

Water Rule Reinstatement Shows Specific Objections Are Key

By **David Fotouhi, Andrew Wilhelm and Amalia Reiss** (April 28, 2021, 5:44 PM EDT)

Last month, in *Colorado v. EPA*, the U.S. Court of Appeals for the Tenth Circuit lifted the only preliminary injunction against the U.S. Environmental Protection Agency's and the U.S. Army Corps of Engineers' latest attempt to define the scope of waters and wetlands subject to federal regulation under the Clean Water Act, or CWA.

The Tenth Circuit's decision not only allowed the Navigable Waters Protection Rule to take effect in Colorado, but it also revealed key elements necessary for challengers to demonstrate when seeking preliminary relief against an agency rule. Practitioners seeking such relief should heed the Tenth Circuit's direction to avoid general allusions of harm that lack specificity or imminence, even in the face of a narrowed federal regulatory regime.

A comparison between the unsuccessful efforts by challengers to the Navigable Waters Protection Rule and the successful efforts by challengers to the rule that preceded it reveals key takeaways that practitioners can use to bolster claims of irreparable harm.

Clean Water Rule Litigation

In 2015, the EPA and the Corps promulgated the Clean Water Rule, which redefined the term "waters of the U.S." [1] The rule was immediately challenged — we highlight challenges below in which parties sought preliminary relief.

North Dakota

That same year, in *North Dakota v. EPA*, North Dakota and 12 other states successfully moved to preliminarily enjoin the Clean Water Rule. The U.S. District Court for the District of North Dakota found that the states were likely to succeed on their claims that the Clean Water Rule violated the CWA and the Administrative Procedure Act. [2]

The court addressed two of the eight declarations supporting the states' motion. North Dakota's declaration asserted that the Clean Water Rule would delay planned and statutorily required efforts to reduce natural gas flaring through pipeline construction, while



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Wyoming's declaration asserted that the rule would impose costs on its ongoing coal-bed methane reservoir reclamation program and new permitting requirements on stock watering ponds, costing more than \$100,000 annually.

Importantly, the court agreed that the states would face irreparable harm because, by the agencies' estimates, the Clean Water Rule would increase federal control over state-regulated waters by 2.84% to 4.65%, which would immediately and "irreparably diminish the States' power over their waters." [3]

The court also found that the states would suffer unrecoverable monetary harm, based on assertions that North Dakota would be subject to "undertaking jurisdictional studies for every proposed natural gas, oil, or water pipeline project," and that Wyoming would be "required to bear the costs of additional [CWA Section] 401 certifications." [4]

Georgia

Georgia and eight other states also challenged the Clean Water Rule. In its 2018 decision in *Georgia v. Pruitt*, the U.S. District Court for the Southern District of Georgia granted the states' motion for preliminary injunction on essentially the same bases as the North Dakota court. [5]

The decision focused on the declaration filed by Kansas, which asserted that the Clean Water Rule would cost the state significantly more than \$300,000 to "inventory the designated uses of classified streams," and would increase obligations on the state under the CWA's water quality standards requirements, allegedly without environmental gains.

Like the North Dakota court, the Georgia court found that the states' loss of sovereignty over certain waters constituted irreparable harm. The court also credited assertions of unrecoverable monetary harm, including that the rule would require states to expend resources updating water quality standards, issuing additional state certifications under Section 401, and issuing additional permits. [6]

Additionally, like the North Dakota court, the Georgia court found these costs unrecoverable, because the U.S. has not waived sovereign immunity from suits seeking damages from the unlawful exercise of regulatory authority.

Texas

In support of its motion for preliminary injunction, Texas filed three declarations demonstrating the increased regulatory burden the Clean Water Rule would impose.

In 2018, in *Texas v. EPA*, the U.S. District Court for the Southern District of Texas preliminarily enjoined the Clean Water Rule, finding that the public interest "tipped the balance in favor of granting an injunction ... to an overwhelming degree" because the rule asks "the states, their governmental subdivisions, and their citizens to expend valuable resources and time operationalizing a rule that may not survive judicial review." [7]

Ohio

In contrast to these cases, the injunction sought by Ohio and Tennessee, in *Ohio v. EPA*, was denied by the U.S. District Court for the Southern District of Ohio in 2019. [8] The court did not credit the states' argument that they suffered irreparable harm from the loss of sovereignty over intrastate waters, and

was similarly unpersuaded by the states' contentions of monetary losses.[9]

Oklahoma

The preliminary injunction sought by Oklahoma and business groups, in *Oklahoma ex rel. Hunter v. EPA*, was denied by the U.S. District Court for the Northern District of Oklahoma in 2019.[10]

Oklahoma filed four declarations from state regulators asserting that the Clean Water Rule would lead to increased permit processing and costs and new permit applications. The business groups filed two declarations from individuals who refrained from improving their property out of concern they would be subject to the Clean Water Rule. The court found that there was "no evidence of an aggressive expansion of federal regulation of Oklahoma waters," and that harms asserted in the declarations were speculative and hypothetical.[11]

Navigable Waters Protection Rule Litigation

In April 2020, the EPA and the Corps published the Navigable Waters Protection Rule,[12] which presented a view of federal jurisdiction narrower than the Clean Water Rule. Like the Clean Water Rule, the Navigable Waters Protection Rule faced several swift challenges.

Colorado

Colorado sought to preliminarily enjoin the Navigable Waters Protection Rule, asserting three principal theories of harm through eight declarations. First, Colorado alleged what it called a "permitting gap" whereby certain waters remained protected under state law, but, because Colorado prohibited all discharge of fill into state waters absent a federal permit, the Navigable Waters Protection Rule's narrowing of federal jurisdiction meant that developers lacked a way to lawfully discharge fill into these waters.

Second, Colorado alleged direct environmental harm because developers may begin filling waters no longer subject to federal jurisdiction, in violation of state law. Third, Colorado argued that it would eventually spend money to expand its permitting and enforcement regime. The state argued that its harm was imminent, because it would not be able to issue dredge and fill permits by the Navigable Waters Protection Rule's effective date.

In its 2020 decision in *Colorado v. EPA*, the U.S. District Court for the District of Colorado concluded that "Colorado advance[d] an unusual and partly self-contradictory theory of harm." [13] Nonetheless, it granted the injunction, and held that the state sufficiently demonstrated potential environmental harm and the likelihood of diverting resources for enforcement.[14]

The court addressed two of Colorado's declarations. The first asserted that the "EPA has historically completed between three and five enforcement cases in Colorado per year for 404 permit violations," and that Colorado "does not currently have dedicated funding or staffing resources to undertake this enforcement effort." The second declaration — from a retired EPA employee — described an unpermitted fill that took place in Telluride "[i]n the late 1980s." [15]

Last month, the Tenth Circuit reversed, holding that Colorado had not shown harm that was "imminent, certain, actual and not speculative." [16] Starting with Colorado's enforcement burden theory, the court found that Colorado failed to show imminence, because it did not establish that harm would occur

before the district court could reach a decision on the merits.

The court also found that Colorado failed the certainty and actuality requirements, because its declaration's description of past enforcement actions was too vague to "tie any alleged reduction in federal enforcement — and thus any potential increase in Colorado's enforcement burden — to the jurisdictional changes." [17] The district court's assumptions that at least some prior federal enforcement actions occurred in waters that the Navigable Waters Protection Rule would not cover, and that Colorado would pursue similar enforcement actions, "crossed over from reasonable inference to pure speculation." [18]

Additionally, the Tenth Circuit rejected Colorado's permitting gap theory, for three reasons. First, it constituted self-inflicted harm, because Colorado's Legislature decided not to permit filling of state waters. Second, Colorado did "not point[] to any particular evidence of a dredge or fill operation that is ready to start but will need a federal permit to move forward before the case is decided on the merits." [19] Third, Colorado "concede[d] it will not incur costs ... anytime soon because legislative action is needed to provide this new regulatory authority." [20]

Finally, the Tenth Circuit rejected Colorado's environmental harm theory for lack of causation, because Colorado "has not adduced specific facts suggesting a previously-permitted developer (one who has so far sought to obey the law) would likely conclude that the narrowing of one law means there must be no more laws to comply with." [21]

California

California led a group of states in seeking to preliminarily enjoin the Navigable Waters Protection Rule nationwide. The U.S. District Court for the Northern District of California denied the injunction in its 2020 decision in *California v. Wheeler*, on the basis that California was unlikely to succeed on the merits. [22]

The court concluded that the other three factors — irreparable harm, balance of equities and public interest — tilted somewhat in favor of relief, but could not overcome California's weak showing on the merits.

The court found it "reasonable to assume that some of the effects of withdrawing federal protection for some waters and wetlands will begin to manifest immediately, and certainly over the course of time this action is likely to be pending," but — like the Tenth Circuit — noted that "the agencies ... have raised substantial challenges to the adequacy of the showing of irreparable harm, particularly insofar as it rests on a number of speculative assumptions." [23]

Takeaways for Practitioners

In challenges to the Clean Water Rule, district courts credited demonstrations of the practical effects of expanded federal jurisdiction, including impingement of state sovereignty. The agencies' estimates of increased federal jurisdiction and the declarations showing costs that broader federal jurisdiction would impose on the states were central to these determinations.

In contrast, states' allegations of harm were more attenuated and speculative in challenges to the Navigable Waters Protection Rule. Furthermore, challengers to the Navigable Waters Protection Rule could not rely on a loss of sovereignty argument. [24] Moreover, states were unable to point to specific,

increased costs that they would incur upon the contraction of federal jurisdiction.

These decisions reinforce the need for practitioners seeking preliminary relief in facial challenges to agency rules to provide specific, well-documented examples of irreparable harm that would result prior to a decision on the merits. This demonstration should go beyond what a challenger relies upon to establish injury for standing purposes in both specificity and a showing that the harm would be irreparable.

For example, Colorado may have been able to show specific enforcement actions in formerly federally regulated waters that would be precipitated by the Navigable Waters Protection Rule, including where the violations would occur, when the enforcement actions would occur, and what those enforcement actions would entail, tying the need for increased state enforcement directly to the rule's effects.

Colorado also may have been able to describe state-level programs that would have been immediately impacted by the diversion of resources, and how that diversion would be required by the Navigable Waters Protection Rule. Effective challenges will focus on specific projects, permits, and enforcement actions (and their estimated costs) that will be impacted immediately upon the rule taking effect, rather than generalizations about the hypothetical increased costs of state-level compliance.

Furthermore, basing assertions of irreparable harm on multiple theories and lines of evidence increases the likelihood of success. Practitioners must keep in mind the background of legal requirements that may reduce or eliminate harm even absent court-issued relief, such as Colorado's blanket prohibition on unpermitted filling of state waters.

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[1] 80 Fed. Reg. 37,054 (June 29, 2015). The Clean Water Rule declared all "tributaries" to be "jurisdictional by rule" so long as they contributed flow downstream and had physical indicators of a bed and banks and an ordinary high water mark. As to adjacent wetlands, the Clean Water Rule categorically asserted jurisdiction over all waters located within the 100-year floodplain of a "jurisdictional by rule" water and not more than 1,500 feet from the ordinary high water mark of such water, among others. Certain waters outside of these distance limits were subject to jurisdiction case-by-case, based on an interpretation of the "significant nexus" standard.

[2] *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D. N.D. 2015). The court found that the agencies likely violated the CWA because the breadth of the Clean Water Rule allowed regulation of waters that were "unlikely to have a nexus to navigable waters within any reasonable understanding of the term." *Id.* at 1056. The court also found that the agencies likely violated the APA because the Clean Water Rule "asserts jurisdiction over waters that are remote and intermittent," yet no "evidence actually points to how these intermittent and remote wetlands have any nexus to a navigable-in-fact water." *Id.* at 1057. And the court found that the definition of "neighboring" within the definition of "adjacent" was not a

logical outgrowth of its definition in the proposed rule. *Id.* at 1058.

[3] *Id.* at 1059.

[4] *Id.*

[5] *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018). The court found that challengers were likely to succeed on their claim that the Clean Water Rule violated the CWA and the APA. *Id.* at 1365–66.

[6] *Id.* at 1367–68.

[7] *Texas v. EPA*, 2018 WL 4518230, at *1 (S.D. Tex. Sept. 12, 2018).

[8] *Ohio v. EPA*, 2019 WL 1368850 (S.D. Ohio March 26, 2019).

[9] *Id.* at *3.

[10] *Oklahoma ex rel. Hunter v. EPA*, 2019 WL 2288446 (N.D. Okla. May 29, 2019).

[11] *Id.* at *5.

[12] 85 Fed. Reg. 22,250 (April 21, 2020). The rule redefined "waters of the United States." as: (1) "the territorial seas" and traditional navigable waters; (2) "tributaries" of those waters; (3) "lakes and ponds, and impoundments of jurisdictional waters; and (4) adjacent wetlands." 33 C.F.R. § 328.3(a).

[13] *Colorado v. EPA*, 445 F. Supp. 3d 1295, 1299 (D. Colo. 2020).

[14] *Id.* at 1304–07. The court also found that Colorado was likely to prevail on the merits because five justices in *Rapanos v. U.S.*, 547 U.S. 715 (2006), agreed that the jurisdictional test advanced by the *Rapanos* plurality — which the district court found was similar to the Navigable Waters Protection Rule — reflected an impermissibly narrow reading of the CWA. *Id.* at 1311–12.

[15] *Id.* at 1305, 1306 n.6.

[16] *Colorado v. EPA*, 989 F.3d 874, 879 (10th Cir. 2021). Because it found that Colorado failed to meet its burden of proving irreparable harm, the Tenth Circuit did not address the other factors of the injunction analysis.

[17] *Id.* at 887.

[18] *Id.*

[19] *Id.* at 888.

[20] *Id.*

[21] *Id.* at 889.

[22] *California v. Wheeler*, 467 F. Supp. 3d 864 (N.D. Cal. 2020). The court concluded that California

could not overcome the deference that courts owe to the agencies' interpretation of the ambiguous term "waters of the U.S." The court also found that the Navigable Waters Protection Rule likely was not arbitrary and capricious because the agencies adequately explained their reasoning for changing course from the Clean Water Rule.

[23] *Id.* at 876. The agencies argued that the states had not shown that upstream states would pollute their waters or that they would be unable to meet water quality standards if the Navigable Waters Protection Rule was implemented. Further, the agencies argued that the states' declarants made unreliable and speculative assumptions regarding the scope of waters no longer protected and that third parties would imminently discharge pollutants or fill wetlands.

[24] California unsuccessfully argued that the Navigable Waters Protection Rule "disserves federalism" by "eviscerating the federal baseline of water pollution controls" and punishing "states that adopt strong clean water safeguards." *California v. Wheeler*, No.20-cv-3005-RS, ECF No. 30 at 36 (N.D. Cal. May 18, 2020).