SIXTH CIRCUIT ASSERTS JURISDICTION OVER CHALLENGE TO EPA'S CLEAN WATER RULE

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The Sixth Circuit ruled today, in In re: Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of "Waters of the United States," case number 15-3751, that it has jurisdiction to hear challenges to the Clean Water Rule, displacing the District Courts. The actions were transferred to and consolidated in the Sixth Circuit by the Judicial Panel on Multi-District Litigation. Eight motions to dismiss have been filed by numerous petitioners and intervenors asserting assert that judicial review is properly had in the district courts, not here. They contend the instant challenges to the Clean Water Rule do not come within the judicial review provisions of the Clean Water Act, 33 U.S.C. § 1369(b)(1).

The appellate court's authority to conduct direct review of the Agencies' challenged action, must be found, if at all, in the Clean Water Act, 33 U.S.C. § 1369(b)(1). Not all actions taken under the Clean Water Act are directly reviewable in the circuit courts. Where review is available under § 1369(b)(1), "it is the exclusive means of challenging actions covered by the statute." (See Decker v. Nw. Envt'l Def. Ctr., 133 S.Ct. 1326, 1334(2013)). Matters not reviewable under § 1369(b)(1) may be actionable in the district courts by other means. Whether subject matter jurisdiction lies in the circuit courts is governed by the intent of Congress.

Movants contend the Rule's definition of "waters of the United States" is not, under § 1369(b)(1)(E), "an effluent limitation or other limitation" approved or promulgated under 33 U.S.C. § 1311, 1312, 1316, or 1345. "Effluent limitation" is defined as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11).

The agencies contend the Rule's clarification of the scope of "waters of the United States" under the Clean Water Act is an "other limitation" because it has the effect of restricting the actions of property owners who discharge pollutants from a point source into covered waters. In addition, it has the effect of imposing limitations or restrictions on regulatory bodies charged with responsibility for issuing permits under the National Pollutant Discharge Elimination System ("NPDES") to those who discharge pollutants into covered waters.

The Sixth Circuit ruled today that the Clean Water Rule is a definitional rule that will result in imposition of limitations. The question is whether that limitation is sufficient to bring the Clean Water Rule within the scope of § 1369(b)(1)(E). The agencies say yes, and the movants say no. The agencies argue that the Clean Water Rule is a "basic regulation governing those individual actions" taken by the EPA Administrator (e.g., promulgation of limitations) that are subject to direct circuit court review.

The Sixth Circuit found that the Rule is definitional only and does not directly impose any restriction or limitation. Yet, neither does the Rule create an exemption from limitation. By redefining "waters of the United States," the Rule alters agency authority to restrict point-source operators' discharges into covered waters through permits. The alteration also results in restrictions on the activities of some property owners. For that reason, the Sixth Circuit held that the Rule is definitional in nature, and is a "basic regulation governing other individual actions issuing or denying permits." E.I. du Pont de Nemours Co. v. Train, 430 U.S. 112, 136 (1977). In E.I. du Pont, the Supreme Court characterized a construction that would provide for direct circuit court review of individual actions issuing or denying permits, but

disallowed such review of the "basic regulations governing those individual actions," as a "truly perverse situation." Id. In other words, if the statute allowed for a circuit court to review individual actions issuing or denying permits, then it must be allowed to also review basic regulations governing those individual actions.

The Sixth Circuit stated:

Viewing the Clean Water Rule through the lens created in E.I. du Pont reveals a regulation whose practical effect will be to indirectly produce various limitations on point-source operators and permit issuing authorities. Accordingly, although the Rule does not itself impose any limitation, its effect, in the regulatory scheme established under the Clean Water Act, is such as to render the Rule, per the teaching of E.I. du Pont and its progeny, subject to direct circuit court review under § 1369(b)(1)(E).

Similarly, the Sixth Circuit cited to the Supreme Court's decision in Crown Simpson Pulp Co. v. Costle, 445 U.S. 193, 196-197 (1980), where the Supreme Court held that an action of the Administrator is "functionally similar" to denial of a permit, it is encompassed in subsection (F). The court found that there is precedent for a strong preference for construing Congress's provision for direct circuit court review of agency action by a practical, functional approach. The Sixth Circuit asserted its authority and claimed it is its duty to directly review the Clean Water Rule in this multi-circuit case.

There is a separate pending case in the Eleventh Circuit appealing a Georgia district judge's finding that an appeals court is the proper venue for their challenge to the Clean Water Rule.