

## CLEAN WATER ACT

# 10th Circuit revives Trump WOTUS repeal in Colo.

Jeremy P. Jacobs, E&E News reporter • Published: Wednesday, March 3, 2021



A federal appeals court has reinstated the Trump administration's narrowed definition of "waters of the United States," or WOTUS, in Colorado as the Biden administration weighs changes to the regulation. The state was the only place where the Trump rule had been put on ice. [pxhere](#)

The Trump administration's rule defining what wetlands, streams and bogs qualify for Clean Water Act protections will go into effect in Colorado after a federal appeals court ruling yesterday.

Colorado had been the only state where former President Trump's Navigable Waters Protection Rule had been blocked after a federal judge last June granted the state's request to halt its implementation while its legal challenge played out.

Before Trump left office, his EPA and Army Corps of Engineers — supported by a wide array of industry groups — appealed that ruling. And yesterday, the 10th U.S. Circuit Court of Appeals reversed the decision on narrow grounds, after denying the Biden administration's request to pause the case.

The Denver-based three-judge panel said Colorado did not satisfy a key requirement in seeking an injunction: showing it would suffer irreparable injury if the rule went into effect.

"Colorado asked for immediate relief but hasn't shown it will suffer irreparable injury absent a preliminary injunction," Judge Bobby Baldock, a Reagan appointee, [wrote](#) for the court. "That alone compels us to reverse."

The 10th Circuit appeared to carefully avoid wading into the murky waters of Clean Water Act legal precedent, including how to interpret the famously muddled 2006 Supreme Court *Rapanos v. United States* decision.

"Generally, I think this court was very careful not to suggest anything on the merits," said attorney Larry Liebesman, a Clean Water Act expert at Dawson and Associates.

Baldock noted that the meaning of "waters of the United States," or WOTUS, is not defined in the law and "remains elusive and unpredictable."

The Trump rule adhered to the late Justice Antonin Scalia's plurality opinion in *Rapanos*, which took a narrower view of the law's reach than former Justice Anthony Kennedy's concurring opinion. Kennedy's opinion — particularly his "significant nexus" test — served as the basis for the Obama administration's prior regulation.

Trump's rule, Baldock noted, "undisputedly represents a significant reduction in the scope of jurisdiction the Agencies have asserted in the past."

Judges Carolyn McHugh, an Obama appointee, and Allison Eid, a Trump pick, also joined Baldock's opinion.

Yesterday's ruling was narrow in scope, but it creates a complicated game of legal chess for the Biden administration, Colorado and industry challengers that have been trying for years to get the issue of the Clean Water Act's scope back to the Supreme Court.

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Tony Francois of the conservative Pacific Legal Foundation represented Idaho landowners Michael and Chantell Sackett, who have been challenging federal Clean Water Act rules in court for more than a decade.

He said they had hoped the appeals court would grapple with the *Rapanos* issue.

"The Sacketts are disappointed that the Tenth Circuit did not address the far more important legal issue of how to apply the Supreme Court's fractured *Rapanos* decision," Francois said in an email, "and whether the 2020 Navigable Waters regulations pass muster under the Clean Water Act."

### Next steps

The case now goes back to U.S. District Court for the District of Colorado Judge William Martinez.

In granting Colorado's injunction last June, Martinez, an Obama appointee, undertook a thorough review of the *Rapanos* ruling, holding that it does "foreclose" the legal interpretation underpinning the Trump rule ([Greenwire](#), June 22, 2020).

The 10th Circuit ruling presents some challenges for the Biden administration. Liebesman said it is clear that the Biden administration does not want to defend the Trump rule. It had asked the 10th Circuit to put the case on hold and has signaled that the Trump rule is one of several it will reevaluate and likely replace.

The court rejected the Biden team's request ([Greenwire](#), March 2).

Liebesman anticipates that the Biden administration will likely ask Martinez to stay the case while it does that analysis.

Colorado faces another dilemma. It could ask Martinez to forge ahead, but that would put the Biden administration in a bind.

The business intervenors in the case, including the American Farm Bureau Federation, American Petroleum Institute and U.S. Chamber of Commerce, will likely try to keep the case going.

"They would love to have to fight this out and force the administration to defend the rule," Liebesman said.

Doing so would keep the issue on track for the ultimate goal: Supreme Court review.

"Now more than ever," Francois said, "the Supreme Court needs to clarify the scope of the Clean Water Act by revisiting *Rapanos*."

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