



STATEments

A brief description of a new bill, regulation, or court decision prepared for you by ACWA.

The Unclear Definition of Water

References:

[ACOE and EPA's waters of the United States \(WOTUS\) rule](#)

[Geographic Boundaries of the United States Courts of Appeals and the United States District Courts](#)

[Murray Energy Corp. v. United States DOD \(In re United States DOD\)](#)

June 29, 2015

Department of Defense (DoD), Army Corps of Engineers (ACOE) and EPA (collectively, "the Agencies") publish and finalize definition of Waters of the United States ("Rule").

Since new Rule was published, several states and industry stakeholders challenged it out of concern that it expands fed's authority to regulate private property under CWA.

June 30, 2015

Georgia leads suit in group of eight other states against EPA in *State of Georgia, et al. v. Regina McCarthy, et al.* (2015), claiming Rule should be enjoined because it violates CWA, APA, and the Constitution.

July 12, 2015

U.S. Chamber of Commerce and other local business organizations sued EPA and ACOE in the 10th Cir., alleging Rule violates the Constitution and the Administrative Procedure Act. The 10th Cir. waited until the 6th Cir.'s Feb. 22, 2016 decision.

July 13, 2015

Murray Energy files suit against EPA, in *Murray Energy Corp. v. U.S. EPA*, claiming that CWA jurisdiction is expanded beyond the bounds of the law.

July 18, 2015

United States Judicial Panel on Multidistrict Litigation consolidates cases pending in the 2nd, 5th, 6th, 8th, 9th, 10th, 11th, and District of Columbia Circuits. 6th Cir. randomly selected as court where petitions of review are to be heard.

Feb. 18, 2016

11th Cir. issues order to stay *State of Georgia v. EPA*. The 11th Cir. waited until the 6th Cir.'s Feb. 22, 2016 decision.

Feb. 22, 2016

6th Cir., in 1-1-1 decision, *Murray Energy Corp. v. DOD (In re United States DOD)*, holding Rule grants circuit courts have original jurisdiction over actions challenging the Agencies' approval or promulgation of any effluent limitations, or other limitations under CWA provision. Circuit

courts, therefore, also have original jurisdiction over the Agencies' issuance or denial of any permit.

District courts have original jurisdiction over issues not directly given to circuit courts.

- Feb. 23, 2016** Georgia requests 11th Cir. to renew its case, arguing that 11th Cir. precedent, *Friends of the Everglades*, runs counter to 6th Cir.'s precedent, *Nat'l Cotton*, that the 6th Cir. based their Feb. 22 decision on.
- Feb. 24, 2016** 10th Cir. dismisses U.S. Chamber of Commerce and local business suit after 6th Cir.'s Feb. 22, 2016 decision.
- Feb. 29, 2016; Mar. 23, 2016** In 6th Cir., several industry groups petition for *en banc* hearing, requesting 6th Cir. to overturn *Nat'l Cotton*, highlighting conflicts between 6th Cir.'s decision in *In re EPA* and the Supreme Court's decision in *In re du Pont de Nemours & Co. v. Train* (1977).
- Apr. 1, 2016** In 6th Cir., government agencies filed opposition to industry groups' Feb 29 and Mar 23 petition, arguing:
1. 6th Cir.'s jurisdiction grant was the correct interpretation of *Nat'l Cotton* and Supreme Court's *E.I. du Pont* decision
 2. Rule should rightfully be considered within scope of actions subject to circuit court jurisdiction under CWA.
- Apr. 20, 2016** Business organizations appealed 10th Cir.'s Feb. 24, 2016 dismissal.
- Apr. 21, 2016** 6th Cir. denied *en banc* petitions, stating that issues raised in industry groups' petitions were fully considered in Feb. 22 decision.
- Aug. 2016** 11th Cir. will not revive *State of Georgia v. EPA*.
- Sept. 2, 2016** Several industries, including the National Association of Manufacturers (NAM) appealed to the Supreme Court on 6th Cir.'s decision, arguing that dissent "fractured" entire Feb. 22 decision.
- Sept. 19, 2016** 10th Cir. schedules oral arguments for Chamber of Commerce and local business' suit against EPA, *Chamber of Commerce et. Al., v. EPA, et. al.*
- Sept. 20, 2016** Senate Republicans on Committee on Environment and Public Works release report criticizing Rule. Report focuses on specific case studies to argue that the WOTUS rule will codify narrow statutory exemptions and other limits, resulting in additional restrictions to activities like farming practices.
- Oct. 4, 2016** 6th Cir. Petitioners (NAM and others) motion to compel administrative record granted in part (for one out of several documents) and denied in part (for the remaining documents). Petitioners had claimed DOJ improperly

excluded several internal ACOE letters criticizing the Rule.

Oct 7, 2016

6th Cir. Petitioners NAM and others (American Farm Bureau Federation, American Petroleum Institute, and the National Association of Home Builders of the U.S.) appeal to Supreme Court. Petitioners echoed previous arguments such as fractured 2-1 6th Cir. decision and the need for the Supreme Court to resolve CWA uncertainties.

Jan. 13, 2017

Supreme Court decides it will determine which courts have authority to hear changes to CWA jurisdiction rule; *i.e.*, Supreme Court will determine if appellate courts have original jurisdiction over CWA WOTUS Rule suits. Case will be known as National Association of Manufacturers (NAM) v. Department of Defense (DOD).

Current Trends

District courts across the country continue dismissing challenges to rules on jurisdictional grounds. *See* State of Ohio v. U.S. EPA (2016, Case No. 2:15-cv-2467); State of Oklahoma v. U.S. EPA (2016, Case No. 4:15-cv-00386-CVE-00386).