

SCOTUS Rules Clean Water Rule Challenges Belong in District Court

The Supreme Court held unanimously Monday that challenges to the Obama Administration's 2015 "Clean Water Rule," which defined "waters of the United States" ("WOTUS") subject to regulation under the Clean Water Act ("Act"), must be filed in federal district court, and not in a United States Circuit Court of Appeals. The opinion, written by Justice Sonia Sotomayor, overturned a split decision from the Sixth Circuit Court of Appeals concluding it had jurisdiction over such challenges. The decision is a win for states, industry, and environmental groups arguing that challenges to the Rule belong in district court, but leaves open the question of not only what is a "water of the United States," but which definition currently governs, and where.

Background

The Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") promulgated the Clean Water Rule in 2015 to revise the definition of "waters of the United States," which governs the jurisdictional reach of the Act. Many States and industry parties challenged the Rule in court, arguing it impermissibly extends the reach of the Act beyond what Congress intended. Because the judicial review provision of the Act provides that challenges to certain enumerated actions taken by the EPA must be brought in the courts of appeals, but provides for district court review of all other challenges, numerous challenges were filed in both district courts and courts of appeals.

Most district courts determined that jurisdiction was properly in the courts of appeals and granted motions to dismiss filed by the government. However, the district court in North Dakota did not dismiss and enjoined implementation of the Rule in the 13 states that were parties to that case.

The challenges brought in the courts of appeals were consolidated into a single case before the Sixth Circuit, which enjoined implementation of the Rule nationwide. In an unusual decision with three separate opinions from a three judge panel, the Sixth Circuit determined that courts of appeals have jurisdiction to hear challenges to the Rule.

Related Capabilities

- Mining
- Environmental

States, industry groups, and environmental organizations appealed the Sixth Circuit's decision to the U.S. Supreme Court, leading to Monday's decision.

The Decision

The government argued that promulgation of the Clean Water Rule is the kind of action Congress expressly provided in Section 509(b)(1) of the Act, 33 U.S.C. § 1369(b)(1), must be reviewed by a court of appeals. Specifically, the government argued the Rule is either an effluent or "other limitation" promulgated under section 301, 302, 306, or 405 of the Act, or that it is permit denial or approval under section 402 of the Act.

The Court rejected these alternative readings of the Act, holding that an action establishing an "effluent or other limitation" is one that controls only the discharge of pollutants, and that "[a]lthough the WOTUS rule may define a jurisdictional prerequisite of the EPA's authority to issue or deny a permit, the rule itself makes no decision whatsoever on individual permit applications." Accordingly, the Court held the "Clean Water Rule" is not one of the "carefully enumerated ... seven categories of EPA action for which [Congress] wanted immediate circuit court review." Rather, it is one of the many other kinds of action "relegated ... to the jurisdiction of the federal district courts."

Which WOTUS Definition Applies?

The Supreme Court's decision raises a question concerning which definition of WOTUS currently applies, and where, because, if the Sixth Circuit lacked jurisdiction, it lacked the authority to stay implementation of the Rule nationwide. Once the Sixth Circuit's stay is removed, EPA and the Corps must start implementing the Clean Water Rule in the 37 states where implementation is not enjoined by the district court in North Dakota's injunction, unless EPA and Corps take action or a district court enjoins implementation of the rule nationwide.

EPA and the Corps have proposed two regulations intended to prevent the Clean Water Rule from taking effect. In June 2017, the agencies proposed a repeal of the Rule. In November 2017, they proposed adding a so-called applicability date to the regulation that would delay enforcement of the Rule until 2020. The addition of an applicability date to the Rule was proposed after the Trump Administration became concerned that the Supreme Court would send challenges to the Rule to federal district courts. While the comment period for both proposed rules are closed, EPA and the Corps have not finalized either proposal.

Administrations have long struggled to create a workable definition of a "water of the United States" that will survive court challenge. While the Supreme Court's decision adds welcome clarity regarding where challenges to the definition of waters of the United States will be heard, it will muddy the waters in the interim as EPA and the Corps will be required to implement two different definitions, unless the agencies finalize one of the proposed rules or a district court issues a nationwide injunction of the Clean Water Rule.

Until one of those actions occurs, confusion and uncertainty over which definition of waters applies in which state will have considerable impacts on resource development and other projects potentially subject to regulation under the Act.