Case Law Update

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I. Introduction

The following summarizes noteworthy judicial developments in environmental law over the last year. While this compilation is by no means comprehensive, it is intended to reflect some key developments in environmental cases that have been or are anticipated to be impactful to the practice of environmental law. This update is current as of August 7, 2020.

II. Water

a. *County of Maui, Hawaii v. Hawaii Wildlife Fund*, No. 18-260, 2020 WL 1941966 (Apr. 23, 2020)

On April 23, 2020, the U.S. Supreme Court issued a decision in this long-awaited case addressing a circuit split on whether indirect discharges of pollutants to navigable waters were jurisdictional for purposes of the Clean Water Act (CWA).

The Court ruled 6-3 that discharges to navigable waters through groundwater require a CWA National Pollutant Discharge Elimination System (NPDES) permit if the discharge is the "functional equivalent of a direct discharge." The Court remanded the case to the lower courts to determine whether, applying the new "functional equivalent" test, the County of Maui's practice of discharging treated wastewater through injection wells (a point source) into groundwater that reaches the Pacific Ocean (a jurisdictional water) a half mile away required a NPDES permit.

The Court purportedly struck a middle ground between what it viewed as the two "extreme" positions of the litigants. One the one hand, the Ninth Circuit Court of Appeals used a broad interpretation requiring a CWA permit when a pollutant in navigable waters is "fairly traceable" to a point source would interfere with the states' authority to regulate groundwater. And on the other hand, the narrower interpretation that would exclude all releases of pollutants to groundwater from CWA permitting.

The Court's new "functional equivalent" test requires consideration of the following "relevant factors": transit time, distance traveled, the nature of the material through which the pollutant travels, the extent to which the pollutant is diluted or chemically changed as it travels, the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, the manner or area in which the pollutant enters

the navigable waters, and the degree to which the pollution (at that point) has maintained its specific identity.

The Court notes that the test does not clearly explain how to deal with "middle instances" and will require case-by-case determinations based on these factors, the most important of which will be the pollutant's "transit time" and "distance traveled" from the point source to the jurisdictional water. Justice Breyer emphasized that both the courts and the Environmental Protection Agency (EPA) can provide future guidance through individual decisions and, in EPA's case, through the development of general rules, and permit decisions, and administrative guidance.

b. Definition of "Waters of the United States" Definition Litigation

Earlier this year, the Trump Administration announced the much-anticipated Navigable Waters Protection Rule—the replacement of the Obama-era Clean Water Rule—which redefines "waters of the United States" (WOTUS). 85 Fed. Reg. 22,250. The 2020 WOTUS rule is intended to narrow the scope of federal CWA jurisdiction by constraining what waters are considered "waters of the US."

In summary, the CWA will be construed to cover territorial seas and traditional navigable waters; tributaries that flow into jurisdictional waters; wetlands directly adjacent to jurisdictional waters; and lakes, ponds and impoundments of jurisdictional waters. Twelve types of waters are categorically excluded from coverage, including groundwater, ephemeral streams and pools; previously converted cropland; and waste treatment systems.

The new rule, which went into effect on June 22, 2020, has already been challenged in various courts. As of the date of release of this case outline, the rule has only been enjoined in Colorado, but these cases are evolving daily.

State of California et al. v. Wheeler et al., No. 3:20-cv-03005 (N.D. Cal.). California, along with sixteen other states,[1] challenged the new rule in May of 2020. In that action, the states argued that the Navigable Waters Protection Rule is contrary to the Administrative Procedure Act by applying the U.S. Supreme Court reasoning that was not a part of the majority opinion—Justice Scalia's plurality opinion in *Rapanos v. U.S.* that CWA protection is extended to "relatively permanent, standing or continuously flowing bodies of water." The challengers assert that Justice Kennedy's "significant nexus" concurrence that courts have used since the 2006 *Rapanos* decision should have been used instead. Although Kennedy agreed with Scalia and the other justices in the plurality, Kennedy's CWA interpretation was more similar to the four dissenting justices. "The 2020 rule is based on the plurality opinion in *Rapanos* even though a majority of the justices in *Rapanos* found that the plurality's interpretation of 'waters of the United States' was

[1] Connecticut, Illinois, Maine, Maryland, Michigan, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, Wisconsin, Massachusetts and Virginia, along with the District of Columbia and New York City.

inconsistent with the CWA's text and purpose." The states sought a nationwide injunction, which was denied.

Similar challenges are raised in: *Conservation Law Foundation et al. v. U.S. Environmental Protection Agency et al.*, No. 1:20-cv-10820 (D. Mass.); *South Carolina Coastal Conservation League et al. v. Wheeler et al.*, No. 2:20-cv-01687 (D. S.C.); *Chesapeake Bay Foundation, Inc. et al. v. Wheeler et al.*, No. 1:20-cv-01063-RDB and No. 1:20-cv-01064-RDB (D. Md.); *State of Colorado v. U.S. Environmental Protection Agency et al.*, No. 20-cv-1461-WJM-NRN (D. Colo.); *Puget Soundkeeper Alliance et al. v. U.S. Environmental Protection Agency et al.*, No. 2:20-cv-950 (W.D. Wash.); *Pascua Yaqui Tribe et al. v. U.S. Environmental Protection Agency et al.*, No. 4:20-cv-00266-RM (D. Ariz.); *Navajo Nation v. Andrew Wheeler et al.*, No. 2:20-cv-00602-MV-GJF (D. N.M.).

On June 6, 2020, in the suit raised by the State of Colorado, the court granted a preliminary injunction to stop the application of the 2020 rule within the state. The EPA and the U.S. Army Corps of Engineers have appealed that decision to the Tenth Circuit. *State of Colorado v. U.S. Environmental Protection Agency*, No. 20-CV-1461-WJM-NRN, 2020 WL 3402325 (D. Colo. June 19, 2020).

New Mexico Cattle Growers' Association v. U.S. Environmental Protection Agency et al., No. 1:19-cv-00988 (D. N.M.). Unlike the other challenges, the plaintiffs in this case argue that the Navigable Waters Protection Rule goes too far in claiming jurisdiction over certain waters. As part of a larger challenge to the new rule, the plaintiffs argued that that the rule inappropriately lists intermittent tributaries and non-navigable wetlands that do not abut navigable rivers or lakes as falling under the CWA's jurisdiction and sought to enjoin that portion of the rule. The preliminary injunction was denied on June 24, 2020, but the underlying challenge is still ongoing.

Similar challenges are raised in: *Oregon Cattlemen's Assoc. v. U.S. Environmental Protection Agency et al.*, No. 3:19-cv-00564-AC (D. Or.) (dismissed without prejudice on August 6, 2020); *Washington Cattlemen's Assoc. v. U.S. Environmental Protection Agency et al.*, No. 2:19-cv-00569-JCC (W.D. Wash.).

c. *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, No. CV-19-44-GF-BMM, 2020 WL 875455 (D. Mont. Apr. 15, 2020)

Nationwide permits (NWP) are a type of CWA general permit issued on a national basis authorizing specific activities that will have minimal individual and cumulative adverse environmental effects. NWP 12 is one of 52 NWPs, and it authorizes discharges of dredged or fill material that result in the loss of up to one-half acre of jurisdictional waters associated with the construction, maintenance, repair, and removal of, among other infrastructure, oil and gas pipelines.

The Northern Plains Resource Council (NPRC) challenged the use of NWP 12 for the discharge dredged or fill material to waters of the U.S. in conjunction with the construction of portions of the Keystone XL pipeline. NPRC argued that the Corps violated the federal Endangered Species Act (ESA) when it failed to consult with the U.S. Fish

and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) in reissuing this general permit in 2017.

Under ESA Section 7(a)(2), federal agencies engaged in actions that "may affect" an endangered species, including permit issuance, are required to consult with the USFWS and NMFS before that action may be performed. But this was not done in 2017 when the Corps reissued all of the NWPs, including NWP 12. This programmatic consultation did not occur, in part, because the Corps imposed General Condition 18 (GC 18) for all NWPs. GC 18 prohibits the verification of coverage under NWP 12 or any NWP if the proposed activity or project is likely to "directly or indirectly jeopardize the continued existence of a threatened or endangered species," which is identified through a pre-construction notice.

The Montana district court ruled that reissuing NWP 12 without programmatic consultation violated the ESA because the general permit would affect endangered species. Further, the District Court found the Corps reliance on GC 18 at the individual project level insufficient to satisfy the Corps' ESA Section 7 obligations. Thus, NWP 12 was unavailable for the Keystone XL pipeline.

The district court initially vacated the NWP in its entirety, but later narrowed the scope to cover only the construction of new oil and gas pipelines until the ESA consultation is complete. The Department of Justice sought an emergency stay in the Ninth Circuit, which was denied. On July 6, 2020, the Supreme Court stayed the vacatur, except as to the Keystone XL pipeline, pending disposition on appeal to the Ninth Circuit. If the petition for a writ of certiorari is denied for the Keystone XL pipeline, the stay would terminate.

d. *Bush v. Lone Oak Club, LLC*, 18-0264, 2020 WL 1966931 (Tex. Apr. 24, 2020)

In this title dispute between the Texas General Land Office and the private Lone Oak Club, at issue was the ownership of the submerged bed of the Lone Oak Bayou. The Court clarified the definition of "navigable streams" as including portions of the stream both above and below the tide line, and that those beds could be conveyed to private owners.

e. *Petition of the Cities of Garland, Mesquite, Plano & Richardson Appealing the Decision by the North Texas Municipal Water District Affecting Wholesale Water Rates*, Docket No. 50382, 2020 WL 757950 (Tex. P.U.C. Feb. 27, 2020)

In this wholesale water rate case, the Public Utility Commission of Texas (PUC) found that the North Texas Municipal Water District's (NTMWD) wholesale water rates to its customer cities were adverse to the public interest. The NTMWD provides water, wastewater, and solid waste services to thirteen member cities pursuant to a contract, each of whom appoint members to NTMWD's board of directors. Four member cities—Garland, Mesquite, Plano, and Richardson—petitioned the PUC in December 2016,

alleging that the 2017 wholesale water rates were unreasonably preferential, prejudicial, and discriminatory.

On February 27, 2020, the PUC agreed with the four petitioning cities that NTMWD's contracted wholesale water rates are adverse to the public interest. This adverse public interest determination is the first time that the PUC has made such a ruling since 1994. The public interest determination is the first step in a two-step process. In Phase 2, which only occurs if an adverse public interest determination is made, the PUC will determine the cost of service to inform what the wholesale rate should be.

f. *Pape Partners, Ltd. v. DRR Family Properties LP,* 10-17-00180-CV, 2020 WL 499639 (Tex. App.—Waco Jan. 29, 2020, no pet.)

Purchasers of a tract of land were notified that another landowner owned a portion of the irrigation water rights associated with the tract. The purchasers sought a declaratory judgment that they owned all of the irrigation water rights in the purchased tract. The court held that the Texas Legislature has vested the Texas Commission on Environmental Quality the exclusive jurisdiction to determine surface water rights and reconfirmed the longstanding principle that parties must exhaust their administrative remedies before filing suit in district court.

g. *Hatchett v. West Travis County Public Utility Agency*, No. 03-18-00668-CV, 2020 WL 1161108 (Tex. App.—Austin Mar. 11, 2020)

In an issue related to impervious cover requirements, the court affirmed trial court's dismissal of uniform declaratory judgements against the water district but finding that the district was not afforded governmental immunity under the Texas Local Government Code's vested rights protections.

III. Waste

a. *Atlantic Richfield Company v. Christian*, 140 S.Ct. 1335 (U.S. Apr. 20, 2020)

The subject of this case is a Superfund site located in Butte, Montana, spanning 300 square miles and contaminated with lead and arsenic from three historic copper smelters owned by the Atlantic Richfield Company (ARCO). EPA has been working with ARCO for the last 35 years to clean up the site, and remedial projects are expected to continue through 2025. Despite this work, in 2008, 98 private landowners with property located within the boundaries of EPA's site sued ARCO in Montana state court for common law nuisance, trespass, and strict liability, seeking, among other remedies, restoration damages to remediate their properties. As part of the litigation, the landowners submitted a proposed restoration plan for their private properties that was inconsistent with and went well beyond the cleanup plan approved by EPA for the Site. The Montana courts found that the landowners' lawsuit could proceed in state court.

On April 20, 2020, the Supreme Court issued a decision holding that state courts have jurisdiction to hear state law claims relating to ongoing Superfund remedial actions, even if such claims constitute a "challenge" to EPA's remedy. The Court agreed that such claims do not constitute a challenge that is jurisdictionally barred by § 113(b) and (h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

However, the Court clarified that such landowners are potentially responsible parties (PRP) under CERCLA, notwithstanding any affirmative liability defenses they may have, and therefore must obtain EPA approval under CERCLA § 122(e)(6) to conduct remedial or restoration work. The Court left unanswered whether CERCLA preempts state common law claims for restoration that seek cleanup remedies that conflict with the EPA-ordered remedies.

The Court remanded the case for further proceedings.

b. *Meritor, Inc. v. U.S. Environmental Protection Agency*, No. 18-1325 (D.C. Cir. 2020)

Meritor challenged EPA's listing of the Rockwell International Wheel and Trim facility in Grenada, Mississippi to the CERCLA National Priorities List (NPL). Brought under the Administrative Procedures Act, the claim alleged that the listing was arbitrary, capricious, and contrary to governing regulations. The D.C. Circuit denied review, holding that EPA did not act arbitrarily or capriciously. At issue was whether EPA appropriately applied its hazard ranking system to determine whether the site should be listed on the NPL. Meritor alleged that EPA failed to adequately consider the impact of a mitigation measure added to the facility to address vapor intrusion, which Meritor alleged is a factor EPA must consider in its application of the agency's hazard ranking system. The D.C. Circuit held that EPA did not act arbitrarily and capriciously because it evaluated the site based on measurements taken before the sub-slab depressurization system was installed; relied on a residential health benchmark when evaluating the "targets" metrics; and calculated the waste characteristics component of the subsurface intrusion pathway.

c. *Baptiste et al. v. Bethlehem Landfill Company*, --- F.3d ----2020 WL 3956680 (3rd Cir. 2020)

On July 13, 2020, the U.S. Court of Appeals for the Third Circuit reinstated a lawsuit against noxious odors emanating from a landfill. The plaintiffs, who own property neighboring the landfill, claimed that the operations of the landfill seriously interfered with their enjoyment of their homes, and also resulted in a loss in their property values because of noxious odors. The 224-acre landfill receives waste daily, and as the landfill waste decomposes, it generates extremely noxious odors that the plaintiffs allege are unbearable. Based in Pennsylvania common law torts, public nuisance, private nuisance, and negligence, the plaintiffs sought $5 million in property damages and other relief.

The landfill is subject to extensive regulation by the Pennsylvania Solid Waste Disposal Act through the Pennsylvania Department of Environmental Protection. The Act,

however, does not provide a private right of action, so the plaintiffs resorted to state common law remedies. The lower court dismissed the lawsuit. The Third Circuit, however, reversed and reinstated the suit. The Third Circuit held that the complaint was well pleaded and should be tried. The court noted some environmental justice concerns but did not rely on these factors in making its determination to reinstate the case. The case was remanded to the trial court.

d. *Government of Guam v. United States of America*, 950 F.3d 104 (D.C. Cir. 2020)

The D.C. Circuit recently ruled that the country of Guam was barred by the 3-year statute of limitations for filing a Superfund contribution claim for the cleanup of a landfill—the Ordot Dump—where the U.S. Navy disposed of military munitions and chemicals. The unlined landfill released contaminants into nearby rivers flowing into the Pacific Ocean. The court determined that a Clean Water Act consent decree between Guam and the U.S. for the unauthorized discharges triggered the 3-year statute of limitations for Guam to pursue a contribution claim against the Navy.

e. *MPM Silicones, LLC v. Union Carbide Corp.*, No. 17-3468 (2nd Cir. 2020)

The Second Circuit revived a private CERCLA cost recovery action against Union Carbide. MPM Silicones LLC, is seeking the right to recover remediation costs from the former owner of a Sisterville, West Virginia chemical manufacturing site and Dow Inc. subsidiary, Union Carbide. The site is contaminated with polychlorinated biphenyls (PCBs). Years ago, Union Carbide completed an environmental cleanup not related to PCBs and sold the property to MPM. Eventually, MPM discovered the PCB contamination and began a new cleanup. MPM sued Union Carbide to recover response costs; the parties settled as to past costs, but the suit proceeded as to future costs.

In its defense, Union Carbide argued that this lawsuit was barred by the relevant CERCLA six-year statute of limitations for remedial actions. The lower court agreed and dismissed MPM's cost recovery claims. However, it also held that Union Carbide is responsible for 95% of the future costs, and MPM for 5%. On appeal, the Second Circuit reversed the lower court's dismissal on CERCLA statute of limitations because it relied on an incorrect reading of Second Circuit precedent. On remand, the court must determine whether the actions Union Carbide took in response to the information that it had acquired about PCB disposal practices are a "remedial action" subject to the statute of limitations.

IV. Air

a. *State of New York, et al. v. U.S. Environmental Protection Agency*, No. 19-1230 (D.C. Cir. July 14, 2020)

This case involves a challenge the EPA's asserted failure to address cross-border pollution under the Clean Air Act's Good Neighbor Provision, 42 U.S.C. § 7410(a)(2)(D)(i).

The State of New York petitioned EPA to find that power-generating and other facilities in nine nearby states were violation of the Good Neighbor Provision by producing emissions that contributed to New York being unable to attain or maintain compliance with the 2008 and 2015 National Ambient Air quality Standards (NAAQS) for ozone.

The EPA reviewed the petition in accordance with a four-step framework developed by the agency in its implementation of the interstate transport of ozone rules and procedures. Through that framework, the EPA denied the petition on the basis that (1) it does not meet the standard for establishing a Good Neighbor Provision violation, and (2) it does not demonstrate that cost-effective controls could be imposed on the pollution sources. That denial was appealed.

The D.C. Circuit rejected the EPA's handling of the petition. It found that the EPA offered insufficient reasoning for what the court described as "the convoluted and seemingly unworkable showing it demanded of New York's petition." Further, the EPA's finding that New York met the 2008 NAAQS for ozone relied on faulty interpretations that have since been invalidated.

The EPA's decision was vacated, and the matter was remanded for further proceedings consistent with the opinion to correct these deficiencies.

b. *Sierra Club et al. v. U.S. Environmental Protection Agency et al.,* No. 20-60303 (5th Cir., pet. filed Apr. 16, 2020)

The Fifth Circuit stayed a lawsuit regarding the EPA's decision to approve two revisions to Texas's State Implementation Plan (SIP) for ozone standards. Specifically, EPA approved the Texas SIP revisions, finding the Houston and Dallas metropolitan areas had each sufficiently demonstrated that the areas met the re-designation criteria for the 1979 1-hour and the 1997 8-hour national ambient air quality standards (NAAQS) for ozone (EPA has since revoked these two standards through new ozone NAAQS in 2008 and 2015).

The stay is to work out whether the D.C. Circuit is the appropriate venue for this matter. Petitioners sued EPA in both actions under the Clean Air Act but argue that the case belongs in the D.C. Circuit because the decisions at issue concern nationally applicable federal air standards. EPA and Respondent-Intervenors, including Texas, argue that the lawsuit is only regionally significant because it is limited in application to the Dallas and Houston metropolitan areas.

c. *Environment Texas Citizen Lobby et al. v. ExxonMobil Corporation et al.*, No. 17-20545 (5th Cir. July 29, 2020)

In this Clean Air Act citizen suit against ExxonMobil for its operation of "the largest petroleum and petrochemical complex in the nation," the Fifth Circuit remanded the case back to the lower court for additional fact-finding on standing. Particularly, the issue is whether the plaintiffs have standing to recover damages for more than 16,000 recordable and reportable emissions standards violations, the statutory cap for which is $600 million. The Fifth Circuit determined that the plaintiffs must show they have standing for

each violation, which they have not yet done. Standing depends, in part, on whether an injury can be traceable to the defendant's conduct. The Fifth Circuit directed the lower court to determine the appropriate geographic nexus in a traceability fact-finding inquiry. Additionally, the lower court must assess Exxon's affirmative defenses, which also has not yet been done. For example, Exxon may be able to assert an "Act of God" defense for violations occurring during a hurricane.

d. *Shrimpers and Fishermen of the RGV et al. v. Texas Commission on Environmental Quality et al.*, No. 19-60558 (5th Cir. 2020)

The Fifth Circuit held that fishing and community groups cannot challenge TCEQ's air permit approvals for a proposed liquefied natural gas (LNG) export terminal in Brownsville, Texas based on hypothetical injuries the groups' members might eventually incur. Particularly, the court determined that the groups failed to show how the TCEQ's issuance of the air quality permits would directly injure even one of their members.

The plaintiffs also alleged that they were injured when TCEQ denied their request for a contested case hearing on the air quality permit application. Their request was denied for lack of standing. Under Texas law, permit protestants must be deemed an "affected person," as that phrase is defined under the Texas Water Code, to be entitled to a contested case hearing for an agency action, such as an air permit issuance. TCEQ determined the plaintiffs did not have a personal interest in the permit apart from the general public, and thus were not affected persons and therefore lacked standing. The Fifth Circuit affirmed, although it had questions about whether it had the authority to hear the dispute in the first place.

V. Climate Change

a. *Mayor and City Council of Baltimore v. BP P.L.C. et al.*, 952 F.3d 452 (4th Cir. 2020)

In April, the Fourth Circuit held that a climate change lawsuit against BP and other oil and gas companies belonged in state court. The City of Baltimore sued oil and gas companies in state court, accusing them of knowingly contributing to climate change and associated harms. Two of the defendants removed the case the federal court, which Baltimore sought to have remanded back to state court. The federal district court granted Baltimore's motion for remand, which was affirmed by the Fourth Circuit.

The Fourth Circuit held that it lacked jurisdiction to review seven of the defendants' eight removal theories. Appellate courts are barred by 28 U.S.C. § 1447(d) from reviewing district courts' remand orders. The Fourth Circuit rejected the defendants' argument that because it had one valid basis for removal, it could review the entire remand order. The Fourth Circuit declined, creating a circuit split with the Fifth, Sixth, and Seventh Circuits.

Then, the court considered the only basis for removal excepted under § 1447(d)—federal officer removal. The companies base their removal on government contracts the companies held, including fuel supply agreements with the Navy, oil and gas leases

administered by the Department of Interior, and an agreement with the Navy for a strategic petroleum reserve. The Fourth Circuit held that none of these relationships were sufficient to trigger federal officer removal because the companies were not actually "acting under" a federal officer or were "insufficiently related" to the acts alleged by Baltimore in its climate change suit. Thus, the state court has jurisdiction.

b. *County of San Mateo et al. v. Chevron Corporation et al.*, Docket No. 18-15499 (9th Cir. May 26, 2020)

The Ninth Circuit held that 28 U.S.C. § 1447(d) limited appellate review of an order to remand to the extent it addressed whether removal was proper under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). The Ninth Circuit further held that the district court did not err in finding that it lacked subject matter jurisdiction under the federal-officer removal statute, and that the state court is the proper venue for this climate change challenge.

The plaintiffs asserted California public nuisance claims against fossil fuel companies, alleging that their "extraction, refining, and/or formulation of fossil fuel products; their introduction of their fossil fuel products; and their failure to pursue less hazards associated with use of those products; and their failure to pursue less hazardous alternatives available to them; is a substantial factor in causing the increase in global mean temperature and consequent increase in global mean sea surface height." The plaintiffs therefore sought an order of abatement requiring the defendants to fund a climate change adaptation program.

The defendants sought removal to federal court, asserting federal jurisdiction under the federal-officer removal statute, 28 U.S.C. § 1442(a)(1), but the plaintiffs sought to have the case remanded back to state court for lack of subject matter jurisdiction. The Ninth Circuit concurred with the district court's finding that the defendants failed to prove by a preponderance of the evidence that they were "acting under" a federal officer by virtue of the various contracts the defendant companies held with the federal government during historic operations. The court equated these contracts to typical commercial contracts that are not "so closely related to the government's function" that the defendants would face state court prejudice.

c. *City of Oakland et al. v. BP PLC et al*., Docket No. 18-16663 (9th Cir. May 26, 2020)

In this case, a companion to *County of San Mateo et al. v. Chevron Corporation et al.*, the Ninth Circuit vacated the district court's order denying remand and sent the case back to the federal district court with instructions to consider whether alternative grounds for subject-matter jurisdiction exist. The district court found that the plaintiff's claims supported federal question jurisdiction because those state law claims were "necessarily governed by federal common law" because the public nuisance claim raised issues relating to "interstate and intentional disputes implicating conflicting rights of States." After deciding jurisdiction, the district court dismissed the claim for failure to state a claim.

On appeal, the Ninth Circuit considered two issues: (1) whether California's state nuisance law presented a federal question, and (2) whether the claims were completely preempted by the Clean Air Act. As to the first issue, the Ninth Circuit found that the state-law claim for public nuisance does not require the resolution of a substantial question of federal law and is thus not a federal question. As to the second issue, the Ninth Circuit found that the Clean Air Act does not completely preempt state law nuisance claims.

d. *Commonwealth of Massachusetts v. Exxon Mobil Corp.*, No. 19-12430-WGY, 2020 WL 279681 (D. Mass. May 28, 2020)

A Massachusetts federal district court remanded a climate change lawsuit brought by the Massachusetts Attorney General against ExxonMobil to the state court. Particularly, the Attorney General alleged that ExxonMobil defrauded consumers and investors about climate change-associated risks. Exxon sought to remove the matter to federal court. However, because the Massachusetts case centers on fraud—rather than a national climate change policy that may implicate a federal interest—state court is the appropriate venue.

e. *People of the State of New York v. Exxon Mobil Corp.*, No. 452044/2018 (N.Y.)

In December 2019, a New York state court dismissed claims against Exxon brought by the New York Attorney General that Exxon deceived investors about climate-change related risks to investors. The claim was brought under New York's securities law, the Martin Act. The court determined that the state failed to prove that Exxon made any material misstatements or omissions about its practices or that it misled any reasonable investor. However, the court noted that nothing in the decision is "intended to absolve ExxonMobil from responsibility" for contributing to climate change through its greenhouse gas production.

VI. Land Use and Governance

a. *In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs*, 147 Fed. Cl. 566 (2020); *In re Upstream Addicks & Barker (Texas) Flood-Control Reservoirs*, 146 Fed. Cl. 219 (2019)

Following Hurricane and Tropical Storm Harvey, property owners sued the federal government, claiming Fifth Amendment taking of flowage easement from dams constructed, modified, maintained, and operated by the U.S. Army Corps of Engineers. The claims stem from properties within flood-pool reservoirs that were either inundated with impounded flood waters or flooded with water the agency released from the Addicks and Barker Dams during the storm. The actions were consolidated, then split on whether the property was upstream or downstream.

In February, a federal judge dismissed the downstream property owners' claims and ruled that the Army Corps of Engineers is not liable because the homes would have

flooded regardless of how the Army Corps operated the dams given Harvey's unprecedented nature. "The damage was caused by Hurricane Harvey, and such a hurricane is an Act of God, which the government neither caused nor committed."

However, in late 2019, another federal judge ruled in favor of the flood victims upstream of the reservoir. Specifically, the court ruled that upstream owners had valid property interests and that a taking of a permanent flowage easement occurred. Further, the Corps could not escape liability because the police powers defense and necessity doctrine did not apply. In large part, this decision was premised on the fact that the harm to plaintiffs' properties was avoidable. The Corps made the decision years earlier to allow for flooding when it designed, modified, and maintained the dams in a way that would flood private properties during severe storms.

The court later clarified that the appropriate date of the taking was the date on which the government's physical possession of the property during the storm reached its highest level and that the scope of the flowage easement was to be measured by the actual elevation of the maximum water level during the storm. *In re Upstream Addicks & Barker (Texas) Flood-Control Reservoirs*, 148 Fed. Cl. 274 (2020)

The difference between the upstream and downstream plaintiffs' claims is that the flooding upstream occurred as a result of the general operation of the Addicks and Barker dams and as a direct result of the Corps' decision to close the floodgates to protect downstream residents at the expense of upstream residents. The difference between the cases is that the downstream plaintiffs did not allege that the general operation of the Addicks and Barker dams flooded their properties.

b. *Hlavinka, et al. v. HSC Pipeline Partnership, LLC*, No. 01-19-00092-CV (Tex. App.—Houston [1st] June 6, 2020).

Under the Texas Property Code and the Texas Natural Resources Code, pipelines can exercise eminent domain powers to acquire pipeline easements over private land. This power can be exercised only after the Texas Railroad Commission has determined that the pipeline will be a common carrier. The First Court of Appeals held that the lower court (the Brazos County Court at Law No. 2) erred when it held that the HSC pipeline was a common carrier. The appellate court determined there was no evidence that the pipeline would be a common carrier. Thus, the lower court's summary judgment was reversed, and the matter was remanded to the trial court.

c. *Bonin v. Sabine River Auth.,* No. 1:19-CV-00527, 2020 WL 614032 (E.D. Tex. Feb. 10, 2020)

This is another flood takings case stemming from the March 2016 Sabine River flood. During the flood, the Sabine River Authority opened nine spillway gates due to rising waters. The court found that the Sabine River Authority of Louisiana could not claim Eleventh Amendment immunity because it was not an arm of the State of Louisiana.

d. *McGirt v. Oklahoma*, 591 U.S. __ (2020)

The United States Supreme Court found that the Creek Indian Tribe's historic reservation boundaries – which include most of the City of Tulsa – remained Indian Country. Therefore, Indians committing certain crimes within those geographic areas were not subject to state law/prosecution, but rather only federal jurisdiction because the Creek Reservation was never *expressly* diminished by Congress. The decision was narrowed to apply only to the Major Crimes Act, but it is expected to be expanded in other arenas soon.

VII. Enforcement

a. ***Natural Resources Defense Council et al. v. U.S. Environmental Protection Agency et al*., No. 1:20-cv-03058-CM (S.D. N.Y, pet. filed Apr. 16, 2020); *New York et al. v. U.S. Environmental Protection Agency et al.,* No. 1:20-cv-03714 (S.D. N.Y., pet. filed May 13, 2020)**

These are ongoing challenges to the EPA's COVID-19 enforcement discretion guidance.

b. ***United States and State of Texas v. City of Houston, Texas*, No. 4:18-cv-03368 (S.D. Tex. 2019)**

On August 27, 2019, the Department of Justice lodged a proposed consent decree with the City of Houston stemming from the City's Clean Water Act violations. Specifically, the EPA and TCEQ sought injunctive relief to address and eliminate the City's historic illegal discharges—primarily sanitary sewer overflows (SSOs)—occurring from the City's wastewater collection and transmission system and from its 39 wastewater treatment plants in excess of its Texas Pollutant Discharge Elimination System Permits. Per the agreement, the City will pay a $4.4 million civil penalty, which will be split by the United States and the State of Texas, and the City will implement comprehensive measures to eliminate SSOs and effluent violations.

VIII. Natural Resources

a. ***Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 440 F.Supp.3d 1 (D. D.C. Mar. 25, 2020); *Cheyenne River Sioux Tribe v. U.S. Army Corps of Engineers*, No. CV 16-1534 (JEB), 2020 WL 3634426 (D. D.C. July 6, 2020)**

On March 25, 2020, a federal judge found that the U.S. Army Corps of Engineers violated the National Environmental Policy Act (NEPA) by failing to fully consider the consequences of a potential oil spill from the Dakota Access Pipeline when it granted a pipeline easement to carry crude oil under Lake Oahe on the Missouri River. The grant of the easement challenged by members of the Standing Rock Sioux Tribe; whose reservation is approximately one mile from the pipeline. The Tribe is worried that a spill under the nearby Missouri River would impact a water of critical importance to them for fishing, drinking water, and religious ceremonies. The judge, siding with the Tribe, ordered

a sweeping new environmental impact statement (EIS). The court determined that "the Court thus cannot find that the Corps has adequately discharged its duties" specifically because the original study did not adequately consider whether an oil spill under the Missouri River would affect the Tribe's fishing and hunting rights, whether the project would disproportionately affect tribal and other at-risk, low-income communities, and whether the pipeline's effects would be "highly controversial."

Initially, the Obama administration indicated that the project would be rerouted. But immediately after taking office, President Trump signed an executive memorandum directing the U.S. Army Corps of Engineers "to review and approve in an expedited manner" the pipeline. While the March 25 order required a full EIS, it did not stop operations on the pipeline.

That decision came on July 6, 2020. The court vacated the easement and ordered that the pipeline be emptied within 30 days (August 5) for the duration of the EIS preparation. "[G]iven the seriousness of the Corps' NEPA error, the impossibility of a simple fix, the fact that Dakota Access did assume much of its economic risk knowingly, and the potential harm each day the pipeline operates, the court is forced to conclude that the flow of oil must cease." However, on August 5, 2020, the D.C. Circuit issued an order to, among other holdings, dissolve the administrative stay the appeals court issued and stay the lower court's injunction that the Dakota Access Pipeline be shut down and emptied of oil by August 5, 2020 because the lower court did not make the finding necessary for an injunction in a NEPA case.

b. *Northern Alaska Environmental Center v. U.S. Department of the Interior et al.*, No. 19-35008 (9th Cir. July 9, 2020)

This case involves a challenge brought under the National Environmental Policy Act (NEPA) against the U.S. Bureau of Land Management (BLM) and other governmental agencies and their 2007 offer and sale of oil and gas leases in the National Petroleum Reserve-Alaska (the Reserve). This is an appeal from the lower court's grant of summary judgment to the agencies.

In 2012, the BLM published a document styled as a combined Integrated Activity Plan and Environmental Impact Statement (EIS). The purpose of this was to determine the appropriate management of all BLM-managed lands within the Reserve. The BLM claimed this document served as an overall programmatic EIS.

In 2017, BLM issued a call for nominations and comments on all unleased tracts in the Reserve for the 2017 lease sale. A separate EIS was not prepared for the 2017 lease sale. The issue before the court was whether the 2012 EIS was sufficient to satisfy the requirements of NEPA, or if a separate EIS was necessary because the 2017 lease sale was a distinct federal action requiring a standalone analysis pursuant to NEPA.

The district agreed with the plaintiffs and held that the 2017 lease sale required some form of site-specific analysis, but that the issue was whether the analysis had been prepared. It found that the 2012 EIS provided a programmatic-level analysis and did not

preclude the legal possibility that it could also later serve as a site-specific analysis for future lease sales. Thus, the court found that BLM met the NEPA requirements for the 2017 lease sale through this initial EIS, but the court did not review any challenge to the adequacy of the initial EIS given that the statute of limitations had run.

On appeal, the Ninth Circuit affirmed. Even though the plaintiffs alleged significant new information and circumstances known to BLM before the lease sale, the appropriate action was to seek supplementation of the EIS, but plaintiffs had waived any supplementation claim.

c. *United States Forest Service v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837 (2020)

On June 15, 2020, the Supreme Court ruled in favor of the Atlantic Coast Pipeline. Particularly, the Court determined that the U.S. Forest Service has the authority to grant the permit required for the pipeline through lands within the national forests traversed by the Appalachian Trail. Petitioners alleged that the Forest Service violated the National Forest Management Act, National Environmental Policy Act, and Mineral Leasing Act by issuing special use permit and record of decision authorizing the developer to construct a natural gas pipeline through parts of national forests and granting right-of-way across Appalachian National Scenic Trail (ANST).

The Supreme Court determined that the Department of the Interior's decision to assign responsibility over the ANST to the National Park Service did not transform the land over which the ANST passes into land within the National Park System and, thus, the Forest Service has authority to grant pipeline rights-of-way through lands within national forests traversed by the ANST.

d. *City of Austin v. Kinder Morgan Tex. Pipeline, LLC,* No. 1:20-CV-138-RP, 2020 WL 1324071 (W.D. Tex. Mar. 19, 2020)

In an issue involving NWP 12, local governmental entities, the Barton Springs Edwards Aquifer Conservation District, and landowners sought injunctive relief against Kinder Morgan's construction of a natural gas pipeline in the Central Texas Hill Country. The plaintiffs alleged that the Kinder Morgan and the USFWS manipulated the Endangered Species Act consultation process to get around the incidental take permitting process: environmental review under NEPA. The court denied the petitioner's request for injunctive relief.

IX. What to Watch in 2020

a. *The Wilderness Society et al. v. Donald J. Trump et al.*, No 1:17-cv-02587 (D.D.C.); Hopi Tribe et al. v. Donald J. Trump et al., No. 1:17-cv-02590 (D.D.C.)

Lawsuits from Native American Tribes and environmental groups in D.C. District Court against the shrinking of the Bears Ears and Grand Staircase-Escalante national monuments.

b. *Conservation Law Foundation et al. v. Donald J. Trump et al.*, No. 1:20-cv-01589 (D.D.C.)

Lawsuit challenging Trump's recently eliminated ban on commercial fishing off the East Coast that was imposed with the creation of the Northeast Canyon and Seamounts Marine National Monument near Cape Cod.

c. *Food & Water Watch Inc. et al. v. U.S. Environmental Protection Agency et al.*, No. 3:17-cv-02162 (N.D. Cal.)

Toxic Substances Control Act citizen suit in California regarding the addition of fluoride to drinking water and whether to regulate fluoride under TSCA. The trial recently concluded in California.

d. *American Academy of Pediatrics et al. v. Andrew Wheeler*, No. 20-1160 (D.C. Cir.)

Challenge to EPA's May determination that compliance costs for 2012 mercury air pollution rules were far higher than their health benefits and rescinding its finding that standards are appropriate and necessary.

e. *Texas v. New Mexico*, No. 22065 (U.S.)

Interstate water dispute between Texas and New Mexico over floodwaters released by New Mexico from the Pecos River in 2014. The river master retroactively changed the 2015 annual report and charged Texas for evaporative losses, arguably without authority under the contract. Oral argument has been re-scheduled in the U.S. Supreme Court for October 5, 2020.