



Last week, a federal district judge in Texas remanded the Obama-era Waters of the United States rule to the EPA and U.S. Army Corps of Engineers (US ACE), citing the agencies' failure to use proper procedure when publishing the rule.

The 2015 rule, generally referred to as WOTUS, allowed for a drastic increase to the reach of the Clean Water Act (CWA), in part, by defining "waters of the United States" to include waters adjacent to waters that had traditionally been considered covered by the CWA. Under the WOTUS definition, the CWA's jurisdiction extended to any area where water is found at any time so long as that water flows on the surface or below the surface to an otherwise recognized WOTUS. Application of WOTUS has been delayed by litigation in courts around the country, and the EPA under the current administration has worked to defang or dismantle the rule.

In the most recent court decision regarding WOTUS, the Southern District of Texas ruled that EPA and US ACE violated the Administrative Procedure Act when they promulgated WOTUS. The proposed version of the rule, on which the public was invited to comment, defined adjacent waters in terms of a hydrologic connection, but the final rule defined adjacent in terms of distance. The court found that the altered definition in the final rule deviated from the proposed rule in a way that interested parties could not have reasonably anticipated, leading to a final rule that was different in kind and degree from the proposed rule. In addition, the agencies received scientific studies that served as a basis for the rule after the comment period for the rule had ended, meaning interested parties had no opportunity to comment on the studies.

Notably, the court did not vacate the WOTUS rule. Instead, the court remanded the rule to the agencies for corrections to the administrative procedure. While the rule has been in court, the current EPA has published a proposed rule to rescind the Obama-era version of WOTUS, and the EPA reports that it anticipates taking a final action on that proposal this summer.

The attorney general of Texas hailed the court's decision as a win for property owners hoping to avoid federal regulation of ponds, puddles, and streams. However, environmental groups were quick to point out that the decision said nothing about whether WOTUS protected too many waters inappropriately - it was only a procedural ruling.

The lesson, as is often the case, is to stay tuned. No matter what the final status of WOTUS, it will have a significant effect on the scope and impact of the CWA.