Suits Challenging Rules Defining "Waters of the United States" Must be Filed in Federal District Court

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In a unanimous opinion written by Justice Sonia Sotomayor, the United States Supreme Court held in *National Association of Manufacturers v. Department of Defense*[1] that lawsuits which challenge the federal government's definition of the statutory phrase "waters of the United States" must be filed in federal district courts, not federal courts of appeal.[2] Although this decision says nothing about the rule's merit, the decision does resolve a key procedural uncertainty as to the appropriate venue to challenge such a rule.

By way of background, in 2015, the Environmental Protection Agency and the Army Corps of Engineers proffered a definition of the term "waters of the United States" through an agency regulation dubbed Waters of the United States Rule ("WOTUS Rule" or Rule).[3] This Rule was offered simply as a "definitional rule that clarifies" the scope of the statutory term "waters of the United States."[4] Attempts by the federal government to define "waters of the United States" – such as the WOTUS Rule – have been met by consistent challenge in the federal courts.

The determination as to whether federal district courts or the federal courts of appeal is the proper forum to challenge a rule such as the WOTUS rule turns on interpretation of 33 U.S.C § 1369(b)(1) of the Clean Water Act.[5] Section 1369(b) contains a list of challenges which must be filed in the federal courts of appeals rather than in federal district court.[6] In *National Association of Manufacturers*, the respondents argued that challenges to the WOTUS rule fell within two provisions of that list: subsection (E), which covers actions "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title," or subsection (F), which covers actions "in issuing or denying any permit under section 1342 of this title." The United States Supreme Court rejected both arguments and held that such challenges must first be filed in district court.[7]

In the opinion's second section, the Supreme Court rejected the respondents' argument that the WOTUS Rule falls within subsection (E) of the Clean Water Act. The Court disagreed with the respondents' position that the WOTUS Rule fell under the "other limitation" language contained in subsection (E) finding that "at a minimum" the "other limitation…must be some type of

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[1] No. 16-299, 2018 WL 491526, 585 U.S. ____(U.S. Jan. 22, 2018)
[2] *Id.* at 4.
[3] *Id.*
[4] *Id.* at 6.
[5] *Id.* at 8.
[6] *Id.*
[7] *Id.* at 9, 12.

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restriction on the discharge of pollutants."[8] Because the WOTUS Rule contained no such restriction, it did not fall under the exception in subparagraph (E).[9]

The Supreme Court similarly rejected the argument that the WOTUS Rule falls within subsection (F) of the Clean Water Act. In reaching this conclusion, the court found that the Rule is not an action "issuing or denying" a permit and disagreed with the respondents' reliance on the Supreme Court's decision in *Crown Simpson Pulp Co v. Costle*.[10] The respondents had relied on *Crown Simpson* to argue that subsection (F) encompasses actions functionally similar to permit denials. In characterizing the respondents' position as "completely unmoored from the statutory text, the court distinguished *Crown Simpson*: the WOTUS Rule "makes no decision whatsoever on individual permit applications" unlike the rule at issue in that case."[11]

In the opinion's third section, the Supreme Court rejected the government's other, non-textual arguments. Despite the Court's acknowledgement that these arguments had some merit, it refused to depart from the statute's plain language.[12] First, even though it may not appear reasonable for challenges to nationwide rules to proceed in district courts nationwide while challenges to individualized permit decisions must proceed in a centralized appellate forum, Section 1369's line-drawing leads to oddities such as sending some permit decisions to district court and others to appellate court.[13] Second, even though directing WOTUS rule litigation to a single appellate court would yield some efficiency and uniformity, this was not a case in which deeper purposes or broader policies sufficed to overcome the statute's text.[14]

The Supreme Court's decision ends years of jurisdictional confusion in the lower courts as to the proper forum to challenge such rules. Prior to this ruling, parties routinely filed in both district and appellate courts as a safeguard — in case either forum determined it lacked authority to hear the case in light of Section 1369. The opinion will end this practice as it states "the statutory language makes clear" that the cases must be filed in district court.

[8] *Id.* at 9.
[9] *Id.*
[10] *Id.* at 12.
[11] *Id.* at 13.
[12] *Id.* at 14 – 15.
[13] *Id.* at 14.
[14] *Id.* at 14-15.

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