

The Supreme Court's Clean Water Act Ruling Opens Floodgates To Future Litigation

We previously reported on [oral arguments before the Supreme Court](#) regarding which court has original jurisdiction to hear challenges to the Clean Water Act's "waters of the United States" ("WOTUS") definition. On January 22, 2018, the Supreme Court issued [a unanimous decision in *National Association of Manufacturers v. Department of Defense*](#) that only district courts have original jurisdiction to hear such challenges. Unanimous Supreme Court rulings often create certainty for regulated entities and individuals. Unfortunately, this holding will likely generate more litigation, not less.

Understanding the impact of this decision requires context. The Clean Water Act regulates the discharge of pollutants into "navigable waters," which is defined to include any "WOTUS." What is and is not a WOTUS has for decades been the subject of much legal wrangling. In an effort to add certainty, the Obama Administration issued the 2015 Clean Water Rule to clarify the WOTUS definition. Critics argued that its inclusion of certain wetlands and other regional, upstream waters in the definition expanded the Clean Water Act's reach beyond what is authorized by statute. Critics challenged the Clean Water Rule and the Sixth Circuit issued a nationwide stay. By imposing the stay, the Sixth Circuit reinstated a narrower but less certain pre-2015 WOTUS definition that was largely defined by case law and Army Corps of Engineers guidance documents.

In 2017, the Trump Administration proposed [a rule repealing the 2015 Clean Water Rule](#) and replacing it with a narrower WOTUS definition that regulates fewer bodies of water. The proposed Trump Administration rule, however, received approximately 700,000 public comments, helping delay the Clean Water Rule's repeal. Faced with delay, the Trump Administration proposed another rule changing the Clean Water Rule's effective date to 2020. This all happened at breakneck speed, and set the stage for the Supreme Court's January 22, 2018 ruling. By holding that only district courts have original jurisdiction to hear challenges to WOTUS rulemaking, it effectively vacates the Sixth Circuit's nationwide stay of the Clean Water Rule. Since the Sixth Circuit lacked jurisdiction to issue the stay, the Clean Water Rule challenge needs to first be heard by a district court. Consequently, the 2015 Clean Water Rule will likely be reinstated



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This is a setback for the Trump Administration, which is undoubtedly moving quickly to finalize its rule to change the 2015 Clean Water Rule's effective date. Clean Water Rule proponents are waiting, pen in hand, to challenge any EPA rule altering the WOTUS definition. Similarly, we anticipate Clean Water Rule critics to file requests to stay the Clean Water Rule with district courts. Meanwhile, the EPA continues to evaluate the public comments regarding its Clean Water Rule repeal.

Where does all this chaos leave us? Significant shifts in policy in such a short period of time resulted, in this instance, in creating significant uncertainty for businesses, local governments, and other regulated entities and individuals. This new status quo will not last long, so it is imperative that the regulated community keep apprised of further developments. Should you have any questions or concerns regarding how these Clean Water Act changes affect you, [please contact our Water Law attorneys](#), Michael Van Zandt and Sean Herman.

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