

District Court Enjoins Federal Regulations Revising Scope of Clean Water Act Jurisdiction

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North Dakota v. U.S. Environmental Protection Agency, No. 3:15-cv-00059 (D.N.D. Aug. 27, 2015)

A federal judge, Ralph R. Erickson, in ***North Dakota*** yesterday granted several states' request for a preliminary injunction to halt implementation of the Environmental Protection Agency and U.S. Army Corps of Engineers' new rulemaking redefining the scope of their jurisdiction under the ***Clean Water Act***. District Judge Ralph Erickson found "it appears likely" that, in promulgating the rule, the EPA both exceeded the authority Congress delegated to it, and violated the Administrative Procedure Act. The court's ruling comes one day before the new rule, which redefines "waters of the United States," was set to take effect.

In a statement in response to the order, the EPA said that the new rule would not apply only in the states that had obtained the preliminary injunction: "In light of the order, EPA and the Army Corps of Engineers will continue to implement the prior regulation in the following states: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming. In all other respects, the rule is effective on Aug. 28. The agencies are evaluating these orders and considering next steps in the litigation."

In contrast to Judge Erickson, courts in both West Virginia and Georgia found that

jurisdiction lies with the Circuit Court of Appeals and has denied the preliminary injunctions.

Judge Erickson found the new rule inconsistent with the Supreme Court's 2006 opinion in *Rapanos v. United States*, 547 U.S. 715, because the rule's broad definition of "tributary" asserts jurisdiction over "vast numbers of waters" that are unlikely to have a "significant nexus" to navigable waters as required by *Rapanos*. The court specifically found that no evidence supports the agencies' conclusion that certain "remote and intermittent" waters have a plausible effect on the "chemical, physical, and biological integrity" of a navigable waterway, which is necessary to establish a significant nexus.

The court also found arbitrary the provision of the rule that requires certain waters to be located within 4,000 feet of a navigable waterway in order to be subject to jurisdiction under the significant nexus standard. Further, the court found the definition of "neighboring" in the final rule, which limits the maximum distance from navigable waters for some "adjacent" waters, violates the APA because it is not a "logical outgrowth" of the definition in the proposed rule.

The court based its analysis on two technical documents and two "clearly pre-decisional and deliberative interagency memoranda" that normally would not be considered in evaluating the agencies' action. But the court found consideration of the memoranda was "the only way there can be effective judicial review" because the administrative record in the case could not be produced before the effective date of the rule. Based on this limited set of agency records, the court concluded that "the Agencies' internal documents reflect the absence of any information about how the EPA obtained its presented results" and "reveal[] a process that is inexplicable, arbitrary, and devoid of a reasoned process."

Before reaching the merits of the states' request for an injunction, the district court considered and rejected the agencies' argument that the Clean Water Act grants the federal Courts of Appeals, and not the district courts, exclusive jurisdiction over challenges to the rulemaking because it is an action of the EPA Administrator. As noted above, this decision is at odds with the rulings of two other district courts.

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