# Environmental Law – The Year in Review

*by **Anthony Cavender**, excerpted from **gravel2gavel.com***

## JANUARY 2020

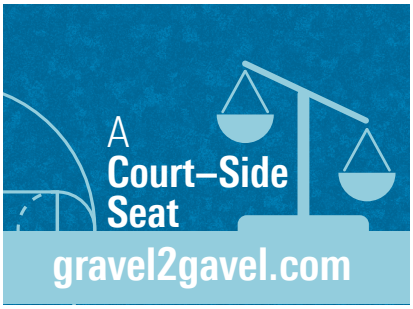
### FEDERAL APPELLATE COURTS

#### U.S. Court of Appeals for the Fifth Circuit

***El Paso County, Texas, et al. v. Donald J. Trump, et al.***
On January 8, 2020, a divided panel of the court quickly granted a stay of the lower court's injunction against using appropriated DOD funds to build a section of the "border wall" in the El Paso area. The court noted that a similar stay was granted by the Supreme Court last year in *Trump v. Sierra Club, 140 S. Ct. 1 (2019)*, and the Government is "entitled to the same relief" here. In addition, the court suggested that the plaintiffs lacked Article III standing. Judge Higginson dissented because, without further discussion, he was unable to conclude that the Government has shown a likelihood of success on the merits or irreparable harm in the absence of a stay.

***BP Exploration and Production, Inc. v. Claimant ID 100354107***
On January 14, 2020, the court upheld the lower court's denial of BP's request for "discretionary review" of several claims for damages resulting from the April 2010 Deepwater Horizon explosion and fire that released millions of gallons of crude oil into the waters of the Gulf of Mexico. (BP negotiated a Settlement Agreement and implementing procedures with representatives of many parties claiming they suffered economic damages from the spill.) In this case, the claimants were the operators of Walmart stores located along the Gulf Coast. Their claims were accepted, and awards totaling over $15 million were granted. BP argued that a change in Walmart's accounting system made it very difficult to determine the scope of the damages suffered by these stores. However, the court, as has done in many of these cases, rejected BP's arguments after the Claims Administrator, the Appeals Panel and the district court agreed that there was sufficient evidence under the terms of the Settlement Agreement to uphold these awards.

***General Land Office of Texas v. The U.S. Department of the Interior, et al.***
Fish and Wildlife Service initially listed the Warbler as an endangered species in 1990—but did not designate a critical habitat—and many years later the General Land Office (GLO) challenged the original listing and also submitted a petition for to reconsider that listing. Agreeing with the lower court, the Fifth Circuit held that the request to set aside the initial listing decision was time-barred, but the Fish and Wildlife Service's decision to deny the reconsideration petition was based on




**Anthony B. Cavender**
Senior Counsel, Houston
+1.713.276.7656
anthony.cavender@pillsburylaw.com

the incorrect legal standard must be remanded to the Service. It should be noted that the court also held that the Service's listing decisions were not subject to traditional NEPA considerations.

***Energy Intelligence Group, Inc., et al. v. Kayne Anderson Capital Advisors, et al.***
In this case, the plaintiffs published an energy industry newsletter, the *Oil Daily*, whose content is largely developed by the plaintiff's employees. The use of this material is authorized by a copyright license purchased by the defendants, which places strict controls on its use within the licensee's office. The publication provides sophisticated coverage of the North American petroleum industry, and the defendants are a "boutique investment firm," where energy securities are an important component of its business. Believing that the defendants were not adhering to the terms and conditions of the copyright license, the plaintiffs filed a copyright infringement lawsuit seeking substantial "statutory damages" under the Copyright Act and the Digital Millennium Copyright Act (DMCA). The defendants argued that the plaintiffs, when they learned that the defendants were not adhering to the terms of the license, were obliged to mitigate their damages by more forceful action. The lower court agreed with this argument, but the Fifth Circuit disagreed, and held that the plaintiffs were entitled to an additional award of over $1 million in addition to substantial legal fees which are permitted under the law.

### U.S. District Court for the Eastern District of Pennsylvania

***Giovani, et al. v. Department of the Navy***
On January 15, 2020, the court dismissed the plaintiffs' lawsuit which alleged that they could seek relief under Pennsylvania's Hazardous Sites Cleanup Act because two chemicals—PFOS and PFOA—were found in area groundwater and drinking water wells. While the court held that the Navy could not assert the defense of sovereign immunity, its defense that neither chemical was listed as a "hazardous substance" in the Pennsylvania statute requiring the dismissal of the lawsuit was granted. The court noted that these facts may change in the future, but litigants must take the statute as they find it.

## STATE COURTS

### Supreme Court of the State of Washington

***Association of Washington Businesses, et al. v. Washington State Department of Ecology***
On January 16, 2020, the Supreme Court of the State of Washington ruled in a 5-to-4 decision that the Washington Clean Air Act does not authorize the state's Department of Ecology to "establish and enforce greenhouse gas emission standards for business and utilities that do not directly emit greenhouse gases, but whose products ultimately do." The majority opinion, written by the Chief Justice, concluded that "by its plain language and structure, the Act limits the applicability of emission standards to actual emitters." The rule was promulgated in 2016, argued before the Supreme Court in March 2019 and decided in January 2020. The court held that this provision of the Rule could be severed from the rest of its validly authorized provisions.

# FEBRUARY 2020

## FEDERAL APPELLATE COURTS

### U.S. Court of Appeals for the D.C. Circuit

***Narragansett Indian Tribe Historic Preservation Office v. Federal Energy Regulatory Commission (FERC)***
The Narraganset Tribe, located in Massachusetts, sought judicial review of a FERC order which denied it motion to intervene in a natural gas pipeline certification proceeding before FERC after the initial FERC certificate of public convenience and necessity had issued. The Tribe was concerned that the construction of the pipeline across affected lands that have a "sacred significance" to the Tribe. By the time this matter reached the DC Circuit, the pipeline had been constructed, with the attendant injuries the Tribe feared. On February 7, 2020, the court ruled against the Tribe for lack of jurisdiction. The Tribe also sought an Order from the court to compel the agency to amend its rules so that the time for useful action on behalf of petitioners would not be affected by the ongoing procedural rules enforced by the agency, but this too was unsuccessful because the Tribe had no standing to pursue this action because the alleged violation was no longer redressable.

***Government of Guam v. United States of America***
On February 14, 2020, the court ruled that the Territory of Guam's CERCLA Section 113 cost recovery lawsuit against the U.S. government must be dismissed on statute of limitations grounds. As stated by the court, for nearly half a century, the U.S. Government operated the "Ordot Dump" as a repository of discarded munitions, chemicals and everyday garbage (described as a 280-foot mountain of trash), yet the dump lacked basic environmental safeguards. In 1983, EPA added this site to its CERCLA National Priorities List, and the U.S. Navy was identified in 1988 as a potentially responsible party in the Record of Decision. However, by that time, the United States had relinquished sovereignty over the island and the site, which now belonged solely to Guam. In 2002, EPA sued Guam under the Clean Water Act for its inability to conduct an adequate remediation, and in 2004, the United States and Guam entered into a consent decree to remediate the site. However, the cost is estimated to be $160 million, which caused Guam to sue the United States in a CERCLA Section 113 contribution action. The lower court agreed with Guam that it could maintain this action, but the DC Circuit reversed, holding that the Section 113 contribution action was subject to CERCLA's three-year statute of limitations which was triggered by the 2004 settlement. The court noted that this result was harsh, but it could not rewrite the statute Congress has enacted.

## U.S. Court of Appeals for the Second Circuit

***Friends of Animals v. U.S. National Park Service***
For many years, the number of white-tailed deer in the Fire Island National Seashore Park has increased to such an extent that it has resulted in a large number of "undesirable human-deer interactions" and other worrisome contacts. In 2015, the National Park Service approved a plan to reduce the deer populations and to manage its impacts on the remaining deer population. The plaintiffs challenged this plan for allegedly violating NEPA, but the courts held that the agency had taken the requisite "hard look" at this plan and concluded the agency had carefully considered all options. On February 3, 2020, the U.S. Court of Appeals for the Second Circuit decided the case, noting that "NEPA is not an animal protection statute" and the number of deer are only one of many environmental factors the agency was required to consider.

## U.S. Court of Appeals for the Second Circuit

***Alpern v. Ferebee***
In *Alpern v. Ferebee*, the Tenth Circuit Court of Appeals agreed with the lower court that the plaintiff's facial challenge to a U.S. Forest Service's $10 parking fee to use one of the parking lots in the White River National Forest should be dismissed because the applicable statutes do not support his claim. The court's exacting analysis of a complex statutory program in this interesting case is exemplary.

## U.S. Court of Appeals for the Third Circuit

***UGI Sunbury LLC v. A Permanent Easement for 1.7575 acres, et al.***
On February 11, 2020, the U.S. Court of Appeals for the Third Circuit issued an important evidentiary ruling in the case of *UGI Sunbury LLC v. A Permanent Easement for 1.7575 acres, et al.* This case involves a pipeline operator's power of condemnation under the Natural Gas Act and a dispute over the value of the lands condemned in accordance with the Act. Here, an expert provided his testimony as to the value of the lands that were condemned for purposes of calculating the appropriate amount of compensation. The trial court accepted his testimony, but the Third Circuit held that it was not reliable under the provisions of Section 702 of the federal rules of evidence as interpreted by the courts. Although this is a pipeline case, the expert based his testimony on his analysis of properties affected by oil spills and radiation exposures and releases. The preferred valuation "lacks a clearly stated basis," and the judgments of the trial court were vacated and remanded.

## U.S. Court of Appeals for the Fourth Circuit

***Federal Energy Regulatory Commission v. Powhatan Energy Fund, LLC, et al.***
On February 11, 2020, the U.S. Court of Appeals for the Fourth Circuit decided an unusual statute of limitations issue. The Federal Power Act prohibits the manipulation of the interstate energy markets, and this prohibition is enforced through the assessment of civil penalties. (The applicable five-year statute of limitation is 28 USC Section 2467.) The defendant in this penalty action

argued that FERC acted too late and let too much time slip away, so that the applicable five-year statute of limitations ran; however, the court, after its review of the statutes, determined that the defendant, when it decided to have the case tried by a federal court instead of by the Commission, triggered some preliminary court-filing requirements and procedures that had the effect of nullifying their statute of limitations defense. By that measure, the action first accrued for purposes of calculating the beginning of the five-year period on July 31, 2015—when the lawsuit was filed—or well within the five-year limit. The defendants here argued the action first accrued on August 3, 2010, when the last questionable trade was made, but the court disagreed.

# MARCH 2020

## THE U.S. SUPREME COURT

***CITGO Asphalt Refining Company v. Frescati Shipping Company***

The court reviewed the charter agreement between CITGO and Frescati, by which CITGO charted an oil tanker to bring Venezuelan crude to CITGO's refinery in New Jersey, located along the Delaware River. A customary "safe berth" provision was part of the charter. As the tanker was nearing the refinery, it struck an abandoned anchor causing a large oil spill into the Delaware River. Cleaning up the spill has cost Frescati and the U.S. government millions of dollars under the Oil Pollution Act, and this litigation involves CITGO's liability for the spill. The court determined that the "safe berth" provision of the charter was in effect CITGO's warranty of safety, and despite there being no negligence on the part of CITGO, the company is now liable for millions of dollars in cleanup costs. The ruling serves to clarify the obligations of the parties in these charter agreements.

# APRIL 2020

## THE U.S. SUPREME COURT

***Atlantic Richfield Company (ARCO) v. Christian, et al.***

This is a Superfund case, which concerns the preemptive effect of an EPA-approved federal cleanup remedy when a state court civil action could impede the effectiveness of the federal cleanup. Here, several Montana residents filed a lawsuit in Montana state court based on common law claims of nuisance and trespass. These plaintiffs aver that the federal cleanup does not adequately protect their properties which have been contaminated by a historic copper smelting operation. ARCO argued that the federal cleanup plan preempts any state action like this. The Court held that the Superfund law does not strip the state of its jurisdiction over claims based on state law. However, since the plaintiff property owners are also potentially responsible parties under Superfund, any separate cleanup plans they develop must be approved in advance by EPA.

***County of Maui v. Hawaii Wildlife Fund***

The question decided by the court was whether a discharge of pollutants to groundwater through a point source which eventually discharges into navigable waters requires an NPDES permit. The statute itself does not directly address this issue, so the court divined the Congressional intent and determined that if the discharge were the "functional equivalent of a direct discharge," a Clean Water Act permit would be necessary. The Court, realizing that more guidance is needed, listed some factors the lower courts could use to decide these controversies.

## FEDERAL APPELLATE COURTS

### U.S. Court of Appeals for the D.C. Circuit

***Physicians for Social Responsibility v. Wheeler***

The U.S. Court of Appeals for the District of Columbia Circuit decided this case, which concerns EPA's staffing of its many science advisory committees. EPA decided to change its long-standing policy because it believed that any person receiving a federal grant should not serve on these committees. Ordinarily, such agency personnel actions would be considered to be exempt from judicial review under an exception to the Administrative Procedure Act because these actions were thought to be committed to agency discretion. Recently, the courts have taken a harder look at these claims and have found that there is often a sufficient body of existing law to make these administrative actions reviewable. The lower court's dismissal of the case was reversed, and EPA was directed to provide a fuller explanation for the policy choice it had made.

### U.S. Court of Appeals for the First Circuit

***Imamura v. General Electric Company***
The U.S. Court of Appeals for the First Circuit used the "forum non conveniens" doctrine to affirm the dismissal of a class action that resulted from the devastating tsunami that battered a Japanese nuclear power plant in 2011. GE manufactured the nuclear reactors used at the plant, and the plaintiffs alleged that their deficiencies attributed to the damages they suffered. However, there was a forum in Japan where the case should be tried.

### U.S. Court of Appeals for the Third Circuit

***PPG Industries v. United States***
The U.S. Court of Appeals for the Third Circuit decided this Superfund case, a cost-recovery action with the plaintiff alleging that the U.S. Government's control over the manufacturing activities of a Pennsylvania chromite ore processing plant in World War II was so comprehensive that the United States qualified as liable party under the law, i. e., an "operator" of the facility, which triggered Superfund liability. The Third Circuit held that the evidence did not show that the Government's role was not so extreme as to make it a PRP under the law.

## U.S. District Courts

***Northern Plains Resource Center v. U.S. Army Corps of Engineers***
The U.S. District Court for Montana held that the U.S. Army Corps of Engineers' use of Clean Water Act general permit—Nationwide Permit 12—to authorize the construction of a pipeline segment in Montana was invalid because the Corps of Engineers' use of this Nationwide Permit procedure did not comply with the consultation requirements of the Endangered Species Act. The court initially ordered the Corps to terminate the use of this general permit on a nationwide basis until the ESA issue is resolved. The Corps immediately complied. This particular Corps of Engineers permit procedure is very popular, and it is used in all kinds of construction projects thousands of times every year.

## Administrative Actions

On April 10, 2020, EPA released its "Enforcement Discretion" policy that affects ongoing cleanups at RCRA and Superfund sites in the wake of the coronavirus. The agency will review, on a case-by-case basis, requests to pause or delay on-site cleanup actions that are adversely affected by the spread of the virus. Concerns about on-site conditions dominated the agency's policy, which, it hastens to add, will not affect the underlying legal basis for the work.

The latest revision of the definition of "waters of the United States" was promulgated by EPA and the Corps of Engineers on April 21, 2020. The agencies clearly state that the latest revision, issued in 2015, so extended the jurisdictional powers of the agencies that is was unworkable. On May 15, 2020, the Pipeline and Hazardous Material Safety Administration (PHMSA) of the U.S. Department of Transportation published a Federal Register notice of its decision which largely rejected a petition for reconsideration filed by the New York City Fire Department. Earlier, the PHMSA determined that recent New York City inspection and permitting rules applicable to motor vehicles carrying hazardous materials in the city were preempted by federal law insofar as the affected motor vehicles were not based in New York City. The city's original petition was filed in 2017. Also, of note is a proposal by the U.S. Coast Guard to update and clarify its vessel financial responsibility rules. Comments are due on August 11, 2020.

# MAY 2020

## FEDERAL APPELLATE COURTS

### U.S. Court of Appeals for the D.C. Circuit

***State of Maryland v. EPA***
On May 19, 2020, the D.C. Circuit decided a Clean Air Act case involving the use of the "Good Neighbor Provision" of the Act, which is triggered when one state has a complaint about emissions generated in a neighboring upwind state that settle in the downwind state. Here, Maryland and Delaware filed petitions with EPA seeking relief from the impact of emissions from coal-fired power plants that allegedly affect their states' air quality. EPA largely denied relief, and the court largely upheld the agency's use and interpretation of the Good Neighbor Provision. The opinion is valuable because of its clear exposition of this complicated policy.

## U.S. Court of Appeals for the Second Circuit

**A Batch of PFOA Decisions**

On May 18, 2020, the Second Circuit Court of Appeals decided a batch of cases which invoked federal diversity jurisdiction regarding claims that the contamination of a village's water supply through the release of quantities of PFOA chemicals during the manufacturing operations of the defendant (the Saint-Gobain Performance Plastics Corporation) made the defendant liable for damages. Saint-Gobain, citing New York state law, objected to the lower court's ruling that allowed the litigation to proceed. The Second Circuit largely rejected these appeals. We can expect to see more of these PFOA cases, although EPA has not yet determined that the chemical is a hazardous substance.

## U.S. Court of Appeals for the Third Circuit

***Wayne Land and Mineral Group v. the Delaware River Basin Commission***

Also on May 19, 2020, the U.S. Court of Appeals for the Third Circuit issued a ruling involving the Delaware River Basin Commission. Established in 1961, the Commission oversees and protects the water resources in the Basin. Not long ago, the Executive Director of the Commission, citing a rule of the Commission, imposed very strict limitations on fracking operations in the Basin. This decision has been very controversial with the Third Circuit opining that the Commission's authority to regulate fracking operations—thought to be a province of state authority—was not clear-cut. In this case, three Pennsylvania state senators filed motions to intervene in the case, but the lower court rejected their request. The Third Circuit has directed the lower court to take another look at their standing to participate in this litigation. This is a volatile issue in Pennsylvania.

## U.S. Court of Appeals for the Fifth Circuit

***Stratta, et al. v. Roe, Director of the Brazos Valley Groundwater District***

In the *Stratta* case, two landowners sued the Brazos Valley Groundwater Conservation District (BVGWCD) under 42 USC Section 1983, with one plaintiff alleging that the actions of the district's board of directors essentially violated their permitting authority by illegally permitting a groundwater well operated by the City of Bryan, which drained groundwater from under his property, amounting to a taking of his property, and generally failing to grant him any relief. The other plaintiff, a board member, was not allowed to speak before the BVGWCD, arguably in violation of his constitutional rights. The trial court dismissed this litigation, holding that the District was entitled to immunity under the Eleventh Amendment, and that the first plaintiff did not have a property interest in this groundwater. The appeals court reversed, holding that under Texas law, the District did not enjoy any Eleventh Amendment immunity; the District did not have any statewide jurisdiction and was not an "arm of the state," and accordingly was not immune from a federal court lawsuit. Also, the Texas Supreme Court has recognized that groundwater is a property interest entitled to protection and the plaintiff could seek redress for a takings violation in a federal lawsuit. Finally, the trial court should not have abstained from ruling in this matter on the basis of the "Burford doctrine." However, the appeals court agreed that that the second plaintiff did not make out a case for a violation of his constitutional rights in view of the provisions of the Texas Open Meetings Act.

***Environmental Integrity Project, et al. v. EPA***

The *Environmental Integrity Project* lawsuit was an appeal of a final administrative order of EPA regarding the provisions of Title V of the Clean Air Act (CAA). At issue was EPA's interpretation of the Title V statutory provisions, and the appeals court upheld the decision of the agency, according it "Skidmore," but not "Chevron" deference. EPA, in its latest interpretation of the Act, decided that CAA Title I preconstruction new source review permitting decisions could not subject to further review in the Title V review process. The plaintiffs, hoping to challenge the TCEQ's preconstruction authorization of a unit at Exxon Mobil's Baytown, Texas Olefins Plant, argued that the agency had misconstrued Title V. The Fifth Circuit disagreed.

***American Stewards of Liberty, et al,. v. U.S. Department of the Interior***

This case involves the Endangered Species Act. Years ago, the Fish and Wildlife Service listed an arachnid, the Bone Cave harvestman (known to live only in Central Texas), as an endangered species. The plaintiffs petitioned the Service to delist this species on scientific grounds, but the Service declined to so. A lawsuit followed, based on the Administrative Procedure Act, and the Service relented; however, two Intervenor plaintiffs were allowed by the

trial court to intervene, and they argued that the listing of this arachnid violated the Commerce Clause. The court rejected this claim, which the Fifth Circuit upheld. Several years ago, the Fifth Circuit decided that this Commerce Clause argument was without merit (see *GDF Realty Investment v. Norton,* 326 F. 3d 622 (2003)), and in addition, the Intervenors did not file a timely complaint. The relevant federal statute of limitations is six years, and since the species was initially listed in 1988, the statute of limitations required the dismissal of this complaint.

### U.S. Court of Appeals for the Ninth Circuit

***County of San Mateo, et al. v. Chevron Corp., et al.* and *City of Oakland v. BP PLC, et al.***

While acknowledging the immensity of the legal issues, the Ninth Circuit held that the federal removal statutes did not permit these climate change cases to be removed to the federal courts. For one thing, state court jurisdiction was not preempted by the Clean Air Act. Accordingly, the court affirmed the ruling of Federal Judge Chhabria in the Chevron case, and vacated Judge Alsup's ruling in the BP case that he had jurisdiction to hear this case pursuant to federal common law, and then to dismiss it. The court also remanded the case to Judge Alsup, and directed him to determine if there was an "alternate basis" for federal court jurisdiction based on the pleadings that an issue of "navigable waters" was a concern.

***Oakland Bulk and Oversized Terminal LLC v. City of Oakland***

This case was treated strictly as a breach of contract case and not an environmental matter. The appeals court affirmed the ruling of the lower court (again Judge Chhabria) that the city breached its agreement with the plaintiff, which planned to develop and operate a commercial rail-to-ship terminal on the grounds of the closed Oakland Army Base. After the agreement was entered into, the City learned that coal would be shipped through the terminal, and held public hearings to review the issues involving these operations. The City took legislative action to bar the management of coal at the facility because it concluded there was substantial evidence that the project would be dangerous to health and safety. The Terminal sued, and the lower court held, after a bench trial, that the city breached its agreement. The city argued that this matter should be treated as an administrative law case, where its health and safety concerns would be the deciding factor. But the trial court rejected this position, a ruling that the Ninth Circuit upheld. The appeals court reviewed at length, the expert evidence presented by the city and found it to be unreliable.

## EXECUTIVE ORDERS

**"Regulatory Relief to Support Economic Recovery"**

The President's latest Executive Order was signed on May 19, 2020. The policy is pretty straightforward: "agencies must continue to remove barriers to the greatest engine of economic prosperity the world has ever known: the innovation, initiative, and drive of the American people." Accordingly, the Order provides that: (1) "federal agencies" (which is broadly defined in the law) will address the economic emergency by rescinding, modifying, waiving, or providing exceptions from regulations and other requirements that may inhibit economic recovery, "consistent with applicable law and the protection of public health and safety; (2) the terms used in this Order are specifically defined; (3) the heads of all agencies are directed to use, to the extent of their authority to support the economic response to the COVID-19 outbreak; (4) except for the Department of Justice, all agencies shall accelerate procedures by which a regulated person or entity may receive a "pre-enforcement ruling"—a feature of the President's recent administrative reform Executive Order—with respect to whether the proposed conduct is consistent with the laws and regulations administered by the agency; (5) the heads of all agencies shall consider the principles of fairness in administrative enforcement and adjudication; and (6) agency heads will review the regulatory standards they have temporarily suspended or modified. Typically, the Office of Management and Budget provides implementing guidance to the agencies.

# JUNE 2020

## FEDERAL APPELLATE COURTS

### U.S. Court of Appeals for the D.C. Circuit

***Solenex LLC v. Bernhardt, Secretary of the Interior***

This is an oil lease case involving land located in a region of "unique cultural and environmental significance." The original lease by the Department of the Interior's Bureau of Land Management was issued in 1982. Thirty-four years later, it was cancelled by the Department. In the

intervening years, the lease was assigned to other parties, but for one reason or another, the lessee never received a drilling permit. Environmental studies were prepared, but a major issue was a concern with the historic and religious values the Indian tribes cherished. In 2013 and after considerable back and forth at the agency, Solenex, the latest lessee, filed a lawsuit claiming that the Department had unreasonably delayed the granting of a drilling permit. When the Department cancelled the lease in 2016 for environmental reasons, Solenex challenged this action in the U.S. District Court of the District of Columbia, which granted summary judgment to the plaintiff. The lower court held that this delay was so unreasonable that it violated the Administrative Procedure Act (APA). However, the DC Circuit has now reversed the lower court, holding that the record and circuit precedent did not support the ruling of the lower court. Delay alone is not enough to strip an agency of its ability to act nor does it justify setting aside an agency action, and the court was also not persuaded that the plaintiff's "reliance interests" were significant.

***Friends of Animals v. Bernhardt***

This case involved the Fish and Wildlife Service's shifting rules and policies regarding the importation of sport-hunted animal trophies—in this instance, African elephants. The importation of trophies has been permitted if the case was made that the hunting of these animals served a useful purpose. In 2014 and 2015, the Service made elephant "findings" that would countenance the importation of these trophies. However, the DC Circuit held, in another case, that such findings were invalid because the notice and comment provisions of the APA were not observed. (Along the way, one court observed that the Endangered Species Act does not require the Secretary to engage in a notice and comment proceeding before making such determinations). Consequently, these practices and procedures have terminated, but the plaintiff wanted a ruling that future actions must observe the APA and that the withdrawn actions were also subject to the APA. The court viewed the matter as now moot and did not provide further relief.

***Meerck & Co. v. U.S. Department of Health and Human Services***

In an administrative law case involving the Department's new rule that would require drug manufacturers to disclose in their advertisement the wholesale costs of new drugs for which payment is available under Medicare and Medicaid, both the lower court and the DC Circuit held that the cited provisions of the Social Security Act (42 USC Section 1302 and Section 1395) did not authorize the Department to do any more than manage the system. These provisions did not allow the Department to regulate "market actors," and it does not enjoy "unbridled power" to regulate in this manner.

***Allegheny Defense Project v. FERC***

On June 30, 2020, in an en banc decision, the court held that FERC's common practice of using "tolling orders" to lengthen the time the Commission had to decide a petition for rehearing a Commission decision was inconsistent with the Natural Gas Act. This is a venerable practice, employed by the agency to give it more time to cope with petitions for rehearing. Nevertheless, the court decided that this practice violated the Natural Gas Act. What may have concerned the court was the fact that the authority conferred on successful applicants allowed them to immediately begin condemnation proceedings under the Act's eminent domain powers to acquire need pipeline easements.

## U.S. Court of Appeals for the First Circuit

***Town of Weymouth, et al. v. Massachusetts Department of Environmental Protection***

On June 3, 2020, the U.S. Court of Appeals decided a case involving the Atlantic Bridge LNG pipeline project which received FERC 's approval in July 2017. At issue is the proposed construction of a natural gas compression station in Weymouth, Mass. The MDEP granted the pipeline's application and granted an air permit. Local opposition resulted in this appeal of the agency's order. The plaintiffs argued that the DEP violated its own procedures in assessing whether an electric motor satisfied EPA's BACT Clean Air Act requirements to control NOx emissions. The appeals court agreed that the DEP's explanation of the cost factors was inadequate, vacated the air permit and remanded the matter to the agency for further proceedings.

## The U.S. Court of Appeals for the Second Circuit

***NRDC and the State of Vermont v. EPA***

On June 5, 2020, the U.S. Court of Appeals for the Second Circuit reviewed a new EPA TSCA mercury reporting rule. The agency provided some reporting exceptions, most of

which were approved by the court. However, the court set aside and vacated the exception for mercury importers because it lacked a "reasoned explanation."

***Vega, et al. v. Semple***

On June 29, 2020, the court refused to dismiss a putative class action by past and present inmates of Connecticut's Garner Correctional Institution who alleged that state correctional officials exposed them to excessive amounts of radon gas in violation of the Eighth Amendment. These officials are alleged to have been "deliberately indifferent" to inmate safety. A 1993 Supreme Court decision, *Helling v. McKiney*, clearly established the law in this area, and the Garner facility opened in 1992. The defense clams of limited immunity as to federal law violations were rejected.

## The U.S. Court of Appeals for the Sixth Circuit

***National Wildlife Federation v. Secretary, Department of Transportation, et al.***

On June 5, 2020, the court upheld the Department of Transportation's Pipeline and Hazardous Materials Safety Administration's approval of the Enbridge Pipeline's oil spill response rules, reversing the decision of the lower court. There was a consensus that the response plans satisfied all of the specific criteria set forth in the Clean Water Act, but the lower court also held that the agency had the duty to apply the requirements of the Endangered Species Act and NEPA , which it had not done. The Sixth Circuit, in a divided opinion, ruled that the lower court erred because the agency had no discretion under the law to apply either the ESA or NEPA.

## The U.S. Court of Appeals for the Seventh Circuit

***Baker, et al. v. ARCO***

Holding that the revised federal removal statutes authorize the removal to federal court of a state-filed complaint against several defendants by the former residents of an Indiana housing complex who contended that the defendants were responsible for the industrial pollution attributed to the operations of a now-closed industrial plant. The housing complex was constructed at the site of the former U.S. Smelter and Lead Refinery. During the Second World War, the plant produced products for the use of the government war effort, thus triggering the applicability of the federal removal statutes.

***Greene, et al. v. Westfield Insurance Company***

As the court notes, this is a matter that "began as a case about environmental pollution and evolved into a joint garnishment action." An Indiana wood recycling facility, VIM Recycling, was the subject of many complaints by nearby residents that its operations and waste disposal activities exposed then to dust and odors in violation of federal law and triggered state tort law claims. VIM was sued in state court, but neglected to notify its insurer, as required by its insurance policy with Westfield Insurance. One thing led to another, and a default judgment in the amount of $50 million was entered against VIM. Since VIM at that point had no assets, the plaintiffs and later VIM sought recovery from Westfield. When this dispute landed in federal court, the court, after reviewing the policy, concluded that there was a provision excluding coverage when the insured knew it had these liabilities when it purchased the insurance. As a result, the lower court dismissed the lawsuit, and this decision has been affirmed by the Seventh Circuit.

## The U.S. Court of Appeals for the Ninth Circuit

***National Family Farm Coalition, et al. v. EPA***

On June 3, 2020,the U.S. Court of Appeals for the Ninth Circuit set aside and vacated an EPA FIFRA herbicide registration determination because there was insufficient evidence in the record to support the agency's decision. The herbicide is dicambra, which has been manufactured for many years by Monsanto (since acquired by Bayer Crop Science). In 2018, EPA granted an amended registration to Monsanto, and the pesticide has been used by many growers of genetically modified crops. The application of the pesticide has created problems for neighboring land owners, and the amended registration included a revised "label," which the court described as consisting of 40 pages of very complex information. The rejection of this registration has caused concern because so many growers have invested so heavily in this product. The court acknowledged these concerns, but determined that the registration must nevertheless be vacated because of the legal errors it noted.

***Sierra Club, et al. v. Trump and State of California, et al. v. Trump***

On June 26, 2020, the Ninth Circuit issued separate rulings in the cases of *Sierra Club, et al. v. Trump* and *State of California, et al. v. Trump*. These cases were

heard by the same panel, which ruled, 2 to 1 in both cases, that the Department of Defense's transfer of funds appropriated in the 2019 Defense Appropriation Act for the construction of a the border wall along the southern Border violated Sections 8005 and 9002 of the Act and the Appropriations Clause of the Constitution. The court unanimously agreed that most of the plaintiffs had standing to sue, but disagreed that these transfers violated the DOD Appropriations Act. The dissent contended that while the plaintiffs had standing, they had no cause of action under the Administrative Procedure Act (APA), and that the holding of the majority that the APA does not rule out constitutional standing claims was in error. The environmental claims were based on the allegations that the construction of the wall would have deleterious effects upon the environment and wildlife in the area. There is likely to be additional litigation in this matter since the Supreme Court earlier granted a stay of the district Court's preliminary injunction.

***May Murray v. BEJ Minerals, LLC***

A noteworthy ruling was made by an en banc panel of the court on June 17, 2020. The dispute involves the ownership of dinosaur fossils found in Montana several years ago. Do these very valuable fossils belong to the surface owner, or the owner of the mineral estate beneath the surface? The Supreme Court of Montana, responding to a certified question, advised the Ninth Circuit that under Montana law, the dinosaur fossils are not "minerals" and thus belong to the surface owner.

## The U.S. Court of Appeals for the Tenth Circuit

***Sierra Club v. EPA***

The court held that EPA erred when, in performing its review under the Clean Air Act of a preconstruction permit renewal issued by Utah to PacifiCorp in 2015 (the application was filed in 2001, or 14 years before the state acted) it approved the state permit. The Sierra Club challenged the permit, but EPA dismissed the petition. The plaintiff argues that the facility's air emissions require it to be subject to major New Source Review, but both Utah and EPA argued that the facility was properly classified as only a minor source. EPA argued that its review concluded that the application satisfied "all applicable requirements" of the Clean Air Act, but the court held that EPA's interpretation of the regulatory language was inconsistent with the basic regulation. The court noted that the Fifth Circuit recently discussed this regulation and EPA's interpretation, and came to a different conclusion. There may be a circuit split here.

## U.S. DISTRICT COURTS

**U.S. District Court for the Northern District of California and U.S. District Court for Colorado—*Rapanos* Rulings**

On June 19, 2020, the court refused to grant a preliminary injunction in the case of *State of California, et al. v. Wheeler.* One of the arguments is that this new rule is contrary to the Supreme Court's ruling in *Rapanos v. U.S.* because if one reads Justice Kennedy's concurring opinion and its holding that some waters may be subject to federal jurisdiction on the basis of their links to undisputed navigable waters (by means of a significant connection) and the dissenting opinion, then the working plurality favors this broader view. In the court's opinion, "it is suspect to cobble together a holding based on the concurrence and the dissent."

Later that day, in *State of Colorado v. EP*A, the court held that the unique interests of Colorado required that the new rule be enjoined insofar as it applied in Colorado. The Court was convinced that the new rule is in conflict with the *Rapanos* holding, especially Justice Kennedy's formulation which has been adopted by many courts. Noting the California's courts skepticism about cobbling together a theory based on Justice Kennedy's concurrence and the four dissenters, this court suggests the California was unaware of an important Supreme Court precedent cutting the other way.

## TEXAS STATE APPELLATE COURTS

On June 18, 2020, the First State Appellate Court (sitting in Houston) decided a pipeline eminent domain case in *Hlavinka, et al. v. HSC Pipeline Partnership, LLC*. Texas law (i.e., the Texas Property Code and the Natural Resources Code) permits pipelines to exercise eminent domain powers in acquiring pipeline easement over private land. The exercise of this power, following a determination of the Texas Railroad Commission that the pipeline will be a common carrier, has spawned considerable litigation in the state courts. 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. At the present time, there is no evidence that the pipeline will be a common carrier, and the lower court's summary

judgment was reversed, and the matter was remanded to the trial court. The opinion is very instructive on Texas law in this area.

# JULY 2020

## THE U.S. SUPREME COURT

***U.S. Army Corps of Engineers v. Northern Plains Resources Council***

On July 8, 2020, the Court issued a partial stay of the decision of the U.S. District Court for Montana, which had held that the nationwide use by the Corps of Engineers of its Nationwide Permit 12 to permit oil and gas pipelines must be vacated because the Corps, when it reissued these permits in 2012, failed to follow the requirements of the Endangered Species Act. The breadth of this ruling seems to have surprised and alarmed many past and perspective permittees of the Corps. The stay will not apply to the ongoing Ninth Circuit litigation.

***Trump, et al. v. Sierra Club, et al.***

On July 31, 2020, in a 5-to-4 decision, the Supreme Court denied a motion to lift the stay entered by the Court a few days earlier. The earlier action stayed a preliminary injunction issued by the U.S. District Court for the Northern District of California, which had enjoined the construction of a wall along the Southern Border of the United States which was to be constructed with redirected Department of Defense funds. The merits will be addressed by the lower court and perhaps the U.S. Court of Appeals for the Ninth Circuit.

## FEDERAL APPELLATE COURTS

### U.S. Court of Appeals for the D.C. Circuit

***State of New York, et al. v. EPA***

On July 14, 2020, the court rejected the Environmental Protection Agency's (EPA) handling of a "Good Neighbor" Clean Air Act petition filed by the State of New York requesting relief from the industrial air emissions released from several "upwind states." Because of these emissions, the State of New York has had great difficulty in satisfying the EPA's 2008 and 2015 NAAQS standards 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. The court held that the EPA's explanation for its decision was unsatisfactory, and the burden of proof laid upon the State by the EPA's procedures was impossible to carry. The matter was remanded to the agency to correct these deficiencies.

***Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers***

In a case involving the Dakota Access Pipeline, the trial court handling this litigation ordered the owner of the pipeline to shut down its operational pipeline running underneath Lake Oahe within 30 days. It had held that the Corps of Engineers easement decision was not supported by an EIS, causing the lower court to vacate the easement. However, the District of Columbia Circuit has stayed that action to give the court sufficient time to review this action.

***Meritor, Inc. v. EPA***

In a case involving EPA's administration of the Superfund National Priority List (NPL) of priority Superfund sites requiring expedited cleanup, the court held that EPA had acted in accordance with the law and its implementing rules, and denied relief. Meritor was spun off from Rockwell Corporation, and is responsible for Rockwell's environmental liabilities, including sites Meritor never operated. In 2016, EPA added the Rockwell International Wheel & Trim facility in Grenada, Miss., to the NPL list. Meritor alleged that this listing was arbitrary and capricious, pointing to EPA's failure to adequately consider the impact of a mitigation measure added to the facility to address vapor intrusion, a factor EPA must consider in its application of the agency's hazard ranking system. However, the court was not impressed by these arguments, and denied relief. The court's discussion of the nuances of the hazard ranking system is very instructive

### The U.S. Court of Appeals for the Second Circuit

***MPM Silicones, LLC v. Union Carbide Corporation (UCC)***

*MPM Silicones, LLC v. Union Carbide Corporation (UCC)* was a private party Superfund (or CERCLA) cost recovery action. Union Carbide operated a manufacturing facility in Friendly, West Virginia, for many years, later known as the "Sistersville Site." In the course of its operations, UCC generated thousands of tons of PCB waste, but the full extent of its on-site disposal actions were not known or publicized for many years, and substantial cleanup costs

have already been borne by MPM, the most recent owner of the site. While reports of these activities by UCC have now been known by both state and federal and federal regulatory authorities (the West Virginia DNR and EPA), the court reports that these agencies have not released any cleanup orders, although UCC took some actions to redress some minor PCB issues. (Indeed, the UCC facility applied for and received a RCRA hazardous waste permit in the 1980s which triggered other RCRA compliance obligations.) MPM, through GE, became owner of the site, and soon discovered that substantial amounts of PCB waste were disposed of at the facility. To date, MPM has spent nearly $375,000 in cleanup activities, and sued UCC in December 2011 for reimbursement of its costs under CERCLA. In its defense, UCC 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 UCC bears some responsibility for future removal cleanup costs. 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. The actions UCC took in response to the information that it had acquired about PCB disposal practices may or may not be a "remedial action" subject to the statute of limitations. On remand, the lower court must sort this out. The appeals court also held that UCC was liable to MPM for 95% of future removal costs. The opinion is fairly long (81 pages) and detailed.

***Power Authority of the State of New York v. M/V Ellen S. Bouchard, et al.***

This Oil Pollution Act (OPA) cost recovery case was decided July 31, 2020. After the Power Authority's submarine electric power transmission lines were damaged by vessels owned by the defendants dropping anchor, causing the release of thousands of gallons into the waters of Long Island Sound, the Power Authority cleaned up the spill, spending $10 million to do so. OPA provides a cause of action to seek recovery against any third party whose actions in fact were responsible for the spill. However, the lower court dismissed the Authority's claims, ruling that the submarine cables were not a "facility" as defined by OPA. The Second Circuit reversed the lower court, holding that these cables were indeed facilities, from which thousands of gallons of an oil, dielectric fluid, were released. The court also noted that OPA is not exclusively concerned with oil and gas production facilities; by its terms it can apply to a wide range of businesses apart from traditional oil and gas entities.

## The U.S. Court of Appeals for the Third Circuit

***Baptiste et al. v. Bethlehem Landfill Company***

In this case, decided on July 13, 2020, the plaintiffs, neighbors of the Bethlehem Landfill, claimed that the operations of the landfill seriously interfered with the enjoyment of their homes, and resulted in a loss in their property values because of noxious odors. The lawsuit was grounded in Pennsylvania common law torts—public nuisance, private nuisance and negligence. The landfill is located on 224 acres and receives tons of waste on a daily basis which, as it decomposes, generates extremely noxious odors that are allegedly unbearable. The plaintiffs have asked for $5 million in property damages and other relief. The landfill is subject to extensive regulation by the Pennsylvania Solid Waste Disposal Act, and the rules of the Pennsylvania Department of Environmental Protection. However, since the statute does not provide a private right of action, the plaintiffs have resorted to the state common law remedies. The lower court dismissed the lawsuit, a decision the Third Circuit has now reversed. The appeals court held that the complaint was well pleaded and the case should be tried. The court noted some environmental justice concerns, but did not rely on these factors. The case was remanded to the trial court.

## The U.S. Court of Appeals for the Fourth Circuit

***Howard County, Maryland v. Federal Aviation Administration***

On July 1, 2020, the court held in an unpublished opinion, that Howard County, Maryland's lawsuit against the Federal Aviation Administration, must be dismissed as not being timely filed. The agency had approved an extension to certain facilities at the Thurgood Marshall Baltimore-Washington Airport, but the County complained that the agency failed to comply with NEPA in its decision making. However, its challenge had to be filed within 60 days of the release of the FAA decision, which was not done.

## The U.S. Court of Appeals for the Fifth Circuit

***Houston Aquarium, Inc. v. Occupational Safety and Health Review Commission***

On July 15, 2020, the court reversed an order of the Occupational Safety and Health Review Commission that the Houston Aquarium was in violation of the Occupational Safety and Health Administration (OSHA) workplace safety rules regulating commercial diving operations. The Aquarium features many large animals in its many tanks. To feed these animals and to clean the tanks, the Aquarium has many certified commercial divers on staff. An anonymous complaint was made to OSHA about these activities, and an investigation followed. The Aquarium was cited, and the citation was upheld by the Administrative Law Judge and the Commission, which concluded that the OSHA rules applied. However, the Fifth Circuit held that the rule's "scientific diving exception" applied, based on the rule's definitions, the agency's guidelines and regulatory history.

***Environment Texas Citizen Lobby, et al. v. ExxonMobil Corporation, et al.***

On July 30, 2020, the court released its ruling in *Environment Texas Citizen Lobby, et al. v. ExxonMobil Corporation, et al.* This is the latest ruling in this long-running Clean Air Act Citizen Suit filed by Environment Texas against ExxonMobil's operation of "the largest petroleum and petrochemical complex in the nation." Emissions from the plant are regulated in part by permits issued by the TCEQ, as overseen by EPA. To date, this controversy has been the subject of four rulings by the U.S. District Court for the Southern District of Texas and the Fifth Circuit. This latest ruling remands the case back to the lower court for additional fact-finding on the vexed issue of standing. Indeed, the court states that the "principal issue in this second appeal of this case is whether the plaintiffs have standing to recover damages for more than 16,000 violations of emissions standards"—whose statutory cap is $600 million. Here the 16,000 violations refer to recorded and reportable infractions of emissions standards, both some very minor and some possibly very significant. The court holds that the first appellate ruling did review the standing issue, and it must be determined in accordance with established law to be consistent with the Constitution's Article III provisions. The plaintiffs must show they have standing for each violation, which hasn't yet been done. The court avers this may not be as formidable a task as it sounds. However, an important component of standing is whether an injury can be traceable to the defendant's conduct. This may be difficult, and the court directs the lower court to determine the appropriate geographic nexus in a traceability fact-finding inquiry. In addition, the lower court must assess Exxon's affirmative defenses, which has yet to be done. For one thing, Exxon may be able to assert an "Act of God" defense for violations occurring during a hurricane. The concurring judge, Judge Oldham, states that the Fifth Circuit's standing precedents "are a mess," and that only an en banc panel can sort this out.

***Shrimpers and Fishermen, et al. v. Texas Commission on Environmental Quality***

This case was a ruling on a direct appeal to the Fifth Circuit, asked the court to vacate the air permitting action of the TCEQ and to order the Commission to conduct a contested case hearing into these permits by the Texas State Office of Administrative Hearings (SOAH). However, the court states that because it was unclear how the Fifth Circuit had the statutory authority to review these administrative actions, it asked for additional briefing. (Apparently, the response was not satisfactory as to whether a federal court has jurisdiction to hear this state-law created cause of action.) In its ruling, the court noted that requests for a contested case hearing can only be made by an "affected person," as defined by the Texas Water Code. Here, the petitioners are membership groups that oppose the construction of an export LNG facility in Brownsville, Texas. As such, they had to show that their members would suffer injuries in fact, and that these injuries were actual or imminent. The court concluded that the petitioners did not satisfy their burden of proof to show any evidence of harm, requiring the dismissal of the petition for lack of standing.

## The U.S. Court of Appeals for the Ninth Circuit

***Northern Alaska Environmental Center v. U.S. Department of the Interior***

Decided July 10, 2020, this is an appeal from the lower court's grant of summary judgment to several agencies involved in the 2017 offers and sale of oil and gas leases in the National Petroleum Reserve—Alaska. An Environmental Impact Statement (EIS) was prepared in 2012 for all BLM-managed lands in the Reserve. A separate EIS was not prepared for the 2017 lease sale, and the issue before the appeals court was whether the older EIS was sufficient. The court held that it was

after reviewing the 2012 "programmatic" EIS. This EIS, for purposes of NEPA compliance, could support both broad-scale and site-specific projects, and is consistent with Ninth Circuit precedent.

### The U.S. Court of Appeals for the Tenth Circuit

***Boulder County Commissioners, et al. v. Suncor Energy, et al.***
Decided on July 7, 2020, this was another instance of energy companies acting to remove state court litigation over alleged climate change damages to the federal courts. Again, the defendants cited the federal officer removal statute, contending that Exxon Mobil's extensive offshore operations were facilitated and permitted by the federal government—and this was sufficient to invoke the federal officer removal law. The Tenth Circuit rejected this argument, holding that Exxon was not "acting under" a federal government official when it obtained the lease and conducted oil and gas operations, principally in the Gulf of Mexico.

## U.S. DISTRICT COURTS

### The U.S. District Court for the District of Columbia

***Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Engineers***
On July 6, 2020, Judge Boasberg issued his latest ruling in the Dakota Access Pipeline case. In March 2020, the court ruled that the Corps must prepare an environmental impact statement with respect to the easement it had approved under the Mineral Leasing Act. The easement allowed the pipeline to construct a segment of the pipeline under Lake Oahe, and it is now in operation. However, the court also asked the parties to file briefs on the issue whether the Corps' failure to prepare an EIS instead of an Environmental Assessment was so significant as to require the vacatur of the easement decision. The court has now determined that the easement decision must be vacated and the operational pipeline must be shut down within 30 days. The Corps must still complete the EIS, which will cover the length and breadth the pipeline project, and it will be subject to extensive judicial review. A petition for a stay will be filed with the DC Circuit.

### The U.S. District Court for the Southern District of New York

***NRDC, et al., v. Bodine***
On July 8, 2020, the court dismissed a challenge filed against EPA's temporary enforcement policy which would only be operative during the COVID-19 pandemic. In brief, the agency would employ enforcement discretion when routine monitoring and reporting requirements at permitted facilities could not be performed because of safety and other concerns. The policy has been controversial, and the plaintiffs sought immediate relief; their lawsuit was filed some twenty days after the policy was announced. The court held that the plaintiffs did not establish their standing to prosecute this case, and noted that in their contentions were not well supported: the plaintiffs "have taken no air quality measurements, they have not taken any samples, they do not attest that the air in their neighborhoods has become more polluted."

## REGULATORY DEVELOPMENTS

EPA's revised Clean Water Act Section 401 State Certification rules were published on July 13, 2020 and are effective on September 11, 2020. (See 85 FR 42210.) The rules update and clarify the states' water quality certification authority with respect to federal permitting requests.

The Council on Environmental Quality published its revised NEPA procedural rules. These rules become effective on September 14, 2020. (See 85 FR 43304 (July 16, 2020).)

# AUGUST 2020

## FEDERAL APPELLATE COURTS

### The U.S. Court of Appeals for the D.C. Circuit

***State of New York, et al. v. National Highway Safety Administration***
Also on August 31, 2020, the U.S. Court of Appeals decided a case involving the National Highway Safety Administration's attempt to modify the 2016 revisions to the Clean Air Act's Corporate Average Fuel Economy (CAFE) standards that affect the automobile industry. In 2016, the prior administration increased the penalties for noncompliance to $14, but in 2019, the new administration

reduced this "base rate" to $5 for every tenth of a gallon below the standard, and in doing so argued that this penalty was not a civil penalty subject to the constraints of the Federal Civil Penalties Inflation Adjustment Act. A panel of the Second Circuit issued a unanimous ruling that the CAFE penalties were in fact and law subject to the Act, and the agency's actions in 2019 were untimely and unauthorized. Moreover, because there is no ambiguity in the Act, the agency's actions were not subject to *Chevron* or *Skidmore* deference.

## The U.S. Court of Appeals for the First Circuit

***Town of Weymouth, et al. v. Massachusetts Department of Environmental Protection (MDEP)***

On August 31, 2020, the U.S. Court of Appeals for the First Circuit issued an opinion revising the mandate of its earlier June 3, 2020, ruling in the case. In the earlier ruling, the court vacated the grant by the MDEP of an air permit to Algonquin Gas Transmission to build and operate an air compressor station, ordering the agency to "redo" its Best Available Control Technology analysis within 75 days. Algonquin asked the court to reverse without vacatur because the agency could not comply within the time limits established by the court. The First Circuit agreed, and established a new deadline for the agency of January 19, 2021.

## The U.S. Court of Appeals for the Fifth Circuit

***The Parish of Plaquemines v. Chevron USA, et al.***

Many oil companies that have conducted oil and gas exploration and production operations along the Louisiana coast for many years have been sued in state court for the environmental damages allegedly resulting from these activities. On August 10, 2020, the U.S. Court of Appeals for the Fifth Circuit decided a case filed in 2013 pursuant to state law, the Louisiana State and Local Coastal Resources Management Act of 1978. The defendants sought to have these cases removed to federal court, but the federal district courts in the Eastern and Western districts denied relief. The defendants appealed to the Fifth Circuit, which has now affirmed the lower courts. The appeals court held that the defendants failed to adhere to the short-term deadlines for filing such removals as set forth in the removal statute, 28 USC Section 1446(b).

## The U.S. Court of Appeals for the Sixth Circuit

***In re Flint Water Cases***

Several local and State of Michigan officials, including the former governor, requested dismissal from the civil litigation seeking damages for the massive failure of Flint, Michigan's public drinking water system. On August 5, 2020, the U.S. Court of Appeals for the Sixth Circuit agreed that the plaintiffs, residents of Flint, have successfully pled a case that the conduct of the defendants so "shocked the conscience" that a claim for a violation of their substantive due process rights was appropriately alleged. The defendants, including the former governor, argued that they were entitled to a qualified immunity defense. The court rejected this argument on the basis of the earlier decisions made by the court in this matter. Judge Sutton concurred because he was bound by this precedent, but remarked that the evidence for the governor's culpability was very thin; he was not intimately connected to the extraordinary error in judgment. The majority was very upset with this concurrence as indicted by their own opinion.

## The U.S. Court of Appeals for the Tenth Circuit

***Kansas Natural Resource Coalition v. U.S. Department of the Interior***

On August 24, 2020, the U.S. Court of Appeals for the Tenth Circuit decided this Administrative Procedure Act (APA) case involving the Congressional Review Act (CRA), which provides Congress with authority to reject regulations issued by the federal agencies. The plaintiffs, an organization of county governments in western Kansas, are concerned with Endangered Species Act (ESA) plans to protect the Lesser Prairie Chicken, a species that has, from time to time, been accorded the protections of the Endangered Species Act. Here, the plaintiffs filed a petition with the district court seeking an order by which the Department would be obliged to submit to the Congress, in accordance with the Congressional Review Act, its rules regarding the department's evaluation of conservation efforts in connection with ESA listing determinations. These 2003 rules were never submitted to the Congress despite the clear requirements of the CRA, and without the benefit of these rules, the petitioners apparently believe that any new listing decision will be inadequate. However, as recognized by the courts, the CRA also contains a provision forbidding the courts to

review "any omission" covered by the CRA. Because this failure could be described as an "omission," this unique litigation was dismissed.

## FEDERAL DISTRICT COURTS

### The U.S. District Court for the District of Columbia

***Center for Biological Diversity v. Bernhart, Secretary of the Interior***

On August 20, 2020, the court reviewed the ESA status of the "Houston Toad." The Houston Toad resides only in Texas, but does not appear to be present in the Houston area. In 1984, the Fish and Wildlife Service issued the "Houston Toad Recovery Plan" which has not been updated although the Act was revised in 1988. The plaintiff seeks to "prevent the U.S. Fish and Wildlife Service from leapfrogging the ESA's current mandates" in its efforts to protect this species. While the agency admits the current plan does not satisfy the criteria set forth in the 1988 revisions, it argues the plaintiff is seeking to litigate the 1984 plan and it is too late to do so now. The court rejected these arguments, and the department's contention that the controlling statute of limitation requires dismissal. The court held that, because the revised ESA had not been followed, there was a continuing violation of the law, and the statute of limitations does not apply.

### The U.S. District Court for the Southern District of New York

***Natural Resources Defense Council, et al. v. U.S. Department of the Interior and the U.S. Fish and Wildlife Service***

On August 11, 2020, the court decided this case involving the Migratory Bird Treaty Act (MBTA) and the department's revised interpretation of the Act's "incidental take" provisions. As stated by the court, in December 2017, the Principal Deputy Solicitor of the department issued a memorandum "renouncing almost fifty years of the agency's interpretation of these provisions." According to this opinion, "the MTBA does not prohibit incidental takes or kills because the law applies only to activities specifically aimed at birds." The court held that this new opinion was contrary to the plain and straightforward meaning of the MBTA, and controlling Second Circuit precedent (*U.S. v. FMC Corporation,* 572 F.2d 902 (1978)). The Second Circuit held that Section 2 of the MBTA was a strict liability provision, and the district court vacated the department's opinion. The department argued that the court need only apply "Skidmore" deference to uphold the law, but the court was not persuaded. The court also attempted to distinguish a contrary ruling of the Fifth Circuit (see *U.S. v. CITGO Petroleum Corp.,* 801 F. 3d 477 (2015), and there may now be a circuit split that the Supreme Court will review.

### The U.S. District Court for the Southern District of Texas

***Exxon Mobil Company v. United States***

On August 19, 2020, the court concluded its review of Exxon Mobil's lawsuit against the United States seeking reimbursement of millions of dollars the company spent to cleanup up the environmental contamination generated at its Baytown, Texas, refinery and Baton Rouge, Louisiana, chemical plant during World War II. The federal government established a complex network of federal agencies to coordinate the manufacture of war materials and essentially commandeered these facilities as part of the war effort. At that time, there were few controls placed on the management of these wastes, but Exxon was obliged to address these contaminating activities and materials after the war. Many years later, Exxon Mobil sought reimbursement from the United States pursuant to under CERCLA and other statutes. This litigation proceeded in three phases, and the last phase was a bench trial conducted during the COVID-19 pandemic. The court concluded that Exxon Mobil should recover more than $20 million dollars as reimbursement. The court examined a wide range of materials and expert testimony that formed the foundation of its ruling.

### The U.S. District Court for the Eastern District of Michigan

***In re Flint Water Cases***

On August 26, 2020, the U.S. District Court for the Eastern District of Michigan rejected a motion to dismiss and held that EPA could be held liable in damages for its negligent handling of the Flint, Michigan, drinking water controversy. The U.S. Government asserted that it was shielded from liability under the provisions of the Federal Tort Claims Act because its actions were "discretionary' and were subject to sovereign immunity. The court,

however, found that the Safe Drinking Water Act placed substantial oversight authority in EPA, which was not exercised carefully. According to the court, EPA's actions were not discretionary under the provisions of Section 1414 of the Act.

# SEPTEMBER 2020

## THE U.S. SUPREME COURT

A climate change case will be reviewed by the Supreme Court. As the new term begins, the Court has agreed to review *BP PLC v. Mayor and City Council of Maryland*, a decision of the U.S. Court of Appeals for the Fourth Circuit which held that a climate change damages case filed against many energy companies must be heard in the state courts of Maryland and not the federal courts. The petitioners argue that the federal office removal statute authorizes such removal, and the Fourth Circuit's contrary decision conflicts with rulings from other circuit courts.

## FEDERAL APPELLATE COURTS

### The U.S. Court of Appeals for the D.C. Circuit

***U.S. House of Representatives v. Mnuchin, et al.***
The court held that the lower court should not have dismissed a lawsuit filed by the U.S. House of Representatives challenging the Executive Branch's transferal of appropriated funds to the Department of Defense to build a physical barrier along the southern border of the United State. More than $8 billion is at stake, a sum that had been transferred from various federal accounts not involved with building the wall. The appeals court held that the lower court should not have dismissed this lawsuit because the House of Representatives had standing to bring this lawsuit even if the U.S. Senate was not involved with this litigation. Accordingly, the case was returned to the lower court for additional findings, with the appeals court noting that the Constitution's Appropriation's Clause serves as an important check on the Executive Branch.

### The U.S. Court of Appeals for the Third Circuit

***New Jersey DEP v. American Thermoplastics Corp. et al.***
On September 8, 2020, the U.S. Court of Appeals for the Third Circuit issued an important interpretive ruling regarding CERCLA and federal/state relationships. The Combe Fill Superfund Site, located in New Jersey, was placed on the CERCLA National Priorities List (NPL) of sites whose cleanup should be pursued expeditiously. Both EPA and the state of New Jersey have spent large sums of money to clean up this former municipal landfill; indeed, EPA has spent over $100 million and New Jersey has spent $24 million. Carter Day, the operator of the site, entered into a separate settlement with New Jersey in 1991, and argued that this settlement afforded Carter Day "contribution protection" against the numerous federal cost recovery claims made against Carter Day in connection with the separate federal cost recovery litigation. After reviewing the terms of Carter Day's settlement with New Jersey, the court concluded that CERCLA Section 113 (f) does not confer this legal protection on Carter Day. To rule otherwise would also frustrate the national CERCLA policy favoring expedited cleanups.

### The U.S. Court of Appeals for the Ninth Circuit

***Idaho Conservation League v. EPA***
In an unpublished case, the court rejected EPA's approval of the State of Idaho's state NPDES permitting rules, agreeing on September 10, 2020, that EPA erred when it approved these rules which contained a *mens rea* intent component in state Clean Water Act enforcement actions. The Ninth Circuit has consistently held that some Clean Water Act enforcement actions do not require a *mens rea* component and that some criminal enforcement actions can be taken on the basis of proof of simple negligence. Also, Idaho's proposed rule did not satisfy the requirements of the relevant EPA rule, 40 CFR Section 123.37(b)(2).

***ASARCO LLC v. Atlantic Richfield Company LLC (ARCO)***
This was a Superfund cost recovery ruling decided by the Ninth Circuit on September 14, 2020. ASARCO entered into bankruptcy in 2005, and finally resolved its outstanding Montana environmental liabilities in 2009, including those involving the site that is the focus of this case, in 2009, by means of a "cash-out bankruptcy settlement." Here, the district court agreed with ASARCO that ARCO was liable for its allocated share of the cleanup costs at a former copper smelter in East Helena, Montana. ASARCO contributed more than $100 million and filed a lawsuit against ARCO to recover some of these costs, and the lower court agreed that this amount was in play. The

court also held that ARCO's allocated share was 25%. On appeal, the Ninth Circuit held that only necessary, non-speculative costs were at issue, and here less than half of the $100 million had been spent to date and could not be recovered by ASARCO at this time. The appeals court affirmed the lower court's allocation of costs to ARCO.

## TEXAS STATE COURTS

**Not Quite Water Under the Bridge**

On September 22, 2020, the Fourteenth Court of Appeals sitting in Houston decided the case of *Sanchez v. Striever,* which involves the application of the Texas Citizen Participation Act (TCPA), a law designed to moderate the impacts of litigation on public free speech. A lawsuit filed in bad faith to squelch free speech may result in the award of attorney's fees against the plaintiff. Here, the plaintiff, Orlando Sanchez, a Houston political figure, was speaking on local school board issues when the defendant surreptitiously poured water on him during a press conference. The defendant tried to flee, but he was identified, allowing Sanchez to sue the defendant for assault by offensive physical conduct. The trial court dismissed the lawsuit, holding that it was subject to the TCPA, and awarded the defendant thousands of dollars in attorney's fees. On appeal, the Fourteenth Court of Appeals reversed, holding that the defendant's conduct was a physical assault subject to the Texas Penal Code: "assaultive conduct was not a protected act of protest under the law. The court also reversed the award of attorney's fees.

## CALIFORNIA

**A Carbon Neutral Stance**

Gov. Gavin Newsom of California recently issued Executive Order N-79-20 to accelerate the state's transition to a carbon neutral future. The state will be using all of its regulatory powers to further reduce the extraction of oil in California (which has significantly declined over the years), ending hydraulic fracturing permitting by 2024, and developing a "Just Transition Roadmap" for affected workers by 2021. In addition, it will be the goal of the State of California that, by 2035, all in-state sales of new cars and trucks will be limited to zero-emission electric vehicles. On September 28, 2020, the Administrator of EPA cautioned Gov. Newsom that these plans raise serious questions regarding its legality and practicality. Specifically, "any attempt by the California Air Resources Board to implement sections of the Order," may require California to request a waiver of U. S. EPA.

# OCTOBER 2020

## FEDERAL APPELLATE COURTS

### The U.S. Court of Appeals for the D.C. Circuit

***North American Butterfly Association v. Chad Wolf***

On October 13, 2020, the court decided the case of *North American Butterfly Association v. Chad Wolf*, Acting Secretary of the Department of Homeland Security. The National Butterfly Center is a 100-acre wildlife sanctuary located in Texas along the border between the United States and Mexico, and in 2017, the DHS exerted control over a segment of the sanctuary to construct facilities to impede unauthorized entry into the United States. It was alleged that the government failed to provide advance notice to the sanctuary before it entered the sanctuary to build its facilities. The Association filed a lawsuit to halt these actions for several reasons, including constitutional claims and two federal environmental laws (NEPA and the Endangered Species Act), but the lower court dismissed the lawsuit because of the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). That law forecloses the applicability of these laws if the Secretary of DHS issues appropriate declaration. On appeal, the DC Circuit held, in a 2 to 1 decision, that the lawsuit should not have been dismissed. The plaintiffs had standing to file this lawsuit, but the jurisdiction stripping provisions of the IIRIRA, when invoked, required that the statutory claims be dismissed as well as a constitutional Fourth Amendment search and seizure claim. However, the plaintiff's Fifth Amendment claim that the government's actions violated their right to procedural due process must be reviewed. The Center was given no notice of the government's claims and no opportunity to be heard before these actions were taken. The dissenting judge argued that the court was being asked to review a non-final decision, which it should not do.

### The U.S. Court of Appeals for the First Circuit

***State of Rhode Island v. Shell Oil Products, et al.***

On October 29, 2020, the court rejected an appeal of various oil and energy companies to have the latest state-filed fossil litigation case removed to federal court. In the case, Rhode Island generally alleged that these defendants are liable for damages caused by the sale and use of their fossil fuels in Rhode Island because the

defendants misled the public as to the consequences of this use. The defendants argued on appeal that the federal officer removal statute authorized the removal of this litigation to the federal courts. Aligning itself with other federal appellate courts, the First Circuit held that producing oil and gas pursuant to federal permits and authorizations or fulfilling federal energy supply agreements does not trigger the federal officer removal doctrine. A similar decision by the U.S. Court of Appeals for the Fourth Circuit will be reviewed by the Supreme Court.

***Chavez v. Occidental Chemical Corporation***
The court may be nearing the issuance of a ruling that could bring to an end the long-standing DBCP banana plantations class action litigation that began many years ago in the state courts of Texas. When an offshoot of this litigation, in particular the impact of state statute of limitations on the viability of this lawsuit, came before the Second Circuit, the court asked New York's highest state court, the New York Court of Appeals, about the application of New York's statute of limitations laws in such circumstances. On October 20, 2020, the New York Court of Appeals responded, stating that (a) New York recognizes the Supreme Court's 1974 ruling in American Pipe, which pertains to the tolling of the statute of limitations for absent class members of a putative class action filed in another jurisdiction, and (b) agreeing that orders issued by the U.S. District Court for the Southern District of Texas in 1995 dismissing that the action on forum non conveniens grounds, ended the tolling.

### The U.S. Court of Appeals for the Tenth Circuit

***Scalia v. Wynnewood Refining Company***
On October 27, 2020, the U.S. Court of Appeals for the Tenth Circuit decided an important OSHA "process safety management" (PSM) case. A boiler located at the Wynnewood Refinery experienced a deadly explosion. The current owner of the refinery was cited for violating provisions of the PSM rules located at 29 CFR Section 1910.119. However, the OSHA appellate determination was that an earlier violation, committed by the previous owner of the refinery, could not be attributed to the current owner. Both the Secretary of Labor and the owner and operator of the refinery appealed. The refinery argued that the boiler was not subject to the PSM rules because it did not contain highly hazardous chemicals. However, the court, after examining the plain language of the rule's definition of "process," determined that the boiler was part of a PSM-regulated unit. The Secretary's argument was also rejected, the court finding that the attribution decision was reasonable.

## TEXAS STATE COURTS

**The Winds Continue to Die Down**
On October 1, 2020, in *State of Texas v. Arkema, et al.*, a Texas state judge dismissed the remaining criminal charges lodged against Arkema Inc., a chemical company operating a facility in Harris County, and some of its executives after a release of toxic chemicals during Hurricane Harvey. After reviewing the case made by the Harris County District Attorney's office, the judge determined that there was no direct evidence of Arkema's guilt, and granted the defense's motion for a directed verdict. However, many civil lawsuits remain to be tried and/or settled.

## NEW LEGISLATION

**America's Conservation Enhancement Act, Public Law 116-182**
This new law, enacted a few days ago, reauthorizes or establishes several important wildlife conservation and protection programs. The law authorizes the North American Wetlands Conservation Act at $60 million annually for five years; prohibits EPA from regulating the use of lead fishing tackle for five years; establishes a task force within the Fish and Wildlife Service to combat a "chronic wasting disease"; authorizes the National Fish Habitat Partnership at $7.2 million for five years; and reauthorizes the Chesapeake Bay Program for five years, starting at $90 million and increasing to $92 million annually.

## REGULATORY DEVELOPMENTS

**Environmental Protection Agency (EPA)**
The agency extends the new NPDES electronic reporting Phase 2 deadline. See 85 FR 69189 (November 2, 2020). EPA has been directed to modernize NPDES Clean Water Act reporting, replacing most paper-based NPDES reporting. Phase 1 is still being implemented, and the Phase 2 implementation deadline has been extended to December 21, 2025.

**The Equal Employment Opportunity Commission (EEOC)**
In response to Executive Order 13891, the EEOC has established new requirements for issuing EEOC guidance documents, effective December 2, 2020. See 85 FR 69167 (November 2, 2020).

**Federal Railroad Administration**
This DOT component has issued a final rule establishing special safety standards for the planned "Texas Central Railroad," an electrified high-speed passenger service that will link—for now—Houston and Dallas. This notice, published at 85 FR 69700, also serves as a final ROD in compliance with NEPA. It is stated that the railroad will maintain an environmental compliance system, and its construction will not trigger any Clean Air Act issues.

## THE FEDERAL COURTS

### The U.S. District Court for the District of Columbia

***NAACP Legal Defense Fund v. Barr***
On October 1, 2020, the court decided, a case involving the Federal Advisory Committee Act (FACA), which was enacted in 1972 to govern the creation and function of the many advisory committees the Executive Branch had been utilizing to assist with the performance of their statutory duties. FACA has been at the forefront of a variety of regulatory disputes, including environmental controversies. (See an August 2019 decision of the Montana federal district court: *Western Organizations of Resource Councils v. Bernhard, Secretary of the Interior*.) This case concerns the makeup of the President's Commission on Law Enforcement and he Administration of Justice. The plaintiff complained that the membership of the Commission, comprising only federal and state law enforcement officials, was unbalanced and was thus violative of FACA and its implementing regulations. The Attorney General, in establishing this Commission, stated that it was not intended to be subject to the provisions of FACA, citing a statutory exemption. However, after reviewing this disclaimer, the court held that the exemption was not applicable. The court did not enjoin the work of the Commission, but asked the parties to file briefs describing the appropriate corrective relief the court should order.

***Earthworks, et al. v. U.S. Department of the Interior***
On October 26, 2020, the court held that the Department's promulgation in 2003 and 2008 of two mining-related claims rules (which reversed an earlier administration's policy) were consistent with the Mining Act of 1872 and FLPMA as well as NEPA and the Administrative Procedure Act. Both rules were held to be consistent with the relevant mining laws, and that NEPA's "categorical exclusion applied so that the Department's failure to produce an environmental assessment did not violate NEPA."

### The District of Wyoming

***State of Wyoming v. U.S. Department of the Interior***
On October 8, 2020, a Wyoming federal court held that a 2016 Department of the Interior federal methane rule applicable to oil and gas operations on federal lands was illegal because the Department and the Bureau of Land Management (BLM) had no statutory authority under the Mineral Leasing Act to promulgate air quality regulations. The decision is fairly long (57 pages), with the court explicating the tangled history of this rule and its challenges in other courts. As this court points out, operators of oil and gas production facilities must manage the disposition of excess methane gas that is generated along with the production of oil and gas. Venting and flaring of this excess gas are used for reasons of safety or a lack of infrastructure to transport the gas. Believing the management of these byproducts is an air quality issue, the Department subjected its management to special BLM air quality controls. However, the court concluded this regulatory decision conflicted with the primary authority of the EPA to formulate these controls under the Clean Air Act. Accordingly, the court vacated these rules, with a few exceptions. (Similar litigation continues in another circuit—the Ninth Circuit.)

### The U.S. District Court for the Northern District of California

**The CWA Holds Sway Over Salt Ponds and the Bay**
On October 5, 2020, the U.S. District Court for the Northern District of California decided a novel Clean Water Act case, *San Francisco Baykeeper, et al., v. U.S. Environmental Protection Agency*. The plaintiffs filed a lawsuit challenging a 2019 Clean Water Act jurisdictional determination applicable to commercial salt pond operations in the southwestern San Francisco Bay area. Prior to its commercial development, the area was a tidal salt marsh. Over the years, using a series a permits

from the U.S. Army Corps of Engineers, the area was converted into the Redwood City Salt Plant well before the Clean Water Act (CWA) was enacted in 1972, and its new regulatory protections for "water of the United States." In May 2019, EPA (not the Corps of Engineers) made a jurisdictional determination that there were no CWA jurisdictional waters at the salt production complex. This determination was based on the agency's conclusion that the site was transformed into "fast land" before the CWA was enacted, and Ninth Circuit precedent. The court rejected EPA's determination, holding that the agency erroneously relied on inapplicable precedent, and not on the CWA's many rules interpreting "waters of the U.S." over the years, especially those in existence in 2016. The court also noted that there appears to be a hydrological connection between the Bay and the salt ponds. The court remanded the matter to the agency to consider the issue anew, and to evaluate the nexus.

## FEDERAL AGENCIES

**Bureau of Land Management—Methane Rules, Rescinded**

Regarding the BLM's methane rules, it should be noted that EPA recently issued two new Clean Air Act rules that rescind the 2016 rules which established new standards for regulating the emission of methane, a greenhouse gas, from segments of the oil and gas production category. The Rescission Rule was published on September 14, 2020 (85 FR 57018), and was effective on publication, and a revised VOC Rule was published on September 15, 2020 (85 FR 57398), effective 60 days later. An administrative stay was issued by the DC Circuit, and briefs have been filed on behalf of the petitioners and the government.

**SEC—Modernizing Reporting Obligations and Simplifying Compliance**

On October 8, 2020, the SEC promulgated rules which modernize a number of standard SEC reporting obligations (i. e., 17 CFR Sections 229.101; 103; and 105). (See 85 FR 63726; the effective date is November 9, 2020.) These rules are intended to inform the public and investors of the description of the business, legal proceedings, and the risk factors the business must evaluate. According to the SEC, these proposals were intended "to improve these disclosures for investors and to simplify compliance for registrants." For example, the regulatory compliance disclosure requirements now include as a topic "all material government regulations," not just environmental laws. The sanctions disclosure threshold was increased from $100,000 to $300,000, but the agency declined to require as a discussable risk factor, how climate change will affect a registrant's access to raw materials. Since environmental disclosures are such an important consideration for many companies, these changes may be of interest.

# NOVEMBER 2020

## FEDERAL APPELLATE COURTS

### The U.S. Court of Appeals for the D.C. Circuit

On November 23, 2020, the court, in a 2-to-1 vote, rejected the plaintiff's request for an emergency injunction pending appeal in the case of ***Manzanita Band of Kumeyaay Nation, et al. v. Wolf***. The majority held the requirement for such relief did not meet the requirements set forth in *Winter v. NRDC*, 555 US 7 (2008). Here, the plaintiffs allege that that the government's construction of a border wall violates several environmental laws that were illegally waived by the Secretary of the Interior. Judge Millett dissented in part because the plaintiffs demonstrated a likelihood of success on the merits. She pointed to the argument that the authority of the Secretary—or Acting Secretary—to take these actions has been successfully challenged in several federal district courts. An expedited pleading schedule was established by the court.

### The U.S. Court of Appeals for the Fourth Circuit

***Ergon-West, Inc. v. EPA***

The court again reversed the EPA's decision denying regulatory relief to a small refinery seeking a waiver of the renewable fuels mandate of the Clean Air Act. Ergon is a small refinery and requested relief in the basis of the economic harm that compliance would entail. In 2018, the court ruled in Ergon's favor and remanded the case back to the agency. After relief was again denied, the court held that "Ergon has come forward with sufficient evidence undermining one aspect" of the agency's latest decision, and the ruling was returned to EPA for additional analysis. It appears that a complicated process has become even more complicated.

***McKiver v. Murphy-Brown, LLC***
The Fourth Circuit affirmed the lower court's ruling that the owners and operators of a large hog production facility could be held liable under state law for the noxious odors and other adverse conditions created by their operations. The court affirmed the award of compensatory damage, but vacated the amount of punitive damages. Judge Wilkinson in his concurrence was especially critical of the "unreformed practices of hog farming" that have caused such distress. The dissenting judge pointed out that there were some environmental justice issues at play here; the community in which the hog farming operation are located is a low-income county.

### The U.S. Court of Appeals for the Eighth Circuit

***Voigt, et al. v. Coyote Creek Mining Company, LLC***
The plaintiffs, North Dakota ranchers and neighbors of a coal-processing operation, alleged that the defendants failed to obtain a Clean Air Act construction permit before they constructed the facility, and failed to implement a required dust control plan. The lower court, after reviewing federal law and guidance and the permitting decisions of the North Dakota Department of Health, held that the arguably applicable laws and regulations did not apply to this particular facility. The coal storage pile is not subject to regulation because the regulations are ambiguous, and the court deferred to the permitting decision of the state authorities. The appeals court, in a 2-to-1 ruling affirmed the holding of the lower court. The dissenting judge noted that "most Americans would be surprised to learn that state bureaucrats can play an even larger role than federal judges do in interpreting federal law." In doing so, the judge states that the panel has established "Voigt Deference" where the legitimacy of a permitting decision can be decided by a state engineer working for the NDDOH.

## FEDERAL REGULATORY DEVELOPMENTS

### EPA

On November 19, 2020, EPA published a final rule regarding the Reclassification of Major Sources of Air Pollution. (See 85 FR 73854.) A major source of air pollution can be reclassified as an area source once its potential to emit hazardous air pollutants below a threshold takes effect. The rule is effective on January 19, 2021.

On November 18, 2020, EPA announced that it has scheduled public hearings on a new Clean Water Act rule regulating incidental discharges from covered vessels. (See 85 FR 73438.)

On November 23, 2020, EPA published a notice that the State of Texas had submitted a request to amend its NPDES delegated authority to include regulating discharges from the oil and gas sector, following the enactment of state legislation to substitute the TCEQ for the Texas Railroad Commission. (See 85 FR 76073.)

### Department of Transportation

The Pipeline and Hazardous Material Administration published a final rule that cleans up, updates, clarifies and provides some regulatory relief from the Hazardous Material rules located at 49 CFR Part 107. (See 85 FR 75680.) The rule is effective on December 28, 2020.

### Department of the Treasury, Office of the Comptroller General

On November 20, 2020, the Comptroller published a notice seeking comments on a proposed new rule, "Fair Access to Financial Sources." In general the agency would promulgate a new rule affecting the financial community to ensure that important extractive industries have access to capital as they attempt to develop coal mining and oil and gas projects, which have been criticized in some quarters. Comments are due on January 4, 2021. (See 85 FR 75261.)

### Department of Commerce

New Export Control Act enforcement rules have been published. (See 85 FR 73411 November 18, 2020)

### Department of Agriculture

The U.S. Forest Service has published a final rule amending its NEPA rules, which now include new and revised categorical exclusions.

### Federal Permitting Improvement Steering Council

On November 27, 2020, the Council added mining to the list of FAST-41 sectors eligible for this accelerated federal permitting processing under the FAST Act. (See 85 FR 75998.)

## DECEMBER 2020

### THE U.S. SUPREME COURT

***Texas v. New Mexico***

On December 14, 2020, the U.S. Supreme Court decided a water rights controversy involving sharing the water of the Pecos River. The 1949 Pecos River Compact provides for the equitable apportionment of the use of the Pecos River's water by New Mexico and Texas, and a "River Master's Manual," approved by the Court in 1988, implements the Compact. These are very dry areas, and access to this water is very important. In 2014, a rare tropical storm drenched the Pecos River Basin, and Texas asked New Mexico to temporarily store the water that would otherwise flow into Texas. A few months later, New Mexico released the water to Texas, but the quantity was reduced because some of the water held by New Mexico had evaporated. The River Master awarded a delivery credit to New Mexico, and after Texas objected, Texas "in response" filed the Original Jurisdiction of the Court, suing New Mexico and seeking a review of the River Master's determination. The Court held for New Mexico, deciding that this dispute was subject to and resolved by the Manual. This case is important because it highlights the high value the states place on the equitable apportionment of water that flows through different states.

### The Federal Appellate Courts

#### The U.S. Court of Appeals for the Fourth Circuit

***Edmonds, et al. v. CSX Transportation***

On December 15, 2020, the court decided a class action brought by residents and businesses located in Lumberton, North Carolina, who alleged that the actions of CSX caused their properties to be flooded during two hurricanes because of the location of a CSX rail line. The city of Lumberton is divided by the Lumberton River, and the south side is prone to flooding. An agreement was reached with the railroad in 1978, which provided that a strategically placed levee could be closed when there was an imminent danger of flooding. However, in 2011 and 2015 it was alleged that CSX refused to allow access to its right-of-way, and severe flooding resulted. Both the trial and the appeals court held that any tort claims the plaintiffs may have against the railway were preempted by provisions in the Interstate Commerce Commission Termination Act, which placed the exclusive power to change the location of a rail line to the Surface Transportation Board; see 49 U.S.C. § 10501(b). However, the court did not decide a related contract claim, which was remanded to the trial court.

#### The U.S. Court of Appeals for the Fifth Circuit

***Southern Recycling, LLC. v. Aguilar, et al.***

The court decided a case of involving a "ship-breaking operation" which resulted in the death of one worker and an injury to another. The claimants filed a lawsuit in the Texas courts, but Southern Recycling sought liability relief pursuant to the provisions of the Limitations of Liability Act, 46 U.S.C. § 30501. The claimants moved to dismiss, arguing that the vessel was a "dead ship" and not a vessel subject to this statute. The Fifth Circuit upheld the lower court's dismissal of Southern Recycling's invocation of this Act, noting that federal jurisdiction here depends on the court's general admiralty jurisdiction (28 U.S.C. § 1333(1), and that the vessel, which had a gaping hole open to the sea, "could not navigate over water" so there was no federal jurisdiction.

***State of Texas, et al., v. EPA***

This case involved the agency's "nonattainment" designation for Bexar County under the Environmental Protection Agency's (EPA) 2005 ozone NAAQS standard. The court upheld this designation, although Texas insisted that certain Clean Air Act modeling determination concluded that Bexar County should be classified as being in attainment (If a county is determined to be out of compliance, then there can be significant regulatory consequences.) The Sierra Club also filed a challenge in the D.C. 4842-8498-2230.v1 Circuit regarding other Texas ozone determinations, but the Fifth Circuit also held that since this was primarily a local matter, the Fifth Circuit's jurisdiction was not preempted by the D.C. Circuit's special jurisdiction under the Clean Air Act.

## The U.S. Court of Appeals for the Ninth Circuit

***Northern Alaska Environmental Center, et al., v. the U.S. Department of the Interior***

On December 22, 2020, the court amended an earlier ruling and denied a petition for an en banc review. This is a dispute over the Bureau of Land Management's 2017 offer and sale of oil and gas leases in the Alaskan National Petroleum Reserve. The agency based its environmental review on the provisions of a 2012 Environmental Impact Statement, which the Ninth Circuit held was a reasonable exercise of the agency's discretionary authority. This Ninth Circuit precedent could be very important in the future.

## The U.S. Court of Appeals for the Tenth Circuit

***Defenders of Wildlife, et al, v. Iverson, Director of the National Park Service, et al.***

On December 30, 2020, the court decided this dispute, which involved the 312,000-acre Grand Teton National Park in Wyoming. 99% of this land is owned by the Federal Government, but the remaining one percent, described as "inholdings," is owned by the State of Wyoming or private parties. The National Park Service has taken the position that its federal wildlife management programs do not apply in these inholdings, which was challenged by a number of environmental plaintiffs. After reviewing an elaborate administrative history, the appeals court concluded that the agency did not act in an arbitrary or capricious manner contrary to the Administrative Procedure Act when it excluded these "inholdings" from the agency's Elk Reduction Program or other federal wildlife management plans. It was also clear to the court that the State of Wyoming, when it approved the law establishing this national park, did not cede its jurisdiction over its property to the federal government. 4842-8498-2230.v1 II.

# FEDERAL AGENCIES

### The Environmental Protection Agency

**EPA** has released its determination that it will not impose additional Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) financial responsibility requirements on chemical, petroleum, coal products and the electric power industry. (See 85 FR 77384.)

**EPA** has requested comments on its draft guidance on how the National Pollutant Discharge Elimination System (NPDES) program intersects with the Supreme Court's County of Maui decision on discharges to groundwater. See 85 FR 79489.

**EPA** has proposed a rulemaking to consider how much flexibility states possess in devising rules that criminally enforce negligent discharges into covered waters under their CWA delegated authority. See 85 FR 80713.

**EPA's** new Clean Air Act cost/benefit framework rule has been promulgated and was effective on December 23, 2020. See 85 FR 84130.

### The Department of Energy

The DoE has issues new National Environmental Policy Act (NEPA) rules that will apply to LNG production and export. See 85 FR 78197.

The DoE has revised and modified its regulatory definition of "showerhead" that implements some of the energy conservation requirements of the Energy Policy Act. See 85 FR 81341.

### The Department of Transportation

The DoT has modified its hazardous material transportation rules. See 85 FR 81411.

The DoT has promulgated "FAST Act" environmental review standards, effective on January 27, 2021. See 85 FR 84213. K. EPA has promulgated its final Ozone National Ambient Air Quality Standards (NAAQS), effective as of December 31, 2020. See 85 FR 87256.

The **Department of Justice** has codified its civil settlement procedures, which will affect the use of Supplemental Environmental Projects (SEPs). See 85 FR 81409.

The **Department of Defense** has released its Per-and polyfluoroalkyl substances (PFAS) cleanup guidelines, under the authority of recent National Defense Authorization Act (NDAA) legislation. See 85 FR 83554.