



Supreme Court Rules that District Courts Retain Jurisdiction Over “Waters of the United States” (WOTUS) Rule

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On January 22, 2018, the United States Supreme Court issued a decision concerning rulemaking over the definition of “waters of the United States” (“WOTUS”) under the Clean Water Act (“CWA”) (the “WOTUS Rule”). [Nat’l Ass’n of Mfrs. v. Dep’t of Def., No. 16-299 \(2018\)](#). As explained in previous Van Ness Feldman alerts circulated in [March 2014](#), [June 2015](#), [May 2016](#), [March 2017](#), [July 2017](#) and [November 2017](#), the WOTUS Rule, which re-defined jurisdictional “waters of the United States” under the CWA, has far-reaching implications for project development across energy, water, agricultural, construction, and transportation sectors.

Although the Supreme Court’s decision merely resolves a jurisdictional dispute between the federal courts of appeals and the federal district courts over which court has jurisdiction to hear challenges to the WOTUS Rule, the decision will result in the lifting of the existing stay of the WOTUS Rule, opening the door to disparate approaches to jurisdictional determinations under the CWA across the country. The decision has significant implications for the fate of the WOTUS Rule and how federal agencies review permit applications that may affect jurisdictional waters under the WOTUS Rule. In particular, the numerous legal challenges to the WOTUS rule that were previously raised in district courts are likely to resume, but pending resolution of those challenges, implementation of the WOTUS Rule—which expands federal control over several types of water bodies—would be legally permissible.

Background

In 2015, after a lengthy and controversial rulemaking process, the U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps”) issued the WOTUS Rule. Immediately after the WOTUS Rule was issued, the rule was challenged in multiple judicial forums, including federal district courts and appellate courts. On October 9, 2015, the Sixth Circuit granted a stay of the WOTUS Rule, effective nationwide, pending the court’s resolution of the question of whether it had jurisdiction over the case. *In re EPA*, 803 F.3d 804, 807 (6th Cir. 2015). In February 2016, a three-judge panel of the Sixth Circuit determined that the courts of appeals, rather than district courts, had jurisdiction over the WOTUS Rule. *In re U.S. Dep’t of Def., U.S. EPA Final Rule: Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261 (6th Cir. 2016). On January 13, 2017, the U.S. Supreme Court agreed to resolve the jurisdictional question over which federal court should hear challenges to the WOTUS Rule. *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 137 S.Ct. 811 (2017).

In its January 22, 2018 decision, the Supreme Court held that challenges to the WOTUS Rule belong at the district rather than appellate court level, overturning the Sixth Circuit’s decision. The Supreme Court remanded the case to the Sixth Circuit, with instructions to dismiss the case. Once that dismissal occurs, the nationwide stay of the WOTUS Rule will be lifted and challenges to the WOTUS Rule in the district courts will resume.

Future Challenges to the 2015 WOTUS Rule

More than two dozen cases were previously filed challenging the WOTUS Rule. Some district courts dismissed the pending lawsuits, concluding that the courts of appeals had exclusive jurisdiction over challenges to the WOTUS Rule. See *Murray Energy Corp. v. EPA*, 2015 WL 5062506, *6 (N.D.W. Va. Aug. 26, 2015); *Georgia v. McCarthy*, 2015 WL 5092568, *3 (S.D. Ga. Aug. 27, 2015); *Arizona Mining Association v. EPA*, No. 15-01752 (D. Ariz. May 3, 2016); *State of Ohio v. EPA*, No. 2:15-cv-2467 (S.D. Ohio April 25, 2016); *Washington Cattlemen’s Association et al. v. EPA*, No. 0:15-cv-03058 (D. Minn. Nov. 8, 2016);

Chamber of Commerce v. EPA, No. 4:15-cv-386 (N.D. Okla.). These challenges could potentially be refiled in light of the Supreme Court's decision.

The North Dakota Federal District Court held that it had jurisdiction to review the WOTUS Rule, and it granted a preliminary injunction against the implementation of the WOTUS Rule within those states that had participating in filing the case, including North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, South Dakota, and Wyoming. The court, however, stayed the case pending a decision by the Supreme Court. *State of North Dakota et al. v. EPA*, No. 3:15-cv-59 (D.N.D. May 24, 2016). Therefore, the conflict in that case remains live. In addition, other district court cases remain pending or were administratively closed following the Sixth Circuit's order holding in abeyance petitions for review of the WOTUS Rule. Parties could, however, file to reopen proceedings after the Sixth Circuit terminates its abeyance and dismisses its WOTUS Rule case in light of the Supreme Court's decision.

In the interim, implementation of the WOTUS Rule would be legally permissible, except in the 13 states that obtained an injunction against the rule in *North Dakota v. EPA*, No. 3:15-cv-00059 (D.N.D. Aug. 27, 2015). However, in light of the Trump Administration's ongoing rulemaking efforts discussed below, it is unlikely that staff at the Corps or the EPA will seek to implement the WOTUS Rule.

Ongoing Rulemaking Efforts

Implementation of the WOTUS Rule will remain in question even after the Sixth Circuit's nationwide stay of the rule is lifted. On July 27, 2017, in response to an executive order by the Trump Administration, the EPA and the Corps unveiled a proposed rule that, if adopted, would rescind the definition of the WOTUS Rule. The first step proposes a rule that would "re-codify" the WOTUS definition that was in place prior to the 2015 WOTUS Rule, and has been in force since the District of North Dakota and the Sixth Circuit enjoined the 2015 WOTUS Rule. In the second step in the rulemaking process, the EPA and the Corps will work on a new rulemaking that will re-evaluate the WOTUS definition. Neither a final rule recodifying the pre-2015 WOTUS definition, nor a final rule that reevaluates the WOTUS definition, has been issued at this time. A final rule recodifying the pre-2015 WOTUS definition may, however, be issued at any time.

In addition, on November 16, 2017, the EPA and the Corps unveiled a proposed rule to amend the effective date of the 2015 WOTUS Rule, proposing that the 2015 rule would not be applicable until two years after the action is finalized and published in the *Federal Register*. 82 Fed. Reg. 55542 (Nov. 22, 2017). The purpose of this proposed rule is to allow the EPA and the Corps time to reconsider the definition of "waters of the United States" before the 2015 WOTUS Rule goes into effect. Although the comment period on this proposed rule has closed, a final rule has not been issued. Until the EPA and the Corps finalize the proposed rule recodifying the pre-2015 WOTUS definition or finalize a rule amending the effective date of the 2015 WOTUS Rule, the 2015 WOTUS Rule could be lawfully implemented in most states, although such a result is unlikely while the agencies' rulemaking efforts are pending.

For more information

Van Ness Feldman closely monitors and counsels clients on water, air, and other environmental regulatory developments. If you would like more information about the implementation of the Clean Water Act, please contact [Duncan Greene](#), [Joseph Nelson](#), [Brent Carson](#), [Jenna Mandell-Rice](#), [Sheri Spang](#), or any member of the firm's [Environmental](#) Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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