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## Supreme Court's Environmental and Administrative Law Decisions in 2015-2016 Term

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*This Advisory briefly reports on some of the significant U.S. Supreme Court actions from January through June 2016 related to environmental and administrative law.*

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### Review of U.S. Court of Appeals Decisions and Actions Interpreting Federal Law

- **Energy Regulation.** On January 25, 2016, the U.S. Supreme Court reversed the D.C. Circuit Court of Appeals and held, in *FERC v. Electric Power Supply Association*, that the Federal Power Act (FPA) authorizes the Federal Energy Regulatory Commission (FERC) to regulate market operators' compensation related to "the sale of electric energy at wholesale in interstate commerce." This directly affects wholesale electricity rates and action that affects such rates, but does not regulate retail sales or "any other sale" of electricity, which is left to the states to regulate. Because electricity rates rise dramatically during peak periods, market operators had created demand-response programs whereby they paid consumers to reduce power use during peak periods. FERC had decided that demand-response providers were to be compensated for conserving energy at the marginal locational price—or the same price paid to generators for producing energy—instead of at the marginal locational price less the rate for electricity, so long as the bids accepted by the providers saved consumers money. The D.C. Circuit vacated the "demand-response" rule, deciding that FERC lacked authority to directly regulate the retail electricity market, and that the compensation scheme was arbitrary and capricious. The Court determined that the rule was not arbitrary and capricious given FERC's detailed explanation for its decision and lengthy response to competing views, and Chevron deference played no role in this decision; the "Chevron deference" test is set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court noted that if FERC could not regulate wholesale demand-response rates, it would run afoul of the FPA's core purposes of ensuring the effective transmission of electric power and protecting against excessive prices.
- **Energy Regulation.** On April 19, 2016, the Court, in *Hughes v. Talen Energy Marketing*, affirmed a decision that struck down a Maryland regulatory program that encouraged development of in-state power generation as being preempted by the FPA. The FPA vests exclusive jurisdiction over interstate

wholesale electricity rates with the FERC. As part of the program, Maryland selected a company to construct a new power plant, and required that electric utilities enter into a twenty-year pricing contract with the company at a rate specified by the company. If the company was unable to clear certain prices at regional transmission organization (RTO) auction, the utilities had to cover the difference of the company's full contract price (via a "contract for differences"). However, FERC has exclusive jurisdiction over wholesale electricity pricing and has approved the RTO auction as the sole rate-setting mechanism, thereby deeming its price just and reasonable. Because Maryland's program adjusted interstate wholesale rates, the program infringed upon FERC's authority and the division between state and federal regulators. The Court noted that no state is precluded from encouraging new or clean energy generation, but that it cannot do so by conditioning payment of funds on clearing certain prices at an RTO auction.

- **Public Lands/Statutory Interpretation.** In *Sturgeon v. Frost*, decided on March 22, 2016, the Court unanimously rejected a Ninth Circuit Court of Appeals interpretation of the Alaska National Interest Lands Conservation Act. However, the Court did not offer its own interpretation of the Act, instead vacating and remanding to the lower court what many have referred to as a "very hard" case. The National Park Service (NPS) had tried to enforce a nationwide ban on hovercrafts on public lands against John Sturgeon, who had used a hovercraft on a navigable river in Alaska, because the river was part of a federally delineated conservation service unit. Sturgeon claimed that river was non-public land and thus not within NPS's jurisdiction. He cited a provision in the Act that states that "[n]o lands which ... are conveyed to the State, ... or to any private party shall be subject to the regulations applicable solely to public lands within such units." Thus, the issue of the case was whether waters flowing through federally managed preservation areas constituted public or non-public land. The Ninth Circuit, emphasizing the word "solely," interpreted the provision as limiting NPS's jurisdiction over non-public lands only when dealing with an Alaska-only rule. The Court rejected this "topsy-turvy" interpretation of the statute as "implausible when read in context with the rest of the statute," but declined to offer further guidance before remanding the case.
- **Land Regulation/Tribal.** Also on March 22, 2016, the Court affirmed a lower court's decision that an 1882 law that authorized the Secretary of the Interior to open up the sale of approximately 50,000 acres of reservation land to non-Indian purchasers did not diminish the size of an Omaha Indian Reservation. Justice Thomas wrote the majority opinion in *Nebraska v. Parker*, and confirmed the Court's oft-stated precedent that only Congress has the authority to regulate the size of Indian reservations, and that there was no evidence here that Congress had pared down the size of the land through the authorization.
- **RICO/Offenses Committed Abroad.** In the latest ruling in a case that has been litigated for many years, the federal government secured a partial victory when the Court, in *RJR Nabisco v. The European Community*, unanimously agreed on June 20, 2016, that the Racketeer Influenced and Corrupt Organizations Act (RICO), a law that was enacted to target organized crime, can apply to offenses committed abroad, so long as the government is prosecuting the offenses and they violate a predicate statute that has extraterritorial effect. The Court noted that although RICO, by its terms, does not explicitly apply in foreign countries, many statutory predicate acts apply to overseas conduct. However, the Court divided 4 to 3 in its decision that private plaintiffs filing civil suits must prove a domestic injury. With respect to RICO's private right of action, the Court held that the Congress, in enacting RICO, did not clearly indicate that it intended to provide a private right of action for injuries suffered outside of the United States. Unlike the ruling in *Kiobel v. Royal Dutch Petroleum Company* in 2013, the presumption against extraterritorial effect of U.S. laws can be overcome.

## Review of Administrative and Regulatory Decisions

The Court decided several cases in 2016 that could significantly affect administrative law and the regulated community.

- **Clean Water Act/Administrative Procedure Act Finality.** In a predictable unanimous decision, in *U.S. Army Corps of Engineers v. Hawkes Co.*, decided May 31, 2016, the Court held that jurisdictional determinations (JD) by the U.S. States Army Corps of Engineers under the Clean Water Act (CWA) are final agency actions, and are thus judicially reviewable immediately under the Administrative Procedure Act (APA). The Corps issues JDs to interested property owners to determine whether the wetlands or other bodies of water on their land constitute “waters of the United States,” which are subject to federal jurisdiction and a lengthy and costly permitting process. Here, the property owner sought judicial review of a JD that determined the waters on his land were jurisdictional. However, because judicial review is only available for final agency actions, the issue was whether the JD met the two-prong test of APA finality. The parties agreed that the JD consummated the Corp’s decision-making process (prong one); thus, the issue was whether the JD constituted an action “by which rights or obligations have been determined, or from which legal consequences will flow” (prong two). The Court determined that a JD does carry legal consequences, primarily because of the Memorandum of Agreement (MOA) between the Corp’s and the Environmental Protection Agency (EPA)—the two agencies that share enforcement authority under the CWA. Specifically, the MOA provides a five-year “safe harbor” for the applicant, which creates concrete legal consequences.
- **Standing.** On May 16, 2016, in *Spokeo v. Robins*, the Court determined that the Ninth Circuit incompletely analyzed Article III standing by making observations only about “particularization,” when an “injury in fact” must be particularized *and* concrete. In a 6 to 2 decision authored by Justice Alito, the Court vacated and remanded the case to the Ninth Circuit, instructing the lower court that a “concrete” injury need not be a “tangible” one, but that the lower court needed to analyze whether the particular violations alleged by the plaintiff created a “degree of risk sufficient to meet the concreteness requirement.” This decision not only clarifies what is required of lower courts when they perform a standing analysis, but it also leaves open the possibility that the case could return to the Court. As stated by the Court, “a bare procedural violation, divorced from any concrete harm, cannot satisfy the injury-in-fact requirement of Article III.”
- **Standing.** On June 23, 2016, in an equally divided one-line per curiam opinion in *U.S. v. Texas*, the Court affirmed a Fifth Circuit Court of Appeals judgment that Texas and other states have standing, as well as a substantial likelihood of success on their substantive and procedural claims, to sue and temporarily enjoin the implementation of the Department of Homeland Security’s (DHS) Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. DAPA establishes criteria for determining when prosecutors can choose not to enforce immigration laws. Texas and other states brought suit arguing that DAPA violated the APA by avoiding the notice-and-comment process, and because it was arbitrary and capricious. Further, the state’s claim that DAPA violates the Take Care Clause of the Constitution. The Fifth Circuit found that the states have standing, in part, because of the cost to the states of issuing drivers licenses to aliens. The Court’s ruling left in place the lower court’s preliminary injunction that blocked the program’s implementation, but did not set any precedent. However, the case may reach the Court again.
- **Agency Interpretation/Chevron Deference.** In a 6 to 2 decision, the Court again reminded federal agencies that the statutory interpretations guiding their decisions should be well and carefully reasoned. *Encinco Motorcars, LLC v. Navarro*, decided on June 20, 2016, considered a provision in the Fair Labor Standards Act (FLSA), which exempts “any salesman, partsman, or mechanic primarily engaged in

selling or servicing automobiles” from an employer’s obligation to pay employees overtime. Although the statute clearly applies to those who sell or fix automobiles, the Department of Labor (DOL) administratively determined that it did not also apply to those who sell automobile services. However, the DOL later changed its view and determined that car dealers must pay overtime to service advisors. Although courts typically defer to agency interpretations under *Chevron*, the Court criticized the DOL for failing to offer any explanation for its regulatory change and emphasized that, “an agency must give adequate reasons for its decisions.” Because the DOL failed to explain why it changed its view, the Court held that the DOL’s interpretation did not warrant deference and sent the case back to the Ninth Circuit to determine whether the statute requires that overtime be paid to service advisors.

### Review of Other Actions

The Court took two actions in 2016 related to issuing stays of a federal regulation.

- **Clean Air Act/EPA Clean Power Plan.** On February 9, 2016, in *State of West Virginia et al. v. EPA, et al.*, the Court halted implementation of a federal regulation by granting a stay of the EPA’s Clean Power Plan (CPP), pending resolution of the challenges to the program before the D.C. Circuit—which heard oral arguments on June 2, 2016, and likely will not issue a decision until early fall. The CPP seeks to control greenhouse gas emissions, and multiple stay applications were filed by numerous industry groups and more than twenty-four states. As a result of the stay, the EPA may not implement, enforce, or take any action on the CPP until disposition of “the applicants’ petitions for review” in the D.C. Circuit, “and disposition of the applicants’ petition for a writ of certiorari, if such a writ is sought.” The stay will terminate if the Court denies the petition or enters its judgment. Justices Ginsburg, Breyer, Sotomayor and Kagan would deny the application.
- **Mercury Air Toxics Standard.** In a decision from the 2014-2015 term, *Michigan v. EPA*, the Court held that the EPA’s Mercury Air Toxics Standards (MATS) regulation was invalid because the EPA did not conduct a cost-benefit analysis before beginning the regulatory process. On March 3, 2016, Chief Justice Roberts rejected the plea of more than twenty states—undoubtedly emboldened by the stay granted for the EPA CPP—that asked the Court to stay or enjoin “further operation of the Mercury and Air Toxics rule,” in keeping with the Court’s ruling last year. The EPA responded that a stay was unnecessary, because it was working to fix the problems identified by the Court, and that the problems would be fixed within a month; a timeframe within which the states would not suffer irreparable harm.

### Declined to Review

The Court declined to review two cases in 2016 that may have implications for environmental law.

- **CWA/American Farm Bureau Federation.** On February 29, 2016, the Court declined to hear a challenge by the American Farm Bureau Federation to the EPA’s ambitious regulatory pollution-control plan for the Chesapeake Bay, which means that the 2015 ruling of the Third Circuit affirming the plan stands. The Third Circuit held that it was within the EPA’s authority to regulate, by means of multi-state Total Maximum Daily Load (TMDL), the runoff of pollutants into the Chesapeake Bay Watershed. In 2010, the EPA attempted to restore clean water to the watershed by issuing the Chesapeake Bay TMDL, which called for a reduction in the percentage of pollutants that annually entered the watershed (25% reduction of nitrogen, 24% of phosphorus, and 20% of sediment), which affects many neighboring states and industries.

- **Groundwater Contamination/Exxon Mobil.** On May 16, 2016, the Court, in *ExxonMobil Corp. v. New Hampshire*, declined to hear an appeal by Exxon Mobil Corp. regarding a record-breaking damages award it owes New Hampshire for groundwater contamination. In 2015, the New Hampshire Supreme Court upheld a 2013 jury award for \$237 million in damages as a result of a spill of the fuel additive methyl tertiary butyl ether (MTBE)—the largest MTBE-related award in the state’s history—which purportedly contaminated nearly 6,000 drinking wells. Exxon, in its appeal, argued that the imposition of liability was based purely on statistical evidence—a study of 177 wells that found contamination in six wells—which, they claimed, thwarted their due process right to present individualized defenses to all elements of liability.

### Cases of Interest in the Next Term

- **Regulatory Takings.** The Court will soon hear a case that could affect “takings” jurisprudence. In *Murr v. Wisconsin*, the Court will confront regulatory takings, and many are hoping that it will clarify *Penn Central* and, specifically, the meaning of “the parcel as a whole.” In 1960, a family purchased a 1.25-acre lot (Lot F), upon which they built a cabin. Several years later, they purchased an adjacent 1.25-acre lot (Lot E), upon which they did not build, and which they later gifted to their children. When the children explored selling the lot, the government prohibited it because the 1.25-acre lot was not large enough for development according to county and state regulations. Because the two lots were commonly owned, the government combined the two and asserted that they could only be sold together. The family sued the state of Wisconsin and the county where the land is situated and claimed that the governments’ actions deprived them of the value of their lot (Lot E) without just compensation, in violation of the Fifth Amendment Takings Clause. *Penn Central*—the test under which regulatory takings claims are analyzed—applies its three factors to “the parcel as a whole,” and thus, this issue turns on the definition of the “whole” parcel; the “*Penn Central* test” is set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). According to the government, both parcels together should constitute the “whole” parcel, and thus the taking is of only half of the parcel and not unconstitutional. The family argues that Lot E should be analyzed individually and is a taking of the “whole” parcel. Without further guidance, lower courts will be left to determine when combination is permissible and when it is not. The Court granted review after the Supreme Court of Wisconsin declined to hear the appeal of the case from the Wisconsin Court of Appeals.
- **Presidential Appointments.** The Court, in *NLRB v. SW General, Inc.*, is set to review a D.C. Circuit decision (reported at 797 F.3d 67) regarding interpretation of the Federal Vacancies Reform Act (FVRA). Under the FVRA, there are two ways for a vacant Executive agency office to be filled: (1) the first assistant to the vacant office automatically becomes the acting officer if that person *served as first assistant for at least 90 days in the previous year*; or (2) the president may appoint someone who “serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate” as the acting officer. However, another FVRA provision states that a person may not serve as an acting officer if the person is nominated by the president to permanently fill the position unless the nominee was the *first assistant to the vacant position for at least 90 days in the previous year*. Thus, the issue is whether the prohibition that an acting officer cannot be nominated to permanently fill the position unless the person has served as first assistant to the vacant position for at least 90 days in the previous year applies only to first assistants who automatically become acting officers by virtue of their position, or whether it applies to all acting officers, including those appointed by the President. The D.C. Circuit held that it applies to all acting officers and, accordingly, struck down a decision that was made by an acting officer who was appointed, and later nominated, by the President, because the acting officer/nominee had never served as first assistant to the position, and thus he was serving in violation of the FVRA. The National Labor Relations Board (NLRB) is seeking review of the

decision, arguing that the D.C. Circuit's interpretation conflicts with the one relied on by every President since the law's passage and that it will severely impede a President's ability to temporarily fill Executive positions with people who are most qualified to permanently fill them. The case is significant because other federal officers will be affected by the Court's ruling.

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