Federal Laws, Regulations, and Programs Affecting Land Use Decision Making

February 2, 2017

8:30 – 10:30 AM

Dwight Merriam, FAICP

Robinson & Cole LLP

Hazardous Materials

Hazardous Waste Defined and Located

1. Prohibiting mobile medical marijuana dispensaries would not create hazardous waste through increasing indoor cultivation such that it would trigger a mandated California Environmental Quality Act review of the decision to prohibit mobile dispensaries.

***Union of Medical Marijuana Patients, Inc. v. City of Upland*, 245 Cal. App. 4th 1265, 200 Cal. Rptr. 3d 62 (4th Dist. 2016).**

Most sources cited can be found in Google Scholar https://scholar.google.com/

2. A search engine that identifies **treatment, storage, and disposal facilities and recycling facilities**, on a state by state basis, is available on the website of the Environmental Compliance Assistance Platform. http://www.envcap.org/statetools/tsdf/

3. **G. Bibel, Train Wreck – the Forensics of Rail Disasters (2012); A Train Wreck in Washington, D.C., The Atlantic (May 2, 2016)** (freight train carrying 15,500 gallons of hazardous material derailed three miles from White House, spilling half).

4. The Congressional Research Services 2016 report on **"Water Quality Issues in the 114th Congress"** identified the principal and diverse sources adversely affecting water quality: "pollution runoff from farms and ranches, city streets, and other diffuse or 'nonpoint' sources, to 'point' source discharges of metals and organic and inorganic toxic substances from factories and sewage treatment

plants." **Copeland, Water Quality Issues in the 114th Congress: An Overview, Congressional Research Service (Jan. 5. 2016) at 1**. https://fas.org/sgp/crs/misc/R43867.pdf

5. The cost of achieving acceptable water quality, which requires separating combined sewers, stormwater management, and upgrading infrastructure, is estimated at $271 billion. **U.S. Environmental Protection Agency, Clean Watersheds Needs Survey 2012: Report to Congress (Jan. 2016).** https://www.epa.gov/sites/production/files/2015-12/documents/cwns_2012_report_to_congress-508-opt.pdf

6. About 15% of the U.S. population, some 43 million people, depend on groundwater for their drinking water from private wells and of those wells, 23% have contaminants at levels of concern for health impacts. Regrettably,"[l]ittle is known about how much contamination is reversible and how rapidly new sites and sources of contamination are being created." EPA has not provided a similar estimation in its biennial National Water Quality Inventory reports because it lacks the data to make an assessment, but groundwater contamination remains a serious national problem.

U.S. Environmental Protection Agency, National Water Quality Inventory: Report to Congress 97 (1998). https://www.epa.gov/sites/production/files/2015-09/documents/1998_national_water_quality_inventory_report_to_congress.pdf

U.S. Geological Survey, Contamination in U.S. Private Wells (last updated Dec. 2, 2016). https://water.usgs.gov/edu/gw-well-contamination.html

Environmental Justice

1. Bullard, Dumping in Dixie: Race, Class, and Environmental Quality (1990); Environmental Racism: Reviewing the Evidence in Race and Race and the Incidence of Environmental Hazards (B. Bryant & P. Mohai eds., 1992); L. Cole & S. Foster, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement (2001); Godsil, Environmental Justice and the Integration Ideal, 49 N.Y.L. Sch. L. Rev. 1109 (2005); Inst. of Med., Comm. on Envtl. Justice, Toward Environmental Justice: Research, Education, and Health Policy Needs (1999); D. Taylor, Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility (2014); Confronting Environmental Racism: Voices from the Grassroots (R. Bullard ed., 1993). Kang, Pursuing Environmental Justice: Obstacles and Opportunities – Lessons from the Field, 31 Wash. U. J.L. & Pol'y 121, 126-27 (2009); U.S. Envtl. Prot. Agency, Environmental Equity: Reducing Risk for All Communities 15 (1992); U.S. Comm'n on Civil Rights, Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice (2003).

2. Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040 (1976), and Vill. of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S. Ct. 555 (1977), require proof of intentional discrimination. Intent can be inferred from disparate impact. Disparate impact is difficult to prove. E.g., East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning and Zoning Com'n, 706 F. Supp. 880 (M.D. Ga. 1989), order aff'd, 888 F.2d 1573 (11th Cir. 1989), opinion amended and superseded on denial of reh'g, 896 F.2d 1264 (11th Cir. 1989); Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979). See Lazarus, supra, at 834; Reich,

Greening the Ghetto: A Theory of Environmental Race Discrimination, 41 U. Kan. L. Rev. 271 (1992).

However, the U.S. Supreme Court decision in **Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015)**, may have made disparate impact claim easier to prove if there is a demonstrable disproportionate impact on certain groups of individuals and there is no defensible business reason for such impact.

Nuisance Claims

1. A private qualified nuisance claim merges with negligence claim. **Little Hocking Water Ass'n, *Inc. v. E.I. du Pont Nemours & Co*., 91 F. Supp. 3d 940 (S.D. Ohio 2015).**

2. Conduct threatening environmental contamination may be sufficient to state a nuisance claim. ***City of Evanston v. Texaco, Inc*., 19 F. Supp. 3d 817 (N.D. Ill. 2014).**

3. Injury-in-fact must be both concrete and particularized. ***Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), as revised (May 24, 2016).**

4. Possession and control of the property may be the basis for a duty to abate a private nuisance. ***Sweetwater Estates, Ltd. v. Carpenter*, 2015 WL 8783927 (N.Y.Sup.).** A municipality that knows of contamination on private lands and fails to seek abatement of it may not be liable for maintain a private musicMe.[1]

> "By way of this proceeding, the petitioner seeks, inter alia, to abate a nuisance created by the alleged illegal dumping of construction debris and contaminated fill at its property and to compel the Town respondents to remediate the hazardous conditions resulting from the contamination of the property. …
>
> Nevertheless, as the Court is constrained to find that it lacks subject matter jurisdiction with respect to the causes of action set forth in Points I and II and that the cause of action set forth in Point III is legally insufficient, dismissal is warranted. As to CERCLA (Point I), 42 USC § 9613 (b) specifically provides, with limited exceptions not applicable here, that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter." Though the matter of exclusive jurisdiction is not quite so well-defined under RCRA (Point II)—subdivision (b) of 42 USC § 6972 provides that any citizen suit against an alleged polluter "shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur"—the "overwhelming majority" of courts "have read this provision to confer exclusive jurisdiction on federal courts" as well (Litgo New Jersey v Commissioner New Jersey Dept. of Envtl. Protection, 725 F3d 369, 394 [3d Cir 2013]).

5. A statute may provide the constitutionally-required just compensation if a temporary nuisance amounts to a temporary taking. ***Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319 (Mo. 2015).**

6. Conduct threatening environmental contamination may be sufficient to state a nuisance claim. ***City of Evanston v. Texaco, Inc.*, 19 F. Supp. 3d 817 (N.D. Ill. 2014).**

7. It is enough to allege that a utility refused to test for contaminants in groundwater that will continue to serve as a conduit and present a continuing "imminent and substantial endangerment" are adequate. ***San Francisco Herring Ass'n v. Pac. Gas & Elec. Co*., 81 F. Supp. 3d 847 (N.D. Cal. 2015).**

Abnormally Dangerous Activity

1. Restatement (Third) of Torts § 20 states:

> (a) An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.
>
> (b) An activity is abnormally dangerous if:
>
> (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and
>
> (2) the activity is not one of common usage.

Injunctive Relief

1. A court determines the appropriateness of injunctive relief to address hazardous waste contamination. ***LAJIM, LLC v. Gen. Elec. Co.*, No. 13 CV 50348, 2016 WL 5792677 (N.D. Ill. Oct. 4, 2016).**

Stigma Damages

1. As noted by one court from a law review article:

> The variety of claims, along with the often uncertain nature of stigma damage, has led to diverse and often confusing jurisprudence. Struggling with the desire to make the plaintiff whole while awarding only those damages that are proven with reasonable certainty, different jurisdictions have fashioned a variety of rules on which to base the award of stigma damages. While most jurisdictions agree that plaintiffs must experience some physical injury to their property before they may recover stigma damages, jurisdictions are divided on whether the injury must be temporary or permanent.

***Houston Unlimited v. Mel Acres Ranch*, 443 S.W.3d 820, 824-25 (Tex. 2014)** (quoting Young, Stigma Damages: Defining the Appropriate Balance Between Full Compensation and Reasonable Certainty, 52 S.C. L. Rev. 409, 409-410 (2001).

Proximity

1. In Florida, suit may be brought where the hazardous waste has not yet actually contaminated a property, but is only in the "proximity" and creates concern of "anticipated contamination." ***Adinolfe v. United Technologies Corp*., 768 F.3d 1161 (11th Cir. 2014).** But see Smith v. ***ConocoPhillips Pipe Line Co.*, 801 F.3d 921 (8th Cir. 2015).**

Preemption

1. RCRA preempts Colorado's prohibition on storing hazardous waste on the Army weapons depot. ***Colorado Dep't of Pub. Health & Env't, Hazardous Materials & Waste Mgmt. Div. v. United States*, 693 F.3d 1214 (10th Cir. 2012).**

Apportionment of Harm

1. ***PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161,185 (4th Cir. 2013)** (harm at the site not subject to apportionment: "The structure and purposes of CERCLA simply do not permit current owner or operator PRPs to use individual share apportionment to apportion themselves a zero-share harm.).

Ownership

1. A court denied a request to admit that easement holder not an "owner" under CERCLA as calling for a legal conclusion. ***Asarco LLC v. Union Pac. R.R. Co*., No. 212CV00283EJLREB, 2016 WL 5799296 (D. Idaho Sept. 30, 2016).**

2. A county is potentially liable as the owner of the underlying land and "having played a direct role in the razing of the structure", even though it had sold the structure that was later demolished by others causing the release of hazardous waste. ***N. States Power Co. v. City of Ashland, Wis.*, 93 F. Supp. 3d 958 (W.D. Wis. 2015).**

Contractual Relationships

1. A court held that even though PRP had no contractual relationship, it was still liable as it committed a disposal of contaminated soil; "Under CERCLA, at 42 U.S.C. § 9607(b), it is a defense if the release or threatened release of a hazardous substance was an act or omission of a third party (unless it occurred in connection with a contractual relationship with the defendant) if the defendant exercised due care concerning the hazardous substance and took precautions against foreseeable acts or omissions of the third party and against the foreseeable consequences of the third party's acts or omissions." ***City of Gary v. Shafer*, 683 F. Supp. 2d 836 (N.D. Ind. 2010).**

Arranger Liability

1. "CERCLA arranger liability is premised upon an intentional act directed toward the disposal of hazardous waste." ***Vine St. LLC v. Borg Warner Corp.*, 776 F.3d 312 (5th Cir. 2015).**

Responsibility for Future Costs

1. State wins when court declares its past response actions were not inconsistent with the National Contingency Plan, ***N.Y. v. Next Millennium Realty, LLC*, 160 F. Supp. 3d 485 (E.D.N.Y. 2016)**

2. The term "response" comprehends "removal" or "short-term response". ***United States v. Boston & Maine Corp*., No. CV 13-10087-IT, 2016 WL 5339573 (D. Mass. Sept. 22, 2016)** (citing Exxon Corp. v. Hunt).

Claims by the State

1. As to claims by a state, "Under the plain language of Section 107(a)(4)(C) of CERCLA, under which the State asserts its NRD claim, natural resource damages expressly "includ[e] the reasonable costs of assessing such injury, destruction, or loss resulting from such a release[.]" 42 U.S.C. § 9607(a)(4)(C). Since the term "include" means "[t]o contain as a part of something[,]" Include, Black's Law Dictionary (10th ed. 2014), for claims seeking natural resource damages under Section 107(a)(4)(C) of CERCLA, the reasonable costs of assessing the injury to natural resources are contained as part of the natural resource damages." ***N.Y. v. Next Millennium Realty, LLC*, 160 F. Supp. 3d 485 (E.D.N.Y. 2016).**

Fracking

1. Hydraulic fracking ("fracking") in gas and oil production has emerged as a critical issue in groundwater protection. **Burger, The (Re)Federalization of Fracking Regulation, 2013 Mich. State L. Rev. 5, 1483 (2013).**

2. The EPA's final report on the impacts of fracking on drinking water leaves many issues unanswered and unresolved. U.S. Envtl. Protection Agency, **Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States (Final Report), No. EPA/600/R-16/236F (2016).**

3. The EPA acknowledged:

> EPA found scientific evidence that hydraulic fracturing activities can impact drinking water resources under some circumstances. The report identifies certain conditions under which impacts from hydraulic fracturing activities can be more frequent or severe:
>
> - Water withdrawals for hydraulic fracturing in times or areas of low water availability, particularly in areas with limited or declining groundwater resources;

- Spills during the handling of hydraulic fracturing fluids and chemicals or produced water that result in large volumes or high concentrations of chemicals reaching groundwater resources;
- Injection of hydraulic fracturing fluids into wells with inadequate mechanical integrity, allowing gases or liquids to move to groundwater resources;
- Injection of hydraulic fracturing fluids directly into groundwater resources;
- Discharge of inadequately treated hydraulic fracturing wastewater to surface water; and
- Disposal or storage of hydraulic fracturing wastewater in unlined pits resulting in contamination of groundwater resources.

Data gaps and uncertainties limited EPA's ability to fully assess the potential impacts on drinking water resources locally and nationally. Because of these data gaps and uncertainties, it was not possible to fully characterize the severity of impacts, nor was it possible to calculate or estimate the national frequency of impacts on drinking water resources from activities in the hydraulic fracturing water cycle.

U.S. Envtl. Protection Agency, Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States (Final Report), No. EPA/600/R-16/236F (2016).

Flint, Michigan

1. A citizen suit resulted from the lead contamination in the Flint, Michigan, public drinking water.

"The SDWA allows a citizen-suit against any person 'alleged to be in violation of any requirement prescribed' by the Act. 42 U.S.C. § 300j-8(a)(1)."

***Concerned Pastors for Soc. Action v. Khouri*, No. 16-10277, 2016 WL 6647348 (E.D. Mich. Nov. 10, 2016); see also *Concerned Pastors for Soc. Action v. Khouri*, No. 16-10277, 2016 WL 7030059 (E.D. Mich. Dec. 2, 2016); *Concerned Pastors for Soc. Action v. Khouri*, No. 16-10277, 2016 WL 3626819 (E.D. Mich. July 7, 2016); and *Concerned Pastors for Soc. Action v. Khouri*, No. 16-10277, 2016 WL 3055624 (E.D. Mich. May 31, 2016).**

Nuclear Waste

1. ***Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393 (2d Cir. 2013)** (Atomic Energy Act facially preempts contested state law) and the decision below Entergy Nuclear Vermont Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183 (D. Vt. 2012) , aff'd in part, rev'd in part, 733 F.3d 393 (2d Cir. 2013).

Flow Control

1. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330, 346, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007) (upholding flow control because it benefits a clearly

public facility); ***Sandlands C & D LLC v. County of Horry*, 737 F.3d 45 (4th Cir. 2013)** (flow control not discriminatory).

Lautenberg Act in 2016

1. The battle over preemption has probably ended with the Lautenberg Act in 2016 which will require industry to comply with state regulation but not to the extent they have been given the Act's preemption provisions. The act prohibits state action as to a chemical if the U.S. EPA finds that there is not an unreasonable risk from the chemical or the EPA acts to address the risks. Also, the Act provides for "pause preemption" which creates a moratorium on state regulation of a chemical from the time EPA defines the scope of its risk and evaluation until it issues its final evaluation or the deadline for action passes, whoever is earlier. The states may continue to enforce actions commenced and requirements imposed before April 16, 2016, and states may enforce and promulgate new regulations for chemicals subject to state law in effect on August 31, 2002.

Waters of the United States

1. In 2015, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers issued a final rule to clarify what are waters of the United States under the CWA. **Clean Water Act Rule: Definiiton of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015).**

2. Cases on whether CWA applies: N. Cal. River Watch v. Mercer Fraser Co., No. C–04–4620 SC, 2005 WL 2122052, at *2 (N.D.Cal. Sept. 1, 2005) (CWA applies); Hawai'i Wildlife Fund v. Cty. of Maui, 24 F. Supp. 3d 980 (D. Haw. 2014) (CWA applies); Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC, No. 1:14-CV-753, 2015 WL 6157706, 9-10 (M.D.N.C. Oct. 20, 2015) (CWA applies where "pollutants travel from a point source to navigable waters through hydrologically connected groundwater."); Sierra Club v. Virginia Elec. & Power Co., No. 2:15CV112, 2015 WL 6830301 (E.D. Va. Nov. 6, 2015) (CWA applies; not claiming groundwater is water of the United Stetas but is hydrologically connected); ***Tri-Realty Co. v. Ursinus Coll.*, 124 F. Supp. 3d 418 (E.D. Pa. 2015**) (CWA applies only because the contaminated groundwater flowed through a point source).

Buffers

1. ***Texas Comm'n on Envtl. Quality v. Sierra Club*, 455 S.W.3d 228 (Tex. App. 2014**), reh'g overruled (Feb. 17, 2015), review denied (Oct. 9, 2015) (license required buffer zone of unsaturated soil). Twitty v. State, 85 N.C. App. 42, 354 S.E.2d 296 (1987) (with buffer zone no inverse condemnation because no contamination detected).

Generally

1. Mintz, State and Local Government Environmental Liability (Liability Prevention Series) (2016);

2. R. Glicksman et al., Environmental Protection: Law and Policy (7th ed. 2015)

3. Tieman, Safe Drinking Water Act (SDWA): A Summary of the Act and Its Major Requirements, Congressional Research Service (Dec. 10, 2010);

4. Kvien, Note, Is Groundwater that is Hydrologically Connected to Navigable Waters Covered Under the CWA?: Three Theories of Coverage and Alternative Remedies for Groundwater Pollution, 16:2 Minn. J.L. Sci. & Tech., 957 (2015).