



More Challenges To WOTUS Rule, More States Under Court-Ordered Stays

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Challenges of the U.S. EPA's 2015 Waters of the United States (WOTUS) rule are nothing new. However, a recent district court decision highlights the complexities created by current and expected lawsuits related to the Trump Administration's efforts to repeal and replace the WOTUS rule.

The Obama U.S. EPA's 2015 promulgation of the [WOTUS rule](#) led to numerous lawsuits objecting to the new definition (and proposed expansion of) "waters" that require federal approvals to alter. Uncertainty about the proper forum to hear the challenges resulted in suits filed in both federal district courts and courts of appeal.

A [North Dakota district court order](#) stayed the rule's effectiveness for 13 states (Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, New Mexico and North Dakota) before an order by the Sixth Circuit Court of Appeals [stayed the rule nationwide](#). However, a [U.S. Supreme Court's ruling](#), deciding that the district courts are the correct forum to decide challenges of the WOTUS rule, led to the Sixth Circuit Court of Appeals' February 28, 2018 withdrawal of that nationwide stay.

Importantly, the Sixth Circuit's withdrawal followed the Administration's issuance of [a rule adding an applicability date](#) of February 6, 2020 to the WOTUS rule. The revision was designed to reduce uncertainty regarding the rule's application given the potential patchwork of decisions on the WOTUS rule coming from district courts spread across the United States. (For example, although the Sixth Circuit's nationwide stay was revoked, the North Dakota district court order has remained in place for 13 states.) For the time being, U.S. EPA's addition of the applicability date for the WOTUS rule means that "waters of the United States" are defined by the pre-2015 rules and

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associated guidance documents while the U.S. EPA [works to repeal and replace the WOTUS rule](#).

This month, a [Georgia district court determined](#) that – notwithstanding the added applicability date to the WOTUS rule – a stay of the WOTUS rule should be applied to another eleven states with appeals pending before that court. Those states are: Georgia, Alabama, Florida, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, Wisconsin and Kentucky. In reaching its decision, the court found that the states’ challenge to the WOTUS rule had a “likelihood of success” in proving that the rule violated the Clean Water Act by expanding the reach of the definition of “waters of the United States,” and the court viewed the current Administration’s efforts to repeal and replace the WOTUS rule as evidence of this. The court ruled that the stay was necessary because the February 6, 2020 applicability date is sufficiently “imminent” and [challenges to the applicability date](#) could result in its invalidation.

The tangle of legal challenges surrounding the WOTUS rule are unlikely to be resolved anytime soon as the initial district court cases have restarted their considerations, challenges to the applicability date are on-going; and appeals of the Administration’s recently announced draft replacement of the WOTUS rule are certainly expected. The recent Georgia decision is just another example of courts’ recognition of these developments in the already years-long challenge.