

**Definition of
“Waters of the United States”
Litigation update**

**WESTCAS
2015 Fall Conference**

States Challenging WOTUS

- ND-----
- North Dakota;
- New Mexico;
- Colorado;
- Wyoming;
- Arizona;
- Idaho;
- Montana;
- South Dakota;
- Alaska;
- Nevada;
- Missouri;
- Arkansas;
- Nebraska;
- SD OHIO-----
- Ohio;
- Michigan;
- Tennessee;
- SD TEXAS-----
- Texas;
- Mississippi;
- Louisiana;
- SD GEORGIA---
- Georgia;
- West Virginia;
- Alabama;
- Florida;
- Indiana;
- Kansas;
- Kentucky;
- North Carolina;
- South Carolina;
- Utah;
- Wisconsin;
- ND OKLAHOMA--
- Oklahoma

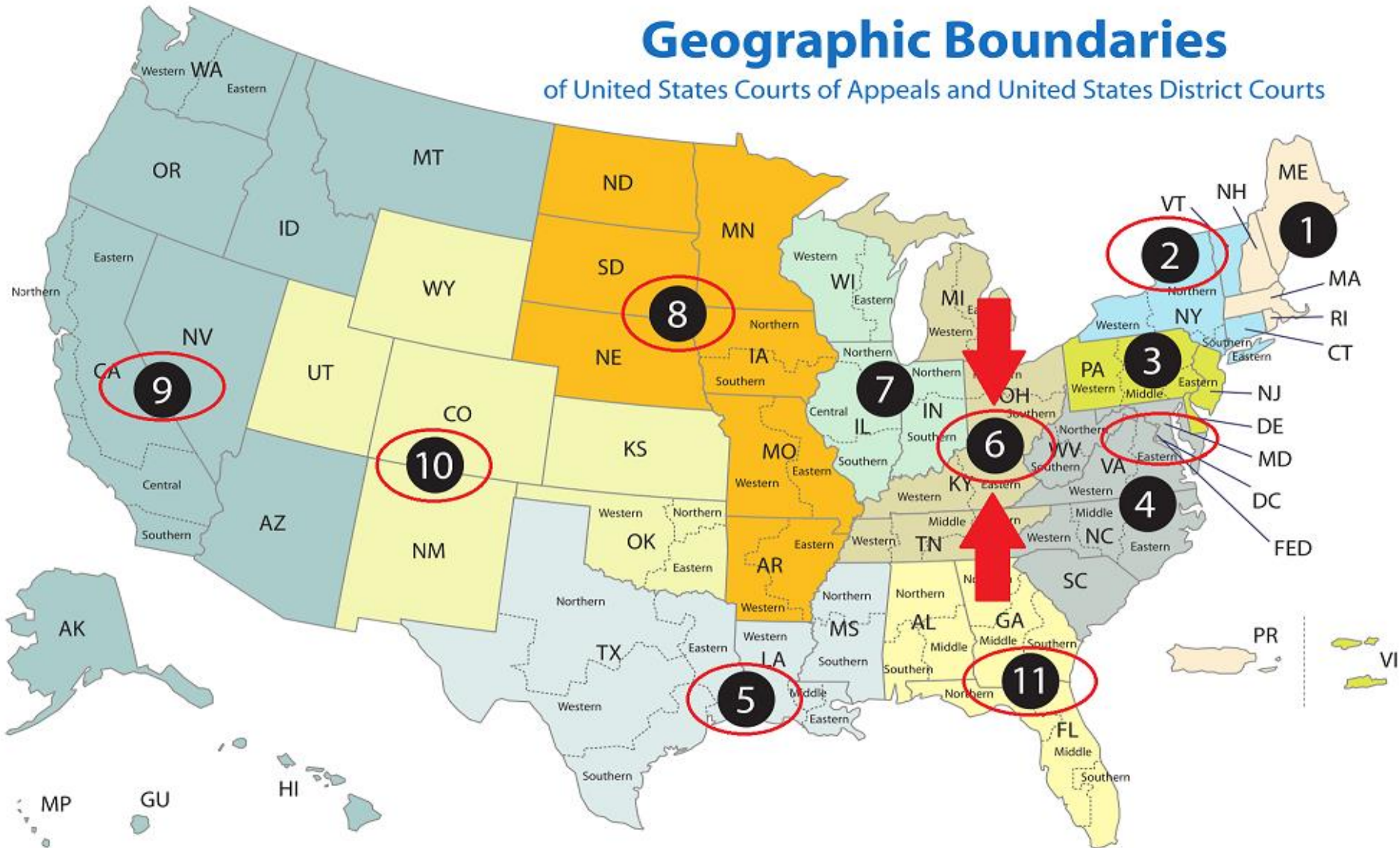
U.S. District Court actions

1. District of North Dakota STAY DENIED
2. Northern District of West Virginia DISMISSED
3. Southern District of Ohio
4. Southern District of Texas (x 2) STAYED * (third case pending)
5. Southern District of Georgia
6. Northern District of Oklahoma (x 2) STAYED
7. Northern District of Georgia STAYED
8. District of Minnesota STAYED
9. District Court for District of Columbia
10. Western District of Washington

U.S. Circuit Court actions

Geographic Boundaries

of United States Courts of Appeals and United States District Courts



Why both?

- petitions in U.S. district and circuit courts to protect opportunity to challenge.
- litigation has been primarily focused on jurisdiction and venue.
- various district courts have answered the question:
 - USDC ND: jurisdiction in USDC
 - USDC WV: jurisdiction in USCA
 - USDC NDGA: jurisdiction in USCA

Circuit vs. District Court

- Circuit Court's CWA jurisdiction is limited:
- 33 U.S.C. § 1369(b) – Review of Administrator's actions . . .
 - review of administrator's actions defaults to USDC unless it is 1 of 7 specific actions.
 - EPA argues Rule falls under (E) and (F).
 - (E) review of actions “approving or promulgating any effluent limitation or other limitation . . .”
 - (F) review of action “issuing or denying any permit under Section 1342.” (NPDES)

1369(b)(E)

- **Effluent limitation** – “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . .” 1362(11).
- **Other limitation** – similar to an effluent lim., it restricts activities that impact navigable waters
- No pollution quantity limits ≠ effluent or other limitation
- *“States have exactly the same discretion to dispose of pollutants into waters of the United States after the Rule as before.”* Judge Ralph Erickson

1369(b)(F)

- Actions issuing or denying a permit under Section 1342. 1342 (402) = NPDES, discharge permits
- **AND** actions “functionally similar”, i.e. EPA objection to a state-issued permit.
- ***National Cotton*** – rule exempting pesticides applied per FIFRA was reviewable by USCA because rule “regulates the permitting procedures.” 553 F.3d 927 (6th Cir. 2009).
- WOTUS Rule does not provide underlying permitting procedures but is a definitional rule, which “does not establish any regulatory requirements” 80 Fed. Reg. 37054.

6th Circuit

- Oral argument on subject matter jurisdiction scheduled December 8 in Cincinnati.

WOTUS Rule on hold

- **August 27, 2015**, Judge Ralph Erickson (District of ND) enjoined the WOTUS Rule.
 - Judge Erickson limited the injunction to the 13 petitioning states.
- **August 28, 2015**, WOTUS Rule effective
- **October 9, 2015**, the Sixth Circuit Court of Appeals issued a nationwide stay of the WOTUS Rule.

Prelim. Injunction / Stay

- Factors:
 - Threat of irreparable harm to plaintiff;
 - Balance of this harm against injury to Defendant resulting from PI;
 - Probability of success on the merits;
 - Public interest.

ND Prelim. Injunction

- #2 Likelihood of success:
- Rule violates Congressional grant of authority
 - the breadth of the definition of “tributary” “seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact waters” (Justice Kennedy *Rapanos*)
 - “While the Agencies assert that the definition’s exclusion of drains and ditches remedies the defect, the definition of a tributary here includes vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of the term”

ND Prelim. Injunction

- Rule violates the Admin. Procedures Act
- (1) Arbitrary & Capricious;
- (2) Not a Logical Outgrowth
- Arbitrary & Capricious:
 - jurisdiction over remote and intermittent waters, without evidence how these waters have any nexus to a navigable-in-fact water.
 - court found no scientific basis supporting the 4,000-ft standard

ND Prelim. Injunction

- Logical Outgrowth
 - Final rule greatly expanded the definition of “neighboring”
 - Proposed: “includ[ing] waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrological connection or confined surface hydrological connection to such a jurisdictional water.”
 - Final: “All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark . . .”
 - substituted distances for ecological and hydrological concepts.

6th Circuit Stay

- Issued stay prior to and without answering jurisdictional question
- “Substantial Likelihood of Success”
 - (1) “not clear that the Rule’s distance limitations are harmonious with [Justice Kennedy’s *Rapanos* instructions]”
 - (2) “Rulemaking process by which distance limitations were adopted is facially suspect”

Substance and Process

- Reviewing court, USDC or USCA, will address two issues—**substance and process**
- Substance – fundamental question behind WOTUS, is Rule consistent with Kennedy standard (Justice Kennedy’s standard operating as an expression of Constitutional limits of CWA jurisdiction)
- Process – DID EPA/Corps adhere to APA?
 - If not, Rule gets vacated or remanded