

## Who's On First? District, Appeals Courts Grapple with Jurisdiction

Litigation is often procedurally messy. Because environmental laws are so complicated. And because there are so many parties involved. But the Sixth Circuit's recent ruling in *Murray Energy Corp v. Department of Defense* extends the mere messiness to the crazily chaotic.

*Murray Energy* concerns the validity of the Clean Water Act rule promulgated in June 2015 by EPA and the Army Corps of Engineers defining "Waters of the United States." It is an exceedingly important and controversial rule, because WOTUS defines the geographic reach of the act, including its applicability to wetlands.

But before even considering the lawfulness of the rule, the Sixth Circuit in *Murray* had to grapple with the threshold issue whether it had jurisdiction to hear the case. The Clean Water Act does not make clear whether such

a lawsuit must be filed first in federal district court or instead in a federal court of appeals in the first instance. Section 509 lists seven categories of challenges to EPA

action that are reviewable directly in the appellate courts, but leaves unclear whether a challenge to EPA's definition of the act's regulatory scope falls within one of those seven.

The federal government's view is that an EPA rule that, like the WOTUS rule, defines the Water Act's geographic reach falls within two of the seven categories, and therefore any challenge to the WOTUS rule must originate in a federal appellate court. But some lower federal courts have disagreed with the government's reading of Section 509 in challenges to prior EPA rules.

Because of the resulting uncertainty, more than 100 plaintiffs representing 32 states, leading industries, and environmental groups filed simultaneous

lawsuits challenging the WOTUS rule all over the country: In 18 federal district courts and, hedging their bets, in eight federal appellate courts. For the government attorneys defending the WOTUS rule, the cases became the litigator's equivalent of Whack-a-Mole. They had to defend in multiple federal courts of appeals and district courts all over the country, responding to competing motions, court schedules, and filing deadlines.

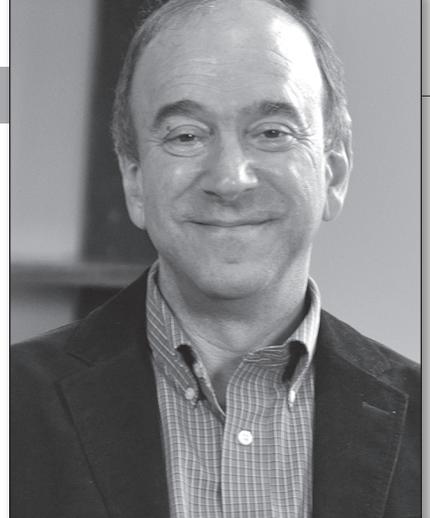
The Sixth Circuit's ruling in *Murray Energy* last February attempted to provide some order. By lottery, the eight federal courts of appeals that had received the petitions challenging the WOTUS rule chose the Sixth Circuit to resolve the issue for all eight. The *Murray Energy* court in turn ruled that federal courts of appeals, not district courts, possessed original jurisdiction in the case, and in the aftermath

### A litigator's equivalent of Whack-a-Mole, with cases popping up in many jurisdictions

of that ruling, most of the district courts around the country dismissed their cases either on their own or in response to the government's motion.

But, even now more than a year after the WOTUS rule's promulgation, it remains uncertain whether the threshold jurisdictional issue is truly at rest. Although the Sixth Circuit's judgment favored its jurisdiction, the three-judge panel was splintered. There were three separate opinions and no majority opinion. One judge thought the court lacked jurisdiction; one thought there was jurisdiction; and the only reason that the panel's judgment was in favor of jurisdiction was because the third judge concluded he was bound by a prior Sixth Circuit ruling to concur in that judgment even though he thought that prior ruling was "incorrect." Hardly a stirring endorsement.

In July, moreover, the Eleventh Circuit heard oral argument on the same



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jurisdictional issue. The Eleventh Circuit case was not one of the cases transferred to the Sixth Circuit because the case began as a district court filing and the Eleventh is accordingly considering the jurisdictional issue on review from a district court ruling. It is far from clear that the Eleventh, should it decide to reach the issue, will agree with the Sixth. Not only is the Eleventh Circuit (unlike the third judge on the Sixth Circuit), of course, not bound by any prior Sixth Circuit ruling, but Eleventh Circuit precedent is the most favorable against the view that the federal appellate courts have original jurisdiction. Should the Eleventh Circuit disagree with the Sixth Circuit, only the Supreme Court could resolve the conflict.

In addition, any party who lost on the jurisdictional issue before the Sixth Circuit still has a little time left to seek Supreme Court review no matter how the Eleventh Circuit rules. And, while it is unclear whether the High Court would grant review over the solicitor general's expected opposition, the obvious confusion caused in the WOTUS litigation might prompt a grant. Ironically, the SG unsuccessfully advised the Court to hear the jurisdictional issue a few years ago, warning that otherwise just the kinds of problems witnessed in the WOTUS litigation would arise.

In retrospect, it certainly looks like the SG was right. It's been a colossal mess and unnecessarily delayed judicial review of an important regulation.