

# 2016 ENVIRONMENTAL CASE LAW HIGHLIGHTS: PART 3

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The first part of this three-part series covered 2016's most significant environmental cases decided by the U.S. Supreme Court and federal courts sitting in the D.C., First, Second, Third and Fourth Circuits. Part 2 highlighted cases decided by the federal courts sitting in the Fifth, Sixth, Seventh, Eighth and Ninth Circuits. Here, part 3 will cover cases decided in the Tenth and Eleventh Circuits, as well as several state supreme courts.

### Tenth Circuit Court of Appeals

On March 8, 2016, the Tenth Circuit affirmed the lower court's dismissal of the Sierra Club's Clean Air Act Citizens Suit which sought civil penalties against the Oklahoma Gas and Electric Company (OG&E) because the complaint was time-barred. The case is *Sierra Club v. Oklahoma Gas and Electric Company*. The Sierra Club alleged that OG&E, the owner and operator of a coal-fired power plant in Muskogee, Oklahoma, modified a boiler serving the plant without first obtaining the necessary permit. The plant is located in an "attainment" area for purposes of the Clean Air Act, and, being a major facility, is subject to the permitting requirements of the "Prevention of Significant Deterioration" (PSD) program as implemented by the Oklahoma Department of Environmental Quality.

The modifications to the boiler began in March 2008, but the Sierra Club did not take any legal action until April 2013. In the course of this litigation, the plaintiff and the defendant entered into a tolling agreement which tolled the running of the statute of limitations, effective April 1, 2013. The majority of judges on the panel decided that the plain reading of 28 USC Section provides that the Sierra Club's action accrued in March 2008 when the modifications started — which makes the lawsuit time-barred because it was not filed until April 2013, or more than five years after the deadline established by law. The Sierra Club argued that the actions of the OG&E facility were subject to the "continuing violations" doctrine, which the court rejected.

### District Court

On June 21, 2016, the U.S. District Court for Wyoming issued a comprehensive ruling holding that the U.S. Department of the Interior lacked statutory authority to promulgate in 2015 its new rules to regulate hydraulic fracturing operations on federal and Indian lands. The case is *State of Wyoming and State of New Mexico v. U.S. Department of the Interior*. The DOI argued that it possessed ample statutory authority to issue these rules under a number of laws, particularly the Federal Land Policy and Management Act of 1976,

the Mineral Leasing Act of 1920, the Indian Mineral Leasing Act, and the Indian Mineral Development Act of 1982. The court was not persuaded that these general statutes provide the authority necessary to promulgate these rules. An appeal has been filed with the Tenth Circuit.

### Eleventh Circuit

On Feb. 5, 2016, the Eleventh Circuit, in the case of *Palmer Ranch Holdings LTD v. Commissioner of Internal Revenue*, largely affirmed the Tax Court's decision regarding a contested evaluation of a conservation easement that resulted in significant claimed deductions. The American Bald Eagle has a nest on a portion of an 82-acre tract located in Sarasota County, Florida. That portion also serves as a "wildlife corridor," and concerns over the presence of the eagle, the corridor and wetlands thwarted the plans of the property owners to sell the land for residential development (apparently large enough to build hundreds of units). To obtain the necessary local permission, in 2006, the owners of the property donated a portion of the land to Sarasota County in the form of a conservation easement, for which they took substantial deductions in their 2006 income tax returns. The IRS challenged the deduction, which was based on the owners' evaluation of the easement as being over \$25 million. The IRS argued that the easement, based on the highest and best use of the property, should be valued at \$7.7 million, and the owners challenged the IRS's determination in the Tax Court.

The Tax Court ruled in favor of the owners, but reduced the valuation of the conservation easement to \$21

million. On appeal, the Eleventh Circuit largely upheld the Tax Court, but remanded the case to the Tax Court for additional explication of its reasoning by which the figure was lowered to \$21 million.

### State Courts

#### Texas

On June 24, 2016, the Texas Supreme Court issued a major decision which explicates, under Texas law, the standard for litigating a private nuisance case. This case is *Crosstex North Texas Pipeline LP v. Gardiner*. The Gardiners were compelled to convey an easement to the pipeline company to use their quiet country farm for building and operating a very noisy compressor system. The pipeline company made many efforts to reduce the incessant noise but unsuccessfully. The plaintiffs filed a nuisance claim and the Texas Supreme Court took this occasion to clarify the law of private nuisances: "We hold that the term 'nuisance' refers not to a defendant's conduct or to a legal claim or cause of action but to a type of legal injury involving interference with the use and enjoyment of real property. We further clarify that a defendant can be liable for causing a nuisance if the defendant intentionally causes it, or — in limited circumstances — causes it by engaging in abnormally dangerous or ultrahazardous activities." With this clarifying guidance, the case is remanded to the trial court.

On April 29, 2016, the court decided *BCCA Appeal Group Inc. v. City of Houston*. The court held that the Texas Clean Air Act (TCAA) and its enforcement mechanisms imbedded in the Texas Water Code preempt a city of Houston ordinance that

required emissions-emitting facilities located within the city limits to register their facilities with the city, and to pay registration fees. Although the TCAA expressly provides that municipalities like the city of Houston can pass air quality ordinances, the court noted that they cannot pass local laws inconsistent with the TCAA and the Texas Commission on Environmental Quality's (TCEQ) enforcement policy and procedures. Here, the city's ordinance makes unlawful what the TCAA allows. While the ordinance expressly incorporated the air quality rules of the TCEQ, this was not enough to save the ordinance from being invalidated to the extent that registration was required that could result in criminal enforcement by the city.

A case that has been closely followed by Texas oil and gas and other interests which involves groundwater disputes has now been decided. In *Coyote Lake Ranch LLC v. The City of Lubbock*, decided on May 27, 2016, the court holds that the "accommodation doctrine," developed by the courts to assist in the resolution of disputes between landowners and their oil and gas lessees, can play a significant role in the resolution of disputes between landowners and the owner of an interest in the groundwater beneath the land. In so ruling, the court reversed the Court of Appeals for the Seventh District sitting in Amarillo, Texas.

#### Pennsylvania

On Sept. 28, 2016, in *Robinson Township v. Commonwealth of Pennsylvania*, the Pennsylvania Supreme Court issued the second of two rulings which essentially rejected "Act 13," which replaced the

existing Pennsylvania Oil and Gas law. The court held that the legislation, spurred by the oil and gas boom in Pennsylvania, violated a number of state constitutional provisions.

### **New Jersey**

In New Jersey, on June 14, 2016, the Supreme Court of New Jersey rejected an appeal by the New Jersey Department of Environmental Protection (NJDEP). *Hackensack Riverkeeper v. the New Jersey DEP*. The appeals court held that the NJDEP's attempts to expand the NJDEP's authority over public access to beaches and other New Jersey tidal waterways on the basis of the NJDEP's inherent authority to manage lands held in public trust cannot be approved in the absence of specific legislative authority.

### **Massachusetts**

On June 6, 2016, the Supreme Judicial Court of Massachusetts released an opinion in the case of *Peterborough Oil Company, LLC v. Department of Environmental Protection (DEP)*, the court interpreted the term "oil" as used in a Massachusetts Department of Environmental Protection (MDEP) regulation implementing the 1983 Massachusetts Oil and Hazardous Materials Release Prevention Act (MOHMRPA) which, in many ways, is the state's counterpart to the federal Superfund law. The court ruled that "oil" as defined in MOHMRPA and interpreted by the MDEP is not subject to the kind of "petroleum exclusion" that is part of the Comprehensive Environmental Response, Compensation and Liability Act. Indeed, under CERCLA, leaded gasoline, the substance at issue here, would likely have been exempted by CERCLA from most cleanup

requirements. The court acknowledged the fact that the act creates "greater liability for cleanup of oil spills than does CERCLA," noting that the MOHMRPA does not incorporate CERCLA's petroleum exception.

On May 17, 2016 in *Isabel Kain and Others v. Department of Environmental Protection*, the Supreme Judicial Court of Massachusetts held that the various existing greenhouse gas rules and initiatives promulgated by the MDEP did not satisfy the strict requirements of the state's Global Warming Solutions Act (GWSA). According to the court, the unambiguous language of Section 3(d) of the GWSA "requires the department to promulgate regulations that establish volumetric limits on multiple greenhouse gas emissions sources, expressed in carbon dioxide equivalents and that such limits must decline on an annual basis." MDEP's duty under the law was described as being mostly aspirational, but the court held this was insufficient. The purpose of the law "is to attain actual, measurable and permanent emissions reductions in the commonwealth."

The 2008 law is largely based on the California's version, which was passed in 2006. After the MDEP failed to take any action to implement the new law by November 2012, a group of Massachusetts residents submitted a petition for rulemaking to the MDEP, to which it responded by noting a number of regulatory initiatives it had taken to address global warming, but were not, admittedly, rules specifically implementing the GWSA. In August 2014, a complaint was filed in the Superior Court seeking declaratory relief or a writ of mandamus to compel the MDEP to promulgate

the rules required by the GWSA. The superior court ruled for the MDEP and this appeal followed. The Supreme Judicial Court has now ruled that the MDEP must issue rules pursuant to the GWSA that "set actual limits for sources or categories of sources that emit greenhouse gases" by providing declaratory relief, it was not necessary to issue a writ of mandamus. The rules were to take effect on Jan. 1, 2013, and to expire on Dec. 31, 2020. This ruling should have significant implication for Massachusetts.

### **Colorado**

On May 2, 2016, the Supreme Court of Colorado issued two rulings which held that local bans on hydraulic fracking within the city limits of Longmont and Fort Collins, Colorado were preempted by state law, namely the Colorado Oil and Gas Conservation Act. Citizen initiatives resulted in a permanent ban on such operations in Longmont, and a five-year moratorium in Fort Collins. *City of Longmont v. Colorado Oil and Gas Association* and *City of Fort Collins v. Colorado Oil and Gas Association*. While Colorado's home-rule municipalities can enact ordinances that address local concerns, and in doing so supersede a conflicting state law, where the local ordinance conflicts with state law in a matter of state-wide or mixed state and local concerns, the state law supersedes and preempts the local ordinance. The court noted that there is a state policy advocating the efficient development of oil and gas resources in Colorado, and these local ordinances would inhibit that development.

## Vermont

In a case decided on May 27, 2016, *State of Vermont v. Atlantic Richfield Company, et al.*, the Vermont Supreme Court rejected the state's claim that its Methyl Tertiary Butyl Ether (MTBE) contamination lawsuit, filed in 2014 against several petroleum companies, was not subject to the relevant Vermont statute of limitations. The state claimed that these defendants were liable for a "generalized injury" to state waters (essentially groundwater) due to groundwater contamination caused by MTBE, a gasoline additive, which for many years was spilled or released from gasoline delivery facilities as well as by releases of MTBE associated with ordinary consumer activities (the operation of snowmobiles, watercraft and lawn mowers). The lawsuit was filed in June 2014, or more than six years after the statewide ban on the use of MTBE became effective, and the defendants argued that this claim was subject to Vermont's general six-year statute of limitations for civil actions. Vermont argued that a Vermont law dating back to 1785 exempted claims alleging injury to

state lands and public trust resources from the six-year statute of limitation on which the defendants rely.

In January 2015, the superior court dismissed the state's claims asserting a generalized injury to groundwater. It ruled that the statute cited by the state only applies to the real property of the state, and not to claims for injury to groundwater held in public trust by the state. This interlocutory appeal followed and the Supreme Court of Vermont upheld the lower court's reading of the statute. However, the Supreme Court also noted that its ruling does not apply to more specific sites of alleged groundwater contamination.

## Illinois

On July 8, 2016, the Illinois Supreme Court, in the case of *Hampton et al. v. Metropolitan Water Reclamation District of Greater Chicago*, held that temporary flooding of the plaintiffs' residential properties located in the Chicago area can be the subject of a "taking" for which they may be entitled to just compensation under the Illinois constitution.

## Conclusion

We have briefly reviewed some 50 decisions rendered by the U.S. Supreme Court, the federal courts of appeals, the federal trial courts, and several state Supreme Courts. Anyone who reads these cases will be impressed by the painstaking approach these courts apply to some of the most vexing and complicated cases on their dockets, which usually involve very contentious legal and public policy questions.

Going forward, the new administration faces the challenge of finding and nominating a replacement for Supreme Court Justice Antonin Scalia, and filling the many judicial vacancies that exist on the appellate bench and the lower federal courts. However, I think we can all be reassured that the courts will continue to play an indispensable role in the operation of our federal system and the just resolution of all manner of cases.