



washington dc update

February 24, 2016

Long-Awaited WOTUS Ruling

At our Henderson workshop, we discussed the Alice in Wonderland world of federal actions these days. Recent developments on WOTUS is no exception.

On February 23rd, the long-awaited decision on Waters of the U.S. (WOTUS) was issued by the US Court of Appeals for the 6th Circuit. The Administration sought to keep all the cases filed against WOTUS in one court as opposed to taking on each case in the various district courts. Recall that last October, this court stated that the petitioners had demonstrated “a substantial possibility of success.” The jurisdictional issue may not be over as the issue of court jurisdiction of Clean Water Act matters continues to be controversial.

Apparently, and this is the Alice in Wonderland part, even though the outcome was 2-1, the vote on “the outcome” was 1 for; 1 against; and 1 abstain. Here is a lawyer’s report from the Pacific Legal Foundation:

“In Judge McKeague’s view, the court should take a “functional” approach to jurisdiction and hear the cases. Judge Griffin agreed that the court has jurisdiction, but objected strongly to the functional approach. In fact, Judge Griffin’s opinion makes clear that he would have voted against jurisdiction were it not for a Sixth Circuit precedent that he construed to be on point (although wrongly decided). And in dissent, Judge Keith argued against both Judge McKeague’s functional approach as well as Judge Griffin’s reading of prior case law.”

This group expects that petitioners will seek a rehearing at the 6th Circuit, which is likely to be considered defensible. Bottom-line the 6th Circuit stay on the WOTUS Rule remains in effect; two of the judges continue to hold that the court has jurisdiction. It is likely to be a long, drawn out process



before the merits of the case are presented. Further, the WOTUS actions of the federal district court is not affected by the circuit court’s action.

So, there really is a rabbit-hole, and it appears we will be staring down this one for some time to come.

