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Legal Sidebar

Clean Water Rule Challenges Must Begin in Federal District Courts, Supreme Court Holds

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In *National Association of Manufacturers (NAM) v. Department of Defense*, the Supreme Court held that legal challenges to the 2015 Clean Water Rule issued by the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) must be litigated in multiple federal district courts rather than in a consolidated case in the United States Court of Appeals for the Sixth Circuit (Sixth Circuit). Since October 2015, a Sixth Circuit order had stayed implementation of the Clean Water Rule on a nationwide basis pending the court's determination of its jurisdiction over the challenge to the Rule. But the Supreme Court's *NAM* decision, which requires the Sixth Circuit to dismiss its case, will result in the elimination of that order, and potentially could complicate legal challenges to the Clean Water Rule and the Trump Administration's effort to rescind and replace it.

Background on *NAM* and the Clean Water Rule

Also known as the "Waters of the United States" or WOTUS Rule, the Clean Water Rule attempts to define which waters and wetlands are subject to regulatory requirements in the Clean Water Act. The underlying issue addressed in the Clean Water Rule—the breadth of federal regulatory jurisdiction under the Clean Water Act—has been debated and litigated for more than 40 years (as outlined in this CRS report), and the Clean Water Rule has been no exception to this trend. After the Corps and EPA announced the Clean Water Rule in 2015, more than 100 parties filed lawsuits challenging its scope and legal authority in federal appellate and district courts across the country. Before any court could address the merits of the claims, however, an impasse arose over what court was the proper forum for the litigation.

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Whereas many opponents of the Clean Water Rule argued that their cases should be litigated at the federal district court level (where challenges to agency actions ordinarily begin), the United States contended that the cases fell within the scope of § 509 of the Clean Water Act, which lists seven categories of agency actions that are subject to direct appellate court review. In a split decision issued in December 2015 (discussed here), a panel of the Sixth Circuit adopted the United States' position and held that § 509 gave the federal appellate courts original jurisdiction to hear all challenges to the Clean Water Rule. But, in the latest turn in the long-winding litigation over the Clean Water Act's jurisdiction, the Supreme Court disagreed with the Sixth Circuit and vacated its opinion with instructions to dismiss the case for lack of jurisdiction. "Congress has made clear that rules like the [Clean Water] Rule must be reviewed first in federal district court[,]" wrote Justice Sotomayor in an opinion for the unanimous Court.

The Future of the Legal Challenge to the Clean Water Rule After *NAM*

Although the Supreme Court's *NAM* decision does not resolve the merits of the challenges to the Clean Water Rule, it could have important implications for how the legal process unfolds. In 2015, suits seeking to invalidate the Rule were proceeding in 13 federal district courts, but those courts stayed or dismissed their cases when the Sixth Circuit issued its now-vacated decision that it possessed exclusive jurisdiction. The plaintiffs in the district court cases could seek to revive their suits, leading to simultaneous challenges to the Clean Water Rule in multiple district courts. (A Judicial Panel on Multidistrict Litigation already rejected a request to consolidate the district court cases in 2015.) Further, each district court case will have its own appeals process, creating the potential for later disagreements in the U.S. courts of appeals on the underlying legality of the Rule.

Regardless of which courts hear challenges to the Clean Water Rule, administrative actions by the Trump Administration are likely to impact the litigation. In February 2017, the President issued an executive order directing the Corps and EPA to review and rescind or revise the Clean Water Rule. In a proposed rule published in July 2017 (analyzed here), the agencies initiated what they described as the first step in a two-step process to (1) rescind the Clean Water Rule and (2) engage in a separate rulemaking process to develop a new rule that will define the jurisdictional reach of the Clean Water Act. EPA and the Corps currently are evaluating over 680,000 comments on the step-one proposal. But once the first step is complete and the Clean Water Rule is rescinded formally, any pending challenges to the Rule will likely be dismissed as moot (as discussed in this Sidebar).

Does *NAM* Allow the Corps and EPA to Start Implementing the Clean Water Rule?

Before the Supreme Court's *NAM* decision, the Sixth Circuit had granted a nationwide stay of the Clean Water Rule, effectively halting its implementation across the United States. Although *NAM* did not vacate the Sixth Circuit's order granting the stay, the *NAM* Court concluded that the Sixth Circuit lacked subject matter jurisdiction over its consolidated appellate-level cases, and it instructed the Sixth Circuit to dismiss those cases in full. Consequently, once the Sixth Circuit enters a dismissal order, its stay of the Clean Water Rule will no longer be in place.

Even before the Sixth Circuit's stay, however, the United States District Court for the District of North Dakota had granted a preliminary injunction blocking operation of the Rule. While that injunction potentially could become effective again if litigation resumes at the district court level, the District of North Dakota did not enjoin implementation of the Clean Water Rule on a nationwide basis. As a result, once litigation resumes in the district courts, the Clean Water Rule could be enjoined in some parts of the country but allowed to operate in others.

Anticipating complications associated with an expiration of the Sixth Circuit's nationwide stay, the Corps and EPA initiated another rulemaking action in November 2017. This proposed rule seeks to add an "applicability date" to the Clean Water Rule of two years from the date of the final agency action on the proposal. According to the Corps and EPA, adding an applicability date to the Clean Water Rule would maintain the status quo and prevent inconsistencies and uncertainties about the regulatory regime that

could arise after the nationwide stay is terminated, but before the agencies have finalized regulations rescinding the Clean Water Rule. In essence, the November 2017 proposed rule would allow the agencies more time to undertake the two-step rescind and replace process without allowing the 2015 Clean Water Rule to take effect during the rulemaking process.

Congress and the Clean Water Rule

Several legislative proposals introduced in the 115th Congress could impact the future of the Clean Water Rule. An omnibus appropriations bill that passed in the House would authorize the Corps and EPA to withdraw the Rule "without regard to any provision of statute or regulation that establishes a requirement for such withdrawal." If enacted, this provision could permit the agencies to complete the "step one" process of rescinding the Clean Water Rule without following the notice and comment rulemaking requirements of the Administrative Procedure Act (discussed in this Report). Other bills introduced in the 115th Congress would directly repeal the Rule or replace it by amending the Clean Water Act. Some Members of the House and Senate also have introduced resolutions expressing the sense of their Chamber that the Clean Water Rule should be withdrawn or vacated.