Blogs
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EPA Delays Applicability of Clean Water Rule While Challenges to Rule Proceed in District Courts

As reported in our prior Update, in a decision issued on January 22, the U.S. Supreme Court ruled in *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617, that challenges to the Obama administration's 2015 Clean Water Rule must be brought in federal district courts, rather than directly in the federal courts of appeals. The Court's decision will likely prolong the ongoing litigation over the validity of the Rule. Shortly after the Court's decision, the Trump administration delayed the Rule's applicability date for two years while it works on rulemakings to rescind and replace the Rule. **The Clean Water Rule** The Clean Water Act establishes federal jurisdiction over "navigable waters," which the law ambiguously defines as "waters of the United States." This definition is critically important because it determines which water bodies are subject to the Clean Water Act's permit programs—including the National Pollutant Discharge Elimination System permit program under Section 402 of the Act, which is administered mostly by the states under the oversight of the Environmental Protection Agency, and the permit program governing the discharge of dredged and fill materials under Section 404 of the Act, which is administered by the U.S. Army Corps of Engineers. The courts, federal regulators, and the regulated community have grappled with this cryptic definition for decades. In 2015, in an attempt to clarify the scope of Clean Water Act jurisdiction, EPA and the Corps jointly published the Clean Water Rule. Thirty-one states and numerous environmental and industry groups filed suit in various district and appellate courts to challenge the validity of the Clean Water Rule, with uncertainty over which courts had jurisdiction to hear the challenges. **The Supreme Court's Decision** In *National Association of Manufacturers,* the Supreme Court decided a relatively narrow issue: whether federal courts of appeals have original and exclusive jurisdiction to hear challenges to the Clean Water Rule, or, instead, such challenges must be brought in the federal district courts. Generally, challenges to EPA actions under the Clean Water Act must be brought in federal district courts, but the Act provides that challenges to seven specified EPA actions must be brought in the federal courts of appeals. EPA and the Corps argued that challenges to the Clean Water Rule fell within two of those exceptions to district court jurisdiction. In a unanimous opinion, the Supreme Court rejected the agencies' broad interpretation of the statute, and held that challenges to the Clean Water Rule must be heard in the first instance in the district courts. The Supreme Court's decision cleared the way for the pending challenges to the Clean Water Rule to proceed in the federal district courts. **The Responses to the Court's Decision** Parties challenging the 2015 Clean Water Rule have filed cases in multiple federal district courts and courts of appeals. In August 2015, the U.S. District Court for the District of North Dakota issued a preliminary injunction that prevented the Rule from taking effect in 13 states. Cases that had been filed in the federal courts of appeals were consolidated in the U.S. Court of Appeals for the Sixth Circuit, and that court issued a nationwide stay of the rule in October 2015. Several weeks after the Supreme Court's decision in *National Association of Manufacturers*, the Sixth Circuit vacated its nationwide stay of the Clean Water Rule and dismissed the case. The District Court for the District of North Dakota's preliminary injunction, which affects 13 states, remains in place. Meanwhile, plaintiffs challenging the Rule in the District Court for the Southern District of Texas recently filed a motion for a nationwide preliminary injunction. Cases challenging the Rule are pending in three other district courts. *See Southeast Legal Foundation v. EPA*, No. 1:15-cv-2488 (N.D. Ga); *Georgia v. McCarthy*, No. 2:15-cv-79 (S.D. Ga.); *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D.); *Ohio v. EPA*, No. 2:15-cv-2467 (S.D. Ohio); *Oklahoma v. EPA*, No. 4:15-cv-381 (N.D. Okla.); *Chamber of Commerce of the United States of America v. EPA*, No. 4:15-cv-386 (N.D. Okla.); *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex.); *American Farm Bureau Federation v. EPA*, No. 3:15-cv-165 (S.D. Tex.). For their part, the EPA and the Corps will continue to apply pre-2015 regulations and guidance; on February 6, the agencies adopted a rule to delay the applicability of the Clean Water Rule until 2020. That delay rule has since been challenged by environmental groups and a coalition of states. *See South Carolina Coastal Conservation League v. Pruitt*, No. 2:18-cv-330 (D.S.C.); *New York v. EPA*, No. 1:18-cv-1030 (S.D.N.Y.); *Natural Resources Defense Council v. EPA*, No. 1:18-cv-1048 (S.D.N.Y.). The EPA and the Corps have also announced their intention to rescind and replace the 2015 Clean Water Rule, and the agencies are currently finalizing a proposed rule to rescind the Clean Water Rule. Until the agencies

issue final rules to rescind the Clean Water Rule and replace it with a new definition of "waters of the United States" (and the inevitable litigation challenging those rules is resolved), the long-standing potential for regulatory uncertainty and inconsistency will remain.