The Supreme Court has agreed to decide whether federal courts of appeals versus federal district courts (lower courts) have the authority to rule whether the “waters of the United States” (WOTUS) regulations are lawful.

Numerous states and local governments have challenged the WOTUS regulations. In *National Association of Manufacturers v. Department of Defense* the Supreme Court will not rule whether the regulations are lawful. Instead, they will simply decide which court gets to take the first crack at deciding whether they are lawful.

The regulations define the term “waters of the United States,” as used in the Clean Water Act. The definition of this term determines the scope of federal authority to regulate water and when states, local governments, and others must seek federal permits to develop land because it contains WOTUS. States and local governments object to numerous aspects of the definition as too broad.

Most federal legal challenges begin in federal district courts, whose decisions are then reviewed by federal courts of appeals. Per the Clean Water Act a number of decisions by the Environmental Protection Agency Administrator must be heard directly in federal courts of appeals, including agency actions “in issuing or denying any permit.”

A definitional regulation like the WOTUS regulation does not involve the issuing or denying of a permit. Nevertheless, the Sixth Circuit Court of Appeals concluded that it has jurisdiction to decide whether the WOTUS regulations are lawful.

Judge McKeague, writing for the court, relied on a 2009 Sixth Circuit decision *National Cotton Council v. EPA* holding that this provision encompasses “not only of actions issuing or denying particular permits, but also of regulations governing the issuance of permits.” The definition of WOTUS impacts permitting requirements. A concurring judge stated he believed *National Cotton* was wrongly decided but that the court was bound by it.

The Supreme Court has likely stepped in to resolve this dispute because it is a waste of judicial resources for federal courts of appeals to decide whether WOTUS regulations are lawful if they don’t in fact have the jurisdiction to make this determination. Even before deciding whether it had jurisdiction to hear this case the Sixth Circuit issued a nationwide preliminary injunction ruling that the WOTUS regulations are unlawful.

Why does it matter whether federal courts of appeals versus federal district courts have the authority to decide whether the WOTUS regulations are lawful? In its *amicus brief* asking the Court to decide this case Ohio, joined by nearly 30 other states, points out that if these (and other) regulations must be reviewed by federal courts of appeals, within 120 days following their enactment and are not, they cannot be challenged in a later enforcement proceeding. But whether states and local governments and others object to a regulation will often depend on how it is applied. So potential future litigants may have no reason to challenge a regulation until long after the 120-day window has passed, but will
be barred from doing so in the future.

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