



# washington dc update

August 28, 2015

## WOTUS Court Rulings includes Several Western States

*Passing along a News Release from National Waterways Conference*

*For the WESTCAS updates, Hicks-Ray typically writes original pieces rather than passing along news releases or information from others. We try to add the “arid West” perspective whenever possible. However, in this case, we will violate that rule to pass along, by permission, a news release (below) from the National Waterways Conference (NWC) that deals with recent court actions on WOTUS. NWC is a prominent water association focusing on US Army Corps of Engineers waterways, flooding, and water supply issues. Fred and I gain a great deal of perspective on Corps issues from NWC and its President, Amy Larson, an attorney well-versed in the WOTUS issues. NWC is one of those water agencies that WESTCAS can look to for collaboration on water issues affecting the arid West.*

*From the Washington Update perspective, these are just the opening salvos of what is likely to be a widespread war between the Executive Branch of the Federal government involving a number of Federal Courts around the country and eventually the United States Supreme Court.*

*United States Congress will also become involved in the issue this fall as it considers the fate of FY16 Appropriations riders that have been inserted into several Appropriations bills forbidding either the USEPA or the Army Corps of Engineers to move forward with the implementation of WOTUS.*

*As the issue develops further WESTCAS will provide an ongoing series of updates and reports. Hopefully everybody noticed the announcement for the WESTCAS fall conference, October 28-30 in Tucson. The WOTUS issue will be thoroughly addressed from the operational, political, and legal perspectives during the conference. We hope you are planning to attend and participate.*

*We have attached both of the “opinions” for your weekend viewing pleasure.*

### WOTUS Court Rulings Muddy the Waters on Rule Implementation

A trio of federal court rulings muddied the waters as the Administration’s controversial “Waters of the United States” rule goes into effect today.

Granting a victory to 13 states, U.S. District Judge Ralph Erickson of North Dakota issued a preliminary injunction against implementation of the regulation, finding that the petitioners in that case were likely to succeed in their lawsuit challenging the Environmental Protection Agency regulation as unlawful. Finding that “It appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the rule,” Judge Erickson said the rule suffered from a “fatal defect” of allowing regulation of ditches and streams that were remote from navigable waters.

The judge faulted several aspects of the rule on both substantive and procedural grounds, holding that a review of internal documents “reveals a process that is inexplicable, arbitrary, and devoid of a reasoned process.” He also found that “the risk of irreparable harm to the States is both imminent and likely. More importantly delaying the Rule will cause the Agencies no appreciable harm. Delaying implementation to allow a full and final resolution on the merits is in the best interests of the public.”

The North Dakota ruling applies to the states that sought an injunction there: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming.

That ruling differs from two other decisions issued yesterday. Judge Irene Keeley for the



Northern District of West Virginia denied a bid to stay the rule by Murray Energy Corp., finding that the court lacked jurisdiction to hear the challenge, stating that it should have been filed in a federal appeals court. The jurisdictional conflict was not unexpected, as Murray has a suit pending in the Sixth Circuit Court of Appeals in Cincinnati.

The West Virginia decision was followed by a Georgia federal judge, who denied the motion for an injunction filed by 11 states. U.S. District Judge Lisa G. Wood similarly found that the district court lacked jurisdiction to hear the appeal, saying only an appellate court has authority to hear the challenge.

The plaintiffs in that case are Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia and Wisconsin.

In response to the North Dakota ruling, EPA stated that the states that obtained the preliminary injunction are not subject to the new rule, and instead continue to be subject to the prior regulation. EPA further stated that "In all other respects, the rule is effective on Aug. 28. The agencies are evaluating these orders and considering next steps in the litigation." EPA has the option of asking that the North Dakota ruling be overturned.

The North Dakota and West Virginia rulings are attached for your reference. Further information will be provided as it becomes available.

COURT RULINGS ATTACHED BELOW

