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Trump's Regulatory Repeals Endanger Another Case in the Supreme Court

Marcia Coyle, Law.com

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A U.S. Supreme Court [case that raises a technical, but critical issue](#) about a Clean Water Act rule may disappear from the docket as the justices grapple with the fallout from the Trump administration's effort to repeal Obama-era regulations.

Three times in the past two weeks, the high court has seen the effects of the Trump administration's push to undo many of President Barack Obama's policies. The changes, involving employment, immigration and the environment, have played out during oral arguments and special briefings.

The most recent example was during [Wednesday's Supreme Court arguments](#) in *National Association of Manufacturers v. Department of Defense*. In that case, the justices have agreed to decide whether challenges to the "waters of the United States" rule must first be filed in a federal appellate court or in a U.S. district court.

The U.S. Court of Appeals for the Sixth Circuit took jurisdiction and [issued a nationwide injunction against the rule](#) in October 2015. Business organizations, agriculture groups and other industries want the legal fight in the district courts. President Donald Trump in January [issued an executive order directing](#) the Environmental Protection Agency to reconsider the water rule, which under Obama had expanded the definition of waters that are accorded federal protection.

"If, as seems likely, the rule, the 'Waters of the United States' definitional rule, is rescinded, is this case moot?" asked Justice Ruth Bader Ginsburg to the association's counsel, Timothy Bishop, a Mayer Brown partner in Chicago. Bishop responded: "Well, I think it's just too early to say when or if it will be rescinded, Justice Ginsburg. The comments came in on September 27th. There were thousands of them. We don't know what the timetable is. We don't know what the government will do."

The Trump administration's EPA is currently engaged in a [two-step process](#) to implement the executive order. In the first step, the agency proposed to replace the 2015 definition and recodify the exact same regulatory text that existed prior to 2015. In the second step, it conducted a notice-

and-comment rule-making to develop a new definition of “waters of the United States” along the lines of how Justice Antonin Scalia [described them in the 2006 case *Rapanos v. United States*](#).

[Ginsburg-Ruth-Bader-Vert-201710120754.jpg]

Ginsburg noted during Wednesday's arguments, the comment period has ended. More than 610,000 comments were submitted by the Sept. 27 closing date. “At some point, the government will take action. We don't know if it will—the agency will rescind the rule or not,” Bishop told Ginsburg.

Bishop noted that environmental groups have vowed to challenge any withdrawal of the Obama rule. “And I would suggest that, while that challenge, doubtless with a stay request attached, is pending, then the fate of the WOTUS rule is still up in the air,” he said.

Ginsburg posed the same question to Bishop's opponent, Rachel Kovner, an assistant to the U.S. solicitor general who argued in support of the appellate courts having jurisdiction for disputes. The government, Ginsburg said, “is poised to moot this case any time it wants and tomorrow it could say no more new ‘waters of the United States’ rule?”

Justice Sonia Sotomayer added: “So, just realistically, is it possible this case would be mooted this term, or is this process one that innately will take longer than this term?”

Kovner reminded the court that, when it became a possibility the rule would be rescinded, the Justice Department in March [suggested](#) the justices hold the case in abeyance. At this point, Kovner said in court Wednesday, she had no new information to provide.

Kovner did tell Chief Justice John Roberts Jr. that if the Obama rule were rescinded, the case would become moot. “But the issue would arise again in the context of the new ‘waters of the United States’ rule,” she said.

In two other situations, the court experienced the results of the new administration's policy reversals.

The justices witnessed during the [first argument](#) of the new term lawyers from the U.S. solicitor general's office and the National Labor Relations Board arguing against each other. The Trump administration, [taking the opposite view of labor regulators](#), said arbitration agreements in employment contracts lawfully prohibit class actions among workers.

Late Tuesday night, the Supreme Court [dismissed](#) as moot a case that challenged the Trump administration's restrictions on immigration. The court dismissed the case *Trump v. International Refugee Assistance* and vacated the Fourth Circuit's decision in favor of challengers.

The travel ban had expired and was replaced by a new executive [order](#), now being challenged in the lower courts. Sotomayer dissented from the order vacating the appellate court judgment. She would have dismissed petition as improvidently granted, leaving the lower court judgment intact.

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