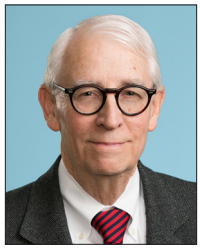
2016 Environmental Case Law Highlights: Part 1

This article was originally published by *Law360* on December 30, 2016.

by Anthony B. Cavender



Anthony B. Cavender
Environmental
+1.713.276.7656
anthony.cavender@pillsburylaw.com

Anthony Cavender is a partner in Pillsbury's Environmental practice and is based in the firm's Houston office.

This is a review of significant environmental law (and some administrative law) cases decided in 2016 (except, by necessity, for the month on December 2016) by federal and state courts. In view of its length, this article will be published in three parts.

Part 1 will cover cases decided by the U.S. Supreme Court and federal courts sitting in the D.C., First, Second, Third and Fourth Circuits. Part 2 will highlight cases decided by the federal courts sitting in the Fifth, Sixth, Seventh, Eighth and Ninth Circuits. Finally, part 3 will cover cases decided in the Tenth and Eleventh Circuits, as well as several state supreme courts.

U.S. Supreme Court

In contrast to more recent terms, the 2015 to 2016 term of the Supreme Court produced only a handful of notable environmental or administrative law decisions.

In *United States Army Corps of Engineers v. Hawkes Co. Inc.*, decided May 31, 2016, the court held that the Army Corps of Engineers' Corps' "approved jurisdictional determinations" under its Clean Water Act authority, are also final agency actions judicially reviewable under the Administrative Procedure Act. The CWA prohibits the discharge of any pollutant into the "navigable waters of the United States" without a permit, and the Corps, during the time relevant to the case, writes the Chief Justice John Roberts, has applied its regulatory definitions and administrative procedures (including judicial determinations) to bring "over 270- to 300-million acres of swampy lands in the United States — including half of Alaska and an area the size of California in the lower 48 state under its jurisdiction."

The scope of the Corps' authority, the cost and length of the permit process, and the definitive nature of approved jurisdictional determinations persuaded the court that the "finality" test of *Bennett v. Spear*, 520 U.S. 154 (1997), was satisfied, and therefore such agency actions are "final" for purposes of APA review. Since this case was decided, several lower courts have used this precedent to facilitate judicial review of a variety of administrative actions. On June 20, 2016, the court decided the case of *Encino Motorcars LLC v. Navarro*, and vacated the ruling of the Ninth Circuit that had extended "Chevron deference" to a U.S. Department of Labor regulation that reversed the department's earlier policy without providing a reasoned explanation for the change.

The court has agreed to hear two new cases of interest: an Eighth Circuit case, *Trinity Lutheran Church v. Pauley*, regarding the exclusion of the church from a Missouri recycling program on religious grounds; and *Gloucester County School Board v. G.G.*, a Fourth

Circuit case that includes a question of whether "Auer Deference" should apply to an unpublished agency letter.

Federal Courts of Appeal and District Courts

D.C. Circuit

The D.C. Circuit has decided an unusual number of Endangered Species Act (ESA) cases this year, and some important Comprehensive Environmental Response, Compensation, and Liability Act-related cases.

The court's ruling in Idaho Conservation League case, decided on Ja. 29, 2016, concerned the U.S. Environmental Protection Agency's rule making duties under CERLCA. By law, EPA is required by Section 108 of CERCLA to establish financial assurance and responsibility rules for classes of facilities that are associated with the production, transportation, treatment, storage or disposal of hazardous substances. However, more than 30 years have passed without any rules or proposed rules being published by the EPA. The court ordered the EPA to expedite its rulemaking schedule for the first class of industries it has chosen to examine, the hardrock mining industry. The EPA was also ordered to prepare a schedule by which it will determine if similar financial responsibility rules should be proposed for the chemical manufacturing, petroleum and coal products, and electric power generation, transmission and distribution industries. On Dec. 1, 2016, EPA released its first notice of proposed rulemaking in response to this decision.

In Defenders of Wildlife and Center for *Biological Diversity v. Jewell*, decided March 1, 2016, the appeals court affirmed the lower court's decision that the U.S. Fish and Wildlife Service's withdrawal of the proposed listing of the Dunes Sagebrush Lizard as an endangered species was consistent with the Endangered Species Act and the policies the service has employed to administer the act.

In *Lockheed Martin Corporation v. United States*, decided Aug. 19, 2016, the court affirmed the lower court's holdings that the equitable allocation for the past remedial costs at these sites was NONE for the United States and 100 percent for Lockheed. Going forward, the court allocated future response costs between Lockheed and the United States at each of these three sites, generally in a 75 percent to 25 percent range, with Lockheed being allocated the higher share. The case is noteworthy because of Lockheed's status as a government contractor with many ongoing contracts with the United States. As a result, Lockheed has already recovered nearly 80 percent of the past remediation costs as well as millions of dollars to reimburse Lockheed's legal costs — something that is not otherwise permitted under CERCLA, but the government contracts allow these legal costs to be recovered.

On July 27, 2016, the D.C. Circuit issued a long and complex opinion essentially upholding every regulatory decision made by the EPA in three major Clean Air Act rulemakings: the "Major Boilers" rule, the "Area Boilers" rule; and the "Commercial/ Industrial Solid Waste Incinerators" (CISWI) rule. The consolidated cases are *United States Sugar Corporation v. EPA*, *American Forest & Paper Association, et al. v. EPA*; and *American Chemistry Council v. EPA*, and again indicates the substantial deference the court extend to the EPA.

In *Mingo Logan Coal Company v. EPA*, decided July 19, 2016, the D.C. Circuit held that the EPA acted in conformity with its authority under the CWA and APA when it vetoed a CWA Section 404 dredge and fill permit Mingo Logan Coal Company received from the Corps in 2007 with the concurrence of the EPA. Judge Karen Henderson ruled that Mingo Logan's argument that the EPA was obliged to consider the costs of its action was forfeited because this argument was not effectively made with the EPA and the district court. Judge Brett Kavanaugh filed a strong dissent, making the case that Mingo Logan had preserved its economic argument, and the EPA was under an obligation to consider the costs of its actions, especially when the permit applicant, on the basis of the initial permitting decision, invested substantial sums of money and hired coal miners. This decision greatly enhances EPA residual authority under Section 404 of the CWA.

In the case of *Earth Reports Inc., et al. v. Federal Energy Regulatory Commission*, decided on July 15, 2016, the court affirmed the Federal Energy Regulatory Commission's "conditional authorization" of the conversion of the Cove Point, Maryland liquefied natural gas (LNG) facility from an import terminal to a mixed-use import and export terminal. The court concluded that, under the law, FERC was not required by NEPA to consider the indirect environmental effects of increased natural gas exports, including possible effects on climate change. The court of appeals also pointed out that the petitioners were free to raise these objections with the U.S. Department of Energy, which "alone has the legal authority to authorize" increased LNG exports.

On June 3, 2016, the D.C. Circuit issued an important administrative law ruling. In *Rhea Lana Inc. v. Department of Labor*, the court reversed the lower court which had held that a warning letter sent to the plaintiff by the Wage and Hour Division of the Department of Labor was not a "final action" for purposes of review under the Administrative Procedure Act. The D.C. Circuit held that the letters were a final agency action because they create significant legal consequences for the plaintiff. The Supreme Court's decisions in *Sackett v. U.S.* and the recent decision in *U.S. Army Corps of Engineers v. Hawkes* were cited as authority.

In *Association of American Railroads v. U.S. Department of Transportation*, decided by the D.C. Circuit on April 29, 2016, the court held that Amtrak's exercise of legislative delegation of authority to it by the Congress is unconstitutional on due process grounds, citing the 1936 Supreme Court decision in *Carter v. Carter Coal*, 298 U.S. 238 (1936), a Supreme Court decision that is not widely cited. Moreover, the Passenger Rail Investment and Improvement Act, by containing a provision that the Surface Transportation Board can designate an arbitrator to resolve disputes between Amtrak and the Federal Railroad Administration, violates the appointments clause of the U.S. Constitution.

On July 5, 2016, the court reviewed the lower court's dismissal of a lawsuit alleging that the government's approval of a Cape Cod offshore wind energy project violated several environmental statutes. The appeals court held that the National Environmental Policy Act finding made by the primary permitting agency, the U.S. Bureau of Ocean Energy Management, did not take a sufficiently "hard look" at the proffered geophysical evidence, and that an ESA "incidental take" determination must be set aside because the service should have considered the submissions of the plaintiffs. Otherwise, the court was satisfied with the project's compliance with the other permitting and development requirements. The case is *Public Employees for Environmental Responsibility v. Hopper, Acting Director of the U.S. Bureau of Ocean Energy Management*. This case indicates how carefully the courts will scrutinize agency NEPA determinations.

On July 5, 2016, the D.C. Circuit issued an important ruling interpreting the reach of the Freedom of Information Act in the case of *Competitive Enterprise Institute v. Office of Science and Technology Policy*. The D.C. Circuit reviewed the CEI's attempts to obtain the records of the director found in emails sent to or from his private, nongovernmental email account. The court holds that an "agency cannot shield its records from search or disclosure under FOIA by the expedient of storing them in a private email account controlled by the agency head," and reversed the lower's ruling that these records, which may otherwise be government records, need not be searched for or turned over.

On June 28, 2016, the court denied petitions to review the NEPA environmental issues affecting two separate Federal Energy Regulatory Commission LNG export terminal facilities in *Sierra Club and Galveston Baykeeper v. FERC* (pertaining to the Freeport, Texas terminal) and *Sierra Club v. FERC* (regarding the Sabine Pass Terminal). The court found that the petitioners had demonstrated sufficient standing, but the basic flaw in the petitioners' argument seems to have been that FERC's role is fairly circumscribed by law, and that the major complaint was that the export of LNG would inevitably reduce the supply of natural gas for domestic purposes, thus increasing reliance on cheaper sources of energy such as coal. The court was satisfied with the quality and comprehensiveness of FERC's NEPA review of nonexport-related environmental consequences, and that the commission did not act in an arbitrary and capricious manner. The court's opinion is especially valuable because it elucidates the "tangled web" of federal export authorization authority.

On Sept. 9, 2016, the U.S. District Court for the District of Columbia denied a motion for a preliminary injunction filed by the Standing Rock Sioux Reservation against the construction of the Dakota Access Pipeline through the lands of the tribe, which has been upheld by the D.C. Circuit. That case is *Standing Rock Sioux Tribe, et al v. U.S. Army Corps of Engineers*. The tribe alleged that the Corps, in its review of the permitting requirements triggered by the project, had failed to engage in the consultative process requirements of Section 106 of the National Historic Preservation Act (NHPA), but that court denied relief, holding that the tribe largely refused to engage in such consultation.

Second Circuit

On Aug. 8, 2016, the Second Circuit issued a comprehensive opinion affirming in all respects the decision of the U.S. District Court for the Southern District of New York that a foreign judgment obtained by

Ecuadorian plaintiffs against Chevron for alleged pollution in the Ecuadoran rain forest by Texaco many years ago was, in fact, procured by fraud. The case is *Chevron Corporation v. Donziger, et. al*, and the court of appeals agreed that equitable relief was warranted under the Federal RICO statute.

Third Circuit

On Jan. 6, 2016, the Third Circuit affirmed the dismissal of a Clean Air Act citizen suit in *Group Against Smog and Pollution (GASP) v. Shenango Incorporated*. Shenango operates coke manufacturing and by-products facility in Allegheny County, Pennsylvania, and the plaintiff alleged that the facility was violating a number of opacity regulations imposed by the local air quality permitting authority, the Allegheny County Health Department (ACHD). In 2012, the Pennsylvania Department of Environmental Protection and the ACHD filed an enforcement action against Shenango in federal court, which resulted in a consent decree to resolve these air quality violations. Importantly, the federal court retained jurisdiction over the consent decree. Then, in 2014, GASP filed a complaint against Shenango in state court, which also resulted in another consent decree with the ACHD. On these facts, the court of appeals agreed that that GASP's citizen suit should be dismissed. According to the court, there was an ongoing diligent prosecution of Shenango when the lawsuit was filed, and this is true even if the ongoing enforcement is currently limited to the ongoing administration of approved consent decrees.

On Aug. 8, 2016, the Third Circuit rejected several challenges to energy projects requiring environmental permits and authorizations granted by state regulatory agencies in New Jersey and Pennsylvania. The consolidated cases are *Delaware Riverkeeper Network et al. v. Secretary, Pennsylvania Department of Environmental Protection* and *New Jersey Conservation Foundation et al v. New Jersey Department of Environmental Protection*. Transcontinental Gas Pipe Line Company LLC (Transco) operates a natural gas pipeline extending from South Texas to New York, and proposed a local expansion of this pipeline, which required, in addition to the approval of the Federal Energy Regulatory Commission, the issuance of facilitating state environmental permits and authorizations in New Jersey and Pennsylvania, that were granted by the New Jersey and Pennsylvania Departments of Environmental Protection in 2015. These permitting actions were challenged by several local environmental organizations in the Third Circuit.

The Third Circuit was obliged to consider the arguments the states made that the court was without jurisdiction to review these petitions, particularly concerning those state actions assessing the water quality impacts of this pipeline expansion under Section 401 of the CWA. In a significant ruling, the court responded to these arguments by holding that it had this authority through the Natural Gas Act; that these states were, in fact and law, acting pursuant to federal law in issuing state permits to Transco. To rule otherwise would frustrate the purpose of Congress' grant of jurisdiction to the federal courts under the NGA.

Fourth Circuit

The District Court. On Oct. 17, 2016, the U.S. District Court for the Northern District of West Virginia granted summary judgment to Murray Energy Corporation, which sued the EPA seeking declaratory and injunctive relief against the EPA because the agency has persistently failed to perform a nondiscretionary duty under Section 321(a) of the Clean Air Act (42 USC Section 7621(a)) to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement" of the Clean Air Act with regard to the effect the agency's actions are having on the coal industry and "the hundreds of thousands of people it directly or indirectly employs."

The case is *Murray Energy Corporation et al. v. McCarthy*. Following a review and analysis of the law and its legislative history, the court concluded that: (1) Section 321(a) imposes a mandatory duty on the EPA to make these studies; (2) that the plaintiffs had standing to maintain these claims; and (3) the EPA has failed or refused to conduct the types of studies the law requires. The court ordered the EPA promptly to develop and submit to the court a plan by which it will comply with Section 321(a), and the plaintiffs will then have an opportunity to comment on these plans. This decision, if affirmed, could have enormous consequences for many EPA rulemaking proceedings.