Updates
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Supreme Court Sends Challenges to Clean Water Rule to Federal District Courts

In a unanimous decision on January 22, the U.S. Supreme Court ruled that challenges to the Obama administration's 2015 Clean Water Rule must be brought in federal district courts rather than directly in the courts of appeals. *National Association of Manufacturers v. Department of Defense*, No. 16-299 (Jan. 22, 2018). The Supreme Court did not address the merits of the Clean Water Rule. The Supreme Court's decision likely will prolong the ongoing litigation over the validity of the Rule, as the current administration considers several rulemaking proposals to rescind the Rule and to extend its effective date.

The Clean Water Rule

The Clean Water Act provides federal jurisdiction over "navigable waters," which the law defines merely as "waters of the United States." This definition is critically important because it determines which water bodies are subject to the Clean Water Act's permit programs—including the National Pollutant Discharge Elimination System (NPDES) permit program under Section 402 of the Act, which is administered mostly by the states under the oversight of the U.S. Environmental Protection Agency, and the permit program governing the discharge of dredged and fill materials under Section 404 of the Act, which is administered by the U.S. Army Corps of Engineers. The absence of a clear definition has bedeviled the courts, state and federal regulators, and the regulated community for years. In 2015, in an attempt to clarify the scope of Clean Water Act jurisdiction, EPA and the Corps jointly published the Clean Water Rule.

Litigation Challenging the Clean Water Rule

Thirty-one states and numerous environmental and industry groups challenged the validity of the Clean Water Rule in various district and appellate courts, with uncertainty over which courts had jurisdiction to hear the challenges.

Two district courts concluded that they lacked jurisdiction to hear challenges to the Clean Water Rule and dismissed the cases, while the U.S. District Court for the District of North Dakota issued a preliminary injunction that enjoined the Rule from taking effect in 13 states. *Murray Energy Corp. v. EPA*, No. 1:15-cv-110, 2015 WL 5062506 (N.D. W. Va. Aug. 26, 2015); *Georgia v. McCarthy*, No. CV-215-79, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015); *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). The Judicial Panel on Multidistrict Litigation denied the agencies' request to consolidate the multiple district court cases. *In re Clean Water Rule*, 140 F. Supp. 3d 1340 (J.P.M.L. 2015).

Meanwhile, cases filed in the federal courts of appeals were consolidated in the U.S. Court of Appeals for the Sixth Circuit. On October 9, 2015, the Sixth Circuit issued a nationwide stay of the Clean Water Rule pending judicial review. *In re EPA and Dep't of Def. Final Rule*, 803 F.3d 804. On February 22, 2016, the Sixth Circuit ruled that it had jurisdiction to hear challenges to the Rule. *In re U.S. Dep't of Defense and EPA Final Rule*, 817 F.3d 261. Various parties appealed the Sixth Circuit's jurisdictional ruling to the Supreme Court.

The Supreme Court's Decision

The issue before the Supreme Court was limited to whether federal courts of appeals had original jurisdiction to hear challenges to the Clean Water Rule. Generally, challenges to EPA actions under the Clean Water Act must be brought in federal district courts, except for challenges to seven specified actions, for which federal courts of appeals have original and exclusive jurisdiction. EPA and the Corps argued that the Clean Water Rule fell within two of those actions: actions "in approving or promulgating any effluent limitation or other limitation," and actions "issuing or denying any [NPDES] permit." See 33 U.S.C. § 1369(b)(1)(E), (b)(1)(F). In a unanimous decision written by Justice Sotomayor, the Supreme Court disagreed with the agencies' broad interpretation of the statute.

First, under Section 1369(b)(1)(E), the Court held that the Clean Water Rule did not approve or promulgate "any effluent limitation or other limitation." The Court noted that a unifying feature among the effluent and other limitations under the applicable sections of the Act is that they all impose restrictions on the discharge of certain pollutants. Therefore, the Court concluded, "an 'other limitation,' at a minimum, must also be some type of restriction on the discharge of pollutants. Because the [Clean Water] Rule does no such thing, it does not fit within the 'other limitation' language of subparagraph (E)." The Court further held that, even if "other limitation" were interpreted broadly to encompass any type of limitation, this would not suffice to give rise to direct appellate jurisdiction, since the Rule was not promulgated under any of the specific sections of the Act that are referenced in subsection (E).

Second, the Court held that the Clean Water Rule did not issue or deny an NPDES permit. The Court rejected the agencies' suggestion that the Rule was "functionally similar" to issuing or denying a permit because the Rule established the geographical limits of EPA's permitting authority and thereby dictated whether permits may or may not be issued. The Court explained that this argument ignored unambiguous statutory language.

The Supreme Court recognized that litigating the same issue in multiple district courts, followed by review in different courts of appeals, may not be the most efficient way to resolve disputes over the legality of the Clean Water Rule. But the Court explained that this was the choice that Congress had made in writing the law, and the Court could not depart from the clear statutory language that required district court jurisdiction.

Implications

The Supreme Court's decision clears the way for challenges to the Clean Water Rule to proceed in the federal district courts.

In the coming weeks, the U.S. Court of Appeals for the Sixth Circuit is expected to lift its nationwide stay of the Clean Water Rule and dismiss its pending case. When that happens, the Clean Water Rule will take effect nationwide, except in the 13 states covered by the North Dakota district court's 2015 preliminary injunction (Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming). In those 13 states, the pre-2015 regulations and agency guidance would continue to apply. As a result, different parts of the country would be subject to two different legal standards regarding the scope of federal Clean Water Act jurisdiction.

The Trump administration has signaled its intent to rescind and replace the Clean Water Rule. On June 27, 2017, EPA and the Corps released a proposed rule to rescind the Clean Water Rule and recodify the pre-2015 regulations that it replaced. In addition, on November 22, 2017, the agencies issued another proposed rule that would delay the effective date of the Clean Water Rule for two years. Until EPA and the Corps promulgate final rules, however, and as litigation proceeds in multiple district courts in the coming months, the potential for regulatory uncertainty and inconsistency will remain.

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