



## **WOTUS Rule Stayed Nationwide; Likely to be Overturned in Part**

**November 2015**

Immediately after EPA and the US Army Corps of Engineers published their long-awaited rule to define “Waters of the United States” in June 2015, it was challenged in 12 court of appeals cases and 14 district court cases by various states, industrial interests, and environmental groups. In one of these cases, a federal district court judge in North Dakota granted a request to halt implementation of the rule in thirteen states. The cases filed in the courts of appeals have been consolidated and assigned the Sixth Circuit in Cincinnati. Eighteen state petitioners requested that the rule be suspended while the consolidated appeal is pending. On October 9, a divided panel (2-1) of the Sixth Circuit issued an order temporarily staying the implementation of the rule **nationwide**. The court stated that its suspension of the rule “temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing.”

In considering whether to suspend the rule, the Sixth Circuit had to determine whether there was a “substantial likelihood” that the states challenging the rule would be successful. The court found that the states had demonstrated a substantial likelihood of success on three of their arguments:

- The rule’s jurisdictional tests for tributaries, adjacent waters, and significant nexus water do not comply with the controlling US Supreme Court decision in *Rapanos v. United States*, 547 U.S. 715 (2006).
- The final rule sets distance limitations for the adjacent waters and significant nexus tests that were not included in the proposed rule, thereby depriving parties of the opportunity to comment on them. Essentially, the Court believes that these aspects of the rule are procedurally invalid – EPA should have republished the rule for additional comment on these new provisions.
- The distance limitations also are arbitrary and capricious.

The Sixth Circuit’s opinion on these issues is not a final ruling, but it is a good indication that the court may be inclined to strike down all or part of the rule – if it gets the opportunity. A number of parties have argued that the Sixth Circuit does not actually have the power to decide the case. The court is expected to issue a decision shortly on whether to dismiss the challenge.

Regardless of whether the Sixth Circuit dismisses its case, the 14 challenges filed in federal district courts will remain pending. EPA and the Corps of Engineers requested that all of these cases be consolidated into one case to be heard by a federal district judge in D.C. That request was denied on October 13, meaning that all of those cases will proceed independently. With so many different courts around the country deciding

the same questions, there are bound to be conflicting outcomes. That puts the WOTUS rule on the fast track to be decided by the US Supreme Court.

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