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High Court Wary Of Feds' Water Rule Jurisdiction Argument

By **Juan Carlos Rodriguez**

Law360, Washington (October 11, 2017, 2:27 PM EDT) -- U.S. Supreme Court justices on Wednesday appeared skeptical of the federal government's position that challenges to a rule defining its authority under the Clean Water Act belong at the appellate rather than district court level.

The 2015 Clean Water Rule defines what bodies qualify as "waters of the United States" under the Clean Water Act, the test the U.S. Environmental Protection Agency and Army Corps of Engineers use to determine whether a particular project needs a permit. The rule was challenged in both federal district and appellate courts, but before the courts could hear the merits of the case they had to sort out exactly where the lawsuits belonged.

A Sixth Circuit panel ultimately decided appeals courts had jurisdiction, but states, industry and environmental groups challenged that finding. The merits portion of the case was put on hold until the jurisdictional question is decided by the Supreme Court.

Assistant U.S. Solicitor General Rachel P. Kovner said Wednesday at oral arguments before the high court that the Clean Water Act gives appeals courts jurisdiction, but several justices appeared reluctant to support that finding or the government's arguments.

"It's hard to agree with you," Justice Stephen Breyer told Kovner. He said the CWA provisions cited by the government do not clearly authorize appeals courts to deal with a definitional rule like the Clean Water Rule.

"Maybe all rules should be reviewed in a court of appeals, but that isn't what [the statute] says," Justice Breyer said.

District courts have jurisdiction over many agency actions related to the Clean Water Act, but there are exceptions that give jurisdiction to appellate courts, and the EPA and the Army Corps have tried to argue that their rule qualifies under a couple of those exceptions.

They argued that the rule challenge belongs at the appellate court level because of language in Section 509(b)(1)(F) of the CWA, also referred to in legal filings as U.S. Code Section 1369, which addresses appellate review of the issuance or denial of permits. They said that the high court's 1980 ruling in Crown Simpson Pulp v. Costle established that Section 509(b)(1)(F) includes EPA actions that are "functionally similar" to the denial of a permit.

They also said direct appellate review of the rule is authorized by Section 509(b)(1)(E), which says courts of appeals are to review “any” EPA action “approving or promulgating any effluent limitation or other limitation” under language in the act that controls the discharge of pollutants.

Justice Breyer said effluent limitations are commonly known as numerical quantities, rates and concentrations, and questioned how a geographical limitation like the definition of waters of the U.S. fits into that category.

Kovner answered that geography is “very closely bound up” with the other factors.

“In order to know the scope of that obligation of the limits on rates or points, you need to know where those limitations apply,” Kovner said.

Regarding the “other limitation” phrase, Justice Breyer said, “It doesn’t sound like a big catch-all; it sounds like a little catch-all,” and not one that would seem to encompass something like the Clean Water Rule.

Chief Justice John Roberts said he is concerned about the due process implications of the government’s interpretations of the CWA exemptions, particularly the fact that rule challengers may have already missed the boat to challenge the Clean Water Rule.

Referencing a hypothetical farmer from Kansas who at some point in the future is denied permission to discharge some waste due to the rule, Chief Justice Roberts said the government’s position would deprive that person an opportunity to challenge it.

“He’s not a lobbyist. He’s a farmer in Kansas,” Chief Justice Roberts said. “And he says ... I don’t think that’s the right definition. And you say, well, ‘You should have come to Washington four years ago.’”

Justices Elena Kagan, Sonia Sotomayor and Samuel Alito also posed skeptical questions regarding the government’s interpretation.

The petitioners fielded questions as well. Chief Justice Roberts asked Timothy Bishop of Mayer Brown LLP, who represents the National Association of Manufacturers, about the greater efficiency that would result from the government’s position that one court of appeals should be responsible for deciding the merits of the Clean Water Rule — or any future definition of waters of the U.S.— rather than myriad district courts.

“The district courts will have to review the entire administrative record,” Roberts said. “You’ll agree that that’s inefficient, won’t you?”

Bishop said that efficiency isn’t the main metric the court should use when deciding the jurisdictional question.

“We would like to litigate these issues in the district court because we think that going through the district courts and the courts of appeals will produce more accurate decision-making, will tee the case up better for this court to review,” he said.

And Justice Ruth Bader Ginsburg addressed the fact that the Trump administration has proposed a rule

to rescind the Clean Water Rule. She asked both Bishop and Kovner whether the administration's actions could moot the matter before the court.

They both told her that while the underlying case over the merits of the Clean Water Rule may become moot if the rule is ultimately discarded, any other attempt to more clearly define waters of the U.S. would run into the same jurisdictional controversy.

Ohio Solicitor Eric Murphy also argued on behalf of states favoring district court jurisdiction.

The government is represented by Daniel R. Dertke, Amy J. Dona, Andrew J. Doyle, J. David Gunter II, Robert J. Lundman, Martha C. Mann and Jessica O'Donnell of the U.S. Department of Justice, Karyn I. Wendelowski of the U.S. Environmental Protection Agency and David Cooper and Daniel Inkelas of the U.S. Army Corps of Engineers.

The National Association of Manufacturers is represented by Timothy S. Bishop, Michael B. Kimberly, Chad Clamage, Jed Glickstein and Samuel D. Block of Mayer Brown LLP and Linda E. Kelly, Quentin Riegel and Leland P. Frost of the Manufacturers' Center for Legal Action.

The Utility Water Act Group is represented by Kristy A.N. Bulleit, Andrew J. Turner, Karma B. Brown and Kerry L. McGrath of Hunton & Williams LLP.

Waterkeeper Alliance, the Center for Biological Diversity, the Center for Food Safety, Humboldt Baykeeper, Russian Riverkeeper, Monterey Coastkeeper, Snake River Waterkeeper, Upper Missouri Waterkeeper and Turtle Island Restoration Network are represented by Allison M. LaPlante and James N. Saul of Earthrise Law Center at Lewis & Clark Law School.

The Sierra Club and Puget Soundkeeper Alliance are represented by Jennifer C. Chavez of Earthjustice.

The states are represented by their attorneys general.

The New Mexico Environmental Department is represented by Lara Katz, Gregory C. Ridgley and Matthias Sayer.

The case is National Association of Manufacturers v. U.S. Department of Defense et al., case number 16-299, in the Supreme Court of the United States.

--Editing by Brian Baresch.

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