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WOTUS implementation stayed in all 50 states

NEWS

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—WOTUS has been blocked across the country! For now.

In a 2-1 ruling on Oct. 9, the Sixth Judicial Court of Appeals stayed implementation of the Waters of the U.S. (WOTUS, also called the “Clean Water Rule”) rule nationwide. The stay applies until the court can determine jurisdiction

over the numerous pending lawsuits surrounding the rule. This follows a late August ruling in the District Court of North Dakota which stayed implementation of WOTUS in 13 states.

Following the rule’s finalization date on Aug. 28, a flurry of lawsuits came from the states asserting everything from violation of several Constitutional amendments to arbitrary and capricious attempts by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) to control the nation’s land. The vast majority of the states, and untold numbers of industry groups are represented in one of several pending cases.

The appeal in question was brought by 18 different states scattered across the country. Generally speaking, their appeal challenged the validity of the WOTUS rule. They allege it expands the jurisdictions of the EPA and the Corps, unbalances the usual federal-state collaboration on water quality, and that it was created in a process that violates the law. The petitioners requested the rule’s implementation be stayed while the merits of their suit are examined.

In his granting of the stay, Judge David McKeague said the 18-state petitioners “have demonstrated a substantial possibility of success on the merits of their claim.” The stay also noted that it “allows for a more deliberate determination whether this exercise of Executive power, enabled by Congress and explicated by the Supreme Court, is proper under the dictates of federal law. A stay temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing.”

Citing the recent ruling as a win, National Cattlemen’s Beef Association (NCBA) President Philip Ellis said, “This is great news for cattlemen and women and all land users who have been at a loss as to how to interpret this rule. A stay by the court has the same effect as an injunction, and this action prevents the EPA and Corps from implementing this disastrous rule across the country. In granting the stay, the majority of the court sided with the states that the rule likely fails on both substantive and procedural grounds.”

NCBA’s Environmental Counsel, Scott Yager, said the effect of the stay will prevent the EPA and the Corps from implementing the rule across the country, at least until the court decides the jurisdictional issue, which could happen in November.

Jurisdictional issues have been cited as a concern in close to 20 lawsuits filed against EPA and the Corps. NCBA and the Public Lands Council are part of the case pending in the Sixth Circuit Court. Meanwhile, the former definition of “waters of the U.S.” and the regulatory framework which existed prior to the new rule’s adoption will remain in effect.

This is the “status quo” the petitioners were seeking in requesting the stay.

The petitioners were not the only ones making requests in the appeal. The EPA and Corps filed a request to transfer and centralize the district court cases to the District of Columbia; that request was denied by the Judicial Panel on Multi-district Litigation on Oct. 13. In its order, the judicial panel stated that “centralization will not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation.” As a result, the other pending cases filed in federal district courts across the country will proceed independently.

NCBA's Vice President of Government Affairs Colin Woodall noted, “Everybody needs to keep in mind this is only temporary. This is not a permanent solution. This is not the end of this discussion and we need producers to remain engaged.

He added producers should remain in contact with members of Congress, especially senators and ask them to act on S. 1140. If Congress takes action, it would send WOTUS back to EPA and instruct them to start over.

If Congress doesn't act, the case could end up in the Supreme Court and that could be several years away. “Ultimately we do want some clarification, but this current rule is not the way to do it.” Woodall said. — **WLJ**