

Texas v. EPA: Procedural Lessons Learned

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This presentation highlights some of the differences between Texas and federal administrative law. It is meant as a useful starting place for Texas practitioners who find themselves drawn into federal cases, particularly rule challenges. Below you will find tips, warnings, and other information that the presenters wish someone had told them.

1. Where to file

State

It's easy—it's Travis County, as expressly stated in the Texas Administrative Procedure Act. The individual statute for a particular agency or program may specify something different—so do check that—but the majority of cases are governed by the APA.

- Rule Challenges may be brought only in a Travis County district court. Texas Government Code § 2001.038.
- Suits for Judicial Review must be filed in Travis County unless otherwise provided by statute. Texas Government Code § 2001.176

Federal

Unlike the state APA, the federal Administrative Procedure Act does not designate a particular court, but rather directs you to “the special statutory review proceeding relevant to the subject matter in a court specified by statute.” 5 U.S.C. § 703. Therefore, it is very important that you check the organic statute. Examples are:

- Clean Air Act, 42 U.S.C. § 7607(b), CAA § 307. File in the circuit court BUT you have to decide which one.

The general rule of thumb is that you file in the D.C. circuit if the rule has national impact or sets national standards. If the rule is particular to your state (approvals and disapprovals of state air plans are done by rule), file in your home circuit. BUT

there is a caveat here. Even for those matters that would normally be filed in your home circuit, you have to file in the D.C. Circuit if the rule includes a finding that EPA has determined that it has nationwide scope and effect.

- Clean Water Act, 33 U.S.C. § 1369, FWPCA § 509. File in circuit court if your matter falls is one of those listed in the statute. Otherwise, you default to the federal APA and file in a district court of competent jurisdiction.
- Making this decision is not always easy. For an example, see *In re U.S. Department of Defense and U.S. EPA Final Rule: Clean Water Rule: Definition of “Waters of the United States”* 80 Fed. Reg. 37,054 (June 29, 2015), 817 F3d 261 (6th Cir. 2016) (“WOTUS”).

If the subject-matter statute does not specify the court, then you file “in a court of competent jurisdiction.” For most federal rule challenges, this will be federal district court. Check the statute under which the rule was promulgated, as it may have specific jurisdictional and/or venue provisions. Otherwise, the normal jurisdiction (like 28 U.S.C. § 1331) and venue (28 U.S.C. § 1391) provisions apply.

Absent a specific statute to the contrary, it is usually possible to sue a federal agency in the District of Columbia. But you may determine that venue is better in another location where venue can be laid pursuant to the general venue statute.

- Whether you file in the circuit or the district court, you may run into the MDL process, which will determine the ultimate location of your case.

This is what happened in WOTUS with the cases filed in the circuit courts of appeal. In fact, WOTUS involved both types of MDL, the lottery for the cases filed in circuit courts, and briefing and oral argument before the MDL panel for the cases filed in district courts.

- Circuit court MDL is governed by 28 U.S.C. § 2112(a)(1),(3). If petitions for review are filed in two or more circuit courts within 10 days after the order is issued, the judicial panel on multi-district litigation will randomly designate one of those court of appeals to hear all of the cases. This is, essentially, an automatic lottery.
- District court cases are governed by 28 U.S.C. § 1407 and the set of rules of procedure for this specific type of proceeding. Transfer and consolidation, for

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