

January 23, 2018

## Federal District Courts Must Hear Challenges to the Obama Administration's Clean Water Rule

On Monday, a unanimous U.S. Supreme Court held that challenges to the Obama administration's 2015 Clean Water Rule, or "Waters of the United States" Rule (the "WOTUS" Rule), initially belong in federal district courts with competent jurisdiction to hear the cases, not in the federal courts of appeals.

The WOTUS Rule seeks to clarify the geographic and, in effect, jurisdictional scope of the Clean Water Act. The regulation defines which bodies of water qualify as "waters of the United States" under the Clean Water Act. This definition is pivotal to a determination by the U.S. Environmental Protection Agency ("EPA") and the Army Corps of Engineers (the "Corps") as to whether a project will or will not require a Section 404 Clean Water Act permit. Challenges to the WOTUS Rule commenced almost immediately upon its publication in June 2015. More than 100 different parties, including over two dozen states, various industry groups and multiple environmental organizations, filed actions in both federal district courts and the courts of appeals across the country. Challengers simultaneously filed actions in federal district and appellate courts, reflecting the jurisdictional uncertainty associated with these challenges.

In 2015, the Sixth Circuit issued a [nationwide stay](#) of implementation of the WOTUS Rule. Parallel litigation continued at the federal district court level, where the EPA and the Corps obtained a number of judicial stays across the country. In 2016, the Sixth Circuit [addressed](#) whether challenges to the WOTUS Rule must be brought first to the federal district court, followed by the court of appeals, or whether these challenges could pass over the district court and be filed with the court of appeals at the outset. A divided Sixth Circuit panel held that the appellate courts have jurisdiction to hear these challenges. Industry groups, environmentalists and states disagreed and petitioned the U.S. Supreme Court to review the Sixth Circuit's jurisdictional ruling.

The Supreme Court's [opinion](#), *National Association of Manufacturers v. Department of Defense et. al.*, slip op. (January 22, 2018), authored by Justice Sonia Sotomayor, overturns the Sixth Circuit's ruling and holds that challenges to the WOTUS Rule belong in the federal district courts. The Court rejected the federal government's position, finding that "Congress has made clear that rules like the WOTUS Rule must be reviewed first in federal district courts."

While this ruling was in favor of the petitioners, its practical ramifications relative to actual implementation of the WOTUS Rule are far from certain. With the Supreme Court holding that challenges to the WOTUS Rule must initially be filed with the federal district courts, the Sixth Circuit's nationwide stay of the WOTUS Rule must be lifted. With that stay terminated, the WOTUS Rule will become effective in all but 13 states (Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming), which are still subject to a [preliminary injunction](#) issued by the federal district court in North Dakota. With the WOTUS Rule in effect across most of the nation, presumably various cases wherein the courts had stayed proceedings could resume. However, at issue will be how vigorously the federal government will defend against these challenges in light of the Trump administration's proposed two-step strategy to rescind and replace the WOTUS Rule. In June 2017, the EPA and the Corps announced a proposed

rulemaking that would replace the WOTUS Rule with regulatory text predating the 2015 rule. Then, in November 2017, these two agencies proposed a rule that would delay implementation of the WOTUS Rule until two years after "the date of final action on this proposal," thereby putting off the effective date of the 2015 WOTUS Rule until 2020.

Should you have any questions regarding the issues discussed above, please feel free to contact any of the attorneys listed in the sidebar.

## Authors



**Elizabeth C. Barton**

**Of Counsel**

Hartford, CT | (860) 275-0371

[ecbarton@daypitney.com](mailto:ecbarton@daypitney.com)



**Harold M. Blinderman**

**Partner**

Hartford, CT | (860) 275-0357

[hmbinderman@daypitney.com](mailto:hmbinderman@daypitney.com)



**William M. Pezzoni**

**Of Counsel**

Boston, MA | (617) 345-4777

[wpezzoni@daypitney.com](mailto:wpezzoni@daypitney.com)