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Federal Regulation of Intrastate Species Under the Endangered Species Act

The Fifth Circuit Court of Appeals is set to review whether a wholly intrastate species in Texas can be subject to the Endangered Species Act under the Commerce Clause and Necessary and Proper Clause.

In a case that could have far-reaching implications for property owners across the country, the Fifth Circuit Court of Appeals will consider whether Congress exceeds its constitutional authority by regulating the "take" of wholly intrastate species under the Endangered Species Act (ESA). The lower court answered in the negative.

The ESA prohibits the "take" of a listed species, defined as harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, collecting, or attempting to engage in any such conduct. The endangered species at issue in the case—the bone cave harvestman—is a tiny spider-like species that spends its entire life underground and is known to inhabit only Travis and Williamson Counties in Texas. It has no commercial or trade value.

Under the Commerce Clause, Congress may regulate intrastate activities if they are an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." Courts generally review whether a "rational basis" exists for concluding that Congress has proper authority to regulate an activity under the Commerce Clause. The plaintiff in this case argued that noncommercial intrastate activity, such as the "take" of an intrastate species, should instead be evaluated under the Necessary and Proper Clause with a higher level of scrutiny. This argument was primarily based on Justice Scalia's concurring opinion in *Gonzales v. Raich*, which noted that "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."

The district court dismissed the plaintiff's arguments and upheld Congress's authority to regulate intrastate species under the ESA. A reversal by the Fifth Circuit would create a circuit split with a recent Tenth Circuit decision in *People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service*. There, the Utah district court had ruled that regulation of an intrastate species—the Utah prairie dog—was unconstitutional under the Commerce Clause, but the Tenth Circuit reversed. The U.S. Supreme Court denied granting review in the Tenth Circuit decision.

A circuit split may make the case prime for review in the highest court. A Supreme Court holding that the federal government may regulate the "take" only of *interstate* species would remove protections for approximately 68% of currently listed species under the ESA; the fate of wholly intrastate species would lie in the hands of state and local governments (most of which already have adequate protections in place). Such a ruling also would have wide-ranging implications in other areas of federal regulation that implicate purely intrastate activities.

Briefing in this case is set to begin in July.

Analyzing Transportation Impacts Under CEQA

Lead agencies start implementing new methodology to evaluate potential traffic impacts under the California Environmental Quality Act through vehicle miles traveled.

California's Natural Resources Agency adopted a comprehensive package of changes to the California Environmental Quality Act (CEQA) Guidelines late last year, including changes that require lead agencies to use new methods for analyzing transportation impacts pursuant to Senate Bill 743. Yet local agencies are just now starting to adopt new methodologies to address requirements in the new Guidelines to change the way traffic impacts are evaluated, and projects currently undergoing environmental review or that will soon undergo review should take note of the impending changes.

The legislature enacted SB 743 in 2013, requiring a change in transportation impact analysis under CEQA to promote the reduction of greenhouse gas emissions, development of multimodal transportation networks, and a diversity of land uses. To meet those goals, the new CEQA guidelines identify vehicle miles traveled (VMT)—which refers to the amount and distance of automobile travel attributable to a project—as the most appropriate metric to evaluate a project's transportation impacts. A project's contribution to automobile delay—the metric traditionally used by lead agencies to evaluate impacts—shall no longer be considered a significant impact.

The California Governor's Office of Planning and Research has provided guidance on adopting new VMT significance thresholds. However, lead agencies have discretion to choose the appropriate significance threshold and methodology to evaluate a project's VMT, including whether to evaluate a project's impacts to VMT in absolute terms, per capita, per household, or through any other measure. Generally, projects that cause a decrease in VMT in the project area compared to existing conditions shall be presumed to have a less than significant impact.

Lead agencies can adopt the new VMT significance thresholds anytime, but must do so by July 1, 2020. Some agencies have already adopted or are in the process of adopting the new significance thresholds and methodologies, including the cities of Pasadena, Los Angeles, and Corona. During this transition period, projects that are currently undergoing environmental review that may not be approved before July 1, 2020, or projects in jurisdictions that have already adopted the new VMT methodology, should confirm that any transportation analysis conforms to the new methods now required under CEQA.

Losing the Battle but Winning the War in RCRA Citizen Suits

Recent cases from the Seventh Circuit show that a defendant's response to contamination may shield it from a costly injunctive relief award in a Resource Conservation and Recovery Act citizen suit.

The Resource Conservation and Recovery Act (RCRA) allows private citizens to stand in the government's shoes and assert lawsuits for, among other things, contributing to past or present disposal of waste that "may present an imminent and substantial endangerment to health or the environment." Two March 2019 Seventh Circuit opinions demonstrate how even though a defendant may be liable under the RCRA, the court may not award the plaintiffs' desired remedy. Indeed, per these decisions, federal courts have discretion—and must apply traditional equitable principles—when determining whether to grant or deny a claim for injunctive relief.

- *LAJIM LLC v. General Electric Co.* The plaintiffs alleged chlorinated solvents from the defendant's manufacturing plant had impacted groundwater below their properties. GE had settled a state enforcement lawsuit related to the contamination almost a decade earlier and was remediating the contamination under the state's oversight. On appeal, the court affirmed the trial court's denial of injunctive relief based on GE's evidence and expert testimony that a court-ordered cleanup would not prevent public or environmental harm, and could, in fact, cause greater harm. Said the court: "the remedy of an injunction does not issue as a matter of course upon a finding of liability but only as necessary to protect against otherwise irremediable harm."
- *Liebhart v. SPX Corp.* The plaintiffs claimed that the demolition of a building that previously manufactured transformers caused PCB-containing dust to contaminate their residential properties. As in *LAJIM*, the Seventh Circuit affirmed the trial court's denial of injunctive relief, finding that denial was reasonable because the plaintiffs had not shown any deficiencies in the defendant's state-approved remediation plan that was already in place.

Together, these cases emphasize that a defendant's response to contamination may shield defendants from costly injunctive relief demands in RCRA citizen suits. Defendants facing potential RCRA citizen suits should consider what proactive measures it can take—e.g., comprehensive remedial measures blessed by state or federal agencies—to develop a defense that a plaintiff's requested corrective action will not abate (and may only exacerbate) environmental harm.

High Court Accepts CERCLA Appeal

The Supreme Court will review a Montana state court's decision to uphold a ruling that residents can sue parties that had already settled with the Environmental Protection Agency for costs related to cleaning up their properties.

On June 10, the U.S. Supreme Court accepted review of a Montana Supreme Court decision that allows residents to sue Atlantic Richfield for cleanup costs related to the Anaconda Smelter Superfund Site even though the defendants had already settled with the Environmental Protection Agency (EPA) and conducted remediation.

The Montana Supreme Court's decision upheld the lower court's key findings:

1. The Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA) limit on challenges to EPA remedies did not apply because the residents were not challenging the EPA's approved cleanup plan.
2. The residents were not "potentially responsible parties" such that the EPA would have to approve their desired remediation.
3. CERCLA does not preempt the residents' claims for restoration damages. (Under Montana law, "restoration damages" are designed to compensate parties if other settlements do not "fully" cover their losses.)

The U.S. Supreme Court will consider each of these questions. How the Court comes out will have significant consequences across CERCLA. For example, affirmation will likely spur plaintiffs to bring state-law damages claims (in states where restoration or similar damages are available) if they are near a Superfund site. Affirmation from the Court could also change the playbook and factors for considerations during negotiations over CERCLA cleanups and remedy selection. On the flip side, if the Court sides with the petitioners, private lawsuits seeking remediation above and beyond an EPA-mandated cleanup will become more difficult to pursue.

Big Verdicts in Glyphosate Litigation

Herbicide manufacturer Monsanto hit for popular weed killer Roundup; food manufacturers and restaurant retailers are in the crosshairs.

On May 13, Monsanto suffered its third big loss for its globally dominant, glyphosate-containing herbicide, Roundup. An Oakland, California jury awarded plaintiffs Alva and Alberta Polliard a total of $55 million in compensatory damages, and $2 billion in punitive damages, against the company for allegations that use of Roundup caused them to develop non-Hodgkin lymphoma. The loss follows two prior verdicts against the company in San Francisco: in August 2018, a jury awarded Dewayne "Lee" Johnson $289 million (since reduced by the judge to $78 million), and in March 2019, a jury awarded Edwin Hardeman $80 million, also for non-Hodgkin lymphoma. The size of the latest verdict may indicate the success of the plaintiffs' "Roundup cocktail" argument: that the mixture of other toxic chemicals in Roundup increases glyphosate's effects. One of these toxic chemicals, a surfactant known as POEA, is banned in Europe, and the company uses a different product in the Roundup sold there.

Monsanto is appealing the verdicts, arguing, among other factors, that the EPA has continued to find that glyphosate is non-carcinogenic and does not pose risks to human health. Nationwide, there are more than 13,000 cases against Monsanto alleging development of non-Hodgkin lymphoma; over 1,300 of these are in multidistrict litigation. Monsanto's first trial in a non-California case, *Gordon v. Monsanto*, is coming up this August in St. Louis.

In the wake of these verdicts, other industries unrelated to herbicides have been increasingly targeted following issuance of reports on detectable levels of glyphosate residue in food brands and restaurant meals. Food manufacturers and restaurant retailers have been named in a number of lawsuits alleging that traces of residual glyphosate are harmful, and that labeling or advertising that their food is "healthy" or "natural" is misleading to the public. The claims against these companies rely heavily on false advertising and consumer protection statutes, and defense against them will likely depend on a comprehensive strategy that ties together the lack of actual consumer confusion and the absence of scientific evidence showing the negligible levels at issue have any impact on human health. Indeed, several courts have thrown out similar cases in recent years. However, given the current public fervor surrounding the issue, related industries should expect continued pressure from the plaintiffs' bar and plan accordingly.

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Cutting the Red Tape on Energy Infrastructure Projects

The EPA streamlines the process for Clean Water Act certification by states.

On June 7, the EPA issued updated guidance intended to streamline the permitting process for oil and gas infrastructure projects under Section 401 of the federal Clean Water Act (CWA). This guidance document was issued pursuant to Executive Order 13868, which President Trump signed to accelerate approvals of energy infrastructure projects, particularly gas pipelines. The EPA's guidance update is an important step toward fulfilling the goals of that Executive Order, which could be a boon to the energy industry.

Under Section 401 of the CWA, states and authorized tribes are directly involved in the federal permitting process. Whenever a proposed project may cause a discharge into navigable waters, the permitting federal agency may not authorize the project until its effects on water quality are certified by state regulators. Because Section 401 has been interpreted broadly over the years, many states use this authority to impose conditions on the project that are unrelated to water quality or even the project itself. As a result, Section 401 certification has been a substantial source of delay in permitting numerous major projects. The burdens imposed by Section 401 certification have been especially felt by energy infrastructure projects, which necessarily involve state regulators.

Fortunately for the energy industry, the tide has begun to turn against such a broad application of Section 401. For example, the Federal Energy Regulatory Commission has expressed its concern with the Section 401 process, while the D.C. Circuit Court of Appeals ruled in January that states must act on Section 401 certification requests within a year without trying to game the deadline. President Trump continued this push with Executive Order 13868 in April.

Now with updated guidance from the EPA, energy developers who have been subject to extensive delays under Section 401 could finally be able to proceed. Granted, the guidance from the EPA does not impose any legally binding requirements upon itself, states, or applicants. But the guidance will immediately provide vital assistance to permit applicants who are working with federal agencies to facilitate certification by state regulators. In the meantime, the EPA has indicated that it will undertake formal rulemaking to change its Section 401 certification regulations, and this guidance provides important insight into how the final rule may look. This is an undeniably positive outcome for developers of our nation's energy infrastructure.

Federal Agencies Dig In for Prolonged PFAS Fight

The Department of Defense has picked a fight with the Environmental Protection Agency and Congress over allowable levels of per- and polyfluoroalkyl substances in groundwater in a remarkably public battle that portends a prolonged fight over how to regulate this emerging family of contaminants.

Per- and polyfluoroalkyl substances (PFAS) are a group of synthetic organic compounds used in myriad ways throughout the U.S., including paper manufacturing, fast food packaging, and firefighting foam. Because of their chemical composition, PFAS have an outsize potential to contaminate water systems. Now regulators at all levels have turned their attention to how to address PFAS contamination.

The Environmental Protection Agency (EPA) has spent years studying the issue, but has yet to set a Safe Drinking Water Act maximum contaminant level (MCL), which acts as the legal threshold for remediation of drinking water systems. An MCL would set a nationwide standard for PFAS remediation and could discourage states from setting their own regulations. The Department of Defense (DOD) has a lot to lose depending on how, or even whether, the EPA sets an MCL. The DOD used firefighting foam widely, and more than 400 DOD facilities have been identified as possibly contaminated with PFAS. As a result, the DOD could face billions of dollars in remediation costs, depending on how remediation levels are set.

The EPA and DOD are miles apart on PFAS cleanup levels. The EPA has set a PFAS "health advisory" level of 70 parts per trillion (ppt) for drinking water systems, which may influence any future setting of an MCL. For its part, the DOD has proposed setting the PFAS acceptable risk level at 380 ppt, or more than five times the EPA level. (To put these concentrations into perspective, one part per billion is the equivalent of a single drop in an Olympic-size pool. So one part per trillion is a single drop in 1,000 Olympic-size pools.)

Both the EPA and DOD recommended risk levels are based on limited scientific research. Although PFAS were manufactured for decades, it is only in recent years that concerns have been raised about their possible health effects. There have been limited studies, particularly studies that look at long-term effects, on how PFAS affect human health.

Neither EPA nor DOD levels for PFAS have significant scientific evidence to back them, and it remains to be seen how any MCL may be set. More studies will be needed to fully ascertain the health effects of PFAS going forward, but the disagreement between the EPA and DOD over what the appropriate risk level should be continues. This has set the stage for an unusually public battle that has some in Congress lining up behind the EPA.

Businesses looking to the federal government to set a nationwide standard on how to address PFAS, and allay ongoing fears about remediation costs, will likely be waiting a lot longer since this fight shows no signs of abating.

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