

4 Environmental Rulings That Flew Under The Radar In 2017

By **Juan Carlos Rodriguez**

Law360, New York (January 5, 2018, 8:05 PM EST) -- Federal and state court judges made several important environmental law rulings in 2017 that managed to avoid the spotlight, from a Ninth Circuit finding that climate change data was misused in a government analysis of how increased fishing could impact loggerhead turtles to a California Supreme Court ruling on groundwater extraction fees.

Here are four environmental rulings that flew under the radar in 2017.

Sea Turtles and Climate Change

In December, the Ninth Circuit ruled the National Marine Fisheries Service improperly had found that allowing more swordfish fishing in Hawaii would not jeopardize loggerhead turtles.

A split three-judge panel said the agency failed to articulate a rational connection between the climate-based population viability model the agency relied on, which predicted a decline in loggerhead populations and the no jeopardy conclusion.

“We ... conclude that NMFS’s 2012 [biological opinion’s] no jeopardy finding as to the loggerhead sea turtles was arbitrary and capricious because the scientific data suggested that the loggerhead population would significantly decline, and the agency failed to sufficiently explain the discrepancy in its opinion and the record evidence,” the court said.

Steptoe & Johnson LLP partner Cynthia Taub said the decision shows that courts are not willing to cut corners on climate change data.

“As we see this administration trying to scale back on what gets considered, the courts are saying, ‘No, that’s part of the mix and you need to include it,’” Taub said.

The case is *Turtle Island Restoration Network et al. v. U.S. Department of Commerce*, case number 13-17123, in the U.S. Court of Appeals for the Ninth Circuit.

Interpreting Supreme Court Guidance on Water Issues

In February, the Eleventh Circuit made a ruling in a criminal drug and firearms sentencing case that could have broader impacts including to environmental law.

The appeals court based its decision on the U.S. Supreme Court's 1977 ruling in *Marks v. U.S.*, which explained that when lower courts are faced with a divided Supreme Court opinion, "the holding of the court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds."

The *Marks* ruling has guided lower courts in interpreting the Supreme Court's 2006 ruling in *Rapanos v. U.S.*, which revolved around what exactly constitute "waters of the United States," the Clean Water Act term that outlines the federal government's permitting jurisdiction.

The *Rapanos* case split the justices 4-1-4, with Justice Anthony Kennedy's solo opinion — which let more waters fall under federal jurisdiction than a plurality opinion penned by the late Justice Antonin Scalia would have — being the standard courts rely on after a *Marks* analysis.

The Supreme Court in December granted the defendant's petition for writ of certiorari for the Eleventh Circuit's decision, meaning *Marks* will be going under the microscope.

Tom Lorenzen, a partner at Crowell & Moring LLP, said the high court's review will be important.

"The reason we look to Kennedy's opinion rather than the Scalia plurality is because of *Marks*," Lorenzen said. "Depending on how the Supreme Court resolves this case, it could significantly change what we view as the controlling decision in *Rapanos*."

The cases are *U.S. v. Erik Lindsey Hughes*, case number 15-15246, in the U.S. Court of Appeals for the Eleventh Circuit, and *Erik Lindsey Hughes v. U.S.*, case number 17-155, in the U.S. Supreme Court.

Local Pesticide Ordinance Preemption

In August, a Maryland state court judge struck down a Montgomery County ordinance that would have prohibited the use of certain pesticides on private and county-owned properties because it was preempted by state laws and regulations dealing with pesticides.

Several individuals, companies and a pesticide trade association challenged the 2015 ordinance in court, arguing that state regulations allow the use of the prohibited pesticides and that the ordinance conflicts with Maryland's fundamental goal to achieve uniformity in federal and state pesticide regulation.

James Slaughter, a principal at Beveridge & Diamond PC who represented the ordinance's challengers in the matter, noted that Circuit Court Judge Terrence McGann said that Maryland law dictates where, when and how each pesticide it has authorized may be used and that "no room is left for more regulation."

"This adds to a growing body of cases finding that localities in various states lack the authority to impose their own local pesticide requirements that effectively 'veto' the comprehensive review and approval processes already in place for these products at the state and federal levels," Slaughter said. "The decision is of particular importance due to the size of Montgomery County, which drew significant attention with its ordinance."

Montgomery County has appealed, and its brief is due on March 30. It's expected that oral argument before the Maryland Court of Special Appeals will occur in September, Slaughter said.

The consolidated cases are Complete Lawn Care Inc. et al. v. Montgomery County, case number 427200-V, and Anita Goodman et al. v. Montgomery County, number 427253-V, in the Circuit Court for Montgomery County, Maryland.

California Groundwater Fees

In December, the California Supreme Court published what one water attorney called “a landmark” ruling in a groundwater pumping fee case. The state high court said that the fees, imposed on well operators by local water conservation districts to fund conservation activities such as replenishing groundwater stores and preventing degradation of the water supply, are not “fees” as defined under Proposition 218.

The proposition holds that charges for a property-related service may not exceed the proportional cost of the service, so they may continue.

The city of San Buenaventura had argued that the fees it pays to the United Water Conservation District are disproportionate to the benefits it receives from the district’s conservation activities.

However, Wesley Miliband, of counsel at Stoel Rives LLP and leader of the firm’s California water practice, said the decision did not resolve a key issue.

“While the court resolved the immediate question about whether the groundwater fees in question are subject to Prop 218, the court expressly deferred whether and to what extent Prop 218 applies to fees or charges inevitably levied by local agencies serving as Groundwater Sustainability Agencies under [the Sustainable Groundwater Management Act],” Miliband said.

The SGMA, signed by Gov. Jerry Brown in 2014, requires “groundwater-dependent regions to halt overdraft and bring basins into balanced levels of pumping and recharge,” according to the state Department of Water Resources.

GSAs are locally controlled entities in the state’s high- and medium-priority groundwater basins and sub-basins that are responsible for developing and implementing groundwater sustainability plans.

The case is City of San Buenaventura v. United Water Conservation District, case number S226036, in the California Supreme Court.

--Editing by Christine Chun and Breda Lund.