White Paper

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Environmental

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Environmental Case Law Update

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"Summer's lease hath all too short a date."—William Shakespeare

Many important environmental and administrative law decisions were reported by the federal and state courts over the past six months. The courts are dealing with very complicated and contentious matters, and, as always, they have tested the force and persuasiveness of the litigants' arguments by the statutory and regulatory provisions at issue.

This 'White Paper' describes and discusses a number of these important and significant cases.

UNITED STATES SUPREME COURT

- Before adjourning in late June, the U.S. Supreme Court announced that it will review a DC Circuit Court of Appeals decision regarding the Federal Vacancies Reform Act, which determines when nominees for agency positions can serve in those positions while their nominations are pending in the Senate. The case is *NLRB v. Southwest General*, and involves a controversy affecting that agency's Acting General Counsel. Because of the lower court's ruling, many administrative decisions were imperiled. It could also affect the actions of the Acting Deputy Administrator of Environmental Protection Agency (EPA).

- In the case of the *United States Army Corps of Engineers v. Hawkes Co., Inc.*, decided May 31, 2016, the Court holds, in a unanimous ruling, that the Army Corps of Engineers' Corps' (Corps) "approved jurisdictional determinations" under its Clean Water Act (CWA) authority, are also final agency actions judicially reviewable under the Administrative Procedure Act (APA). 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, has applied its regulatory definition of the "waters of the United States" to "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 states." The Court notes that it is often difficult to determine whether a particular piece of property contains waters of the United States, "but there are important consequences if it does." The scope of this 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. Justice Kennedy, whose concurring opinion in *Rapanos v. United States*, 531 U.S. 159 (2006), has had significant consequences for the recent regulatory redefinition of "Waters of the United States," expressed some misgivings about the CWA. He notes that the "reach and systemic consequences of the CWA remain a cause for concern."

- 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 Department of Labor regulation that reversed the Department's earlier policy without providing a reasoned explanation for the change.

FEDERAL COURTS OF APPEAL AND DISTRICT COURTS

D.C. CIRCUIT

Court of Appeals

- Lockheed Martin Corporation, one of the largest defense contractors in the United States, operated three California facilities that manufactured solid-propellant rockets for the U.S. Department of Defense pursuant to contracts subject to the Federal Acquisition Regulations. Substantial quantities of hazardous substances were released by the facilities over the years which resulted in extensive environmental contamination, especially groundwater pollution. In 2008, Lockheed filed a Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) Section 107 cost recovery lawsuit against the United States in 2008, seeking the recovery of its past and future costs to remediate these sites. The lawsuit was filed several years after the company began remediation activities at these sites. Both Lockheed and the United States have conceded that they are potentially responsible parties at these sites.

  The Government in turn, filed a CERCLA contribution action against Lockheed, and this long and costly litigation resulted, which the DC Circuit may have finally brought to an end. The case is *Lockheed Martin Corporation v. United States*, decided August 19, 2016. The lower court, after an extensive trial, held that the equitable allocation for the past costs at these sites was NONE for the United States and 100 percent for Lockheed. Going forward, the court equitably 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 decision is reported at 35 F. Supp. 3d 92 (DDC 2014). The Court of Appeals affirmed this determination.

  Because of Lockheed's status as a government contractor with many ongoing contracts with the United States, 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 permitted under CERCLA, but the government contracts allow these legal costs to be recovered. The government argued that all of this amounted to a double recovery that is forbidden by CERCLA Section 114, but the Court of Appeals rejected this argument, observing that by entering into these contracts and other agreements with Lockheed, "we are in no position to save the government from the consequences of its own conduct."

- On August 5, 2016, the DC Circuit reviewed the complaints that the decisions of the U.S. Fish and Wildlife Service (Service) to issue permits to build a wind farm in Ohio violated provisions of National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). The case is *Union Neighbors United v. Jewell*. The Court of Appeals held that the Service failed to comply with NEPA because its environmental impact statement (EIS) did not consider feasible alternatives that would have ensured that fewer numbers of the Indiana Bat, an ESA-protected species-were taken in the course of operating the wind farm. On the other hand, the Service's interpretation of the ESA, as found in its handbook and

policy statements, was entitled to at least "Skidmore deference." The case was returned to the lower court for additional proceedings.

- On August 9, 2016, the DC Circuit held that the administrative law judges employed by the Securities and Exchange Commission were not "Officers" as that term is employed by the Constitution because their actions were also subject to review by the Commission. Since they are not constitutional officers, their decisions cannot be set aside simply because they were not appointed in accordance with the Appointments Clause. This case is *Raymond J. Lucia Companies v. SEC*. This ruling would appear to apply to many ALJs employed by the federal government.

- On July 27, 2016, the DC Circuit released a 152 page opinion essentially upholding every regulatory decision made by the EPA in three major Clean Air Act (CAA) 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*. These new rules, according to the court, "set emissions limits on certain combustion machinery known to release hazardous air pollutants (HAPs)," and each rule was promulgated on March 21, 2011. In 1990, the CAA was substantially revised by the Congress, placing special emphasis on the need to regulate nearly 200 hazardous air pollutants that the Congress identified in the statute.

  The Court of Appeals explains that industrial boilers are used for large scale industrial operations (i.e., manufacturing, mining, refining, etc.), commercial boilers are used by such facilities as shopping centers, laundromats, hotels and apartments, and institutional boilers are used by medical centers, prisons, churches and courthouses. All told, the scope and scale of these rules is very impressive: they will extensively govern the HAP emissions generated by 200,000 boilers at over 100,000 separate facilities. In addition, the third rule, the CISWI Rule, regulates HAP emissions generated by incinerators burning "solid waste" as that term is defined by the Resource Conservation and Recovery Act (RCRA).

  The significance of these rules is attested to by the fact that 30 separate challenges were filed in the DC Circuit by a large group of industry petitioners and a smaller group of environmental petitioners. The Court of Appeals developed separate categories for the many challenges that were made to assist its review under the CAA in particular and the tenets of administrative law in general. There were eight categories developed for the industry petitioners, and 13 categories of challenges for the environmental petitioners. Somewhat surprisingly, the industry petitioners failed to prevail in any of their challenges, while the environmental petitioners were successful in only a few of their arguments. The Court of Appeals vacated one of the new HAP standards and remanded to the agency for further consideration a few other challenges.

- The DC Circuit ruled, 2 to 1, that the EPA satisfied its duties 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 EPA. The case is *Mingo Logan Coal Company v. EPA*, decided July 19, 2016. Mingo Logan Coal also received a section 402 permit from the State of West Virginia pursuant to its delegated authority. The dispute has been the subject of two district court rulings and now two DC Circuit rulings. Judge Henderson ruled that Mingo Logan's argument that EPA was obliged to consider the costs of its action was forfeited because this argument was not effectively made with EPA and the district court. In addition, EPA was under no special obligation to justify its reversal, and that such Supreme Court cases as *Fox Television* had no bearing on this issue. EPA also held, and the Court of Appeals agreed, that post-permit data on the effects of downstream pollution could be weighed by the agency in deciding whether to exercise its veto authority, which is not subject to any temporal limits by

law. Judge Kavanaugh filed a strong dissent, making the case that Mingo Logan had preserved its economic argument, and 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. These "reliance interests" should have been considered by EPA, which argued that it was under no duty to do so. Judge Kavanaugh closed by stating that, "In revoking the permit, EPA considered the benefits to animals, but none of the costs to humans."

- In the case of *Earth Reports, Inc., et al. v. Federal Energy Regulatory Commission*, decided on July 15, 2016, Judge Rogers, writing for the court, affirmed the Federal Energy Regulatory Commission's (FERC) "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. Several environmental organizations objected to this ruling, arguing that FERC failed to consider several possibly adverse indirect environmental impacts this conversion will cause, and that FERC thus failed to satisfy its obligations under NEPA. In a painstaking opinion, Judge Rogers 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 held that FERC's two year study of the environmental impacts of the conversion project was sufficient, and that the FERC's orders are not the legally relevant cause of the indirect effects listed by the petitioners. The Court of Appeals also pointed out that the petitioners were free to raise these objections with the Department of Energy (DOE), which "alone has the legal authority to authorize" increased LNG exports.

- In another Cove Point case, *BP Energy Company v. Federal Energy Regulatory Commission*, decided July 15, 2016, BP, a long-time customer of the LNG terminal's import services, had contracted for pipeline and terminal services valued at $25 million annually, and argued that the decision of the operator of the facility to enter into an agreement with a "turn back" option with Statoil Natural Gas, LLC, was discriminatory under the Natural Gas Act (NGA), and that FERC's approval of this agreement was invalid under the NGA. On appeal, the DC Circuit held that FERC failed to provide an adequate explanation of its interpretation of the relevant provisions of the NGA, and the matter was remanded to FERC for further explanation.

- Also on July 15, 2016, the court announced a unanimous opinion in the case of *Friends of Animals v. Jewell*. This is a case involving the Citizen Suit provisions of the ESA. The petitioner, Friends of Animals, argued that the Department of the Interior (DOI) failed to abide by the statutory provisions of the ESA following its decision to issue positive "90-day Findings" that a listing of the spider tortoise and flat-tailed tortoise as threatened or endangered may be warranted under the ESA. Asserting that it had "informational standing" to bring this deadline lawsuit, the petitioner challenged the failure of the DOI to follow-up these 90-day findings in an expeditious manner as required by law. The DC Circuit, however, affirmed the lower court's decision to dismiss this lawsuit, holding that the relevant provisions of the ESA invoked by the petitioner "does not mandate the disclosure of any information whatsoever."

- On June 3, 2016, the DC Circuit issued a ruling in the case of *State of New York, et al., v. United States Nuclear Regulatory Commission*. The Court of Appeals rejected the arguments made by "several states, a Native American Community, and numerous environmental organizations" objecting to a rule and a generic EIS issued by the Nuclear Regulatory Commission (NRC) concerning the "continued, and possibly indefinite storage" of spent nuclear fuel generated by nuclear power plants operating in the United States. As the Court of Appeals notes, virtually all spent nuclear fuel remains radioactive for thousands of years and must be safely managed and eventually disposed. Without a permanent repository, most spent nuclear fuel must be stored on site, where it is cooled before being placed in dry casks. In 2014, the NRC promulgated a "Continued Storage Rule" and the generic EIS to support the

rule. The Court of Appeals rejected all of the plaintiffs' arguments, including the position that the rule was, in effect, a licensing action, and held that the generic EIS satisfied NEPA. As the court concluded, "this case is not the first, or even the second, time that concerned parties have petitioned this Court to address the spent-nuclear-waste problem," but it reminded the parties that its role in resolving what are essentially political questions is circumscribed by the requirement that such administrative actions must be assessed in accordance with the arbitrary and capricious standard of judicial review.

- On June 3, 2016, the DC Circuit issued another important ruling involving the ESA. The case is *Friends of the Earth v. Jewell*. The court affirmed the lower court, and held that the Service's reinstated "Captive-Bred Exemption," which allows protected antelope species that are bred in captivity to be exempted from ESA's Section 9 prohibitions against taking such species without a permit. In 2009, the lower court held that the exemption, initially crafted in 2005, violated Section 10c of the ESA, and the exemption was revoked by the DOI. However, the Omnibus Appropriations Act of 2014 included a provision directing the Secretary of the Interior to reinstate the exemption. This was done, and the plaintiffs again filed a lawsuit challenging the action, asserting that it violated the ESA, and it was also constitutionally flawed. This time, the lawsuit was dismissed, and this appeal followed. The appeals court first held that the plaintiffs, an advocacy group, has "informational standing" that allowed it to bring this lawsuit. According to the court, Congress, by enacting this exemption, has denied the plaintiffs information regarding permitting requirements, and this is considered an "injury in fact" under circuit precedent. Turning to the merits, the court held that the action by Congress was constitutional, as it did not represent an unconstitutional intrusion into matters committed to the authority of the judicial branch. Judge Sentelle concurred, but he stated that the plaintiffs had not established standing in his view because they did not allege any harm that could be redressed in this litigation.

- Also on June 3, 2016, the DC Circuit issued an 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 plaintiff conducts a charitable operation with the assistance of unpaid consignor volunteers, and the Department stated in a warning letter that it considered this arrangement to be a violation of the Federal Labor Standards Act. The letter advised the plaintiff that its refusal to comply with the Act subjected the plaintiff to civil penalties, and intimated that even more stringent penalties could be assessed for "willful violations." The letters were challenged in court, with the lower court holding that the plaintiff has standing to bring this lawsuit but since this letter was not a "final action," it was not subject to pre-enforcement review in the federal courts. The DC Circuit reversed, holding 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. US* and the recent decision in *US Army Corps of Engineers v. Hawkes* were cited as authority.

- Another important case to be noted is *Association of American Railroads v. US Department of Transportation*, decided by the DC Circuit on April 29, 2016. In the last term of the Supreme Court, this case was reviewed, reversed and remanded to the DC Circuit for consideration of the issues the Court did not decide. That decision of the Supreme Court is reported at 135 S. Ct 1225 (2015). The DC Circuit held that a 2008 transportation act, the Passenger Rail Investment and Improvement Act, unconstitutionally delegated regulatory power to a private entity, Amtrak, which in effect enabled Amtrak to regulate the operations of some of its competing railroads. The Supreme Court held that Amtrak was a governmental body, and remanded the case to the appeals court to decide the remaining constitutional issues. The DC Circuit has now held that Amtrak's exercise of this legislative delegation of authority is unconstitutional on due process grounds, citing the 1936 Supreme Court decision in *Carter v. Carter Coal*, 298 US 238 (1936). Moreover, the 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 Constitution. The arbitrator's authority over the railroads requires that he be considered an Officer of the United States who must be appointed in a manner prescribed by the Appointments Clause.

- On July 5, 2016, the DC Circuit 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 NEPA 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 US Bureau of Ocean Energy Management*.

- The Cape Wind Energy Project would generate three quarters of the electrical power needed by Cape Cod when it is up and running. In fact, 130 large wind turbines, placed in Nantucket Sound, would generate the power, but the Bureau's duty was to ensure that the turbines could be safely moored to the seabed. The court decided that the agency's site-specific geological and geophysical scientific data was inadequate, and the finding was returned to the agency for additional work. However, the court also held that there was no need to vacate the project's existing regulatory approvals, which have been acquired through a tedious slog through several state and federal regulatory regimes, beginning in 2001. The court states that the project is, in one way or another, subject to NEPA, the Outer Shelf Lands Act, the National Historic Preservation Act, the Migratory Bird Treaty Act, the ESA, and the 2006 Coast Guard and Maritime Transportation Act. The opinion makes clear the regulatory hurdles these large projects must negotiate, but it appears that the end may be sight for the project's proponents.

- On July 5, 2016, the DC 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 Office is located in the Executive Branch and it has been engaged in a long-running dispute with the Competitive Enterprise Institute (CEI) with respect to a short, two-minute video released by the Director of the Office, John Holdren. In January 2014, the Director's video claimed that the extremely cold weather experienced in Washington, DC that month (the "polar vortex") could be attributed to climate change. The CEI took exception to this claim as not being supported by scientific evidence and requested copies of the data the director used to make this claim. Eventually, this dispute was litigated in the U.S. District Court in Washington, and a number of rulings have been made by various federal judges, most of them favorable to the CEI's efforts to obtain relevant records under FOIA. In this matter, the DC Circuit reviewed the CEI's attempts to obtain the records of the director found in emails sent to or from his private, non-governmental 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 or turned over. The case was remanded to the lower court to determine if any of these records may nevertheless be subject to any of the current FOIA exemptions.

- The Equal Access to Justice Act (EAJA) directs a court to award fees and other expenses to prevailing parties in civil actions against the United States unless the government's position was substantially justified or special circumstances make an award unjust. The Act has been used to recover attorney's fees from the government in connection with challenges to federal administrative actions. In the case of

Security Point Holdings, Inc. v. Transportation Security Agency, decided on September 2, 2016, the court held that Security Point was entitled to substantial attorney's fees (in the amount of $86,714.78) under the Act when its successful litigation against the TSA was a remand to the agency that required some corrective action. In so ruling, the court overruled an earlier precedent that had the effect of making Security Point ineligible for the award of attorney's fees, and may expand the right to recover these fees in the future.

- Security Point provides plastic bins used to secure items collected from airline passengers as part of the TSA's airport security program. In 2014, the DC Circuit agreed with Security Point that administrative actions taken by the TSA (with respect to advertising on the bins) were legally disadvantageous to Security Point, and that the TSA's response to its complaints, in the form of a letter from its chief counsel, was a final action that could be reviewed by the courts under the Administrative Procedure Act. The court held, in an opinion reported at 769 F. 3d 1184 (CADC 2014), that the agency's action was arbitrary and capricious, and it the matter was remanded to the TSA for correction. When that happened, Security Point made a timely request for attorney's fees in the amount of $108,393.48 under the EAJA. In opposing this fee request, the TSA argued that under DC Circuit precedent, Security Point was not a prevailing party because it had achieved only a "purely procedural victory" as a result of the remand. The court then reviewed its precedents in the perspective of intervening Supreme Court interpretations of the EAJA, and held that the remand "effectuated a court-ordered change in the legal relationship of the parties," and Security Point was eligible to receive attorney's fees from the government. Consequently, "a petitioner who secures a remand terminating the case and requiring further administrative proceedings in light of agency error is a prevailing party without regard to the outcome on remand."

- On June 28, 2016, the DC Circuit denied petitions to review the NEPA environmental issues affecting two separate FERC 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). These cases were argued by and decided by the same attorneys and panel of judges. 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 compliant 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 non-export-related environmental consequences, and that the Commission did not act in an arbitrary and capricious manner. The court's opinion elucidates the "tangled web" of federal export authorization authority. Since the issue of the environmental consequences of exporting natural gas is the responsibility of the DOE, the court advised the plaintiffs that those objections should be raised with the DOE in a separate proceeding. Nevertheless, these are very important rulings because they clarify the different roles played by FERC and the DOE in reviewing these applications.

D.C. District Court

- On August 3, 2016, the US District Court for the District of Columbia temporarily halted a light rail project that will serve the Maryland suburbs of Washington, DC because the EIS prepared by the Federal Transit Administration failed to discuss the alarming drop in light rail ridership in the district and its growing safety problems. Also concerning the court was the fact that at least $1 billion in federal funds would be spent on this project. The case is *Friends of the Capital Crescent v. Federal Transit Administration*.

Second Circuit

Court of Appeals

- On August 8, 2016, the Second Circuit issued a 127 page ruling affirming in all respects the 400 page opinion of the U.S. District Court for the Southern District of New York that found that a massive 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. Donzinger, et. al*. The trial court enjoined Donzinger and his associates from seeking to enforce in the U.S. an $8.6 billion judgment; imposed a constructive trust for Chevron's benefit on any property that Donzinger and his associates received that is traceable to this judgment or its enforcement; held that the conduct of the litigation violated the RICO statutes; and also warranted relief under the common law of New York. The defendants-appellants argued that Chevron had no Article III standing to pursue this action and that to uphold Chevron would violate principles of international comity and judicial estoppel.

- The *Kiobel* ruling is an important decision for corporations with foreign operations. In 2011, the Second Circuit held, in *Kiobel v. Royal Dutch Petroleum*, 642 F. 3d 591 (CA2, 2011), that the Alien Tort Statute (ATS) does not regulate corporate conduct because customary international law does not recognize corporate liability, and therefore the litigation against the defendant could not proceed in the federal courts on the basis of the ATS. The defendant was alleged to have violated environmental human rights in the Congo. That ruling was very controversial, and an appeal was made to the Supreme Court, which upheld that ruling, but on different grounds, The Court held that the ATS is subject to a presumption against the extraterritorial application of domestic statutes, and that presumption had not been overcome by the plaintiffs. See 133 S. Ct. 1659 (2013). Other circuits have issued rulings which disagreed with the Second Circuit, but the original *Kiobel* decision is still the law of the circuit. Recently, a controversy involving the Arab Bank, which is headquartered in Jordan, created an opportunity to revisit this precedent. The case is *In Re: Arab Bank, PLC Alien Tort Statute Litigation*. The Arab Bank was alleged to have distributed funds to terrorists, and a lawsuit seeking damages was filed under the ATS, arguing that the bank had a presence in the U.S. The Second Circuit upheld the lower court's dismissal of the lawsuit on the basis of the 2011 *Kiobel* ruling, and a request for rehearing en banc was made by an active judge on the Second Circuit. On May 9, 2016, the court, in a 4 to 3 vote, decided against rehearing the *Arab Bank* decision, with the majority holding that there was no need to do so since this matter could easily be disposed of by the trial court on the basis of the Supreme Court's decision. Circuit Judge Poole dissented from the denial for rehearing because the initial decision "was wrong" and "every circuit to address the matter agrees that it is wrong."

Third Circuit

Court of Appeals

- On August 9, 2016, the Third Circuit held that a 2014 New Jersey law which partially repealed the state's prohibitions on sports betting was preempted by the federal Professional and Amateur Sports Protection Act. Consequently, the federal law prohibiting sports betting will prevail in New Jersey, where the Legislature was hoping to find a way to generate more revenues for its casinos and racetracks. The en banc court rejected New Jersey's arguments that the federal law was unconstitutional because it "commandeered" the states to act in a way that violates the Constitution. *NCAA v. Governor of New Jersey*.

- On August 8, 2016, the Third Circuit released an opinion rejecting several challenges to environmental permits and authorizations granted by environmental 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 Environment of Environmental Protection*. Transcontinental Gas Pipe Line

Company, LLC (Transco) operates a natural gas pipeline extending from South Texas to New York. Transco proposed a local expansion of this pipeline, which required, in addition to the approval of the Federal Energy Regulatory Commission (FERC), the issuance of facilitating state environmental permits and authorizations in New Jersey and Pennsylvania. These authorizations were granted by the New Jersey and Pennsylvania Departments of Environmental Protection in 2015. According to the court, the agencies reviewed Transco's proposal for potential water quality impacts and issued permits for construction. These permitting actions were challenged by several local environmental organizations in the Third Circuit.

FERC has the exclusive authority to authorize the construction and operation of interstate natural gas pipelines. However, before FERC can grant a certificate of public convenience or necessity, it must examine the potential environmental consequences of the actions it takes in accordance with the provisions of NEPA. The affected states participate in the calculus of environmental compliance of this pipeline project through the exercise of their reviewing authority as provided to them under the federal CAA, the CWA, and the Coastal Zone Management Act. Both New Jersey and Pennsylvania were obliged to determine the water quality impacts, if any, on their states, and issue appropriate permits under state environmental statutes. The New Jersey authorizations were completed in April 2015, and the Pennsylvania actions were completed in July 2015, and this lawsuit was filed soon thereafter.

Before the court could review the merits of these challenges, it 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. The court responded to these arguments by ruling that it had this authority through the NGA; that these states were, in fact and law, acting pursuant to federal law in issuing state permits to Transco. To rule otherwise would be to frustrate the purpose of Congress' grant of jurisdiction to the federal courts under the NGA. The states also argued that their "mere participation" in this permitting scheme did not waive their sovereign immunity, but the court held that their voluntary participation in the regulatory schemes of the NGA and the CWA constituted a waiver of their sovereign immunity, "given the clear language in these statutes subjecting their actions to federal review." Moreover, under Third Circuit precedent, the states' participation in these schemes is a knowing "gratuity waiver." A state may consent to suit in federal court by accepting a gift or gratuity from Congress where a waiver of sovereign immunity may be a condition of acceptance. In addition, a grant of regulatory authority, such as that resulting though the operation of the NGA or the CWA, may be considered a gift or gratuity.

Satisfied that it had jurisdiction to decide these cases, the court made short work of the objections posed to the New Jersey and Pennsylvania permits, and concluded that neither state agency acted arbitrarily or capriciously in issuing these permits or other forms of authorization.

Fifth CircuitCourt of Appeals

- On August 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 (PHMSA) of the Department of Transportation. In March 2013, ExxonMobil Pipeline Company's Pegasus pipeline released 5000 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. *ExxonMobil Pipeline Company v. US 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 re-wrote the existing rules and standards to hold the pipeline liable for violating the Act and the agency's regulations.

The court, applying the standard criteria for evaluating such stay requests, held that the pipeline has not established that it can prevail on the merits, and otherwise seems to express serious misgivings about this line of defense. In any case, the parties were ordered to follow an expedited briefing schedule.

- On August 4, 2016, the Fifth Circuit reversed the trial court's decision granting summary judgment to an insured electrical power generator that sought insurance coverage from its insurance companies to fund the remedial efforts the utility was obliged to perform as part of a Consent Decree the generator executed with EPA to resolve CAA violations. *Louisiana Generating LLC v. Illinois Union Insurance Company*. The underlying policy was subject to the law of the State of New York. Briefly, Louisiana Generating argued that its remediation costs for installing new and expensive pollution control equipment and performing supplemental environment projects pursuant to the Consent Decree were remediation costs encompassed by the insurance policy. The insurer argued that remediation is typically viewed as being direct, physical remediation, and not these indirect remediation efforts. Because of these arguments, the court of appeals held that summary judgment was inappropriate and the case was returned to the lower court.

- On June 2, 2016, the Fifth Circuit addressed a matter of alleged attorney misconduct in *In re Deepwater Horizon*. This controversy also involves Louis Freeh, who was designated a Special Master by the court when allegations of impropriety surfaced involving Andry Lerner, LLC., a firm that represents claimants in the "Court-Supervised Settlement Program" (CSSP). BP funded this administrative settlement program to address another set of specific claimants for oil spill damages. Two CSSP lawyers formerly represented CSSP clients before joining the CSSP staff and they referred these clients to other attorneys in private practice. These lawyers paid referral fees of several thousand dollars to one of the new CSSP lawyers, and former FBI Director Louis Freeh was asked by the court to investigate these payments. He concluded that these lawyers were guilty of misconduct and the trial court issued sanctions disqualifying these attorneys from further participation in the CSSP program. The Fifth Circuit affirmed the lower court's ruling.

- On May 27, 2016, the Fifth Circuit vacated the lower court's ruling, in a CAA 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. *Environment Texas Citizen Lobby, et al. v. ExxonMobil Corporation, et al*. The case was remanded to the district court and a petition for rehearing and en banc review was later denied.

- On June 30, 2016, Fifth Circuit issued a significant ruling involving critical habitat designations on private land in *Markel Interests v. US Fish and Wildlife Service*. The case was decided on a 2 to 1 vote, with Judge 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 CWA considerations.

The dusky gopher frog is an endangered species which is now found only in Mississippi. In 2010, the Service designated 1544 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 that the dissent describes as "unprecedented and sweeping." The landowners argued that this designation of their land: (1) violates both the ESA and the APA; (2) exceeds the Service's constitutional authority under the Commerce Clause, and (3) violates NEPA. The appeals court held that the landowners have standing to contest the critical habitat designation, but no standing under NEPA to challenge the Service's failure to prepare an EIS because in this instance they were asserting purely economic injuries and this is insufficient.

The ESA envisions two types of critical habitat: those that affect occupied and unoccupied areas. The Service conducted a scientific search for the ephemeral ponds the frogs need and found five of them on the plaintiffs' Louisiana property. Next, the Service had to determine whether this land could be adjudged to be "essential" for the conservation of the species. Since that term is not defined in the ESA, and the Service has been delegated authority to make these ESA determinations, the court applied *Chevron* deference to hold that the agency's use of "essential" was authorized. The dissent strongly disagreed with this ruling. Indeed the case may well have turned on this use of the term "essential"; The court then held that the economic calculus made by the Service was committed to agency discretion and it was unreviewable. The landowners argued they stood to lose several million dollars and any economic test would find the agency's determination unreasonable. The Commerce Clause argument failed principally because no court has ruled that the ESA, even when it affects private property, can be challenged as an unwarranted expansion of the Congress' Commerce Clause authority.

In dissent, Judge Owen notes that the only way this species can thrive on this unoccupied land is the hope that the landowners will remove their existing pine trees and replace them with another variety more suitable for the propagation of the dusky gopher frog.

- On June 27, 2016, the Fifth Circuit ruled, in a 2 to 1 opinion, that a 2012 EEOC Enforcement Guidance, entitled "Enforcement Guidance on the Consideration of Arrest and Conviction Record in Employment Decisions Under Title VII of the Civil Rights Act of 1964," was a final action, and the lower court erred in dismissing a declaratory judgment action filed against this Guidance Document by the State of Texas. *State of Texas v. Equal Opportunity Commission*. Texas argues that this document is a binding substantive interpretation of Title VII, and it was adopted in violation of the Administrative Procedure Act. The court held that Texas had standing to bring this lawsuit, and that this document is a final action that can be reviewed in the federal courts, citing the Supreme Court's recent decision in *US Army Corps of Engineers v. Hawkes Co., Inc*. which applied a pragmatic approach to resolving a question whether an administrative determination was a final action for purposes of APA review. Accordingly, the case was remanded to the trial court. Judge Higginbotham dissented, stating that this controversy does not, in his mind, "meet Article III's demand of ripeness, injury and adversarial engagement." Just recently, the Fifth Circuit has withdrawn the *State of Texas v. Equal Opportunity Commission* opinion in order to give the lower court an opportunity to consider the Supreme Court ruling in the *Hawkes* case.

- On July 15, 2016, the Fifth Circuit unanimously granted a stay of EPA's January 2016 Rule which partially approved and partially disapproved the Regional Haze plans developed and submitted to EPA as state SIP submissions by Texas and Oklahoma and replacing the disapproved SIP provisions with a Federal Implementation Plan. This decision, written by Judge Elrod, is a long and complex journey through the CAA. The case is *State of Texas, et al. v. EPA*.

- This is the court's conclusion: "Section 7607(b)(1) directs that challenges to 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. Petitioners have demonstrated a strong likelihood of success in establishing that 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. Petitioners have also shown a threat of irreparable injury if a stay is not granted. Finally, Petitioners have shown that the balance of public interest weigh in favor a stay." The court stayed the Final Rule in its entirety. It was especially critical of 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 EPA has no expertise in this area (FERC did not participate). EPA argued that this case should have been transferred to the DC Circuit because the Final Rule had nationwide impact, and by law, such cases must be heard by the DC Circuit. However, the Fifth Circuit, after reviewing the statute and EPA's arguments, determined that it would not defer to the agency's interpretation of the venue provisions of the CAA.

Sixth CircuitCourt of Appeals

- A case, decided by the Sixth Circuit on June 3, 2016, is noteworthy because it resulted in an opinion affirming the government's use of the criminal restitution laws to require a defendant to pay EPA $10.4 million in restitution. *US v. Sawyer*. Sawyer and his compatriots undertook the salvaging of a 300-acre industrial facility, but without paying much regard to the EPA's asbestos removal standards. An expensive cleanup by EPA resulted, after the defendants failed to abide by various EPA administrative orders. 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 EPA did not have a "possessory interest" in the property made no difference. The defendant objected to EPA's use of a sophisticated accounting spreadsheet known as "SCORPIOS," but the court held that it could have been an abuse of discretion if the lower court approved this sentence based solely on the SORPIOS program, but there was sufficient additional evidence supporting this amount of restitution.

- In *State of Tennessee and State of North Carolina v. Federal Communications Commission*, decided on August 10, 2016, the court held that Section 706 of the Communications Act does not authorize the FCC, acting as a federal agency, to preempt laws enacted by the legislatures of Tennessee and North Carolina to confine municipalities engaged in telecommunications services (by providing internet service) to their current territorial boundaries. Both Chattanooga, Tennessee and Wilson, North Carolina have been very successful in providing internet service when local businesses for one reason or another could not provide the service needed and wanted by most residents. Both cities wanted to expand their service to nearby communities, but the laws of both Tennessee and North Carolina stopped them from doing so. Both cities filed petitions with the FCC to have these state-law barriers preempted by the FCC, and it did so. This appeal followed, and the court held that Section 706 does not explicitly authorize the

Commission to preempt these state laws. Congress could, of course, enact legislation that explicitly grants this power to the FCC, but it has not done so. In addition, the court decided *Chevron* deference need not be accorded the Commission's ruling and interpretation of its authority.

Seventh CircuitCourt of Appeals

- On August 8, 2016, the Seventh Circuit, in a decision affirming the final energy efficiency regulations issued by the DOE for commercial refrigeration equipment, held that 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. *Zero Zone v. U.S. Department of Energy*.

- On June 1, 2016, the Seventh Circuit issued a ruling in *Beatrice Boyer, et al. v. BNSF Railway Company*. A few years ago, the court decided the first case that was generated by a July 2007 flood in Bagley, Wisconsin which damaged many homes there. The plaintiffs' counsel in a federal class action matter filed a lawsuit against BNSF Railway, alleging that its poor maintenance of a railway trestle caused the flood waters to back up and inundate the community. The case was dismissed because these claims were subject to a state statute and they were not properly filed as the state law required. Just before the relevant Wisconsin statute of limitations expired, the plaintiffs' counsel then filed identical claims in Arkansas. That state was selected because BNSF Railway was licensed to do business there. The case was promptly removed to the federal courts in Arkansas, and then to the U.S. District Court in Wisconsin, where it was again dismissed. On appeal, the Seventh Circuit again ruled against the plaintiffs and agreed with BNSF's counsel that plaintiffs' counsel should be sanctioned for engaging in vexatious, objectively unreasonable litigation. The plaintiffs' counsel was ordered to pay BNSF almost $35,000 as reimbursement for its additional costs to defend this matter in the appellate courts.

District Court

- In the case of *National Resources Defense Council, et al. v. Illinois Power Resources, LLC and Illinois Power Resources Generating, LLC*, decided August 23, 2016, the District Court for the Central of District of Illinois held that the defendants, who operate a coal-fired power plant in Bartonville, Illinois, failed to establish that they were entitled to various regulatory and statutory defenses in this CAA citizen suit. The plaintiffs alleged that the power plant had violated the relevant opacity limits on thousands of occasions over a four year period (2008-2014). The plant is subject to particulate matter limits, for which compliance is measured by the degree of opacity which is used as a proxy for the amount of particulate matter the plant emits. The defendant argued that it was in compliance with the particulate limitations at all times, including those times when it was not in compliance with the opacity limits. Moreover, most of the opacity exceedances occurred during those times when the plant's emission control equipment had malfunctioned or had broken down.

  After finding that the plaintiff environmental organizations had standing to file this lawsuit (the court observes that even an "identifiable trifle" can establish an injury-in fact), the court rejected these defenses. To avail itself of the Illinois EPA's regulatory opacity defenses, the defendant was required to conduct the required tests within the required timeframe, but the court determined the defendant did not do this. In addition, the regulatory malfunction defense depended on the defendants' strict compliance with the regulatory requirements to trigger this defense (such as prompt and consistent reporting) and these requirements were not satisfied. Finally, the defendants argued that if the controlling regulations are so ambiguous, then it did not have "fair notice" of the true meaning of these rules. However, the court noted that official policy statements by EPA and state authorities provided fair notice to the regulated community.

Eighth Circuit

Court of Appeals

- On May 20, 2016, the Eighth Circuit reversed the federal district court's decision to grant class certification in an environmental contamination lawsuit. *Ebert, et al. v. General Mills, Inc.*

  General Mills owned and operated an industrial facility in the Minneapolis suburbs from 1930 to 1977, when the property was sold. From 1947 until 1962, General Mills disposed of thousands of gallons of hazardous substances every year by placing the waste in perforated drums and then burying the drums on its property. After the enactment of CERCLA in 1980, General Mills entered into a 1984 Consent Order and Remedial Action Plan with the Minnesota Pollution Control Agency (MPCA) to address the presence, if any, of TCE in groundwater below and near the facility. According to the court, General Mills engaged in groundwater cleanup and remediation efforts for nearly 30 years, and in 2011, in conjunction with the MPCA, began to evaluate the potential for the migration of TCE from shallow groundwater and the adjacent soil. General Mills installed 118 vapor mitigation systems in the neighborhood. All of the plaintiffs in this lawsuit received vapor mitigation systems and filed a lawsuit seeking property damages (for diminution in value) and injunctive relief under RCRA, CERCLA, and on common law grounds. The district court granted the plaintiffs' request for class certification under Rule 23 of the Federal Rules of Civil Procedure, and General Mills appealed the ruling.

  Reviewing the requirements of Rule 23, in particular Rules 23 (b)(2) and (3), the court generally agreed with General Mills that the "exceedingly complex issues of injury and causation unique to each of the proposed plaintiffs in the class defeat considerations required for class certification." The court also stated that "we think it is clear that individual issues predominate the analysis of causation and damages that must be litigated to resolve the plaintiffs' claims," and that the "disparate factual circumstances of class members prevent the claims from being cohesive and thus unable to be certified." The case was remanded and the district court was directed to revisit these issues raised "in conformity with this opinion."

- In a decision released on April 11, 2016, the Eighth Circuit issued a ruling confirming the decisions of the US 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 USDA's grant of authority is not subject to the CWA's wetlands provisions, and indeed may be more comprehensive that any EPA or Army Corps of Engineers' determination. In any case, what may be more interesting is that the petitioners, Arlen and Cindy Foster, were able to avail themselves of direct federal court review of the administrative determinations. 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 CircuitCourt of Appeals

- In *Center for Biological Diversity, et al. v. Bureau of Land Management*, the Ninth Circuit held on August 16, 2016, that the Bureau of Land Management did not violate the ESA when its analysis of plans to expand access for off-road vehicles in the Imperial Sand Dunes Special Recreation Area in California did not include a Biological Opinion with an "Incidental Take Statement" for the threatened Pierson's milkvetch. The court therefore affirmed the lower court's ruling that the BLM complied with the ESA and other environmental statutes in its decision to open the area for off-road vehicles. Parts of the Imperial Sand Dunes Planning Area have been set aside for the protection of plants and wildlife, as well as for outdoor recreation. The BLM's plans to expand access to off-road vehicles have been challenged by the

Center for Biological Diversity (CBD) in a series of lawsuits, including the current litigation. In 2013, the CBD complained that the BLM violated the ESA when its latest Biological Opinion, mandated by the ESA, did not include an "Incidental Take Statement" for this threatened plant species, and that its latest management plans also violated NEPA, the CAA, the Federal Land Policy and Management Act, and the Administrative Procedure Act. The agency responded that Incidental Take Statements are reserved solely for fish and wildlife, and not plant species.

Construing Sections 7 and 9 of the ESA, the Ninth Circuit agreed. When these sections of the law are read together, the court held that the ESA prohibits the taking of fish and wildlife only; therefore, the law does not require that the Biological Opinion contain an Incidental Take Statement for endangered plants. The remaining challenges were analyzed under the "arbitrary and capricious" rubric of the APA, and were similarly rejected.

- An earlier unpublished opinion by the Ninth Circuit, *Ash Grove Cement Company v. Liberty Mutual Insurance Company*, decided May 11, 2016, is worth noting. The court held that the receipt of a CERCLA Section 104(e) information request in a Superfund matter triggers the insurance company's duty to defend its insured. It was argued that this administrative notice and information request is not a "suit" which normally triggers such duties, but the court held this matter is now well settled.

- In a case decided 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 CERCLA. The court was bound by an earlier 2014 Circuit ruling that "disposal" under RCRA does include air emissions of hazardous waste.

District Court

- On June 20, 2016, the US District Court for the Northern District of California held, in *Center for Environmental Health, et. al. v. Vilsack*, that a USDA guidance document, intended to provide guidance with respect to the Organic Foods Act, was a legislative rule, not merely an interpretive statement of agency policy. The Act establishes the standards a product must satisfy to be labeled "organic." Since the guidance document was not issued following notice and comment, the court vacated and remanded it. The California Department of Food and Agriculture is certified by the USDA to administer the program in California, and in 2009, the California agency's inspectors found detectable levels of bifenthrin in three compost products used in organic agricultural operations. Since the substance is not on a "National List" of approved synthetic substances, the USDA rules prohibit this use in compost products. In response to inquiries made by the manufacturer, the department issued the guidance document in question which allows the use of this substance under certain conditions.

  The plaintiffs' challenge was not made until nearly five years had passed since its adoption by the Department of Agriculture, but the court held that vacatur was still appropriate since the issuance of the document effectively amended the operative rule and withdrew a prior basis for enforcement without notice and comment.

- On April 4, 2016, the U.S. District Court for Montana (the Missoula Division) issued an 85-page opinion which vacates the Service's withdrawal of its proposed listing of the North American Wolverine as an endangered species. The opinion includes a very interesting account of the agency's internal struggles to grapple with the import of this listing, and the reliance it placed on climate change modeling, which generated considerable criticism. *Defenders of Wildlife v. Jewell*.

The species' numbers are fairly small and it requires a consistent spring snow cover to thrive. The climate models suggested that this snow cover will be reduced in the coming years. The court held that the decision to withdraw this proposed listing was unduly influenced by "immense political pressure" brought to bear on the agency, and its regional offices by a handful of western states. Moreover, the comments made by a regional director of the Service who was asked to participate in the internal reviews and who criticized the climate models were nothing more than "an unpublished, unreviewed, personal opinion" and were given undue weight. Several energy interests intervened, but the court dismissed their basic argument that the ESA cannot be interpreted to protect subspecies (such as the North American Wolverine) were "unnecessarily and insupportably restrictive," and "defies logic." Accordingly, the court ordered the Service to reconsider its decision.

Tenth CircuitCourt of Appeals

- *Caring Hearts Personal Home Services, Inc. v. Burwell,* a Tenth Circuit Medicare reimbursement case decided May 31, 2016, describes the challenges confronting federal administrative agencies and the regulated community at a time when the demands on and the growth of government are somewhat astonishing. Judge Gorsuch begins his opinion as follows: "Executive agencies today are permitted not only to enforce legislation but to revise and reshape it through the exercise of so-called "delegated" legislative authority...The number of formal rules these agencies have issued, thanks to their delegated authority, has grown so exuberantly it's hard to keep up. The Code of Federal Regulations now clocks in at over 175,000 pages. And no one seems sure how many more hundreds of thousands (or maybe millions) of pages of less formal or "sub-regulatory" policy manuals, directives and the like might be found floating around these days. For some, all this delegated legislative activity by the executive branch raises interesting questions about the separation of powers… For others, it raises troubling questions about due process and fair notice—questions like whether and how people can be fairly expected to keep pace with and conform their conduct to all of this churning and changing "law"…But what happens if we reach the point where even these legislating agencies don't know what their own "law" is?"

District Court

- On June 21, 2016, the US District Court for Wyoming issued a comprehensive ruling holding that the DOI lacked statutory authority to promulgate in 2015 its new rules to regulate hydraulic fracturing operations on federal and Indian lands. *State of Wyoming and State of New Mexico v. U.S. Department of the Interior*. 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 of Appeals was not persuaded that these general statutes provide the authority necessary to promulgate these rules. In addition, while the subject of these rules, hydraulic fracking operations, is a major concern of the Safe Drinking Water Act (SDWA), the revisions to the SDWA in the 2005 Energy Policy Act excludes hydraulic fracking from federal regulation unless the operation involves the use of diesel fuels.

STATE COURTS

TEXAS

- On June 24, 2016, the Texas Supreme Court issued a major decision which explicates the standard for making a private nuisance case. *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 ultra-hazardous activities." With this guidance, the case is remanded to the trial court.

- In another case, *Union Pacific Railroad Company v. Nami*, the Court ruled that Nami, an employee of Union Pacific who contracted a debilitating case of West Nile virus from being bitten by a plague of mosquitos while working on the railroad in Sweeny, Texas (known as the "mosquito capital of the world"), could not recover from the railroad for his injuries under the Federal Employees Liability Act (FELA). There is an exception to FELA liability for injuries resulting from mosquito bites because the insects are classified as "ferae naturae."

- On June 12, 2015, the Court, in a 5 to 4 ruling, held that the plaintiff Houston, Texas homeowners raised a "fact question" in their lawsuit alleging that Harris County and the Harris County Flood Control District subjected their residential properties to inverse condemnation because of their negligence or malfeasance in failing to take taking appropriate measures to protect their property from serious flooding events. As a result, the case should be tried. *Harris County Flood Control District and Harris County v. Kerr, et al.* (In the months that followed, the Houston area was subjected to even more frequent flooding). The gist of the complaint was that Harris County did not exert sufficient control over the threat of flooding when it approved new development and construction without mitigating resulting runoff and drainage problems. Several petitions for rehearing were filed, and rehearing was granted in February 2016. On June 17, 2016, the court withdrew its earlier opinion and held, 5-4, that the homeowners' case must be dismissed. The new majority now holds, as a matter of law, that there was no unconstitutional taking of the homeowners' property in approving private development plans that did not fully implement the county's previously-approved flood control plan. According to the court, "we have made clear that a taking cannot be established by proof of mere negligent conduct by the government." In addition, the court held that if it affirmed the homeowners' theory of liability, this decision would "vastly and unwisely expand the liability of governmental entities, a view shared by many public and private amicus curiae who have urged rehearing…governments must be allowed to survive financially and carry out their public functions."

- On April 29, 2016, the court decided *BCCA Appeal Group, Inc. v. City of Houston*. The Court held, 8-1, 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. Indeed, 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. The consequences of this decision may result in a concentration of air quality enforcement authority in the TCEQ and Texas cities will need to exercise caution in promulgating local ordinances that could conflict with state policy.

- In a unanimous ruling, the Court holds, on June 17, 2016, in *Southwest Properties, Inc. v. Hegar*, Comptroller of Public Accounts of the State of Texas, that the plaintiff did not prove that the sales taxes for which it sought reimbursement were subject to a specific "manufacturing exemption." Southwest

Properties Inc., an oil and gas exploration and production company, purchased and paid sales taxes on casing, tubing, other well equipment and associated services that it used to extract oil and gas. The amount in controversy is nearly $500,000. The Texas Tax Code provides a manufacturing exemption for certain property used in manufacturing, including the "processing" of tangible personal property for resale, its use in a pollution control process, or its use to comply with federal state or local laws that establish requirements related to public health. The court agreed with the Comptroller's Office and the intermediate courts that Southwest was not eligible for this exemption because mineral extraction is not "manufacturing, processing or fabrication." According to the court, it was clear that the legislature intended that such "processing" was limited to the application of materials and equipment to modify or change the characteristics of tangible personal property, and there was no evidence that the equipment and materials purchased by Southwest performed this function on hydrocarbons.

- A case that has been closely followed by 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.

  In 1953, when Texas was enduring another long and severe drought, the City of Lubbock entered into an agreement with the owners of the Coyote Lake Ranch, a very large ranch nearby comprising over 26,000 acres, in which the city purchased an interest in the groundwater beneath the ranch to provide residents of Lubbock and the residents of nearby communities with an additional source of water. The city was authorized to install the necessary wells to recover this groundwater and seven wells have been drilled. The most recent drought prompted the city to greatly increase its "water-extraction" efforts at the ranch. The city planned to install 20 test wells followed by 60 new groundwater recovery wells. The owners of the ranch protested, arguing that such a large scale operation would adversely affect the ranch and its environment, as well as posing a threat to an endangered species, the lesser prairie chicken, that is located on the ranch. The city responded that its agreement with the ranch gave it full rights to go forth, and it had no duty to accommodate the ranchor its concerns because the "accommodation doctrine" does not apply to the owners of groundwater such as the city. The ranch prevailed in the trial court and obtained an injunction, but the Court of Appeals agreed with the city. The court has now reversed the Court of Appeals. If the terms of the parties' agreement do not address such conflicts, the courts must employ the accommodation doctrine as a vehicle to settle the dispute. In this context, the accommodation doctrine would hold that the owner of an interest in the groundwater has an implied right to use the land as reasonably necessary to produce and remove the groundwater, but must exercise that right with due regard for the landowner's rights. According to the court, "[t]he accommodation doctrine, based on the principle that conflicting estates should act with due regard for each other's rights, has provided a sound and workable basis for resolving conflicts between ownership interests."

- In *Caffe Ribs, Incorporated v. State of Texas*, the court held, in a unanimous decision on April 1, 2016, that the trial court in a condemnation proceeding, abused its discretion when it excluded evidence of the State's role in delaying the cleanup of the contaminated property that was relevant to the issue of the market value of the property.

  The petitioner purchased the property in 1995, knowing that the property was contaminated and had to be cleaned up in accordance with the rules and procedures of the TCEQ. Environmental specialists were

engaged to handle the cleanup. In 2000, the source of the contamination was identified and the property was placed in the agency's Voluntary Cleanup Program. Various reports were filed, but the TCEQ was not satisfied with the initial cleanup efforts. Indeed, in 2003, the TCEQ informed the property owner that additional groundwater monitoring wells must be installed. Then the state informed the property owner that it intended to condemn the property or some part of it to facilitate the expansion of Interstate 10. Nevertheless, the owner continued with the TCEQ cleanup but the state notified the property owner that its condemnation would require that all such groundwater monitoring wells be plugged and abandoned and no new monitoring wells could be installed until after the highway expansion project (the construction of a stormwater detention pond) was completed.

In 2005, the state initiated statutory condemnation proceedings which would result in a proper evaluation of the value of the condemned property. At trial, the state's witnesses testified that it would take eight years to clean up the property to make it marketable, and therefore its market value should be discounted to account for this delay. As rebuttal, the condemnee offered testimony that it was the condemnation project itself that is delaying the cleanup, and the court should allow this evidence. However, at the government's request, this evidence was excluded, and the jury determined the value of the condemned property to be almost $5 million instead of $10 million. The Court of Appeals agreed with the trial court that if the exclusion of this evidence was erroneous, it was harmless. The Texas Supreme Court has now reversed these holdings and the matter has been returned to the trial court where the jury can assess the impact of these governmental delays on the value of the property.

- In *Houston Belt & Terminal Railroad Co. et al. v. City of Houston*, decided April 1, 2016, the Court reviewed the implementation of the City of Houston's 2011 drainage fee ordinance. The petitioner railroads (Houston Belt & Terminal, BNSF Railway, and Union Pacific Railroad) were assessed substantial new annual city drainage fees of $3 million by the City's Director of Public Works. The director determined that all of the railroads' properties within the City of Houston "benefitted" – a term in the city ordinance—from the city's drainage system, and that 93 million square feet of railroad property was "impervious," allowing stormwater to runoff into the drainage system which collected and otherwise managed this runoff. The director made his determination of assessable property on the basis of aerial images and not digital map data as required by the ordinance. For this reason, the railroads protested this new assessment and filed a lawsuit to challenge it. The city moved to dismiss the lawsuit on the basis of governmental immunity, but the court noted that the defense of governmental immunity does not "bar claims that a government officer acted ultra vires, or without legal authority." Reviewing its case law and the pleadings, the court held that the railroads' pleadings were sufficient to confer the trial court with jurisdiction over their claims that the director acted in an ultra vires capacity when he determined the extent of the impervious surface area of their properties.

Intermediate Court of Appeals

- In a "case of first impression," the Third Court of Appeals, sitting in Austin, issued an important decision interpreting the scope of the Texas Solid Waste Disposal Act (TSWDA) as it pertains to the judicial review of certain administrative cleanup orders issued by the TCEQ. In general, relatively few opinions have been issued interpreting the TSWDA, and in particular, Subpart F of the TSWDA which is the Texas counterpart to CERCLA (or Superfund), entitled "Registry and Cleanup of Certain Hazardous Waste Facilities." This case is *TCEQ v. Exxon Mobil Corporation; Exxon Mobil Oil Corporation; Pennzoil-Quaker State Company*; and Shell Oil Company, and it involves the Voda Petroleum State Superfund Site. The case was decided on April 8, 2016.

The site was used by Voda Petroleum for oil-blending and oil-recycling from 1981 to 1991, when operations ceased and the site was abandoned. In 1999, EPA referred the site to the TCEQ to have it

cleaned up pursuant to Texas law, namely the TSWDA. The site was eventually added to the state Superfund Registry. In 2010, the TCEQ issued a unilateral administrative order to several hundred potentially responsible parties (PRPs), ordering them to conduct remedial cleanup actions under Sections 361.188 and 361.322 of the TSWDA.

Exxon Mobil and Shell filed a lawsuit in the Travis Country District Court challenging the order and seeking declaratory relief, to which the agency responded and filed a counter petition seeking cost recovery against Exxon and Shell and other responsible parties. After a few years dedicated to discovery, the TCEQ filed a plea to the jurisdiction arguing that the court had no jurisdiction to hear this case because the state had not waived sovereign immunity, and even if the court had jurisdiction, the appropriate standard of review was the "substantial evidence test" as applied to the administrative record. Exxon and Shell argued that the Voda Order was in fact issued under both Sections 361.182 and 361.272 of the TSWDA, meaning that the proper standard of review was the "preponderance of the evidence test," which would require the TCEQ to prove liability under the law, conceivably a much more onerous test for the EPA to overcome.

The Court of Appeals agreed with the respondents, holding that in this instance, the agency has the burden of proof in seeking to enforce this order, and that the Texas Legislature has waived any defense of sovereign immunity. Given the significance of this decision, an appeal to the Texas Supreme Court seems likely.

- On August 17, 2016, the Fourth Court of Appeals, sitting in San Antonio, held 2-1, that a City of Laredo ordinance prohibiting the distribution of "single use" plastic bags at check-out counters in order to reduce litter was preempted by state law, namely, Section 361.0961 of the TSWDA. The case is *Laredo Merchants Association v. City of Laredo* and it could be important for many Texas cities coping with solid waste management issues. Section 361.0961, enacted in 1993, is entitled "Restrictions on Authority of Local Government or Other Political Subdivision," and provides that no local ordinance shall prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law. The City of Laredo is a home rule city, and as such it possesses "broad discretionary powers of self-government," unless the Texas Legislature has expressly placed limits on these powers. Texas home rule cities cannot enact an ordinance that contains a provision that conflicts with the Texas Constitution or the general laws of the State of Texas. A local merchants association challenged this ordinance, but the trial court granted summary judgment to the City of Laredo and this appeal followed.

- On August 4, 2016, the First Court of Appeals, sitting in Houston, issued an interesting ruling in the case of *Manderscheid v. LAZ Parking of Texas and Boot Man, Inc.* Phillip Manderscheid's car was booted, and learning that he had the right to a hearing to complain about the fairness of this action, he sought a hearing at the Justice of the Peace (JP) Court and the County Court of Law in Houston. While the JP Court provided him a hearing-and denied relief, the County Court denied his appeal and also held he had no right to a jury to hear his case. The Court of Appeals reversed the County Court, and now anyone upset with having their cars "booted" and paying the fees to have the car returned to them, now have the right to a jury trial.

- On August 4, 2016, the Fourteenth Court of Appeals, sitting in Houston, decided the case of *Oil Tanking Houston, LP v. Delgado, et al*, a personal injury action. Delgado was the employee of an independent contractor and died in an oil storage tank explosion on an Oil Tanking Houston, LP oil storage facility located adjacent to the Houston Ship Channel. A wrongful death claim was tried before a jury, and a $21 million judgment was entered against Oil Tanking. On appeal, the jury verdict was reversed because the

plaintiffs failed to comply with Chapter 95 of the Texas Civil Practice and Remedies Code, which limits the exposure of such defendants as Oil Tanking. This is a tort reform law which makes it more difficult to hold the facility owner liable in such litigation unless there's a very strong case of negligence on the part of the facility owner.

PENNSYLVANIA

- On July 26, 2016, an intermediate Pennsylvania appeals court, the Commonwealth Court of Pennsylvania, reviewed and rejected a petition for mandamus filed against the Governor of Pennsylvania and various Pennsylvania executive agencies by the guardians of several minor children who argued the defendants had a duty to develop a comprehensive plan to regulate the state's emissions of CO2 and other greenhouse gases that contribute to climate change. The court held the petitioners had standing to bring this action and the court had jurisdiction to hear it. However, despite the approval of the Pennsylvania Environmental Rights amendment to the state constitution, the court observed that the petitioners could not point to any legislative actions that mandate the defendants to take the actions demanded of them. *Funk, et al. v. Tom Wolf, Governor of Pennsylvania*.

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 of considerable importance to petroleum retailers in Massachusetts. 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) and Response [?] which, in many ways, is the state's counterpart to the federal CERCLA. 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 CERCLA. Indeed, under CERCLA, leaded gasoline, the substance at issue here, would likely have been exempted by CERCLA from most cleanup requirements.

  Peterborough owns a property that was formerly the site of a gasoline service station, from which there was a release in 1994, and which Peterborough has been cleaning up and monitoring ever since. In 2007, the MDEP promulgated an "oil exemption" in its rules addressing the cleanup and remediation of spills and releases of hazardous materials within a specific radius of a public water supply. The exemption is located in the MDEP rules at 310 Mass. Regs. Section 40.0924(2)(b)3a—"contamination is limited to Oil." After the exemption was created, Peterborough submitted a revised remediation plan, arguing that since there was now an oil exemption, the leaded gasoline should be interpreted as being "oil" under the law, and if so, its remediation obligations may well have been satisfied. The MDEP disagreed, stating that it has always interpreted the oil exemption to be limited to petroleum hydrocarbons naturally occurring in oil and not to such gasoline additives as lead. The dispute was then litigated, and now the Supreme Judicial Court has decided that the MDEP was correct in its consistent interpretations of its own rule, which it found to be reasonable, given the policies behind the enactment of the MOHMRPA and the remedial purposes it is intended to serve. Before the MDEP promulgated the oil exemption, it studied the hazards posed by spills of different chemicals released in soil and groundwater, and the agency concluded that the release of petroleum hydrocarbons pose a low safety

risk to specified public water supply systems. 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. Consequently, "oil" as defined by the MDEP in these regulations does not extend to releases or spills of leaded gasoline.

- On May 17, 2016, 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." *Isabel Kain and Others v. Department of Environmental Protection*.

  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 January 1, 2013, and to expire on December 31, 2020.

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.

- Construing the Colorado Ski Safety Act of 1979 (SSA), the Colorado Supreme Court holds that fatal avalanche that occurred within the bounds of the Winter Park ski resort was an "inherent danger and risk of skiing" and the SSA precludes skiers or their families from bringing claims against the operators for any resulting injuries. The case is *Fleury v. IntraWest Winter Park Operations Corp.*, decided May 31, 2016. The Court ruled, in a split decision, that since the SSA's definition of "inherent risks of skiing" specifically includes "snow conditions as they exist or may change," it must also which must encompass an avalanche which, at its core, is the movement or changing condition of snow. Although it was alleged that the operators of Winter Park were well aware of avalanche warnings from the Colorado Avalanche Information Center and the unstable condition of the snow on the ski run, the run was not closed, nor were warning signs posted.

The dissent noted that the term "avalanche" does not appear in the SSA and the justice was reluctant to add to the SSA's already lengthy list of inherent skiing dangers. As a result of this decision, the dissent observes that the SSA does not require ski operators to mitigate avalanches or to issue avalanche warnings, and the majority's holding, "today abrogates any common law duty of care to do so."

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 lawnmowers). 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.

NORTH CAROLINA

- On June 10, 2013. The Supreme Court of North Carolina issued a unanimous ruling affirming the intermediate appellate court's decision that the use of the state's Roadway Corridor Official Map Act (Map Act) by the North Carolina Department of Transportation (NCDOT) amounted to a taking of the plaintiff's property without just compensation. *Kirby, et al., v. North Carolina Department of Transportation*. In connection with its responsibility to develop highway transportation projects, the NCDOT is authorized to file a highway corridor maps with the affected county register of deeds. When this takes place, no building permit can be granted to property within the highway corridor. Despite the restrictions placed by the law on the use of property within the designated and recorded highway corridor, the NCDOT is not required to build or complete the highway project.

  The highway project that is at the heart of this case is alleged to have been in the planning stage since 1965 and shown on the planning maps since 1987, with the route determined by the 1990s. The plaintiff landowners filed separate complaints against the NCDOT asserting constitutional claims based on alleged taking without compensation, and these claims were consolidated for case management purposes. The trial court denied relief, holding that the NCDOT was asserting its police power, and that a regulatory taking through the exercise of its police power occurs only when the statute deprives the owners of all practical use of their property, and that the mere recording of these maps does not constitute a taking. The appeals court reversed the trial court, holding that these actions of the NCDOT were not exercises of the NCDOT's police power. Indeed, the court viewed the Map Act as cost-controlling legislation that allows the NCDOT to employ the power of eminent domain. By imposing restrictions on the use of the plaintiffs' property, the Map Act resulted in a taking of their "elemental property rights."

In affirming the appeals court, the North Carolina Supreme Court held that the Map Act is not a valid, regulatory use of the police power; that the right to own property is a "fundamental right, as old as our state"; and that the law has jealously guarded against the government's taking of property. It observes that the state must compensate for taking property rights by eminent domain, noting that damages resulting for the use of an NCDOT's police power are not compensable. In sum: "By recording the corridor maps at issue here, which restricted plaintiffs' rights to improve, develop and subdivide their property for an indefinite period of time, NCDOT effectuated a taking of fundamental property rights." On remand, the Supreme Court directed the lower courts to determine the value of the loss of these fundamental rights.

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. Following very heavy rains in July 2010, the Metropolitan Water Reclamation District of Greater Chicago allegedly diverted storm water to nearby creeks and took other actions which exacerbated local flooding conditions. The lower court, relying on Illinois case law, held that the state does not recognize a takings claim based on temporary flooding. However, the plaintiffs argued that the U.S. Supreme Court's 2012 decision in *Arkansas Game and Fish Commission v. United States*, 133 S.Ct. 511 (2012), which held that temporary flooding can constitute a "taking" under the federal constitution, must be acknowledged. The lower court then certified this question to the Illinois Supreme Court: Did the Supreme Court's ruling in Arkansas Game and Fish Commission overrule an inconsistent Illinois state court ruling interpreting the Illinois constitution? The Illinois Supreme Court would not go that far, concluding that since "taking" can be interpreted the same under both constitutions, the Illinois courts can use the factors discussed by the U.S. Supreme Court to determine whether a compensable taking occurred.

If you have any questions about the content of this Alert, please contact the Pillsbury attorney with whom you regularly work, or the author below.

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