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News Alert

Unanimous Supreme Court: WOTUS Rule Challenges Belong in Federal District Courts

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In a unanimous opinion, the Supreme Court today held that lawsuits challenging the 2015 rule amending the definition of waters of the United States (WOTUS Rule) under the Clean Water Act (CWA) must be brought in federal district courts because federal courts of appeals lack jurisdiction over those challenges. The case, *National Association of Manufacturers v. Department of Defense*, resolves uncertainty over the scope of the CWA's judicial review provisions. The Court's opinion also opens a new chapter in the fight to keep the WOTUS Rule from going into effect.

The Court rejected arguments that the WOTUS Rule fell into either of two categories of agency action subject to the courts of appeals' exclusive jurisdiction under CWA section 509(b)(1): (1) approval or promulgation of "any effluent limitation or other limitation" or (2) issuance or denial of an NPDES permit under section 402. 33 U.S.C. § 1369(b)(1)(E)-(F). The justices concluded that the first category is limited to substantive restrictions on the discharge of pollutants rather than actions that define the geographic scope of the CWA. The Court further determined that the CWA's plain language precluded holding that the WOTUS Rule could be considered an issuance or denial of an NPDES permit.

The Court's decision immediately has the potential to allow the WOTUS Rule to go into effect in the absence of further action from the executive branch or litigants challenging the rule in district court. The courts of appeals' lack of jurisdiction means that the Sixth Circuit's nationwide stay of the WOTUS Rule—in effect since 2015—must be lifted. With that stay terminated, the Sixth Circuit's nationwide stay of the WOTUS Rule—in effect since

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2015—must be lifted. With that stay terminated, the rule will become effective in all but thirteen states which are the subject of a preliminary injunction issued by a district court in North Dakota. *See North Dakota v. EPA*, No. 3:15-cv-00059. One should expect states and organizations challenging the rule to seek additional relief to prevent the WOTUS Rule from going into effect in the rest of the country while challenges continue to work their way through the courts.

This development also places greater urgency on the Trump administration to finalize its proposed rule to delay the WOTUS Rule's effective date. On November 22, 2017, EPA and the Army Corps of Engineers published a proposed rule in the Federal Register that would delay applicability of the WOTUS Rule for two years from the date of this new rule becoming final. The comment period for this proposal closed on December 13, 2017. If finalized, and not successfully challenged, this two-year delay would provide the administration additional time to implement its two-step approach to the repeal and then the replacement of the WOTUS Rule. EPA and the Army Corps started this process this past summer by proposing a rule that would reinstate the pre-2015 definition of WOTUS.

Today's Supreme Court decision, while resolving an important procedural question under the CWA, is just the start of what should be a new flurry of activity in the fight over how to define WOTUS. Expect action from both the Trump Administration and the Courts addressing if and when the WOTUS Rule goes into effect. At the same time, substantive challenges to the WOTUS Rule on its merits, as well as the administration's efforts to repeal and replace it, will continue in the months to come. By virtue of today's decision, these challenges will play out in federal trial courts, not the courts of appeals.

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