In a 2-1 decision the Sixth Circuit Court of Appeals ruled that it—rather than a federal district court—has jurisdiction to decide whether the Clean Water Rule, clarifying the scope of the “waters of the United States (WOTUS),” exceeds the Environmental Protection Agency’s (EPA) authority.

In October the Sixth Circuit assumed it had jurisdiction and issued a temporary nationwide stay of the rule. The WOTUS rule defines “waters the United States,” according to the EPA, “through increased use of bright-line boundaries” to make “the process of identifying waters protected under the Clean Water Act easier to understand, more predictable and consistent with the law and peer reviewed science, while protecting the streams and wetlands that form the foundation of our nation’s water resources.”

The Sixth Circuit stayed the rule concluding it was likely that a number of the definitions were at odds with Rapanos v. United States (2006) and the distance limitations in the final rule weren’t a “logical outgrowth” of the proposed rule, in violation of the Administrative Procedures Act.

Per the Clean Water Act, as relevant to this case, EPA actions “approving or promulgating any . . . other limitation” on discharges or “issuing or denying any permit” are reviewable by a federal court of appeals.

Judge McKeague noted that the WOTUS rule is definitional; it doesn’t directly impose discharge limits or directly cause permits to be issued or denied. Nevertheless, he concluded that the Sixth Circuit has jurisdiction reasoning that “[o]ver the last 35 years . . . courts, including the Supreme Court and the Sixth Circuit, have favored a “functional” approach over a “formalistic” one in construing these provisions.”

Concurring Judge Griffin also found appeals court jurisdiction concluding he was constrained by a Sixth Circuit case from 2009 National Cotton Council v. EPA, defining “issuing or denying any permit” to include anything merely relating to permitting.

Dissenting Judge Keith argued that Judge Griffin read National Cotton too broadly and that it only applies to rules that “regulate” or “govern” the permitting process.

The coalition of states and other organizations suing EPA are likely to seek en banc review (ask all the judges in the Sixth Circuit to rehear and decide this case). If they don’t seek en banc review or petition the Supreme Court to review the decision on jurisdiction, the Sixth Circuit will next decide whether to issue a permanent stay of the WOTUS rule.

Challenges to the WOTUS rule have been filed in federal district and appeals courts throughout the country. While a number of district courts have ruled they don’t have jurisdiction to decide the merits of the challenge to the WOTUS rule, a district court in North Dakota ruled it did and issued a stay of the rule. The Eleventh Circuit had put ruling on jurisdiction on hold pending the Sixth Circuit decision.
It seems likely that the Supreme Court will ultimately decide either or both the questions of which court has jurisdiction and whether the EPA had authority to issue this rule. Justice Scalia was well-known for his hostility towards the EPA; so, the fate of the WOTUS rule ultimately may well rest in the hands of a currently unknown Supreme Court Justice.

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