

On April 12, the U.S. District Court of North Dakota (*West Virginia et al. v. EPA*, #3:23-cv-32) issued a preliminary injunction staying the implementation of the 2023 Waters of the United States (WOTUS) Rule in 24 states (AK, AL, AR, FL, GA, IA, IN, KS, LA, MI, MO, MT, ND, NE, NH, OH, OK, SC, SD, TN, UT, VA, WV, and WY). The court agreed with many of the findings and conclusions of the U.S. District Court for the Southern District of Texas as it issued a similar preliminary injunction (*Texas et al. v. EPA*, #3:23-cv-17). See WSW #2559.

On the issue of whether the States have standing, the court said: “The Clean Water Act clearly contemplates a state and federal enforcement scheme. States must establish water quality standards for ‘waters of the United States’ within their borders, subject to EPA approval. 33 U.S.C. §§ 1313(a) and 1342. States administer the National Pollution Discharge Elimination System. The intent of the Clean Water Act is not to impede state’s rights and responsibilities in governing pollution, land use, and water use. 33 U.S.C. § 1251(b). The numerous declarations filed in this case by state officials outline in detail the specific costs of state compliance with the EPA’s new 2023 Rule, as well as the significant infringement on state sovereignty that confers standing on the named plaintiffs.... The 2023 Rule does cause injury to States because they are the direct object of its requirements. And the States are also landowners with direct obligations under the Clean Water Act. There is not a mere possibility the new regulations will impact the States - it is a given. The irreparable harm to the states that occurs with the implementation of the new 2023 Rule is clear and undisputed.... More important, the 2023 Rule arguably asserts jurisdiction over interstate waters not covered by the Clean Water Act as well as intrastate waters that may have some ‘significant nexus’ to non-jurisdictional waters.... These declarations reveal the new stringent compliance requirements of the Rule (and associated costs) will result in the significant expenditure of additional state funds.”

The court determined that Chevron deference “does not apply when the statutory language of the law at issue...implicates criminal penalties as it does in this case. There are significant criminal penalties that may apply under the 2023 Rule – fines, imprisonment, or both – even for negligent violations of the rule.... The principle derives from the established rule of lenity, which requires that ambiguities be resolved against the application of criminal penalties.” The court also acknowledged the recent passage of H.J. Res. 27, and noted that the CWA does not express a clear intent from Congress for the agencies to implement such a far-reaching regulation.

The court found that the 2023 rule has unlimited boundaries and “raises a litany of other statutory and constitutional concerns.” The court noted that EPA has arguably acted beyond its statutory authority, noting problems with several categories of water, including: (1) interstate waters not connected to navigable waters; (2) impounded waters without any outlet or hydrologic connection to the tributary network; (3) an overly broad definition of tributary that includes dry waterways; (4) non-navigable intrastate waters previously considered isolated and not subject to CWA jurisdiction; and (5) a treatment of wetlands that is “plagued with uncertainty” and extends jurisdiction to remote wetlands that the U.S. Supreme Court has already excluded.

Additionally, the court recognized that “the exercise of Commerce Clause authority under the Clean Water Act has some limits, and the regulations must in some manner be tied to navigability to withstand a constitutional challenge. The exercise of jurisdiction over all rivers, lakes, and other waters that flow across state boundaries, no matter how small or isolated and regardless of navigability is constitutionally troublesome. There is nothing in the text of the Clean Water Act that supports making every wetland, stream, or other water crossing a border subject to federal jurisdiction.”

The court pointed to numerous terms that remained undefined, such as “similarly situated,” “in the region,” “chemical, physical, or biological integrity,” or the standard to measure a “significant effect.” The court described other definitions as murky and unintelligible, and noted that they “provide little guidance to the parties impacted by the regulation.”

On the issue of “irreparable harms,” the court walked through several pages of examples cataloged by Alaska, North Dakota, and West Virginia, as well as the arguments of the 24-state coalition regarding: (1) loss of sovereignty over waters of the state; (2) the cost of significantly increased state obligations to implement the CWA programs; and (3) increased costs for taxpayer-funded projects and development throughout the State, and loss of project tax revenue due to delays. “The twenty-four States in this case have persuasively shown that the new 2023 Rule poses a threat to their sovereign rights and amounts to irreparable harm. The States involved in this litigation will expend unrecoverable resources complying with a rule unlikely to withstand judicial scrutiny.”

Regarding the balance of harms and the public interest, the court disagreed with EPA's argument that the public would benefit from the added clarity of the 2023 Rule. "There is no legitimate concern that natural resources are threatened because all local lands and waters remain under the State's traditional protection. A delay allows for a full and final resolution on the merits, and is in the best interests of the public. The Court finds that a far broader segment of the public would benefit from a preliminary injunction because it would ensure that federal agencies do not extend their power beyond the express delegation from Congress.... There is little public interest or any efficiency gained by implementing a new rule which codifies the 'significant nexus' test before the United States Supreme Court issues a decision in *Sackett*. Common sense dictates that it only makes sense to wait. There is no urgency to implement the 2023 Rule. The Supreme Court's decision in *Sackett* will be issued by June 2023 and will likely address many of the unresolved legal issues and jurisdictional determinations at the heart of this lawsuit."