

Will Justice Gorsuch on Water Act Prove Different Than Scalia Would?

What is the significance of our newest justice, Neil Gorsuch, for environmental law? We may get a hint as soon as the justice's first First Monday, on October 2. And, it is unlikely to be good news for the federal government, depending of course on what one means by the "federal government," which is hardly a static concept these days.

On First Monday itself, or later that same week, the Court is likely to schedule for oral argument a Clean Water Act case, *National Association of Manufacturers v. Department of Defense*. The case raises the threshold issue whether industry challenges to EPA and the Army Corps' joint definition of "navigable waters" should be heard in the first instance in federal district court or the court of appeals. In *NAM*, the High Court will not be considering the underlying merits of the two agencies' shared rule, which CWA aficionados know relates to the biggest legal issue under that statute: the validity of the Obama administration's Waters of the United States rule.

Assuming the case does not become moot before argument (President Trump has targeted the WOTUS rule for elimination), the case will offer an early opportunity for Justice Gorsuch to express his views on the role of courts in construing statutes. As a federal appellate judge, Gorsuch made clear his distinct view: he is a fan of literal reading of statutory text and, when the meaning of that text is unclear, not a fan of deferring to the construction of that ambiguous text proffered by the federal agency charged with the statute's administration.

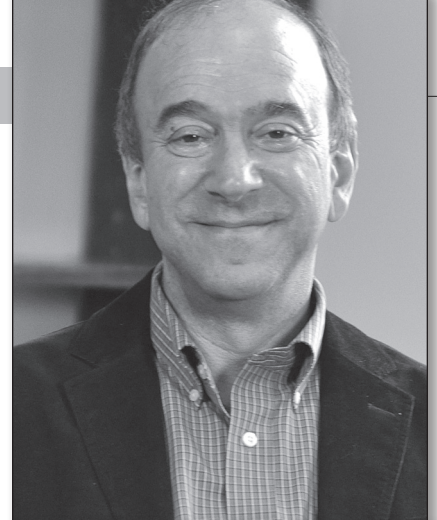
In the first respect, Gorsuch aligns completely with the views of his predecessor, Justice Antonin Scalia, who was

the Court's champion of dictionaries (*Webster's New International Dictionary, Second*, but never the *Third*) for discerning the plain meaning of statutory text. But with regard to the latter — the judicial function in construing ambiguous statutory text — Gorsuch promises to be the anti-Scalia. While Scalia was a strong proponent of deferring to a federal agency's construction of ambiguous statutory language, in accordance with the Supreme Court's seminal 1984 decision in *Chevron v. Natural Resources Defense Council*, Judge, now-Justice Gorsuch has gone so far as to suggest that such *Chevron* deference is unconstitutional because it violates separation of powers principles.

If Justice Gorsuch adheres to that view in *NAM*, the federal government will be hard pressed to secure his vote. The case is not one in which *Chevron* deference itself is at issue, but resolution of the threshold jurisdictional issue does turn on the extent to which courts think that the literal meaning of the text is controlling.

The federal government has the far stronger policy argument that it makes much more sense to have challenges to these kinds of rules defining the scope of agency authority brought directly in federal courts of appeals. That is how judicial review proceeds for challenges to similar kinds of rules promulgated by EPA under the Clean Air Act. And, it has worked well, by expediting judicial decisionmaking and avoiding fragmented litigation scattered among district courts across the country.

The government's problem is that, unlike the controlling language of the CAA, the relevant CWA language listing the kinds of challenges that must be brought first in the court of appeals does not directly refer to a rule like the WOTUS rule. The two statuto-



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rily described categories of agency action upon which the government relies refer to "approving or promulgating any effluent limitation or other limitation" and "issuing or denying permit." Suffice it to say, neither neatly fits the WOTUS rule.

That is why the solicitor general's brief is relegated to arguing that the justices should adopt a "pragmatic construction" of the CWA. But while pleas for pragmatism were very much in vogue in 19th century philosopher William James's time, such arguments today are more akin to the equivalent of a red cape for judges who, like Justice Gorsuch, are bullish about strict adherence to literal text.

The bigger question, however, is whether Gorsuch will be in the *NAM* majority or dissent. And the decades-old answer to that question — "it depends on how Justice Anthony Kennedy votes" — is also why it seems unlikely that Gorsuch's joining the High Court will make nearly as much difference for environmental law as a Justice Merrick Garland would have.

If D.C. Circuit Chief Judge Merrick Garland had replaced Justice Scalia, that would have been potentially transformative of the Court, including its environmental law cases. There would have been a working progressive majority of five justices for the first time in 50 years. From that vantage, we can already answer the question of the significance for environmental law of Justice Gorsuch's joining the Court. A lot.