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# WHAT ARE NAVIGABLE WATERS?

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In June of 2015, the Environmental Protection Agency (EPA) published new definitions in the Federal Register, redefining the “waters of the United States.”<sup>[i]</sup> One of the new definitions expands the traditional meaning of “navigable waters” from exclusively large bodies of water that facilitated interstate commerce to almost any body of water found in the United States, including small creeks and farm ponds.<sup>[ii]</sup> This has led to a large uproar across the country with numerous organizations challenging the new regulation, implemented with no Congressional oversight.<sup>[iii]</sup>

These challenges have arrived before both district courts and appellate courts simultaneously, leading to confusion over which arm of the judiciary actually has jurisdiction over the executive branch department.<sup>[iv]</sup> However, the Sixth Circuit released a 2-1 ruling stating that the district courts did not have proper jurisdiction to hear challenges to in-house EPA regulation changes.<sup>[v]</sup> This decision has surprisingly upset both industry giants and environmental groups, who have found common ground in wanting to fight their battles at the district court level.<sup>[vi]</sup> This has created an ideological divide between private organizations who believe that issues should progress along a traditional appeal route, starting at the district court level, and the EPA (along with Army Corps of Engineers) who believe that a single circuit court forum would be preferable.<sup>[vii]</sup>

The Sixth Circuit also implemented a nationwide stay on the Clean Water Rule until further actions by the courts are taken.<sup>[viii]</sup> In compliance with the court, the EPA has proceeded to continue using the previous regulations defining the “waters of the United States.”<sup>[ix]</sup> In January of 2017, the Supreme Court agreed to review the Sixth Circuit findings, which private organizations argued were badly fractured considering one of the judges in the majority thought the decision was wrong but felt they were bound by precedent.<sup>[x]</sup> But in an odd turn of events, an executive order President Trump issued may save the EPA from going before the Supreme Court, leaving the Sixth Circuit ruling as law.<sup>[xi]</sup>



The President's executive order informs the EPA and the U.S. Army Corps of Engineers that they must either revise or rescind the rule.[xii] In a move of compliance with the new head of the executive, the agencies quickly filed an intent to do as ordered.[xiii] This would mean that the regulation at issue would no longer exist, possibly rendering the pending action before the Supreme Court moot. If the action is truly moot, then this would mean that the federal agencies would have managed to successfully circumnavigate both the legislative branch and the final authority of the judicial branch.

However, the executive branch is not in complete agreement, as acting Solicitor General Noel Francisco has asked that the justices keep the action on their schedule while the new rule is being crafted, stating that the new rule will ultimately have little significance on a decision regarding jurisdiction.[xiv]

Just because precedent has allowed for the EPA to go straight to the circuit courts does not mean the Supreme Court cannot overturn these decisions. It would be best for the private parties of the United States to be able to argue their cases at the district court level. The circuit courts are far removed from the people and have been likened, by parties who do not have the resources to challenge large federal agencies, to bureaucrats in Washington. In any instance, the Supreme Court should listen to Noel Francisco and clear up the rampant confusion that has been plaguing the EPA and environmentalists for the past year.

[i] *Definitions of Waters of the United States Under the Clean Water Act*, U.S. Envtl. Prot. Agency, <https://www.epa.gov/cleanwaterrule/definition-waters-united-states-under-clean-water-act> (last updated July 20, 2016).

[ii] Rand Paul & Scott Pruitt, *EPA water rule is blow to Americans' private property rights*, The Hill (Mar. 4, 2015, 8:35 PM), <http://thehill.com/opinion/op-ed/234685-epa-water-rule-is-blow-to-americans-private-property-rights>.

[iii] Juan Carlos Rodriguez, *High Court Asked For Clarity On EPA Clean Water Rule Jurisdiction*, Law360 (Sept. 8, 2016, 7:47 PM), <https://www.law360.com/articles/837724>.

[iv] *Id.*

[v] *Id.*

[vi] Juan Carlos Rodriguez, *6th Circ. Will Decide Fate Of Feds' Clean Water Rule*, Law360 (Feb. 22, 2016, 12:57 PM), <https://www.law360.com/articles/753120>.

[vii] *Id.*

[viii] *Clean Water Rule Litigation Statement*, U.S. Envtl. Prot. Agency, <https://www.epa.gov/cleanwaterrule/clean-water-rule-litigation-statement> (last updated Oct. 13, 2016).

[ix] *Id.*

[x] Juan Carlos Rodriguez, *High Court To Review 6th Circ.'s Water Rule Jurisdiction*, Law360 (Jan. 13, 2017, 3:27 PM), <https://www.law360.com/articles/881026>.

[xi] Juan Carlos Rodriguez, *Feds Ask High Court To Halt Proceedings On Clean Water Rule*, Law360 (Mar. 9, 2017, 5:48 PM), <https://www.law360.com/articles/900314/feds-ask-high-court-to-halt-proceedings-on-clean-water-rule>.

[xii] *Id.*

[xiii] *Id.*

[xiv] *Id.*

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