White Paper: Supreme Court Rules that Federal District Courts Have Jurisdiction Over Challenges to the Waters of the United States Rule… What Now?

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On January 22, 2017, the Supreme Court decided the closely-watched case of National Association of Manufacturers v. Department of Defense, No. 16-299. In a unanimous opinion authored by Justice Sotomayor, the Court held that challenges to the Clean Water Rule (often referred to as the Waters of the United States Rule, and hereinafter as “WOTUS Rule”) promulgated by EPA and the Army Corps of Engineers (“agencies”) in 2015 must be brought in the federal district courts, not the federal courts of appeals. In so ruling, the Court reversed a decision rendered by a split panel of the Sixth Circuit, which reached the opposite conclusion. Although the Supreme Court answered one contested question pertaining to Clean Water Act (“CWA”) jurisdiction, the answer it reached will likely spur even more widespread litigation over the many remaining unanswered questions. Moreover, the decision and recent actions by the Trump Administration to delay the effective date of the WOTUS Rule will perpetuate the uncertainty over the reach of CWA jurisdiction.

Background

The Clean Water Act of 1972 prohibits “any addition of any pollutant to navigable waters from any point source” except in certain enumerated circumstances. 33 U.S.C. §1362(12). “Navigable waters” is in turn defined as “waters of the United States,” a term that the Act left undefined. 33 U.S.C. §1362(7). Driving the National Association of Manufacturers case is a decades-long dispute over the meaning and scope of that term. The Supreme Court has wrestled with the question several times, most recently in the 2006 case of Rapanos v. United States, 547 U.S. 715 (2006), a 4-4-1 opinion that did little to settle the issue. Since Rapanos, most courts have relied on the standard articulated by Justice Kennedy in his concurring opinion in Rapanos,
under which waters and wetlands that are not adjacent to navigable in fact waters do not fall within the CWA’s ambit unless they have a “significant nexus” with navigable in-in-fact waters.

Using the “significant nexus” standard as its lodestar, the Obama Administration promulgated the WOTUS Rule, which was intended to provide further clarity on the meaning of “waters of the United States”, and thus, the jurisdictional reach of the CWA. See 80 Fed. Reg. 37054. Importantly, the WOTUS Rule itself states that “it does not establish any regulatory requirements”, rather it is meant only as “a definitional rule that clarifies the scope of” the term “waters of the United States”. Id. The Rule, which was set to go into effect on August 28, 2015, was immediately challenged on various grounds in numerous in federal courts across the country by plaintiffs with a wide, and often divergent, range of interests.

Under the CWA, the federal courts of appeals are granted original and exclusive jurisdiction to hear challenges to several enumerated types of EPA actions. Challenges to all other EPA actions under the CWA are to be brought in the federal district courts pursuant to the Administrative Procedure Act. Thanks to this rather unconventional scheme of judicial review, uncertainty and conflicting opinions about which courts had jurisdiction led to parallel litigation in the district and circuit courts, and created a threshold jurisdictional question over which the various courts and myriad parties disagreed.

The panel on multidistrict litigation denied the government’s request to consolidate the challenges filed in district courts across the country before a single district court. Part of the panel’s justification for denying the consolidation was the fact that several district courts had already ruled on the jurisdictional issue, and had reached different conclusions. Meanwhile, the challenges filed in eight different circuit courts were consolidated and transferred to the U.S. Court of Appeals for the Sixth Circuit.

On August 27, 2015, the day before the WOTUS Rule was to go into effect, the U.S. District Court for the District of North Dakota—which had previously ruled that WOTUS challenges are properly brought in the district courts—issued a preliminary injunction blocking implementation of WOTUS in thirteen states. In October 2015, the Sixth Circuit stayed the WOTUS Rule nationwide pending further proceedings. In February 2016, a split panel of the Sixth Circuit sided with the government on the jurisdictional issue, retaining jurisdiction over the consolidated challenges brought in the appellate courts. In light of the Sixth Circuit’s ruling, the
District of North Dakota stayed further proceedings on the merits of the WOTUS Rule challenge pending further direction from a higher court.

In January 2017, as litigation on the merits proceeded in the Sixth Circuit, the Supreme Court agreed to review the Sixth Circuit’s jurisdictional determination.

One week after the Supreme Court granted certiorari, President Trump was inaugurated. The Trump Administration strongly opposes the WOTUS, and wasted little time moving forward to delay, repeal, and ultimately replace it. In February 2017, President Trump signed an executive order directing the agencies to rescind and/or replace the WOTUS Rule. In July 2017, the agencies issued a proposed rule, which, if finalized, would rescind the WOTUS Rule and reinstate the previous regulatory definition with the expectation that the agencies would devise and submit a replacement at some point in the future.

In October 2017, the Supreme Court heard oral argument in National Association of Manufacturers. The case pitted the agencies, which argued that the Sixth Circuit correctly ruled that it had jurisdiction over challenges to the WOTUS Rule, against an unlikely alliance of certain states, industry groups, and environmental groups, which argued that jurisdiction lay with the district courts.

In November 2017, shortly after oral argument, the agencies issued a second proposed rule which would delay the WOTUS Rule’s effective date by two years. This was widely viewed as an attempt to ensure that the WOTUS Rule, which at the time remained stayed by order of the Sixth Circuit, would not go into effect in the event that the Supreme Court ruled that the Sixth Circuit lacked the jurisdiction upon which the stay was predicated.

*National Association of Manufacturers v. Department of Defense*

In its unanimous opinion, the Court hinged its decision on a plain reading of the CWA’s jurisdictional provision and the text of the WOTUS Rule itself. The government had argued that the Rule falls under two of the categories of EPA action over which the CWA grants the courts of appeals exclusive and original jurisdiction. Specifically, the government contended that the Rule constituted an action “approving or promulgating any effluent limitation or other limitation under [several other sections of the Act],” 33 U.S.C. §1369(b)(1)(E), asserting that the WOTUS Rule would have the “practical effect” of making effluent and other limitations applicable to the waters that the Rule. The Court rejected this argument, concluding that such an interpretation
went beyond the bounds of the text, which is expressly limited to actions approving or promulgating such limitations, not actions that have the effect of “making such limitations applicable to certain waters.” Nat’l Ass’n of Mfrs. v. Dep’t of Defense, No. 16-299, slip op. at 13 (January 22, 2018).

The government also argued that the Rule constituted an action “issuing or denying any [NPDES] permit,” 33 U.S.C. §1369(b)(1)(F). This, too, the court rejected, concluding that “[a]lthough the WOTUS Rule may define a jurisdictional prerequisite of the EPA’s authority to issue or deny a permit, the Rule itself makes no decision whatsoever on individual permit applications.” Nat’l Ass’n of Mfrs., slip op. at 16.

The Court ultimately remanded the case with instructions to dismiss the petition for review for lack of jurisdiction.

**Fallout**

The Court’s ruling further complicated a situation already fraught with uncertainty and has already prompted further developments in the ongoing WOTUS Rule saga.

Immediately after the ruling, the government filed a motion with the Sixth Circuit requesting that it forestall taking any action until the 25-day period in which a motion for reconsideration may be filed in the Supreme Court. The Sixth Circuit has yet to take any action. Even after the Supreme Court’s mandate is issued, and the Sixth Circuit’s stay is lifted, the WOTUS Rule will not become operative immediately, and may be delayed for up to two years. Indeed, the Trump Administration has settled—at least for the moment—the question of whether and where the WOTUS Rule is in effect following the National Association of Manufacturers decision. On January 31, 2017, the agencies finalized the rule first proposed in November 2017 postponing the implementation date of the WOTUS Rule by two years (“the delay rule”). Although the delay rule will almost certainly be challenged in multiple district courts throughout the country—and may itself be subject to some form of injunction—at the moment, it is effectively blocking the WOTUS Rule from going into effect.¹

¹ Even if the expected challenges to the delay rule are successful, implementation of the WOTUS Rule across the country is far from certain. The District of North Dakota’s 13-state injunction, which remains in effect, may still be in place if and when the delay rule is struck down. In addition, with litigation commencing and recommencing in district courts across the country, it is entirely possible that other district courts may impose regional or even nationwide stays.
In the meantime, litigation over the WOTUS Rule itself and the delay rule will continue on a district court-by-district court basis, meaning that it is entirely possible that the answer to the question of what may be regulated under the CWA as “waters of the United States” will vary depending on location. Although litigation has already commenced (or recommenced) in several district courts, in light of the agencies’ continued commitment to rescinding the WOTUS Rule entirely, many would-be-challengers are wary of jumping in to the melee to attack a rule that is not currently in effect, and whose days may ultimately be numbered. Of course, rescission of the WOTUS Rule would spur yet another massive wave of litigation. And it is worth noting that the WOTUS Rule was carefully and painstakingly crafted on the basis of what can be characterized as a substantial body of scientific evidence that might not be easily dismissed or contradicted by the agencies in litigation challenging rescission of the Rule.

In short, thanks in part to the Supreme Court’s decision in National Association of Manufacturers v. Department of Defense, those seeking clarity, consistency, and predictability as to what areas are subject to CWA jurisdiction still face a long road ahead with no promise of an end in sight.