

WOTUS Rule Reinstated in 26 States After Court Enjoins Delay

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After years of litigation concerning the 2015 “Waters of the United States” Rule (the “WOTUS Rule”), which redefined the geographic scope of federal jurisdiction under the Clean Water Act, the WOTUS Rule is, for now, effective in 26 states, including California, Connecticut Delaware, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, and Washington. Courts have stayed the effectiveness of the WOTUS Rule in 24 other states.

On August 16, 2018, in *South Carolina Coastal Conservation League v. Pruitt*, a federal judge for the United States District Court of South Carolina enjoined a 2018 rule adopted by the Environmental Protection Agency and United States Army Corps of Engineers’ (collectively the “Agencies”) that sought to delay the implementation of the WOTUS Rule for two years (the “Suspension Rule”). The Court reasoned that, in adopting the Suspension Rule, the Agencies had failed to comply with the Administrative Procedure Act (“APA”).

BACKGROUND

As explained in previous alerts circulated in [March 2014](#), [June 2015](#), [May 2016](#), [March 2017](#), [July 2017](#), [November 2017](#), [January 2018](#), [February 2018](#), and [July 2018](#), the WOTUS Rule has far-reaching implications for project development and landowners across the energy, water, agricultural, construction, and transportation sectors.

Since its enactment, the WOTUS Rule has been subject to numerous legal challenges, and its effectiveness has been stayed in some states. As discussed in a [previous alert](#), the WOTUS Rule was subject to a stay issued by the U.S. Court of Appeals for the Sixth Circuit (the “Sixth Circuit Stay”) for all of the United States except Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. These thirteen states were also subject to a previous stay issued by the U.S. District Court for the District of North Dakota. The United States Supreme Court lifted the Sixth Circuit Stay, holding that only U.S. District Courts had jurisdiction to consider challenges to the WOTUS Rule. Subsequently, the

WOTUS Rule was challenged in the U.S. District Court for the Southern District of Georgia. On June 6, 2018, the Southern District of Georgia issued an order that enjoined the implementation the WOTUS Rule in eleven states: Alabama, Florida, Georgia, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin.

On February 6, 2018, the Suspension Rule went into effect. The Suspension Rule delayed the implementation of the WOTUS Rule until 2020. Under the Suspension Rule, the definition of “waters of the United States” would be based upon a 1982 regulation and the Agencies’ and courts’ interpretations of that regulation. Several states and environmental and conservation organizations challenged the Suspension Rule in South Carolina and New York federal courts. The cases in the Southern District of New York, *New York v. Pruitt* and *Natural Resources Defense Council v. Environmental Protection Agency*, are still pending.

THE OPINION

In *South Carolina Coastal Conservation League v. Pruitt*, the district court judge held that the Agencies violated the APA by failing to provide meaningful opportunity for notice and comment because the Agencies refused to solicit public comment on the merits of the WOTUS Rule or the 1982 regulations. The Court rejected the Agencies’ argument that the Suspension Rule did not rescind or revise the WOTUS and determined that the Agencies failed to provide a reasoned analysis for changing course.

The scope of the injunction was also at issue. The Agencies argued that the injunction should be limited in geographic scope, while the Plaintiffs argued for a nationwide injunction. Siding with the Plaintiffs, the Court stated that a nationwide injunction was necessary to provide complete relief to the Plaintiffs, noting the “vast array of wetlands across the United States” that would be affected by the Suspension Rule. The Court emphasized, however, that it was only ruling on the Agencies’ failure to comply with the procedural requirements of the APA and was not ruling on the merits of the WOTUS Rule.

PRACTICAL IMPLICATIONS

The immediate effect of the nationwide injunction of the Suspension Rule is that careful attention must be placed on where property is located to determine the governing rules for whether a particular stream or wetland is federally regulated. This situation may not last long. An appeal of the decision in *South Carolina Coastal Conservation League* is likely. The Agencies may issue a new Suspension Rule that comports with the requirements of the APA. As previously reported, the Agencies have already proposed formal rulemaking to rescind the WOTUS Rule. The comment period for the proposed rescission closed on August 13, 2018. The Agencies have also discussed issuing a new WOTUS rule. The Agencies sent a new proposed WOTUS rule to the Office of Management and Budget (“OMB”). The new WOTUS rule will be available for public comment after OMB completes its review. The regulated community is unlikely to see true certainty on the question of the geographic scope of the Clean Water Act until either Congress clarifies the scope of federal Clean Water Act jurisdiction or the Supreme Court issues a new substantive decision on a case that addresses this issue.

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