

Environmental Law Update: What You Missed This Summer When You Were Up at the Cabin (or sheltering in your COVID cave)



Jeffery A. Sepesi

Environmental Law and Science, PLLC

j.sepesi@att.net; 952-426-8279

Is Climate Change Litigation a Federal Case?

BP P.L.C. v. Mayor and City Council of Baltimore (U.S. Supreme Court, May 2021)

Baltimore filed suit against 26 energy companies alleging state law claims relating to concealment of climate impacts. Defendants removed to federal court, citing the federal officer removal statute (28 U.S.C. § 1442) and other federal jurisdictional arguments. The district court rejected these arguments and remanded back to state court. On appeal, the Fourth Circuit affirmed as to the federal officer removal and said it lacked jurisdiction to consider the others.

Generally, a remand order is not reviewable on appeal, except that Section 1447(d) expressly allows appeal if removal was sought under 28 U.S.C. § 1442 (federal officer) or 1443 (civil rights). Supreme Court granted cert to address circuit split on scope of review of remand orders – review entire remand order or review only the portion addressing the Section 1447(d) permitted appealable removals.

Holding: Supreme Court found (7-1) when a remand order is appealable under 28 U.S.C. § 1447(d), the court of appeals may review the entire remand order, not just the grounds for removal giving rise to the order’s appealability. Supreme Court did not address whether climate change cases should be in federal or state court.

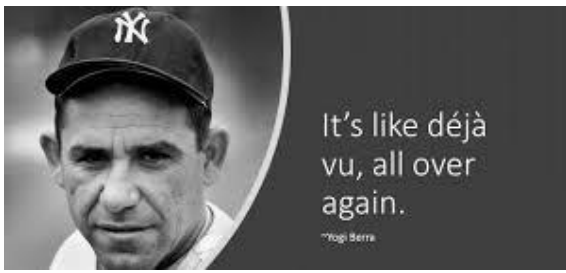
Chevron Corp. v. Oakland (U.S. Supreme Court cert. denied, June 2021)

Oakland and San Francisco brought a public nuisance claim against five oil companies, who removed the case to federal court. District Court did not grant remand, found a federal law basis that preempted the state law claim and dismissed. On appeal, the Ninth Circuit held that claim did not arise under federal law because it “[did] not require resolution of a substantial question of federal law.”

Minnesota v. API, et al. (D. Minn., August 2021)

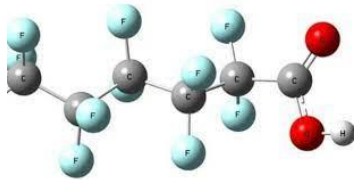
District Court issues stay to its remand, pending appeal to Eight Circuit.





Never Ending WOTUS War

- April 2020. Trump EPA Navigable Waters Protection Rule (NWPR) replaced Obama EPA 2015 Clean Water Rule and codified WOTUS definition of *Rapanos* plurality.
- June 9, 2021. EPA and the Corps announce their intent to revise WOTUS definition.
 - foundational rule to restore pre-2015 regulations defining WOTUS, updated based on relevant Supreme Court decisions; a second rulemaking to further refine and build upon this.
 - August 4, 2021. Notice of Public Meetings Regarding “Waters of the United States,” 86 Fed. Reg. 41,911
- August 30, 2021. In *Pasqua Yaqui Tribe v. U.S. EPA* (D. AZ), the district court ordered the remand and vacatur of the Navigable Waters Protection Rule
- September 3, 2021. EPA and the Corps confirmed a halt in implementation of the NWPR nationwide and that they are interpreting WOTUS consistent with the pre-2015 WOTUS regulatory regime, including their 2008 guidance interpreting *Rapanos* which followed Kennedy’s “significant nexus” concurrence.
- Congress could fix and put an end to this endless cycle, but ...



PFAS Developments – Federal Level



- June 28, 2021. Proposed TSCA 8(a)(7) PFAS Reporting and Recordkeeping Rule
 - Persons that have manufactured (or imported) these chemical substances in any year since January 1, 2011, to electronically report information regarding PFAS uses, production volumes, disposal, exposures, and hazards. Usual TSCA exemptions (e.g., articles) do **NOT** apply.
- July 14, 2021. EPA announces PFAS LVE Stewardship Program
 - No new PFAS LVEs; encourage voluntary withdrawal of existing PFAS LVEs.
- July 21, 2021. PFAS Action Act of 2021 passes in the House
- August 26, 2021. FDA makes available latest test results of PFAS in food
 - Of 167 nationally available processed food, only three item had detectable PFAS: fish sticks (PFOS, PFNA), canned tuna (PFOS, PFDA) and protein powder (PFOS), all at low levels.
 - FDA concludes *“no scientific evidence that the levels of PFAS found in the TDS samples tested since 2019 indicate a need to avoid any particular foods in the general food supply.”*
- September 2, 2021. Draft EPA-validated laboratory analytical method for 40 PFAS in wastewater, surface water, groundwater, soil, biosolids, sediment, landfill leachate, and fish tissue.



PFAS Developments – State Level

- Eight states add restrictions on use of class B PFAS fire fighting foams
- Three states pass restrictions on products containing PFAS
 - Minnesota: food packaging (by 2024)
 - Vermont: ski wax, food packaging, residential rugs/carpet, aftermarket and stain and water resistant treatments (by 2023)
 - Maine: carpets/rugs and fabric treatment (by 2023); all products (by 2030)
- Maine passes bill setting 20 ppt MCL for six PFAS in June 2021
- Illinois bans incineration of PFAS in July, but vetoed by the governor in September
- State-wide water testing of all PWS completed in Illinois and Ohio
 - 90-95% of systems had no detectable PFAS; only a few systems exceeded EPA DWHA
- Pennsylvania targeted drinking water testing – near airports, refineries, etc.
 - One-third of samples detected some PFAS (generally low); none found at 40 reference systems





PFAS Litigation



"See? I told you sharks don't attack lawyers. It's a respect thing."

- AFFF MDL (2873) marches on with more cases added
 - 1,200 member cases; claims: (i) property damage - water providers, (ii) property damage - property owners, (iii) bodily injury, and (iv) medical monitoring for potential future injury.
- Notable settlements
 - July 2021: DuPont, Chemours and Corteva agreed to pay \$50 million to Delaware settling natural resource damage claims (related to manufacturing)
 - July 2021: 3M, Saint-Gobain and Honeywell agree to collectively pay \$65.25 million to resolve individual/class claims regarding the water supply pollution in Hoosick Falls, NY (DuPont did not settle).
 - August 2021: 3M and Georgia Pacific \$11.9 class settlement; groundwater contamination from paper mill source in Parchment, MI.
- States/territories suing PFAS manufacturers for contaminating water supplies/NRD
 - Alaska, Guam, Marana Islands, Michigan, Mississippi, North Carolina, New Hampshire, New Jersey, New Mexico, New York, Ohio and Vermont. Wisconsin has retained counsel.
- Cities and counties joining in the PFAS litigation wave grew over the summer.
 - Proposed Wisconsin PFAS municipal grant bill would prohibit grantees from suing.
- 3M sues New Jersey and Michigan over PFAS MCLs.