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PERSPECTIVE

Troubled waters at the high court

By Skip Spaulding and Chris Locke

On Jan. 13, the U.S. Supreme Court granted certiorari in a case involving the controversial Clean Water rule (often referred to as the "waters of the United States" or "WOTUS" rule) issued by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency. Just one week later — on the day the new president was inaugurated — the White House posted on its website an "America First Energy Plan" announcing that President Donald Trump "is committed to eliminating harmful and unnecessary policies such as the Climate Action Plan and the Waters of the U.S. rule."

The WOTUS rule litigation and political debate are the latest skirmish in the continuing battle over the scope of Clean Water Act (CWA) jurisdiction, which has been hotly contested for decades in the courts, Congress and public arena. Federal CWA jurisdiction has important practical and financial ramifications for owners, managers, farmers, developers and operators of property throughout the nation because it defines what features constitute a wetland or waterway that require a federal permit before they can be developed or a regulated discharge can occur, and it governs potential enforcement for any violations. The final WOTUS rule disclaimed jurisdiction over a few limited water features, but expanded coverage over many other types of waters and surface features and, under a fair reading, adds expense and uncertainty by requiring more studies, more expense, and more case-by-case determinations regarding what features are covered.

Following its finalization in June 2015, the WOTUS rule immediately spawned dozens of lawsuits in federal district and circuit courts seeking to invalidate it. The circuit court lawsuits were consolidated in the 6th U.S. Circuit Court of Appeals, which promptly stayed the WOTUS rule. Many of these litigants challenged the 6th Circuit's jurisdiction to directly review the WOTUS rule rather than having the matter first considered by a district court. The CWA provides for direct review by a circuit court only in limited circumstances, including where review involves "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316 or 1345," or "in issuing or denying any permit under section 1342" of the Act. See 33 U.S.C. Sections 1369(b)(1)(E)-(F).

In a fragmented set of opinions, a divided panel of the 6th Circuit (1-1-1) decided last February that the CWA confers jurisdiction on circuit courts to directly review challenges to the WOTUS rule. *In re United States Dep't of Defense, United States EPA Final Rule: Clean Water Rule: Definition of Waters of United States*, 817 F.3d 261 (6th Cir. 2016). The lead opinion took a "functional" rather than "formalistic" interpretive approach based on its view of the "manifest purposes" of Congress. The dissent insisted that a strict textual interpretation was necessary and would lead to jurisdiction in the district courts, while the concurring opinion essentially agreed with the dissent, but felt constrained by 6th Circuit precedent. Although the 6th Circuit then set a briefing and hearing schedule on the merits, a trade association petitioned for interlocutory Supreme Court review on the question of direct review by circuit versus district courts, asserting that "Clean Water Act litigants deserve an answer to the question presented to bring to an end the current jurisdictional morass." The Supreme Court accepted the case and, if the matter proceeds to a ruling, it will presumably decide the narrow question of which level of federal court should decide the legality of the WOTUS rule.

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It is difficult to envision a scenario in which the current WOTUS rule survives. The Trump administration's inauguration day announcement of its intention to eliminate the rule may lead quickly to withdrawal or revocation of the rule. Alternatively, Congress may take legislative action to override it or a court with jurisdiction will decide its validity. Even before issuance of the WOTUS rule, the Supreme Court had issued a series of recent rulings invalidating agency assertions of CWA permitting jurisdiction and criticized the agencies for their expansive jurisdictional positions. *E.g., Rapanos v. United States*, 547 U.S. 715 (2006) (five justices hold that the agencies overreached in their interpretations of the WOTUS definition, noting that they were "beyond parody"). If the WOTUS rule is not withdrawn and the 6th Circuit retains jurisdiction, it could invalidate the rule given its earlier decision to stay the rule in part because the challengers were likely to prevail on the merits.

However, when viewed in a historical context, the current disputes regarding the WOTUS rule are the latest waypoint in the continuing quest by many stakeholders to obtain certainty and a reasonable regulatory approach to CWA jurisdiction. Thus, regardless of how these WOTUS rule scenarios play out, the important question is: What's next? On the judicial front, even if the WOTUS rule is withdrawn, the Supreme Court may retain jurisdiction (perhaps under an exception to the mootness doctrine) to resolve the circuit versus district court issue for future CWA disputes.

More fundamentally, it is essential that the scope of CWA jurisdiction be fully and finally resolved. Whether by judicial interpretation, legislation or further rulemaking, the challenge going forward will be in formulating a rule that protects navigable waters and wetland areas, eases the current permitting burden on the Corps and EPA, reduces unnecessary expense, and provides certainty and predictability to landowners, facility operators, agricultural interests, transportation corridors, states, counties and municipalities going forward. The current set of WOTUS rule disputes could serve as an important catalyst to achieve this goal, which has proven to be elusive for decades.

Skip Spaulding *and* **Chris Locke** *are environmental law partners in Farella Braun + Martel's San Francisco office and practice extensively in the Clean Water Act area. They can be reached at sspaulding@fbm.com and clocke@fbm.com.*


SPAULDING


LOCKE