



Colorado Joins the Surge of WOTUS Lawsuits and Proposes State Legislation to Institute a State-Run 404 Program

This is an updated version of a [previous blog](#) to include recent developments.

On May 22, 2020, Colorado joined the surge of lawsuits challenging the Waters of the United States (“WOTUS”) rule issued in April by the Trump administration. See the link below to the Colorado lawsuit filed in federal court in Colorado as well as links to other similar lawsuits in other jurisdictions.

See link to Colorado case [here](#).

In addition, the Colorado Department of Public Health and Environment has drafted proposed legislation which would authorize the state Water Quality Control Commission to institute a state-run 404 dredge and fill program.

See the proposed bill [here](#).

The bill would add Colorado to the short list of two states authorized to implement a state-run 404 program. Currently, only Michigan and New Jersey implement 404 programs; all the other 48 states leave it to the federal Corps of Engineers and Environmental Protection Agency.

See link to EPA 404 interactive map [here](#).

On May 1, 2020 in the Northern District of California, 17 States, the District of Columbia and New York City joined the menagerie suing to prevent implementation of the “waters of the United States” (“WOTUS”) rule. The Plaintiffs include the states of California, New York, Connecticut, Illinois, Maine, Maryland, Michigan, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington and Wisconsin,

the Commonwealths of Massachusetts and Virginia, the North Carolina Department of Environmental Quality, the District of Columbia, and the City of New York.

See link to the state/city case [here](#).

The state/city claims are essentially the same as those brought months earlier on October 23, 2019 by the Southern Environmental Law Center (“SELC”) in federal court in South Carolina. Both cases address some of the substance of the new rule, but primarily allege, on procedural grounds, that EPA and the U.S. Army Corps of Engineers violated the Administrative Procedure Act that prohibits agencies from changing environmental safeguards without giving the public adequate notice and a chance to weigh in.

See link to SELC case [here](#).

And the Natural Resources Defense Council (“NRDC”) also filed last week on April 29 in Massachusetts.

See link to NRDC case [here](#).

All four lawsuits ask the courts (1) to declare that the new rules are arbitrary and capricious and (2) to issue injunctions to stop their implementation.

And coming from the other direction, the Pacific Legal Foundation (“PLF”) representing the New Mexico Cattle Growers’ Association filed suit in federal court in New Mexico on October 22, 2019 challenging the Trump administration’s “repeal and recodification rule” which (1) attempted to repeal the Obama administration’s 2015 Navigable Waters Definition and (2) tried to readopt the 1986 regulations and related guidance memoranda.

See link to PLF case [here](#).

All of the complaints retrace the tortured history of the federal regulation of defined “navigable waters” under the Federal Water Pollution Control Act of 1948, which with major amendments signed by President Richard Nixon in 1972 became the Clean Water Act.

Of course, one of the most comprehensive accounts of that history is in the 322-page preamble to the final WOTUS rule published in the Federal Register on April 21,

2020.

See link to final rule [here](#).

Opponents of the new rules have identified over a dozen alleged flaws with the new rule. For a short discussion of only one of the major concerns that directly affects Colorado and other states, see the ColoradoBiz article prepared by John L. Watson of Spencer Fane LLP [here](#).

Read Spencer Fane attorneys Paul Jacobson and A.J. Ferate's article on the new WOTUS rule [here](#).

The confusion for those who face the trauma of trying to determine what is and what is not regulated under federal law will only get worse with the possible change of administrations in the November elections.

Stay tuned.

This post was drafted by [John Watson](#), an attorney in the Denver, CO office of Spencer Fane LLP. For more information, visit www.spencerfane.com.