would create a state-based dredge-and-fill permitting regime. Because the impetus for that legislation was the alleged permitting gap created by the new rule, which is now stayed and appears to be in jeopardy in Colorado, the support for such legislation in the 2021 session may diminish.

In the next several months, parties to this case will fully brief the issues, and the court will rule on the merits. As indicated above, it seems likely that Judge Martinez will invalidate the new rule. Meanwhile, courts across the country, including the U.S. District Court for the District of Oregon and the U.S. District Court for the Western District of Washington, will consider similar requests for a stay, and it seems likely that some will invoke Judge Martinez's analysis.

Given the growing patchwork of competing definitions of waters of the United States across the country created by Rapanos, the EPA's 2008 guidance, the 2015 Clean Water Rule, stays of that rule, subsequent rulemaking for the new rule, and now stays of that rule, it is

important now — more than ever — to monitor and potentially help shape new developments.

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[1] Rapanos v. United States, 547 U.S. 715 (2006), at 739.

[2] Id. at 779-80.

[3] C.R.S. § 25-8-103(19).

[4] Order at 5.

[5] Order at 8.

[6] Id. at 11.

[7] Id.at 13–14.

[8] Id.at 13–17.

[9] Id.at 22–23.

[10] 547 U.S. at 733–34, 776.

[11] Order at 23–25.

[12] Id. at 26.

[13] 84 Fed. Reg. 56,626 (Oct. 22, 2019).

[14] State of California et al. v. Andrew Wheeler et al., Case No. 20-cv-03005-RS.

[15] Vasquez v. Hillery, 474 U.S. 254, 262 n.4 (1986).