WOTUS Rule Remains Uncertain Even After U.S. Supreme Court Ruling

Publication:

Riker Danzig Environmental UPDATE June 2018

During the Obama Administration, the United States Environmental Protection Agency ("USEPA") revised the Clean Water Act definition of Waters of the United States ("WOTUS Rule") to broaden (to some overly so) federal protection of certain waterbodies. The WOTUS Rule sparked numerous lawsuits in a number of federal District Courts and Courts of Appeals. In January 2018 the Supreme Court decided in National Association of Manufacturers v. Department of Defense, 138 S. Ct. 617 (2018), that challenges to the WOTUS Rule are properly brought in federal District Courts and not in Courts of Appeals, disagreeing with the government's argument that the Court of Appeals was the proper venue to hear challenges to the WOTUS Rule under the Clean Water Act.

Across the country, certain parties challenging the WOTUS Rule filed suits in District Courts and others filed petitions in Courts of Appeals. Parties that filed petitions in the Court of Appeals argued that the language of the Clean Water Act allowed them to bring initial challenges to the WOTUS Rule at the appellate level. The Courts of Appeals cases were consolidated and transferred to the Sixth Circuit where the Sixth Circuit was asked to decide whether it was the proper venue for such cases. After reviewing the language of the Clean Water Act, the Sixth Circuit found it had jurisdiction over the WOTUS Rule challenges. The National Association of Manufacturers appealed this Sixth Circuit decision to the Supreme Court and the Supreme Court overturned the Sixth Circuit.

The government argued before the Supreme Court that challenges to the WOTUS Rule fell under two specifically identified conditions set forth in the Clean Water Act where a party can first file in the Court of Appeals rather than the District Court. These were Subparagraphs E and F of section 1369(b)(1) of the Act. The Supreme Court reviewed both Subparagraphs and disagreed.

Subparagraph E grants the Courts of Appeals exclusive jurisdiction to review an action by the USEPA in "approving

or promulgating any effluent limitation or other limitation." The Court found that the WOTUS Rule was not an "effluent limitation" in that it did not impose a restriction on pollutants that could be discharged into navigable waters. Instead, according to the Court, the WOTUS Rule is purely a regulatory definition for a statutory term. The Court also found that "other limitation" as used in Subparagraph E must be read to be similar in kind to an "effluent limitation." Likewise, the Court refused to read "other limitation" to include the WOTUS Rule.

The Court also found that the WOTUS Rule does not fall under Subparagraph F, which provides Courts of Appeals with exclusive jurisdiction to review any USEPA action "in issuing or denying any permit." The Court rejected the government's argument that the WOTUS Rule was functionally similar to "issuing or denying permits." Rather, the Court found that the WOTUS Rule "makes no decision whatsoever on individual permit applications."

The government also maintained that for public policy reasons the Courts of Appeals should hear the WOTUS Rule challenges, alleging that it would be more efficient and promote uniformity with respect to the interpretation of the WOTUS Rule. The Court acknowledged that the government's argument was reasonable, but found that Congress did not authorize this course of action, and therefore, neither could the Court.

Accordingly, the Supreme Court found that the District Courts have jurisdiction to hear challenges to the WOTUS Rule. Although the Court's reasoning is sound, its decision may lead to varying rulings across the country. In response to this decision, the USEPA suspended the WOTUS Rule for two years allegedly "due to regulatory uncertainty." This action by the USEPA has only sparked new litigation questioning the legality of the USEPA's actions to suspend the Rule. At this time, the only thing that can be said with confidence about the WOTUS Rule is that its implementation and outcome continues to be the subject of litigation and uncertainty.

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