

## ENVIRONMENTAL LAW

By Jean M. Flores

The past year has been an exciting one for environmental law practitioners. We saw a number of significant environmental policy directives and holdings, some of which are highlighted below.

### Policy

On January 25, 2018, with a stated goal of reducing unnecessary regulatory burdens, the Environmental Protection Agency, or EPA, issued a guidance memo ending its 23-year-old Clean Air Act, or CAA, “once in, always in” policy that kept “major source” air toxics pollution controls in place permanently once facilities have triggered requirements for reducing emissions.<sup>1</sup>

The same day, the associate attorney general directed the Department of Justice not to rely on agency guidance to establish a violation in affirmative civil enforcement cases.<sup>2</sup> The directive prohibits “effectively convert[ing] agency guidance documents into binding rules” and applies to future actions and actions pending as of January 25, 2018.

### U.S. Supreme Court

In *National Association of Manufacturers v. Dept. of Defense*,<sup>3</sup> the Supreme Court, reversing a 6th Circuit Court of Appeals opinion, held that challenges to the Waters of the United States, or WOTUS, Rule belong in the U.S. District Courts.

### Federal Courts

Do pollution leaks into groundwater violate the Clean Water Act, or CWA? An apparent split on this topic between the 4th,<sup>4</sup> 9th,<sup>5</sup> and 6th U.S. Circuit Courts of Appeals has resulted in petitions for cert seeking Supreme Court review. The 4th and 9th Circuits have held that a violation of the CWA occurs when the groundwater flows directly into jurisdictional surface waters. The 6th Circuit, on September 24, 2018, rejected that theory, creating the split.<sup>6</sup>

In *Sierra Club v. FERC*,<sup>7</sup> the U.S. Court of Appeals for the District of Columbia Circuit vacated approval of a pipeline, finding that the Federal Energy Regulatory Commission, or FERC, failed to include the “reasonably foreseeable” increase in greenhouse gas emissions from the end users. The environmental impact statement was held to be inadequate and remanded to the FERC.

Delivering a strategic loss to the White House, in *Clean Air Council v. Pruitt*,<sup>8</sup> the District of Columbia Circuit held that the EPA lacked authority under the CAA to stay a methane emissions rule because the EPA failed to pass a test of central relevance and impracticability in timely raising an objection.

### Texas State Courts

*Ring Energy v. Trey Resources*<sup>9</sup> held that suits involving Texas Railroad Commission permits do not have exclusive venue in Travis County.

Finally, local government suits under Section 7.351 of the Texas Water Code<sup>10</sup> by contingency fee lawyers continue to raise eyebrows. The state, an indispensable party, shares in the settlement proceeds. In one recent case, subsequently dismissed, a county sought millions in civil penalties against the owner of a Leaking Petroleum Storage Tank Program site—with a Texas Commission on Environmental Quality “no further action” letter—alleging violations for releases of petroleum to ground waters during the corrective action performed with TCEQ oversight and during a state-lead cleanup.

### Notes

1. William L. Wehrum, Assistant Administrator, Memorandum, Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act (Jan. 25, 2018), [https://www.epa.gov/sites/production/files/2018-01/documents/reclassification\\_of\\_major\\_sources\\_as\\_area\\_sources\\_under\\_section\\_112\\_of\\_the\\_clean\\_air\\_act.pdf](https://www.epa.gov/sites/production/files/2018-01/documents/reclassification_of_major_sources_as_area_sources_under_section_112_of_the_clean_air_act.pdf).
2. Office of the Associate Attorney General Memorandum, Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases (Jan. 25, 2018), <https://www.justice.gov/file/1028756/download>.
3. *National Association of Manufacturers v. Dept. of Defense*, et al, 583 U.S. \_\_\_, 138 S. Ct. 217 (2018).
4. *Upstate Forever, et al v. Kinder Morgan Energy Partners*, 887 F.3d 637 (4th Cir. 2018).
5. *Hawai'i Wildlife Fund, et al v. County of Maui*, 886 F.3d 737 (9th Cir. 2018).
6. *Kentucky Waterways Alliance et al v. Kentucky Utilities Company*, 905 F.3d 925 (6th Cir. 2018).
7. *Sierra Club v. Federal Energy Regulatory Commission*, 867 F.3d 1357 (D.C. Cir. 2017).
8. *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017).
9. *Ring Energy v. Trey Resources*, 546 S.W.3d 199 (Tex. App.—El Paso 2017).
10. Tex. Water Code § 7.351.



### JEAN M. FLORES

is a founding shareholder in the 27-year-old environmental law boutique Guida, Slavich & Flores. She has a diversified national environmental law practice, covering air and water pollution control, solid and hazardous waste management issues, and toxic substances. Flores is a past chair of the State Bar of Texas Environmental and Natural Resources Law Section.