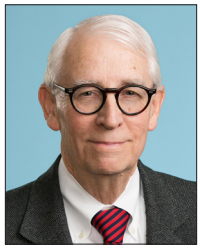
Late Innings: Top Enviro Decisions From Final Days Of 2016

This article was originally published by *Law360* on January 26, 2017.

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.

Federal Courts of Appeal and District Courts

D.C. Circuit

On Dec. 6, 2016, the D.C. Circuit reversed the ruling of the lower court, which had dismissed a complaint filed by the Safari Club and the National Rifle Association, that a decision by the U.S. Fish and Wildlife Service to suspend the import of African elephant hunting trophies was invalid. The lower court held that the decisions of the service were not final decisions susceptible to judicial review, and the plaintiffs had not exhausted their administrative remedies, a determination that has now been set aside. The case is *Safari Club International v. Jewell*.

The Fish and Wildlife Service of the U.S. Department of the Interior regulates the import of species protected by a treaty, the Convention on International Trade of Endangered Species of Wild Fauna and Flora, and the African elephant is a protected species. The service also determines whether hunters can receive permits to import "sporthunted trophies." The service, until recently, allowed the importation of these trophies, which indicate to the service that, while these species have been hunted and killed in Tanzania, the revenues generated by this hunting activity can be used for the conservation of the species. However, once the service learned that the numbers of the African elephant were significantly declining, it decided in 2014 to suspend these imports, which was challenged in court.

Their complaint was dismissed, and the D.C. Circuit reversed this ruling. Reviewing the record and the effect of this suspension, the court held that these actions by the service were final and appealable to the district court. Moreover, since the service's actions had the effect of making futile any application for a permit to obtain the right to pursue an administrative review, there was no basis to dismiss the complaint on the theory that the plaintiffs had not exhausted their administrative remedies. The case is significant because it emphasizes that the courts can only review "final agency actions," and they must be satisfied that this standard has been met.

The District Courts

On Dec. 22, the U.S. District Court for the District of Columbia issued an opinion in *Water Quality Insurance Syndicate v. U.S.*, which reversed the U.S. Coast Guard's National Pollution Funds Center's (NPFC) finding of "gross negligence" by the captain of the MONARCH, a supply vessel that collided with an offshore oil and gas

production platform in the Cook Inlet, Alaska. This decision may have important implications for insurers, and influence future interpretations of this term in other cases involving other environmental laws.

Water Quality Insurance Syndicate (WQIS) insured the MONARCH, a supply vessel engaged in providing needed supplies to offshore oil platforms operating in treacherous Alaskan waters around the Cook Inlet. While trying to supply an offshore oil and gas production platform operated at that time by Chevron, the MONARCH's captain was forced to contend with and navigate through stormy seas and ice packs surrounding the platform. The vessel collided with the platform, resulting in a spill of 38,000 gallons of fuel, lube and generator oil into Cook Inlet.

The MONARCH was a responsible party under the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 et seq. (OPA), but its liability would be capped by law at $800,000 unless the MONARCH's captain was deemed to be grossly negligent. The MONARCH's insurer incurred nearly $2,700,000 in removal costs and expenses, and filed a claim for reimbursement from the Oil Spill Liability Trust Fund, created under Section 2712(a)(4) of the OPA, which is managed by the Coast Guard's National Pollution Funds Center (NPFC). WQIS's claim was denied by the NPFC, on the basis that the captain was grossly negligent, and this appeal followed.

Searching for a usable definition of "gross negligence", the district court noted the use of the term "gross negligence" in the OPA and other laws that have been enacted over the years such as the Clean Water Act, and Comprehensive Environmental Response, Compensation and Liability Act of 1980. However, none of these statutes defines "willful" or "gross" negligence, except for a single section of CERCLA, which limits the liability of state and local governments when they render assistance in addressing hazardous incidents, save for those instances where the responding governmental agency has engaged in gross negligence, defined there as "reckless, willful or wanton conduct" (42 U.S.C. § 9607(d)(2)).

The district court concluded that "[t]hus, Congress has defined the term 'gross negligence' in a parallel statute to the OPA to require 'misconduct' that is 'reckless, willful or wanton.'" Measuring the NPFC's working definition, described as being "an extreme departure from the care required under the circumstances or a failure to exercise even slight care" against this CERCLA definition, the district court granted the WQIS's motion for summary judgment and the matter was remanded to the NPFC so that it can consider, for a third time, WQIS's claim for reimbursement, consistent with the district court's ruling. As a result, a relatively obscure provision of CERCLA, the Superfund law, may affect the courts' interpretation of the OPA and the CWA.

Fifth Circuit

On Dec. 13, the Fifth Circuit decided an important False Claims Act case, *United States of America, e ex rel. Jeffrey M. Simoneaux v. E.I. du Pont de Nemours & Co.* Reversing the district court, the Fifth Circuit held that "potential or contingent penalties" are not obligations under the federal FCA and they are not obligations under the FCA "even when a statute requires immediate action from a violator, [because] the government must still choose whether to impose a penalty."

The plaintiff and former DuPont employee, Jeffrey Simoneaux, brought a qui tam action against DuPont under the FCA, alleging that DuPont "violated the reverse-false-claims provision, 31 U.S.C. § 3729(a)(1)(G), by concealing an obligation to pay the United States a penalty arising from alleged violations of the Toxic Substance Control Act." It was alleged that DuPont failed to report to the U.S. Environmental Protection Agency leaks of sulfur dioxide and sulfur trioxide. By failing to make a report under Section 8(e) of the TSCA, it was argued that DuPont owed the United States a penalty and had avoided that obligation. In response, DuPont argued that it had no obligation to pay anything to the United States because the EPA had not assessed a penalty, and the court held that Section 2615(a) of the TSCA gives the EPA the discretion to determine whether a penalty should be assessed. The Fifth Circuit notes that the FCA has been amended recently, but these amendments, ostensibly liberalizing the relevant FCA requirements, did not have the effect of nullifying applicable Fifth Circuit precedent. Accordingly, the reverse-FCA claim was reversed and remanded.

On Dec. 29, 2016, the Fifth Circuit issued a major Occupational Safety and Health Administration opinion in the case of *Delek Refining Limited v. Occupational Safety and Health Review Commission*. Delek purchased a Tyler, Texas oil refinery from Crown Central in 2005, and the facility was

inspected by OSHA for four months in 2008 (February to May 2008). In August 2008, the agency cited the refinery for several alleged violations of OSHA's rules regulating "Process Safety Management of Highly Hazardous Chemicals." According to the court, these rules are intended to prevent, or minimize the consequences of catastrophic releases of toxic, flammable or explosive chemicals. Delek sought the commission's review of three citations.

One citation alleged a failure to resolve "open findings and recommendations" identified during earlier process hazards analysis conducted in 1994, 1998, 1999, 2004 and 2005, or before Delek took control of the refinery. Another citation faulted Delek for failing to determine and document a response to the findings of a 2005 compliance audit in a timely manner, an audit that also took place before Delek assumed control. This citation is based on Delek's failure to inspect a "positive pressurization unit" that is a component of the refinery's fluid catalytic cracking unit. The Occupational Safety and Health Commission affirmed these determinations. The appeals court largely argued with Delek.

Delek challenged the first two citations on the basis that they are barred by the law's six-month statute of limitations (29 USC Section 658(c). The secretary of labor argued that these violations were "continuing violations" and therefore the statute of limitations did not apply. Agreeing with Delek and the D.C. Circuit's decision in the case of *AKM LLC dba Volks Contractors v. Secretary of Labor*, 675 F. 3d 752 (CADC 2012), the Fifth Circuit rejects the agency's reliance on a continuing violations exception to the provisions of the statute, at least in cases in which there are no overwhelming threats to worker safety. However, the court affirmed the secretary's interpretation of the application of the OSHA regulatory inspection rules to certain refinery process units.

This decision is noteworthy, not only because the Fifth Circuit is now aligned with the D.C. Circuit on this important issue, but also because the agency has recently published a final rule amending its record-keeping regulations "to clarify that the duty to make and maintain accurate records of workrelated injuries and illnesses is an ongoing obligation" See 81 FR 91792 (Dec. 19, 2016). This rule will be effective on Jan. 18, 2017.

The District Court

On Dec. 23, 2016, the U.S. District Court for the Western District of Louisiana decided an important case involving the issue of an independent contractor's liability for safety and environmental violations on the Outer Continental Shelf. The case is *Island Operating Company Inc. v. Jewell, et al.* In 2013, the U.S. Interior Department's Bureau of Safety and Environmental Enforcement (BSEE) issued a notice of violation to Island Operating following an incident in the Gulf of Mexico involving fire on an OCS platform owned by Apache Corporation, an oil and gas lessee of the Department of the Interior.

Island Operating challenged this citation in court, arguing that the BSEE had no statutory authority to issue this notice to independent contractors working for a lessee, and the court agreed. Reviewing the relevant provisions of the Outer Continental Shelf Lands Act, the court was persuaded that Congress did not grant the BSEE the legal authority to enforce the agency's safety and environmental rules against independent contractors who were not permit holders. It now appears that the important issue of a contractor's liability for alleged civil and criminal violations of the rules of the BSEE will be settled by the Fifth Circuit.

Seventh Circuit

On Dec. 12, 2016, the Seventh Circuit issued a ruling holding that a lower court's decision dismissing the federal government's civil claim that the defendants were at fault in connection with a spill of clarified slurry oil had preclusive effect upon the government's later-filed criminal enforcement case in the same matter. The case is *U.S. v. Egan Marine Corporation and Dennis Michael Egan*. In January 2005, a barge carrying slurry oil that was pushed along by a tug boat exploded, resulting in a spill of the cargo and the death of one of the barge's deckhands. An employee of the tug allegedly directed the decedent to warm a pump by using a propane tank. The propane tank's flame allegedly caused the explosion, the death and the oil spill.

The government initially filed a civil suit in federal court seeking damages, but the district court ruled that the government failed to prove its case, and ruled against it. There was no appeal.

Two years later, the government obtained a criminal indictment against the tugboat company and its employee Dennis Michael Egan for the same incident. Egan was found guilty and sentenced to six month's

imprisonment, and both Egan and the tug boat company were ordered to pay $6.75 million in restitution.

On appeal, the Seventh Circuit held that the outcome of the civil case had preclusive effect upon the criminal case, and the Seventh Circuit reversed the convictions and remanded the case to the district court for the entry of judgments of acquittal.

Tenth Circuit

On Dec. 27, 2016, the Tenth Circuit held, in a 2-1 ruling, that the administrative law judges of the U.S. Securities and Exchange Commission are "inferior officers" and not simply agency employees, and are subject to the appointments clause of the U.S. Constitution. As they have not been appointed and confirmed by the Senate, the ALJ's unconstitutional enforcement decision against David Bandimere in *Bandimere v. U.S. Securities and Exchange Commission*, must be set aside. This decision conflicts with a recent D.C. Circuit ruling in *Lucia v. SEC*, 832 F. 3d 277 (2016). The dissent notes that there are thousands of ALJs employed by the federal government, and this case raises serious questions about their status and civil service protections.

State Courts

District of Columbia Court of Appeals

On Dec. 22, 2016, the D.C. Court of Appeals issued a significant First Amendment ruling in the case of *Competitive Enterprise Institute and National Review Inc. v. Michael Mann*. This lawsuit resulted from articles published by the Competitive Enterprise Institute and National Review, which were sharply critical of Mann's comments and opinions on climate change. He filed a lawsuit in Washington, D.C., alleging that these publications were defamatory and libelous. In reply, the defendants argued that these lawsuits should be dismissed because their comments were protected by the First Amendment and the district's "Anti-SLAPP" Act. Many news organizations filed briefs in support of the defendants.

Nevertheless, the court of appeals held that Mann's defamation claims can be tried, but his claims against National Review must be dismissed.

Conclusion

This brief report of some of the major decisions made by federal and state courts in December 2016 concludes our review of many of the significant environmental and administrative law cases decided in 2016. Looking ahead, the federal courts will, as always, be confronting very vexing legal and procedural issues while the U.S. Supreme Court appears to be poised to clarify the scope of "Auer Deference," an analytical approach established by the court in the case of *Auer v. Robbins*, 519 US 452 (1997). In Auer, the Supreme Court held that the courts should accord substantial deference to an agency's interpretation of its own regulations. It appears that this issue will be front and center when the court reviews the Gloucester County School Board case in the current term.

State courts, which always address some very interesting issues, will principally be concerned with the application of state constitutional and statutory laws. Nevertheless, the work of the state courts often influences the legal debates at the federal level and it is important to stay abreast of their rulings.