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2020 Environmental and Energy Law Forecast

FEDERAL FORECAST

Overview of Federal Activities

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The Trump administration and the EPA ended the decade with a number of policy announcements and rulemaking that we predicted in our 2019 forecast. In particular, EPA's repeal of the Obama administration's Waters of the United States (WOTUS) rule became final in December. EPA also undertook rulemaking actions and issued several memoranda relating to certain New Source Review permitting policies under the Clean Air Act at the end of 2019. Additionally, EPA promulgated the final Affordable Clean Energy rule, which replaced the Clean Power Plan implemented during the Obama administration. Although EPA largely continued its deregulatory focus during 2019, EPA also took steps to address the emergence of per- and polyfluoroalkyl substances (PFAS), and announced the next chemicals to undergo risk evaluation under the Toxic Substances Control Act (TSCA).

This year, we can expect continued efforts to address PFAS contamination from both EPA and Congress. EPA is also likely to issue rulemaking implementing many of the key policy objectives raised during the first year of the Trump administration, such as a finalized new WOTUS rule, and proposed rules addressing vehicle emissions standards and review of federal actions under the National Environmental Policy Act (NEPA). Changes made to the Endangered Species Act regulations in late 2019 also are expected to significantly alter federal decision-making under that statute in 2020. Finally, Two Executive Orders addressing how federal agencies develop, publicize and use guidance documents could radically change the nature, scope and effect of these important documents.

We may also see a significant decision from the Supreme Court impacting EPA's ability to implement its remediation plans under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and a separate decision under the Clean Water Act that could bring the discharge of pollutants to groundwater within the ambit of that Act's NPDES permitting program. Further, litigation related to climate change and the jurisdictional reach of the federal and state courts will continue to occupy the judiciary in 2020.

The articles in this Federal Forecast discuss many of the significant federal activities that we expect to see unfold in 2020.

Legal Fights Over Clean Water Act Rule Expected to Continue in 2020

Todd D. Kantorczyk, Esq.

2020 promises to bring more action in the ongoing saga over rules intended to define the extent of Waters of the United States (WOTUS) subject to federal Clean Water Act (CWA) jurisdiction. Readers may recall that back in 2015 during the Obama administration, USEPA and the Department of the Army published a rule that attempted to define waters, including wetlands, that were subject to CWA jurisdiction because they had a "significant nexus" to a navigable water, a standard originally announced in the 2006 Supreme Court decision in *Rapanos v. United States*.

The 2015 rule spawned a series of lawsuits arguing that the rule improperly expanded federal authority, some of which resulted in court rulings that enjoined enforcement of the 2015 rule in certain jurisdictions. Additionally, in 2017, the Trump administration issued an executive order directing USEPA and the Army to review and either revise or rescind the 2015 rule. The agencies subsequently issued a series of notices that stated the agencies would repeal and recodify the 2015 rule, and then published a final rule that postponed the applicability date of the 2015 rule until February 2020. The rule postponing the applicability of the 2015 rule was also challenged in several district courts. The legal challenges resulted in a patchwork framework leaving the 2015 rule in effect in 22 states, but subject to preliminary injunctions in 27 states.

In October 2019, the USEPA and Department of the Army issued the final rule repealing the 2015 rule and reinstating 1986 regulations. That action resulted in its own series of legal challenges, including lawsuits by environmental groups in South Carolina and landowners in New York challenging the repeal, a lawsuit by a cattle growers association in New Mexico arguing that simply reverting back to the 1986 rules (as opposed to issuing new rules) was unlawful, and a recent lawsuit by sixteen states and cities filed in the southern district of New York, challenging the repeal and return to the 1986 regulations.

Notwithstanding these legal challenges, the USEPA and the Army have continued to work on a replacement for the 2015 rule. The agencies signed a proposed new WOTUS rule in December 2018, for which the comment period ended in April 2019. The agencies have indicated that this new rule could be published as a final rule in February 2020, which will undoubtedly trigger more lawsuits and potentially more jurisdiction by jurisdiction decisions. And looming over all these activities is the 2020 election and the possibility that a new administration might change course yet again. So, while events in 2020 may not provide final answers on all WOTUS questions, they will bear watching as they will likely lay the groundwork on the scope of CWA jurisdiction for years to come.

CERCLA Litigation

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At the end of 2019, the Supreme Court heard oral argument in Atlantic Richfield Company [ARCO] v. Christian, et al. which addressed the question of whether CERCLA prevents individuals from seeking restoration damages under state common-law claims. The Supreme Court's decision is expected in 2020 and has the potential to upend implementation of site remediation under CERCLA.

In this case, ARCO is seeking to overturn a Montana Supreme Court decision which allowed landowners to proceed with their 2008 lawsuit seeking restoration damages from ARCO's allegedly inadequate cleanup of the Anaconda Smelter Superfund site, asserting state common-law trespass, nuisance, and strict liability

theories against ARCO as bases to secure restoration of their nearby properties to a pre-contamination condition.
In its petition to the Supreme Court, ARCO claimed that Section 113 of CERCLA grants exclusive jurisdiction to federal courts over "controversies arising under" CERCLA, making the landowners' state-court claims jurisdictionally barred. Additionally, ARCO argued that the landowners are potentially responsible parties under Section 122(e)(6) of CERCLA as the owners of polluted land, which prohibits the landowners from challenging EPA's remediation of the site. ARCO also claimed that CERCLA preempts state-law remedies that would work against EPA's cleanup plan. In particular, ARCO argued that a state-law obligation to restore the landowners' property would cause ARCO to violate EPA's cleanup plan.

The landowners' asserted that Section 113 of CERCLA permits state law claims, and cited to legislative history to argue that Congress did not intend for CERCLA to bar claims made in state courts. The landowners alleged further that the definition of potentially responsible parties under CERCLA extends only to those parties that face actual risk of liability, and that as innocent parties, CERCLA does not contemplate involving them in its allocations of responsibility. Lastly, the landowners disagreed with ARCO's assertion that any obligation imposed on ARCO would cause it to violate EPA's cleanup plan, claiming that the payment of damages does not categorically interfere with EPA's cleanup plan.

Climate Change Litigation - Uncertainty and Jockeying will Continue in 2020 on Jurisdictional Questions

Garrett D. Trego, Esq.

2019 saw certain landmark decisions in the realm of climate change litigation, but many essential threshold questions remain – principally, who has legal rights to challenge corporations' or governments' roles in climate change, and in which jurisdiction(s) may those challenges be heard? Expected decisions in 2020 will likely move these questions forward but resolution likely remains years away.

2019 was highlighted by some of the following key developments.

- Exxon Mobil successfully defended the New York state attorney general's securities fraud claims regarding disclosure of the financial risks associated with climate change. *People v. Exxon Mobil Corp.*, 2019 N.Y. Slip Op. 51990(U), 2019 WL 6795771, at *30 (N.Y. Supr. Ct. Dec. 10, 2019) ("In sum, the [OAG] failed to prove, by a preponderance of the evidence, that ExxonMobil made any material misstatements or omissions about its practices and procedure that misled any reasonable investor.").

- At least three groups of state and municipal governments defeated attempted removals that would have relegated their claims against corporate defendants to less favorable federal venues, where the corporate defendants would argue that federal common law and statutes preempt state law climate change claims. *See Bd. of Cty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, 2019 U.S. Dist. LEXIS 151578 (D. Colo. Sep. 5, 2019); *Rhode Island v. Chevron Corp.*, 2019 U.S. Dist. LEXIS 121349 (D.R.I. July 22, 2019); *Mayor of Balt. v. BP P.L.C.*, 388 F. Supp. 3d 538, 556 (D. Md. 2019). As explained further below, these decisions are key waypoints in an ongoing jurisdictional struggle over the proper venue for climate change cases.

- The overall quantity of cases directly and indirectly implicating climate change vastly proliferated in 2019. As a representative example, in a class action claim against the Keurig coffee company filed in

California state court, a putative class alleges that the company misrepresented the ease with which its "K-cups" could be recycled, thereby increasing the amount of methane emissions as compared to the class's expectations. *Smith v. Keurig Green Mountain, Inc.*, No. RG18922722 (Cal. Super. Ct. Alameda 2018). With so many cases like this one addressing climate change in an indirect way, the number of "climate change litigation" matters become increasingly difficult to track.

In 2020, we can expect federal circuit courts to weigh in with key decisions. Already a circuit court decision was issued in January 2020 in the regularly-reported children's climate change litigation that began in federal court in Oregon, where a group of 21 children alleged constitutional claims against the federal government for the failure to prevent climate change. After hearing oral arguments in mid-2019, the Ninth Circuit held in January that the children lack Article III standing to pursue their claims because the federal courts are not positioned to order and oversee a sufficient remedy for their claims. Juliana v. United States, No. 18-36082, -- F.3d --, 2020 WL 254149 (9th Cir. Jan. 17, 2020). The Ninth Circuit placed the burden on the executive and legislative branches to tackle the issue. Id. at *8 ("[A]ny effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."). Similar cases that have sprouted across the country face an uphill battle to survive a district court judge's scrutiny, after the Ninth Circuit's decision here.

Also in the Ninth Circuit, a decision is likely in 2020 on consolidated cases from municipalities regarding the federal preemption of state common law claims related to climate change against corporations. *County of San Mateo v. Chevron Corp., et al.*, No. 18-15499 (9th Cir.). In the Second Circuit, the court is likely to issue its decision on similar jurisdictional and standing issues in New York City's case against a similar group of corporate defendants. *City of New York v. BP P.L.C., et al.*, No. 18-2188 (2d Cir.). These federal circuit court cases are especially important as more states and municipalities consider litigation against private entities to recover costs or obtain assistance related to infrastructure improvements in response to climate change.

We are not aware of any case against a government or group of corporations directly seeking damages or injunctive relief in response to climate change having been finally resolved by trial. Courts are split over the proper jurisdiction for these claims – if any – and whether state common law climate change claims are preempted by federal law. The threshold questions remain unresolved, and no final resolution is likely coming in 2020, as they may ultimately be destined for the U.S. Supreme Court.

Groundwater Discharge - U.S. Supreme Court May Decide *Maui* Case in 2020

Garrett D. Trego, Esq.

The United States Supreme Court heard oral arguments on November 6, 2019, in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, No. 18-260 (U.S.), and may issue a decision in 2020. The principal question at issue is whether the Clean Water Act's regulation of discharges to the navigable "waters of the United States" extends to circumstances where the discharge is made to groundwater which ultimately reaches a navigable water of the United States.

The case arises from a citizen suit brought against the County of Maui for failing to obtain Clean Water Act permits for wastewater treatment plant discharges of treated wastewater to groundwater injection wells. It was undisputed that the treated wastewater, through the groundwater, ultimately reached the Pacific Ocean. The parties' arguments rise and fall on the definition of "discharge" under the Clean Water Act,

which "means … any addition of a pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), and whether the effluent from the wastewater treatment plant is *from* any *point source*.

Having lost in the lower courts, Maui, joined by the United States Environmental Protection Agency, which issued a policy statement in April 2019 declaring that discharges to groundwater were excluded from the Clean Water Act's definition of a point source discharge, argued that regulation of discharges to groundwater would be a vast overreach of the federal government. The citizen advocacy organizations argued that exempting these discharges would create a gaping regulatory loophole. As the Supreme Court Justices acknowledged throughout the oral argument, the decision, which could be rendered by June 2020, could have far-reaching impact on large and small dischargers across the country.

Federal PFAS Legislative and Regulatory Developments

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In 2019, Congress considered a variety of proposed bills that touched on a class of emerging chemicals known as per- and polyfluoroalkyl substances (PFAS). Many of those bills were which were included in early versions of the National Defense Authorization Act for 2020 (NDAA), a piece of must-pass legislation. After months of negotiations to consolidate the House and Senate versions of the NDAA, Congress released a compromise bill, which President Trump signed into law on December 20, 2019. The compromise NDAA contains fewer PFAS provisions than either the House or Senate versions, and notably, removed provisions which would have required EPA to promulgate drinking water standards for PFAS or to classify any PFAS as hazardous substances under CERCLA. The Act does, however, add certain PFAS to the Toxics Release Inventory (TRI) of the Emergency Planning and Community Right-to-Know Act and establishes a procedure for EPA to add other PFAS compounds to this inventory. Importantly, the Act tagged a number of PFAS provisions — including PFOA, PFOS, GenX, PFNA, and PFHxS — for inclusion on the TRI beginning January 1, 2020, which means covered facilities will be required to include those PFAS chemicals in the TRI report that they submit to EPA and relevant states on July 1, 2021. Although many provisions were removed from the final version of the NDAA, those provisions are likely to resurface in 2020. Notably, on January 10, 2020, the House passed H.R. 535 — the PFAS Action Act— was re-introduced in the House.

While Congress negotiated PFAS legislation, EPA moved forward with its PFAS Action Plan, which outlines the agency's short- and long-term goals for investigating and regulating PFAS compounds. In November, EPA published advance notice of proposed rulemaking, soliciting information from the public on whether and to what extent EPA should add certain PFAS to the Toxics Release Inventory. And in December, the agency sent a proposed regulatory determination for PFOA and PFOS in drinking water to the Office of Management and Budget. The agency also issued interim recommendations for addressing groundwater contaminated with PFOA and PFOS, establishing a screening level of 40 ppt and a preliminary remediation goal of 70 ppt for contaminated groundwater that is a current or potential source of drinking water, where no state or tribal MCL are available.

In 2020, we expect EPA to further expand its regulation of PFAS while legislation is introduced in Congress to move more aggressively.

Toxic Substances Control Act Developments

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At the end of 2019, EPA announced the next twenty chemicals to undergo risk evaluation under TSCA. The twenty high priority chemicals that will undergo risk evaluation include seven chlorinated solvents, six phthalates, four flame retardants, formaldehyde, a fragrance additive, and a polymer precursor. Under the Frank R. Lautenberg Chemical Safety for the 21st Century Act, which amended TSCA on June 22, 2016, EPA is required to carry out a prioritization process for chemical substances that may designed as high priority for risk evaluation. In 2020, EPA plans to finalize the scoping documents for the twenty high priority chemicals, which will include the hazards, exposures, conditions of use, and the potentially exposed or susceptible subpopulations EPA expects to consider during each chemical's risk evaluation. Additionally, in early 2020 EPA expects to finalize the list of low-priority chemicals it proposed in August 2019. A final designation of "low-priority" means that risk evaluation for a chemical substance is not warranted because the risks associated with the chemical are low.

National Environmental Policy Act Rulemaking to Revamp Environmental Project Reviews

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In early January, the Trump administration and the Council on Environmental Quality (CEQ) proposed new regulations related to the process and implementation of NEPA. CEQ published an advance notice of proposed rulemaking in 2018 soliciting public comment on suggested revisions of NEPA regulations "to update the regulations and ensure a more efficient, timely, and effective NEPA process." CEQ also asked for public comment on the potential revision of key NEPA terms involving the scope of NEPA, cumulative impacts of proposed projects subject to NEPA review, and major federal action. The rulemaking proposed in early January of this year includes a number of revisions intended to streamline the process and implementation of NEPA on federal agency actions, including establishing page limits for environmental assessments (EAs) and environmental impact statements (EISs) (75 pages and 300 pages, respectively), and time limits for the completion of EAs and EISs (1 year and 2 years, respectively). Additionally, the proposed rulemaking modifies the definition of "effects" by simplifying the definition and striking references to direct, indirect, and cumulative effects. The purpose of the revision is to focus NEPA reviews on effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternative. CEQ states explicitly in its rulemaking that an analysis of cumulative effects is not required under NEPA. Ultimately, the proposed rulemaking effectively narrows the range of projects subject to review under NEPA and no longer considers the cumulative impact that proposed projects will have on climate change. Such revisions will ease the review of major energy infrastructure projects such as natural gas pipelines that require federal approvals subject to NEPA review.

Vehicle Emissions Standards

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The year 2020 may be the year that the Trump administration moves forward with rolling back vehicle greenhouse gas emissions standards set during the Obama administration in 2012. In August 2018, EPA and the National Highway Traffic Safety Administration (NHTSA) proposed the "Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks" (SAFE Vehicles Rule). The proposed rule would amend the fuel economy and tailpipe carbon emissions standards for passenger cars and light trucks through model years 2021 through 2026. The SAFE Vehicles Rule would maintain the fuel economy and tailpipe emissions standards applicable to vehicle model year 2020 through

model years 2021 to 2026, while taking comment on a range of alternative fuel economy and carbon dioxide emissions standards.

As part of the SAFE Vehicles Rule, EPA proposed to withdraw the waiver it previously provided to California for its state greenhouse gas and zero emissions vehicle programs under Section 209 of the Clean Air Act. That withdrawal of the waiver became final in September 2019, although the remainder of the SAFE Vehicles Rule relating to fuel economy and tailpipe carbon emissions is expected to be finalized in 2020. The waiver allowed California to set vehicle emissions standards that were more stringent than the federal government standards. EPA first granted California a waiver in 2009, which covered emissions standards for greenhouse gasses. As EPA withdrew the waiver, NHTSA finalized regulatory text making it clear that state fuel economy standards are preempted under the Energy Policy and Conservation Act. At the end of 2019, California and at least 22 other states filed a lawsuit in the Court of Appeals for the D.C. Circuit challenging EPA's revocation of the waiver. Whether EPA's withdrawal of the waiver can withstand judicial scrutiny will be one of the many developments to follow in 2020.

Revisions to Endangered Species Act Regulations

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Final revisions to the federal Endangered Species Act's implementing regulations were published by the U.S. Fish and Wildlife Service (USFWS) in August 2019. *84 Fed. Reg. 45020.* The recent changes primarily involve four significant revisions:

Consideration of Economic Impacts

Before the recent rule changes, the Endangered Species Act (ESA) regulations required that the USFWS base its decision on whether to list a species as threatened or endangered on the best currently available scientific and commercial data "without reference to possible economic or other impacts of such determination." Under the revised regulations, this "economic impacts" clause has been removed. Some have interpreted this deletion to mean that USFWS is now permitted to consider economic impacts when making listing determinations.

Defining "Foreseeable Future" to Potentially Limit What is a Threatened Species

A threatened species is "any species that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range." The phrase "foreseeable future" was previously undefined. In the revised regulations, this phrase has been defined so as to extend "only so far into the future as [USFWS] can reasonably determine that both the future threats and the species' responses to those threats are likely."

Loss of Blanket Protections for Threatened Species

Section 9 of the ESA prohibits the "taking" of endangered species. To "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Section 9 also includes several other protections for endangered species, including prohibitions on importing, possessing, or selling an endangered species. These protections used to also be automatically extended to threatened species under the ESA's blanket rule, but this no longer applies, and newly-listed threatened species will each get species-specific conservation rules.

Designation of Unoccupied Critical Habitat

In the last of these significant changes, the USFWS is reverting to a two-step process for designating unoccupied critical habitat. Now (as was the case until 2016), when designating critical habitat, USFWS will first evaluate areas that are currently occupied by the species. If the occupied critical habitat is found to be inadequate, then unoccupied critical habitat can be considered.

Federal Agencies Scheduled to Revamp Use of Guidance Documents

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In October 2019, President Trump issued two executive orders addressing how federal agencies develop, publicize and ultimately use interpretive guidance documents that are routinely issued by those agencies to "clarify" obligations under enacted laws and promulgated regulations. While it remains to be seen whether the two executive orders will have a near-term meaningful impact on the use of guidance documents in enforcement contexts, they have set out some important deadlines and requirements for agencies, including USEPA, that will play out in 2020.

Executive Order 13891, entitled "Promoting the Rule of Law Through Improved Agency Guidance Documents" in large part establishes a framework that requires federal agencies to evaluate and publicize existing guidance, and develop procedures with respect to the development of new "significant guidance" going forward. And the issuance of OMB's implementation memorandum for EO 13891 at the end of October 2019 established some key 2020 deadlines for federal agencies on these points. In particular:

- By February 28, 2020, federal agencies must establish a single, searchable, indexed website that includes, or contains links to, guidance documents currently in effect. Availability of the website must be published in the Federal Register as well as the agency's typical means of publicizing important announcements.
- As part of establishing this database, agencies are required to perform some housekeeping by evaluating existing guidance documents and rescinding those that should no longer be in effect.
- After establishing the database, federal agencies have until June 27, 2020, to reinstate any guidance that may have been left off the initial database. After that date, any additional guidance documents must follow the procedures for developing new guidance.
- To that end, agencies are supposed to promulgate regulations for issuing new guidance documents by April 28, 2020. These regulations must provide a 30-day notice and comment period for "significant guidance", which is defined as guidance that has an annual effect of the economy of $100 million or more, or adversely affects in a material way, among other things, the economy, jobs, the environment, or public health or safety.

Executive Order 13892, entitled "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication" includes several directives that arguably reflect current law with respect to the use of guidance documents in enforcement proceedings. But this EO also includes some notable items and deadlines that could have an effect in 2020. For example, Section 6 of the EO requires agencies to provide an opportunity to be heard *before* taking any action that has "legal consequence," which includes no-action letters and notices of non-compliance (although there is an exception in cases of a serious threat to health safety or other emergency). In addition, within 270 days (July 13, 2020), federal agencies are supposed to propose procedures that: encourage voluntary self-reporting in exchange for reduction or waiver of civil penalties; encourage information sharing among

regulated parties; and provide for pre-enforcement rulings (although all procedures only need to be "to the extent practicable.") Furthermore, by February 12, 2020, agencies are required to publish a rule of agency procedure regarding civil administrative inspections.

It is not unusual for agencies to miss EO imposed deadlines, especially in an election year, but how these guidance document directives play in out in 2020 may bear watching.