UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2016 Texas Water Law Institute

November 3-4, 2016
Austin, Texas

Federal Case Law Update

Paulina Williams
Samia Broadaway

Federal Case Law Update

By: Paulina Williams and Samia Broadaway

This case law update provides summaries of federal water law cases that have concluded or been active over the past year. While not exhaustive, this update is intended to provide useful highlights from the preceding year of water law issues in environmental and natural resource litigation. The status of these cases was last updated on October 15, 2016, but many of them are still pending or are the subject of ongoing appeals.

I. Waters of the United States and the Army Corps of Engineers

A. *In re: EPA & Dep't of Defense Final Rule: Clean Water Rule*, 817 F.3d 261 (6th Cir. 2016)

1. Which Court Hears the Case?

On June 29, 2015, the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (collectively, the "Agencies") published a final rule redefining the term "waters of the United States" ("WOTUS Rule"). This term is the touchstone of Clean Water Act ("CWA") jurisdiction. Thus, the WOTUS Rule underlies and determines the scope of key programs such as permitting of discharges of dredged and fill material under Section 404, point source discharge permitting under Section 402, oil spill liability, and the requirement to have spill prevention, control, and countermeasure plans, among other things.

By the end of 2015 over thirty states, numerous trade organizations, and others had filed over twenty lawsuits challenging the rule in both district and circuit courts, as the statutory venue for the rule challenges remained (and remains) in controversy. To complicate matters further, a federal district court in North Dakota enjoined the rule's application, but only in thirteen states. Shortly thereafter, the U.S. Court of Appeals for the Sixth Circuit, where the appellate challenges were consolidated, issued a nationwide stay of the Final Rule — but without deciding whether it had jurisdiction to hear the challenges to the rule.

This rule challenge thus presents two important issues: (1) whether the new WOTUS Rule is permissible under the Clean Water Act and (2) which court gets the first opportunity to decide that question—that is, whether under CWA § 509 the courts of appeals have jurisdiction over the petitions for review or whether jurisdiction lies with the district courts.

On February 22, 2016, a three-judge panel held in a 1-1-1 split decision that the Sixth Circuit rather than the district court had jurisdiction over the petition for review of the WOTUS Rule. Accordingly, the nationwide stay of the rule has remained in effect. The Sixth Circuit found that "Congress's manifest purposes are best fulfilled by our exercise of jurisdiction to review the instant petitions for review of the Clean Water Rule." In the splintered decision, the Sixth Circuit accepted the government position that the WOTUS Rule qualifies as either an "effluent limitation or other limitation," or as "the issuance or denial" of a discharge permit, both of which are listed under Section 509(b)(1) and, therefore, are reviewable by an appellate court. In the 2-

to-1 decision, Judge McKeague delivered the opinion of the court holding that the courts of appeals have jurisdiction over the WOTUS Rule challenges. Judge Griffin concurred in the result, with Judge Keith dissenting. In his concurring opinion in the February 22 jurisdictional ruling, Judge Griffin stated that he believes the proper reading of Section 509(b) is that the courts of appeals do not have jurisdiction over the WOTUS Rule challenges but that he felt compelled to concur in the result reached by Judge McKeague because he felt bound by *National Cotton v. EPA*, 553 F.3d 927 (6th Cir. 2009) as circuit precedent.

On April 21, 2016, the Sixth Circuit denied six petitions for rehearing *en banc*. In seeking *en banc* review (and in a pending petition for certiorari), parties argue that *National Cotton* is inconsistent with the Act's plain text and in conflict with a decision by the U.S. Court of Appeals for the Eleventh Circuit addressing the challenge to the Water Transfers Rule under the CWA. *See Friends of the Everglades v. EPA*, 699 F. 3d 1280 (11th Cir. 2012).

Following the Sixth Circuit's decision, most district courts have dismissed challenges to the WOTUS Rule on jurisdictional grounds. *See Ohio v. EPA*, No. 2:15-cv-2467 (S.D. Ohio April 25, 2016); *Oklahoma v. EPA*, No. 15-CV-0381-CVE-FHM (N.D. Okla. Feb. 24, 2016). But in May of 2016, the District Court for the District of North Dakota, which had previously ruled that it had jurisdiction to hear the challenge, issued an order stating that the Sixth Circuit's fractured opinion does not make the law clear, citing its three separate opinions and staying rather than dismissing the proceedings. *North Dakota v. EPA*, No. 3:15-cv-00059.

In February of 2016, the Eleventh Circuit had stayed the case of *Georgia v. McCarthy*, No. 15-14035, pending the Sixth Circuit's decision on the rule. After the Sixth Circuit held that it had jurisdiction, Georgia requested that the Eleventh Circuit continue reviewing the case and cited the Sixth Circuit's decision. The Sixth Circuit's opinion conflicts with Eleventh Circuit precedent, so the court requested supplemental briefing on April 25, 2016, on several issues that were raised by the Sixth Circuit opinion. Subsequently, on August 16, 2016, the court issued a stay of all proceedings until the Sixth Circuit completes its review on the merits. The Eleventh Circuit case involves largely the same parties as the Sixth Circuit case as well as the same issues on the merits and requested relief.

An additional appeal has surfaced in the Court of Appeals for the Tenth Circuit. Industry and the State of Oklahoma are pursuing a consolidated appeal of district court dismissals of their WOTUS Rule challenges for lack of jurisdiction in *Chamber of Commerce v. EPA*, No. 16-5038. Petitioners filed their briefs July 1, 2016, urging the Tenth Circuit to find jurisdiction lies with district courts. EPA and the Corps filed a joint response brief on August 19, 2016, arguing that the district court correctly dismissed the underlying WOTUS Rule challenge in light of the Sixth Circuit's jurisdictional ruling. The agencies also assert that the Tenth Circuit "need not agree with the Sixth Circuit to acknowledge that Court's ability to provide Plaintiffs a remedy." The federal appellees filed their reply briefs September 19, 2016, defending the rule. The court has not yet set a date for oral argument. If the Tenth Circuit rules that district, not appellate, courts have jurisdiction over WOTUS Rule challenges, this will create a direct circuit split.

Title search: Federal Case Law Update

First appeared as part of the conference materials for the
2016 Texas Water Law Institute session
"Federal Case Law Update"