SCOTUS: WOTUS Rule Suits Belong in District Courts

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On January 22, 2018, the US Supreme Court unanimously held that challenges to the Obama-era Clean Water Rule, commonly referred to as the WOTUS Rule (for “waters of the United States”), must be filed in federal district courts rather than directly in federal appeals courts. The case is *National Association of Manufacturers v. Department of Defense et al.*, case number 16-299.

The WOTUS Rule sought to clarify which wetlands and streams receive automatic protection under the Clean Water Act (CWA) in an attempt to further the CWA's objective “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” The US Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) jointly issued the WOTUS Rule in 2015. Dozens of parties filed lawsuits over the rule in both federal appeals courts and district courts, teeing up a battle over the appropriate legal venue for challenges. Last year, the Supreme Court agreed to take up the case brought by the National Association of Manufacturers (NAM).

Meanwhile, the Trump Administration has been actively working to repeal and replace the WOTUS Rule with a version that would narrow the jurisdictional reach of the CWA.

Key Takeaways

Although the Supreme Court considered the case's potential mootness in light of the Trump Administration's proposal to rescind or delay the WOTUS Rule, the Court acknowledged that, so long as the WOTUS Rule stands, a party's challenge to the rule presents a live controversy.

The permitting regime that predated the WOTUS Rule continues in effect, as EPA and the Corps work to formulate a new rule and rescind the Obama-era WOTUS Rule.

Now that the Supreme Court has established the proper jurisdiction for the litigation, several district court cases that had been stayed could be restarted; however, the Trump Administration is unlikely to defend the WOTUS Rule, which may spur further challenge by environmental groups in favor of the rule.

The Decision

In *National Association of Manufacturers v. Department of Defense*, the Supreme Court considered whether lawsuits challenging the WOTUS Rule should be filed in district courts or courts of appeals. The CWA creates specific categories of agency actions that are directly and exclusively reviewable by courts of appeals. 33 U.S.C. § 1369(b)(1). NAM, several states and some environmental groups, including the Sierra Club and Waterkeeper Alliance, contended that the WOTUS Rule did not fit within any of the listed categories, and therefore was subject to review in district court. On the other side, the United States argued that because the WOTUS Rule established the geographic scope of the CWA's effluent limitations, subject to subparagraph (E) of 33 U.S.C. 1369(b)(1), and controlled the types of waters that would be subject to EPA's permitting authority, subject to subparagraph (F) of 33 U.S.C. 1369(b)(1), direct appellate review applied under the statute. Further, the United States argued that having an appeals court decide the fate of the WOTUS Rule would be more efficient—a position shared by both the Obama and Trump Administrations.

While the Court agreed that direct appellate review of the WOTUS Rule may be more efficient, it held that the categories of actions that may be heard by appellate courts in the first instance, listed in 33 U.S.C. § 1369(b)(1), do not include the WOTUS Rule.

Specifically, the Court held that the WOTUS Rule, which redefined what is and what is not a water of the United States for purposes of federal jurisdiction and permitting under the CWA, did not fall within either subparagraph (E) or (F) of 33 U.S.C. § 1369(b)(1) of the statute. The Court held that the WOTUS Rule did not impose an effluent limitation or "other limitation" covered by subparagraph (E). Further, the Court found that the promulgation of the WOTUS Rule was neither the issuance nor denial of a permit, nor "functionally similar" to a permit decision, which could be heard in the first instance by a circuit court of appeal, and therefore was not covered by subparagraph (F).

The ruling did not address the merits of challenges to the WOTUS Rule.

Implications

The Court's decision on the proper venue is significant; it affects the resources needed to litigate the merits of CWA challenges because claims must first be exhausted in federal district court to be eligible for appellate review in the circuit courts, and clarifies the applicable statute of limitations for filing lawsuits (six years rather than 120 days). In addition, because agency actions reviewable under 33 U.S.C. 1369(b)(1) are not subject to judicial review in any civil or criminal proceeding for enforcement, and the WOTUS Rule does not fall within the purview of the enumerated list, the decision may open the door for review of agency actions under the WOTUS Rule in subsequent civil or criminal proceedings.

The decision also undermines a 2015 Sixth Circuit decision to impose a nationwide stay on the WOTUS Rule. *In re* EPA, 803 F.3d 804 (6th Cir. 2015). The Sixth Circuit's stay will likely be vacated, meaning the WOTUS Rule may go into effect, at least until it is rescinded or replaced, in the 37 states where it was not also stayed by a North Dakota district court judge. *North Dakota v. United States EPA,*127 F. Supp. 3d 1047 (D.N.D. 2015). Because the Sixth Circuit's stay has not yet been vacated, the pre-WOTUS-Rule regulations remain in effect nationwide. Ongoing efforts by EPA and the Corps to rescind and replace the rule will require notice and comment, a time-consuming

process that likely will be protracted by litigation. In the interim, the regulated community must continue to abide by the ill-defined existing pre-WOTUS-Rule regulations, case law and agency guidance on what is meant by “waters of the United States.”

If you would like to discuss more particularized implications for your project or company, please contact WilmerHale's Energy, Environment and Natural Resources Group. For further background on the CWA's regulation of discharges into “navigable waters,” see WilmerHale's March 2017 publication, President Trump Signs WOTUS Rule's Death Warrant.

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