Nationwide Injunctions in Environmental Law: *South Carolina Coastal Conservation League v. Pruitt*

INTRODUCTION

Scholars have criticized the issuance of nationwide injunctions by district courts, arguing that they are an inappropriate and excessive use of power.[1] Others have defended nationwide injunctions, asserting that they are necessary to ensure complete relief for plaintiffs.[2]

Litigation over the Clean Water Act's (CWA's) definition of "waters of the United States" (WOTUS) has prominently featured the use of injunctions. A recent WOTUS case from the Fourth Circuit, *South Carolina Coastal Conservation League v. Pruitt*, provides a helpful lens through which to consider the benefits and drawbacks of nationwide injunctions in environmental law. The case also demonstrates the continued importance of nationwide injunctions as a check on federal agency overreach.

I. NATIONWIDE INJUNCTIONS: HISTORY AND CURRENT ACADEMIC CRITICISM

A. Development of the Use of Nationwide Injunctions

U.S. courts began to issue nationwide injunctions in the mid-twentieth century.[3] Before the 1960s, nationwide injunctions were not issued in cases challenging federal regulations; instead, courts would issue relief only to the plaintiffs that were party to the case.[4] This practice led to particularly striking results during the New Deal Era, as the reach of the federal agencies began to expand dramatically.[5] For example, 1,600 separate injunctions were issued to

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1. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 418 (2017); *see also* Matthew Erickson, *Who, What, and Where: a Case for a Multifactor Balancing Test as a Solution to Abuse of Nationwide Injunctions*, 113 NW. U. L. REV. 331, 333 (2018).

2. *See generally* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018) (defending nationwide injunctions); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017) (discussing the limitations courts impose when issuing nationwide injunctions).

3. *See* Bray, *supra* note 1, at 428.

4. *See id.*; *see also* Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1077 (2017).

5. *See* Bray, *supra* note 1, at 434.

prevent enforcement of the Agricultural Adjustment Act processing tax, each limited in scope to the plaintiffs in each lawsuit.[6] One of the first nationwide injunctions against the federal government was issued in 1963, in *Wirtz v. Baldor Electric Co.*[7] Courts rarely used nationwide injunctions through the 1980s, but the use of nationwide injunctions has since steadily increased.[8]

The use of nationwide injunctions against regulatory actions by the executive branch has spanned a diverse set of policy areas.[9] For example, a district court issued a nationwide injunction against the Obama administration's Deferred Action for Childhood Arrivals immigration policy.[10] More recently, federal courts have issued nationwide injunctions against the Trump administration's executive order to withhold federal funds from sanctuary cities.[11]

Over the short time that courts have used nationwide injunctions against the executive branch, such relief has become a critical tool for district courts adjudicating claims against administrative agencies.

B. Legal Scholarship on Nationwide Injunctions

Legal scholars who have studied the use of nationwide injunctions have adopted two primary views: support for completely eliminating nationwide injunctions and support for specific limits on their use.

1. Current Standard for Injunctive Relief

The modern standard governing the scope of injunctions comes from *Califano v. Yamasaki*, a Supreme Court decision in which the Court held that injunctive relief must be expansive enough to provide the plaintiff with complete relief but go no further.[12] This approach aims to ensure that plaintiffs receive complete relief while minimizing the burden on the defendants.[13] Current doctrine recognizes that federal district courts have the authority to issue equitable relief that restrains defendants' behavior nationwide, cabined by normative limits.[14]

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6. *Id.*
7. *See generally id.* at 437 (discussing the beginnings of nationwide injunctions).
8. *See* Berger, *supra* note 4, at 1077–78.
9. *See id.* at 1078–79.
10. *See id.* at 1079.
11. *See* Frost, *supra* note 2, at 1074.
12. *See* 442 U.S. 682, 702 (1979).
13. *See id.*
14. *See* Siddique, *supra* note 2, at 2103.

2. The Case for Eliminating Nationwide Injunctions

One scholar, Samuel Bray, has argued that nationwide injunctions are never appropriate.[15] Bray asserts that the fact that nationwide injunctions are a rather new development undermines their legitimacy.[16] Bray argues that injunctive relief should not extend any further than the defendant's behavior as it applies to the plaintiff, regardless of the existence of nonparties that are similarly situated to the plaintiff.[17] In Bray's view, the availability of nationwide injunctions encourages forum shopping and limits opportunities for the same issue to be litigated in multiple circuits, thereby stunting legal development.[18] Bray's rule, if applied, would have enormous implications for actions taken against the federal government, as it would prevent district courts from striking down federal regulations nationwide.

3. Toward Principled Limits on Nationwide Injunctions

Other scholars have proposed frameworks for analyzing when the use of nationwide injunctions is appropriate. Amanda Frost, in what she billed as "the first sustained academic defense of nationwide injunctions," argued that nationwide injunctions, though a flawed tool, are critical because they allow the judiciary to serve as an effective check on the other branches of the federal government.[19] However, Frost argues that nationwide injunctions should only be employed where they are necessary to: (1) provide complete relief to the plaintiffs, (2) prevent nonparties from suffering irreparable injury, or (3) are the only "practicable method of providing relief."[20]

In a student note on the subject, Matthew Erickson advocates for a "multifactor balancing test" as a means of limiting the use of nationwide injunctions, but also warns against completely eliminating them.[21] While he echoes Bray's concerns about the use of nationwide injunctions, he argues that "a complete ban on nationwide injunctions is both impractical and undesirable."[22] Erickson argues that nationwide injunctions are an important tool at the disposal of the judicial branch as it serves its function to "declare what the law is."[23] He also notes that nationwide injunctions help ensure that laws are applied equally across the country.[24] For example, nationwide injunctions ensure that parties equally affected by administrative action, but lacking the resources to bring suit individually, are not subjected to regulations that the courts have

15. *See* Bray, *supra* note 1, at 420.
16. *See generally id.* at 425 (discussing the relative infancy of nationwide injunctions).
17. *Id.* at 424.
18. *Id.* at 419.
19. *See* Frost, *supra* note 2, at 1065, 1069.
20. *See id.* at 1090, 1098.
21. Erickson, *supra* note 1, at 353.
22. *Id.* at 331.
23. *Id.* at 336.
24. *See id.* at 336–37.

deemed improper.[25] Erickson proposes a multifactor balancing test that would consider: (1) the identity of parties involved, (2) the nature of the claim being litigated, and (3) the effect on the court system as a whole, with specific attention to considerations such as conservation of judicial resources.[26]

II. NATIONWIDE INJUNCTIONS AND THE CLEAN WATER ACT

Environmental law provides an excellent context in which to consider the merits of nationwide injunctions in light of the contemporary academic debate. The resources governed by environmental law are often geographically connected in ways that ignore jurisdictional limits (for example, watersheds crossing state boundaries), making concerns about relief outside the jurisdiction where a case is litigated particularly salient.

A. The History of Waters of the United States

Congress enacted the CWA to limit the discharge of pollutants into navigable waters.[27] The CWA defines navigable waters as "waters of the United States."[28] Under the CWA, a permit is required to discharge pollutants into a navigable water.[29] The CWA does not provide a clear definition of "waters of the United States," which has led to significant litigation about the jurisdictional reach of the CWA.[30]

The Supreme Court has held that a body of water must be connected to a "navigable" waterway in order to fall within the purview of the Clean Water Act.[31] In *Rapanos v. United States*, the Court did not reach a majority opinion as to whether wetlands qualify as "waters of the United States" under the CWA.[32] After the *Rapanos* plurality opinion, courts have settled on a general agreement that waters must have a "significant nexus" to waters that are navigable in fact to qualify as WOTUS.[33]

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25. *See id.*

26. *See id.* at 358–59.

27. 33 U.S.C. § 1251(a)(3) (2019).

28. 33 U.S.C. § 1362(7) (2019).

29. *See* EPA, *NPDES Permit Basics* (last visited June 30, 2019), https://www.epa.gov/npdes/npdes-permit-basics.

30. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (holding that Congress intended "navigable waters" to be interpreted broadly, and to encompass wetlands and other bodies of water that "would not be deemed 'navigable' under the classical understanding of that term"); *see also* Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 171 (holding that to fall under CWA, waters must be "navigable"); *see also* Rapanos v. United States, 547 U.S. 715, 726 (2006) (reasoning by the plurality that "significant nexus" test must be applied to determine whether water falls under CWA jurisdiction).

31. *SWANCC*, 531 U.S. at 171.

32. *Rapanos*, 547 U.S. at 742.

33. *See generally* HOLLY DOREMUS, ET. AL., ENVIRONMENTAL POLICY LAW 781–83 (Robert C. Clark et. al. eds., 6th ed. 2012) (discussing the aftermath of *Rapanos*); *see also Rapanos*, 547 U.S. at 742 (noting that "significant nexus" is in Justice Kennedy's concurring opinion, which held that wetlands must be adjacent to "a relatively permanent body of water connected to tradition interstate navigable waters"

*B. Executive Branch Treatment of the WOTUS Rule post-*Rapanos

The U.S. Environmental Protection Agency (EPA) issued what is known as the WOTUS Rule in 2015 in order to provide "clearer and more consistent approaches" for determining which waters fall under the CWA. The WOTUS Rule codified the significant nexus test for those waters that require a "case-specific analysis" to determine CWA jurisdiction.[34] The WOTUS Rule also expanded the definition of "waters of the United States" to cover several types of water bodies, including vernal pools and prairie potholes, which EPA determined would likely meet the significant nexus test in their aggregate effect.[35]

The WOTUS Rule has been successfully challenged in a number of district court cases as an unjustified expansion of CWA's reach.[36] This litigation has resulted in an inconsistent application of the WOTUS Rule across the country.[37] As of September 2018, the WOTUS Rule was in effect in twenty-two states.[38]

In 2017, President Trump directed EPA to issue the Suspension Rule, which contained a two-year delay of the WOTUS Rule, during which time the definition of "waters of the United States" would revert back to its 1980 definition.[39] After publishing the Suspension Rule in the Federal Register, EPA invited public comment, but explicitly instructed commenters not to address the substantive impact of the rule and to limit comments to discussion of the length of the suspension.[40]

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and that the connections between these bodies must be so continuous as to make it "difficult to determine where the 'water' ends and the 'wetland' begins.").

34. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053, 37,059 (June 29, 2015) (codified 33 C.F.R. pt. 328).

35. *Id.* at 37,071.

36. *See generally* N.D. v. EPA, 127 F. Supp. 3d 1047 (D.N.D. 2015) (granting motion for preliminary injunction against WOTUS Rule).

37. Eleven states, and two New Mexico agencies, joined North Dakota to challenge the validity of the WOTUS Rule on the grounds that it went beyond the authority granted by CWA. *Id.* The states' motion for preliminary injunction against the WOTUS Rule was granted by the district court. *Id.* However, the injunction was limited in scope to the thirteen states that were parties to the lawsuit (including New Mexico). *See id.* In 2018, the District Court for the Southern District of Georgia granted a preliminary injunction against the WOTUS Rule on similar grounds. *See generally* American Bar Association, *Waters of the U.S. Rule* (Nov. 15, 2018), https://www.americanbar.org/groups/environment_energy_resources/resources/wotus/wotus-rule/. Litigation is currently pending in Texas, where plaintiffs (other industry groups) are seeking a nationwide stay of the WOTUS Rule. *Id.*

38. National Association of Counties, *Waters of the U.S. (WOTUS): Where does the 2015 WOTUS rule apply?* (Sept. 19, 2018), https://naco.sharefile.com/share/view/scfe07ac45ed4c8fb.

39. S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 962 (D.S.C. 2018).

40. *Id.*

III. ANALYSIS OF *SOUTH CAROLINA COASTAL CONSERVATION LEAGUE V. PRUITT*

A. Case Background

South Carolina Coastal Conservation League v. Pruitt demonstrates that while nationwide injunctions may be broad remedies, they can be necessary to provide complete relief to similarly situated parties and maintain an administrable system.

In *South Carolina Coastal Conservation League*, several environmental organizations challenged the Suspension Rule on the grounds that the notice and comment period did not comply with the Administrative Procedure Act (APA).[41] In promulgating the Suspension Rule, EPA sought comment only as to delaying the effective date of the WOTUS Rule.[42] EPA explicitly stated that it was not soliciting comment on the "scope of the definition of 'waters of the United States' that the agencies would ultimately adopt."[43] Plaintiffs asserted that the notice and comment period did not meet the requirements of the APA.[44] Plaintiffs requested that the court vacate the Suspension Rule nationally.[45] The district court held for the plaintiffs and issued a nationwide injunction on the Suspension Rule, grounding its opinion in both the insufficient length of the notice and comment period and the narrow scope of comments solicited.[46] As a result, the WOTUS Rule remains in place in the states where it was in effect. EPA appealed the case to the Fourth Circuit, but the case was dismissed in early 2019.[47] EPA issued a new version of the Suspension Rule, on which it solicited comments until April 15, 2019.[48]

B. South Carolina Coastal Conservation League *and the Benefits of Nationwide Injunctions*

A more limited injunction in *South Carolina Coastal Conservation League* would have denied complete relief to the plaintiffs, caused "irreparable injury" to nonparties,[49] and led to convoluted regulation under CWA.

1. Complete Relief

The issuance of a nationwide injunction in *South Carolina Coastal Conservation League* ensured that the plaintiffs received complete relief for their

41. *Id.*
42. *See id.* at 965.
43. *Id.*
44. *Id.* at 963.
45. *See S.C. Coastal Conservation League*, 318 F. Supp. 3d at 968.
46. *See id.* at 969–70.
47. *See S.C. Coastal Conservation League v. Wheeler*, No. 18-1988/19-1136, 2019 U.S. App. LEXIS 7064, at*1 (4th Cir. Mar. 8, 2019).
48. *See, e.g.*, 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) (publishing for public comment the revised WOTUS definition).
49. *See* Frost, *supra* note 2, at 1095.

claim that the Suspension Rule rulemaking process did not comply with the APA. The court held that a nationwide injunction was necessary to provide plaintiffs complete relief in this case because the Suspension Rule potentially impacted downstream waters "not just in South Carolina or even within the Fourth Circuit but throughout the United States."[50] The Fourth Circuit justified the issuance of a nationwide injunction by noting that at least one of the plaintiff organizations had members who fished in waters outside of the Fourth Circuit who could have been impacted by the Suspension Rule.[51] The use of a nationwide injunction allowed plaintiffs complete relief from this harm.

Applying Bray's suggestion that relief should be limited to the plaintiffs would have produced a strange result.[52] In order to craft such relief, the court would be required to ensure that the waters plaintiffs sought to protect were not connected to waters that fell under the Suspension Rule. Such a resolution would be difficult to administer and does not address the violation at the heart of the case—namely, that EPA failed to carry out its duties under the APA in this rulemaking process. Further, the plaintiffs' arguments focused primarily on the need for enforcing the APA requirements with regard to federal regulatory actions and the importance of clarity of the governing CWA rule.[53] They justified their requested relief—a nationwide injunction of the Suspension Rule—not by discussing the far-reaching effects of watershed pollution, but by arguing that such an injunction would be an important enforcement of the APA and bring much needed clarity to this regulatory area.[54]

2. Protecting the Rights of Similarly Situated Parties

A nationwide injunction in *South Carolina Coastal Conservation League* was critical to protect nonparties who would have faced "irreparable harm" without such relief. *South Carolina Coastal Conservation League* provides a clear example of the concerns Erickson expressed over equitability.[55] As Erickson pointed out, nationwide injunctions ensure that parties without the resources to bring similar lawsuits in other jurisdictions do not face the same harm that plaintiffs sought to avoid simply for lack of resources.[56] Here, the court reasoned the APA notice and comment violation gave rise to the need for a nationwide injunction because when "agency regulations are unlawful, the ordinary result is that the rules are vacated[,]" as opposed to individualized

50. *S.C. Coastal Conservation League*, 318 F. Supp. 3d at 969.

51. *See id.*

52. *Compare id.* (noting that environmental plaintiffs had nationwide members), *with* Bray, *supra* note 1, at 418 (criticizing the efficacy of nationwide injunctions).

53. Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgement and Reply in Support of Plaintiffs' Motion for Summary Judgement at 2, S.C. Coastal Conservation League v. Wheeler, 2018 WL 3913065 (D.S.C. 2018).

54. *Id.*

55. *See supra* Part III.

56. *See* Erickson, *supra* note 1, at 336–37.

relief.[57] Limiting relief in this case, and in analogous cases relating to improper rulemaking, would allow the government to hastily impose new rules on all parties who lacked the resources to bring a lawsuit and do little to incentivize agencies to dutifully obey the law.

3. Consistency of Federal Regulation Implementation

Finally, issuing a national injunction as opposed to a circuit-wide injunction, for example, helps ensure that laws are applied evenly across the country. Not only do nationwide injunctions clearly benefit those similarly situated to the plaintiff, but they also may have marginal benefits for industry. The extensive litigation surrounding the CWA and WOTUS Rule has resulted in roughly half of the states being governed by the WOTUS Rule, while the remaining half are still governed by the previous standard.[58] The American Farm Bureau Federation has called this uneven application of the WOTUS Rule a "deeply troubling state of affairs," and has argued that "a rule this fundamental to the CWA's regulatory scheme should not apply in a patchwork manner."[59]

On the other hand, nationwide injunctions, like that issued in *South Carolina Coastal Conservation League*, give clear guidance to all states on the future of the rule, instead of allowing EPA to implement regulations that apply only to the parties that have not challenged them in court. A national injunction instructs the agency to return to the drawing board. In this case, where the legal issue related to notice and comment, the knowledge that courts may issue national injunctions on regulations that lacked proper public comment opportunities could incentivize agencies to use due diligence when attempting to conform with the rules set forth by the APA.

C. South Carolina Coastal Conservation League *and the Harms of Nationwide Injunctions*

Many legal scholars have expressed concern that national injunctions incentivize forum shopping.[60] However, Frost argues that this concern is misplaced because forum shopping is a strategy at the disposal of plaintiffs in any case—regardless of the relief sought.[61] It is true that the nature of national injunctions can amplify the impact of forum shopping, because the plaintiffs' choice of favorable venue may impact the scope of federal regulations nationally. However, our legal system gives plaintiffs the right to choose between venues with jurisdiction. Choice of forum is a strategic decision in all litigation, and

57. *S.C. Coastal Conservation League*, 318 F. Supp. 3d at 969 (citation omitted).

58. *See* National Association of Counties, *supra* note 38.

59. Business Intervenor-Plaintiffs' Motion to Amend the Court's Preliminary Injunction and Incorporates Memorandum of Law at 2, Georgia v. Wheeler, No. 2 :15-cv-79 (S.D. Ga. Sept. 26, 2018).

60. *See* Bray, *supra* note 1, at 419; *see also* Erickson, *supra* note 1, at 333; *see also* Siddique, *supra* note 2, at 2107.

61. *See* Frost, *supra* note 2, at 1105.

cases involving federal administrative regulations are no exception. Furthermore, the benefits of national injunctive relief as an available remedy are critical and outweigh concerns about forum shopping in these cases. Efforts to scale back on forum shopping should seek to specifically address forum shopping itself, rather than limiting an important forum of equitable relief.

D. Additional Considerations: Complete, and Administrable, Relief for Plaintiffs and Similar Parties

South Carolina Coastal Conservation League illustrates the challenge of creating an injunction of sufficient scope to provide plaintiffs complete relief, without forcing courts to spend significant resources to determine the geographic scope of the injunction.

The Suspension Rule concerns water—a complex and interconnected resource. In *South Carolina Coastal Conservation League*, relief that was limited geographically, either to South Carolina or to the Fourth Circuit, would have failed to address the plaintiffs' claimed injury that focused primarily on the harm associated with disregard for proper notice and comment.[62] To provide complete relief to the plaintiffs, the court would need to ensure that plaintiffs would not suffer downstream effects from pollution in waters that were not WOTUS under the Suspension Rule, but would have fallen within the WOTUS Rule definition. A nationwide injunction ensures that plaintiffs receive complete relief. Were this remedy unavailable, courts would be required to conduct an individualized evaluation of local hydrology and the potential for pollution from outside the geographic region to impact the plaintiffs for each case that came before them. This could create an enormous amount of work for the judiciary, which is poorly positioned to execute such work efficiently or accurately.

CONCLUSION

In the face of the robust and nationwide powers of administrative agencies within the executive branch, federal courts must be able to serve as a check on executive agency actions. Nationwide injunctions are the primary means through which federal courts can ensure that federal regulations are issued in accordance with the law. Future scholarship should address whether certain types of resources or regulatory postures lend themselves to more broadly crafted remedies. Environmental cases relating to regulation of migratory resources, such as water and air, provide an excellent place to start such an examination.

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62. *See* Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment, *supra* note 53, at 2.

We welcome responses to this In Brief. If you are interested in submitting a response for our online journal, Ecology Law Currents, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, http://www.ecologylawquarterly.org.