



ENVIRONMENTAL REGULATION AND THE CURRENT POLITICAL CLIMATE

By

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What happens when you place the chief litigator for the National Association of Home Builders (“NAHB”) in the same room with the counsel for the National Resources Defense Council (“NRDC”) and National Wildlife Federation (“NWF”) with a tenuous buffer of U.S. Army Corps of Engineers (“USACE”) and Environmental Protection Agency (“EPA”) attorneys in between? No, not a group hug and smiling faces. Passionate debate, frayed nerves, a few sucker punches and very little common ground is more like it.

This was the scene at the Wetlands Law and Regulation conference in Washington, D.C. that I recently attended. The organizers assembled a diverse panel of both legal and scientific experts to provide environmental practitioners with an update on recent legal precedent, efforts by federal and state governments to clarify their positions for the regulated public, and an update on efforts to revise and amend current environmental law. It was heavily laden with political and policy positions as one would expect from these groups in an election year.

Environmental law came of age in this country in the early 1970s with passage of the National Environmental Policy Act (“NEPA”), the Clean Air Act (“CAA”), and the Clean Water Act (“CWA”). The CAA and CWA have undergone amendment and revision since their inception, but a great deal of discretion has been given to the regulatory agencies in the implementation of these Acts. In order to flesh the Acts out and carry out Congress’ intent, the agencies are given authority to enact regulations which they then enforce. In what is commonly

known as the Chevron two-step, federal courts conduct a two part analysis to determine whether challenged agency regulations are proper. First, the court must decide whether the statute in question is ambiguous. If it is clear, then there is no need for agency interpretation of it and the regulation is struck. If the statute is ambiguous, then courts go to the second step. There the court determines whether the agency's interpretation of the ambiguous statute is reasonable. The concept is that if Congress left an ambiguity in the statute, then it intended the agency tasked with implementation of the statute to interpret it first and foremost. Courts will not second guess the agency, which is comprised of experts in the field, unless their interpretation is deemed clearly unreasonable.

Since the 1970's, the breadth and scope of environmental regulation has continued to expand to the point where it impacts not only large power companies and utilities but land developers and even private landowners. The CWA has expanded, virtually unchecked, until relatively recently. However, in its recent opinion known as Rapanos, the Supreme Court ruled against the agencies and their interpretation of wetlands regulation. The Rapanos decision has invigorated the regulated public, such as the NAHB, and dozens of cases have been filed seeking to overturn or reduce the scope of environmental regulation.

The vast economic development and construction in this country accompanied by a much greater scientific understanding of the environment and the impact of development on it has further polarized the environmental movement and developers. The regulatory agencies are left somewhere in the middle, attempting to keep pace with changing times and science, and it is being challenged from both the left and the right in court constantly.

There have been some congressional attempts to craft new law. Perhaps the most noticeable is the Clean Water Restoration Act of 2007 ("CWRA"). Lobbying efforts from all sides have been intense and the CWRA did not make it past the committee level last year. However, with a pending change in administration, regardless of the winner, it is very likely that environmental regulation will undergo an overhaul in the coming years.



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