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Uncertainty For Environmental Law After Scalia's Death

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U.S. Supreme Court Justice Antonin Scalia has died at age 79, leaving us with great uncertainty concerning pending judicial challenges to two new U.S. Environmental Protection Agency rules: the Clean Power Plan and the Clean Water Rule.

In a 5-4 party line vote, the Supreme Court, with Justice Scalia, voted on Feb. 9 to stay implementation of the EPA's Clean Power Plan until the Supreme Court reviews the challenge. The EPA's Clean Power Plan calls for existing power plants to cut carbon emissions by 32 percent from 2005 levels by 2030. States must start submitting implementation plans by 2018 and start showing emissions reductions by 2022. Industry representatives challenged the rule arguing the EPA doesn't have the authority under the Clean Air Act to craft the rule.

But what happens now that Justice Scalia has suddenly died? What happens if Scalia is not replaced before the Clean Power Plan challenge comes before the court? If the court is divided 4-4, then the D.C. Circuit ruling will stand. The D.C. Circuit is set to hear whether the EPA has the authority under Section 111 of the Clean Air Act to enact the Clean Power Plan on June 2, 2016. Presumably, there will be a petition for writ of certiorari, which would likely be granted and heard in the next Supreme Court term. Reviewing the court's history of voting on Clean Air Act issues and deference to the EPA, it looks likely that the court, without Scalia or a replacement, will be divided evenly along party lines, 4-4. A split decision effectively reverts to the ruling of the lower court (in the case of the Clean Power Plan, the lower court would be the D.C. Circuit).

The D.C. Circuit Court currently is made up of four Obama appointees, three George W. Bush appointees, three Clinton appointees, and one George H. W. Bush appointee. It doesn't take a rocket scientist to count the conservative versus liberal judges and determine that industries and states face an uphill battle to win their challenge to the Clean Power Plan at the appellate court level. All eyes had been on the U.S. Supreme Court assuming it would overturn a future D.C. Circuit ruling and would vote party lines, 5-4, that the EPA abused its discretion when enacting Clean Power Plan regulations.

Now, if Scalia is not replaced before the Supreme Court ultimately hears the case, it is possible the D.C. Circuit's ruling after June 2 will be the last word.

In the event of a tie, the Supreme Court issues a per curiam decision (in the name of the court without a majority and a minority opinion), essentially a boilerplate opinion that lets the lower court decision stand. Importantly, a per curiam decision is not deemed to set any precedent. The lack of precedent

may not be problematic for the EPA if it wins and can implement the plan. Opponents to the plan would likely want a precedent if they win, and without one, they may find themselves bringing another challenge to yet another EPA rule in the future.

The Clean Power Plan case is not dissimilar to two cases heard by the Supreme Court in 2014. In Utility Air Regulatory Group v. EPA, Justice Scalia opined that EPA was mistaken in thinking the act compelled a greenhouse-gas-inclusive interpretation of the prevention of significant deterioration (PSD) and Title V triggers. He also opined that the EPA's interpretation was impermissible under Chevron. Similarly, in Michigan v. EPA, Justice Scalia wrote that it was unreasonable for the EPA to not consider costs in developing the first limits on mercury, arsenic and acid gas air emissions from coal-fired power plants, casting doubt on the scope of agency deference under the so-called Chevron doctrine. Many pundits believed this opinion foreshadowed Scalia's disapproval of the Clean Power Plan.

Like the Clean Power Plan, there have been many challenges by states and industries to the EPA's Clean Water Rule, known as "Waters of the United States" (WOTUS). The Sixth Circuit imposed a nation-wide stay of the Clean Water Rule on Oct. 9, 2015, pending judicial review. The rule gives the EPA and the Army Corps of Engineers jurisdiction over waters within a stream's 100-year floodplain or within 4,000 feet of a high-tide line, including waters that are not connected to the navigable waters of the U.S. as defined by the Clean Water Act. The term "navigable waters" is critical to determine when a landowner must have a permit for discharge and to determine whether there has been an unlawful discharge to such waters in violation of the Clean Water Act. In the new rule, the EPA and the corps may regulate waters if they "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as 'navigable.'" The EPA and the corps also may regulate "intermittent" waters such as western vernal pools in California that only accumulate water during wet months and dry up during warm months.

Looking back at Justice Scalia's voting record and written opinions, it is clear that if he were here to hear the WOTUS challenge, he would likely rule that the EPA and the corps overreached by redefining "waters of the United States" inconsistent with the clear language of the Clean Water Act. In Scalia's opinion in the Rapanos v. U.S. case, he ruled that the phrase "waters of the United States" in the Clean Water Act can only refer to "relatively permanent, standing or flowing bodies of water," not "occasional," "intermittent" or "ephemeral" flows. Furthermore, he ruled that a mere "hydrological connection" is not sufficient to qualify a wetland as covered by the Clean Water Act; rather, it must have a "continuous surface connection" that makes it "difficult to determine where the 'water' ends and the 'wetland' begins." The Rapanos court was evenly divided 4-4, with Justice Kennedy providing the tie-breaking vote to reject the Sixth Circuit decision and write his own separate opinion.

More than likely there will be a petition to the Supreme Court to review the challenge to WOTUS during the next Supreme Court term. Like the Clean Power Plan challenge, Scalia likely would have voted to void the Clean Water Rule because the EPA went beyond the clear language in the Clean Water Act. And like the Clean Power Plan challenge, without Justice Scalia on the court now, the outcome of this case will depend on who is nominated and confirmed to be Justice Scalia's replacement. Also, like the Clean Power Plan challenge, if the petition for cert is granted and oral argument is heard before Justice Scalia's replacement is confirmed, there could be a 4-4 vote of the court, evenly split along party lines, which would result in a per curium decision, effectively affirming the Sixth Circuit's ruling. The Sixth Circuit is made up of five liberal judges and ten conservative judges. In addition, the Sixth Circuit signaled its concern about the EPA's overreaching in the opinion accompanying the stay. It is possible that the Sixth Circuit will rule in favor of the petitioners and void the Clean Water Rule. If an eight-justice Supreme

Court then hears the rule, the Sixth Circuit's ruling could have lasting impact.

One other significant pending environmental case, American Farm Bureau Federation v. EPA, is set to be heard by the U.S. Supreme Court on Feb.19, 2016, without Justice Scalia on the bench. In this case, the American Farm Bureau Federation challenged the EPA's establishment of a total maximum daily load (TMDL) for nitrogen, phosphorous and sediment pollution in each of the Chesapeake Bay's major tributary rivers. The TMDL identifies limits for individual sources and types of sources along the bay watershed, and sets deadlines for states to implement control measures for those sources.

States have projected that the costs of compliance is in the tens of billions of dollars. The Supreme Court will consider whether the Third Circuit erred by deferring to the EPA's interpretation of the words "total maximum daily load" in the Clean Water Act, to permit the EPA to impose a complex regulatory scheme that does much more than cap daily levels of total pollutant loading and that takes that regulatory power away from the states. Scalia likely would have voted to void the EPA's interpretation of the Clean Water Act to micromanage state water quality programs. More than likely, he would have found that the EPA's opinion on "best policy" should not usurp Congress's plain and clear language. Now, without Scalia on the bench, it is likely that the court will rule 4-4, resulting in a per curium decision affirming the Third Circuit's holding upholding the EPA's establishment of a TMDL for the Chesapeake Bay.

President Obama, or perhaps the next president, will have the ability to determine the future of environmental law and whether Justice Scalia's replacement will continue or end his environmental law legacy.

If Justice Scalia's replacement intends to continue his legacy, the new justice would need to agree with Justice Scalia that the EPA should not micromanage states in cooperative federalism programs such as the Clean Water Act and the Clean Air Act. In 1992, Justice Scalia wrote in Lucas v. South Carolina Coast Council that a state law preventing a landowner from building on a barrier island amounted to an unconstitutional taking. In 1987, Justice Scalia wrote in Nollan v. California Coastal Commission that California must provide compensation to coastal property owners if it wanted to require them to maintain a pathway for the public to the beach. And in 2012, Scalia wrote for a 9-0 court in Sackett v. EPA, ruling in favor of pre-enforcement review of an EPA Clean Water Act enforcement action that forbade a family from developing their property.

To continue Justice Scalia's legacy, his replacement would also need to understand when it is appropriate to protect the EPA and other agencies from environmental group challenges. In Lujan v. Defenders of Wildlife in 1992, Scalia wrote that an environmental group lacked an "injury in fact" that would allow standing under the Endangered Species Act. He affirmed that holding in 1998 in Steel Co. v. Citizens for a Better Environment when an organization filed an enforcement action for relief under the Emergency Planning And Community Right-To-Know Act of 1986's Citizen-Suit Provision.

Similarly, in 2007, Justice Scalia wrote a scathing dissent stating that the petitioners lacked standing to challenge the EPA's judgment not to regulate greenhouse gas emissions from new motor vehicles. Also, in 2008, in Summers v. Earth Island Institute, Justice Scalia wrote that an environmental group lacked standing to challenge the regulations of the U.S. Forest Service. And, in 2009, in Entergy v. Riverkeeper, Justice Scalia opined that the EPA was allowed to rely on a cost-benefit analysis when it set the national performance standards and in providing for variances from the new standards in the phase 2 regulations.

Also, if he or she wishes to continue Justice Scalia's environmental regulatory legacy, his replacement

would need to know when to defer to the EPA and when the EPA is overreaching. Scalia deferred to the EPA's judgment in 2001, in Whitman v. American Trucking Associations Inc., when he wrote that the EPA may consider the costs of implementation in setting national ambient air quality standards under section 109(b)(1) of the Clean Air Act. And in 2004, in Norton v. Southern Utah Wilderness Alliance, he wrote for the majority "[i]f courts were empowered to enter general orders compelling compliance with broad statutory mandates ... it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management." And, yet, on the other hand, Justice Scalia notoriously did not support the EPA's discretion or judgment in his opinions, discussed above, including Utility Air Regulatory Group v. EPA, Michigan v. EPA, and Rapanos v. U.S.

Whether or not a new justice will carry on Justice Scalia's legacy, it is unlikely we will see a new justice, let alone a "Scalia-like" justice, confirmed before the upcoming presidential election. If the Supreme Court hears these challenges before a replacement is seated, then, given the make-up of the lower courts, it is foreseeable that the Clean Power Plan will be upheld, while the Clean Water Rule will fail. If Justice Scalia's replacement is seated before the challenges come before the court, he or she will determine the fate of these two rules. Time will tell if the new justice will bear any similarity to the late Justice Scalia.

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