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DAILY NEWS

Judge's Rejection Of CWA Delay Suit Transfer Boosts Bid For Myriad Cases

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A federal district judge in a newly released opinion rejects a slew of legal arguments the Trump administration made for transferring litigation over its delay of the Obama-era Clean Water Act (CWA) jurisdiction rule and consolidating it with suits over the rule, boosting states and environmentalists aiming to keep myriad cases over the delay separate.

In **a May 14 order**, Judge David C. Norton of the U.S. District Court for the District of South Carolina explains his rationale for retaining a pending case over environmentalists' bid to scrap the rule delaying to 2020 the Obama-era CWA standard, also known as the Waters of the United States (WOTUS) rule. The order comes more than a month after **he first rejected** the government's request to transfer *South Carolina Coastal Conservation League (SCCCL), et al., v. EPA, et al.*, to the southern district of Texas.

The Texas court is hearing some of the suits brought by opponents of the Obama-era WOTUS rule in hopes of scrapping that policy entirely. The Department of Justice has argued that the delay and the rule itself are so closely linked that they should be considered by the same court to avoid contradictory rulings.

However, Norton's order rejects that assertion. “This is a mischaracterization of the fundamental nature of this case. This is not a case about the legality of the issuance or even the merits of the WOTUS rule. It is a case about the legality of the process by which the WOTUS rule was suspended,” he writes.

Norton continues that not only is there no need for a transfer “in the interests of justice,” but that the rules governing transfers specifically forbid granting one for the *SCCCL* suit because a case can only be transferred to a court where the plaintiff would have been allowed to file it in the first place.

He writes that because neither EPA nor the Army Corps of Engineers -- which co-developed the WOTUS rule -- have their primary offices in Texas, they cannot be considered to “reside” there even though both agencies do some work within the southern district. Rather, he writes that at least one would have to perform a “significant amount” of their duties in that region for it to qualify as a residence.

“The government has not ever alleged that [EPA Administrator Scott] Pruitt or [Assistant Secretary of the Army for Civil Works Ryan] Fischer performed any amount -- let alone a 'significant amount' -- of their official duties in the Southern District of Texas,” the order reads.

Since none of the environmental groups involved in *SCCCL* have operations in Texas, the suit could only have been filed there based on the agencies' “residence,” the order says.

“Because this case could not have been filed in the Southern District of Texas, it does not fulfill the first step of the venue transfer analysis. The court denies the motion to transfer on this ground alone,” Norton writes.

But the judge adds that he is nonetheless addressing the other elements of DOJ's argument “to demonstrate that even if this action could have been filed in the Southern District of Texas, the [statutory] factors do not weigh in favor of transfer.”

While Norton announced his denial of the transfer motion at an April 5 hearing, he did not explain that decision until his new order, meaning it was unclear which of the government's arguments he disagreed with. But now that the opinion has been released, other plaintiffs challenging the WOTUS delay are citing it to support their own arguments

against transfers to Texas.

For instance, a letter filed by attorneys for environmental plaintiffs in *Natural Resources Defense Council, et al., v. Pruitt, et al.,* a delay case pending in the southern district of New York, filed **a May 14 letter** invoking Norton's order.

“Likewise here, as explained in Plaintiffs’ briefs, this Suspension Rule challenge could not have been brought in the Southern District of Texas and so the Defendants’ transfer motion fails at the first step, and in any event, the remaining factors do not weigh in favor of transfer, either,” that letter says.

Merits Arguments

Although the New York court is still considering whether to transfer control of its WOTUS delay cases -- including one brought by Democratic-led states in addition to the *NRDC* suit -- the plaintiffs there have already filed **motions for summary judgment** calling for immediate vacatur of the delay, and are drawing support from third parties in newly-filed *amicus* briefs.

For instance, the Society for Wetland Scientists filed a **May 14 brief** in the states' case where it attacks the Trump administration's scientific basis for finding that a two-year delay of the 2015 rule is proper.

“[T]he EPA and Corps expressly refused to consider the scientific basis of the Clean Water Rule when the agencies suspended it for two years,” the Society says in its brief. It continues that while the agencies claimed they are “under no obligation to address the merits” of the rule being suspended, “That is an implausible explanation. The agencies suspended the Clean Water Rule precisely because the current Administration disagrees with its content.”

Similarly, the Institute for Policy Integrity says in **a May 11 *amicus* brief** that the agencies' focus on “regulatory certainty” as a justification for suspending the rule is “irrational,” and their refusal to consider any potential costs from the action is “meritless.”

Finally, **a third *amicus* brief** by New York City and Nassau County, NY, attacks the notice-and-comment procedure EPA and the Corps used to issue their delay rule, saying a 21-day comment period was legally insufficient and backing the plaintiffs' argument that it was illegal for the agencies to expressly refuse to consider the underlying rule's merits.

“[T]he agencies completely failed to consider the substantive impact of the Rule and failed to provide a rational basis for the Rule,” that brief says.

Injunction Debate

Meanwhile, the Trump administration continues to spar with GOP states and other opponents of the 2015 rule that are still seeking court decisions to hold the Obama-era policy unlawful and suspend its enforcement, either within certain states or nationwide. Such an injunction would avoid any requirement that EPA and the Corps implement the WOTUS rule if the two-year delay is scrapped, but the administration continues to fight the requests, instead seeking stays of the challengers' cases while it weighs a repeal of the policy.

Most recently, DOJ filed a request to revise its arguments against an injunction in the district court for the southern district of Georgia, which is hearing a suit brought by 10 GOP-led states over the rule.

The revised request, filed May 9, focuses on the administration's claim that there is no need for an injunction as long as the delay rule remains in effect, because that is enough to avoid any “immediate” harm from the regulation -- even though there is active litigation over whether the delay is lawful.

“The mere existence of litigation does not mean that the States have demonstrated that the 2015 WOTUS Rule is 'likely' subjecting any person to immediate and irreparable harm,” DOJ's brief says.

But the state plaintiffs are asking the court to force a more robust response from DOJ -- in particular, one that addresses whether the government still believes the WOTUS challengers are not “likely to prevail on the merits” of their suit. That seems to be a bid to force the government to say it now believes the Obama administration's policy is fatally flawed, despite Trump officials' warnings that doing so would force them to prejudge the repeal decision -- potentially exposing them to court challenges that would claim they failed to keep an “open mind” in the rulemaking

process.

“So that the Court and the States can fully understand the Agencies’ current position, this Court should require the Agencies to clarify in any 'updated response' their position on each of the preliminary-injunction factors-- including whether they now disclaim their prior arguments against the States’ likelihood of success on the merits or their positions on any other factors not currently addressed in the Agencies’ proposed update,” reads **the states' May 11 response**. -- *David LaRoss* (dlaross@iwpnews.com)

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