Environmental Litigation

2017 Year-End Update

Walsworth is pleased to provide you with its year-end update regarding environmental litigation.

Executive Summary

From a regulatory standpoint, 2017 was a busy year. With the election of Donald Trump as president of the United States, the administration has quickly gone after what the Republicans have long argued is wasteful and overbearing regulation. The result has been a comprehensive dismantling of several regulatory frameworks. Ongoing litigation leaves much of these efforts to deregulate tenuous. Moreover, efforts by states and nongovernmental agencies to step into the regulatory vacuum are creating the potential for not just "business as usual," but a more complicated and disparate patchwork regulatory environment. While a lot of uncertainty remains, one thing is clear: 2018 will be a year in which new players sort out their respective roles and responsibilities.

The Political Landscape under President Trump

► Continued Signs of Deregulation

The Trump administration continues to lag in appointments to key positions. While the administration places much of the blame on Congress, as of January 12, 2018, there are no pending nominees for 245 of the 626 jobs The Washington Post tracks. A total of 559 of those jobs require congressional approval to fill, further weakening the administration's efforts to blame Congress.

Whatever the cause of the delay in making appointments, it is clearly consistent with this administration's stated goal of reducing the size of the federal government.

President Trump's proposal to slash the EPA's budget by 31 percent, or $5.65 billion, is also consistent. This budget is some $2.6 billion lower than the 2017 budget and anticipates a work force of 11,511, compared to 2017's 15,408 full-time equivalents.

► Waters of the United States Rule

Keeping true to his word, on February 28, 2017, President Trump issued his executive order "Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule" to roll back the waters of the United States, or WOTUS, rule.

The WOTUS rule, promulgated by the EPA and the Army under the Obama administration in 2016, established a long-missing definition of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science (80 CFR 37053). According to many critics of the rule, it was overly inclusive and vague, and it failed to consider the potential economic impacts of its application.

On July 27, 2017, the Department of Defense (DOD) and the U.S. Environmental Protection Agency(EPA) issued their joint proposed rule (under 33 CFR Part 328 and 40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302 and 401, respectively) to "initiate the first step in a comprehensive, two-step process intended to review and revise the definition of 'waters of the United States' consistent with the February 28, 2017, Executive Order." The

public comment period on the proposed rule closed on September 27, 2017.

Section 3 of that executive order requires the administrator of the EPA and the assistant secretary of the Army to consider, in future rulemaking, with regard to the definition of "Navigable Waters" as used in the CWA, the majority opinion of Justice Scalia in the case of *Rapanos v. United States* (2006) 547 U.S. 714. There, Justice Scalia held that the term "navigable waters," under the CWA, includes only relatively permanent standing or flowing bodies of water, not intermittent or ephemeral flows of water, and only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right are considered to be adjacent to such waters and covered by the CWA.

Until the rulemaking process is complete, there is a nationwide stay on application of the WOTUS Rule, which was imposed by the Sixth Circuit Court of Appeals on October 9, 2015, although that stay is now in question as the Supreme Court recently ruled that federal district courts have primary jurisdicton to hear the numerous challenges to the rule.

Meanwhile, the Trump administration has issued an effective date for the rule that is "two years after publication in the Federal Register." For the time being, the rule will not be implemented. And the EPA and DOD are expected to issue a revised rule long before the original rule becomes effective.

- The Border Wall

President Trump has continued to push one of his campaign pledges to build a wall along the U.S.-Mexico border, only to be met with great resistance. In addition to the many lawsuits filed by the Center for Biological Diversity, the State of California has filed suit seeking an injunction against construction of the wall unless and until the administration demonstrates compliance with federal environmental laws. That lawsuit was consolidated on October 24, 2017, with two others filed by the Center for Biological Diversity and jointly by Defenders of Wildlife, the Sierra Club, and the Animal Legal Defense Fund, and they are currently pending before Judge Gonzalo P. Curiel (S.D. Cal.), who also presided over the three lawsuits involving Trump University. The proposed border wall project is still in its conceptual stages, so it is reasonably foreseeable that the construction will lead to further environmental litigation in the months and years to come.

The wall was a cornerstone issue for the Trump Campaign, so it is anticipated that this issue will be litigated aggressively. The courts have been and continue to be a major obstacle to Trump's policies so far, and they may continue to delay the fulfilment of his campaign promises.

Changes to Federal Law

- United States' Withdrawal from the Paris Climate Accord

On June 1, 2017, President Trump announced that the United States would withdraw from the Paris Agreement. The earliest possible effective date for the withdrawal would be November 4, 2020, which is one day after the next U.S. presidential election. The withdrawal has no formal effect until one year thereafter, which means that the next president of the United States will have been in office almost a full year when the withdrawal becomes effective. Until the effective date of the withdrawal, the U.S.'s commitment to the agreement remains, including the requirement that the U.S. report its emissions to the United Nations.

In response to the administration's withdrawal from the agreement, a bipartisan coalition of states and unincorporated self-governing territories in the United States formed the United States Climate Alliance, which is committed to upholding the objectives of the Paris Agreement within their respective borders by achieving the goal of reducing

greenhouse gas emissions 26 to 28 percent from 2005 levels by 2025 and meeting or exceeding the targets of the federal Clean Power Plan. Formed on June 1, 2017, the alliance had, as of January 15, 2018, sixteen members representing more than 46 percent of the total population of the United States and at least $7 trillion in GDP.

While this situation continues to play out, it is clear from these efforts, and from other efforts by some of the states to resist the Trump administration's agenda, that the states are stepping, and will continue to step, into the void left by the dismantling of the regulatory state by the Trump administration.

► Federal Clean Power Plan

On February 9, 2016, in a 5-4 decision, the Supreme Court issued a ruling granting a motion to stay implementation of the federal Clean Power Plan. Then, in April 2017, the D.C. Circuit granted another 60-day stay of the Clean Power Plan litigation.

On March 28, 2017, President Trump issued an executive order establishing the policy of the administration to "immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law." With respect to the Clean Power Plan in particular, the Executive Order directs the EPA administrator to "immediately take all steps necessary" to review it for consistency with these and other policies set forth in the order.

Consistent with this executive order, on March 28, 2017, the EPA issued a Federal Register notice announcing the EPA's review of the Rule and noting that if EPA's review "concludes that suspension, revision or rescission of this Rule may be appropriate, EPA's review will be followed by a rulemaking process that will be transparent, follow proper administrative procedures, include appropriate engagement with the public, employ sound science, and be firmly grounded in the law." 82 Fed. Reg. 16,329, 16,329 (Apr. 4, 2017).

As a result of these activities, the cases have been held in abeyance (and the Plan's implementation stayed) since March 28, 2017, and will continue to be held in abeyance until the EPA completes its review of the Clean Power Plan and makes a decision regarding its future.

Major Consumer Litigation

► Additional Volkswagen Settlement

As noted in our midyear update, in May 2017, a federal judge in the Northern District of California approved a $1.2 billion settlement between Volkswagen and owners of 88,500 Volkswagen vehicles with three-liter diesel engines. These settlements are in the process of being carried out.

In October, Volkswagen settled its civil liability with the U.S. EPA, along with several other car makers who had been caught cheating emissions testing. The settlement includes a recall component, a $3 billion mitigation component, a $2 billion zero-emission-vehicle investment component, required actions to prevent future violations, and a $1.45 billion civil penalty.

Changes to California Law

► Proposition 65 Amendments

On August 30, 2018, amendments to Article 6, Clear and Reasonable Warnings, of the California Code of Regulations will go into effect, repealing all the regulatory provisions of Title 27 of the California Code of Regulations, Article 6 (sections 25601 et seq.), except those added via an emergency rulemaking in April 2016 related to warnings for exposures to bisphenol A in canned foods and beverages (Sections 25603.3(f) and (g)), and replacing

them with a new regulation divided into two new subarticles to Article 6. The repealed and new regulations provide, among other things, methods of transmission and content of warnings deemed to be compliant with the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65).

Because the new regulations provide details for a safe harbor warning, compliance with the new regulations prior to August 30, 2018, is expressly allowed and provides the same protections current law provides.

► California's Cap-and-Trade Program Upheld Following Finding It Is Not a Tax

In April 2017, the Third District Court of Appeal upheld California's cap-and-trade program, which was authorized in 2006 with the passage of Assembly Bill 32. The California Chamber of Commerce and several businesses had argued that the program constituted an unauthorized tax and exceeded the scope of the California Air Resources Board's (CARB) authority. Two of the three judges on the panel agreed that the program was not a tax in violation of Proposition 13, but rather a system in which the buyer makes a business decision to purchase an allowance or reduce emissions. Furthermore, the majority of the judges determined the allowances were a valuable commodity that conferred a privilege on the buyer.

The California Chamber of Commerce and the Pacific Legal Foundation announced they would appeal the decision to the Supreme Court of California.

► California Air Resources Board Proposed Scoping Plan

On January 20, 2017, CARB released its plan to reduce California's greenhouse gas emissions by 40 percent by 2030. This plan is consistent with Governor Brown's 2015 executive order that called for such action. The most significant aspect of the proposal is a 10-year extension of the state's cap-and-trade program. Additionally, this plan includes a new requirement for oil refineries to reduce their greenhouse gas emissions by 20 percent from 2005 levels by 2030.

At this time, it is unclear whether the ongoing litigation surrounding California's cap-and-trade program will affect CARB's proposed scoping plan.

Key Cases and Decisions

► *U.S. v. U.S. District Court for the District of Oregon* (*Juliana v. United States*) (9th Cir. 2017) Case No. 17-71692

The Ninth Circuit heard oral argument on the government's writ petition in this portion of the "kids' climate change litigation" in December, which asks the Court to dismiss the underlying case or to stay the case while its writ petition is fully considered.

While the current posture of the case has no direct effect on environmental law, continued prosecution of the case could have dramatic effects on climate change regulation as well as other areas of environmental law.

► *U.S. v. Erik Lindsey Hughes, (*11th Dist. 2017*) Case No. 15-15246*

Although a criminal drug and firearms case, *U.S. v. Erik Lindsey Hughes* has the potential to dramatically affect how long-standing Supreme Court precedent articulated in *Marks v. U.S.* (1977) 430 U.S. 188 is applied to ascertain the applicable rule of law in other Supreme Court cases, thus having the potential to impact all areas of law, including environmental law.

In *Hughes*, the criminal defendant had pleaded guilty to drug and firearm offences and entered into a binding plea agreement with the government. The district court accepted the plea deal and entered sentence. The defendant then sought a sentence

reduction permitted under 18 U.S.C. § 3582(c)(2) for defendants who have been sentenced based on a sentencing range that has subsequently been lowered by the Sentencing Commission. In deciding the question, the district court applied Justice Sotomayor's concurring opinion in the case of *Freeman v. U.S.* (2011) 564 U.S. 522, in reliance of the decision in *Marks v. U.S.* (1977) 430 U.S. 188, which holds that "the holding of the court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds," denying the request for a sentencing reduction. The Eleventh Circuit affirmed, finding that under a *Marks* analysis, Justice Sotomayor's concurring opinion stated the holding on the narrowest grounds. The Supreme Court granted certiorari in December.

This case is important in that the *Marks* case has been relied upon in numerous cases to find the holding of other cases. The most recent case in the environmental context is the case of *Rapanos v. U.S.* (2006) 547 U.S. 715, a split 4-1-4 decision in which Justice Anthony Kennedy rendered the controlling opinion under a traditional *Marks* analysis that brought more waters under federal jurisdiction under the WOTUS Rule.

While we cannot predict how, or even whether, the Supreme Court will re-evaluate the rule articulated in *Marks*, it stands to reason that any ruling by the Supreme Court is likely to have lasting effects in all areas of law, including environmental law.

- *American Petroleum Institute v. EPA* (Jul. 7, 2017) U.S.D.C. Case No. 09-1038

In this case, the United States Court of Appeals for the District of Columbia Circuit struck down portions of the EPA's 2015 changes to the definition of solid waste, which were designed primarily to cut down on what the EPA called "sham recycling." Industry had objected to the rule's governing when certain hazardous materials qualify as "discarded" and hence are subject to the EPA's regulatory authority. The D.C. Court agreed to most of the objections.

The effect of this ruling is that certain corners of the recycling industry will likely continue to evade regulatory oversight by the EPA. This could, however, open those corners to litigation by other interested parties.

- *Beatrice Boler et al. v. Darnell Earley et al.* (6th Cir. Jul. 28, 2017) Case No. 16-1684, and *Melissa Mays et al. v. Rick Snyder et al.* (6th Cir. Jul. 28, 2017) Case No. 17-1144

In these consolidated cases, the Sixth Circuit Court of Appeals revived two proposed class actions arising out of the Flynt, Michigan, water crisis, saying that the suits' claims were not preempted by the federal Safe Drinking Water Act (SDWA).

The Court found that there was no evidence that Congress intended to preempt these claims and that the rights the SDWA is designed to protect may not be the same rights as those protected by the constitutional claims asserted by the plaintiffs under 42 U.S.C. 1983.

The case is an important victory for private claimants seeking redress for harms caused to their drinking water, which courts have historically found preempted by the SDWA.

- California Climate Change Cases

Two California counties and one California city have filed separate lawsuits against 37 oil, gas, and coal companies, alleging that the companies knew of the connection between consumption of fossil fuels and climate change for years, but continued to produce, market, and sell those products to an uninformed populace, resulting in billions of dollars in damages to businesses, citizens, and the environment. These cases follow the pattern of other public nuisance cases used by environmental groups to combat

pollution. They will be an interesting test of the courts' willingness to expand that area of law.

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About Walsworth

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