

National Association of Manufacturers v. Department of Defense v. Dep't of Defense, et al., No. 16-299, 2018 WL 491526 (U.S., Jan. 22, 2018)

Supreme Court Ruling on WOTUS Rule Challenges Could Create More Confusion

In [Summer 2017](#), we summarized issues regarding the uncertainty in the federal regulation of wetlands. For two years, our team has tracked efforts by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers to clarify the jurisdictional definition of "waters of the United States" under the Clean Water Act ("CWA") by rule. [We explained that the rule](#), known as the WOTUS rule, would require Florida landowners and developers to secure CWA permits where they were not previously necessary.

After the promulgation of the WOTUS rule, several challenges were filed in federal district courts. Many parties also filed petitions for review in the federal courts of appeals to preserve rule challenges in the event that the district court lawsuits were dismissed. Soon after, the Sixth Circuit issued a national stay of the WOTUS rule, pending further proceedings. Most district courts dismissed their lawsuits, finding that the appeals courts had jurisdiction over rule challenges. However, one district court in North Dakota held that it had jurisdiction to evaluate the WOTUS rule and enjoined the implementation of the rule in 13 states.

As a result of the complicated procedural history, the Supreme Court took up the issue of whether the federal district courts or the federal courts of appeals have jurisdiction to hear WOTUS rule challenges. The Court concluded that the WOTUS rule is outside of two categories of agency action that are subject to review by federal courts of appeals under the CWA: (1) EPA actions "approving or promulgating any effluent limitation or other limitation" under the CWA; and (2) EPA actions "issuing or denying any [National Pollutant Discharge Elimination System ("NPDES")] permit" under the CWA.

In its unanimous opinion, the Court held the WOTUS rule: (1) is not an "effluent limitation or other limitation" under the CWA, which bans the discharge of pollutants into navigable waters absent a permit; and (2) does not issue or deny a permit under the NPDES permitting program, but was promulgated under the general rulemaking authority section of the CWA. Therefore, the WOTUS rule does not apply to this NPDES section of the CWA. Additionally, Congress made clear that rules, such as the WOTUS rule, must be reviewed by district courts first, despite arguments that the process might complicate rule review and hinder judicial efficiency and uniformity. Because of this, WOTUS rule challenges must originate in the federal district courts. The Court remanded the case back to the Sixth Circuit to dismiss the petitions.

This decision may result in uncertainty, confusion, and delay in CWA permitting processes. After the Sixth Circuit dismisses the petitions before it as the Supreme Court instructed, the WOTUS rule will take effect in the 37 states—including Florida—that aren't subject to the North Dakota District Court's injunction. However, the EPA has already [finalized a rule](#) that postpones the effective date of the WOTUS rule for two years. Challenges to the postponement have already been filed.