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Client Alert

Environmental Health & Safety Practice Group

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The Supreme Court Clarifies Court Jurisdiction in Challenges to Clean Water Act Rules; Muddies the Water for WOTUS

The Supreme Court unanimously ruled that challenges to the Waters of the United States ("WOTUS") Rule, which defines the jurisdictional reach of the Clean Water Act, must be resolved in federal district courts and not the courts of appeals as the United States had argued. *See National Association of Manufacturers v. Department of Defense*, Slip Op. (Jan. 22, 2018).

The Court's decision creates significant uncertainty regarding the jurisdictional reach and application of the Clean Water Act, which regulates the discharge of pollutants into "waters of the United States" through programs regulating activities in wetlands, NPDES discharge permits, and the regulation of stormwater. The WOTUS Rule adopts a broad and controversial interpretation of which waters, and thus which discharges, are regulated under the act.

Challenges to the rule were filed across the country in both district courts and courts of appeals because it was unclear at the time which courts had jurisdiction to hear them. Ultimately, the Sixth Circuit concluded that it had jurisdiction to review the rule and stayed it nationwide, finding a stay would "temporarily silence[] the whirlwind of confusion" the WOTUS Rule had created. *In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015).

The immediate effect of the Court's decision will be to lift a nationwide stay of the rule entered by the Sixth Circuit. Absent further district court action, the rule will take effect in most states,[i] risking inconsistent application of the rule and the Clean Water Act. Additionally, the need to initiate challenges at the district court level will likely delay for years a final resolution.

The practical effects of the Supreme Court decision are less clear. The Trump administration has stated its intent to delay the effectiveness of the rule and ultimately to promulgate a new rule in its place. *See* 82 Fed. Reg. 34889 (July 27, 2017); 82 Fed. Reg. 55542 (Nov. 22, 2017). Though rescinding and replacing the rule presents challenges and uncertainties in its own right, lifting the nationwide stay imposed by the Sixth Circuit could increase the incentives to advance this process.

Moreover, the regulated community should understand that the agencies—EPA and the Corps of Engineers—have *always* applied the Clean Water Act expansively. In many respects, the primary effect of the WOTUS Rule,

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if it were ultimately implemented, would not be to expand past practices substantially, but rather to codify them and insulate them from judicial review. Similarly, the rule establishes broad new categories of waters that would be considered "jurisdictional" without the need for case-by-case analysis.

Going forward, persons engaged in regulated activities in "marginal waters"—waters that may or may not be jurisdictional depending on the validity of the WOTUS Rule—should proceed with caution, weighing their options carefully. They should also keep in mind that the current regulatory environment is likely to change. These considerations are especially important for longer-term, phased projects, because future phases might be governed by a different rule.

King & Spalding has significant experience both counseling and defending clients on these issues. Please contact us if you have any questions about the impact of this decision, or about the WOTUS Rule generally, on your business.

[i] The rule would not become effective in thirteen states, where it is subject to a district court injunction imposed prior to the Sixth Circuit's stay and the Supreme Court's decision. States where the rule is stayed include: North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, South Dakota, and Wyoming. *See North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D.).