Environmental Hot Topics and the New Administration

Presented by:

John Fehrenbach, May Wall, and Stephanie Sebor
Today’s eLunch Presenters

John Fehrenbach
Partner, Environmental Law Practice
Washington, D.C.
jfehrenbach@winston.com

May Wall
Partner, Environmental Law Practice
Washington, D.C.
mwall@winston.com

Stephanie Sebor
Associate, Environmental Law Practice
Chicago
ssebor@winston.com
Environmental Legislation in the 115th Congress
Environmental Legislation – 115th Congress

• Differences between the 114th and 115th Congress
  • Overall makeup
  • Leadership
  • Committees

• Dynamics
  • Working with / against / in spite of Trump Administration
  • Competing priorities
    • Healthcare, tax reform, and infrastructure
  • Campaign promises of—and pent-up demand—for change
Environmental Legislation (cont’d)

• Types of legislation
  • Resolutions
    • Congressional Review Act (CRA)
      • Sledgehammer tool allows Congress and President to repeal rules (and block substantially similar future rules) within 60 working days of notice of issuance
      • 70 to date, of which 6 were for EPA rules; 14 were successful (none for an EPA rule)
        • House-passed resolution voiding DOI oil/gas methane rule failed in Senate
  • Other (e.g., Sense of the Senate or House)
    • S. Res. 12 (Fisher, R-NE) and H. Res. 152 (Gibbs, R-OH) call for nullification of WOTUS rule (EPW and T&I Committees)
  • Reauthorizations
Environmental Legislation (cont’d)

• Environment-focused bills – examples

  • Waste

    • H.R. 1524, *Superfund Polluter Pays Act* (Pallone, D-NJ) would reinstate/extend CERCLA tax (W&M)
    • S. 822 (Inhofe, R-OK) would amend CERCLA grant provisions (EPW)
    • H.R. 917, *Secure E-Waste Export & Recycling Act* (Cook, R-CA) (For. Aff.)

  • Air

    • S. 452, *ORDEAL Act* (Flake, R-AZ), S. 263, *Ozone Standards Implementation Act of 2017* (Capito, R-WV), and H.R. 806, *Ozone Standards Implementation Act of 2017* (Olson, R-TX) would delay implementation of 2015 ozone standard (EPW and E&C)
      • S. 263 and H.R. 806 also would change review cycle for criteria pollutant NAAQs from 5-year to 10-year review cycle
    • H.R. 2326, *Climate Solutions Commission Act* (Delaney, D-MD; Faso, R-NY) (E&C and Science)
Environmental Legislation (cont’d)

• Water
  • H.R. 1105, *Stop WOTUS Act* (Allen, R-GA) would nullify the WOTUS rule (T&I)

• General regulatory
  • H.R. 1430, *Honest and Open New EPA Science Treatment Act of 2017* or *HONEST Act* (Smith, R-TX) (passed House) would require EPA to rely on best available science, specifically identified, and “[p]ublicly available online in a manner that is sufficient for independent analysis and substantial reproduction of research results” at each stage (proposal, finalization, dissemination) of a “covered action” (“a risk, exposure, or hazard assessment, criteria document, standard, limitation, regulation, regulatory impact analysis, or guidance”)
  • S. 971, *Real EPA Impact Reviews Act* or *REPAIR Act* (Thune, R-SD) would require EPA to include in each regulatory impact analysis an analysis that does not include any other proposed or unimplemented rule (EPW)
  • S. 951, *Regulatory Accountability Act of 2017* (Portman, R-OH) would amend APA to add procedural steps for issuing final rules, require consideration of cost effectiveness in major and high-impact rules, and impose requirements on issuance of major guidances (Homeland Sec. & Gov’t Affairs)
Environmental Legislation (cont’d)

- Appropriations bills and budget process
  - FY 2017
    - EPA funding levels relatively unscathed (1% cut), with no poison pill riders
    - Report language (examples):
      - **Accidental Release Prevention**: “The Committees note that EPA has postponed the effective date for implementation by 90 days as it reviews and reevaluates the rule. The Committees expect EPA to work with State regulators, facility managers, small businesses, and other stakeholders as it reevaluates the rule.”
      - **Ozone NAAQS**: “Concerns remain about potentially overlapping implementation schedules related to the 2008 and 2015 standards … some flexibility must be granted to States … Within 90 days … the Agency is directed to provide … a report examining the potential for 41 administrative options to enable States to enter into cooperative agreements with the Agency that provide regulatory relief and meaningfully clean up the air.”
  - FY 2018
    - “Skinny” budget proposes 31% cut (to $5.7 billion) and 11,800 employees (down from 15,000)
    - Déjà vu all over again: Recall the early Reagan budget cuts of 22% and staff cuts of 30%
The Clean Water Act and Waters of the United States
The Clean Water Act & WOTUS
(Where we are and where we’re going)

The Clean Water Act Statutory Framework

• Section 301(a) prohibits discharges of pollutants to “navigable waters” without a permit, 33 U.S.C. §§ 1311(a), 1362(12)
  • “Navigable Waters,” means: “the waters of the United States, including the territorial seas,” 33 U.S.C. § 1362(7)
    • The definition of “navigable waters” also applies in CWA §§ 401, 402, 404
      • § 404 wetlands protection provision
      • Interpretation of "waters of the United States" controversial since the CWA was enacted in 1972
      • The United States Supreme Court has addressed this definition 3 times
WOTUS, Navigable Waters, and the U.S. Supreme Court

United States v. Riverside Bayview Homes (S. Ct. 1985)

• Corps sued after property owner began filling wetlands on the shore of Lake St. Clair, Michigan; District Court found for Corps; Sixth Circuit reversed; cert. granted and Supreme Court reversed

• In a unanimous decision, Supreme Court held CWA authorizes regulation of wetlands adjacent to navigable waters
  • the term “navigable” is of “limited import”
  • “The language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of material into wetlands adjacent to other "waters of the United States"
WOTUS, Navigable Waters, and the U.S. Supreme Court

• In 1986, “Migratory Bird Rule”
  • §404(a) extends to intrastate waters that, inter alia, provide habitat for migratory birds. 51 Fed. Reg. 41217

**Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)**

• Corps claimed jurisdiction over ponds in former sand and gravel mining pit; permit to fill denied
• District court granted Corp summary judgment on jurisdiction issue
• Seventh Circuit upheld Corps’ jurisdiction
  • Migratory Bird Rule: reasonable interpretation of authority
WOTUS, Navigable Waters, and the U.S. Supreme Court


• Supreme Court reversed the Seventh Circuit and held (5-4), Corps cannot regulate isolated, non-navigable, intrastate waters solely based on their use as habitat for migratory birds
  • “navigable” may have limited effect, but not “no effect”
  • Held: 33 CFR § 328.3(a)(3), as clarified by the Migratory Bird Rule and applied to petitioner’s site, exceeds the authority granted to respondents under § 404(a) of the CWA

• Justice Stevens dissented, joined by Justices Ginsburg, Souter and Breyer
WOTUS, Navigable Waters, and the U.S. Supreme Court


- Involved filling wetlands adjacent to ditches and drains that flowed to traditionally navigable waters
  - District Court and Sixth Circuit Court of Appeals affirmed Corps’ jurisdiction
- The Supreme Court failed to produce a majority opinion
  - Justice Scalia wrote for a plurality of the court (4 votes)
    - Held: vacated and remanded—relatively permanent waters that connect to TNWs, and wetlands with a “continuous surface connection” to TNWs fall within the definition of “navigable waters” and can be regulated under the CWA; but isolated intrastate waters with no such connection cannot
WOTUS, Navigable Waters, and the U.S. Supreme Court

Rapanos (con’t)

• Justice Kennedy’s concurring opinion broadened the Scalia test by including waters that have a “significant nexus” to traditionally navigable waters (either alone or together with other similarly situated features in the region)

• Writing for the minority, Justice Stevens concluded that the test should be broader, but held that waters that satisfy either the Scalia or the Kennedy standards fall within the purview of CWA regulation

• Since Rapanos…..
WOTUS After *Rapanos*

- Litigation continued unabated
  - Appellate courts across the U.S. that have decided WOTUS cases since *Rapanos* have universally ruled that waters meeting Kennedy’s standard are subject to CWA jurisdiction
  - The Seventh and Ninth Circuits have said that Kennedy’s is the only valid test for jurisdiction, while other Circuits have held that jurisdiction is found over any water that satisfies either Scalia’s or Kennedy’s tests
The Waters of the United States Rule
“WOTUS Rule”

U.S. EPA and U.S. Army Corps of Engineers

• Proposed Rule (March 2014); Final Rule (June 2015)
• “Intended to clarify and refine the definition of ‘waters of the United States’ to provide consistency in jurisdictional determinations based on science, agency expertise, and Supreme Court decisions”
  • Kennedy standard = waters that are jurisdictional in all instances
  • Obama scientific report: relationship of upstream/downstream water bodies to justify “significant nexus” test—to protect physical, chemical and biological integrity of waters as CWA requires
  • Waters that require case-by-case “significant nexus” analysis
  • Excluded certain waters (inter alia, man-made drainage ditches)
WOTUS Rule Litigation & Status

Criticized by some as expansion of regulatory authority/creates greater uncertainty; believed by others to neither expand nor retract existing authority

Legal challenges filed in multiple federal courts, as soon as the final rule was published, by industry groups, more than half of the state governments, and environmental groups

- 18 district court complaints; 100 plaintiffs
  - U.S. moved to consolidate all cases; denied (10/13/15)
  - Preliminary injunction issued by a district court in North Dakota (8.27.15), which blocked implementation of the rule in 13 states but not in the remaining states
- Additionally, 22 petitions for review filed in federal courts
  - Petitions consolidated in Sixth Circuit Court of Appeals; stay of rule granted (10.9.15); Re-hearing *en banc* denied (4.21.16); opening and response briefs filed (11.1.16 and 1.13.17); litigation stayed (1.25.17) pending hearing on petition for certiorari
WOTUS Rule Litigation & Status

• Cert. granted in *National Association of Manufacturers (NAM) v. the United States Department of Defense, et al.*

• Did the Sixth Circuit Court of Appeals properly find jurisdiction under 33 USC § 1369?
  • Briefing in Spring 2017; oral argument in Fall 2017
  • At stake: Court for federal judicial review—one circuit court of appeals or multiple district courts; Statute of Limitations—120 days or 6 years; ability to challenge action in a subsequent civil or criminal proceeding for enforcement
  • Only EPA and the Army Corps of Engineers are seeking to keep the case in appellate court. Strange bedfellows: several states, industry groups and environmental groups back NAM’s appeal to allow district court challenges
  • Request by Trump Administration to stay briefing on petition for cert. while EPA reviews the regulation was denied by the Supreme Court (4.3.17)
Executive Order 13778: “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States Rule’” (2.28.17)

• The EO directs EPA to “Revise or Rescind” the existing WOTUS rule
  
  • March 6, 2017 EPA/DOD ANPR consistent with EO, will consider interpreting WOTUS “in a manner consistent with the opinion of Justice Scalia in Rapanos” 82 Fed. Reg. 12532
  
  • April 19, 2017 EPA hosts “Federalism Consultation Meeting”
    • To obtain state and local governments’ perspectives
    • Provide an overview of potential changes to definition of WOTUS
Trump Administration and WOTUS Rule

(Federalism Consultation Meeting)

• EPA announces two-phased rulemaking
  • First: Rescind Clean Water Rule (essentially reverting to current status quo due to stay of rule by Sixth Circuit)
  • Then: Promulgate new WOTUS definition
  • Requested comments/input on different approaches by June 19, 2017

• On May 2, 2017, EPA sent the “first phase” proposed rule, which would repeal the CWA rule, to OMB for 90-day policy review
  • OMB deemed rule not “economically significant,” thus avoiding hurdles posed by President Trump’s order requiring agencies to designate two existing rules for repeal in order to issue a new rule
Air and Climate Change Regulatory Updates
Trump Climate Change Executive Order

• On March 28, 2017, President Trump issued an Executive Order directing heads of agencies to review existing regulations, orders, guidance, documents, and policies that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.

• The Executive Order revoked several other executive orders, policy memos, and reports related to President Obama’s Climate Action Plan and directed heads of agencies to revoke rules, guidance, and policies related thereto.
  • This includes the Clean Power Plan and related regulations, as well as GHG emission standards for the oil and gas industry.

• The Executive Order disbanded the Interagency Working Group on Social Cost of Greenhouse Gases.
Clean Power Plan

• The capstone of Obama’s Climate Action Plan, the Clean Power Plan would have regulated greenhouse gas emissions from existing coal- and natural gas-fired power plants
  • On February 9, 2016, the Supreme Court stayed the implementation of the Clean Power Plan during the pendency of litigation challenging the rule
  • The D.C. Circuit heard oral argument in *West Virginia v. EPA* on September 27, 2016 but has not yet issued a decision
• On April 28, 2017, the D.C. Circuit issued an order staying the case for 60 days and requiring the parties to file supplemental briefs addressing whether the case should be remanded to EPA
  • The parties’ briefs are due on May 15, 2017
New & Modified Power Plant GHG NSPS Rules

• EPA finalized its GHG New Source Performance Standards for new, modified, and reconstructed power plants on October 23, 2015

• Oral argument had been scheduled for April 17, 2017 in the case challenging the rule, *North Dakota v. EPA*, but the D.C. Circuit delayed oral argument pending the disposition of a motion by EPA to hold the case in abeyance

• On April 28, 2017, the D.C. Circuit issued an order holding the case in abeyance for 60 days and requiring the parties to file supplemental briefs addressing whether the case should be remanded to EPA
  • The parties’ briefs are due on May 15, 2017
Vehicle Emission Standards

• On March 13, 2017, EPA and DOT announced their intention to reconsider GHG standards for MY 2022-2025 light-duty vehicles and to coordinate their reconsideration with the parallel process to be undertaken by the NHTSA regarding CAFE standards for cars and light trucks for the same MYs
  • The standards are subject to a lawsuit filed on May 13, 2017 by the Alliance of Automobile Manufactures

• EPA and DOT are expected to delay implementation of the rule, although the timing for doing so has not been announced
  • EPA must make a new decision on the appropriateness of the MY 22-25 standards by April 1, 2018

• On March 24, 2017, CARB announced its retention of California’s vehicle GHG standards for MY 2022-2025, which align with the standards in the rule being reconsidered
Methane

• On April 4, 2017, EPA announced its review of the 2016 Oil and Gas New Source Performance Standards, which would require methane emission reductions from new and existing oil and gas facilities

• On April 18, 2017, EPA granted petitions for reconsideration from the American Petroleum Institute, Texas Oil and Gas Association, Independent Associations and GPA Midstream Association

• The 2016 NSPS is currently subject to litigation in *American Petroleum Institute v. EPA* pending in the D.C. Circuit
  • On April 7, 2017, EPA moved to hold the case in abeyance pending its review of the rule
  • The court has not yet issued a decision
Methane

On May 10, 2016, the Senate attempted to use the Congressional Review Act to overturn a BLM rule regulating methane emissions from oil and gas wells on federal land.

- Three Republicans—Sens. John McCain (R-AZ), Lindsey Graham (R-SC) and Susan Collins (R-ME)—joined with all 48 Democrats to block a vote on the CRA disapproval resolution.

- The rule is subject to litigation by energy groups and is subject to review by BLM Secretary Zinke.

During the Obama Administration, EPA promulgated rules regulating methane emissions from new and existing landfills.

- According to a joint May 11 statement from the National Waste & Recycling Association and the Solid Waste Association of North America, Administrator Pruitt sent the groups a letter announcing his intention to reconsider parts of the rules and to issue a 90-day administrative stay of the rules’ requirements.
Paris Agreement

• The Paris Agreement was created by the United Nations Framework Convention on Climate Change (UNFCCC) and was negotiated at the 21st Conference of the Parties of the UNFCCC in Paris
  • It was adopted by consensus on December 12, 2015, with nearly 200 countries signing on, including the U.S., China, and India
  • The United States’ commitment under the Paris Agreement was based on initiatives under President Obama’s Climate Action Plan, including the Clean Power Plan and other GHG regulations
• White House press secretary Sean Spicer has stated that President Trump will wait until after the G7 leaders’ summit, which begins on May 27th, to announce a decision on whether to remain in the Paris Agreement
Thank You.

John Fehrenbach
Partner, Environmental Law Practice
Washington, D.C.
jfehrenbach@winston.com

May Wall
Partner, Environmental Law Practice
Washington, D.C.
mwall@winston.com

Stephanie Sebor
Associate, Environmental Law Practice
Chicago
ssebor@winston.com