In *National Association of Manufacturers v. Department of Defense* [2] the Supreme Court held unanimously that a legal challenge to the definition of “waters of the United States” (WOTUS) must begin in a federal district court not a federal court of appeals. What this ruling means for the 2015 WOTUS definitional rule is unclear.

As Justice Sotomayor stated at the beginning of the Court’s opinion, defining “[WOTUS]—a central component of the Clean Water Act—is a contentious and difficult task.” In 2015 the Obama administration issued a new WOTUS definitional rule which it intended to provide “simpler, clearer, and more consistent approaches for identifying” the scope of the Act.

The National Association of Manufacturers (NAM), among numerous other groups, sued the Environmental Protection Agency (EPA) over the definition. While most challenges to EPA actions must be filed in federal district court first, the Clean Water Act (CWA) lists seven categories of EPA actions where “review lies directly and exclusively” in the federal courts of appeals. The Sixth Circuit held that it had jurisdiction to hear this case and issued a nationwide injunction preventing the 2015 rule from going into effect.

The federal government argued that this case must be heard in federal appellate court because two of these categories apply to the 2015 rule. The Supreme Court disagreed.

One of the categories providing courts of appeals exclusive jurisdiction is an EPA action “in approving or promulgating any effluent limitation or other limitation” under various sections of the CWA. The Court rejected the argument the WOTUS rule is an “effluent limitation or other limitation” because both terms refer to EPA restrictions on the discharge of pollutants. “The WOTUS Rule imposes no such restriction. Rather, the Rule announces a regulatory definition for a statutory term and ‘imposes no enforceable duty’ on the ‘private sector.’”

The second category providing courts of appeals exclusive jurisdiction is an EPA action “in issuing or denying any permit” under a particular section of the CWA. EPA permits issued under that section “authoriz[e] the discharge of pollutants” into certain waters “in accordance with specified conditions.” According to the court, the WOTUS rule “neither issues nor denies a permit” under the EPA permitting program at issue.

So what happens to the 2015 WOTUS rule now? Presumably sooner rather than later the Sixth Circuit will void its nationwide stay of the 2015 rule. It is possible then that the 2015 rule will be the law of the land except in 13 states where a federal district court issued a stay before the Sixth Circuit issued its stay. But the 2015 rule may not be the law of the land (minus 13 states) for long. Groups objecting to the 2015 rule will almost certainly ask federal district courts to issue a nationwide stay of the rule.

Meanwhile the Trump administration has begun the lengthy process of rescinding the 2015 rule. Step one of the process is to issue a final rule putting back in place the pre-2015 WOTUS definitional rule. Step two is to finalize a new definition of WOTUS. Neither step one nor step two are complete. In November 2017 the Trump administration proposed [3] adopting an effective date for the 2015 rule...
sometime in 2020 to keep the status quo as it works through steps one and two. This rule isn’t yet final.

E&E News explains what might happen next to the 2015 rule in more detail [here](https://www.eenews.net/stories/1060071583).

By:

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