

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

January 29, 2018

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA;
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS; TULSA
REGIONAL CHAMBER; PORTLAND
CEMENT ASSOCIATION; STATE
CHAMBER OF OKLAHOMA,

Plaintiffs - Appellants,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; E. SCOTT
PRUITT, in his official capacity as
Administrator of the United States
Environmental Protection Agency;
UNITED STATES ARMY CORPS OF
ENGINEERS; JO-ELLEN DARCY, in her
official capacity as Assistant Secretary of
the Army (Civil Works),

Defendants - Appellees.

No. 16-5038
(D.C. No. 4:15-CV-00386-CVE-PJC)
(N.D. Okla.)

PACIFIC LEGAL FOUNDATION; CATO
INSTITUTE; SOUTHEASTERN LEGAL
FOUNDATION; STATE OF ALABAMA;
STATE OF ALASKA; STATE OF
ARIZONA; STATE OF ARKANSAS;
STATE OF COLORADO; STATE OF
FLORIDA; STATE OF GEORGIA;
STATE OF IDAHO; STATE OF
INDIANA; STATE OF KANSAS; STATE
OF KENTUCKY; STATE OF
LOUISIANA; STATE OF MICHIGAN;
STATE OF MISSISSIPPI; STATE OF

MISSOURI; STATE OF NEBRASKA;
NEW MEXICO STATE ENGINEER;
NEW MEXICO ENVIRONMENT
DEPARTMENT; STATE OF NEVADA;
NORTH CAROLINA DEPARTMENT OF
ENVIRONMENTAL QUALITY; STATE
OF NORTH DAKOTA; STATE OF
OHIO; STATE OF SOUTH CAROLINA;
STATE OF SOUTH DAKOTA; STATE
OF TENNESSEE; STATE OF TEXAS;
STATE OF UTAH; STATE OF WEST
VIRGINIA; STATE OF WISCONSIN;
STATE OF WYOMING; AMERICAN
ROAD AND TRANSPORTATION
BUILDERS ASSOCIATION; THE
AMERICAN FARM BUREAU
FEDERATION; AMERICAN FOREST &
PAPER ASSOCIATION; AMERICAN
PETROLEUM INSTITUTE; GREATER
HOUSTON BUILDERS ASSOCIATION;
LEADING BUILDERS OF AMERICA;
NATIONAL ALLIANCE OF FOREST
OWNERS; NATIONAL ASSOCIATION
OF HOME BUILDERS; NATIONAL
ASSOCIATION OF
MANUFACTURERS; NATIONAL
ASSOCIATION OF REALTORS;
NATIONAL CATTLEMEN'S BEEF
ASSOCIATION; NATIONAL CORN
GROWERS ASSOCIATION; NATIONAL
MINING ASSOCIATION; NATIONAL
PORK PRODUCERS COUNCIL;
NATIONAL STONE, SAND & GRAVEL
ASSOCIATION; PUBLIC LANDS
COUNCIL; TEXAS FARM BUREAU;
U.S. POULTRY & EGG ASSOCIATION,

Amici Curiae.

STATE OF OKLAHOMA EX REL. MIKE
HUNTER, in his official capacity as

Attorney General of Oklahoma,

Plaintiff - Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES ARMY CORPS OF ENGINEERS; E. SCOTT PRUITT, in his official capacity as Administrator of the United States Environmental Protection Agency; JO-ELLEN DARCY, in her official capacity as Assistant Secretary of the Army for Civil Works,

Defendants - Appellees.

PACIFIC LEGAL FOUNDATION; CATO INSTITUTE; SOUTHEASTERN LEGAL FOUNDATION; STATE OF ALABAMA; STATE OF ALASKA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF COLORADO; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS; STATE OF KENTUCKY; STATE OF LOUISIANA; STATE OF MICHIGAN; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF NEBRASKA; NEW MEXICO STATE ENGINEER; NEW MEXICO ENVIRONMENT DEPARTMENT; STATE OF NEVADA; NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF TEXAS; STATE OF UTAH; STATE OF WEST

No. 16-5039
(D.C. No. 4:15-CV-00381-CVE-FHM)
(N.D. Okla.)

VIRGINIA; STATE OF WISCONSIN;
STATE OF WYOMING; AMERICAN
ROAD AND TRANSPORTATION
BUILDERS ASSOCIATION; THE
AMERICAN FARM BUREAU
FEDERATION; AMERICAN FOREST &
PAPER ASSOCIATION; AMERICAN
PETROLEUM INSTITUTE; GREATER
HOUSTON BUILDERS ASSOCIATION;
LEADING BUILDERS OF AMERICA;
NATIONAL ALLIANCE OF FOREST
OWNERS; NATIONAL ASSOCIATION
OF HOME BUILDERS; NATIONAL
ASSOCIATION OF
MANUFACTURERS; NATIONAL
ASSOCIATION OF REALTORS;
NATIONAL CATTLEMEN'S BEEF
ASSOCIATION; NATIONAL CORN
GROWERS ASSOCIATION; NATIONAL
MINING ASSOCIATION; NATIONAL
PORK PRODUCERS COUNCIL;
NATIONAL STONE, SAND & GRAVEL
ASSOCIATION; PUBLIC LANDS
COUNCIL; TEXAS FARM BUREAU;
U.S. POULTRY & EGG ASSOCIATION,

Amici Curiae.

ORDER AND JUDGMENT*

Before **LUCERO, PHILLIPS**, and **MORITZ**, Circuit Judges.

Plaintiffs filed these actions in the United States District Court for the Northern District of Oklahoma to challenge a regulation issued by the Environmental

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Protection Agency defining the term “waters of the United States” for purposes of the Clean Water Act. The district court dismissed both cases, concluding that such challenges must be brought in the United States Circuit Court of Appeals pursuant to 33 U.S.C. § 1369(b)(1). We consolidated the subsequent appeals.

Following oral argument, the Supreme Court granted certiorari in a case raising the same issue. Nat’l Ass’n of Mfrs. v. Dep’t of Def., 137 S. Ct. 811 (2017). We abated these appeals pending the Court’s decision in that case. The Supreme Court has now held that the regulation at issue “falls outside the ambit of § 1369(b)(1), and any challenges to the Rule therefore must be filed in federal district courts.” Nat’l Ass’n of Mfrs. v. Dep’t of Def., ___ U.S. ___, No. 16-299, 2018 WL 491526, at *4 (Jan. 22, 2018).

We accordingly **LIFT** the abatement, **REVERSE**, and **REMAND** to the district court for further proceedings.

Entered for the Court
Per Curiam

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK**

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

January 29, 2018

Chris Wolpert
Chief Deputy Clerk

Mr. John J. Carwile
Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco
1500 ParkCentre
525 South Main
Tulsa, OK 74103

Mr. John Michael Connolly
Mr. William Consovoy
Consovoy McCarthy
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201

Mr. P. Clayton Eubanks
Office of the Attorney General for the State of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105

Karen R. Harned
NFIB Small Business Legal Center
1201 F Street NW, Suite 200
Washington, DC 20004

Mr. Andrew D. Herman
Miller & Chevalier Chartered
900 16th Street N.W.
Washington, DC 20006

Ms. Mary Elizabeth Kindelt
McDonald, McCann, Metcalf & Carwile
15 East 5th Street, Suite 1400
Tulsa, OK 74103

Mr. Steven P. Lehotsky
U.S. Chamber Litigation Center
1615 H Street, NW

Washington, DC 20062-2000

Mr. James P. McCann
McDonald, McCann, Metcalf & Carwile
15 East 5th Street, Suite 1400
Tulsa, OK 74103

Mr. Thomas R. McCarthy
Consovoy McCarthy
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201

Michael H. Park
Consovoy McCarthy Park
3 Columbus Circle, 15th Floor
New York, NY 10019

Mr. Warren Postman
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062-2000

Luke A. Wake
NFIB Small Business Legal Center
1201 F Street NW, Suite 200
Washington, DC 20004

RE: 16-5038, 16-5039, Chamber of Commerce, et al v. EPA, et al
Dist/Ag docket: 4:15-CV-00386-CVE-PJC

Dear Counsel:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40, any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. If requesting rehearing en banc, the requesting party must file 6 paper copies with the clerk, in addition to satisfying all Electronic Case Filing requirements. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

A handwritten signature in cursive script that reads "Elisabeth A. Shumaker". The signature is written in black ink and has a long, sweeping horizontal line extending to the right at the end.

Elisabeth A. Shumaker
Clerk of the Court

cc: Timothy S. Bishop
Chad Clamage
Julio N. Colomba
Bridget DiCosmo
Amy Jeanne Dona
Andrew James Doyle
Anthony L. Francois
John David Gunter II
Kimberly S Hermann
M. Reed Hopper
Richard Peter Hutchison
Lara Katz
Michael B. Kimberly
Robert Lundman
Mithun Mansinghani
Cathryn Dawn McClanahan
Eric Murphy
Michael J. O'Neill
E. Scott Pruitt
Matthias L. Sayer
Ilya Shapiro
Patrick R. Wyrick

EAS/jm