ALSTON & BIRD

ENVIRONMENTAL & LAND USE

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IN THIS ISSUE:

Supreme Court to Review Controversial Groundwater Discharge Case

The Supreme Court has decided it will review a lower court ruling that concluded that discharges that reach a surface water via groundwater require permits under the Clean Water Act.

On February 19, 2019, the Supreme Court issued an order granting further review of a lower court decision on the Clean Water Act (CWA) and groundwater discharges. Key takeaways of this important ruling:

- **The Supreme Court will review a court of appeals decision that held a discharger liable for discharges to the ground or groundwater that eventually reached a covered surface water.** At issue in the Ninth Circuit's decision in *County of Maui* were injections of treated wastewater into underground wells, some of which eventually reached the ocean. The court granted review of one issue—whether a permit is required for a discharge of pollutants that originates from a point source but only reaches a navigable water via a nonpoint source. Ultimately, the court did not grant independent review to the related case of *Kinder Morgan*, which dealt with discharges from a pipeline.
- **Implications of the outcome of the Supreme Court's review and decision for businesses are nearly limitless.** Unless the Supreme Court reverses the lower courts, companies may be found liable under the CWA years after a discharge to ground or groundwater occurred, so long as the discharge ultimately migrates underground and reaches a jurisdictional water.
- **The Supreme Court will hear argument in its fall 2019 sitting.** The Court will set a briefing schedule, with the petitioners seeking to overturn the lower court's decision due in approximately 45 days. Respondents seeking to uphold the lower court will file their brief 35 days later. This case is expected to attract a number of amicus briefs on both sides. Amicus briefs are filed either seven days after the petitioners' brief or seven days after the respondents' brief, depending on which side the amicus supports.

PFAS Management Plan Released

On February 14, 2019, the EPA issued a long-awaited PFAS management plan that has been the product of bipartisan concern.

The plan includes the next steps the EPA will take toward developing new ways to measure and mitigate the risks posed by perfluoroalkyl or polyfluoroalkyl (PFAS) contamination. This is in line with the EPA's previous efforts to manage the suite of chemicals, largely aimed at gathering research and providing more information to the public on PFAS. The agency's acting administrator, Andrew Wheeler, has indicated that the plan is the first step in what is likely to be a long regulatory process.

The EPA has suggested it may finalize a maximum contaminant level in the future as part of this process and will consider listing two chemicals within the PFAS family as hazardous under Superfund cleanup requirements. However, the EPA has yet to put binding PFAS regulations into place. The agency has previously provided some guidance to this end—including issuing a drinking water advisory for PFAS at 70 parts per trillion and releasing new tools for testing and treating water contaminated with PFAS and related chemicals. In the absence of federal regulations, however, some states have begun to issue their own PFAS regulations, including Colorado, Michigan, Minnesota, New Jersey, New Mexico, New York, Texas, Vermont, and Washington. Without stronger federal guidance, this state-action approach may create a complicated patchwork for those responsible for cleanup efforts.

Proposed New Definition of "Waters of the United States"

The EPA and Department of the Army submitted their revised proposal to amend the definition of "waters of the United States" for purposes of establishing federal jurisdiction under the Clean Water Act.

The public comment period on the revised proposal has opened and will close on April 15, 2019. The agencies will host a two-day public hearing on February 27 and 28, 2019. It appears the agencies intend to finalize the new rule this year. The proposed waters of the United States (WOTUS) rule is a result of the February 2017 presidential Executive Order that directed the agencies to review and revise federal CWA jurisdiction.

Most significantly, the new WOTUS rule would eliminate the "significant nexus" test, which has created substantial uncertainty for federal courts and regulated entities. Circuit courts are split on what rules to apply, and landowners are left guessing whether the CWA would apply to their property. The existing 2015 WOTUS rule offers little guidance, with regulators required to make "a case-specific showing of their significant nexus to traditionally covered waters" whenever there is any question. Litigation over the existing 2015 WOTUS rule continues in multiple courts across the country.

The new proposal would replace the "significant nexus" test with six categories of waters subject to federal jurisdiction while delineating specific waters that are not. Under the proposed WOTUS rule, bodies of water such as "ephemeral" streams (in which water runs only during or after rainfall), groundwater, and wetlands that are not adjacent to other jurisdictional waters would no longer be regulated by the CWA. These changes would be a boon to many rural landowners who have been swept up into the existing regulations, though environmentalists have already raised alarm at the effect the proposed rule would have on federal regulation of wetlands. Even if the new WOTUS rule is approved by the agencies this year, there will certainly be fierce litigation over its scope and force.

State Takes Action on California's Housing Crisis

On January 25, 2019, California Governor Gavin Newsom announced that the state of California is suing the city of Huntington Beach for failure to meet its fair share of regional housing needs.

The suit signals the governor's commitment to enforce state housing laws to compel local governments to build housing for residents across all income levels or risk losing funding. Huntington Beach is the first city the governor has approved legal action against; however, there are currently 39 cities with housing elements out of compliance.

To address housing production delays, the California Department of Housing and Community Development (HCD) will modify the current Regional Housing Needs Assessment (RHNA) process that is used to determine the number and types of housing that jurisdictions must produce to meet their needs. HCD will oversee the enforcement of regional housing goals and will link housing production to the distribution of certain transportation funds.

To avoid litigation and the loss of needed funds, local governments should be eager to develop housing plans that allow for increased density and removal of barriers to permitting and constructing new housing units.

Prop 65 Trends

Proposition 65 bounty hunters have set their sights on two chemicals commonly found in plastics to target a wide spectrum of consumer products.

Nearly 500 Proposition 65 notices of violations were filed against consumer products containing the chemicals DEHP or DINP, both common components in plastics, during the last three months of 2018. This accounted for more than 70 percent of the notices filed during that period, far outstripping all other notices. This is a marked increase from the last quarter of 2017, when DEHP and DINP notices of violations accounted for just 25 to 30 percent of all notices.

Other notable trends include:

- Food products, particularly those containing nuts, were targeted for containing acrylamide.
- Spices were targeted for containing arsenic.
- Thirty-five hookah lounges were cited for tobacco smoke.
- The Coachella Valley Music and Arts Festival was targeted for allegedly exposing festival goers to benzene.

Proposition 65, officially called the Safe Drinking Water and Toxic Enforcement Act of 1986, does not restrict the use of harmful chemicals; it merely requires businesses to provide warnings. Businesses that fail to provide adequate warnings can be sued by either the state attorney general, city or district attorneys in cities with more than 750,000 people, or as is most likely, private individuals, who can get 25 percent of any settlement in addition to attorneys' fees.

EPA Has Broadened Mobile Source Enforcement

Two recent Clean Air Act mobile source enforcement cases against alleged defeat device manufacturers signal a broadening of the EPA's mobile source enforcement focus, demonstrating that the EPA is targeting small dealers and installers of defeat devices.

Derive Systems: The EPA settled claims of Clean Air Act (CAA) violations with Derive Systems. Derive sold tuning software ("tunes") that the EPA alleged overwrote vehicles' software and rendered inoperative onboard diagnostic systems that reduced vehicle emissions in gasoline- and diesel-fueled motor vehicles. Derive's products were sold either online through Derive's website or through Derive's distribution network. Under the consent decree, neither Derive nor its distributors may advertise that the products defeat emission controls or sell them with defeat devices. The Derive settlement serves as a reminder that manufacturers of tunes, and also "deletes," must closely monitor their distributors. When distributors market products as defeat devices, the EPA may claim that the manufacturer should have known its product would reduce emissions.

Spartan Diesel Technologies LLC: The EPA assessed a $4.2 million civil penalty on Spartan Diesel Technologies LLC for allegedly selling or installing at least 5,000 defeat devices on Ford trucks with heavy-duty diesel engines to evade emission standards. Spartan failed to respond to the EPA's complaint, which led the agency to move to default. The EPA sought a penalty in the case based on the profits from the sale of Spartan's devices—the economic benefit portion—and then significantly increased the fine in the gravity of harm portion of its benefit calculation. In this portion, the EPA increased the penalty based substantially on egregiousness, noncooperation, and lack of remediation. While this penalty is significant, it didn't even reach the statutory maximum. Violators are subject to civil penalties of up to $4,527 per sale of each defeat device.

Given the increase in enforcement in this area, and the hefty penalties that follow, manufacturers, distributors, and retailers of tune- and delete-related products should carefully monitor their marketing. While a company may not itself market the product as a means to evade emission controls, it would be difficult to claim that it wouldn't have known of such use.

California Adopts Significant Amendments to CEQA Guidelines

After years of drafting and incorporating revisions in response to public comments, the California Natural Resources Agency recently adopted the first comprehensive update to the CEQA Guidelines since the late 1990s.

The amendments likely will not streamline the California Environmental Quality Act (CEQA) review process or shorten the timeline for legal challenges under CEQA, but they do provide important clarifications by better aligning the CEQA Guidelines with recent changes in the statute and court decisions. Key revisions include:

Efficiency Improvements

- Clarifications on the formation of significance thresholds and certain CEQA exemptions.
- Clarifications, revisions to, and deletion of duplicative questions on the Environmental Checklist in Appendix G for nearly all impact areas.
- Clarification on requirements to evaluate a project's potential impacts to energy and wildfire risks.
- New section on remedies for legal actions challenging a lead agency's CEQA compliance.

Substantive Improvements

- New guidance on analyzing a project's impacts to energy, water supply, and greenhouse gases.
- New methods for analyzing transportation impacts pursuant to Senate Bill 743.

Technical Improvements

- Clarifications for how an agency may describe a project's environmental baseline, including clarification that the environmental setting may consider historic conditions and/or future conditions.
- Clarification that lead agencies may defer specific details of mitigation measures when it may be impractical or infeasible to fully formulate details of mitigation at the time of project approval.
- Clarifications that a lead agency may provide only general responses to general comments received on environmental documents.

The amendments became effective on December 28, 2018. The revisions to the Guidelines will apply prospectively, applying only to steps in the CEQA process that have not yet commenced by the effective date of the revisions.

CEQA Lead Agencies Must Connect a Project's Significant Air Quality Impacts to Likely Health Consequences

The California Supreme Court recently invalidated the EIR for the Friant Ranch project for the lead agency's failure to connect the project's significant air quality impacts to specific health effects.

The project at issue in the case—*Sierra Club v. County of Fresno*—consists of a planned development in Fresno County with approximately 2,500 single- and multifamily residential units, with other commercial and recreational uses. The supreme court considered four principal questions: (1) the standard of review to apply to the adequacy of an environmental impact report's (EIR) discussion of adverse environmental impacts and mitigation measures; (2) whether CEQA requires an EIR to connect a project's air quality impacts to specific health consequences; (3) whether a lead agency can substitute new mitigation measures in the future to reduce a project's significant impacts; and (4) whether a lead agency may adopt mitigation measures that do not reduce a project's significant and unavoidable impacts to less than significant levels.

For the appropriate standard to review whether an EIR adequately discusses environmental impacts, the court held that the ultimate question to consider is whether an EIR "includes enough detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." Applying that standard, the court held that the EIR's discussion of public health impacts from the project's significant and unavoidable air quality impacts was inadequate. The EIR included general information about the health impacts of the project-related pollutants, but the EIR never connected those adverse health effects to the specific levels of pollutants that the project would emit.

Without connecting those dots, the court held that the EIR failed as an informational document. The court recognized that it may not be scientifically possible to connect estimated air quality emissions with potential human health impacts, but if that is the case, the EIR must explain "why, in a manner reasonably calculated to inform the public of the scope of what is and is not yet known about the project's impacts."

Finally, the court held that the air quality mitigation measure could include a "substitution clause" allowing the lead agency to substitute different air pollution control measures that are equally effective or superior to those proposed in the EIR as new technology or other feasible measures become available. The court also held that the EIR could include a mitigation measure that reduced an environmental impact, even if the measure would not reduce the impact to a less than significant level.

Supreme Court Considering Whether to Hear Key Case on the Scope of Class Certification in Toxic Tort Cases

The unanimous *Martin* decision—which may soon be heard by the U.S. Supreme Court—signals that issue classes are certifiable even if fundamental questions of liability remain unsolved.

In *Martin v. Behr Dayton Thermal Products LLC*, 30 residents of the McCook Field neighborhood of Dayton, Ohio, alleged that Behr Dayton Thermal Products LLC, Behr America Inc., Chrysler Motors LLC, and Aramark Uniform & Career Apparel Inc. contaminated the groundwater beneath their properties with carcinogenic volatile organic compounds, posing a vapor intrusion risk in the homes and buildings on approximately 540 properties.

The district court denied class certification because individualized issues of causation and injury-in-fact defeated predominance; however, the court did certify seven issue classes under Rule 23(c)(4). The Sixth Circuit unanimously affirmed, joining other circuits and adopting a "broad approach" to issue certification, which allows certification under Rule 23(c)(4) even if predominance is not met for the whole action. Applying this standard, the panel held that the district court did not err in certifying the issue classes because the seven certified issues did not overlap with injury-in-fact or causation determinations, ensuring that individualized inquiries did not "taint" the class proceeding.

But Behr and co-defendants have pointed out that the courts have not unanimously adopted the "broad view"—arguing that the Supreme Court should take up *Martin* to decide this important class action issue. If the *Martin* decision stands, it will encourage plaintiffs to pursue issue certification in toxic tort class actions as a means not only to advance litigation but also to ratchet up pressure for settlement. Factual development of the record to identify, develop, and highlight individualized issues will be key for defeating such attempts.

NRD Overhaul on the Horizon?

Trustees and stakeholders have lamented for decades that the Natural Resource Damages assessment process under CERCLA is needlessly expensive and protracted. But change may be afoot.

The Department of the Interior (DOI) published an advance notice of proposed rulemaking on Natural Resource Damages (NRD) assessment and requested comments on ways to "improve the efficiency and cost-effectiveness" of certain aspects of the NRD process, including:

- How to revise the regulations so that they use "plain English" and closely align with the structure of the existing Oil Pollution Act NRD regulations.
- How to revise and utilize Type A regulations to result in efficient, cost-effective, and standardized assessments.
- How and when the regulations should emphasize restoration to encourage early scoping of restoration opportunities.
- How the regulations should align early restoration settlements with existing statutory and regulatory requirements for assessment and restoration planning.
- Whether the regulations should provide guidance on situations when restoration is undertaken in anticipation of marketing portions of such restoration to responsible parties.
- Whether the DOI should adopt categorical exclusions from the National Environmental Policy Act for NRD restoration planning.

The DOI received 56 comments, all which supported the DOI's effort to craft simple regulations that streamline the injury assessment process and expedite restoration of natural resources, but few agreed on how best to do so.

The DOI may issue a proposed rulemaking in 2019, though timing is uncertain especially in light of Secretary Zinke's departure.

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