ENVIRONMENTAL LAW UPDATE

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§ 27.01 Introduction

This paper summarizes the key judicial, legislative, and administrative developments in environmental law since the 2015 Annual Institute.

§ 27.02 Developments Under the Endangered Species Act: Spotlight on 4(d) Rules, Voluntary Conservation, and Climate Change

This year, Endangered Species Act ("ESA") cases and challenges focused primarily on the U.S. Fish and Wildlife Service's ("USFWS") decisions not to list species under the ESA and application of special rules under ESA section 4(d). On the regulatory front, the revisions to the USFWS and National Marine Fisheries Services' ("NMFS") (together, the "Services") joint critical habitat regulations are the most significant development.

[1] Northern Long-Eared Bat

[a] Final 4(d) Rule

In April 2015, the USFWS published a final decision to list the northern long-eared bat as threatened under the ESA and, rather than publishing a final 4(d) rule, opted to publish an interim 4(d) rule and open a 90-day comment period to gather additional information and potentially refine the interim rule.[1] The effect of the interim 4(d) rule depended on the location of a particular activity. For areas of the country not affected by white-nose syndrome, the interim 4(d) rule exempted incidental take from all activities. For areas of the country affected by white-nose syndrome, the interim 4(d) rule exempted the following activities from ESA take prohibitions: (1) forest management practices, (2) maintenance and limited expansion of transportation and utility rights-of-way, (3) prairie habitat management, and (4) limited tree

[1] 80 Fed. Reg. 17974 (Apr. 2, 2015). Section 4(d) of the ESA provides the Services with two tools to address threatened species: (a) the promulgation of regulations deemed "necessary and advisable" to conserve a threatened species; and (b) the application, by rule, of the section 9(a) take prohibitions to a threatened species.

removal projects, provided these activities protected known maternity roosts and hibernacula. Under the interim 4(d) rule, those activities were exempted provided: (1) the activity occurred more than 0.25 mile (0.4 km) from a known, occupied hibernacula, (2) the activity avoided cutting or destroying known, occupied roost trees during the pup season (June 1–July 31), and (3) the activity avoided clearcuts (and similar harvest methods, *e.g.*, seed tree, shelterwood and coppice) within 0.25 mile (0.4 km) of known, occupied roost trees during the pup season (June 1–July 31).[2] Thus, with a few narrow exceptions, the interim 4(d) rule prohibited *all* incidental take within areas of the country affected by white-nose syndrome.

On January 14, 2016, the USFWS published the final 4(d) rule[3] and, in doing so, significantly revised the interim 4(d) rule. The fundamental difference between the interim 4(d) rule and the final 4(d) rule is the extent to which incidental take is prohibited within the "WNS zone" (defined as the set of counties within the range of the northern long-eared bat within 150 miles of the boundaries of counties where white-nose syndrome has been detected). As outlined above, the interim 4(d) rule prohibited all incidental take and then created specific exceptions. Under the final 4(d) rule, only the following incidental take is prohibited:

> "(A) Actions that result in the incidental take of northern long-eared bats in known hibernacula.
>
> "(B) Actions that result in the incidental take of northern long-eared bats by altering a known hibernaculum's entrance or interior environment if it impairs an essential behavioral pattern, including sheltering northern long-eared bats.
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> "(C) Tree-removal activities that result in the incidental take of northern long-eared bats when the activity:

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[2] *Id*. at 18028.

[3] 81 Fed. Reg. 1900 (Jan. 14, 2016).

> "(*1*) Occurs within 0.25 mile (0.4 kilometer) of a known hibernaculum; or
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> "(*2*) Cuts or destroys known occupied maternity roost trees, or any other trees within a 150-foot (45-meter) radius from the maternity roost tree, during the pup season (June 1 through July 31)."[4]

Thus, under the final 4(d) rule, activities within the WNS zone not involving tree removal are not prohibited provided they do not result in the incidental take of northern long-eared bats in hibernacula or otherwise impair essential behavior patterns at known hibernacula.

[b] Center for Biological Diversity's Legal Challenge

On February 12, 2016, a coalition of environmental organizations led by the Center for Biological Diversity ("CBD") filed a 60-day notice of intent to sue the USFWS, alleging that the final 4(d) rule for the northern long-eared bat is unlawful.[5] The environmental groups contend that the species should have been listed as endangered rather than threatened and that the final 4(d) rule fails to adequately provide for the conservation of the species. The environmental groups also argue that the measures adopted by the USFWS to protect hibernacula and roost trees are not sufficiently protective. CBD filed an amended complaint in the District Court of the District of Columbia on May 3, 2016 challenging the listing decision and final 4(d) rule.

[2] Greater Sage-Grouse

[a] USFWS's Decision Not to List

In 2010, the USFWS determined that the greater sage-grouse was warranted for protection under the ESA, but the USFWS opted not to list the species due to the need to address higher-priority listing decisions. Several conservation groups challenged the "warranted, but

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[4] *Id*. at 1921.

[5] *See* Center for Biological Diversity, Lawsuit Launched Over Federal Authorization of Widespread Destruction of Protected Bat's Habitat (Feb. 12, 2016), http://www.biologicaldiversity.org/news/press_releases/2016/northern-long-eared-bat-02-12-2016.html.

precluded" decision and, as part of a multi-species settlement agreement, the court required the USFWS to make a listing decision on the greater sage-grouse by September 30, 2015.

Eight days before the 2015 deadline, the USFWS announced that it would not list the greater sage-grouse under the ESA. According to the USFWS, a listing is no longer warranted because the greater sage-grouse's primary threats have been reduced by federal, state, and local conservation efforts.[6] USFWS's decision was based, in part, on amendments to 98 federal land management (federal Bureau of Land Management ("BLM") and U.S. Forest Service) plans. Finalized in September 2015, the plan amendments adopt a tiered land use allocation system that provides the greatest protection for habitat that is most important to the greater sage-grouse (*i.e.*, sagebrush focal areas).[7] Among other things, the plan amendments recommended that the Secretary of the Interior withdraw sagebrush focal areas from mineral location and entry. Consistent with that recommendation, on September 24, 2015, the BLM published notice of the proposed withdrawal of roughly 10 million acres of "sagebrush focal areas" from mineral location and entry.[8]

[b] Legal Challenges

In late September 2015, Elko and Eureka Counties in Nevada and two exploration companies filed suit against the BLM and USFWS in the U.S. District Court for the District of Nevada,[9] and Idaho Governor Otter filed suit in the U.S. District Court for the District of

[6] 80 Fed. Reg. 59,858 (Oct. 2, 2015).

[7] Sagebrush focal areas are characterized by large, contiguous blocks of federal land, high population connectivity, and high densities of breeding birds.

[8] 80 Fed. Reg. 57,635 (Sept. 24, 2015), *corrected*, 80 Fed. Reg. 63,583 (Oct. 20, 2015).

[9] *W. Expl. LLC v. U.S. Dep't of the Interior*, No. 3:15-CV-00491-MMD-VPC (D. Nev. Sept. 23, 2015).

Columbia, alleging violations under the National Environmental Policy Act ("NEPA") and the Federal Land Management and Policy Act ("FLPMA").[10] The Wyoming Stock Growers Association filed suit in October 2015,[11] and Utah Governor Gary Herbert filed suit in February 2016,[12] both alleging similar violations of FLPMA and NEPA. The Utah suit requests that the federal court discard the federal plan amendments in deference to the State of Utah's plan for sage-grouse management. In April 2016, the American Exploration and Mining Association filed suit in the U.S. District Court for the District of Columbia, alleging violations of FLPMA, the National Forest Management Act ("NFMA"), and NEPA.[13]

Not to be outdone by their industry counterparts, on February 25, 2016, four environmental organizations filed a lawsuit in the U.S. District Court for the District of Idaho alleging that the BLM and U.S. Forest Service plans "fail to ensure that greater sage-grouse populations and habitats will be restored in accordance with best legal science and legal mandates."[14] The complaint alleges violations under FLPMA, NFMA, and the Administrative Procedure Act ("APA").[15]

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[10] *Otter v. Jewell*, No. 1:15-CV-01566 (D.D.C. Sept. 25, 2015).

[11] Wyo. Stock Growers Ass'n v. U.S. Dep't of the Interior, No. 2:15-CV-181-KHR (D. Wyo. Oct. 14, 2015).

[12] *Herbert v. Jewell*, No. 2:16-CV-00101-DAK (D. Utah Feb. 4, 2016).

[13] *Am. Expl. & Mining Ass'n v. U.S. Dep't of Interior*, No. 1:16-CV-00737, 2016 WL 1576547 (D. D.C. Apr. 19, 2016).

[14] *W. Watersheds Project v. Schneider*, No. 1:16-CV-00083-EJL (D. Idaho Feb. 25, 2016).

[15] *Id.*

[3] Lesser Prairie Chicken

[a] Western District of Texas Vacates USFWS's Listing Decision, *Permian Basin Petroleum Association v. Department of Interior*

On April 14, 2014, the USFWS published a final rule in the Federal Register that listed the lesser prairie chicken as "threatened" under the ESA. The USFWS also issued a special rule under ESA section 4(d). The 4(d) rule provided that take incidental to activities conducted by a participant in the Lesser Prairie Chicken Range-Wide Conservation Plan ("Range-Wide Plan"), and operating in compliance with the Range-Wide Plan, would not be prohibited.[16] The USFWS included this provision in the 4(d) rule "in recognition of the significant conservation planning efforts of the five State wildlife agencies within the range of the lesser prairie-chicken."[17] The USFWS's decision was immediately challenged by several organizations, including the Permian Basin Petroleum Association, which alleged that the USFWS had not appropriately considered the conservation benefits of the Range-Wide Plan[18] on the lesser prairie-chicken and therefore the decision to list the lesser prairie-chicken as threatened was not warranted.

On September 1, 2015, the U.S. District Court for the Western District of Texas vacated the USFWS's listing decision, concluding that the USFWS had not properly applied its "Policy for Evaluation of Conservation Efforts When Making Listing Decisions" ("PECE") to its

[16] 79 Fed. Reg. 20074 (Apr. 10, 2014).

[17] *Id*.

[18] The Range-Wide Plan was developed by the Western Association of Fish & Wildlife Agencies and applies to a number of activities, including oil and gas operations, agricultural practices, and wind energy. Using a support tool (the Critical Habitat Assessment Tool or CHAT) that identifies focal areas and connectivity zones for lesser prairie-chicken, the Range-Wide Plan sets forth population and habitat goals, and establishes a mitigation framework administered by the Western Association of Fish and Wildlife Agencies that allows participants to mitigate any unavoidable impacts. In addition to the mitigation framework, the Range-Wide Plan requires participants to comply with established avoidance and minimization measures.

evaluation of the Range-Wide Plan. The federal defendants subsequently filed a motion to amend the judgment, requesting that the court remand, rather than vacate, the final rule listing the lesser prairie-chicken as threatened under the ESA. On February 29, 2016, the court issued an order denying the federal defendants' motion to amend the judgment. On April 29, 2016, the federal defendants filed a notice of intent to appeal the decision to the Fifth Circuit, but on May 10, 2016, the federal defendants filed an unopposed motion to dismiss the appeal.

[4] Dunes Sagebrush Lizard

[a] D.C. Circuit Upholds USFWS Decision to Rely on State Plan, *Defenders of Wildlife v. Jewell*

In 2010, the USFWS proposed to list the dunes sagebrush lizard as endangered, but in 2012 the USFWS withdrew its proposal. In the intervening years, the USFWS had evaluated updated information about state and BLM conservation efforts. Based on the information, the USFWS concluded that "current and future threats are not of sufficient imminence, intensity, or magnitude to indicate that the . . . lizard is in danger of extinction (endangered), or likely to become endangered within the foreseeable future (threatened), throughout all or a significant portion of its range."[19] The Center for Biological Diversity and the Defenders of Wildlife sued the USFWS. The U.S. District Court for the District of Columbia sided with the USFWS, concluding that the USFWS had sufficiently considered the ESA's five listing factors, complied with the ESA's best available science standard, and reasonably relied on the State of Texas' conservation plan.

The environmental groups appealed the district court's decision to the D.C. Circuit, alleging that the withdrawal decision was arbitrary and capricious because the State of Texas'

[19] 77 Fed. Reg. 36,872, 36,897-98 (June 19, 2012).

plan was not certain to be implemented or certain to be effective under the USFWS's PECE and that the USFWS's decision unreasonably elevated unenforceable private conservation agreements over the ESA's required consideration of existing regulatory mechanisms. The question was "whether the [USFWS] could properly rely on the Texas plan in determining whether or not to withdraw its proposed listing of the lizard."[20]

In April 2016, the D.C. Circuit upheld the USFWS's decision to withdrawal its proposal to list the dunes sagebrush lizard as endangered, concluding that the USFWS had adequately explained its reliance on the Texas plan. The court determined that the appellant's argument that the USFWS had unreasonably elevated unenforceable voluntary agreements was waived at the district court. On the issue of whether the Texas plan was sufficiently certain to be implemented and effective, the court held that the appellants failed to demonstrate that the USFWS acted arbitrarily and capriciously in opting to rely on the Texas plan. According to the court, "[t]he Texas plan may not be foolproof, but neither is every regulatory regime. The evaluation of the adequacy of the Texas plan involves the USFWS's judgment based on its expertise and experience."[21]

[5] Revisions to Critical Habitat Regulations and Policy

On February 11, 2016, the Services issued two joint, interrelated final rules and a final policy, substantially revising their joint critical habitat regulations and policy under the ESA. In the first rule,[22] the Services revised the regulatory definition of "destruction or adverse

[20] *Defenders of Wildlife v. Jewell*, 46 Envtl. L. Rep. (Envtl. Law Inst.) 20046 (D.C. Cir. Mar. 1, 2016).

[21] *Id.*

[22] 81 Fed. Reg. 7214 (Feb. 11, 2016).

modification" of critical habitat. The Services were required to modify the definition of "destruction or adverse modification" in response to court decisions finding the previous definition invalid. The final definition provides:

> "*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or preclude or significantly delay development of such features."[23]

Although the Services clarified that the definition of "destruction or adverse modification" is a prohibitory standard and is not intended to create an affirmative conservation requirement or a mandate for recovery, the Services stated that the focus of the definition is on "the role that critical habitat plays for the conservation of listed species and acknowledges that the development of physical and biological features may be necessary to enable the critical habitat to support the species' recovery."[24] The Services also asserted that their determination of "destruction or adverse modification" must consider both the current status of the critical habitat as well as the "capability, in the foreseeable future, of the critical habitat to support the species' recovery given the backdrop of past and present actions that may impede formation of the optimal successional stage or otherwise degrade the critical habitat."[25] Thus, although the Services state that the new rule definition does not alter its section 7(a)(2) consultation process from current practice, the focus on future development of habitat to support species conservation appears to be a departure from past agency practice.

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[23] *Id.* at 7216.

[24] *Id.*

[25] *Id.* at 7220.

In the second rule, the Services amended several regulatory provisions governing designation of critical habitat under ESA section 4.[26] Among other changes, the rule defines the term "physical and biological features" to remove the concept of "primary constituent elements," and defines the term "geographic area occupied by the species" to include areas used throughout all or a part of the species' life cycle, "even if not used on a regular basis."[27]

In the Federal Register notice, the Services acknowledged that "critical habitat designations in the future will likely increasingly use the authority to designate specific areas outside the geographical area occupied by the species at the time of listing."[28] Specifically, the Services noted:

> "As the effects of global climate change continue to influence distribution and migration patterns of species, the ability to designate areas that a species has not historically occupied is expected to become increasingly important. For example, such areas may provide important connectivity between habitats, serve as movement corridors, or constitute emerging habitat for a species experiencing range shifts in latitude or altitude (such as to follow available prey or host plants). Where the best available scientific data suggest that specific unoccupied areas are, or it is reasonable to determine from the record that they will eventually become, necessary to support the species' recovery, it may be appropriate to find that such areas are essential for the conservation of the species and thus meet the definition of 'critical habitat.'"[29]

The Services' policy[30] on exclusion from critical habitat sets forth the Services' position on partnerships and conservation plans permitted under section 10 of the ESA and the Services' consideration of such agreements in their critical habitat exclusion analysis. In the policy, the

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[26] 81 Fed. Reg. 7414 (Feb. 11, 2016).

[27] *Id.* at 7429.

[28] *Id.* at 7435.

[29] *Id.*

[30] 81 Fed. Reg. 7226 (Feb. 11, 2016).

Services confirmed their commitment to always consider areas covered by a permitted Candidate Conservation Agreement with Assurances, Safe Harbor Agreement, or Habitat Conservation Plans.[31] To ensure exclusion from critical habitat designation, however, (1) the permittee must be in compliance with the terms of the agreement, (2) the species for which critical habitat is being designated must be a covered species, and (3) the agreement must address the species' habitat needs.[32]

§ 27.03 Developments Under the Bald and Golden Eagle Protection Act: A Still-Evolving Permitting Program

This year, Bald and Golden Eagle Protection Act ("BGEPA") developments have focused on the USFWS's continued efforts to fully implement its eagle permitting program.

[1] Northern District of California Vacates 30-Year Tenure Provision for Programmatic Eagle Permits, *Shearwater v. Ashe*

In 2014, the American Bird Conservancy ("ABC") filed a lawsuit challenging the USFWS's 2013 revisions to its eagle permit regulations, alleging violations of NEPA and the ESA. ABC's challenge related to the extension of the maximum term for programmatic Eagle Take Permits under BGEPA to 30 years, subject to a recurring five-year review process throughout the permit life. Under a previous version of the rule, the maximum term for programmatic permits for incidental "take" of bald and golden eagles was five years.

In August 2015, the U.S. District Court for the Northern District of California issued an order granting in part and denying in part ABC's Motion for Summary Judgment as well as the Motions for Summary Judgment filed by the USFWS and the American Wind Energy

[31] *Id*. at 7247.

[32] *Id*.

Association.[33] Notably, the Court ruled in favor of ABC and set aside the 30-year tenure provision on NEPA grounds, concluding that the USFWS had "failed to show an adequate basis in the record for deciding not to prepare an EIS–much less an EA–prior to increasing the maximum duration for programmatic eagle take permits by sixfold."[34] The Court found the USFWS's reliance on certain U.S. Department of Interior NEPA categorical exclusions misplaced. According to the Court, the USFWS failed to establish that the decision was "administrative" or "procedural" in nature and failed to address concerns by its own experts that the rule revisions might have highly controversial environmental effects. Although the Court set aside the USFWS's decision on NEPA grounds, the Court declined to set aside USFWS's decision under the ESA. According to the Court, the plaintiffs failed to provide a basis for setting aside the USFWS's conclusion that the 30-year tenure provision would not affect endangered or threatened species or designated critical habitat.

The court set aside and remanded the 30-year tenure provision to the USFWS for further consideration. Although the USFWS initially appealed the decision, the U.S. Department of Justice dropped its appeal to the Ninth Circuit Court of Appeals on January 19, 2016.

[2] Proposed Rule Amendments and Draft Programmatic Environmental Impact Statement

On May 6, 2016, the USFWS published notice in the Federal Register of proposed changes to its eagle permitting regulations.[35] Concurrent with the proposed rule, the USFWS issued a draft programmatic environmental impact statement ("DPEIS") analyzing the proposed

[33] *Shearwater v. Ashe*, 45 Envtl. L. Rep. (Envtl. Law Inst.) 20151 (N.D. Cal. Aug. 11, 2015).

[34] *Id.*

[35]

changes under NEPA. Among other changes, the proposed revisions re-extend the maximum permit term to 30 years. The Federal Register notice on the rule revisions also notes that the USFWS anticipates tiering environmental assessments for site-specific projects to the programmatic environmental analysis. The comment period on the proposed rule and the DPEIS is open until July 5, 2016.

§ 27.04 Developments Under the Clean Water Act: What's a WOTUS Anyway?

This year, developments under the Clean Water Act ("CWA") have focused on the extent of Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers' ("Corps") jurisdiction and when a regulated party may challenge an agency's determination on whether a particular waterbody is a water of the United States ("WOTUS").

[1] Waters of the United States Rule

[a] Final Rule

The CWA protects "navigable waters," which it defines simply as "waters of the United States." On June 29, 2015, EPA and the Corp issued joint regulations revising their regulatory definition of WOTUS.[36] The revised definition was a response to Supreme Court decisions in 2001[37] and 2006,[38] which held that the Corps had (or may have) applied the pre-2015 WOTUS definition too broadly. The 2015 rule redefined WOTUS as:

> "(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> "(ii) All interstate waters, including interstate wetlands;

[36] 80 Fed. Reg. 37054 (June 29, 2015).

[37] *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng's*, 531 U.S. 159 (2001).

[38] *Rapanos v. United States*, 547 U.S. 715 (2006).

"(iii) The territorial seas;

"(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

"(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

"(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

"(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

"(A) Prairie potholes. . . .

"(B) Carolina bays and Delmarva bays. . . .

"(C) Pocosins. . . .

"(D) Western vernal pools. . . .

"(E) Texas coastal prairie wetlands. . . .

"(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an

> adjacent water under paragraph (1)(vi) of this definition, they are an adjacent water and no case-specific significant nexus analysis is required."[39]

The 2015 rule retained the previous rule's exclusions from WOTUS for wastewater treatment systems and "prior converted cropland" and added several additional exclusions, including certain types of ditches, certain artificially irrigated areas, and certain artificial lakes and ponds. The revised rule took effect on August 28, 2015.

[b] Challenges

State, industry, and agriculture interests filed challenges to the WOTUS rule in federal district and appellate courts across the United States. Under the terms of the CWA, there is a significant question whether challenges to the rule are to be brought in federal district or circuit courts. Although the jurisdictional issue is beyond the scope of this paper, it explains the multiple challenges filed in multiple forums throughout the country. Amid wrangling over jurisdiction, several appellate court challenges were consolidated in the Sixth Circuit.

[c] Sixth Circuit Stays Implementation of Final Rule, *Ohio v. U.S. Army Corps of Engineers*

On October 9, 2015, the Sixth Circuit issued a nationwide stay of the WOTUS rule.[40] In balancing the harms, the court noted:

> "There is no compelling showing that any of the petitioners will suffer immediate irreparable harm—in the form of interference with state sovereignty, or in unrecoverable expenditure of resources as they endeavor to comply with the new regime—if a stay is not issued pending determination of this court's jurisdiction. But neither is there any

[39] 80 Fed. Reg. at 37118.

[40] Ohio v. U.S. Army Corps of Eng'rs, 803 F.3d 804 (2015).

> indication that the integrity of the nation's waters will suffer imminent injury if the new scheme is not immediately implemented and enforced."[41]

The court went on to note:

> "What is of greater concern to us, in balancing the harms, is the burden—potentially visited nationwide on governmental bodies, state and federal, as well as private parties—and the impact on the public in general, implicated by the [WOTUS rule's] effective redrawing of jurisdictional lines over certain of the nation's waters. . . . [T]he sheer breadth of the ripple effects caused by the [r]ule's definitional changes counsels strongly in favor of maintaining the status quo for the time being."[42]

In response to the decision, EPA and the Corps resumed use of prior regulations defining WOTUS.[43]

[2] *Hawkes Co. v. U.S. Army Corps of Engineers*

On March 30, 2016, the U.S. Supreme Court heard argument on a case that presents the question of whether a jurisdictional determination by the Corps is final agency action under the APA. In *Hawkes Co. v. U.S. Army Corps of Engineers*, Hawkes Co. ("Hawkes") proposed to mine peat from wetlands on a property in Minnesota. Hawkes applied for a permit from the Corps, and the Corps issued a preliminary determination that the property contained jurisdictional waters despite the fact that the property was roughly 120 miles from the nearest traditional navigable water. The Corps then issued an "Approved JD."

After Hawkes appealed the JD administratively, the Corps revised the determination but again concluded that the property contained jurisdictional waters. Hawkes sued the Corps. The

[41] *Id.* at 808.

[42] *Id.*

[43] EPA, Clean Water Rule Litigation Statement, https://www.epa.gov/cleanwaterrule/clean-water-rule-litigation-statement (last visited May 13, 2016).

U.S. District Court for the District of Minnesota dismissed the lawsuit,[44] concluding that the JD was not a final agency action under the APA, but the Eighth Circuit reversed.[45] Hawkes appealed to the U.S. Supreme Court.

The Court's decision, issued on May 31, 2016, turned on an interpretation of the second prong of the "final agency action" test set forth in *Bennett v. Spear*, which provides:

> "As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."[46]

Hawkes argued that the practical consequences of a JD are sufficient to render the jurisdictional determination immediately reviewable, but the Corps argued that such an interpretation is unworkable and that practical effects alone are insufficient to render agency communications reviewable under the APA.

In a unanimous decision, the Court concluded that a JD meets both of the *Bennett v. Spear* requirements, reasoning that the "definitive nature of approved JDs also gives rise to 'direct and appreciable legal consequences.'"[47] The Court focused on language in a memorandum of agreement between the Corps and the EPA, which notes that JDs are "binding on the Government and represent the Government's position in any subsequent Federal action or

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[44] *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 963 F. Supp. 2d 868, 871, 878 (D. Minn. 2013).

[45] *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.2d 994, 1002 (8th Cir. 2015) ("In our view, a properly pragmatic analysis of ripeness and final agency action principles compels the conclusion that an Approved JD is subject to immediate judicial review. The Corps's assertion that the Revised JD is merely advisory and has no more effect than an environmental consultant's opinion ignores reality.").

[46] 520 U.S. 154, 177-78 (1997) (citations omitted).

[47] 136 S.Ct. 1807, 1814 (2016).

litigation concerning that final determination."[48] Thus, negative JDs have the consequence of binding the two agencies authorized to bring enforcement actions under the CWA and, conversely, affirmative JDs "represent the denial of the safe harbor that negative JDs afford."[49] According to the Court:

> "The conclusion tracks the 'pragmatic' approach we have long taken to finality . . . . [W]hile no administrative or criminal proceeding can be brought for failure to conform to the approved JD itself, the final agency action determination not only deprives respondents of a five-year safe harbor from liability under the Act, but warns that if they discharge pollutants onto their property without obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties."[50]

§ 27.05 Developments Under the Clean Air Act ("CAA"): The Obama Administration's Attempts to Address Climate Change

[1] Mercury and Air Toxics Standards ("MATS") for Power Plants

[a] U.S. Supreme Court Finds EPA's Interpretation of CAA Unreasonable, Saying Cost of Compliance Should Be Taken into Account, *Michigan v. EPA*

In *Michigan v. EPA*,[51] the U.S. Supreme Court considered whether it was reasonable for EPA to refuse to consider cost when finding that it was "appropriate and necessary" under the CAA to regulate emissions of hazardous air pollutants from power plants. One of the programs to control air pollution under the CAA is the National Emissions Standards for Hazardous Air Pollutants Program, which targets stationary source emissions of numerous hazardous air pollutions. With respect to power plants, the CAA directs the EPA to perform a study of hazards

[48] *Id.*

[49] *Id.*

[50] *Id.* at 1815.

[51] 135 S. Ct. 2699 (2015).

to public health from emissions, and if EPA "finds . . . regulation is appropriate and necessary after considering the results of the study," it "shall regulate [power plants] under [§7412]."[52]

EPA completed its study of hazards in 1998, concluding that regulation of coal and oil-fired power plants was "appropriate and necessary," and, in 2012, promulgated floor standards. In doing so, EPA found regulation "appropriate" because emissions from power plants posed risks to human health and controls were available to reduce those emissions. EPA found the regulations "necessary" because other requirements under the CAA did not eliminate the human health and environmental risks. Importantly, however, EPA opted not to consider cost when deciding whether to promulgate regulations despite estimated costs to the industry of $9.6 billion per year.

Petitioners, including 23 states, challenged EPA's rule in the U.S. Court of Appeals for the D.C. Circuit, alleging that EPA's refusal to consider cost was unreasonable. The D.C. Circuit upheld EPA's decision,[53] but the U.S. Supreme Court reversed the D.C. Circuit's judgment and remanded the case for further proceedings. The Supreme Court held that the EPA "interpreted [CAA] §7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants."[54] Although the Court noted that "[t]here are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass cost[] [b]ut this is not one of them."[55] According to the Court, "it is unreasonable to read an instruction to an administrative

[52] *Id.* at 2705 (citation omitted; brackets in original).

[53] *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014).

[54] *Michigan v. EPA*, 135 S. Ct. 2712.

[55] *Id*. at 2707.

agency to determine whether 'regulation is appropriate and necessary' as an invitation to ignore cost."[56]

[b] EPA's Supplemental Finding on Cost, 80 Fed. Reg. 75025 (Dec. 1, 2015)

In response to the U.S. Supreme Court decision in *Michigan v. EPA*, the EPA on April 25, 2016 issued a supplemental finding[57] that it is appropriate and necessary to regulate hazardous air pollutants from coal- and oil-fired electric utility steam generating units. In the supplemental finding, EPA concluded that, even after considering cost, the regulation of hazardous air pollutant emissions from power plants is appropriate and necessary and that electric steam generating units are therefore properly included on the CAA section 112(c) list of sources that must be regulated under the CAA. In arriving at its determination, EPA

> "evaluated the reasonableness of the regulation's cost of compliance by comparing that cost to metrics relevant to the utility sector**:** revenues, expenditures (including capital and production costs), and retail electricity rates, and also the impact that compliance with the CAA section 112(d) standards would have on the power sector's ability to provide a reliable source of electricity. After concluding the costs of MATS are reasonable based on these metrics, the agency confirmed that the industry could comply with MATS without unreasonably increasing electricity prices or undermining the reliability of the electric grid."[58]

[2] EPA's Clean Power Plan

[a] Clean Power Plan Final Rule and Federal Plan Final Rule

On August 3, 2015, the EPA released a prepublication version of the Clean Power Plan ("CPP"), a rule that requires states to reduce carbon dioxide emissions from existing fossil fuel

[56] *Id.* at 2708.

[57] 81 Fed. Reg. 24420 (Apr. 25, 2016).

[58] *Id*. at 24428.

electrical generating units ("EGU"). Published in the Federal Register on October 3, 2015,[59] the CPP requires states to develop plans to reduce carbon dioxide emissions by meeting either state-specific mass-based targets (measured in metric tons of CO_2) or state-specific emission rate targets (measured in pounds of CO_2 per megawatt hour). The rule sets a final emission rate target for each state for 2030 and an interim target to be measured between 2022 and 2029.

Along with the emissions standards, EPA released a Federal Implementation Plan ("FIP")[60] that outlines two approaches for states that do not submit an approvable plan. The intent of the FIP is to "establish requirements directly applicable to a state's affected EGUs that meet the[] emission performance levels, or the equivalent statewide goal, in order to achieve reductions in CO_2 emissions in the case where a state or other jurisdiction does not submit an approvable plan. The stringency of the emission performance levels established in the final [emission guidelines] will be the same whether implemented through a state plan or a federal plan."[61]

[b] Challenges

In November 2016, 29 states challenged the legality of the CPP and sought a stay of the rule from the D.C. Circuit. The states alleged that the CPP exceeded the EPA's authority and was otherwise arbitrary, capricious, and not in accordance with law. The D.C. Circuit denied the petition for a stay on January 21, 2016. The states then filed an application to stay the CPP with the U.S. Supreme Court, alleging that a stay was necessary to prevent "irreversible change and harms" that would occur during the circuit court proceedings.

[59] 80 Fed. Reg. 64662 (Oct. 23, 2015).

[60] 80 Fed. Reg. 64966 (Oct. 23, 2015).

[61] *Id.*

[c] U.S. Supreme Court Stays Implementation of CPP, *West Virginia v. EPA*

On February 9, 2016, the U.S. Supreme Court stayed EPA's implementation of the CPP. The Court's action prevents EPA from further implementation of the CPP until the petitioners' appeal is decided. The underlying challenge to the CPP is proceeding on an expedited schedule with oral argument set for June 2 and 3, 2016. The D.C. Circuit is likely to issue its opinion later this year.