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We Already Knew Many Federal Judges Weren't Deferring to EPA, Now the 10th Circuit Court of Appeals Isn't Deferring to Judges Either.

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Just before the holidays I wrote about three Judges of the Fifth Circuit Court of Appeals who decided, over the Army Corps of Engineers' objection, to apply the Supreme Court's *Sackett* test for determining whether something is a Water of the United States within the jurisdiction of the Federal Clean Water Act instead of EPA's and the Corps' duly promulgated, and immediately challenged, post-*Sackett* regulation responding to the Supreme Court's edict. This Fifth Circuit decision was only the latest example of Federal Judges stepping into the vacuum created by Congress's refusal to refresh the more than half century old Clean Water Act.

Now this week we see that it isn't just Federal agencies authorized by Congress to administer the Act that aren't feeling the love as three Judges of the Tenth Circuit Court of Appeals weren't at all hesitant to reverse a Colorado Federal District Court Judge's determination after a full blown trial with many witnesses, including experts, that four settling ponds associated with a gold mine were point sources of pollutants to a Water of the United States requiring a Federal NPDES permit.

The Colorado lawsuit was brought by two NGOs alleging that the unlined settling ponds, the fourth of which was only ninety feet from the Middle Fork of the South Platte River, were unpermitted point sources from which pollutants were discharged to the river in violation of the Clean Water Act. According to the Tenth Circuit Judges, the Defendant had admitted to a state regulatory agency that water seeped from the unlined ponds into groundwater and the Defendant's expert admitted at trial that groundwater found its way to the river. The Tenth Circuit Judges also didn't take issue with testimony that it took only two days for water from the ponds to find its way to the river.

The Tenth Circuit Judges, like the District Court Judge before them, applied the Supreme Court's *Maui* factors for determining whether a discharge to groundwater is a functional equivalent of a discharge to a Water of the United States. (Yes, it is historically quite unusual for the nation's highest court to hear two Clean Water Act cases in three years and I suspect it isn't done with the Act yet.) But the Appeals Court Judges saw things differently than the Judge who heard all the evidence, finding that these facts put this case in the “middle ground” respecting the two factors the Supreme Court found most important respecting functional equivalence and, for that reason, the District Court erred in not sufficiently considering other factors, more specifically the dilution of, and chemical

change in, pollutants from the ponds on their short journey to the River.

Putting aside whether the majority in *Maui* would agree with the Tenth Circuit Judges' middle ground characterization (it definitely wouldn't), what really seemed to concern the Judges was the fact that the State of Colorado doesn't require the mine in question to have a state permit similar to the Federal NPDES permit under a Colorado statute similar to the Federal Clean Water Act. Of course that's true in nearly all cases of citizen suits under the Act, including the case involving the County of Maui decided by the Supreme Court.

The bottom line is the Supreme Court that decided *Maui*, which is much different than the Supreme Court that decided *Sackett*, may have been optimistic in thinking that it had done that which is necessary for District Courts to do the job it gave them and, until Congress acts, the battles between courts and agencies, and now courts and courts, over the reach of the Act will continue.

The lawsuit was launched in 2019 when three people who live downstream of the Alma, Colorado, gold mine and a pair of nonprofit groups — The South Park Coalition Inc. and Be the Change USA — alleged High Mountain did not line the ponds used to store wastewater from the mining process, which resulted in damage to nearby wetlands. Randall Weiner of Weiner & Cording, who represents the environmental groups, said much of the Tenth Circuit's ruling notes the strengths of the evidence that the groups presented in district court. "We are hoping to have the opportunity to address the remaining Maui factors before the district court on remand," Weiner told Law360 on Wednesday. "I haven't seen a court previously require an exhaustive review of all Maui factors, but we will meet that challenge if given the chance."

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