Environmental Law Update

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The author has used a number of helpful secondary sources in compiling this update. They include the ABA's publications *Trends* and *Natural Resources & Environment*, as well as their *Year in Review*. BNA's *Environment Reporter* is a valuable resource, as well as the Environmental Law Institute's *Environmental Law Reporter*, *ELR News & Analysis*, and *ELR Update*. Helpful blogs and websites include the following:
http://www.ryankuehler.com/cwa-blog (Mark Ryan's Blog)
http://www.agandfoodlaw.com/ (National Ag Law Center's Blog)
http://www.calt.iastate.edu/article (CALT)
http://lawprofessors.typepad.com/agriculturallaw/ (Roger McEowen's Blog)
https://lawoftheland.wordpress.com/category/agricultural-uses/ (Patty Salkin's Blog)
http://agrilife.org/texasaglaw/category/water-law/page/2/ (Tiffany Dowell's Texas Agriculture Law Blog)
http://ohioaglaw.wordpress.com/ (Ohio Ag Law Blog by Peggy Hall)
https://pennstatelaw.psu.edu/academics/research-centers/center-agricultural-and-shale-law (Penn State's Ag Law Resources from Ross Pifer)

I. Clean Water Act

WOTUS Rulemaking Saga

Litigation concerning the 2015 final rules is ongoing in multiple venues. Since last year, there have been few developments. A good resource describing the current state of affairs is Christopher D. Thomas, *Judicial Challenges to the Clean Water Rule: A brief and Relatively Painless Guide for the Procrastinator*, in *Trends* at http://www.americanbar.org/publications/trends/2015-2016/march-april-

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2016/judicial_challenges_to_the_clean_water_rule_a_brief_and_relatively_painless_guide_for_the_procrastinator.html. Since that writing, the 6th Circuit has denied rehearing en banc and, thus, firmly stated its view that it has jurisdiction under the CWA for direct circuit court review of the regulations. 817 F.3d 261 (2016). A petition for certiorari has been filed.

As to the impact on agriculture if the rules stand, two recent pieces attempt to explain some of the questions the rules raise. See Tiffany Dowell Lashmet, *Agriculture & the CWA*, The Water Report (August 15, 2016); Emily Taylor, *"Waters of the United States" and the Agricultural Production Sector: Sweeping Change or More of the Same?*, 44 ELR 10743 (9/2016).

All of this litigation is still geared at trying to figure out where to resolve the dispute about the rules. For now and pursuant to judicial order, the ACOE and EPA are operating under the old rules. *See* https://www.epa.gov/cleanwaterrule/clean-water-rule-litigation-statement.

Jurisdiction

Mark Ryan reports a case on his blog that I've been unable to locate in other places, but it appears relevant enough to include. http://www.markryanlaw.com/cwa-blog2.html. He reports that *Universal Welding & Fabrication, Inc. v. USACOE*, No. 4:14-cv-00021-TMB (D. Ak. Oct. 1, 2015), involved a successful assertion of jurisdiction over a wetland because the wetland provided subsurface flow to a ditch that was a relatively permanent water. The wetland was not adjacent because it was separated from the ditch by a road. But the court held the Corps had adequately found the presence of a significant nexus between the wetland and downstream navigable waters.

Judicial Review of Agency Action

United States Army Corps of Engineers v. Hawkes Co., No. 15-290, 578 U.S. __ (May 31, 2016) (from *Trends* July/August 2016)

The Supreme Court held that an "approved jurisdictional determination" (JD), specifying whether a particular property contains "waters of the United States," is a final agency action judicially reviewable under the Administrative Procedure Act. The Hawkes companies sought a permit from the U.S. Army Corps of Engineers to discharge material onto wetlands located on their property and planned to mine peat. The Corps issued an approved JD determining that the property contained "waters of the United States." The High Court held that the approved JD marked the consummation of the Corps' decision-making and as such was final agency action with legal consequences because the property owner faces potential liability under the Clean Water Act. The opinion stated that parties need not await enforcement proceedings to challenge final agency action where such proceedings carry the risk of serious criminal and civil penalties. The opinion of the Court relied on an EPA-Corps memorandum of agreement (MOA), which the

Court characterized as stating that approved JDs were binding. In a brief concurring opinion, in response to the suggestion that the government could revoke or amend the MOA, Justice Kennedy (joined by Justices Thomas and Alito) stated that Clean Water Act, "especially without the JD procedure were the Government permitted to foreclose it, continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."

Foster v. EPA, No. 2:14-cv-16744, 2015 WL 5786771 (S.D. W.Va. Sept. 30, 2015) (from *Trends* January/February 2016).

EPA issued a compliance order alleging that in the course of developing their property, plaintiffs discharged dredge and fill material into several intermittent and ephemeral streams without a permit. EPA's order required plaintiffs to restore the property to pre-disturbance grade and conditions. Plaintiffs then sought declaratory and injunctive relief to void the EPA order. The district court denied in part EPA's motion to dismiss plaintiffs' claim that the EPA order was unconstitutional. The opinion concludes that plaintiffs demonstrated a substantial property interest of which they have been deprived, namely the ability to physically alter or sell their land. The court rejected EPA's argument that procedural due process protections may be limited to post-deprivation judicial review under the Administrative Procedure Act, stating: "When the penalties from disobeying a law are ruinous, but compliance undermines judicial review, the effect is a deprivation of due process because judicial review becomes unavailable as a practical matter." However, the district court rejected plaintiffs' substantive due process claim, stating that the complaint contains no allegations of enforcement actions that "shock the conscience."

Mark Ryan explains the consequences of this decision in *NR&E* Winter 2016, available at http://www.americanbar.org/content/dam/aba/publications/natural_resources_environment/Winter 2016/NRE_v030n03_Insights04_Ryan.authcheckdam.pdf:

> If this case is affirmed on appeal or picked up by other courts, it could become a game changer. If this court is correct that an EPA section 309(a) order per se violates the respondent's due-process rights, then it is hard to envision the EPA continuing to exercise the compliance order authority given to it by Congress. Since EPA ALJ's do not have injunctive relief authority under the CWA, EPA's only recourse may be to sue in federal court instead of issuing administrative orders. The advantage to the regulated community is fewer administrative orders. EPA has to refer federal court cases to DOJ for enforcement, and those referrals are very resource and time intensive, so fewer orders would be issued. The net effect, however, might be that EPA will simply sue violators in federal court, where penalties are larger and litigation costs are much higher than in administrative cases.

Point Sources and Ag Stormwater

Rose Acres Farms in North Carolina continues to seek some relief from the North Carolina decision that it needs an NPDES permit for its egg production operation because the fans on its buildings and the vegetation strips between them constitute point sources. This theory was rejected in the *Alt* case, but it saw success in state court proceedings involving Rose Acre. *Rose Acre Farms Inc. v. N.C. Dept. of Environment*, 2013 WL 459353 (Sup. Ct. Jan. 4, 2013). An effort to try the matter in federal court failed in *Rose Acre Farms Inc. v. N.C. Dept. of Environment*, 131 F. Supp. 3d 496 (E.D. N.C. 2015), for lack of subject matter jurisdiction. One should not forget the impact of cooperative federalism. While the CWA may not require the permit, North Carolina may. And if it does, then there is no federal question that arises. The court also refused to take up the ag stormwater question under the Declaratory Judgment Act. To it, the state courts could adequately consider the matter on appeal.

In a non-agricultural case, the court in *Yadkin Riverkeeper Inc. v. Duke Energy Carolinas*, 141 F. Supp. 3d 428 (M.D. N.C. 2015), concluded that a wastewater lagoon constituted a point source and that discharges via hydrological connected groundwater are within the scope of the CWA. Indeed, the jurisdictional scope that is so hotly contested in the WOTUS litigation may mean relatively little to the NPDES program, depending upon how one defines the notion of discharge.

Cooperative Federalism

Askins v. Ohio Department of Agriculture, 809 F.3d 868 (6th Cir. 2016) (from *Trends* July/August 2016)

The Sixth Circuit affirmed a district court decision dismissing a lawsuit by citizen plaintiffs challenging Ohio EPA's transfer of part of its National Pollutant Discharge Elimination System (NPDES) permit authority to the Ohio Department of Agriculture (ODA). The plaintiffs challenged specific NPDES permits to animal feeding operations and filed a citizen suit in U.S. district court alleging that the transfer of permit authority to ODA was made without notifying the U.S. EPA or obtaining EPA's approval. The Sixth Circuit agreed with the U.S. EPA and Ohio position that it was for EPA to decide whether or not the appropriate state authority is handling Clean Water Act permits. The court concluded that EPA's oversight power in this arena is discretionary, stating "the Clean Water Act does not require the U.S. EPA to conduct a hearing if a state fails to administer properly a state-NPDES program." The court of appeals also drew a distinction between the statute's requirements for NPDES programs versus NPDES permits, stating that only permits are subject to the citizen suit provisions and that "a regulator's failure to follow procedural regulations is not grounds for a citizen suit."

TMDL

Ohio Valley Environmental Coalition, Inc. v. EPA, 2016 WL 4744164 (S.D. W.Va. 2016) (plaintiffs have standing to bring suit against EPA were they alleged that EPA violated a nondiscretionary duty to disapprove state's actual or constructive submission of TMDLs, and by approving TMDLs for listed water bodies that did not include ionic toxicity; rejected EPA's argument that plaintiffs lacked standing where they could not show injury for every water body in state that might be subject to a TMDL). http://www.ryankuehler.com/cwa-blog

The Supreme Court has denied cert in *American Farm Bureau Federation v. EPA*, 792 F.3d 281 (3d Cir. 2015), which was reported last year and involved a determination that the Chesapeake Bay TMDL can move into implementation.

A court in Virginia upheld a Water Control Board's decision not to require landowners to fence cattle out of streams. Part of the claim was that the Chesapeake Bay TMDL required such a measure. *Chesapeake Bay Foundation v. Virginia State Water Control Board*, 90 Va. Cir. 392 (2015).

Nationwide Permits

The comment period for renewing and revising 50 nationwide permits for work in wetlands closed on August 1, 2016. Further information can be found at the rulemaking portal at docket COE-2015-0017: http://www.regulations.gov/docket?D=COE-2015-0017. There are no proposed changes to NWP 40 Agricultural Activities. NWP 41 Reshaping Existing Drainage Ditches has some proposed changes, some of which may streamline the permits use, but all of which are geared at facilitating improvements to water quality.

The Gulf

Gulf Restoration Network v. McCarthy, 783 F.3d 227 (5th Cir. 2015) (from *Trends* October/November 2015)

The Fifth Circuit vacated and remanded a district court decision ordering EPA to determine whether new water quality standards were necessary to control nitrogen and phosphorus in the Mississippi River and the northern Gulf of Mexico. EPA denied a petition by environmental groups to make such a necessity determination under section 303(c)(4) of the Clean Water Act. The Fifth Circuit relied on the Supreme Court's decision in *Massachusetts v. EPA* that EPA may avoid making a threshold determination "if it provides some reasonable explanation as to why it cannot or will not exercise its discretion." The court thus held that EPA may decline to make a necessity determination under section 303(c)(4) of the Clean Water Act if it provides an adequate explanation grounded in the statute. On remand, the district court must determine whether EPA's explanation was adequate.

Des Moines Water Works

Helpful information on the litigation can be found at CALT's site:

http://www.calt.iastate.edu/article/des-moines-water-works-litigation-resources
(collecting articles, blog posts, and pleadings and orders)

http://www.calt.iastate.edu/article/iowa-supreme-court-considers-dmww-common-law-claims
(reporting state court arguments from September)

The case currently has a motion for summary judgment pending and questions about drainage-district immunity have been certified to the Iowa Supreme Court.

Another case may be brewing in Hawaii, where Earthjustice has submitted a 60-day intent to sue concerning a 40 mile drainage system on Kauai operated by Hawaii's Agribusiness Development Corporation. *See* Carolyn Whetzel, *Hawaii Agribusiness Agency Drainage System Violates Clean Water Permit, Activists Say*, 47 Environment Reporter 1407 (May 6, 2016).

CAFO

A Wisconsin case, *Clean Wisconsin v. Wisconsin DNR*, Case No. 2015CV002633, (Wisc. Cir. Ct. Dane County, July 14, 2016), dealt with some challenges relating to the reissuance of a state administered WDPES permit. After much legal wrangling, the court affirmed a decision to require the operator to monitor groundwater and maintain animal populations below a permit-set maximum. Information on the case can be found at http://midwestadvocates.org/issues-actions/actions/kinnard-farms-cafo-expansion-water-pollution-permit-challege/ . It is also described at Michael J. Bologna, *Wisconsin DNR Ordered to Revise CAFO Permit to Control Groundwater Contamination,* 47 Environment Reporter 2221 (July 22, 2016).

The court in *Environmental Integrity Project v. McCarthy*, 139 F. Supp. 3d 25 (D. DC 2015), concluded that the EPA was within its bounds in withdrawing a rule that would have required large CAFOs to provide information to the EPA. It provided enough explanation for the court.

404(f)

In a lengthy opinion dealing with all aspects of a 404 violation on a farm, the court in *Duarte Nursery, Inc. V. USACOE*, 2015 WL 4717986 (E.D. Cal. June 10, 2016), concluded that a violation existed where the farming activities that occurred within a wetland area were not established and ongoing and impacted the flow or circulation of water in the wetland. While the wetlands continued to exist, the court concluded that a violation had nonetheless occurred.

Misc.

In *Holdner v. Coba*, 2016 WL 3102053 (D. Or. 2016) the court dismissed a rancher's challenge to Oregon's state water quality standards program, holding that there is no private right of action under CWA, and section 505 does not authorize a challenge against the state in federal court alleging lack of authorization to enforce the CWA. Reported at http://www.ryankuehler.com/cwa-blog

Last year, I reported *Am. Farm Bureau Fed'n & Nat. Pork Producers Council v. EPA*, 2015 WL 364667 (D. Minn. Jan. 27, 2015), where the court rejected on standing grounds a challenge by farm-organization plaintiffs to the release of farm information. In a nutshell, the associations' members could show no injury from the release of the information, and they would have a very difficult time showing a causal relationship between the disclosure and any injury. This, in turn, would make redressability quite difficult to establish.

The 8th Circuit reversed, 2016 WL 4709117 (8th Cir. 2016), concluding that the district court erred in the injury prong of the analysis by conflating the merits (was the information public) with the injury. That there was personal information was enough to the court. The court went on to address the FOIA claim, concluding that the information sought was within the scope of the FOIA exemption for disclosures that would constitute clearly unwarranted invasions of personal privacy. The court remanded the matter to determine whether or not the Privacy Act prohibits discretionary disclosure of the information.

In a relevant case, *Environmental Integrity Project v. EPA*, 2016 WL 1254211 (D. DC Mar. 29, 2016), the court concluded that information collected in the course of creating effluent limitations is still subject to FOIA exemptions for confidential business information. That case could become relevant to agricultural point sources, where effluent limitations are often set using best management practices.

Gathering data about natural resources has also become the subject of litigation in Wyoming. *Western Watersheds Project v. Michael*, 2016 WL 3681441 (D. Wyo. July 6, 2016), involved a First Amendment challenge to Wyoming statutes protecting private landowners from trespassers who were seeking to collect such information. The court rejected the challenge, concluding that the groups had no First Amendment right to trespass upon private property to collect resource data. "The ends, no matter how critical or important to public concern, do not justify the means, violating private property rights."

II. Farm Program Litigation

Swampbuster

The court in *Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016), rejected a landowner's claim that the agency improperly delineated wetlands on a farm. The dispute focused on the difficult question of whether or not hydrophytic vegetation would exist on the side under normal circumstances, when the landowner has removed such vegetation through tillage. The court concluded the selection of a comparison site was not improper.

The court in *Boucher v. Vilsack*, 149 F. Supp. 3d 1045 (S.D. Ind. 2016), was faced with similar arguments. While the deference afforded the agency won the day, it is noteworthy that the court also concluded that a 10-year delay in making a final determination of wetland status and conversion did not deprive the farmer of any due process rights.

III. Clean Air Act

Humane Society of the United States v. McCarthy, 2016 WL 5107003 (D. DC sept. 19, 2016) (from http://nationalaglawcenter.org/ag-and-food-law-blog/)

Plaintiffs sued EPA pursuant to the Administrative Procedure Act (APA), seeking to compel EPA to provide a response to their 2009 petition for rulemaking. That petition requested that EPA regulate Concentrated Animal Feeding Operations (CAFOs). Plaintiffs argued EPA's failure to respond to their petition violated the APA. The court noted, "whether this court has jurisdiction in this matter turns on whether the government has waived immunity to suit." Per the court, "Plaintiffs failed to effectuate waiver of sovereign immunity through notice," and therefore, the court "lacks subject matter jurisdiction over this particular dispute." Defendant's motion to dismiss granted.

Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685 (6th Cir. 2015) (from *Trends* March/April 2016)

The Clean Air Act does not preempt common law claims alleging negligence, nuisance, and trespass against a whiskey distiller, the Sixth Circuit held. Nearby property owners complained that ethanol vapor from the distillation facility creates an unreasonable annoyance and interference with the use and enjoyment of their property. The facility had a federally-enforceable Clean Air Act permit that did not set permit limits for fugitive emissions of ethanol, but the distiller was ordered by the Louisville air pollution district to abate the emissions contributing to the nuisance. The property owners brought a class action in federal district court seeking compensatory damages and an injunction. The district court rejected the distiller's argument, in its motion to dismiss, that plaintiffs' claims were preempted by the Clean Air Act, and the Sixth Circuit affirmed. The Sixth Circuit's opinion concludes that the states' rights savings clause, 42 U.S.C. § 7416, preserves to states the right to impose "any requirement"

respecting air pollution control, which "clearly encompasses common law standards." The opinion cites Supreme Court decisions, including *International Paper Co. v. Ouelette*, 479 U.S. 481, 497–98 (1987), holding that the Clean Water Act, which contains provisions modeled on the Clean Air Act, preserves state common law claims, although it preempts state common law claims as applied to out-of-state sources.

IV. Endangered Species Act & Wildlife

Karr v. Virginia Dep't of Envtl. Quality, 66 Va. App. 507, 789 S.E.2d 121 (2016) (from http://nationalaglawcenter.org/ag-and-food-law-blog/)

Plaintiffs appealed circuit court decision upholding permits issued by Virginia Department of Environmental Quality (DEQ). Plaintiffs argued circuit court erred in finding "wildlife" to be an ambiguous term and in granting DEQ's interpretation of "wildlife" special weight. Appellate court ruled DEQ had authority to determine what constitutes "significant adverse impact to wildlife." Court also found circuit court did not err in ruling DEQ "used its discretion appropriately and reasonably in its interpretation of the term 'wildlife,'" and in its determination of the "appropriate triggers for the creation of mitigation plans." Judgment for defendant affirmed.

Permian Basin Petroleum Association v. Dept. of Interior, 127 F. Supp. 3d 700 (W.D. Texas 2015) involved claims dealing with the threatened listing of the lesser prairie-chicken. Plaintiffs success has resulted in the chicken being de-listed. See https://www.dtnpf.com/agriculture/web/ag/perspectives/blogs/ag-policy-blog/blog-post/2016/07/19/usfws-de-lists-lesser-prairie.

Agricultural interests are currently attempting to intervene in a case involving the implementation of a plan to protect the endangered sage grouse in Utah. https://www.dtnpf.com/agriculture/web/ag/perspectives/blogs/ag-policy-blog/blog-post/2016/06/29/farm-groups-intervene-sage-grouse

V. NEPA

Farm finance by the FSA and SBA ran headlong into NPA and the ESA in *Buffalo River Watershed Alliance v. Dept. of Agriculture*, 2014 WL 6837005 (E.D. Ark. Dec. 2, 2014). In that case, environmental groups argued that the agencies failed to comply with NEPA and the ESA in lending money to a large hog farm. The court agreed, concluding that the FONSI was "cursory and flawed" and the FSA had failed to notify the public about its likely loan guarantee. Interestingly, the court also concluded that the parties had standing to sue the agencies because the loans were the lifeblood of the hog farming operation, which was harming them.

NEPA also met up with the USDA in its administration of the Conservation Reserve Enhancement Program that the agency was operating in the Colorado portion of the Republican River Basin. In *Cure Land, LLC v. USDA*, 2016 WL 4254932 (Aug. 12, 2015 10th Cir.), the court concluded that USDA had complied with NEPA. The court disagreed with the claim that there was a conflict between the FONSI at issue and a prior EA.

VI. FIFRA

Pollinator Stewardship Council v. EPA, 806 F.3d 520 (9th Cir. 2015) (from *Trends* January/February 2016)

The Ninth Circuit vacated EPA's unconditional registration of sulfoxaflor, an insecticide. Commercial bee keepers and organizations challenged EPA's approval of insecticides containing sulfoxaflor, which was classified as "extremely toxic" to honey bees. EPA concluded that additional studies were required when semi-field studies were found by EPA to be "inconclusive" as to brood development and long-term colony health. Subsequently, EPA decided to unconditionally register the pesticide even though the requested additional studies were not completed. The court held that EPA's decision was not supported by substantial evidence, stating that "[w]ithout sufficient data, the EPA has no real idea whether sufloxaflor will cause unreasonable adverse effects on bees, as prohibited by FIFRA."

Syngenta Agrees to Pay $1.2 M. for Selling Misbranded Pesticides (from http://www.pennstateaglaw.com)

On September 16, 2016, the United States Environmental Protection Agency (EPA) issued a press release stating that the agency has reached a settlement agreement with Syngenta Crop Protection, LLC (Syngenta) for allegedly violating the Federal Insecticide, Fungicide, and Rodenticide Act through the repackaging, selling and distribution of unregistered and misbranded pesticides. As a result of the settlement agreement, Syngenta will pay $766,508 in civil penalties and spend $436,990 to implement an environmental compliance promotion Supplemental Environmental Project.

Preemption and Round Up

Mendoza v. Monsanto Co., No. 1:16-cv-00406, 2016 WL 3648966 (E.D. Cal. July 8, 2016). (from *Trends*, September/October 2016)

A district court denied a motion by Monsanto to dismiss a lawsuit by an individual who claims to have developed non-Hodgkin lymphoma as a result of using Monsanto's Roundup® product.

The lawsuit seeks damages based on strict liability, failure to warn, negligence, and breach of express and implied warranty. Monsanto moved to dismiss, arguing that the claims were preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), citing various statements by EPA. The district court found that documents cited by Monsanto did not support Monsanto's claims. The court also concluded that plaintiffs' state law claims, if successful, would not necessarily impose any additional requirements beyond FIFRA's requirement that the product not be misbranded, and that a registration under FIFRA is not conclusive as to whether or not a product is misbranded. Finally, the court rejected Monsanto's argument that the design defect claims were barred by comments to the *Restatement of Torts (Second)* section 402A.

A similar result was reached in *Sheppard v. Monsanto*, 2016 WL 3629074 (D. Haw. June 29, 2016).

VII. Toxic Substances Control Act

The Frank R. Lautenberg Chemical Safety for the 21st Century Act was signed by the President on June 22, 2015. Information about the changes can be found on EPA's website, https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/frank-r-lautenberg-chemical-safety-21st-century-act, as well as a number of secondary sources, like these:

http://www.natlawreview.com/article/what-s-new-about-revised-tsca-toxic-substances-control-act

http://www.americanbar.org/publications/trends/2016-2017/september-october-2016/tsca-amendments.html

VIII. Sundries

Privacy

Western Watersheds Project v. Michael, No. 15-CV-00169, 2016 WL 3681441 (W.D. Wyo. July 6, 2016). (from *Trends* September/October 2016 issue)

A district court in Wyoming dismissed a lawsuit by public interest groups challenging the constitutionality of both civil and criminal Wyoming data-gathering or trespass statutes that prohibit the collection of "resource data" on private land without express permission or authorization by the landowner. In this case, plaintiffs Western Watersheds Project and other environmental groups sought to collect water samples designed to prove that overgrazing of the land by the cattle industry was polluting the water supply. The district court concluded that the plaintiffs' claims are erroneously premised on a perceived First Amendment right to enter upon

private property in order to collect resource data. The opinion noted that the Supreme Court has not recognized a free speech right on privately owned property, citing *Lloyd Corp. Ltd. v. Tanner*, 407 U.S. 551, 558 (1972) and concluded: "The ends, no matter how critical or important to a public concern, do not justify the means, violating private property rights." Finally, the court declined to rule on plaintiffs' challenge to the statutory provision requiring the expunging of data collected in violation of the statutes, concluding that such restrictions on publication of information should be addressed on an "as applied" basis not presented here.

International Law

Jam v. International Finance Corp., No 15-cv-00612, 2016 WL 1170936 (D.D.C. Mar. 24, 2016), appeal pending No. 16-7051. (from *Trends* September/October 2016)

A district court dismissed a lawsuit by fishermen and farmers against the International Finance Corporation (IFC), which provided a $450 million loan for construction of a coal-fired power plant in India. Plaintiffs alleged that the power plant caused various environmental impacts, including warm water discharges that depress the fish catch, causing salt water intrusion into groundwater making it unusable for drinking or irrigation, and emissions degrading air quality. The IFC's Ombudsman issued a report concluding that the IFC failed to adequately consider the environmental and social risks posed by the power plant, but was unable to provide relief to plaintiffs, who subsequently filed suit. The district dismissed the suit because the IFC has immunity under the International Organizations Immunities Act, 22 U.S.C. 288 et seq. and the IFC has not waived its immunity from suit.