10/25/16 REUTERS LEGAL 10:00:01

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David Bailey | REUTERS LEGAL *(Approx. 4 pages)*

October 25, 2016

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David Bailey

(Reuters) - Critics say an Obama administration rule approved in 2015 to clarify what waters are covered by the U.S. Clean Water Act is so broad it could apply to dry land.

The Waters of the United States rule has drawn dozens of challenges over what defines navigable waters, what authority the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers have to regulate them and even what court should hear the question.

The 6th U.S. Circuit Court of Appeals issued an injunction blocking the rule from taking effect more than a year ago and will hear arguments some time next year. At the same time, attorneys have asked the U.S. Supreme Court to decide if a challenge belongs first in the Circuit or District courts and a 10th Circuit panel has oral arguments on that issue in November.

Anthony Francois, who focuses on environmental regulations and water and property rights as a senior staff attorney for the Pacific Legal Foundation, is representing groups challenging the rule's breadth in Minnesota federal court.

The foundation litigates for private property rights and limits on government property rights. In May, the U.S. Supreme Court ruled for the PLF in a decision holding that landowners whose property are designated wetlands under the Clean Water Act have a right to seek judicial review.

Francois also believes a challenge should first be at the federal trial court level to fully develop a record of issues for likely appeals across circuits, rather than just having the 6th Circuit weigh in. The foundation is part of an amicus brief in the 10th Circuit arguing that position.

The following answers have been edited for clarity and brevity.

REUTERS: What are the main concerns opponents have about the rule?

FRANCOIS: The starting point is that wherever the Clean Water Act does apply - whatever actually are navigable waters - you are required to get permits from either the EPA or the Corps of Engineers for a wide variety of activities. The permitting is time-consuming, it's expensive and then it establishes substantial limits on your activity on the property. There is a lot at stake on the question of how broad is this definition, the geographic scope of it.

Since the Clean Water Act was adopted in the early 70s, the federal agencies have progressively expanded their view of what the act covers from these obviously navigable and important waterways like the Mississippi River, for example, farther and farther afield into small isolated ponds, ephemeral drainages that will only hold water or channelize any water during significant storms, various small tributaries that don't contribute much flow.

REUTERS: Is this just a really expansive interpretation of the word navigable?

FRANCOIS: It is an ambiguity introduced by Congress, that's part of the problem. The statute says this applies to navigable waters and then there is a definition in the statute that says navigable waters means waters of the United States.

The Supreme Court has said this seems to include a little bit more than actually navigable waterways. But actually, in their decisions they have never allowed it to extend much beyond actually navigable waterways. What the agencies are doing with the current rule is saying this extends to anything where we think a raindrop might fall and one day that drop will be in a lake or a river. That can't be what Congress originally meant by adopting this.

REUTERS: How much different is the rule from what we have currently?

FRANCOIS: There are several types of land the Army Corps of Engineers now wants to, on a case-by-case basis, analyze to decide whether they are waters of the U.S. or not. Any of those case-by-case basis decisions are converted in the rule into categorical inclusions. There is no more site-specific analysis.

If you are going to challenge the inclusion, there is no agency discretion or decision-making you are challenging. You are just trying to fight whether or not that category of the rule is outside the scope of the statute or not. As a practical matter those can be harder cases to win.

REUTERS: When can we expect some kind of ruling?

FRANCOIS: Congress also created an ambiguity in the Clean Water Act over what courts are supposed to hear these challenges. Maybe two dozen lawsuits were filed in various federal trial courts around the country against the Waters of the U.S. definition.

Certain types of Clean Water Act decisions go directly to the court of appeal and you start the case there. As a result of this provision of the Clean Water Act, several of us also filed petitions in the Court of Appeals saying we are not sure if we are supposed to be in the trial court or the Court of Appeal.

We have spent the last year, more than a year, working our way through which court we are even supposed to be in. We think it is important for the Supreme Court to clarify that.

It probably makes more sense to simply allow these types of challenges to go forward in the trial courts. It fleshes out a lot of different legal theories that the courts of appeal could then address and if it requires Supreme Court review, what you finally get in the Supreme Court is very well developed legal issues that are more straightforward to resolve.

Our view is that the proper reading of the Clean Water Act judicial review provisions is that the challenge to this regulation belongs in the district courts.

REUTERS: Does the 4-4 Supreme Court split on ideological lines affect the process?

FRANCOIS: I am not persuaded that this is an issue they couldn't come to a majority resolution on - which court should these cases be heard at. On the political side of things, maybe this is one of the cases the Senate has in mind as they are vetting judicial nominees, or not. That's outside my bailiwick.

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Language: EN

Other Indexing: (Anthony Francois; Matt McKnight; Matt McKnightSteam)

Keywords: energy (MCC:OEC); (N2:US); (N2:AMERS); (N2:NAMER); (N2:USA); (MCCL:OVR)

Word Count: 1056

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