RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLIMATE CHANGE POLICY

California's Low Carbon Fuel Standard Endures Rocky Mountain II

A. Introduction

Despite a widespread consensus that climate change poses a substantial risk to the welfare of future generations, we have yet to see a comprehensive federal climate policy from legislators on Capitol Hill. However, with the 2020 presidential election on the horizon and a number of potential candidates calling on Congress to respond to climate change, the prospect of effective federal climate legislation is certainly not so remote as it appeared when the Trump Administration scrapped the Clean Power Plan in 2017. Further, lawmakers' options are not restricted to legislative "stabs in the dark," as a number of states have implemented effective policies designed to reduce the respective state's greenhouse gas emissions. California's Low Carbon Fuel Standard (LCFS), a regulatory scheme that combats climate change by limiting lifecycle carbon emissions for transportation fuels, serves as a prime example of climate action policy that has achieved survival and even prosperity, notwithstanding a tumultuous decade in the making.

In *Rocky Mountain Farmers Union v. Corey* (*Rocky Mountain II*), the Ninth Circuit considered revised challenges to California's LCFS based on the Commerce Clause and "the federal structure of the Constitution."[1] Plaintiffs representing the oil and ethanol industries asserted that the LCFS violates the dormant Commerce Clause by penalizing out-of-state fuels more than in-state fuels, as well as the "federal structure of the Constitution" by extraterritorially regulating

1. Rocky Mountain Farmers Union v. Corey (*Rocky Mountain II*), 913 F.3d 940, 951 (9th Cir. 2019).

interstate commerce.[2] The court held that the plaintiffs' Commerce Clause claims were largely precluded by the Ninth Circuit's decision in *Rocky Mountain Farmers Union v. Corey* (*Rocky Mountain I*), 730 F.3d 1070 (9th Cir. 2013), *reh'g en banc denied*, 704 F.3d 507 (9th Cir. 2014), *and cert. denied*, 573 U.S. 946 (2013), where the court rejected nearly identical challenges to the two previous versions of California's LCFS, which were substantially similar to the current LCFS.[3] Further, the court rejected the plaintiffs' argument that their claims based on the "federal structure of the Constitution" were not controlled by *Rocky Mountain I*, where the plaintiffs could not identify any constitutional provision or doctrine outside the Commerce Clause that might apply to their structural federalism claims.[4] Finally, the court held that the LCFS did not facially discriminate against interstate commerce in its treatment of ethanol and crude oil, nor did it purposefully discriminate against out-of-state ethanol.[5] Thus, the Ninth Circuit declined to overturn the lower court's ruling keeping California's LCFS in place.[6]

B. Background

1. Legislative History

Since 2006, the California Air Resources Board (CARB) has been subject to a mandate based on the California legislature's determination that "[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California."[7] The mandate is codified in Assembly Bill 32, the Global Warming Solutions Act of 2006, which requires CARB to establish emissions-reduction measures to meet its greenhouse gas reduction goal for the year 2020.[8]

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2. *Id.* at 953-54.

3. *Id.* at 944-45 (citing Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013), *reh'g en banc denied*, 704 F.3d 507 (9th Cir. 2014), *and cert. denied*, 573 U.S. 946 (2013) (*Rocky Mountain I*)). In 2013, the court decided the first appeal in this "long-running, complex" challenge to the LCFS, in which the same industry plaintiffs brought similar constitutional claims asserting discrimination to out-of-state fuel and impermissible extraterritorial regulation of commerce. *Id.* at 944. The court rejected a number of plaintiffs' claims and remanded for further proceedings on others; namely, whether the LCFS was discriminatory in purpose or in effect and whether the LCFS unduly burdened interstate commerce. *Id.* at 948.

4. *Id.* at 954.

5. *Id.* at 956-57.

6. *Id.* at 957-58.

7. *Id.* at 945. Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a) (2017), prohibits state regulation of emissions from motor vehicles, but California sought a waiver under 42 U.S.C. § 7543(b). *See also* CAL. HEALTH & SAFETY CODE § 38501(a)-(b) (2019).

8. CAL. HEALTH & SAFETY CODE § 38550.

Further, Assembly Bill 32 directs CARB to implement a cap-and-trade program to enforce limits on carbon emissions from various domestic sources, as well as regulations aimed at reducing greenhouse gas emissions from the transportation sector.[9] At thirty-nine percent, vehicle emissions constitute the principal contribution to the state's greenhouse gas emissions.[10]

In order to achieve California's goal of reducing emissions to their 1990 level by the year 2020, the LCFS establishes a declining annual cap on the average "carbon intensity"[11] of California's transportation-fuel market.[12] The program regulates nearly every transportation fuel that is consumed in California, as well as any fuels that may be developed in the future.[13] Using a "lifecycle analysis" that measures all emissions associated with the production, refining, and transportation of a fuel, the LCFS assigns a cumulative carbon intensity value to individual fuels' lifecycles.[14] Thus, the LCFS recognizes that the effect of greenhouse gas emissions is independent of geographic location and ensures that all emissions associated with a particular fuel are appropriately accounted for.[15]

In addition to command-and-control regulations, the LCFS uses an emissions trading scheme, relying on market-based mechanisms whereby providers are able to choose how to comply with the program while responding to consumer demand.[16] Depending on a fuel's designated carbon intensity relative to the annual cap, a fuel generates credits or deficits under the program.[17] Credits may be used to offset deficits, saved for compliance in future years, or sold to other blenders, as all blenders must ensure that the average carbon intensity of their total volume of fuel

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9. *Id.* § 38562(a)-(c); *see also* CAL. CODE REGS. tit. 13, § 1961.1 (2019).

10. CAL. AIR RES. BD., CALIFORNIA GREENHOUSE GAS EMISSIONS FOR 2000 TO 2016, at 4 (2018), https://www.arb.ca.gov/cc/inventory/pubs/reports/2000_2016/ghg_inventory_trends_00-16.pdf.

11. *Rocky Mountain II*, 913 F.3d at 946 n.4 (noting a fuel's carbon intensity rating is based on the greenhouse gas emissions associated with the fuel from production to consumption, including distribution, use, maintenance, and disposal).

12. CAL. CODE REGS. tit. 17, § 95482(b).

13. *Id.* § 95482(a).

14. *Id.* § 95488.3(a)-(d).

15. *Rocky Mountain I*, 730 F.3d 1070, 1080-81 (9th Cir. 2013).

16. *See* CAL. ENVTL. PROT. AGENCY, AIR RES. BD., PROPOSED SCOPING PLAN: CAP-AND-TRADE ECONOMIC ANALYSIS (2017), https://www.arb.ca.gov/cc/scopingplan/cap-and-trade-economic-analysis-factsheet_july2017.pdf.

17. CAL. CODE REGS. tit. 17, §§ 95485(a)-(b), 95486(a)-(b).

falls below the LCFS's annual limit.[18] Accordingly, the LCFS is designed to promote a marketplace that effectively stimulates the development of alternative fuels, as CARB expects demand for credits to encourage producers to develop fuels with lower carbon intensities regardless of their respective locations.[19]

2. Prior Legal Proceedings

CARB's first iteration of the LCFS, which was set to take effect in 2011, was published in 2009.[20] Legal challenges arose not long thereafter, when Rocky Mountain Farmers' Union (Rocky Mountain) and American Fuels & Petrochemical Manufacturers Association (American Fuels) promptly challenged the first iteration of the rule as violative of the Commerce Clause.[21] In three separate rulings, the district court held that the LCFS (1) facially discriminated against out-of-state ethanol, (2) engaged in impermissible extraterritorial regulation of ethanol, (3) discriminated in purpose and effect against out-of-state crude oil, and (4) could not be saved by the state's preemption waiver in the Clean Air Act.[22] In addition to granting motions for summary judgment on the Commerce Clause claims, the court granted Rocky Mountain's request for a preliminary injunction.[23]

The appeals of the orders were consolidated and heard by the Ninth Circuit in *Rocky Mountain I*, where the court reversed, holding that the 2011 LCFS did not (1) facially discriminate against interstate commerce in ethanol or crude oil, (2) regulate extraterritorially, nor (3) discriminate in purpose or effect against crude oil.[24] The court remanded to the district court to determine whether the LCFS's ethanol provisions discriminated purposefully or in effect, as well as whether the LCFS constituted an undue burden on interstate commerce.[25]

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18. *Rocky Mountain I*, 730 F.3d at 1080. For example, blenders selling high carbon-intensity fuels can comply with the LCFS by purchasing credits from other regulated parties who received credits for falling below the LCFS' annual emissions cap.

19. *Id.*

20. *Id.* at 1080-81.

21. *See id.* at 1078.

22. *See* Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1042, 1070 (E.D. Cal. 2011); Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1090, 1093 (E.D. Cal. 2011); Rocky Mountain Farmers Union v. Goldstene, Nos. CV-F-09-2234 LJO DLB, CV-F-10-163 LJO DLB, 2011 WL 6936368, at *12-14 (E.D. Cal. Dec. 29, 2011).

23. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1105.

24. *Rocky Mountain I*, 730 F.3d at 1100, 1103-04, 1107.

25. *Id.* at 1107. Several other remanded issues, including those based on preemption under federal law, were ultimately not considered by the district court or the Ninth Circuit in *Rocky*

C. Court's Decision

On remand, Rocky Mountain and American Fuel amended their complaints to reflect the 2015 version of the LCFS, and the district court heard motions to dismiss and motions for judgments on the pleadings.[26] The plaintiffs brought claims against all three iterations of California's LCFS,[27] asserting that all three versions (1) were preempted by federal law, (2) impermissible extraterritorial regulations, and (3) violated the "federal structure of the Constitution," as well as the Commerce Clause facially, in purpose and effect, and under the *Pike* balancing test.[28] The district court held that the plaintiffs' claims against the repealed versions of the LCFS were not moot, but it concurrently held that the plaintiffs' constitutional claims were largely precluded by *Rocky Mountain I*, granting motions to dismiss on most other claims under Federal Rule of Civil Procedure 12(b)(6).[29] Plaintiffs then appealed the district court's decision on claims challenging the 2015 version of the LCFS, as well as previous orders deciding the prior motion to dismiss.[30]

The Ninth Circuit began by examining whether the plaintiffs' claims against the 2011 and 2012 versions of the LCFS were moot.[31] In reversing the district court, the Ninth Circuit held that no effective relief could be provided on the plaintiffs' claims against the previous versions of the LCFS.[32] The court explained that under Supreme Court and circuit precedent, "a case is moot when the challenged statute is repealed, expires, or is amended to remove the challenged language."[33] Because the 2011 and 2012 LCFS were no longer in effect, the plaintiffs' obligations under them were discharged, and "it [was] not possible for the court to grant any

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Mountain II, as the plaintiffs voluntarily dismissed the relevant claims. *Rocky Mountain II*, 913 F.3d 940, 948 (9th Cir. 2019).

26. *Id.*

27. There are three iterations of the LCFS: (1) the first LCFS, which went into effect in 2011; (2) the LCFS as amended in 2012; and (3) the 2015 LCFS, which repealed the 2011 LCFS and 2012 amendments. *Id.* at 946-47.

28. *Id.* at 948. In *Pike*, the Supreme Court held that, absent discrimination, a law will be upheld "unless the burden imposed on [interstate] commerce [is] clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

29. *Rocky Mountain II*, 913 F.3d at 948. The court denied motions to dismiss plaintiffs' claims that ethanol provisions of the 2011 and 2015 versions of the LCFS are discriminatory under the Commerce Clause, but plaintiffs voluntarily dismissed the claims.

30. *Id.*

31. *Id.* at 949.

32. *Id.* at 950.

33. *Id.* at 949 (quoting Log Cabin Republicans v. United States, 658 F.3d 1162, 1166 (9th Cir. 2011)).

effectual relief."[34] Thus, the court vacated the district court's judgment and remanded with directions to dismiss the challenges to prior versions of the LCFS as moot.[35]

The court then addressed the plaintiffs' claim that the 2015 LCFS regulated extraterritorially and violated the Commerce Clause in addition to the "federal structure of the Constitution."[36] *Rocky Mountain I* expressly rejected the plaintiffs' Commerce Clause claims against the 2011 and 2012 versions of the LCFS, but the court did not, "for obvious reasons, address any claims that the plaintiffs may have had against the 2015 LCFS," nor did the court examine plaintiffs' claims based on the "federal structure of the Constitution."[37] However, as the court explained, "the controlling substance at the crux of the case [had] not changed" because the 2015 LCFS, like its predecessors, relied on a lifecycle analysis to assign credits and deficits.[38]

The district court dismissed the claims based on preclusion under *Rocky Mountain I*, reasoning that the plaintiffs failed to demonstrate how the 2015 LCFS operated differently from the two prior iterations with regards to extraterritoriality.[39] The plaintiffs contended the judgment was in error because *Rocky Mountain I* did not decide the plaintiffs' claim based on the "federal structure of the Constitution."[40] Prudentially speaking, the plaintiffs' claims were precluded under *Rocky Mountain I* unless "the court [was] convinced that its prior decision [was] 'clearly erroneous' such that its application 'would work a manifest injustice.'"[41]

The court rejected the proposition that its *Rocky Mountain I* decision was "clearly erroneous" such that *Rocky Mountain I* did not control the plaintiffs' claims against the 2015 LCFS.[42] *Rocky Mountain I* followed a well-established path of Supreme Court and circuit precedent reflecting the conventional notion that a sovereign state may seek to minimize in-state harm by regulating products that are sold within the state.[43] The LCFS, which subjects both in and out-of-state entities to the same

34. *Id.*
35. *Id.* at 950.
36. *Id.* at 951.
37. *Id.* at 951-53.
38. *Id.* at 951.
39. Am. Fuels & Petrochem. Mfrs. Ass'n v. Corey, Nos. 1:09-cv-2234-LJO-BAM, 1:10-cv-163-LJO-BAM, 2015 WL 5096279, at *11-12 (Aug. 28, 2015).
40. *Id.*
41. *Id.*
42. *Rocky Mountain II* at 952 (quoting Pepper v. United States, 562 U.S. 476, 506-07 (2011)).
43. *Id.*

regulatory scheme, constitutes a "traditional use of the State's police power" because it ensures that both in and out-of-state entities doing business in California are subject to consistent environmental standards.[44] Further, the court dismissed the plaintiffs' contention that California's interest in the LCFS was merely concern for environmental harms that were properly subject to the police power of other states, reasoning that the LCFS was enacted to protect the welfare of California rather than other states.[45]

Additionally, the court was less than receptive to the plaintiffs' constitutional argument that their claims based on the "federal structure of the Constitution" were not controlled by *Rocky Mountain I*.[46] The plaintiffs could not identify any constitutional provision or doctrine outside the Commerce Clause that might govern their "structural federalism claims."[47] Further, the court held that the claims were precluded by the law of the case itself as well as Ninth Circuit precedent established in *American Fuel & Petrochemical Manufacturers v. O'Keeffe*,[48] where the court held that an Oregon program modeled after the California LCFS was not inconsistent with the Constitution.[49] Accordingly, the court affirmed the district court's decision to dismiss the plaintiffs' extraterritoriality claims against the 2015 LCFS.[50]

Finally, the Ninth Circuit addressed the plaintiffs' two discrimination claims: (1) that the LCFS facially discriminated against interstate commerce in its treatment of ethanol and crude oil, and (2) that the LCFS purposefully discriminated against out-of-state ethanol.[51] The court quickly dispensed of the plaintiffs' facial discrimination claim, as ruling in favor of those claims would require the court to reject *Rocky Mountain I*, where the Ninth Circuit dismissed facial discrimination claims to the 2011 LCFS.[52] In analyzing the plaintiffs' claim that the LCFS purposefully discriminated against out-of-state ethanol, the court explained that the plaintiff "bears the burden of establishing that a challenged regulation has a discriminatory purpose or effect under the Commerce Clause."[53]

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44. *Id.*
45. *Id.* at 953.
46. *See id.* at 953-54.
47. *Id.* at 953.
48. *Id.* (citing Am. Fuel & Petrochem. Mfrs. v. O'Keeffe, 903 F.3d 903, 916-17 (9th Cir. 2018)).
49. *O'Keeffe*, 903 F.3d at 916-17.
50. *Rocky Mountain II*, 913 F.3d at 954.
51. *Id.* at 954-58.
52. *Id.* 954-55.
53. *Id.* at 956 (citing Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)).

Rejecting the suggestion that the LCFS constituted "economic protectionism," the court held that the plaintiffs failed to meet this burden because their arguments relied primarily on California's motivations for previous versions of the LCFS rather than the 2015 LCFS.[54] Therefore, the Ninth Circuit affirmed the district court's decision concerning the plaintiffs' claims against the LCFS with regard to purpose and effect discrimination.[55]

The Court was ultimately not persuaded by the plaintiffs' challenges to the 2015 LCFS, affirming the district court's judgment dismissing the plaintiffs' constitutional claims to the 2015 LCFS and vacating the district court's ruling that the plaintiffs' challenges to past versions of the LCFS were not moot.[56] As the court explained,

> The Constitution does not require California to shut its eyes to the fact that some ethanol is produced with coal and other ethanol is produced with natural gas because these kinds of energy production are not evenly dispersed across the country or because other states have not chosen to regulate the production of greenhouse gases.[57]

Accordingly, the court remanded the case to the district court with instructions to dismiss the latter claims as moot, effectively allowing California to retain the LCFS in its current form.[58]

D. Analysis

At this juncture, it is uncertain whether the industry groups will petition the Supreme Court for certiorari. More recently, the Supreme Court has not shied away from climate-related litigation, although it did indeed deny the plaintiffs' writ of certiorari in *Rocky Mountain I*.[59] It is possible, however, that the Supreme Court was aware that California intended to repeal the 2011 LCFS and 2012 amendments, which were the subjects of the lawsuit in *Rocky Mountain I*, and replace them with the 2015 LCFS. If the Supreme Court does grant certiorari, conservative justices, who tend to side with industry over the environment, will be

54. *Id.* at 957.
55. *Id.* at 958.
56. *See id.*
57. *Id.* at 955-56.
58. *Id.* at 958.
59. Rocky Mountain Farmers Union v. Corey, 573 U.S. 946 (2014) (denying petition for writ of certiorari).

forced to reconcile the tension between sovereign state rights and regulatory burdens on commerce.[60]

The Ninth Circuit's decision to uphold California's LCFS is not especially surprising considering the court's rejection of the plaintiffs' similar challenges to the previous versions of the LCFS in *Rocky Mountain I*, as well as the Ninth Circuit's reputation concerning environmental protection.[61] The Ninth Circuit made a point of mentioning the destruction to California as a result of fires, which were caused in part by extensive droughts throughout the state, in addition to the increase in powerful storms along California's coastline.[62] Further, CARB has long been permitted to establish fuel economy standards for vehicles, although the Trump Administration has threatened legal action to revoke the state's ability to impose stricter standards than the federal government establishes for vehicle emissions.[63] Despite such threats, California officials have clearly indicated that the state has no intention of rolling back emission standards.[64]

With climate change rapidly developing into a national (and global) emergency, California's LCFS can serve as a prominent example of effective climate action policy for those supporting federal climate legislation. The LCFS has achieved a five-percent reduction in the average carbon intensity of fuels sold in California since 2010 and the program provides benefits for utilities, automakers, and even oil companies.[65] Further, the LCFS appropriately utilizes performance-based standards in conjunction with a credit trading mechanism, effectively allowing market forces to dictate prices while ensuring that emission reduction targets are met.[66] Legislators should certainly note the program's ability to incentivize emission reductions while retaining appeal to a wide range of parties, as well as California's comprehensive approach in accounting for

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60. *See* Emily Bazelon, *When the Supreme Court Lurches Right*, N.Y. TIMES (Aug. 22, 2018), https://www.nytimes.com/2018/08/22/magazine/when-the-supreme-court-lurches-right.html.

61. *See* Dylan Matthews, *How the 9th Circuit Became Conservatives' Least Favorite Court*, VOX (Jan. 10, 2018), https://www.vox.com/policy-and-politics/2018/1/10/16873718/ninth-circuit-court-appeals-liberal-conservative-trump-tweet.

62. *Rocky Mountain II*, 913 F.3d at 958.

63. Evan Halper & Joseph Tanfani, *Trump Administration Moves on Two Fronts to Challenge California Environmental Protections*, L.A. TIMES (Apr. 2, 2018), https://www.latimes.com/politics/la-na-pol-epa-fuel-standards-20180402-story.html.

64. *Id.*

65. Daniel Sperling, *How (Almost) Everyone Came to Love Low Carbon Fuels in California*, FORBES (Oct. 17, 2018), https://www.forbes.com/sites/danielsperling/2018/10/17/how-almost-everyone-came-to-love-low-carbon-fuels-in-california/#4800b5e45e84.

66. *See id.*

emissions.[67] Supporters of the ambitious, albeit necessary, resolution known as the Green New Deal[68] should certainly examine whether aspects of California's LCFS can be applied on a larger scale to reduce national emissions. Decarbonization and alleviation of the threat of climate change may appear to pose insurmountable challenges, but sound policy and effective market mechanisms can, at the very least, promote the goal of guaranteeing a safe and healthy environment for future generations. Apathy and inaction in the face of such a momentous threat to human existence is simply not an option.

Drew Renzi

II. CLEAN WATER ACT REGULATIONS

WOTUS Rollback in Louisiana Amid Rising Tides

A. WOTUS Rollback

Earlier this year, after a lapse in appropriations triggered by the longest government shutdown in U.S. history,[69] the Environmental Protection Agency and U.S. Army Corps of Engineers (Agencies) finally released their long-awaited proposal to redefine the "waters of the United States" (WOTUS);[70] it should be considered a rollback from the 2015 definition contained in the Clean Water Act (CWA).[71] The CWA regulates water pollution and aims "to restore and maintain the chemical, physical, and biological integrity" of the Nation's waters, which are further defined as the Nation's "navigable waters," typically classified as WOTUS.[72] The Act established pollution controls for navigable waters and surrounding territorial seas, but subsequent Corps regulations expanded federal jurisdiction to include tributaries of navigable waters, wetlands adjacent to such tributaries, and other isolated waters, that may, quite arguably, not

67. *See Fuels Program*, CAL. AIR RESOURCES BOARD, https://www.arb.ca.gov/fuels/fuels.htm (last visited Apr. 1, 2019).

68. *See* David Roberts, *Green New Deal Critics Are Missing the Bigger Picture*, VOX (Feb. 23, 2019), https://www.vox.com/energy-and-environment/2019/2/23/18228142/green-new-deal-critics

69. *See, e.g.,* Bob Bryan, *The Government Shutdown Is in Day 35 and Has Shattered the Record for the Longest Shutdown in History*, BUS. INSIDER (Jan. 25, 2019), https://www.businessinsider.com/history-of-government-shutdowns-in-congress-2018-1.

70. News Release, EPA & U.S. Army, EPA and Army Postpone Public Hearing on Proposed New "Waters of the United States" Definition (Jan. 7, 2019).

71. *See* Revised Definition of ''Waters of the United States,'' 84 Fed. Reg. 4154, 4202 (Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

72. 33 U.S.C. § 1251(a)-(a)(1) (2012).

have been in the contemplation of the CWA's framers.[73] These regulations defined WOTUS in a manner that remained largely intact for nearly three decades.

Under the Obama administration, the Agencies began revising the definition of WOTUS in order to distinguish its geographic scope relative to traditionally navigable waters.[74] Consequently, the Agencies adopted the Clean Water Rule (CWR) in 2015, extending WOTUS to include non-navigable waters linked to navigable waters by a "significant nexus" so as to facially conform with the Supreme Court's decision in *Rapanos v. United States*.[75] Under the CWR, certain non-navigable waters, such as streams and non-floodplain wetlands, could acquire WOTUS status if they had a "significant nexus" so as to be "connected to downstream waters through surface water, shallow subsurface water, and groundwater flows, and through biological and chemical connections."[76] As was widely expected, following its promulgation, the new rule spurred sharp criticism and a series of lawsuits in both state and federal court contesting the legality of the CWR and forcing its subsequent delay.[77]

B. A Civil Water Affair

After hotly contesting the definitional revamp of WOTUS, Louisiana, as well as twenty-seven other states, remain governed by the less-expansive definition that dates back to the 1980s.[78] The divergence exists primarily between environmentalists who criticize the CWR as being insufficiently protective and the twenty-seven states that view the 2015 rule as a federal usurpation, far exceeding the scope of the Agencies' statutory authority to sequester and regulate formerly state-regulated waters.[79]

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73. *See* Rapanos v. United States, 547 U.S. 715, 722 (2006).

74. 80 Fed. Reg. 37,054, 37,055 (June 29, 2015).

75. *Id.* at 37,056, 37,106 (defining "significant nexus" as "a water, including wetlands, either alone or in combination with other similarly situated waters in the region, [that] significantly affects the chemical, physical, or biological integrity" of navigable-in-fact waters).

76. *Id.* at 37,063.

77. *See* Georgia v. Pruitt, 326 F. Supp. 3d 1356, 1370 (S.D. Ga. 2018) (enjoining implementation of the CWR in Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, Wisconsin); North Dakota v. EPA, 127 F. Supp. 3d 1047, 1060 (N.D. 2015) (enjoining implementation of the CWR in Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming); Texas v. EPA, No. 3:15-CV-00162, 2018 WL 4518230, at *1 (S.D. Tex. Sept. 12, 2018) (enjoining implementation of the CWR in Louisiana, Mississippi, and Texas).

78. *See id.*

79. *See* H.R. Res. 152, 115th Cong. 3 (Feb. 27, 2017) (requesting that the CWR definition of WOTUS be withdrawn and vacated based on procedural missteps and "broad and expansive

On August 27, 2015—one day before the CWR's effective date—a federal judge in North Dakota issued an injunction barring the application of the CWR in thirteen states.[80] The court determined that it maintained the right to intervene after finding the thirteen challengers likely to succeed on their claim that the EPA violated its "[c]ongressional grant of authority" in promulgating the CWR.[81] Thereafter, cases filed in federal appellate courts were consolidated via multidistrict litigation in the U.S. Court of Appeals for the Sixth Circuit;[82] in October 2015, that court had issued a nationwide stay based on the imminent threat triggered by CWR enforcement.[83] In January 2017, the Supreme Court granted the case certiorari.[84]

The next month, President Trump issued an Executive Order titled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the Waters of the United States Rule."[85] The Order declared, "It is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the role of the Congress and the States under the Constitution."[86] The mandate authorized the Agencies to review the CWR for consistency with this stated policy while publishing for notice-and-comment a rule proposing to rescind or revise the CWR.[87] Accordingly, the Agencies thereafter formally proposed a recodification of the pre-2015 WOTUS definition.[88]

In January 2018, the Supreme Court concluded that CWR challenges were subject to the direct review of the federal district courts, not the federal appellate courts.[89] Although the Supreme Court did not address the merits of the CWR, the Sixth Circuit vacated the stay on the CWR

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jurisdiction that encroaches on traditional State authority and undermines longstanding exemptions from Federal regulation under the Federal Water Pollution Act").

80. *North Dakota,* 127 F. Supp. 3d at 1060.

81. *Id.* at 1056.

82. *In re* Dep't of Def., U.S. EPA Final Rule: Clean Water Rule: Definition of "Waters of the United States," 817 F.3d 261 (6th Cir. 2016).

83. *In re* EPA, 803 F.3d 804, 808-09 (6th Cir. 2015).

84. Nat'l Ass'n of Mfrs. v. Dep't of Def., 137 S. Ct. 811 (granting certiorari).

85. Exec. Order No. 13,778, 82 Fed Reg. 12,497 (Feb. 28, 2017).

86. *Id.*

87. *Id.*

88. Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017).

89. Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 633-34 (2018).

following the ruling.[90] Before the CWR could become effective, however, it was blocked and deferred until 2020 after the Agencies published the Applicable Date Rule (ADR).[91] The Agencies explained that the ADR ensured regulatory compliance and implementation of the CWA nationwide while they pursued steps to recodify the pre-2015 WOTUS definition and repeal the CWR.[92]

Today, however, the ADR remains functionally inoperative after being challenged in several district courts. Despite the ongoing effort by the Agencies to rescind the CWR,[93] a judge in the District of South Carolina struck down the ADR in August 2018, enjoining its application nationwide.[94] That court rejected the efforts to postpone CWR via the ADR, noting that it constituted an impermissible agency action that did not meet the standards set forth by the Administrative Procedure Act.[95] Thus, the CWR was revived, at least facially, nationwide except for in the states shielded by the preliminary injunction.[96]

Nonetheless, in September 2018, a judge in the Southern District of Texas issued an injunction against CWR enforcement in Louisiana, Mississippi, and Texas after finding sufficient evidence in challenging the CWR based on heightened security interests.[97] In its decision, the court emphasized how the public's interest "tipped the balance in favor of granting an injunction—and did so to an overwhelming degree."[98] Lack of an injunction, the court noted, posed a threat of potential economic injury, affecting the farming and petroleum industries in particular.[99] Notwithstanding a revised definition of navigable waters relative to the CWR, the Texas court "decided to avoid the harmful effects of a truncated implementation . . . until a permanent decision . . . regarding the Rule's

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90. *In re* Dep't of Def., U.S. EPA Final Rule: Clean Water Rule: Definition of "Waters of the United States," 713 Fed. App'x 489, 490 (6th Cir. 2018).

91. Definition of ''Waters of the United States''—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018).

92. *Id*.

93. *See* Definition of ''Waters of the United States''—Recodification of Preexisting Rule, 83 Fed. Reg. 32,227 (July 12, 2018) (extending the public comment period until August 13, 2018).

94. S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 969-70 (D.S.C. 2018).

95. *Id.* at 967.

96. *See id*. at 969-70.

97. Texas v. EPA, No. 3:15-CV-00162, 2018 WL 4518230, at *1 (S.D. Tex. Sept. 12, 2018).

98. *Id*.

99. *Id*.; *see also* Greg Hillburn, *Is a Puddle Navigable? Farmers Hail Trump "Ditching" Water Rule*, USA TODAY NETWORK (Mar. 1, 2017), https://www.thenewsstar.com/story/news/2017/03/01/puddle-navigable-farmers-hail-trump-ditching-water-rule/98574128/.

constitutionality [could] be made.[100] The Louisiana Attorney General, Jeff Landry, applauded the injunctive relief, declaring it "a great victory for Louisiana's farmers, landowners, job creators, and taxpayers."[101]

C. The Proposed WOTUS Definition

On February 14, 2019, the final proposed WOTUS replacement was published in the *Federal Register*, signaling the second step of the two-part process to replace the CWR.[102] As proposed, the scope of WOTUS was to mesh with the standard set out in the plurality opinion in *Rapanos.*[103] In that case, Justice Scalia authored the four-justice plurality opinion in a split 4-1-4 decision, concluding that WOTUS comprised relatively permanent, standing, or continuously flowing water bodies.[104] Further, the plurality opinion noted that CWA dredge and fill provisions applied to wetlands if an unbroken surface connection existed with a relatively permanent body of water, such as streams, lakes, and rivers.[105] Therefore, tributaries and other waters—often regarded as non-navigable waterways—adjacently located next to WOTUS, but lacking a continuous WOTUS connection, fell outside of CWA jurisdiction.[106]

The 2019 WOTUS proposal is important because it decreases the jurisdictional coverage of the CWA.[107] It provides a more straightforward interpretation of WOTUS in a manner consistent with preserving the rights and jurisdiction of the states by eliminating the "significant nexus" test while allowing for the stipulation of water body exemptions from specified CWA jurisdiction.[108] Contrary to the CWR's seemingly limitless coverage over interstate waters, the new 2019 definition excludes ephemeral water features from WOTUS.[109] As proposed, WOTUS would comprise "traditional navigable waters, including the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise

100. *Texas*, 2018 WL 4518230, at *1.

101. News Release, La. Dep't of Justice, Federal Court Blocks Unlawful WOTUS Rule, http://ag.state.la.us/Article.aspx/9597?TypeId=1&CatId=2 (last visited Feb. 1, 2019).

102. Revised Definition of ''Waters of the United States," 84 Fed. Reg. 4154 (Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

103. *Id.* at 4162.

104. Rapanos v. United States, 547 U.S. 715, 716 (2006).

105. *Id.* at 742.

106. *Id.*

107. Revised Definition of ''Waters of the United States," 84 Fed. Reg. 4154, 4172 (Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

108. *See id.* at 4170, 4180.

109. *See id.* at 4168.

jurisdictional waters; and wetlands adjacent to other jurisdictional waters."[110] Thus, certain waters previously under CWR purview, such as tributaries created by a mere ephemeral waterflow, or wetlands lacking a direct connection or separated by a berm from navigable waters, would no longer be classified as WOTUS.[111]

D. WOTUS and Louisiana Coastal Land Loss

Despite the narrower proposed WOTUS definition, Louisiana will likely face an increasingly complex and costly CWA regime in the face of rising tides—responsible for creating new coastlines further inland that would establish further WOTUS connections. During the past century, the state has lost over 2000 square miles of its coastal marshland[112] and currently loses an estimated twenty-five to thirty-five square miles of wetlands every year, far more than any other U.S. state.[113] In 2017, the Louisiana Legislature passed the state's Coastal Master Plan, a $50 billion effort designed to target coastal land restoration in areas most susceptible to loss over the next fifty years,[114] which was accompanied by a House resolution proposing assessment of creating public servitudes over privately owned lands.[115] The creation of such public servitudes could be significant and extensive given that approximately eighty percent of Louisiana's coastal marsh is privately owned.[116] Likewise, the state has taken the increase in open water to claim more oil and gas rights.[117] Thus, given Louisiana's unique situation with regard to water generally, it seems likely that water-related issues, including the identification of "WOTUS," will continue to grow in complexity despite the effort to streamline the CWA's definitional purview.

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110. *Id.* at 4155.

111. *See id.*

112. Sara Sneath, *As Louisiana's Coast Washes Away, State Cashing in on Disputed Oil and Gas Rights*, TIMES-PICAYUNE (May 31, 2018), https://www.nola.com/environment/2018/05/as_louisiana_lands_washes_away.html.

113. *Wetlands*, SEA GRANT LA., http://www.laseagrant.org/education/topics/wetlands/ (last visited Feb. 1, 2019).

114. Mark Schleifstein, *Louisiana's $50 Billion Coastal Master Plan, $644 Million Annual Plan OK'd by Senate*, TIMES-PICAYUNE (May 17, 2017), https://www.nola.com/environment/2017/05/lousiana_senate_approves_coast.html.

115. H.R. Res. 178, 2017 Reg. Sess. (La. 2017).

116. Sneath, *supra* note 112.

117. *Id.*