

## OHIO FEDERAL JUDGE OPENS THE DOOR FOR ENVIRONMENTAL GROUPS TO INTERVENE IN CLEAN WATER RULE SUIT

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On Friday, February 1, 2019, Ohio Federal Judge Edmund A. Sargus Jr. granted a Renewed Motion to Intervene, filed jointly by the Natural Resources Defense Council and the National Wildlife Federation (collectively, the “Environmental Groups”), opening the door for the Environmental Groups to intervene as defendants in a suit between plaintiffs States of Ohio, Tennessee, and Michigan and defendant United States Environmental Protection Agency (EPA) over the 2015 Clean Water Rule.

The complaint was filed on June 29, 2015, and an amended complaint was filed on July 23, 2015, in which the states of Ohio, Tennessee, and Michigan argued two causes of action: one brought under the Administrative Procedure Act and one brought under the “structural federalism provisions of the United States Constitution including the Tenth Amendment.” Plaintiffs allege that the Clean Water Rule “1) extends the scope of the Clean Water Act’s protections beyond the reach of the statute’s language; 2) contradicts United States Supreme Court precedent; 3) attempts to extend federal authority beyond the limits established under the United States Constitution; and 4) was promulgated in violation of the notice and comment procedures required under the Administrative Protection Act.” Shortly after, the Environmental Groups filed a Motion to Intervene as Defendants. The court denied this motion, finding that the Environmental Groups had failed to rebut the presumption that their interests—i.e., defending the Clean Water Act—were adequately represented by President Obama’s EPA.

In June 2018, however, the Environmental Groups filed a Renewed Motion to Intervene, arguing that new evidence not previously discoverable justifies reconsideration of their motion to intervene. The Environmental Groups argued that the fact that President Trump’s EPA is now working towards repealing the Clean Water Act, rather than defending it, is evidence that EPA is not adequately representing their interests. The Environmental Groups point to four specific actions as evidence: 1) Executive Order No. 13.778, which required the EPA to review the Clean Water Rule’s definition of “Waters of the United States”; 2) the EPA’s publication of a proposed rule that formally repeals the Clean Water Rule; 3) the EPA’s decision to suspend application of the Clean Water Rule until February 6, 2020; and 4) the EPA’s decision to not defend the merits of the Clean Water Rule in other related cases.

While the Court noted that it “generally disfavors reconsiderations of previous Orders, [x] the evidence submitted by the Environmental Groups presents one of those rare situations in which reconsideration is proper.” Finding that the Environmental Groups and the EPA no longer have the same ultimate objective, the Court granted the Environmental Groups’ Renewed Motion to Intervene due to the Court’s opinion that “without intervention, the Clean Water Rule, as it currently stands, would be without defense.”

The case is State of Ohio et al. v. U.S. Environmental Protection Agency et al., case number 2:15-cv-02467, in the U.S. District Court for the Southern District of Ohio, Eastern Division.

The Environmental Attorneys at Bick Law LLP will continue to monitor the progression of high-profile environmental cases such as this, that have the potential to affect businesses across both the state and country.

