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## Two-year delay to WOTUS applicability date finalized after the Supreme Court ruled that challenges belong in federal district courts

January 31, 2018

On January 22, the U.S. Supreme Court unanimously ruled that any challenges to the Waters of the United States (WOTUS) Rule must be filed in federal district courts, not federal courts of appeals. Since the WOTUS Rule was finalized in 2015, dozens of parties filed lawsuits in both federal district courts and appeals courts challenging the Obama-era regulation that expanded the definition of “waters of the United States” protected under the Clean Water Act. On October 9, 2015, the Sixth Circuit Court of Appeals stayed the WOTUS Rule nationwide, thus blocking the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) from using the new definition when enforcing the Clean Water Act. The Supreme Court jurisdictional ruling on the *National Association of Manufacturers vs. Department of Defense* (No. 16-299) now removes the nationwide stay from the Sixth Circuit Court, but the August 28, 2015, North Dakota federal district court’s injunction against implementation of the WOTUS Rule in 13 states remains in effect.

While the Supreme Court’s ruling would have permitted enforcement of the WOTUS Rule in 37 states, the EPA and USACE finalized a rule (82 FR 55542) on January 31 that creates a new applicability date for the WOTUS rule two years from now. Meanwhile, the agencies are in the process of overturning the rule to recodify the previous definition (82 FR 34899) and eventually write a replacement regulation, pursuant to President Donald Trump’s executive order on February 28, 2017. Changing the applicability date is a novel approach to delay regulation enforcement and will likely be challenged in court by environmental groups that argue the intention was to change the “effective date” of WOTUS. According to the Administrative Procedure Act, the effective date for a rule cannot be changed after the regulation takes effect – the WOTUS Rule already took effect in August 2015.

*Sources: Agri-Pulse; E&E News; Environmental Protection Agency; Federal Register; National Law Review; U.S. Court of Appeals for the Sixth Circuit; U.S. Supreme Court; White House*

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