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Department



FEDERAL CLEAN WATER ACT REGULATIONS ON WATERS OF THE UNITED STATES STATUS

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Waters of the US (WOTUS)

A study in confusion, overreach, and hundreds of fingers in the pie

- WOTUS Overview
- Jurisdictional Issues
- Briefing Timeline
- Implications for New Mexico



WOTUS Overview

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- EPA's proposed Waters of the US Rule is an example of gross federal overreach into states' management of their waterways.
- "The [North Dakota] district court concluded that ... EPA had adopted an "exceptionally expansive" view of its own jurisdiction under the Clean Water Act"*
- There are 131 petitioners divided into 3 groups (states, business/municipal, and associational) with 22 consolidated cases.

* https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/28/north-dakota-district-court-blocks-controversial-waters-of-the-united-states-rule/?utm_term=.610bd0b4e8cb



WOTUS Overview

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The range of petitioners is broad, reflecting national disagreement with the proposed WOTUS rule.

□ Petitioners include:

- American Exploration & Mining Association
- American Farm Bureau Federation
- American Petroleum Institute
- American Road and Transportation Builders Association
- Association of American Railroads
- Association of Commerce and Industry
- Chamber of Commerce of the United States of America
- Coalition of Arizona/New Mexico Counties for Stable Economic Growth
- Florida Rural Water Association, Inc.
- National Alliance of Forest Owners
- National Association of Home Builders
- National Association of Realtors
- National Cattlemen's Beef Association
- National Federation of Independent Business
- National Mining Association
- National Wildlife Federation
- Natural Resources Defense Council, Inc.
- New Mexico Cattle Grower's Association
- New Mexico Farm & Livestock Bureau
- New Mexico Federal Lands Council
- New Mexico Mining Association
- New Mexico Wool Growers, Inc.
- One Hundred Miles
- Sierra Club
- Utility Water Act Group
- Waterkeeper Alliance



WOTUS Overview

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- New Mexico joined the North Dakota Coalition, which includes 12 other states:
 - State of North Dakota
 - State of Alaska
 - State of Arizona
 - State of Arkansas
 - State of Colorado
 - State of Idaho
 - State of Missouri
 - State of Montana
 - State of Nebraska
 - State of Nevada
 - State of South Dakota
 - State of Wyoming
 - New Mexico Environment Department
 - New Mexico State Engineer



WOTUS Overview

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- “A proposed rule by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers related to the definition of “waters of the U.S.” (“WOTUS”) would expand both agencies’ authority under the Clean Water Act, allowing the federal government to extend its reach into most bodies of water across the United States—waters that are in many cases already being managed by their states.”¹
- “In two separate decisions, the Supreme Court has said that there are limits to EPA’s authority under the Clean Water Act [CWA]. If the agency can regulate every water body from the largest to the smallest, and even those areas that aren’t wet most of the time, as it is proposing in this rule, then there are effectively no limits to the agency’s regulatory reach.”²

1. <http://www.eei.org/resourcesandmedia/energynews/Pages/EPA%E2%80%99s%20WOTUS%20Rule%20Only%20Muddies%20the%20Waters%20.aspx>

2. https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/28/north-dakota-district-court-blocks-controversial-waters-of-the-united-states-rule/?utm_term=.a11e4c291c72



Jurisdictional Issues

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- Which Courts have jurisdiction?
 - One of the complexities of the jurisdictional issue is the vague language used in the Clean Water Act. Do appeals go to circuit or district courts?
 - Because of this vague language multiple appeals were filed in multiple circuit courts.
 - Under other environmental statutes (such as the Clean Air Act), jurisdiction is very clear: challenges to EPA regulations go to the D.C. Circuit Court of Appeals.



Jurisdictional Issues – 6th Circuit Court

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- The 6th Circuit was the first court to hear the appeal. The 6th Circuit comprises: Kentucky, Michigan, Ohio, and Tennessee
- In February 2016, a 3-judge panel of the 6th court denied the motions to dismiss.
- In a fractured decision, the court found the Clean Water Act vests exclusive jurisdiction over this rule challenge to the Circuit Court of Appeals.
 - 1 judge voted no
 - 1 judge voted yes because there was a precedent to do so
 - 1 judge voted yes because there was a precedent to do so, but did not think the 6th circuit should have jurisdiction
- The North Dakota Coalition was one of several coalitions who petitioned to have the entire 6th Circuit (15 judges) review the jurisdictional issue. The petition was denied.



Jurisdictional Issues – 10th and 11th Circuit Courts

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- The 10th Circuit Court has not issued a decision on jurisdiction, but NMED believes it is likely that they will decline to take up the issue (to avoid duplication and possible conflict with the 6th and 11th circuits' decisions).
 - The 10th Circuit comprises: Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah, plus those portions of the Yellowstone National Park extending into Montana and Idaho

- The 11th Circuit Court declined to hear the case.
 - The 11th Circuit comprises: Alabama, Florida and Georgia



Briefing Timeline

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□ **September 30, 2016**

- State Petitioners and Business/Municipal Petitioners are each permitted to file one initial appellate brief
- Associational Petitioners can file two initial briefs as some say it goes too far, others say not far enough

November 30, 2016 - EPA and the U.S. Army Corps of Engineers will file a single consolidated response brief

- **December 14, 2016** - States, Businesses/Municipalities, and Associations can file a response brief
- **January 20, 2017** - Petitioners file reply briefs
- **February 3, 2017** - A single comprehensive Joint Appendix will be filed
- **February 17, 2017** - All parties' final form briefs will be filed
- Oral Arguments will be scheduled as soon as practicable after the briefing is complete. This will likely be, at earliest, in late spring/early summer of 2017.
- NMED estimates a decision around the end of 2017



Implications for New Mexico

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- If upheld, WOTUS vastly expands EPA's jurisdiction under the Clean Water Rule.
- It will have significant and wide-ranging impacts on New Mexico's landowners, businesses, and economy requiring federal permits for activities previously under state jurisdiction.
 - Farming, ranching, oil and gas operations, utilities, manufacturing, real estate development, etc.
- WOTUS was designed and written without consideration for the unique conditions in western states, such as New Mexico:
 - Arid climates
 - Remote and intermittent waters
 - Ephemeral streams and channels that only flow during seasonal rains or exceptional flooding events
- The North Dakota coalition has pushed for a portion of the State Petitioners' brief to address the unique issues that the rule poses for western states with arid climates.

