



Obama Era WOTUS Rule Reinstated in Washington State (For Now)

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After years of litigation concerning the 2015 “Waters of the United States” Rule (the “WOTUS Rule”), which redefined the geographic scope of federal jurisdiction under the Clean Water Act, the WOTUS Rule is, for now, effective in 26 states, including Washington and Oregon. A more detailed discussion of the WOTUS Rule litigation can be found in our [August 2018 alert](#). The WOTUS Rule has far-reaching implications for project development and landowners across the energy, water, agricultural, construction, and transportation sectors.

On February 6, 2018, the Environmental Protection Agency and the United States Army Corps of Engineers (collectively, the “Agencies”) had issued a final Suspension Rule, which delayed implementation of the WOTUS Rule for two years. This was intended to give the Agencies time to issue a new regulation defining Waters of the United States.” Under the Suspension Rule, the Agencies would rely on 1982 regulations and the Agencies’ and courts’ interpretations of that rule for the geographic scope of Clean Water Act authority. However, on August 16, 2018, in *South Carolina Coastal Conservation League v. Pruitt*, a federal judge for the United States District Court of South Carolina enjoined the Suspension Rule because the Agencies had failed to comply with the Administrative Procedure Act (“APA”). Although the South Carolina Court ruling is effective nationwide, federal courts in other lawsuits have enjoined use of the WOTUS Rule in 24 states: Alaska, Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Missouri, Montana, Nevada, New Mexico, North Carolina, North Dakota, South Carolina, South Dakota, West Virginia, Wyoming, and Wisconsin.

IMPLICATIONS FOR WASHINGTON STATE

The immediate impact of the nationwide injunction of the Suspension Rule is that the WOTUS Rule is now in effect in Washington State. As [previously reported](#), the WOTUS Rule expands the Agencies’ jurisdiction to include tributaries, certain waters adjacent to traditional navigable waters, interstate waters, or territorial seas, as well as waters subject to a new significant nexus analysis. Notably, the WOTUS Rule also states that all jurisdictional determinations (“JDs”) issued prior to the effective date of the Rule and JDs associated with a complete permit, application will be made consistent with the previous definition of “waters of the United States” and the Rule does not impact reliance on preliminary JDs. However, all JDs which are made on or after the effective date of the WOTUS Rule are subject to the WOTUS Rule definition of “waters of the United States.” Because JDs expire after five years, those expiring in the near-term could be impacted by this new rule.

This situation may not last long. An appeal of the decision in *South Carolina Coastal Conservation League* is likely. Parties in other pending lawsuits challenging the WOTUS Rule have asked for a nationwide stay of the WOTUS Rule. The Agencies may also issue a new Suspension Rule that comports with the requirements of the APA. [As previously reported](#), the Agencies have already proposed formal rulemaking to rescind the WOTUS Rule. The comment period for the proposed rescission closed on August 13, 2018. The Agencies have also discussed issuing a new WOTUS rule. The Agencies sent a new proposed WOTUS rule to the Office of Management and Budget (“OMB”). The new WOTUS rule will be available for public comment after OMB completes its review. The regulated community is unlikely to see true certainty on the question of the geographic scope of the Clean Water Act until either Congress clarifies the scope of federal Clean Water Act jurisdiction or the Supreme Court issues a new substantive decision on a case that addresses this issue.

For more information

Van Ness Feldman closely monitors and counsels clients on water, air, and other environmental regulatory developments. If you would like more information about the implementation of the Clean Water Act, please contact [Duncan Greene](#), [Joseph Nelson](#), [Brent Carson](#), or any member of the firm's [Environmental](#) Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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