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ALERT
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U.S. Supreme Court Decision Revives Multiple Federal District Court Lawsuits Challenging the Clean Water Rule

On January 22, 2018, the U.S. Supreme Court unanimously held that lawsuits challenging the Obama administration's 2015 Clean Water Rule (Rule) – a landmark revision to the definition of "waters of the United States" (WOTUS) that arguably expanded the scope of the federal government's authority under several regulatory programs, including those associated with wastewater discharges and dredge/fill activities under the Clean Water Act (CWA) – must be filed in federal district courts instead of the federal courts of appeal. *Nat'l Assoc. of Mfrs. v. Dept. of Def., No. 16-299 (Jan. 22, 2018) (NAM)*. While the Supreme Court's decision in *NAM* did not address the merits of the lawsuits challenging the Rule, it did determine the appropriate forum for those legal challenges.

The decision is significant because it will end the nationwide judicial stay of the Rule, dismiss all appellate-level judicial challenges, and revive more than a dozen federal district court lawsuits challenging the Rule filed by more than 100 parties, including industry groups and 31 states. Among other considerations, the revival of the numerous federal district court cases increases the likelihood that the Rule will be inconsistently interpreted across the United States and lengthens the amount of time before a challenge to the merits of the Rule could reach the Supreme Court. For example, one of the federal district courts with a pending challenge to the Rule previously held that it had jurisdiction and stayed the Rule in 13 states. *North Dakota v. U.S. EPA*, No. 3:15-cv-59 (D.N.D. August 27, 2015) (staying the Rule in Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming). Absent further judicial decisions or action by the Agencies to delay the Rule's effective date, the Rule will soon be in effect in the remaining 37 states, most of which are located east of the Mississippi River and on the west coast. Yesterday, a federal appellate court revived a federal district court lawsuit in Georgia, where 11 of these 37 states have sought to stay the Rule.

In *NAM*, the Supreme Court reversed a 2015 split decision by the U.S. Court of Appeals for the Sixth Circuit holding that it had exclusive jurisdiction to decide the lawsuits challenging the Rule. Prior to its decision on the jurisdictional question, the Sixth Circuit issued a nationwide stay of the Rule. The Supreme Court's decision on the jurisdictional question turned primarily on its interpretation of specific language in the CWA governing judicial review of certain U. S. Environmental Protection Agency (U.S. EPA) actions. 33 U.S.C. § 1369(b)(1). Rejecting the federal government's proposed interpretations of the CWA, the Court held that the Rule did not fall within the eight categories of U.S. EPA actions that can be challenged directly in federal courts of appeal. Instead, lawsuits challenging the Rule must be filed in federal district courts. Although the Supreme Court acknowledged that its decision could lead to conflicting outcomes in the federal district courts, it held that the applicable statutory language was clear and was unpersuaded by the federal government's judicial efficiency and national uniformity arguments.

The Supreme Court decision in *NAM* will present challenges to the Trump administration, which has sought to withdraw the Rule in its entirety. On February 28, 2017, President Donald J. Trump issued an executive order that directed the U.S. EPA and the U.S. Army Corps of Engineers (collectively, the Agencies) to withdraw the Rule and rescind or revise the Rule's definition of WOTUS as appropriate and consistent with the law. Since that time, the Agencies have issued proposals to withdraw or delay the implementation of the Rule. In July 2017, the Agencies proposed to rescind the Rule and re-codify the pre-2015 regulatory definition of WOTUS while they completed the process to reconsider the Rule.

JANUARY 25, 2018

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More recently, the Agencies proposed to add an applicability date to the Rule, which would make the Rule effective two years from the date the Agencies finalized the proposed regulatory stay of the Rule. At the time these proposals were issued, the Agencies stated that they were necessary to ensure regulatory continuity, because without them, the nationwide judicial stay depended on the continued existence of the Sixth Circuit's order. The proposals predicted that there could be "possible inconsistencies, uncertainty, and confusion as to the regulatory regime" if the Supreme Court reversed the Sixth Circuit, as it ultimately did in *NAM*.

When all litigation pending against the Rule at the appellate-level is dismissed in accordance with the Supreme Court's decision in *NAM*, the national stay on the Rule will be lifted. The Agencies likely will be unable to finalize the proposals to withdraw or delay implementation of the Rule before the nationwide judicial stay is lifted. Even if the Agencies' proposals became effective, many of the state attorneys general that intervened in lawsuits to defend the Rule have signaled that they may file separate lawsuits challenging the legality of any final action by the Agencies withdrawing or delaying implementation of the Rule.

While the Rule's fate and current status are uncertain, continued litigation over the scope of the federal government's authority under the CWA is almost guaranteed. Regardless of whether the Rule is withdrawn or delayed, affected parties will continue to be subjected to varying interpretations of the definition of WOTUS, either under the Rule or the pre-2015 definition, as the judicial challenges and rulemaking efforts continue.

Babst Calland attorneys will be closely monitoring the developments following the Supreme Court's decision in *NAM*. If you have questions regarding the Supreme Court's decision in *NAM* and what it means for your business, please contact Lisa M. Bruderly at (412) 394-6495 or lbruderly@babstcalland.com, or Gary E. Steinbauer at (412) 394-6590 or gsteinbauer@babstcalland.com.