

On February 2, the Department of Justice, Environment and Natural Resources Division (DOJ-ENRD) filed a motion to stay the proceedings in the 10th Circuit Appeal over the 2020 Navigable Waters Protection Rule (NWPR). The judge in the underlying case *Colorado v. EPA et al.* (U.S. District Court for Colorado, 20-cv-01461) issued a preliminary injunction last June, making Colorado the only state where the 2020 NWPR has not taken effect. Several parties appealed the preliminary injunction, and the 10th Circuit heard oral arguments last November, but has not issued a decision. The District Court case is on hold pending a decision on the consolidated appeals.

The DOJ-ENRD noted the change in Administrations. In conformance with the EO 13990, the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) are reviewing the NWPR. The EO also provides that the DOJ may provide notice of the EO and may “request that the court stay or otherwise dispose of litigation, or seek other appropriate relief consistent with this order, until the completion of the processes described in this order.”

The DOJ-ENRD argued: “The Agencies ask the Court to hold the consolidated appeals in abeyance for 60 days in order to allow the Agencies to review the NWPR and assess potential next steps in this litigation. Because the appeals have been briefed and argued, the Agencies are asking the Court to hold off on issuing a ruling. The Agencies will make another filing before the end of the 60 days updating the Court on the status of the Agencies’ review and will propose that the Court continue or end the abeyance or that the Court take some other action.... While this is the only pending challenge to the NWPR in a court of appeals, the Agencies are also seeking abeyances or stays in the many pending district court challenges to the NWPR.”

CONGRESS/WATER QUALITY
EPA/Clean Water Act/NWPR

On February 5, with Vice President Kamala Harris breaking a 50-50 tie, the Senate passed a concurrent resolution setting forth the Fiscal Year 2021 congressional budget and budgetary levels for FY2022 through FY2030 (S.Con.Res.5). The measure now goes to the House for consideration. Senator Shelly Capito (R-WV) successfully offered an amendment (S.Amdt. 655) to establish a deficit-neutral reserve fund relating to preserving the continued implementation of the consistent, clear, and functional categories and exclusions of jurisdictional waters in the NWPR, with Senator Joe Manchin (D-WV) voting in favor (51-49).

On February 3, the Senate Committee on Environment and Public Works (EPW) held a confirmation hearing on the nomination of Michael Regan to be the new Administrator of the EPA. Senator Shelly Moore Capito (R-WV) called the meeting to order and acknowledged that it was Senator John Barrasso’s (R-WY) last meeting as he would be moving over to the Energy and Natural Resources Committee to take a leadership position there. Senator Tom Carper (D-DE) will be the new EPW Chair, and Capito will be the new Ranking Member.

Regan has served as the Secretary of the North Carolina Department of Environmental Quality (NCDEQ) for the past four years. In his written testimony, Regan said: “Throughout my career, I’ve learned that if you want to address complex challenges, you must first be able to see them from all sides and you must be willing to put yourself in other people’s shoes. The best way to do that is by convening stakeholders where they live, work and serve, fostering an open dialogue rooted in a respect for science, a clear understanding of the law, and a commitment to building consensus around pragmatic solutions. I have also learned that we can’t simply regulate our way out of every problem we face. This approach has proven to be effective during my time as the Secretary of DEQ. We’ve tackled adverse impacts from hog farms, cleaned up toxic PFAS pollution in our rivers, and reached the largest coal-ash cleanup agreement in U.S. history.... In North Carolina, we are moving beyond the old argument that we must pit creating jobs against protecting the environment. We’ve demonstrated that you can do this from the mountains to the coast and everywhere in between. These two values are not mutually exclusive, they can go hand in hand.”

Regan also said: “This Administration’s priorities for environmental protection are clear. We will restore the roles of science and transparency at EPA, and support the talented, dedicated career officials. We will move with a sense of urgency on climate change. We will stand up for environmental justice and equity. And we will do it in a collaborative manner, in partnership with state and local governments who know their own communities better than the federal government ever could. We will work transparently with responsible industries eager to establish clear, consistent rules of the road. We will collaborate with innovative businesses well positioned to help solve problems. We will engage working Americans whose voices have been absent from the conversation about our environment for too long. And, finally, we will do this work in partnership with Congress, leveraging your expertise and concerns for your constituents as we strive to build

healthier communities through environmental stewardship and economic growth. We all have a stake in the health of our environment, the strength of our economy, the well-being of our communities, and the legacy we will leave to the next generation in the form of our nation's natural resources. And while those values may not unite us on every single question of policy, I think it's a pretty solid foundation for a successful partnership."

When questioned about the NWPR and next steps, he noted that the NWPR was a rollback that left vulnerable wetlands unprotected. "What I'm hopeful for is that we don't have to go with the slingshot approach, that we can look for a common ground where we give the farming community and the environmental community some certainty that as we move forward that we're going to follow the science, follow the law, look at a pragmatic approach that doesn't overburden the farmer. But we don't have to sacrifice precious wetlands in North Carolina like our Carolina bays and the others." (E&E News 4/4/20)

On January 17, Senate Republicans introduced a Senate Resolution (S. Res. 17), "Expressing the sense of the Senate that clean water is a national priority and that the April 21, 2020, Navigable Waters Protection Rule should not be withdrawn or vacated." The resolution was referred to the EPW Committee. Similar resolutions were introduced in the House and Senate by both parties in the 115th and 116th Congresses in an effort to support or oppose the 2015 Clean Water Rule, and the 2020 NWPR, but Congress has not reached any agreement on how "waters of the United States" should be defined in the Clean Water Act (CWA), leaving it to the EPA and the courts to determine the extent of CWA jurisdiction.

LITIGATION/WATER QUALITY

Navigable Waters Protection Rule/WOTUS

On January 19, just prior to the change in Administrations, the DOJ-ENDR filed a response and cross-motion for summary judgment in *California et al. v. Wheeler et al.* (U.S. District Court for the Northern District of California, #20-cv-3005). California and other states filed their motion for summary judgment on November 23, 2020. The Plaintiff states and cities challenged the narrowed jurisdiction of the NWPR, which excluded ephemeral streams, wetlands without surface connections to covered waters, and made interstate waters an independent category. They argued that the Corps and EPA's NWPR is flawed because: (1) they failed to examine important factors in their effort to balance water quality and federalism, such as "how excluding all ephemeral streams and countless wetlands will impact water quality or state rights and responsibilities;" (2) they ignored prior factual findings of the agencies under the previous Administration about the impact that ephemeral streams and wetlands have on downstream waters, and the "typical year" evaluation of flow is vague; and (3) they failed to examine the extent to which states and cities "have relied on prior long-standing definitions of 'waters of the United States' that included those streams and wetlands." The Plaintiffs also argued that the NWPR interpretation of the CWA conflicts with precedents in previous Supreme Court decisions.

The DOJ-ENRD responded that the NWPR "brought decades of debate regarding the jurisdictional limits of the [CWA] to a close. Under prior regulatory regimes, CWA jurisdiction often turned on an administratively burdensome and case-specific analysis. This analysis looked at whether certain wetlands and other waters had a "significant nexus" to traditionally navigable waters – a case-by-case analysis merely intended to be a stopgap absent more specific regulations by the Agencies." They argued that under the NWPR, the "regulated public can better anticipate whether a CWA permit may be required to discharge pollutants to a particular water or wetland."

The Defendants argued: "While jurisdiction is fundamentally a legal inquiry, the Agencies did consider the science, as well as other factors relevant to their reasoned decisionmaking. The Agencies' analysis and discussion span more than 1,500 pages across the rule's preamble, the Response to Comments, the Resource and Programmatic Assessment, and the Economic Analysis." They disagreed with the Plaintiffs that shifting "regulation of certain waters and wetlands exclusively to state and tribal authorities automatically spells environmental catastrophe. But the Agencies' balancing of the CWA's objective and policy consistent with the CWA's cooperative federalism framework is reasoned. The NWPR is consistent with the CWA, is well-supported by the administrative record, and is a lawfully promulgated regulation entitled to *Chevron* deference." They also argued that the NWPR is entitled to deference as a reasonable interpretation of the ambiguous phrase "waters of the United States," both because earlier precedent is not directly applicable to the current rule, and because prior judicial construction of a statute only trumps an agency construction where the term is unambiguous with no room for agency discretion.