On February 16, a coalition of 24 states, led by West Virginia, filed a lawsuit in the U.S. District Court in North Dakota (3:23-cv-00032) against the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) regarding the final rule on the Revised Definition of Waters of the United States (WOTUS) (88 FR 3004). Ten western states joined the lawsuit, including: Alaska, Kansas, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming. The complaint requests that the rule be vacated and remanded to the agencies for violations of the Clean Water Act (CWA), the Administrative Procedures Act (APA), and the U.S. Constitution, including the Commerce Clause and the Fifth and Tenth Amendments.

The complaint noted that the U.S. District Court in North Dakota previously issued a preliminary injunction on the 2015 WOTUS rule "after finding that it likely violated the CWA's grant of authority to the Agencies, was arbitrary and capricious because it offered tests not supported by evidence, and violated procedural requirements because it was not a 'logical outgrowth' of the proposed rule." The States asserted that the 2023 WOTUS rule mirrors or exceeds the 2015 WOTUS Rule, and that it "improperly upsets the balance of State and federal powers in an area typically dominated by the States." Each State expressed its sovereign authority to govern, manage, and protect the waters within its borders, as cited in their respective state constitutions and statutes. Under the 2023 WOTUS rule, "once a water is determined to fall within the Agencies' authority, this determination eliminates the State's primacy to regulate and protect that water under the State's standards. The Final Rule imposes significant federal burdens upon the States by forcing them to shift attention and resources to the federal scheme to the disadvantage of local, state-based programs. In all cases, state regulation necessarily plays a secondary role when a state water becomes a 'water of the United States.'" The complaint alleged an impact of the expanded jurisdictional rule on taxes and revenues, increased permitting and litigation costs, and increased resources spent on issuing standards and submitting reports.

The complaint said: "The Final Rule points to nothing in the CWA that provides a clear statement of Congress's intent for the Agencies to take on a jurisdictional reach of this scale. The lone jurisdictional provision speaks of waters – not land – and navigability – not isolated moisture. These words imply a congressional intent to confine the Agencies to their appropriate role of regulating waters truly connected to traditional navigable waterways or that otherwise present a problem of national interest. If Congress had intended the Agencies to instead regulate the vast majority of the country's land and water (a constitutionally dubious proposition to begin with), then it would have spoken with directness and clarity in the CWA when laying out such an all-encompassing range of jurisdiction." The States allege that the agencies cherry-picked preferred parts of Supreme Court precedents, the 2015 science report on hydrology, and their own generalized experience to determine the meaning of the statute, while ignoring or minimizing information about specific costs and consequences of their proposed rule.

The States argued that the final rule is not a logical outgrowth of the proposed rule, and did not provide adequate notice and opportunity to comment, because the agencies did not indicate their intent to: (1) redefine "significant nexus" to include any water that might have a "material influence" on jurisdictional waters; (2) expand the reach of "adjacency" to collective mosaics of wetlands; and (3) create a new standard for existing jurisdictional determinations issued under the 2020 WOTUS rule.

The States noted that congressional authority over "waters of the United States" in the CWA relies on Constitutional authority under the Commerce Clause and "is tethered to navigable channels of interstate commerce." Conversely, the 2023 WOTUS rule "reaches land and waters without requiring that they bear a direct connection to navigable waters or otherwise bear some substantial relationship with (or otherwise substantially affect) interstate commerce."

They argued that the rule violates the Due Process Clause because the terms are "irretrievably vague," lacking "qualitative standards" for a case-by-case approach. "All together, the Final Rule does not give fair notice of what waters are subject to the reach of the Clean Water Act, and thus when unpermitted activities involving waters might carry substantial civil or criminal penalties. In other words, the Final Rule's vagueness prevents ordinary people from understanding when the CWA even applies, and 'most laws do not require the hiring of expert consultants to determine if they even apply to you or your property.'"

Finally, the States argued that the Tenth Amendment reserves to the States or the people the powers that are not expressly granted to the federal government by the Constitution. Legislative powers are not unlimited.

“Among the rights and powers reserved to the States under the Tenth Amendment is the authority to regulate intrastate land use and water resources. In the CWA, Congress expressly honored this constitutionally mandated primacy of the States of intrastate waters and lands.”

On February 27, Idaho joined the Texas-led WOTUS lawsuit in the U.S. District Court for the Southern District of Texas (3:23-cv-00017), filed on January 18, against EPA and the Corps. The complaint similarly requested that the 2023 WOTUS rule be vacated for violations of the Constitution, the CWA, and the APA. Texas alleged: “The Final Rule harms Plaintiffs by: (1) expanding federal regulation beyond that authorized in the CWA; (2) eroding the states’ authorities over their own waters; (3) increasing the states’ burdens and diminishing the states’ abilities to administer their own programs; and (4) undermining the states’ sovereignty to regulate their internal affairs as guaranteed by the Constitution.”

Texas asserted that the CWA “only authorizes the Federal Agencies to regulate ‘navigable waters,’ defined as ‘waters of the United States’” and the new rule is a violation of the CWA and APA for asserting jurisdiction over lands and waters that fall outside the CWA and effectively removing any requirement of navigability.

Texas argued that the new rule “seeks to subject the State of Texas, its agencies, and its citizens to a costly and confusing regulatory framework affecting large, crucial portions of the economy – agricultural development, construction and maintenance of infrastructure, energy development, and management of State-owned lands to name a few – with the risk of potentially incurring daily civil and/or criminal penalties of non-compliance. Moreover, the Federal Agencies seek to expand their own authority without clear statutory support when the CWA itself specifically recognizes, preserves, and protects the primary responsibilities of the states to plan the development and use of their land and water resources.”

The complaint alleged that the rule exceeds Congress’s authority to regulate interstate commerce, and intrudes on state sovereignty and the powers reserved to the states under the Tenth Amendment. “The federal government lacks a general police power and may only exercise powers expressly granted to it by the Constitution. Land-use planning, regulation, and zoning are not enumerated powers granted to the federal government…. The courts traditionally expect ‘a clear and manifest statement from Congress to authorize an unprecedented intrusion into traditional state authority’…. The Final Rule also intrudes on the environmental regulatory powers vested to the states.”

Finally, Texas claimed: “The Due Process Clause of the Fifth Amendment requires adequate notice of what conduct is forbidden before criminal or civil penalties may attach and may not be so incomplete, vague, indefinite, or uncertain that persons of common intelligence must necessarily guess at its meaning and as to its application. The Final Rule fails to give adequate notice of what is, and what is not, ‘waters of the United States.’ By employing vague, undefined terms, and unweighted arbitrary factors that may or may not be employed by the Federal Agencies, the Final Rule does not give adequate notice of what the terms ‘interstate waters,’ ‘impoundments,’ ‘tributaries,’ ‘adjacent wetlands,’ ‘relatively permanent,’ ‘seasonally,’ ‘significant nexus,’ ‘similarly situated,’ and ‘significantly affect’ are defined and interpreted as meaning. Accordingly, the Final Rule fails to give fair notice of what conduct is forbidden under the CWA….”

Idaho Attorney General Raúl Labrador said: “The rule change ignores Congress’ express will and expands federal authority by lumping minor water features like streams, ponds, and wetlands that cross state lines with traditional waters. With its unique waterways, Idaho would be subject to increased federal government interference. This would pose a massive regulatory barrier for Idaho’s farmers, ranchers, and small businesses that depend on unfettered access to Idaho’s resources…. This unlawful federal encroachment threatens the sovereignty of Idaho, and we will not allow it.”

On February 22, a third state WOTUS lawsuit was filed by Kentucky in the U.S. District Court for the Eastern District of Kentucky (3:23-cv-00007). The complaint alleged: “The Final Rule’s expansive definition of ‘waters of the United States’ is contrary to the plain language of the CWA and the Supreme Court’s decisions interpreting it. The Final Rule’s expansion of federal authority over the Commonwealth’s sovereign decisions regarding intrastate water and land management also unconstitutionally exceeds Congress’s Commerce Clause authority and violates the Commonwealth’s sovereign authority under the Tenth Amendment.”