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Supreme Court to Decide Proper Forum to Review WOTUS Rule Challenges

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The U.S. Supreme Court on January 13, 2017, granted the National Association of Manufacturers' request to determine whether the U.S. Court of Appeals for the Sixth Circuit was correct in concluding that it had jurisdiction to hear legal challenges to the ***Waters of the United States rule (WOTUS Rule)***.

The decision will cap off almost two years of litigation about the WOTUS Rule. After the ***U.S. Environmental Protection Agency (EPA)*** and the U.S. Army Corps of Engineers (Corps) issued the WOTUS Rule on June 29, 2015, it was immediately challenged in district and circuit courts around the country as a regulatory overreach.

The Sixth Circuit ultimately (i) asserted jurisdiction under section 1369(b)(1) of the ***Clean Water Act (CWA)***, (ii) consolidated pending cases, and (iii) stayed the rule nationwide on October 9, 2015. While the parties have continued briefing the merits of the WOTUS Rule before the Sixth Circuit, the National Association of Manufacturers sought Supreme Court review of the jurisdictional issue.

The question is one of statutory interpretation. Section 1369(b)(1) of the CWA bestows exclusive jurisdiction on the federal courts of appeals over certain EPA actions. In determining that the Sixth Circuit had jurisdiction over the WOTUS Rule, a divided three-judge panel found that challenges to the WOTUS Rule were indeed among those certain EPA actions. Specifically, the majority held that EPA's WOTUS Rule was subject to appellate jurisdiction under 1369(b)(1)(F), because it concerned the "issu[ance] or den[ial] of a permit under CWA 1342." One panel judge also determined that jurisdiction was appropriate under 1369(b)(1)(E), because the rule concerned "any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345."

The dissent reached the opposite conclusion. The final panel judge opined that the Sixth Circuit did not have appellate jurisdiction under CWA 1369(b)(1). The National Association of Manufacturers sought review by the Supreme Court, arguing that jurisdiction is instead proper in the district court under the Administrative Procedure Act, and not in the appellate courts under 1369(b)(1)(F). The Supreme Court has now agreed to consider that issue.

The Supreme Court is expected to determine whether district courts or circuit courts have jurisdiction to review challenges to the WOTUS Rule. The National Association of Manufacturers and other challengers including agriculture, realtor, building, and mining groups hope the Supreme Court will hold that the district courts must determine the merits of the WOTUS Rule (discussed in our [June 2015](#) and [September 2015](#) posts) with the circuit courts considering appeals from those district court decisions in the normal course. All parties seem to agree that resolving the jurisdictional question will eliminate the potential for wasted judicial and party resources. Because of the lack of clarity across and within circuits on the jurisdiction issue, plaintiffs have chosen to file appeals in both district and appellate courts to preserve a forum for their claims. With the Supreme Court's decision, the parties will likely have certainty on the proper forum before they brief their claims.

In the meantime, the WOTUS Rule will not be implemented. At least until the stay of the WOTUS Rule is lifted, EPA and the Corps have stated that they intend to use the agencies' prior regulations defining the term "waters of

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the United States.” That means that the agencies will implement those regulations as they did before the effective date of the WOTUS Rule. They will apply relevant case law, applicable policy, and the best science and technical data on a case-by-case basis to determine which waters are protected by the CWA. It is not yet clear whether these agency positions will change under the next administration.

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