

WWE

MEMORANDUM

To: WWE Clients and Colleagues
Via Email

From: Wright Water Engineers, Inc.
Drew Maraglia

Date: June 11, 2019

Re: WOTUS UPDATE: Colorado Withdraws from *North Dakota v. EPA*; Preliminary Injunction of the 2015 Clean Water Rule Lifted in Colorado

It has been nearly 45 years since the passage of the federal Clean Water Act (Act), yet fundamental questions regarding which waters are subject to federal regulatory jurisdiction under the Act remain unanswered. A single jurisdiction-defining phrase, “waters of the United States,” has been the source of uncertainty concerning the Act’s jurisdictional scope. All three branches of government have struggled to interpret the meaning of “waters of the United States,” and disputes over the meaning of the phrase have been ongoing since 1972.

Attempts at defining jurisdictional limits have resulted in significant confusion with the *Rapanos*^{1,2} case being a prime example. In 2015, the agencies responsible for administering the Clean Water Act – the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) – attempted to resolve this confusion by issuing the Clean Water Rule³. The Clean Water Rule substantially redefined “waters of the United States” for the first time in more than two decades. Numerous court challenges ensued, both over the merits of the Clean Water Rule and over which federal courts have jurisdiction to decide the fate of the Clean Water Rule. In 2015, under Attorney General Cynthia Coffman, the State of Colorado joined a multistate civil action⁴ in the U.S. District Court for the District of North Dakota (Court) which challenged the Clean Water Rule and sought injunctive relief from the implementation of the Clean Water Rule.

Earlier this year, under Attorney General Phil Weiser, the State of Colorado filed a motion⁵ with the Court to withdraw as a plaintiff in the lawsuit. On May 14, 2019, the Court issued an Order⁶ dismissing the State of Colorado as a plaintiff in the civil action and lifted the preliminary injunction of the Clean Water Rule in Colorado. Pursuant to the recent Court order, the Clean Water Rule is now in effect in 23 states, including Colorado. In addition, WWE received guidance from the Colorado Attorney General’s Office confirming that the Clean Water Rule is applicable in Colorado.

¹ *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality opinion) (Scalia, J.) (describing “the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations”).

² Revised Mem. from Envtl. Prot. Agency & Dep’t of the Army on Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States* (December 2, 2008).

³ U.S. Army Corps of Engineers and Environmental Protection Agency (EPA). “Clean Water Rule: Definition of ‘Waters of the United States.’” Final Rule. Federal Register, 80 FR 37053. 2015-06-29.

⁴ *North Dakota et al v. U.S. Environmental Protection Agency et al*, 127 F. Supp. 3d 1047, 1051 (D.N.D. 2015)

⁵ *North Dakota et al v. U.S. Environmental Protection Agency et al*: 259. Miscellaneous Relief

⁶ *North Dakota et al. v. U.S. Environmental Protection Agency et al.*: 280. Order on Motion for Miscellaneous Relief

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The recent developments at the District Court level initially appeared to provide clarity for the State of Colorado regarding the definition of waters of the U.S. However, the EPA and Corps have not issued guidance on which regulations are applicable in Colorado. The U.S. Department of the Army has directed all Colorado Corps Regulatory Offices to cease issuance of permits based on approved jurisdictional determinations until the U.S. Department of Justice provides guidance to the Corps. WWE is engaged in an ongoing dialogue with the Corps Denver Regulatory Office in which they confirmed that preliminary jurisdictional determinations will continue to be processed during the temporary stay on approved jurisdictional determinations.

WWE will continue to update our clients on developments regarding which regulations will be implemented in Colorado.

Please feel free to contact Drew Maraglia (dmарaglia@wrightwater.com) or your WWE project manager if you have any questions.