

“WOTUS”: A Tale of Two Rules While Litigation and Rulemaking Continue



On August 16, 2018, the U.S. District Court for the District of South Carolina issued a nationwide injunction on a Trump administration rule that has been preventing the 2015 rule that revised the definition of “waters of the United States” (WOTUS) under the Clean Water Act (CWA) from taking effect. In *South Carolina Coastal Conservation League v. Wheeler*, the Court held that the Trump administration violated the Administrative Procedure Act (APA) in promulgating the so-called “Suspension Rule,” which delayed implementation of the Obama-era WOTUS Rule for two years. As a result, the 2015 WOTUS Rule applied in twenty-six states and Washington D.C.

Immediately after this decision was issued, states then exposed to the WOTUS Rule filed for injunctions against the WOTUS Rule in two other related cases. On September 12, 2018, a temporary injunction was issued in the U.S. District Court for the Southern District of Texas and on September 18, 2018, an additional state was added to an existing preliminary injunction in the U.S. District Court for the District of North Dakota. The WOTUS Rule currently applies in twenty-two states and Washington D.C., while litigation over both the WOTUS and Suspension Rules continues.

Background

In 2015, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (“Corps”) issued their WOTUS Rule, redefining the scope of waters and wetlands subject to federal jurisdiction under the CWA. According to the agencies, the WOTUS Rule was designed to resolve years of debate and confusion in the wake of the Supreme Court’s *Rapanos* decision in 2006 and several iterations of failed guidance attempting to interpret that decision.

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The WOTUS Rule was challenged in a number of federal district and appellate courts. Many of those cases were consolidated before the Sixth Circuit, which issued a nationwide stay on implementation of the rule. On January 22, 2018, the United States Supreme Court ruled that federal circuit courts of appeal lack jurisdiction to consider the agencies' rulemaking, resulting in the Sixth Circuit vacating the nationwide stay. This caused the WOTUS Rule to go into effect immediately in all but thirteen states, which were already subject to a preliminary injunction issued by the U.S. District Court for the District of North Dakota. See *North Dakota v. EPA*, 127 F. Supp.3d 1047 (D.N.D. 2015).

In March 2017, President Trump issued an Executive Order instructing EPA and the Corps to reconsider the WOTUS Rule. On February 6, 2018, the agencies promulgated the Suspension Rule, under which they formally delayed implementation of the WOTUS Rule until 2020 and reinstated the regulatory definition of "waters of the United States" that was applicable prior to issuance of the WOTUS Rule. Several states and environmental groups immediately filed suit challenging the rule.

Suspending the Suspension Rule

The federal district court in South Carolina was the first to adjudicate the legality of the Suspension Rule. In *S.C. Coastal Conservation League*, the Court held the government violated the APA by failing to provide a "meaningful opportunity for comment" on the Suspension Rule. The Court explained that, when proposing the Suspension Rule, EPA and the Corps solicited comments only as to whether the effective date of the WOTUS Rule should be amended. The agencies did not solicit or consider input on the merits of the WOTUS Rule or its predecessor, which they sought to reinstate.

The Court found that, in the context of issuing a rule to suspend the effective date of a targeted rule and reinstate an earlier regulation, an agency's failure to evaluate the targeted rule's substance and merits amounts to a content restriction that is "so severe in scope that . . . the opportunity for comment cannot be said to have been a meaningful opportunity." The Court therefore found the Suspension Rule arbitrary and issued a nationwide injunction vacating the rule. The Court acknowledged the implications of issuing a nationwide injunction and considered the geographic scope of the injunction in its ruling, ultimately concluding that because the effect of the Suspension Rule has impacts across the United States a nationwide injunction was necessary to provide complete relief. Parties have already appealed the Court's injunction.

Implications

The injunction of the Suspension Rule continues the debate over the appropriate scope of federal jurisdiction under the Clean Water Act. It means that the Obama-era WOTUS Rule is now the law of the land in twenty-two states and Washington D.C., while the regulatory definition of "waters of the United States" that it replaced remains in effect in the other twenty-eight. As a result, the WOTUS Rule is now the jurisdictional standard everywhere except Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming.

For the time being there are two different regulatory standards for determining the scope of federal jurisdiction under the Clean Water Act—sometimes in neighboring states. The conflict between these two interpretations means that, for example, interstate projects could be exposed to different methodologies and regulatory standards at the project-review stage based on state lines. This inconsistency could be further exacerbated by the other challenges to the WOTUS Rule and Suspension Rule pending before federal courts.

As has become the norm, it looks like the scope for CWA jurisdiction will remain murky for years to come.

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