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Deciding The Forum For 'Waters Of The US' Suits

By **Joel Beauvais**
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Joel Beauvais

On Oct. 11, the U.S. Supreme Court heard oral argument in National Association of Manufacturers v. U.S. Department of Defense(No. 16-299), in which the court will decide whether the district courts or the courts of appeals are the correct forum for suits challenging the "Clean Water Rule" promulgated in 2015 by the U.S. Environmental Protection Agency and the Army Corps of Engineers. The rule defines "waters of the United States" that are subject to regulation under the Clean Water Act, and has been the subject of major controversy. While the case now before the court focuses on a threshold jurisdictional issue, it is being watched closely by states, industry groups and environmental organizations, as the outcome will have significant impacts on future litigation.

The precise question before the court is whether the Clean Water Rule qualifies as one of the types of agency actions for which CWA Section 509(b)(1) authorizes challenges to be brought in the courts of appeals. Specifically, the court must decide whether the rule is an "other limitation" covered by Section 509(b)(1)(E) (which refers to actions "approving or promulgating an effluent limitation or other limitation promulgated under" specified CWA provisions), or an action "issuing or denying a permit" under the CWA Section 402, for purposes of Section 509(b)(1)(F). If the rule is not either, suits challenging the rule would instead be brought in the district courts. The National Association of Manufacturers, other industry groups, a coalition of 30 states, Waterkeeper Alliance and other environmental groups argue in favor of district court jurisdiction. The EPA and the Corps, along with the Natural Resources Defense Council and the National Wildlife Federation, argue the case should be heard in the court of appeals.

At the Oct. 11 argument, the court appeared divided — but, as described below, the balance of questions seemed to favor the industry and state petitioners arguing in favor of district court jurisdiction. Whether the case will be rendered moot before it is decided — a question foreshadowed at oral argument — remains to be seen. In June of this year, the EPA and the Corps signed a proposal to rescind the Clean Water Rule; if the agencies finalize the rescission before the court issues its decision, some may argue the case should be dismissed as moot. But the jurisdictional issue now before the court will have continuing importance regardless, because the inevitable suits challenging the rescission rule, and any other later rules addressing the definition of waters of the United States, will raise the same threshold jurisdictional question.

How Did We Get Here? A Quick Refresher on the Procedural History

Almost immediately after the Clean Water Rule was published in June 2015, it was challenged by over 100 different parties — including over two dozen states and multiple industry groups and environmental organizations — in 13 different district courts and eight different courts of appeals. Many parties sued in both district court and the court of appeals, reflecting the uncertainty over the correct forum that gave rise to the case now before the Supreme Court.

Early in the litigation, the federal agency defendants asked the Judicial Panel on Multidistrict Litigation (JPML) to consolidate the district court proceedings in a single forum. The JPML rejected that request, concluding that the law authorizing consolidation of district court suits (28 U.S.C. § 1407) focuses on resolution of "common issues of fact," whereas these cases turned primarily on questions of statutory interpretation. The JPML did, however, consolidate the court of appeals challenges in the Sixth Circuit, pursuant to the separate, random selection process applicable to those suits.

Litigation proceeded apace in both the district courts and the Sixth Circuit. In August of 2015, the District Court for the District of North Dakota issued a preliminary injunction enjoining the rule — but the injunction was later narrowed to apply only to the 13 states that were represented in that suit. In October 2015, the Sixth Circuit stepped in to issue a nationwide stay of the rule — less than two months after it went into effect. Meanwhile the federal agencies sought and ultimately obtained stays of most of the district court suits across the country.

The Sixth Circuit requested briefing and heard argument on the question of its jurisdiction, issuing a decision in February 2016. The three-judge panel found that it had jurisdiction, but on a fractured 1-1-1 basis. Judge David McKeague concluded that the rule was subject to the court's jurisdiction under both Section 509(b)(1)(E) and (F). Judge Richard Allen Griffin concurred in the judgment, concluding that it did not constitute an other limitation for purposes of Section 509(b)(1)(E), but considering himself bound by Sixth Circuit precedent to find it was an action in issuing or denying a permit for purposes of Section 509(b)(1)(F). Judge Damon Keith dissented, concluding that neither of these provisions applied.

Several parties, led by the National Association of Manufacturers, petitioned the Supreme Court for certiorari on the jurisdictional issue, and the court granted review on Jan. 13, 2017. The Sixth Circuit issued an order on Jan. 25 holding the merits litigation in abeyance.

The following month, President Donald Trump signed Executive Order 13788, which called upon the EPA and the Corps to publish for notice and comment a proposed rule to rescind or revise the Clean Water Rule. Shortly thereafter, the United States requested that the Supreme Court hold the case in abeyance, but the court denied the motion. In June 2017, the EPA and the Corps proposed a rule to rescind the Clean Water Rule and to "recodify" the 1986 regulations that were previously in place. The agencies have stated that this is the first of two rules they plan to issue regarding the definition of waters of the United States. The agencies plan to finalize the "step one" rule and to follow it with a second "step two" rulemaking that would further narrow the definition of waters of the United States.

In proposing the step one rule, the agencies expressly acknowledged that part of the rationale for moving quickly to issue the rule is to ensure that the Clean Water Rule can be rescinded before the Supreme Court issues a decision: If the court finds jurisdiction lies in the district courts, the agencies noted, the Sixth Circuit would be without jurisdiction and its nationwide stay on the Clean Water Rule would be lifted. The comment period on the step one rule concluded in September.

Key Issues in the Case — and Insights from the Argument

National Association of Manufacturers v. Department of Defense pits two sets of rather strange bedfellows against one another in a battle of statutory interpretation. On one side are the EPA and the Corps, joined by two environmental groups, defending the Sixth Circuit's judgment that the courts of appeals have jurisdiction under Section 509(b)(1)(E) and (F). They argue that the court should look at the functional character of the Clean Water Rule, asserting among other things, that it is effectively a geographic "limitation" on the discharge of pollutants. In addition to their textual arguments, the defenders of court of appeals jurisdiction offer judicial "efficiency" arguments that this is a national rule addressing statutory interpretation issues, which should be resolved in a single forum, rather than simultaneously litigated in multiple district courts.

On the other side are an array of industry groups, 30 states and a separate set of environmental groups. They argue that the Clean Water Rule is a definitional rule that cannot be cast as an other limitation promulgated under CWA Section 401 or the other relevant sections or an action issuing or denying a permit. The industry groups and states also focused on a "fairness" argument rooted in CWA Section 509(b)(2), which provides that an EPA action that could have been challenged under Section 509(b)(1) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." This, they argue, would preclude parties defending against future enforcement actions under the CWA from raising challenges to the waters of the United States definition in those actions. Virtually all of the court's landmark decisions addressing the jurisdictional scope of the CWA have arisen in such cases.

At the Oct. 11 oral argument, the justices grappled with questions about the fit or lack thereof between the Clean Water Rule and the text of Section 509(b)(1)(E) and (F), on the one hand, and practical and policy issues related to the parties' efficiency and fairness arguments, on the other. Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan asked questions of both sides, but appeared to direct more pointed challenges to the industry and state petitioners — focusing, among other points, on what Congress' rationale may have been in crafting Section 509(b)(1) as it did. Chief Justice John Roberts and Justices Samuel Alito and Neil Gorsuch, by contrast, had more questions for the federal agencies' counsel and all three appeared skeptical of the agencies' position.

In particular, several questions focused on the industry and state petitioners' fairness arguments related to Section 509(b)(2) — including whether and how defendants in future enforcement actions in district court might raise issues related to the rule, and how this would bear on the parties' efficiency arguments. Justice Anthony Kennedy raised only one question, asking counsel for the federal agencies whether their position was that an interpretation of a definitional phrase is a limitation. Perhaps most notably, Justice Stephen Breyer extensively questioned counsel for the federal agencies, voicing skepticism about their reading of the statute.

In addition, Justices Ginsburg and Sotomayor and Chief Justice Roberts each raised questions related to whether the agencies would finalize rescission of the Clean Water Rule before the court issues a decision, and whether this would render the case moot. Counsel for the industry petitioners emphasized that it was unclear what the timing of the rescission might be, but argued that environmental groups had stated their intention to challenge the rescission rule and that there would be a "live" controversy over the Clean Water Rule so long as any such challenges remained pending. Counsel for the EPA and the Corps declined to predict the schedule for finalizing a rescission of the Clean Water Rule, and acknowledged that the jurisdictional issue would have continuing practical importance, notably for suits challenging any rescission rule.

Conclusion

Whatever the Supreme Court does will have important consequences, including for the step one rulemaking that the EPA and the Corps have proposed, as well as the step two rule they are contemplating. If the court were to rule in favor of court of appeals jurisdiction, review of these and future rules addressing the definition of waters of the United States would be procedurally straightforward — with parties challenging the rules in various circuits and the JPML randomly selecting one to hear the consolidated case.

If the court instead decides in favor of district court jurisdiction — and the JPML maintains the position it took for the Clean Water Rule — suits likely will be brought and litigated in multiple district courts. This presents the possibility of many such suits proceeding simultaneously, with the potential for varying outcomes relating not only to the merits but also with regard to motions for preliminary injunctive relief and other issues. Finally, if the court were to dismiss the case as moot, challengers likely would bring suits in both the district courts and courts of appeals — as happened with the Clean Water Rule. Under this scenario, the issue could be back at the Supreme Court within another two to three years.

Joel Beauvais is a partner in the environment, land and resource department at Latham & Watkins LLP in Washington, D.C. He previously served as deputy assistant administrator for water at the EPA.