

“Waters of the United States” Rule Update

By Gary Pasheilich

On April 12, a federal judge in North Dakota blocked implementation of the Biden Administration’s “Waters of the United States” Rule in 24 states.

As we mentioned in last month’s client update, the Biden Administration’s issuance of its final rule to redefine the term “waters of the United States” or “WOTUS” under the Clean Water Act (the “Rule”) was to receive heightened legal challenge until the U.S. Supreme Court issues its decision in *Sackett v. EPA*. Recent events have proven this prediction to be accurate, and signal that the Rule is under serious threat.

The first indication of how courts view the legal challenges to the Rule was issued on March 19, 2023, when a federal judge in Texas granted a preliminary injunction against the Rule taking effect in Texas and Idaho, but stopped short of granting a nationwide injunction. While the ruling had only limited geographic impact, the court held that the petitioners were likely to succeed in challenging the Rule’s imposition of Clean Water Act jurisdiction over all interstate waters regardless to navigability.

Within days, on March 23, a judge in North Dakota allowed industry groups to intervene in litigation brought by 24 states’ Attorneys General, providing a second opportunity to seek a nationwide injunction against the implementation of the Rule. On April 12, the court granted the request for injunction thereby enjoining the implementation of the Rule in the 24 states in question, specifically: West Virginia, North Dakota, Georgia, Iowa, Alabama, Alaska, Arkansas, Florida, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia and Wyoming.

Judge Hovland was highly critical of the Rule, stating: “The Court finds that the new 2023 Rule is neither understandable nor ‘intelligible,’ and its boundaries are unlimited. Beyond the many problems with the new 2023 Rule recognized by the considered decision of the federal district court in Texas, this Court is of the opinion the 2023 Rule raises a litany of other statutory and constitutional concerns.”

Even so, like the Texas court, Judge Hovland did not issue a nationwide injunction as requested, noting that many states have not challenged the Rule and the U.S. Supreme Court’s decision in *Sackett* remains pending, which will provide much needed clarity.

While a judge dismissed a similar challenge by Kentucky and business groups on March 31 holding that the parties lacked standing, the court followed-up with a ruling on April 20 granting their request for a preliminary injunction pending appeal of the dismissal of their lawsuits.

As a side note, the resolution brought by GOP lawmakers to block the implementation of the Rule under the Congressional Review Act found Senate approval, but was vetoed by President Biden on April 6. In contrast to the above court rulings, the President cited the Rule’s purported clarity.

The impact of the North Dakota ruling cannot be overstated, with the Rule now blocked in more than half of the states in the nation. As litigation continues, it is anticipated that even more important developments

will take place until the U.S. Supreme Court issues its ruling in *Sackett*. We shall continue to monitor and advise on these developments.

For more information, please feel free to contact any of Roetzel's EHS professionals.

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