2016 Environmental Case Law Highlights: Part 2

This article was originally published by *Law360* on January 3, 2017.

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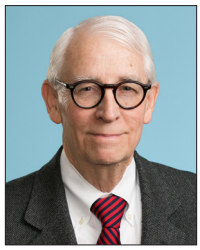

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The first part of this three-part series covered cases decided by the U.S. Supreme Court and federal courts sitting in the D.C., First, Second, Third and Fourth Circuits. Here, part 2 will highlight cases decided by the federal courts sitting in the 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.

The cases reported in part 2 reflect the issues common to the energy-producing states as well as additional Endangered Species Act decisions reviewed by the Fifth and Ninth Circuits.

Fifth Circuit

On Aug. 11, 2016, the Fifth Circuit issued an opinion rejecting the ExxonMobil Pipeline Company's request for a stay pending appeal of a compliance order issued by the Pipeline and Hazardous Materials Safety Administration of the U.S. Department of Transportation. In March 2013, ExxonMobil Pipeline Company's Pegasus pipeline released 5,000 barrels of crude oil near Mayflower, Arkansas. So far, the release has resulted in more than $57 million in property damages and the forced evacuation of 22 homes. This case is *ExxonMobil Pipeline Company v. U.S. Department of Transportation*. Following this spill, the PHMSA issued a notice of violation and conducted a hearing, resulting in a fine of $2.6 million and an order to the pipeline to initiate several actions to bring this old pipeline into compliance with pipeline integrity management procedures. Exxon argues that the agency has not demonstrated that the operation of the pipeline was in violation of the existing rules and procedures, and to the contrary, the agency in effect rewrote the existing rules and standards to hold the pipeline liable for violating the act and the agency's regulations. These allegations did not warrant a stay, and the case will now be decided on the merits, which could result in a significant ruling on pipeline safety laws.

On May 27, 2016, in *Environment Texas Citizen Lobby, et al. v. ExxonMobil Corporation, et al*, the Fifth Circuit vacated the lower court's ruling, in a Clean Air Act citizen suit, that ExxonMobil should not be assessed any civil penalties under the CAA for violations of its CAA permits required for operation of Exxon's Baytown, Texas, refinery. After hearing and assessing the evidence against Exxon's operation of the refinery, the lower court held that no penalties should be levied against Exxon. However, the appeals court held that the lower court erred in its

analysis and abused its discretion in applying the mandatory CAA penalty criteria, and remanded the case to that court.

On June 30, 2016, the Fifth Circuit issued a significant ESA ruling designations in *Markel Interests v. U.S. Fish and Wildlife Service*. The case was decided on a 2 to 1 vote, with Judge Priscilla Owen providing a strong dissent. The majority was at pains to state that "critical habitat designations do not transform private land into wildlife refuges." Nevertheless, the extension of the ESA to this private land may conceivably have federal permitting consequences later if the future development of the land triggers Clean Water Act considerations.

The dusky gopher frog is an endangered species which is now found only in Mississippi. In 2010, the service designated 1,544 acres in Louisiana as a critical habitat of the frog although it has not been seen in the state since 1965. The service reasoned that this land in Louisiana contains the ephemeral ponds the frogs need that are essential to the species' existence. However, the land is privately owned and the landowners plan to use this land for residential and commercial development. The district court upheld this designation, and the Fifth Circuit has now affirmed that decision in a holding which the dissent describes as "unprecedented and sweeping."

On July 15, 2016, the Fifth Circuit unanimously granted a stay of the U.S. Environmental Protection Agency's January 2016 rule which partially approved and partially disapproved the regional haze plans developed and submitted to the EPA as state implementation plan submissions by Texas and Oklahoma and replacing the disapproved SIP provisions with a federal implementation plan. The case is *State of Texas, et al. v. EPA*, and it is especially important for holding that not all Clean Air Act policy cases must be heard by the D.C. Circuit.

The court rejected the EPA's argument that the case should be transferred to the D.C. Circuit, reasoning that "Section 7607(b)(1) directs that challenges to the EPA's assessment of a state implementation plan may only be filed in the appropriate regional circuit. Because the final rule is not based on a determination that has nationwide scope or effect, the narrow exception in Section 7607(b)(1) does not apply. Venue for this challenge is appropriate in this court. The petitioners have demonstrated a strong likelihood of success in establishing that the EPA acted arbitrarily, capriciously and in excess of its statutory authority when it disapproved the Texas and Oklahoma implementation plans and imposed a federal implementation plan. The petitioners have also shown a threat of irreparable injury if a stay is not granted. Finally, the petitioners have shown that the balance of public interest weigh in favor of a stay." The court stayed the final rule in its entirety.

It was especially critical of the EPA's summary dismissal of the arguments of the operators of the Texas grid that imposing expensive new emissions controls on power plants in Texas could have a devastating impact on the region and many plants in Texas, particularly since the EPA has no expertise in this area (FERC did not participate). The EPA argued that this case should have been transferred to the D.C. Circuit because the final rule had nationwide impact, and by law, such cases must be heard by the D.C. Circuit. However, the Fifth Circuit, after reviewing the statute and the EPA's arguments, determined that it would not defer to the agency's interpretation of the venue provisions of the CAA.

Sixth Circuit

Following up on its earlier ruling issuing a nationwide stay of the implementation of a new rule, redefining the regulatory definition of "Waters of the United States," the Sixth Circuit decided on Feb. 22, 2016, that it has jurisdiction under the act to hear challenges to this rule. The case is In re: U.S. Department of Defense and U.S. Environmental Protection Agency Final Rule: Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015). Several actions were consolidated in the Sixth Circuit by the Judicial Panel on Multidistrict Litigation, and the petitioners argued there that the new rule was deeply flawed and they moved for a stay of the rule pending the completion of the court's review. However, they also requested that their petitions be dismissed for lack of subject matter jurisdiction in the courts of appeal. Several parties opposed the stay and asserted the court indeed had jurisdiction. On Oct. 9, 2015, a divided panel of the Sixth Circuit granted a nationwide stay pending the court's determination of its jurisdiction, and oral argument was held on Dec. 8, 2015.

Judge David McKeague, conceding

that the question was very close, nevertheless held that most courts have applied a functional test to determining whether the Clean Water Act allows a direct appeal of such rules to the circuit courts, and that a 2009 Sixth Circuit ruling in the case of *National Cotton Council of America v. U.S. EPA* compelled the court to rule this way. Judge Richard Allen Griffin, casting the decisive vote, felt himself bound by the circuit precedent although he also writes that the National Cotton Council case was incorrectly decided. Judge Damon Keith, in dissent, argued that the National Cotton Council ruling has been erroneously interpreted, and the cases should be heard in the first instance in the district courts.

US v. Sawyer, a criminal environmental enforcement case decided by the Sixth Circuit on June 3, 2016, affirmed the government's use of the criminal restitution laws to require a defendant to pay the EPA $10.4 million in restitution for the agency's costs in cleaning up a site contaminated with asbestos. Sawyer pled guilty to one charge, and received a sentence of six years' confinement. His pleas included a waiver of his right to appeal if the sentence was consistent with the sentencing guidelines. The court held that it did and therefore would not revisit the reasonableness of his sentence. In addition, the court approved the sentence of restitution, holding that this was an offense against "property," and the fact that the EPA did not have a "possessory interest" in the property made no difference.

Seventh Circuit

On Feb. 23, 2016, in a brief opinion, the Seventh Circuit dismissed as moot several challenges to Safe Drinking Water Act permits issued to FutureGen Industrial Alliance to construct and operate underground injection (UIC) wells to store large quantities of carbon dioxide near the land of the petitioners, permits that had already expired. The case is *DJL Farm LLC et al. v EPA*.

According to the court, FutureGen was formed to research and develop "near-zero emissions coal technology," and intended to use carbon capture and storage to develop the "world's first near-zero emissions power plant" in Morgan County, Illinois. In March 2013, FutureGen submitted applications for EPA permits to build four UIC Class VI wells and to inject nearly 22 million metric tons of carbon dioxide over a 20-year period. The final permits were issued in May 2015, which the petitioners then challenged in the Seventh Circuit. However, in January 2015, the U.S. Department of Energy had suspended funding for the FutureGen project, and no alternative funds were acquired. As a result, the EPA was requested to terminate the permits, and they expired on Feb. 2, 2016. Since the permits had expired, the court reasoned that there is no relief the court could grant to the petitioners, and the case was dismissed as moot.

On Aug. 8, 2016, the Seventh Circuit, in a decision affirming the final energy efficiency regulations issued by the DOE for commercial refrigeration equipment, held that the DOE's use of a measure of carbon emissions known as the "Social Cost of Carbon" was proper under the law and that the department was authorized to consider such environmental factors in its standards. The case is *Zero Zone v. U.S. Department of Energy*.

Eighth Circuit

On April 11, 2016, the Eighth Circuit upheld a ruling confirming the decisions of the U.S. Department of Agriculture that an area of the petitioners' farmland in Miner County, South Dakota, is a "wetland" as that term is defined in the law. The U.S. Department of Agriculture's grant of authority is independent of the CWA's wetlands provisions, and indeed may be more comprehensive than any EPA or Army Corps of Engineers' determination. The case is *Foster v. Vilsack*, decided April 11, 2106. The department acted under its "swampbuster" authority (16 USC Section 3801(a)(27)), which is intended to "combat the disappearance of wetlands through their conversion into crop lands." Under the law, anyone determined to have converted wetlands into crop lands may become ineligible to receive federal farm program payments.

Ninth Circuit

In the case of *Center for Biological Diversity, et. al v. U.S. Forest Service*, the the Ninth Circuit, in an unpublished opinion released on Jan. 12, 2016, reversed the lower court's dismissal of a Resource Conservation and Recovery Act citizens suit filed against the Forest Service which alleged that the Forest Service violated the RCRA by failing to regulate the disposal of spent lead ammunition in a national forest. Reviewing the allegations in the complaint, the court of appeals held that the plaintiffs had established standing — their claims are "not wholly insubstantial or frivolous." The court noted that the government could make the argument in the lower court that the Forest Service

was not a "contributor" to the solid waste problem, something the RCRA Citizen Suit provision requires for prosecuting such complaints.

In *Alaska Oil and Gas Association, et al. v. Jewell*, decided on Feb. 29, 2016, the Ninth Circuit reversed the ruling of the U.S District Court for the District of Alaska which vacated the Fish and Wildlife Service's designation of the critical habitat for the polar bear, which was listed as a threatened species in 2008, and for which a critical habitat was determined by the service in 2010. The final critical habitat designation encompassed 187,000 square miles, which was broken down into three segments or units. Energy industry petitioners, the state of Alaska and several Alaska Native corporations challenged the critical habitat with respect to two of the three units (unit one, the sea ice habitant, which comprises 95 percent of the entire critical habitat, was not challenged). They argued that the service's determination was arbitrary and capricious under the Administrative Procedure Act and the ESA; the district court agreed and vacated the entire critical habitat designation.

The court of appeals reversed the lower court, holding that the service followed the law, and indeed the lower court erroneously required the service to adhere to a "standard of specificity" that the ESA does not require. According to the court, the lower court's "narrow construction of critical habitat runs directly counter to the act's conservation purposes." The plaintiffs also argued the service's reliance on the deleterious consequences of climate change (by reducing the extent and quality of Arctic ice) was inappropriate because there was no evidence in the record that, in fact, showed how the proposed critical habitat is currently receding because of climate change. However, noting that the D.C. Circuit took these developments into account when upholding the service's decision to list the polar bear as a threatened species, and that a "majority of the state-of-the-art climate models" predict a substantial loss of Arctic ice, the Ninth Circuit holds that the service properly took this information into account. The court reversed the lower court and remanded the matter to that court, instructing the court to enter a judgment in favor of the government appellants.

On July 27, 2016, the Ninth Circuit issued an important Superfund decision which holds that the aerial emissions of hazardous substances are not an "arrangement for the disposal" of hazardous substances, triggering Superfund cleanup liability. The case is *Pakootas v. Teck Cominco Metals Ltd*. The term "disposal" is defined in the RCRA, and it is cross-referenced in the Comprehensive Environmental Response, Compensation and Liability Act. The court was bound by an earlier 2014 circuit ruling that "disposal" under RCRA does include air emissions of hazardous waste. The Ninth Circuit has refused to grant any further review of this decision.

On Oct. 24, 2016, the Ninth Circuit reversed the lower court and upheld the determination of the National Marine Fisheries Service that two distinct population species of the Pacific bearded seal subspecies — located in the shallow waters of the Arctic — were likely to become endangered within the foreseeable future, based on climate projections that the loss of sea ice over those shallow waters would leave these species endangered under the provisions of ESA by the year 2095. The case is *Alaska Oil and Gas Association, et al. v. Pritzker*. After reviewing the scientific record compiled by the NMFS, the appeals court holds that, on the basis of the administrative record, the listing decision is reasonable. Accordingly, the lower court's ruling that the government's action was arbitrary and capricious because the attempt to predict the bearded seal's viability beyond 50 years was too speculative and remote to support a determination that the bearded seal is in danger of becoming extinct was set aside. While there is no evidence that the numbers of these seals is diminishing, the court adds that, "There is no debate that temperatures will continue to increase over the remainder of the century and the effects will be particularly acute in the Arctic."

On Nov. 23, 2016, the Ninth Circuit issued a unanimous ruling in the case of *Oregon Coast Scenic Railroad LLC. v. State of Oregon Department of State Lands*, holding that the Surface Transportation Board has exclusive jurisdiction over "railroad repair work done at the direction of a federally regulated rail carrier but performed by a contractor rather than the carrier itself." The Oregon Coast Scenic Railroad is a nonprofit operator of tourist trains which entered into an agreement with a federally recognized railroad, the Port of Tillamook Bay, to repair a railroad track owned by the port that was damaged in 2007 as the result of a winter storm. In 2012, the port and the railway entered into a five-year agreement which allowed

Oregon Coast to continue leasing the damaged portion of the track, but instead of paying the port for the use of the track, it would use those funds for deferred maintenance and the upgrading of the track. Once the repairs were completed, the parties expressed their intention to allow the tourists trains to run alongside of the port's anticipated railway freight traffic.

However, the state of Oregon intervened before the repairs had been completed, issuing a cease-and-desist order and asserting that the repair work was violating an Oregon environmental law governing removal fill rules, and that a state permit to conduct these repairs was essential. The state permit would authorize the removal of any amount of material from water designated by the state as being an essential salmonid habitat. Oregon Coast then challenged this requirement, asserting that this repair work was preempted in favor of the Surface Transportation Board by the Interstate Commerce Commission Termination Act, codified at 49 USC Section 10101, et seq. The lower court held that this activity was not preempted by the act, but the Ninth Circuit has held otherwise. Reviewing the act, the court holds that this activity is not subject to state jurisdiction, and the state's permitting requirements in this area are indeed preempted.

District Court

The U.S. District Court for Oregon has denied the government's motions to dismiss a complaint that the government, by failing to take aggressive steps to reduce carbon dioxide emissions, had violated the plaintiff's constitutional rights and the government's obligation under the Public Trust Doctrine. The case is *Juliana, et al v. United States*, decided November 10, 2016.

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