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Practice Update

WOTUS - The Beat Goes On But the Underlying Issue Remains Unresolved

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The procedure-based litigation over the EPA and Army Corps' "Waters of the United States" rule (WOTUS) is continuing. The agencies issued WOTUS, which they intended to constitute the implementation of the Supreme Court's decision in *Rapanos* v. *United States*, 547 U.S. 715 (2006) on June 19, 2015. Dozens of lawsuits challenging the rule were promptly filed, including challenges filed by the attorneys general of 13 states. The two cases that have been generating the greatest "buzz" were filed in North Dakota[1] and Georgia, respectively. Both cases became bogged down in the weeds of whether jurisdiction to hear challenges to the rule lay in the district courts or the courts of appeal. This jurisdictional wrangling continues, as WOTUS approaches its first birthday and no court has ruled on the merits of the challenges.

The District Court of North Dakota, in *North Dakota v. EPA*, 127 F. Supp. 3rd 1047 (D.N.D. 2015), held that jurisdiction lays in the district court and issued a preliminary injunction against the enforcement of the rule. In a later order, that injunction was limited so as to apply only to the thirteen states that are parties to that litigation.

The Georgia case took a different turn. In addition to filing in the district court, the states that are parties

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to that case made a "protective filing" in the U.S. Court of Appeals for the 11th Circuit, seeking review of the rule under Section 1369(b)(1) of the Clean Water Act. That petition was transferred to the Sixth Circuit on July 20, 2015. Those plaintiffs continued to litigate in the district court, filing a motion for a preliminary injunction the very next day. That motion was denied by the district court on the ground that the district court did not have jurisdiction over the challenge. The parties to the Georgia case filed expedited briefs on the jurisdictional issue to the 11th Circuit on September 21 and 30, 2015.

Shortly thereafter, on October 9, 2015, in response to a motion by the attorneys general in the consolidated cases to dismiss their petitions (on the ground that the district courts, not the courts of appeals, have jurisdiction over the challenges to the rule), the Sixth Circuit entered an order staying WOTUS entirely while it considered the jurisdictional issues. The Sixth Circuit, in an unusual 1-1-1 vote, ruled that (for differing reasons) jurisdiction lies on the courts of appeal, not the district court. The attorneys general moved for a rehearing *en banc*, which motion was denied by order dated April 21, 2016. The following day, the Eleventh Circuit issued a supplemental briefing order in the Georgia case, limited to the question of jurisdiction. The attorneys general filed their brief on May 16, 2016.

More recently, back in North Dakota, the District Court, in an order issued last week, denied a motion by the EPA and ALOE to dismiss the case pending in that court. Although the court recognized that the Sixth Circuit held that the Courts of Appeal have exclusive jurisdiction over regulatory challenges, rather than dismissing the case, it stayed future proceedings.

Thus, all that almost an entire year of litigation has provided a great deal of smoke, some flames, but little heat. WOTUS has been stayed. The Supreme Court's directions in *Rapanos* have not been

followed and the development community, the states, the regulators and the environmental community have no clear guidance as to what exactly "Waters of the United States" means. What we do have is a prolix and arcane discussion of jurisdictional issues and the prospect of two conflicting interpretations of the jurisdictional issue. While this may make for interesting reading among procedure junkies and will most likely open the door for review of WOTUS by SCOTUS, it does little to provide guidance to those affected by the permitting requirements of the Clean Water Act[2].

[1] *North Dakota v. EPA*, No. 315-cv-0059 (D.N.D.) and *State of Georgia v. McCarthy,* Civ. No 2:15 –cv-0079 (S.D. Ga).

[2] Another skirmish over procedures has wended its way through the courts. On March 30, the Supreme Court heard argument in *U.S. Army Corp of Engineers v. Hawkes* (Supreme Court Case No 15-290). The issue in *Hawkes* is whether a determination by the Army Corps that a permit is required under the CWA is a "final action" subject to judicial review, or whether an applicant has to go through the process and have a determination made on its application before it challenges the need for one in the first place. In a May 31, 2016 decision, 578 U.S. __ (Slip Opinion), aff'g 782 F. 3d 994 (8th Cir. 2015), the Supreme Court affirmed the Eighth Circuit's holding that a jurisdictional determination by the Corps is a final action subject to individual review.
