

## Federal Case Law Update

Paulina Williams

November 2016

CONFIDENTIAL  
© Copyright Baker Botts 2016. All Rights Reserved.

BAKER BOTTS 

## Clean Water Act

---

***In re: Murray Energy Corporation v. EPA, et al,***  
No. 15-3751 (6th Cir.)

***aka***  
***WOTUS Rule Challenge***

BAKER BOTTS

2

# WOTUS Rule: Why Does it Matter?

- **CWA 404 Permitting (Corps dredge and fill permits)**
  - Any foot print expansion, ever?
  - Any new, replaced, or significant maintenance of infrastructure?
  - Do you have any schedules for the above?
- **NPDES (state or federal discharge permits)**
  - Point source discharges
  - 316(b) applicability for cooling water intakes
- **Spill Prevention, Control, and Countermeasure Plans**
- **Spill Reporting**

## Big Picture

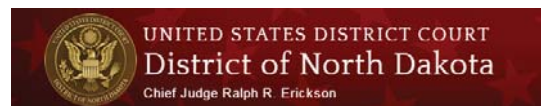
- **Categorically Jurisdictional**
  - Actually navigable, interstate, or territorial seas
  - **Tributaries**
  - Impoundments of above
  - Adjacent waters: Bordering, Contiguous, or **Neighboring**
- **Categorically Excluded**
  - Qualifying Ditches
  - Specific Features on Dry Land
  - Groundwater
  - Wastewater treatment systems
  - Prior converted cropland
- **Case by Case for "Other Waters"**



Table 1. WOTUS REUL TRACKING CHART: Circuit Court Challenges (Updated 04.17.16)			
Plaintiffs	Date Filed	Originating Circuit Court (Now Transferred to Sixth Circuit by MDL Panel)	
National Wildlife Federation (15-1234) (docketed in Sixth Circuit as 15-3817)	07/22/2015	D.C. Circuit  (Motion to dismiss on jurisdictional grounds denied 02/27; petition for rehearing on base filed 02/29, 03/04, 03/11, 03/22, 03/24, response in opposition to petition for rehearing on base filed 04/14)	ag Circuit Transferred out by MDL panel (7 and 12/05)
American Engineers & Mining Association (15-1411) (docketed in Sixth Circuit as 15-4365)	11/09/2015	D.C. Circuit  (Motion to intervene by environmental groups granted 12/13 and 01/20)  (Motion to dismiss on jurisdictional grounds denied 02/22)  (Petition for rehearing on base filed 3/22, 3/23, response in opposition to petition for rehearing on base filed 4/1)	ag Circuit Transferred out by MDL panel (7 and 12/05)
North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming, and the New Mexico Environment Department and New Mexico State Engineer (15-2552) (docketed in Sixth Circuit as 15-3818)	07/17/2015	Eighth Circuit  (Motion to dismiss on jurisdictional grounds denied 02/22; petition for rehearing on base filed 02/26, 03/04, and 03/11)	ag Circuit Transferred out by MDL panel (7 and 12/05)
Texas, Railroad Commission of Texas, Texas Commission on Environmental Quality, Texas Department of Agriculture, Texas Department of Transportation, Texas General Land Office, Texas Water Development Board, Louisiana, Mississippi (15-8049) (docketed in Sixth Circuit as 15-3855)	07/16/2015	Fifth Circuit  (Motion to dismiss on jurisdictional grounds denied 02/22; petition for rehearing on base filed 02/26, 03/04, and 03/11)	ag Circuit Transferred out by MDL panel (7 and 12/05)
Paper Stockpilers Alliance and Santa Cruz (15-7222) (docketed in Sixth Circuit as 15-3839)	07/22/2015	Ninth Circuit  (Motion to dismiss on jurisdictional grounds denied 02/22; petition for rehearing on base filed 02/26, 03/04, and 03/11)	ag Circuit Transferred out by MDL panel (7 and 12/05)
Shore Bank (15-781)	07/13/2015	Sixth Circuit  (Motion to dismiss on jurisdictional grounds denied 02/22; petition for rehearing on base filed 02/26, 03/04, and 03/11)	ag Circuit Transferred out by MDL panel (7 and 12/05)
Arizona Mining Association, Arizona Farm Bureau, Association of Commerce and Industry, New Mexico Association, Arizona Chamber of Commerce & Industry, Arizona Food Products Association, and New Mexico Farm & Livestock Bureau (15-1512)	09/01/2015	District of Arizona  (Court granted supplemental motion to continue stay 03/10)	ag Circuit Transferred out by MDL panel (7 and 12/05)
Natural Resources Defense Council, Inc., National Wildlife Federation, and South Carolina Coastal Conservation League (15-1512)	08/14/2015	District of Columbia  (Court issued order on 03/09 continuing stay pending Sixth Circuit's resolution of on base petition; or on base review is granted, pending Sixth Circuit's resolution of the jurisdictional question)	ag Circuit Transferred out by MDL panel (7 and 12/05)
American Engineers & Mining Association (15-1411)	08/14/2015	District of Columbia  on 07/19 voluntary agreement by AEMO	ag Circuit Transferred out by MDL panel (7 and 12/05)
Washington Cattlemen's Association, California Cattlemen's Association, New Mexico Cattle Growers Association, New Mexico Wild Game Assn., New Mexico Federal Lands Council, Duane Shapley, Inc., Pieter Investment Company, LPP Property, LLC, Harkson Company, Inc. (15-3688)	07/15/2015	District of Minnesota  (Petition filed prior to completion on continuation of stay on 03/18 requesting the court to continue the stay pending the Sixth Circuit's final resolution on the on base petition)	ag Circuit Transferred out by MDL panel (7 and 12/05)
North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming, and the New Mexico Environment Department and	06/29/2015	District of North Dakota  (Court granted preliminary injunction staying the two business days of such a development and setting deadline for the district to start cases of July 6/23/2016)	ag Circuit Transferred out by MDL panel (7 and 12/05)
Endangered Species Foundation, San-Geronimo Association, and Colorado Cattlemen's Association	04/14/2015	Northern District of Georgia  (Motion to dismiss on jurisdictional grounds denied 02/22; petition for rehearing on base filed 02/26, 03/04, and 03/11)	ag Circuit Transferred out by MDL panel (7 and 12/05)
Other Plaintiffs (Sumner 15-1487)	06/29/2015	Southern District of Ohio  (Motion to dismiss on jurisdictional grounds denied 02/22; petition for rehearing on base filed 02/26, 03/04, and 03/11)	ag Circuit Transferred out by MDL panel (7 and 12/05)
State of Michigan, Michigan Wildlife Federation, and Michigan Department of Natural Resources and Environment (15-1512)	07/13/2015	District of Michigan  (Motion to dismiss on jurisdictional grounds denied 02/22; petition for rehearing on base filed 02/26, 03/04, and 03/11)	ag Circuit Transferred out by MDL panel (7 and 12/05)
Association of American Railroads, Port Terminal Association, and U.S. Coast Guard (15-1512)	07/13/2015	District of Maryland  (Motion to dismiss on jurisdictional grounds denied 02/22; petition for rehearing on base filed 02/26, 03/04, and 03/11)	ag Circuit Transferred out by MDL panel (7 and 12/05)

BAKER BOTTS

- **District Court or Court of Appeals?**
  - CWA 509
    - (b)(1)(E) - actions "approving or promulgating any effluent limitation or other limitation"
    - (b)(1)(F) - actions "issuing or denying any permit"



Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: Federal Case Law Update

Also available as part of the eCourse

[2016 Water Law Update: State and Federal Case Law, TCEQ, PUC, the SWIFT Program, State Water Plan, and Legislative Preview](#)

First appeared as part of the conference materials for the  
2016 Texas Water Law Institute session  
"Federal Case Law Update"