



Ashley Peck

Partner
 801.799.5913
 Salt Lake City
 aapecck@hollandhart.com

Legal Quagmire Over WOTUS Persists

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More than three years after the August 2015 effective date of the Obama-era Waters of the United States rule ("WOTUS Rule"), the regulated community is no closer to clarity regarding which waters qualify for protection under the Clean Water Act ("CWA"). This alert provides an update on recent rulemaking and court decisions that have continued the uncertainty regarding the legal effect of the WOTUS Rule.

Background

The Trump Administration issued a rule in February that postponed application of the WOTUS Rule for two years until February 2020 (the "Suspension Rule"). The Suspension Rule extended the effective date of the WOTUS Rule while EPA and the Army Corps of Engineers (the "Corps") conduct rulemaking to repeal and replace the Obama administration's jurisdictional rule. In mid-June, the agencies submitted a proposed replacement rule to the White House Office of Information and Regulatory Affairs ("OIRA") for review – a step required before publishing the rule for public comment.

South Carolina Court Issues Injunction

On August 16, 2018, the U.S. District Court for the District of South Carolina enjoined the Suspension Rule. Although the South Carolina court issued a nationwide injunction against the Suspension Rule, the decision, if not overturned on appeal, will create a checkerboard effect—it effectively revives the WOTUS Rule in just over half of the country before the Trump Administration finalizes its replacement rule. The WOTUS Rule now defines CWA jurisdiction in 26 states: 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. The WOTUS Rule does not apply in the rest of the country due to two injunctions issued by federal courts in North Dakota and Georgia, which bar enforcement of the WOTUS Rule in the other 24 states, regardless of whether EPA delays implementation under the Suspension Rule.

Siding with a group of environmental organizations, the South Carolina court found that EPA and the Corps violated the Administrative Procedure Act ("APA") by not providing the public a "meaningful opportunity for comment" on the Suspension Rule's substance or the impact of the two-year delay. The court explained, "[c]ertainly, different administrations may implement different regulatory priorities, but the APA requires that the pivot from one administration's priorities to those of the next be accomplished

with at least some fidelity to law and legal process."

Court Battles Prolong Uncertainty

The South Carolina decision is just the latest chapter in the controversial fight over the WOTUS Rule. And the battle is not expected to dissipate soon. Industry groups and the Justice Department have both appealed the South Carolina order to the U.S. Court of Appeals for the Fourth Circuit and requested a stay of the injunction of the Suspension Rule pending the appeal. Additionally, a request for a nationwide injunction of the WOTUS Rule, filed by three states and farm industry groups, remains pending before a district court judge in Texas. Another preliminary injunction request of the WOTUS Rule was filed by three other states in a federal court in Ohio, which could have nationwide reach. An issuance of a stay by either court could render the South Carolina decision moot.

Meanwhile, it is unclear when OIRA will conclude its review of the EPA and the Corps' proposed rule. While few details have been released, EPA previously indicated that its new definition will track the late Justice Scalia's plurality opinion in the 2006 *Rapanos* case, which would greatly reduce the number of waters and wetlands that fall under CWA regulation.

This is a complex, evolving issue. If you have questions about how the CWA applies to your operations, or any other issues raised by this alert, please feel free to reach out to any of the attorneys on Holland and Hart's Environmental Compliance Team.

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