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Sixth Circuit Hears Arguments Over Jurisdiction to Decide WOTUS Challenge

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The United States Circuit Court of Appeals for the *Sixth* Circuit heard oral arguments on Tuesday, December 8, 2015, on the limited question of whether the court has jurisdiction to hear challenges brought by 31 states and others ("States") to the Waters of the United States ("WOTUS") Rule, promulgated earlier this year by the Environmental Protection Agency and the U.S. Army Corps of Engineers ("Federal Agencies"). If the court finds that it has jurisdiction, it will then proceed to consider the merits of the States' challenges to the WOTUS Rule, which include allegations that the final WOTUS Rule is not a logical outgrowth of the proposal, that its promulgation did not comply with the Administrative Procedure Act, that the Rule is unconstitutional in its regulation of intrastate waters and that parts of the Rule are arbitrary and capricious. Otherwise, the case will be decided at the district court level.

The question before the court was the applicability of 33 USC §§1369(b)(1)(E) and (F) (also referred to as §509(b)(1)(E) and (F)), which provide that "[r]eview of the Administrator's action ….(E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [or] (F) in issuing or denying any permit under section 1342 of this title… may be had by any interested person in the Circuit Court of Appeals of the United States…." In short, the court was asked to decide whether the States' petitions for review of the WOTUS Rule seek the review of an effluent limitation or other limitation authorized to be heard by the circuit court by (E), or are tantamount to the issuance or denial of a permit under (F) –both of which are arguments advanced by the Federal Agencies. If the challenges are found to fall within either of these two categories, then the Circuit Court of Appeals has jurisdiction to hear the cases. Otherwise, the challenges to the WOTUS Rule belong in the district courts, as the States urge.

I attended the oral arguments and can report the court and the parties all agreed that, whatever the court's ultimate decision is on its jurisdiction to hear the cases, the circuit court had authority to issue the nationwide stay of the Rule pending a resolution of the jurisdictional issue.

The States' case was argued by Eric Murphy, Solicitor General for Ohio. The States' position is that the jurisdictional questions in the present cases (re: what court should review the WOTUS Rule) can be distinguished from those in *National Cotton*[1], a Sixth Circuit case involving a permitting decision that was found to be subject to circuit court review under §509(b)(1)(F). The Federal Agencies relied heavily on *National Cotton* in their briefs, arguing that EPA's grant of an exemption in that case was,

in effect, a permitting decision subject to review under (F). Judge Griffin pointed out that the first part of the *National Cotton* holding authorized the court of appeals to review not only the actual issuance or denial of a permit under §509(b)(1)(F), but also the regulations governing the issuance or denial of permits, which is arguably broader than the authority granted by the plain text of (F). The judge questioned why the court shouldn't be bound by *National Cotton's* holding that permit and permit program review are both by the circuit court, noting that even if it was broader than it needed to be, "it's still the holding, isn't it?"

The States urged the court not to read the jurisdictional holding of *National Cotton* in isolation, but to include an examination of the facts in that case. According to the States, the regulation at issue in *National Cotton* had a narrow purpose and was the functional equivalent of a permit. The States' asserted that the WOTUS Rule is very broad and applies to the entire Clean Water Act. Interpreting what is meant by a "permitting" regulation broadly, as the Federal Agencies urged, would result in the placement of challenges to every definition in the CWA within the circuit court permit review jurisdiction granted by (F).

Judge McKeague questioned whether *National Cotton* is even binding on the court when, as here, the court is hearing cases referred to it through the multi-circuit litigation referral process and includes cases from several circuits outside of the Sixth Circuit. The States cited precedent they believe indicates the court is bound by the law of the circuit where the case sits. Thus, they do not dispute that *National Cotton* is binding. They simply believe it can be distinguished.

While noting that the States' arguments about the plain text of the jurisdictional provisions are appealing and make sense, Judge McKeague pointed out that Supreme Court precedent, including the *E.I.DuPont*[2] and *Crown Simpson*[3] cases, seems to favor a functional reading over a strict reading of the text in sections (E) and (F). He questioned why the case should not be heard in the circuit court, especially where the purpose of the WOTUS Rule is national uniformity in regulation of water issues.

The States disputed the notion that jurisdiction should lie with the circuit court simply because of uniformity concerns. Citing the seven express actions that §509(b)(1) authorizes for review by the circuit court, Solicitor Murphy urged the court to respect Congress' choices regarding jurisdiction, noting that in other statutes, such as the Clean Air Act, Congress knew how to clearly give exclusive jurisdiction to the circuit courts to review agency action when it wanted to do so. As additional support for the States' argument, he pointed out that §509(b)(1)(E) talks of "actions of the Administrator," and argued that another reason the WOTUS rule shouldn't fall with (E) is that it was issued by both the Administrator and the Corps. Judge McKeague was quick to shut down that line of argument by noting that section (E) doesn't refer to actions of the Administrator alone.

The judges questioned the rationale behind the States' argument that the cases should be heard by the federal district courts, especially given their admission that the challenges are facial attacks and don't turn on any facts specific to a particular case as would happen with an "as applied" challenge. To adopt the States' argument, Judge Griffin pointed out, would dissolve the nationwide stay issued by the Sixth Circuit, meaning the WOTUS Rule would be stayed only in the 14 states subject to the holding in the North Dakota district court.[4] In every other state, the Rule would be in effect and would need to be litigated in each district court and then appealed through the various circuits, meaning the Rule would remain unsettled for a long time. The States stood by their argument that this was Congress' will and that the court must respect the choices Congress made in drafting §509(b)(1). The States also indicated they believed there would be a benefit to having "more eyes" look at the issue before it was resolved, although the judges did not seem to accept this logic, questioning

repeatedly how there was a benefit to having multiple decisions where there as no fact finding involved – just repeated interpretations of the same administrative record.

Martha Mann argued the case for the Federal Agencies. She advanced the two alternative arguments that the Federal Agencies made in their briefs – first, that the Rule is an "other limit" and that jurisdiction is thus proper under §509(b)(1)(E), and second, that the Rule governs NPDES permits issued under section 402 of the Act, 33 USC §1342, and is thus reviewable as a permitting action under §509(b)(1)(F). The Agencies noted that *DuPont*, *Crown Simpson*, and other cases are not completely in accord, but that the Supreme Court and the Sixth Circuit had previously read the requirements of §509(b)(1) in a practical fashion.

Looking at the Federal Agencies' arguments about section (E) jurisdiction, the court noted concerns with the fact that (E) speaks of effluent limitations or other limitations "under sections 1311, 1312, 1316, or 1345" whereas the WOTUS Rule is in section 1362 – not one of the sections listed. The Federal Agencies argued that section 1311, which is one of the listed sections for which review falls under section (E), says "no discharge to waters of the united states," so the WOTUS Rule is implicitly incorporated into section 1311.

When asked whether the Federal Agencies' argument was stronger for jurisdiction under (E) or (F), the Federal Agencies indicated that *National Cotton's* interpretation of subsection (F) permit review should govern. That conclusion prompted Judge Griffin to ask whether the current Supreme Court would be likely to adopt the States' argument of a broader practical rather than a narrower textual reading of the provisions in §509(b)(1), pointing out that Congress knows how to grant unambiguous jurisdiction to a circuit court, as it has done in other statutes. The Federal Agencies conceded that while the CWA is perhaps not the best written statute, it is written clearly enough to indicate Congressional intent, and prior cases involving challenges to definitions – such as the definition of "new source" – have been viewed as limitations subject to review in the circuit courts.

The Federal Agencies were asked to respond to the same question the court asked the States – practically speaking, why should challenges to the WOTUS Rule be reviewed by the district courts where there is no fact finding role for the courts? Not surprisingly, the Federal Agencies argued that exclusive jurisdiction with the circuit court would avoid duplicative effort, delay and cost, while providing more uniformity.

On rebuttal, the States took exception to statements made by the Federal Agencies that the Federal Agencies' interpretation would not unreasonably sweep all CWA challenges into §509(b)(1). The States questioned the logic of the Federal Agencies' view that water quality standards are not limits under (E) but that a definition is. The States wrapped up by pointing out that each CWA section referenced in (E) is a type of limitation or regulation (e.g., technology-based, water quality-based, new source limits and sewage sludge limits) and not a definition and that, with respect to (F), *National Cotton* similarly dealt with permitting "regulations" and not definitions and thus does control.

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[1] *Nat'l Cotton Council of Am. v. E.P.A.*, 553 F.3d 927, 929, 933 (6th Cir. 2009).

[2] *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977).

[3] *Crown Simpson Pulp Co. v. Costle, 445 U.S. 193 (1980) (per curiam)*

[4] *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-59, 2015 WL 5060744 (D.N.D. Aug. 27, 2015) (staying operation of the Rule in North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, and New Mexico).

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