

CROWLEY | FLECK PLLP ATTORNEYS



Federal Judge Stays Implementation of Rule Defining "Waters of the United States" under the CWA

On August 27, 2015, a North Dakota Federal Court issued a preliminary injunction enjoining implementation of the new Clean Water Act ("CWA") rule ("Rule") jointly promulgated by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (collectively "Agencies") that purports to define "waters of the United States." The preliminary injunction effectively, if temporarily, halts the Agencies' ability to exercise greater control over waters traditionally governed by the states.

The Rule has met with strong opposition since its proposal on April 21, 2014. Thirty states wrote the EPA in July 2015 requesting its enactment be postponed nine months. After no response from the EPA, North Dakota, joined by twelve other states, including Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, New Mexico, South Dakota, and Wyoming, filed a lawsuit seeking an injunction. On August 27, 2015, the Court granted the States' request and issued an injunction shielding, at least, these thirteen states from the Rule, which was to be effective as of August 28, 2015.

In reaching his decision, Chief District Judge Ralph R. Erickson first found that the District Court, and not the United States Court of Appeals, had jurisdiction. In so finding, the Judge found unpersuasive the Agencies' argument that the Rule was a form of "effluent limitation" or, in the alternative, directly related to the permitting process under 33 U.S.C. § 1342.

The Judge then turned to the requested preliminary injunction, applying the standard four factor test. The Judge quickly found the first three factors to be satisfied, weighing that the threat of infringement on state sovereignty over state waters and the potential for monetary costs posed imminent and irreparable harm greater than the harm to the Agencies caused by postponement of the Rule's implementation. The Judge spent the majority of his decision demonstrating that the States had established a "likelihood of success on the merits." Although lacking the administrative record, the Judge found that the promulgation of the Rule was "a process that is inexplicable, arbitrary, and devoid of a reasoned process." More importantly, the Judge found that the promulgation of the Rule violated the EPA's Congressional grant of authority; the Rule was likely arbitrary and capricious; and violated 5 U.S.C. § 553(b)'s requirement that a final rule be a "logical outgrowth" of the initially proposed rule.

The EPA may appeal the preliminary injunction under 28 U.S.C. § 1292(a)(1). Any appeal must be filed within sixty days (Fed. R. App. P. 4(a)(1)(B)) and will be reviewed under the “abuse of discretion” standard. The Rule’s implementation will be halted until the injunction is overturned on appeal, or a decision is issued after a full hearing on the merits.

North Dakota Attorney General, Wayne Stenehjem, has stated the injunction is applicable nationwide, but the EPA asserts that it will begin enforcement of the Rule in thirty-seven other states effective Monday. This difference in opinion may lead to additional requests for injunctive relief.

The full impact of the Rule would likely be far reaching and dramatic. The Rule uses the “significant nexus test” set forth in Justice Kennedy’s concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), to expand federal control over certain waters. Under the Rule, “waters of the United States” would be expanded to include areas where there is a trace amount of water that could present a “physical indicator of a bed and bank and an ordinary high water mark.” While the Agencies dispute the significance of the Rule, they have acknowledged that “at least 2.84-4.65%” of waters traditionally under the sovereign control of the states will be ceded to the Agencies. Also, by expanding what is considered “waters of the United States,” oil and gas producing states will potentially be required to undertake jurisdictional studies for every proposed natural gas, oil, or water pipeline project. Further, the Rule will result in a dramatic increase in CWA §401 certifications, thus increasing costs to the states, industry, and agricultural users.

For any questions, contact the following:

North Dakota:

Craig Smith

(701) 224-7521

csmith@crowleyfleck.com

Montana:

Mark Stermitz

(406) 523-3625

mstermitz@crowleyfleck.com

Wyoming:

Lynne J. Boomgaarden

(307) 772-4842

lboomgaarden@crowleyfleck.com



www.crowleyfleck.com | [Forward to a Friend](#) | [Web Version](#) | [Unsubscribe](#)

DISCLAIMER – Crowley Fleck prepared these materials for the reader’s information, but these materials are not legal advice. We do not intend these materials to create, nor does the reader’s receipt of them constitute, an attorney-client relationship. Online readers should not act upon this information without first obtaining direct professional counsel. Specifically, please do not send us any confidential information without first speaking with one of our attorneys and obtaining permission to send us information. Thank you.