

Revised Definition of “Waters of the United States”

HISTORY OF THE EFFECTS OF LITIGATION OVER RECENT DEFINITIONS OF “WATERS OF THE UNITED STATES”

Each of the agencies’ recent rulemakings to revise the definition of “waters of the United States” has given rise to a host of legal challenges. Over the years, this litigation has, at times, led to different definitions of “waters of the United States” being in effect in different parts of the country. As of the date of signature of this final rule, there are over a dozen cases challenging the agencies’ rules defining “waters of the United States,” including the 2015 Clean Water Rule, 2019 Repeal Rule, and the 2020 Navigable Waters Protection Rule (2020 NWPR).¹ All of these cases are administratively closed, inactive, or being held in abeyance as of the date this final rule was signed. Some of these cases challenge only one of the rules, while others challenge two or even all three rules in the same lawsuit.

Parties challenging the 2015 Clean Water Rule initially brought suit in both federal district and appellate courts. The day before the 2015 Clean Water Rule’s August 28, 2015 effective date, the U.S. District Court for the District of North Dakota preliminarily enjoined the rule in the 13 states challenging the rule in that court at the time. Specifically, the North Dakota district court enjoined the 2015 Clean Water Rule from going into effect in Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015); Order, *North Dakota v. EPA*, No. 3:15-cv-59, Dkt. No. 79 (D.N.D. Sept. 4, 2015) (limiting scope of preliminary injunction to the parties before the court).

Meanwhile, the petitions filed in the courts of appeals seeking review of the 2015 Clean Water Rule were consolidated in the U.S. Court of Appeals for the Sixth Circuit. In that litigation, the agencies argued that the Sixth Circuit properly had subject matter jurisdiction to review the rule, while other parties argued that jurisdiction over review of the rule lay with the district courts. Some parties further argued that the rule should be stayed. In response, on October 9, 2015, the Sixth Circuit issued an order staying the 2015 Clean Water Rule nationwide “pending determination of [the court’s] jurisdiction” and recognizing that its order would restore the “familiar, if imperfect” pre-2015 regulatory regime. *In re EPA & Dep’t of Def. Final Rule*, 803 F.3d 804, 806, 808 (6th Cir. 2015).

On January 13, 2017, the U.S. Supreme Court granted *certiorari* on the question of whether the courts of appeals had original jurisdiction to review challenges to the 2015 Clean Water Rule. *See Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 137 S. Ct. 811 (2017). A year later—on January 22, 2018—the Court issued a unanimous opinion holding that the rule was subject to direct review in the district courts. *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 624 (2018). In response to the Supreme Court’s decision, on February 28, 2018, the Sixth Circuit lifted its nationwide stay of the 2015 Clean Water Rule and

¹ *Pascua Yaqui Tribe v. EPA*, No. 4:20-cv-266 (D. Ariz.); *Colorado v. EPA*, No. 1:20-cv-1461 (D. Colo.); *Am. Exploration & Mining Ass’n v. EPA*, No. 1:16-cv-1279 (D.D.C.); *Env’tl. Integrity Project v. Regan*, No. 1:20-cv-1734 (D.D.C.); *Se. Stormwater Ass’n v. EPA*, No. 4:15-cv-579 (N.D. Fla.); *Se. Legal Found. v. EPA*, No. 1:15-cv-2488 (N.D. Ga.); *Chesapeake Bay Found. v. Regan*, Nos. 1:20-cv-1063 & 1:20-cv-1064 (D. Md.); *Navajo Nation v. Regan*, No. 2:20-cv-602 (D.N.M.); *N.M. Cattle Growers’ Ass’n v. EPA*, No. 1:19-cv-988 (D.N.M.); *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D.); *Ohio v. EPA*, No. 2:15-cv-2467 (S.D. Ohio) (dismissed as moot), No. 22-3292 (6th Cir.) (appeal stayed); *Or. Cattlemen’s Ass’n v. EPA*, No. 3:19-cv-564 (D. Or.); *Puget Soundkeeper All. v. EPA*, No. 2:20-cv-950 (W.D. Wash.); *Wash. Cattlemen’s Ass’n v. EPA*, No. 2:19-cv-569 (W.D. Wash.).

dismissed the corresponding petitions for review. *See In re Dep't of Def. & EPA Final Rule*, 713 Fed. Appx. 489 (6th Cir. 2018).

Following the dissolution of the Sixth Circuit's nationwide stay, the 2015 Clean Water Rule did not go back into effect due to the "Applicability Date Rule"—a rule that the agencies had issued on February 6, 2018, that added an applicability date of February 6, 2020 to the 2015 Clean Water Rule (83 FR 5200). The Applicability Date Rule restored the pre-2015 regulatory regime. On August 16, 2018—mere six months after the rule had been issued—the U.S. District Court for the District of South Carolina vacated and enjoined the rule nationwide. *See South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018); *see also* Order, *Puget Soundkeeper All. v. Wheeler*, No. 2:15-cv-1342, Dkt. No. 61 (W.D. Wash. Nov. 26, 2018) (vacating the Applicability Date Rule nationwide as well).

After the Applicability Date Rule was vacated in August 2018, the 2015 Clean Water Rule went back into effect, except in those jurisdictions where the rule had been enjoined. Specifically, pursuant to the North Dakota district court's preliminary injunction, the 2015 Clean Water Rule did not go into effect in Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). Due to another preliminary injunction, the 2015 Clean Water Rule also did not go into effect in Alabama, Georgia, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin. *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018). Thus, in these 24 states, the agencies continued to implement the pre-2015 regulatory regime following vacatur of the Applicability Date Rule.

In September 2018, three more states obtained a preliminary injunction against the 2015 Clean Water Rule—Texas, Louisiana, and Mississippi—and the North Dakota district court expanded the scope of its preliminary injunction to cover the state of Iowa, raising to 28 the total number of states in which the 2015 Clean Water Rule was not in effect. *See Texas v. EPA*, No. 3:15-cv-162, Dkt. No. 140 (S.D. Tex. Sept. 12, 2018); *North Dakota v. EPA*, No. 3:15-cv-59, Dkt. No. 250 (D.N.D. Sept. 18, 2018).

The regulatory landscape shifted yet again in 2019. First, in May 2019, Colorado withdrew from the North Dakota district court litigation, prompting the court to lift its injunction against the 2015 Clean Water Rule in that state. *North Dakota v. EPA*, No. 3:15-cv-59, Dkt. No. 280 (D.N.D. May 14, 2019).² Then, in July 2019, the Oregon district court issued a preliminary injunction barring implementation of the 2015 Clean Water Rule in Oregon. *Or. Cattlemen's Ass'n v. EPA*, No. 3:19-cv-564, Dkt. No. 58 (D. Or. July 26, 2019), *vacated as moot* Dkt. No. 81 (Mar. 2, 2020).³

² The court also granted New Mexico's motion to withdraw from the litigation and lifted the preliminary injunction as to New Mexico. Order, *North Dakota v. EPA*, No. 3:15-cv-59, Dkt. No. 280 (D.N.D. May 14, 2019). At the same time, however, the court stated that the preliminary injunction against the 2015 Clean Water Rule would remain in effect as to a plaintiff-intervenor representing ten counties in New Mexico. The agencies filed a motion in May 2019 seeking clarification of the applicability of the court's preliminary injunction to those ten counties in New Mexico, but the court has not yet ruled on the motion. *See Defendants' Motion for Clarification Regarding the Scope of the Court's Preliminary Injunction*, *North Dakota v. EPA*, No. 3:15-cv-59, Dkt. No. 282 (D.N.D. May 24, 2019).

³ Three other district courts denied motions seeking to preliminarily enjoin the 2015 Clean Water Rule. *See Ohio v. U.S. Army Corps of Eng'rs*, No. 2:15-cv-2467, Dkt. No. 86 (S.D. Ohio Mar. 26, 2019) (denying preliminary injunction motion filed by Michigan, Ohio, and Tennessee), *appeal dismissed as moot*, *Ohio v. EPA*, 969 F.3d 306, 310 (6th Cir. 2020); *Oklahoma v. EPA*, No. 4:15-cv-381, Dkt. No. 110 (N.D. Okla. May 29, 2019); *Washington Cattlemen's Ass'n v. EPA*, No. 2:19-cv-569, Dkt. No. 61 (W.D. Wash. Dec. 30, 2019).

As a result of these various court orders, the agencies continued to implement both the 2015 Clean Water Rule and the pre-2015 regulatory regime in a patchwork of states until the 2019 Repeal Rule went into effect on December 23, 2019. 84 FR 56626 (Oct. 22, 2019).⁴ With the repeal of the 2015 Clean Water Rule, the agencies returned to implementing the pre-2015 regulatory regime nationwide.

The agencies implemented the pre-2015 regulatory regime nationwide until the 2020 NWPR went into effect on June 22, 2020 in all states except Colorado. 85 FR 22250 (Apr. 21, 2020). In Colorado, the 2020 NWPR was subject to a preliminary injunction issued by the U.S. District Court for the District of Colorado. *Colorado v. EPA*, 445 F. Supp. 3d 1295 (D. Colo. 2020); *see also California v. Wheeler*, 467 F. Supp. 3d 864 (N.D. Cal. 2020) (denying motion for preliminary injunction as to other states). The Tenth Circuit later reversed the Colorado district court's order on appeal; as a result, the 2020 NWPR went into effect in Colorado on April 26, 2021. *Colorado v. EPA*, 989 F.3d 874 (10th Cir. 2021); *Colorado v. EPA*, No. 20-1238, ECF No. 010110512604 (Doc. 10825032) (10th Cir. Apr. 26, 2021).

Following the reversal of the Colorado district court's preliminary injunction against the 2020 NWPR, the agencies implemented the 2020 NWPR nationwide until the rule was vacated on August 30, 2021, by the U.S. District Court for the District of Arizona in *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021). Following the court's vacatur order, the agencies returned to implementing the pre-2015 regulatory regime nationwide. *See, e.g., U.S. EPA, Current Implementation of Waters of the United States*, <https://www.epa.gov/wotus/current-implementation-waters-united-states>. Another court subsequently issued an order vacating the 2020 NWPR on September 27, 2021. *Navajo Nation v. Regan*, 563 F. Supp. 3d 1164 (D.N.M. 2021). In six additional cases, courts remanded the 2020 NWPR without vacatur or without addressing vacatur.⁵

⁴ Two courts remanded the 2015 Clean Water Rule to the agencies prior to issuance of the 2019 Repeal Rule, but neither court vacated the rule. *See Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019); *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019).

⁵ Order, *Pueblo of Laguna v. Regan*, No. 1:21-cv-277, Dkt. No. 40 (D.N.M. Sept. 21, 2021) (declining to reach issue of vacatur in light of the *Pascua* decision); Order, *California v. Wheeler*, No. 3:20-cv-3005, Dkt. No. 271 (N.D. Cal. Sept. 16, 2021) (same); Order, *Waterkeeper All. v. Regan*, No. 3:18-cv-3521, Dkt. No. 125 (N.D. Cal. Sept. 16, 2021) (same); Order, *Conservation Law Found. v. EPA*, No. 1:20-cv-10820, Dkt. No. 122 (D. Mass. Sept. 1, 2021) (same); Order, *S.C. Coastal Conservation League v. Regan*, No. 2:20-cv-1687, Dkt. No. 147 (D.S.C. July 15, 2021) (remanding without vacating); Order, *Murray v. Wheeler*, No. 1:19-cv-1498, Dkt. No. 46 (N.D.N.Y. Sept. 7, 2021) (same).