

Water Quality Standards

Water Jurisdiction Case Headed for Pause, Attorneys Agree

BNA Snapshot

- Sixth Circuit likely to stay review of Clean Water Rule while Supreme Court decides which court is best to hear challenges
- EPA, corps defense of water rule may not amount to much if EPA under new administration pulls its support



By Amena H. Saiyid

Attorneys rarely agree, but in this instance they all are singing the same tune: The ongoing legal review of the federal rule clarifying the scope of Clean Water Act jurisdiction will pause until the U.S. Supreme Court has resolved where challenges to this rule will be heard.

The Clean Water Rule (RIN:2040-AF30), also known as the waters of the U.S. (WOTUS) rule, was written jointly by the Environmental Protection Agency and the U.S. Army Corps of Engineers and is currently stayed nationwide by the U.S. Court of Appeals for the Sixth Circuit, which is currently reviewing briefs filed in opposition (*In re Murray Energy Corp. v. EPA (In re EPA and Dep't of Def. Final Rule)* , 6th Cir., No. 15-03751, government brief1/13/17).

The Sixth Circuit will suspend the briefing schedule when they receive formal notice of the Supreme Court's decision to address the question of court's jurisdiction, Timothy Bishop, a partner at Mayer Brown LLP, told Bloomberg BNA in a Jan. 16 e-mail.

"If the Court doesn't enter such an order within the next week or so we will file a motion. Certainly, the merits proceedings will not go forward while the Supreme Court considers jurisdiction," said Bishop, whose petition on behalf of the National Association of Manufacturers questioned the Sixth Circuit's interpretation of a Clean Water Act provision to establish itself as the legal jurisdiction to review water rule challenges.

Also agreeing with Bishop's reading of the Sixth Circuit's expected action is Brooks Smith, of Troutman Sanders LLP, who is representing Murray Energy Corp., and Ellen Steen, general counsel for the American Farm Bureau Federation, Murray Energy and the Farm Bureau, who are challenging the rule in the Sixth Circuit.

As of Jan. 17, the federal district courts located in Florida, Georgia, Texas and Washington state haven't decided whether to defer to the Sixth Circuit and dismiss challenges, while the federal district court in North Dakota stayed all proceedings until the Sixth Circuit made a decision or the Supreme Court accepted the industry petition on procedural grounds.

All Suits Dismissed

"I would expect all the suits that have not been dismissed would now be stayed pending the decision of the Supreme Court," said Steen, alluding to the Farm Bureau's pending lawsuit. If the Supreme Court finds that the appellate court does not have jurisdiction, then there would be a flurry of filings to resume those district court proceedings and presumably seeking a stay of the rule during the litigation, since the Sixth Circuit's stay of the rule would no longer be in effect.

That in turn could make the administration's final defense of the water rule irrelevant, Steen and other attorneys said. For instance, a Supreme Court decision that holds a federal district court to be jurisdictional would make not just the administration's brief, but all briefs filed in the Sixth Circuit to be irrelevant because the district court would have to start a new briefing schedule, said Larry Liebesman, a senior adviser to Dawson & Associates, a consulting and environmental permitting firm.

"I don't think that the EPA/Corps brief carries oomph anymore—it doesn't change the fact that the new EPA could come in and say that they are no longer defending the rule," said Julia Anastasio, general counsel and executive director for the Association of Clean Water Administrators that represents state and interstate water officials. The association isn't challenging the lawsuits, but 31 of its members states have filed in opposition to the rule, while seven have supported it.

Reconsider Rule

The agencies could ask the Sixth Circuit, the Tenth Circuit and others to hold the proceedings in abeyance while they reconsider the rule.

But if the EPA decides to reconsider the rule before the Supreme Court has issued a decision, "the brief itself will be of very little consequence," Steen said. "The only meaningful power of the brief would be to influence the court's decision. If there is no decision, it's just a brief that was filed by lawyers defending an agency rule, which typically would hold little sway in subsequent litigation."

Most importantly, Steen said, the final brief by the Obama administration will not tie either the EPA or the corps in making any future policy decisions or even legal interpretations, "which may change over time, so long as the agency's new decisions and interpretations are reasonable and consistent with the statute."

To contact the reporter on this story: Amena H. Saiyid in Washington, D.C., at asaiyid@bna.com

To contact the editor responsible for this story: Larry Pearl at lpearl@bna.com

For More Information

The EPA, corps brief in the U.S. Court of Appeals for the Sixth Circuit is available at <http://src.bna.com/ltW>.