The following article by Dawson Senior Advisor Larry Liebesman appeared in The Hill on January 20, 2017.

U.S. Supreme Court's 'Waters of the U.S.' gift to the Trump administration

By Larry Liebesman

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On Jan. 13, the U.S. Supreme Court agreed to resolve jurisdictional wrangling over which federal court should hear challenges to the Environmental Protection Agency's contentious 2015 Waters of the United States (WOTUS) rule. The Court's decision came on the same day that the Obama administration filed a 300-page brief with the Sixth Circuit Court of Appeals vigorously defending the rule.

Issued in 2015, the WOTUS rule unleashed a torrent of Federal litigation. Thirty-one states, many local governments, and private industry asserted that the rule unconstitutionally expanded the Clean Water Act's (CWA) reach and misapplied Justice Anthony Kennedy's "significant nexus" opinion in the 2006 Rapanos case.

A leading voice in the effort to overturn the new rule is Oklahoma Attorney General Scott Pruitt, the Trump administration's choice to head EPA. Pruitt has vowed to vacate the rule.

While the Supreme Court will resolve whether the WOTUS rule can only be challenged in federal courts of appeals, not federal district courts, the Court's granting of review eliminates a major burden on the Trump administration. Justice Department officials will not need to file further briefs on WOTUS' merits until the High Court's ruling on jurisdiction, which is expected next year.

This gives the Trump administration and Congress time to focus on how best to eliminate or replace the rule.

Background

Confusion surrounding the Supreme Court's review stems from ambiguous language in section 509 of the Clean Water Act, which provides for exclusive appellate review of the EPA administrator's approval or promulgation of "effluent or other limitations" and of EPA actions "issuing or denying a permit under section 402 of the Act."

Various Courts of Appeal challenges had been consolidated before the Sixth Circuit in Cincinnati, which granted a nationwide wide stay in November 2015. Last February, it ruled that the review could only occur in federal appellate courts and approved a schedule to wrap up briefing by March 2017.

However, this ruling on jurisdiction conflicted with contrary rulings by other courts including the Eleventh Circuit in Friends of the Everglades v. EPA and a North Dakota federal district court, which had enjoined the rule in August 2015.

Industry sought Supreme Court review of the jurisdictional question arguing that it would waste of time, money and judicial resources for the Sixth Circuit to consider the merits if it did not have jurisdiction.

Implications

The Supreme Court's grant of review will provide time for the Trump administration and Congress to try to resolve this issue. Indeed, in seeking Supreme Court review, industry argued that "the grant of certiorari now would foreclose the need for the otherwise inevitable motion practice over how the case should proceed in light of President Elect Trump's promise that his administration will eliminate the [WOTUS rule]." (Reply Br. of National Association of Manufacturers at p. 10).

The Court's action is especially important because the briefing had proceeded at an exceptionally brisk pace. Last November, WOTUS challengers filed extensive briefs arguing that the new WOTUS rule:

- Violates 10th Amendment federalism principles and 14th Amendment due process provisions;

- Exceeds the Constitution's Commerce clause;

- Misapplies Justice Kennedy's "significant nexus" ruling in the Supreme Court's 2006 Rapanos decision; and

- Violates the Administrative Procedure Act, the 1970 National Environmental Act, and the Small Business Regulatory Flexibility Act.

Instead of asking for a delay in the briefing schedule, the Obama administration filed its 300-page brief asking the court to defer to the EPA and Corps of Engineers' extensive legal, scientific and policy findings in their massive administrative record and uphold the rule as Constitutional. Thus, the rule's defenders will now be able to cite the brief's vigorous defense in the likely upcoming battle to vacate the rule.

But there is a major obstacle before the Trump administration if it chooses to rescind the WOTUS rule. Under the Supreme Court's decision in Motor Vehicle Mfrs. Assn. v. State Farm, a decision to rescind is subject to the same "arbitrary and capricious" test applied to the rule's promulgation.

WOTUS proponents are sure to challenge the Trump administration aggressively on this point, particularly given the fact of last week's Obama administration filing.

Alternately, Congress could act to vacate the rule and provide direction on issuing a new rule. This would obviate the need for a voluntary remand. Sens. Joni Ernst (R-Iowa) and Deb Fischer (R- Neb.) proposed a "Sense of the Senate" resolution on Jan. 12 vacating the rule and making a finding that the WOTUS rule violated multiple required Federal procedures.

This issue has generally been fought along party lines, though there have been indications among some on both sides of a willingness to compromise. It remains to be seen if the new administration and Congress can come together on a revised rule that meets the goals of the Clean Water Act while respecting the limits of federal power.

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