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Got a WOTUS challenge? Go straight to district court

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The U.S. Supreme Court has unanimously held that challenges to the so-called "Waters of the United States" rule, commonly known as the "WOTUS rule" -- a federal regulation promulgated by the Obama administration to delineate the scope of waters regulated under the federal Clean Water Act -- must be heard by federal district courts. The decision in *National Association of Manufacturers v. Department of Defense*, 2018 DJDAR 703 (Jan. 22, 2018), reversed the 6th U.S. Circuit Court of Appeals' earlier ruling that challenges could be brought directly in federal courts of appeal without deciding the merits of the WOTUS rule itself.

While the outcome of WOTUS challenges will now be determined in the first instance at the district court level, the ruling does have implications for future CWA suits, as the Trump administration is currently working on substantial revisions to the WOTUS rule.

A Brief History of the WOTUS Rule

In 2015, the Obama administration promulgated the WOTUS rule to define the scope of federal jurisdiction under the CWA. The WOTUS rule was intended to resolve the much-litigated question of what constitutes a "water of the United States" subject to CWA regulation. The CWA itself prohibits discharge into "navigable waters," a term which the statute defines to mean "the waters of the United States, including the territorial seas." 33 U.S.C. Section 1334. A long line of cases, stretching back to *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), has considered whether "waters of the United States" must actually be navigable.

Over the years, the Supreme Court has, on multiple occasions, considered whether a non-navigable water near a navigable water can be considered a "water of the United States" for purposes of the CWA. The court's most recent foray into the issue, in *Rapanos v. United States*, 547 U.S. 715 (2006), which considered jurisdiction over both non-navigable wetlands near navigable waters and non-navigable tributaries of navigable waters, produced a plurality with multiple articulated tests for determining the reach of CWA jurisdiction. Two justices in particular, Justice Anthony Kennedy and Justice Antonin Scalia, offered distinct methods for determining what constitutes a "water of the United States." Justice Kennedy's opinion, which is generally recognized as controlling, articulated a view that non-navigable waters may be subject to CWA jurisdiction when there is a "significant nexus" between those waters and navigable waters. Justice Scalia's opinion offered a far more restrictive view, countering that "'waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water" and does not include intermittent or ephemeral waters.

In an attempt to offer clarification after *Rapanos*, the WOTUS rule set its own standards for determining CWA jurisdiction -- and stretched jurisdictional reach even further than Justice Kennedy's "significant nexus" test to include "those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas." 80 Fed. Reg. 37055. Shortly after taking office, on Feb. 28, 2017, President Donald J. Trump signed an executive order to initiate the withdrawal of the WOTUS rule and replace it with a rule that defines "waters of the United States" in accordance with Justice Scalia's *Rapanos* opinion. That rulemaking process is ongoing. In the interim, the Trump administration pushed the effective date of the WOTUS rule to Feb. 6, 2020, to prevent the rule from having effect while the administration's revision process moves forward.

The Challenge and Decision

After promulgation of the WOTUS rule in 2015, several parties, including the National Association of Manufacturers, filed challenges to the rule in a number of federal district courts. Because the CWA specifically provides that certain categories of Environmental Protection Agency actions are reviewable directly by the federal courts of appeals, some parties additionally elected to file petitions in several federal courts of appeals, in case their district court suits were rejected for lack of jurisdiction.

The circuit court petitions were consolidated before the 6th Circuit, at which point the National Association of Manufacturers intervened and moved to dismiss the circuit court action for lack of jurisdiction. The government opposed the motion, arguing that the WOTUS rule fell within two of seven categories of EPA actions are reviewable directly by the federal courts of appeals: EPA actions "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345" and EPA actions "issuing or denying any permit under section 1342." 33 U.S.C. Section 1369(b)(1)(E)-(F). The 6th Circuit agreed with the EPA, and denied to dismiss the circuit court action.

The Supreme Court overturned the 6th Circuit's decision, finding that neither of the two categories discussed in Section 1369(b)(1)(E) and (F) were applicable to the WOTUS rule. With respect to section 1369(b)(1)(E), the court said, the WOTUS rule is not an "effluent limitation," because it does not restrict the quantities, rates, or concentrations of pollutants. Nor could it be an "other limitation," because the CWA's language contemplates that such an "other limitation" would be similar in kind to an effluent limitation -- in other words, a limitation related to the discharge of pollutants -- which the WOTUS rule is not. Even if the WOTUS rule could be read to be an "effluent limitation or other limitation," said the court, a challenge to the WOTUS rule would still not be subject to circuit court jurisdiction because it was not promulgated pursuant to Section 1311, but was instead promulgated pursuant to Section 1361(a), which gives EPA general rulemaking authority to set regulations effectuating the CWA. With respect to Section 1369(b)(1)(F), the court found that the WOTUS rule neither issues nor denies NPDES permits pursuant to Section 1342, and is not "functionally similar" to issuing or denying a permit.

Nor did the court find the government's policy arguments for circuit court jurisdiction to be convincing. Rejecting the argument that allowing initial circuit court review would be more efficient and avoid a bifurcated process, the court concluded that Congress intended rules like the WOTUS rule to be reviewable in district court. Despite conceding some "logical force" to the argument that initial circuit court review would promote national uniformity, the court found the government's proposed interpretation would expand circuit court jurisdiction beyond what Congress intended.

What's Next?

As a result of the Supreme Court's decision, any challenges to the existing WOTUS rule will be heard in district court. Should the various original petitioners pursue litigation in the district courts, there is theoretically the potential for courts to return multiple conflicting interpretations of the validity of the WOTUS rule, which could lead to a time-consuming appeals process and even more regulatory uncertainty. As a practical matter, though, the promulgation of new regulations to replace the existing WOTUS rule, and the suspension of the rule's effective date, could moot the litigation on the original rule.

That being said, it is likely that the Trump WOTUS rule, when finalized, will be challenged -- in district courts, per the *National Association of Manufacturers* ruling. As such, litigants and regulated parties may yet be treated to a patchwork of lower court decisions regarding the rule's validity and scope. The waters may not clear on the WOTUS rule for some time to come.