

Sixth Circuit Grants Stay for Federal Clean Water Rule

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On the morning of October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) issued a nationwide stay against the enforcement of the controversial "Clean Water Rule" (Rule), which was promulgated by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (ACOE) and took effect on August 28, 2015. This stay effectively halts the enforcement of the Rule until the Rule is reviewed by the federal courts.

The Rule was the EPA's and ACOE's effort to clarify federal jurisdiction over the nation's waters in light of the uncertainty created by multiple Supreme Court (Court) decisions in past decades. The Rule has been subject to significant criticism by farmers and ranchers, real estate developers and the energy industry for its exercise of federal jurisdiction over certain tributaries, "adjacent waters" and waters having a "significant nexus" to navigable waters. On the other hand, the EPA claims that the Rule only applies to waters historically protected by the Clean Water Act (CWA) and environmental groups have applauded the Rule. In a [previous alert on the Rule](#), we outlined the details of the final rule and foreshadowed the inevitable litigation, of which the stay granted today is the most significant development thus far.

Since our previous alert on this topic, numerous lawsuits have been filed to challenge the Rule in both federal district courts and the federal circuit courts of appeal. Before today's stay, the Rule had already been enjoined in 13 states, yet there remains uncertainty under the CWA regarding whether the challenges against the Clean Water Rule should be heard in the federal district courts or federal circuit courts. Therefore, while the Sixth Circuit issued a nationwide stay of enforcement of the Rule, the stay is granted "pending determination of [the court's] jurisdiction." Interestingly, the challengers of the Rule in the Sixth Circuit case have filed a petition arguing that proper jurisdiction lies with the district courts, not the Sixth Circuit. The Sixth Circuit wrote that it anticipates issuing a decision on the jurisdictional matter in the coming weeks.

The Sixth Circuit's stay sheds some light on what aspects of the Rule may be the focus of a federal court's review. For example, the Sixth Circuit's decision concluded that the challengers, a group of 18 states, had shown a sufficient likelihood of prevailing on the merits because it is "far from clear" whether the Rule's distance limitations, discussed in our [previous alert](#) on this topic, fit with the Court's previous holdings on the topic. The Court also referenced the Rule's distance limitations in finding the rule adoption under the Administrative Procedures Act to be facially suspect, noting the distance limitations were not contained in the proposed rule. Finally, the Court found that a stay of the Rule would best provide a continuation of the status quo and "temporarily silence the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule" while it is reviewed by the courts.

We will continue to monitor the developments of the Clean Water Rule and provide updates through future client alerts. A copy of the Sixth Circuit's Order can be found [here](#).

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