
Environmental Litigation Alert: Citizen Suits Challenge Rollbacks, Replacements and Project Approvals

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This is the ninth issue of WilmerHale's 10-in-10 Hot Topics in Energy Series. Over the course of 10 weeks, our attorneys will share insights on current and emerging issues affecting the US energy sector. Attorneys from across various practice groups at the firm will offer their take on issues ranging from congressional investigations, to the impact of key regulatory reforms, to emerging trends in domestic litigation and international arbitration.

Over the past two years the Trump Administration has initiated a fast-paced agenda of rolling back environmental regulations, while also reexamining enforcement priorities. At the same time, the Administration has accelerated permitting of energy, infrastructure, and other development projects. In response, citizen challenges to those actions have increased. Brought by public interest groups, states, and local governments, those challenges have taken several forms, including lawsuits against private parties for alleged violations of environmental laws, and those against federal agencies challenging regulations (or rollbacks), policies, and permit issuances. Recently, there also has been an uptick in attempts to use more traditional legal tools and common law to address emerging environmental issues, with a particular focus on climate change and per- and polyfluoroalkyl substances (PFAS). The regulated community should be prepared to address citizen suits on several fronts, including challenges to federally issued permits for infrastructure and energy projects. It is also vitally important to track "replacement" environmental regulations, bearing in mind that the vast majority of those regulations will be challenged judicially.

Citizen Suits and the Administrative Procedure Act

Many cornerstone environmental laws, including the Clean Air Act (CAA), Clean Water Act (CWA), Resource Conservation and Recovery Act (RCRA), and Endangered Species Act (ESA), contain citizen suit provisions which authorize two types of lawsuits: (1) enforcement actions against entities that violate environmental laws, including permit limitations and other regulatory and statutory requirements; and (2) actions to compel agencies to carry out nondiscretionary duties, including promulgating statutorily required regulations or acting on a listing petition under the ESA within a specific time frame. See CAA, 42 U.S.C. § 7604; CWA, 33 U.S.C. § 1365; RCRA, 42 U.S.C. § 6972; ESA 16 U.S.C. § 6972.

A number of environmental and natural resources statutes—most notably, the National Environmental Policy Act (NEPA)—do not contain citizen suit provisions allowing a lawsuit to be brought directly under the relevant statute. In those cases, challenges are often brought under the Administrative Procedure Act (APA), alleging that the agency acted in a manner that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706.

Citizen Enforcement Suits Against Regulated Entities

Lawsuits asserting violations of environmental laws provide an avenue for citizens or groups to compel compliance in the absence of agency enforcement. There has been an increase in citizen suits against a host of regulated entities in recent years, and suits against energy companies and utilities—whether meritorious or not—will likely continue to be filed.

In one high-profile example, the Supreme Court recently agreed to hear a case that originated as a [citizen suit](#) contending that a wastewater reclamation facility in Hawaii violated the CWA by discharging (without a permit) treated effluent through wells into groundwater which was hydrologically connected to the Pacific Ocean. See *Cty. of Maui v. Hawaii Wildlife Fund*, No. 18-260.

Another recent example arising under the CWA is a suit alleging that a utility violated conditions of its Water Quality Certification designed to ensure that discharges from its hydroelectric facilities complied with state water quality standards. See *Deschutes River Alliance v. Portland Gen. Elec. Co.*, No. 3:16-cv-1644 (D. Or., filed Aug. 12, 2016). The court found that the plaintiff’s claims properly arose under the CWA’s citizen suit authority, but determined that the utility did not violate the Certification’s requirements. See *id.*, Docket No. 128, Opinion and Order (Aug. 3, 2018).

Challenges to Rulemakings and Rule Rollbacks

There has been a notable uptick in judicial challenges by environmental groups and citizens to agency actions since President Trump took office. Many prominent challenges have used the APA to oppose regulatory rollbacks or suspensions of Obama-era regulations.

One recent example disputed a technique used by the Trump Administration to stall implementation of Obama-era rules: since there is a lag time associated with replacing those rules, the effective date is delayed until a rollback can be effectuated or a substitute promulgated. In that case, the state of California and several environmental organizations challenged the Trump Administration’s decision to suspend the effective date of the Bureau of Land Management’s (BLM) Obama-era methane rule, which would have limited methane emissions from oil and gas development and production sites on federal lands. See *California v. BLM*, 286 F. Supp. 3d 1054 (N.D. Cal., July 17, 2018). The plaintiffs prevailed, and the court preliminarily enjoined the suspension. However, due to the promulgation of a replacement rule in September 2018 and the expiration of the suspension under its own terms in January 2019, the case is currently being held in abeyance.

Although many replacement rules have not yet been finalized, those that have been promulgated have faced swift opposition. For instance, the BLM replacement methane rule referenced above was challenged mere days after issuance. See *California, et al. v. Zinke*, No. 4:18-cv-05712 (N.D. Cal., filed Sept. 18, 2018); *Sierra Club v. Zinke*, No. 4:18-cv-5984 (N.D. Cal., filed Sept. 28, 2018). Other

replacement rules—including those related to the Clean Power Plan, the Mercury and Air Toxics Standard, the Fuel Economy Standards, the Methane New Source Performance Standards, and Waters of the United States—are in various stages of the administrative process, but likely will be promptly challenged once final rules are issued. As discussed in a [previous alert](#), that will lead to a somewhat uncertain policy and regulatory environment for the foreseeable future.

Challenges to Federal Authorizations

Numerous lawsuits have been filed under the APA, often led by environmental groups, opposing federal authorizations, permits, and approvals issued to specific projects—especially in the energy sector. Those actions include highly publicized challenges to federal permits for proposed pipelines, including the Dakota Access Pipeline, the Keystone XL Pipeline, and the Mountain Valley Pipeline. See, e.g. Supplemental Complaint, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 1:16-cv-1534 (D.D.C., filed Nov. 1, 2018) (challenging the Army Corps of Engineers decision affirming the issuance of permits for the Dakota Access Pipeline); *Appalachian Voices et al. v. FERC*, No. 18-1216 (D.C. Cir. 2019) (upholding the Federal Energy Regulatory Commission's issuance of a certificate of public convenience and necessity to the Mountain Valley Pipeline).

Lawsuits also have challenged agency actions that authorize future resource development but do not authorize specific projects, such as the sale of oil and gas leases on public lands. Recently, for example, the United States District Court for the District of Columbia found inadequate the climate analyses underpinning lease sales in Wyoming. See *WildEarth Guardians v. Zinke*, No. 1:16-cv-1724 (D.D.C., Mar. 19, 2019). Responding to a NEPA-based action brought by two nonprofit organizations, the court concluded that the BLM had not sufficiently considered climate change in authorizing the leases and had failed to analyze greenhouse gas emissions linked to drilling and downstream uses of the oil and gas produced from the leases. Although the court left the leases in place for the time being, it remanded the climate analyses to the BLM to address these deficiencies and—significantly—enjoined the BLM from issuing related drilling permits in the interim.

Challenges to federal authorizations have had a mixed success rate, but they often delay project implementation. Project proponents should anticipate challenges to federal permits and other authorizations, and plan ahead by building appropriate safeguards into financing and contracting arrangements, working cooperatively with the issuing agency to build a strong and defensible record, and when appropriate, working with stakeholders in advance to proactively address issues of significant interest.

Citizen Suits to Compel Agency Action

Agencies also may face citizen suits if they fail to take nondiscretionary action. Those types of challenges typically result from an agency failing to issue regulatory standards when it is required to do so, or missing a deadline by which it must take a particular action or set a certain standard. One common example is the failure of the US Fish and Wildlife Service to respond to or otherwise meet deadlines for a petition seeking to list a species as endangered or threatened. See 16 U.S.C. § 1533; *Friends of Animals v. Jewell*, 828 F.3d 989 (D.C. Cir., 2016). Similarly, citizen groups frequently file actions and notices of potential lawsuits against the Environmental Protection Agency (EPA)

under the CAA or CWA for failure to meet deadlines for setting air quality or water quality standards, reviewing state-submitted plans, or designating geographical areas as being in attainment with air quality standards. See, e.g. [Letter](#) from Howard Learner, Env'tl. Law & Policy Ctr., to Administrator Andrew Wheeler, EPA (Mar. 13, 2019). These types of suits are common in any administration, including in the Trump Administration.

Common Law Claims

Increasingly, as environmental laws have not been successful vehicles through which to force action on emerging environmental issues, plaintiffs have turned to more traditional, common law approaches. The vast majority of those efforts have focused on climate change and attempts to address PFAS contamination.

An early attempt to use common law to address climate change was rejected by the Supreme Court in *American Electric Power v. Connecticut*, 564 U.S. 410 (2011). In that case, the state of Connecticut claimed that the defendant utility companies created a public nuisance because carbon emissions from their generation facilities contributed to climate change. *Id.* at 418–19. The Supreme Court rejected that argument, concluding that federal common law in this area was displaced by the CAA and that Congress had entrusted EPA to decide how greenhouse gases should be regulated. *Id.* at 424.

Since *AEP*, plaintiffs have attempted to use other common law avenues to address climate change. Recently, a number of local governments have sought damages from fossil fuel companies for climate change-related injuries. See, e.g., *City of New York v. BP*, No. 18-2188 (2d Cir.); *County of San Mateo v. Chevron*, No. 18-15499 (9th Cir.). In those cases, plaintiffs allege that the defendants are responsible for greenhouse gas emissions, which have injured and will continue to injure plaintiffs via impacts related to climate change, including sea level rise. Claims have been brought under state law for trespass and private and public nuisance; to date, no court has awarded damages.

In another high-profile case, a group of youth plaintiffs asserted constitutional claims against the federal government for failure to reduce carbon emissions. See *Juliana v. United States*, No. 6:15-cv-01517 (D. Or., filed Aug. 12, 2015). Those plaintiffs have alleged that the federal government's failure to take action to address climate change violates the Due Process Clause, equal protection principles, unenumerated rights reserved under the Ninth Amendment, and the public trust doctrine. Although that challenge was filed in 2015 against the Obama Administration, the Trump Administration has been vigorously defending the lawsuit.

Similarly, lawsuits related to emerging contaminants found in groundwater—known as PFAS—are on the rise. In the absence of promulgated state or federal standards, those suits rely on common law claims including personal injury, negligence, property damage, and product liability to address the persistent presence of those contaminants. Many of those challenges have been styled as class actions, including those filed in Colorado, Michigan, New York, and Pennsylvania, as well as a nationwide claim filed in Ohio. In the meantime, we expect regulatory activity to address PFAS will continue, both on state and federal levels.

Conclusion

Environmental litigation against federal agencies and private parties has accelerated over the past two years as citizens challenge regulatory rollbacks, new regulations, permitting decisions, and agency inaction. It is unlikely that these challenges will slow or wane. The regulated community should be prepared to defend against citizen suits alleging violations of environmental laws and consider intervening to defend challenges to agency permitting decisions. Businesses and project proponents should devote increased attention to tracking challenges to regulatory actions and should participate in defense of those regulations where appropriate, whether through robust comments or as an amicus.