

## Supreme Court to Hear "Waters of the United States" Argument this Fall

We previously reported on [recent efforts to rescind](#) the Obama Administration's rule amending the Clean Water Act's "waters of the United States" ("WOTUS") definition. This followed, [as we also reported](#), the Sixth Circuit's nationwide stay of the Obama Administration's WOTUS rule. As an update on these efforts, [the Supreme Court just announced](#) it will hear oral argument on October 11, 2017 regarding the Sixth Circuit's nationwide stay. On appeal is the issue of whether district or circuit courts have jurisdiction to hear challenges to WOTUS rulemaking. The WOTUS rule's merits are not otherwise at issue. The matter is entitled *National Association of Manufacturers v. Department of Defense*.

The Obama Administration's WOTUS rule modified what waters the Clean Water Act govern, a move the Trump Administration and other critics argue is an unwarranted expansion of federal authority. Eighteen states challenged the WOTUS rule and the Sixth Circuit issued the nationwide stay pending resolution of these challenges. The Sixth Circuit also held it had jurisdiction to hear these challenges under the Clean Water Act since the WOTUS rule "governed" how permits were issued. The Sixth Circuit retained jurisdiction despite concerns that the WOTUS rule may not directly "issu[e] or den[y] any permit" – a prerequisite for providing circuit court jurisdiction. Resolving this jurisdictional uncertainty clarifies how future Clean Water Act challenges shall proceed and affects the procedural difficulties in bringing such challenges.

The Supreme Court's notice comes on the heels of the Trump Administration's [recent proposal to rescind](#) the 2015 WOTUS rule and reinstate the pre-2015 WOTUS definition. The intent of this proposal is "to provide continuity and certainty" by essentially codifying the Sixth Circuit's nationwide stay. The Supreme Court's decision to hear the case this fall reinforces the Trump Administration's urgency in finalizing its rescind/reinstate proposal. Failure to finalize this proposal before the Supreme Court's *National Association of Manufacturers* ruling may result in reinstating the Obama Administration's WOTUS rule should the Supreme Court find the Sixth Circuit lacked jurisdiction to issue the 2015 stay.



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