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Justices Say Clean Water Rule Suits Belong In District Courts

By **Juan Carlos Rodriguez**

Law360, New York (January 22, 2018, 10:10 AM EST) -- The U.S. Supreme Court held Monday that challenges to an Obama-era rule defining the federal government's authority under the Clean Water Act belong at the district rather than appellate court level, dealing a blow to executive branch agencies that argued appeals courts were the appropriate venue.

The high court's unanimous decision overturned a split Sixth Circuit panel finding that appeals courts have jurisdiction over legal challenges to the 2015 Clean Water Rule, which defines what aquatic bodies qualify as "waters of the United States" under the Clean Water Act. The U.S. Environmental Protection Agency and Army Corps of Engineers crafted the rule to clarify when a particular project needs a permit.

The U.S. Supreme Court has dealt a blow to executive branch agencies arguing that challenges to the Clean Water Rule belong in the appellate courts, unanimously ruling that such challenges belong in district court. (Law360)

The opinion, written by Justice Sonia Sotomayor, said that the waters of the U.S. rule wasn't covered by part of the CWA that lists EPA actions that circuit courts have exclusive power to review.

"It is true that Congress could have funneled all challenges to national rules to the courts of appeals, but it chose a different tack here: It carefully enumerated the seven categories of EPA action for which it wanted immediate circuit court review and relegated the rest to the jurisdiction of the federal district courts," Monday's ruling said.

The government had argued that the rule challenge belongs at the appellate court level because of language in 509(b)(1)(E) of the CWA, also referred to in legal filings as U.S. Code Section 1369, 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.

But the Supreme Court disagreed.

"The government ... maintains that the WOTUS Rule is an 'other limitation' under subparagraph (E).

Although the act provides no express definition of that residual phrase, the text and structure of subparagraph (E) tell us what that language means. And it is not as broad as the government insists," the justices said.

The government had also said that direct appellate review of the rule is authorized by Section 509(b)(1)(F), 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.

On that point, the high court said the government misconstrued Crown Simpson and ignored the statutory text.

"Contrary to the government's suggestion, the WOTUS rule in no way resembles the EPA's veto of a state-issued permit addressed in Crown Simpson," the court said. "Although 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."

Timothy S. Bishop of Mayer Brown LLP, who argued the case at the high court for WOTUS rule challenger National Association of Manufacturing, praised the ruling.

"We're pleased that the court resolved the decades-old uncertainty about where challenges to CWA rules belong," Bishop said.

Now that the high court has established the proper jurisdiction for the litigation, several district court cases that had been put on hold could be restarted, although it seems certain the Trump administration, which has already proposed rescinding the 2015 rule, will not defend it the way the Obama administration would have.

After the rule was promulgated, opponents brought allegations that it improperly gives the EPA and the Corps broad new authority to require permits for projects that may affect nearby waterways. States including Ohio and North Dakota and industry groups such as the Utility Water Act Group and Murray Energy Corp. challenged the rule in both district and circuit court, but before the courts could reach the merits of the challengers' arguments, they had to sort out exactly where the lawsuits belonged.

The challengers told the Sixth Circuit that district courts were the proper venue, and several environmental groups including Sierra Club and Waterkeeper Alliance joined that side of the argument at the Supreme Court level.

Jon Devine, senior attorney for the Natural Resources Defense Council, said his organization expects the Obama-era rule to go back into effect in many jurisdictions after the Sixth Circuit's nationwide stay is invalidated as the cases trickle back down to the district court level.

"The Clean Water Rule provides strong protections for streams, wetlands and other bodies of water that feed the drinking water supplies for one in three Americans," Devine said in a statement. "It also helps prevent dangerous flooding, helps provide habitat for the fish we eat, and supports a robust recreational economy."

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 Bruce Goldman and Rebecca Flanagan.