RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN WATER ACT

In Search of WOTUS

The definition of "waters of the United States" is among the most recent legal issues to become intertwined with the United States' current political maelstrom. The Trump Administration is attempting to rescind and rewrite the Obama-era definition of "waters of the United States" as found in the Clean Water Act (CWA). With the passage of the several statutes that comprise the CWA, Congress expressed an objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). The Trump administration's proposed rule undermines this objective.

The CWA allows the federal government to regulate discharges of pollutants from point sources into *navigable waters*. A mindful reader of the statute would likely wonder, "What is a navigable water?" This reader would hold their place in the statute and go find the definitions section. There, the reader would find the following, "The term

'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Like many viewers of the movie *Inception*, this reader is likely left unsatisfied and confused.

The Obama administration attempted to alleviate the distress caused by this definition with a rule to define "waters of the United States." The regulation known as the *Clean Water Rule* provided a broad and comprehensive definition with some exceptions. The definition included major bodies of water, "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide," and "[a]ll interstate waters, including interstate wetlands," and "[t]he territorial seas." 33 C.F.R. § 328.3(a)(1) (2016); *id.* § 328.3(a)(2); *id.* § 328.3(a)(3). For the sake of brevity, these bodies of water will be referred to as "major bodies of water." The definition also includes bodies of water such as "prairie potholes," "Carolina bays," "pocosins," "western vernal ponds," and "Texas coastal prairies." *Id.* § 328.3(a)(7)(i). These will be referred to as "minor bodies of water." The only restriction on the minor bodies of water is that they must have a significant nexus to one of the major bodies of water identified previously in the definition. *Id.* For example, a prairie pothole, which is a pothole created from snowmelt, with a significant nexus to a body of water currently used in interstate or foreign commerce would seemingly be covered by this definition.

The Clean Water Rule solved a problem so simple that, in retrospect, it is remarkable that it remained unresolved until the Obama administration. It recognized the precept that connected bodies of water feed into each other. Simply put, this is the nature of hydrological systems. When just the major bodies of water are regulated, pollution will still run rampant throughout the system when it is discharged into connected minor bodies of water.

Several states challenged the *Clean Water Rule* in federal court culminating in *In re Environmental Protection Agency*. *See In re Environmental Protection Agency,* 803 F.3d 804 (6th Cir. 2015). The court balanced four factors to rule on the states' motion to stay the rule while the court decided the appeal on the merits:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Id. at 806. Ultimately, the court stayed the rule. *Id.* ("[W]e now grant the stay pending determination of our jurisdiction"). Currently, the rule is on

the Supreme Court's docket in the form of *National Ass'n of Manufacturers v. Department of Defense*. Amy Howe, *Court Adds 16 New Cases to Its Merits Docket (Expanded)*, SCOTUSBLOG (Jan. 13, 2017, 4:36 PM), http://www.scotusblog.com/2017/01/court-adds-16-new-cases-merits-docket/. The Court granted *certiorari* to resolve the jurisdictional issue. *Id.* As of today, the rule remains stayed.

Since the Court granted the stay, Donald Trump was elected President. On February 28, 2017, President Trump signed Executive Order 13778, *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule*. Executive Order 13778, 82 Fed. Reg. 12497 (Feb. 28, 2017). He ordered the EPA to review the Obama-era *Clean Water Rule* as part of his mission to roll back environmental regulations. *Id.*

On June 27, 2017, the EPA offered a proposed rule responsive to Executive Order 13778, *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*. The proposed rule is the first step in a two-step process. First, the instant proposed rule aims to reinterpret the definition of "waters of the United States" prior to the Obama-era *Clean Water Rule*. Definition of "Waters of the United States" Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,900 (proposed June 27, 2017). In the second step, the EPA endeavors to create an entirely new rule altogether. *Id.* at 34,899.

The proposed rule narrows the scope of the Obama-era definition. It completely dispels of including minor bodies of water with a significant nexus with one of the major bodies of water. *See id.* at 34,905 (to be codified at 33 C.F.R. pt. 328). Indeed, the proposed rule only includes the first part of the Obama-era definition. *Id.* This is inadequate. Under the proposed rule, the federal government would no longer have the ability to regulate a pollutant discharge into a prairie pothole that would eventually run into a major body of water covered by the CWA.

This proposed rule is troubling. The EPA exists to protect the environment and to ensure the safety of and advocate for United States citizens. In fact, the EPA's mission statement is "[o]ur mission is to protect human health and the environment. *About EPA*, EPA.GOV, https://www.epa.gov/aboutepa (last visited Oct. 19, 2017). In practice, this rule circumvents the scheme of the CWA. The *Clean Water Rule* protected the minor sources of water because of the interconnected nature of tributaries, streams, and larger bodies of water. Pollution into one is pollution into another. If a polluter is barred from discharging pollutants into a stream, it could discharge pollutants into a body of water

connected to the stream and create the same negative environmental effects the CWA strives to alleviate. The EPA is willfully creating a blind spot and is intentionally abdicating its role to protect clean water, undermining its own mission. The EPA is playacting as a security guard looking the other way with a wink and a nod to would-be polluters. "See that water over there? Oh, we won't look over there. We promise."

This is just the beginning of what will likely be a long process. The Trump administration's rule will likely result in years of litigation. In addition, after this proposed rule an entirely new definition is forthcoming. Concern is warranted; the EPA should actively fight to keep pollution out of water—not bend over backwards to let it flow in.

Thomas Gosselin

Clean Water Act § 401: State Agency Authority To Deny Interstate Gas Pipelines that Fail To Comply with State Water Quality Standards

A. Introduction

Constitution Pipeline Company (Constitution) petitioned for review of the New York State Department of Environmental Conservation's (NYSDEC) decision to deny its application for certification pursuant to § 401 of the Clean Water Act (CWA). *Constitution Pipeline Co. v. New York State Department of Environmental Conservation,* 868 F.3d 87, 90-91 (2d Cir. 2017). Constitution argued the decision should be vacated because (1) the decision was preempted by the Federal Energy Regulatory Commission's (FERC) performance of its obligations under the National Environmental Policy Act (NEPA), and (2) the decision was arbitrary and capricious because Constitution had submitted sufficient information demonstrating that its proposed interstate natural gas pipeline would comply with New York State's water quality standards. *Id.* at 91. NYSDEC invoked § 401 of the CWA to deny Constitution's water quality certification. *See id.* at 96. NYSDEC concluded that Constitution did not provide the relevant and necessary information regarding the pipeline's cumulative impact on the state's waterbodies. *Id.* at 96, 98. On August 17, 2017, the Second Circuit Court of Appeals upheld NYSDEC's decision on the merits and denied Constitution's petition. *Id.* at 103.

B. Background

Before constructing the 121-mile interstate natural gas pipeline (Pipeline) through Pennsylvania and New York, Constitution was required to apply for both federal and state permits. *Id.* at 91. For the federal permit, Constitution applied for a "certificate of public convenience and necessity" from FERC. *Id.* FERC announced it would prepare an environmental impact statement (EIS) for the pipeline and required that Constitution submit a "trenchless" feasibility study. *Id.* There are several methods to install pipelines across water streams; however, the trenchless method is the environmentally preferred method because it does not disturb soil or organisms in stream banks, beds, or in the stream itself. *See id.* at 92.

Initially, Constitution limited its trenchless feasibility study to eighty-nine "sensitive or high quality" water streams of the 251 total crossed or affected streams. *Id.* Next, Constitution reduced the number of streams from eighty-nine to twenty-six by excluding the streams that were less than thirty feet wide, due to the greater workspace requirements of trenchless crossings. *Id.* Finally, Constitution cut the number of streams to thirteen due to budget restrictions. *Id.*

Throughout the FERC certification process, NYSDEC submitted numerous letters stating that it preferred the trenchless crossing method because it minimizes land disturbance and avoids the need to dewater the stream, leaving the stream bed and bank intact and reducing erosion. *Id.* at 92-93. It requested that Constitution explain why the trenchless method was not feasible for the 238 streams that Constitution removed from its analysis. *See id.* at 93.

Nevertheless, FERC issued its final EIS without addressing the major concerns NYSDEC raised and merely parroted Constitution's argument that such methods are not "practical" for stream crossings less than thirty feet wide. *Id.* As a result, Constitution completed studies for only two New York sites. *Id.* at 94.

While the certificate for public convenience and necessity from FERC was pending, Constitution shifted gears to address its obligations to the states. *Id.* Under § 401 of the CWA, in order to receive a federal permit Constitution had to first apply for a water quality certification (WQC) from NYSDEC, which required it to demonstrate that any discharge from the pipeline complied with the state's water quality standards. *Id.* at 91, 99. NYSDEC asked Constitution to provide additional information about the stream crossings, including their cumulative impact on water bodies. *Id.* at 94.

Constitution delivered a letter to NYSDEC explaining its decision to use trenchless methods at only two of the eighty-nine crossings for which Constitution originally indicated it would use trenchless methods. *Id.* at 94-95. The letter indicated that three crossings were found to be infeasible for trenchless crossings due to a high risk of failure, and six were changed to trenched crossings because of concerns by state and local authorities regarding crossing specific roadways and infrastructure. *Id.* at 94.

NYSDEC requested documents that Constitution relied upon in deciding to use the trenched method at two locations and restated its request for site-by-site information regarding stream crossings. *Id.* at 94-95. Constitution provided NYSDEC with virtually the same documents it had provided FERC, which still failed to furnish the information for site-by-site stream crossings that NYSDEC had requested on at least three prior occasions. *See id.* at 95.

Constitution hoped to explain away its decision not to consider trenchless feasibility at streams less than thirty feet wide by citing recognized industry standards. *Id.* Invoking its authority to condition certification under § 401 of the CWA, NYSDEC elected to allow Constitution to use the trenched method at four crossings, provided that Constitution agreed to supply NYSDEC with site-by-site information on nineteen other crossings. *Id.* Further, NYSDEC required Constitution to submit a trenchless crossing plan for each trenchless crossing containing detailed engineering plans including blasting plans and safety protocols for each location. *Id.* Constitution failed to do so. *Id.* at 96.

Ultimately, NYSDEC denied Constitution the WQC. *Id.* Under § 401 of the CWA, NYSDEC had a duty to determine whether the pipeline would comply with New York's water quality standards. *Id.* Here, Constitution failed to provide NYSDEC with the information it needed to make that determination. *Id.* Notably, NYSDEC pointed to Constitution's failure to address the agency's numerous requests to provide detailed site-by-site information analyzing trenchless crossings for *all* streams, including those less than thirty feet wide. *Id.* at 96-97. Additionally, NYSDEC noted Constitution's failure to provide information regarding the feasibility of the Alternative M route along an interstate highway, site-specific blasting plans, and detailed safety protocols for in-water blasting, protection of aquatic resources and habitats, pipe burial depth, and wetland crossings. *Id.* at 96.

NYSDEC concluded that the pipeline would disturb a total of 250 streams—eighty-seven of which support trout habitat and spawning—and that construction would cause cumulative disturbance of a total of

3161 linear feet of streams, resulting in a combined total of 5.09 acres of temporary stream disturbance impacts. *Id.* at 96. For these reasons, NYSDEC was hard-pressed to conclude that Constitution demonstrated compliance with New York's water quality standards for turbidity and preservation of best usages of affected waterbodies and therefore did not possess the information necessary to grant the WQC to Constitution. *Id.* at 98. Constitution subsequently petitioned for review with the United States Court of Appeals for the Second Circuit. *Id.*

C. Court's Decision

In its petition, Constitution argued that NYSDEC's decision was both *ultra vires* and arbitrary and capricious. *Id.* The Second Circuit disagreed, finding (1) that NYSDEC acted lawfully under § 401 to deny the interstate natural gas pipeline, and (2) that Constitution failed to provide sufficient relevant information demonstrating the pipeline's compliance with the state's water quality standards. *Id.* at 101, 103. Accordingly, the court denied Constitution's petition and refused to order NYSDEC to grant Constitution the requested § 401 WQC. *Id.* at 103.

The court divided Constitution's legal contentions into three discrete arguments. First, Constitution argued that, as a matter of law, NYSDEC's "jurisdiction to review"—in effect, vetoing FERC's certification by denying the § 401 WQC—was *ultra vires* and preempted by FERC's performance of its obligations under NEPA. *Id.* at 100. Second, Constitution contended that NYSDEC exceeded its statutory authority when it demanded information regarding possible alternative routes, blasting plans, and burial depth for the planned pipeline. *Id.* at 101. Third, Constitution asserted that NYSDEC's decision was arbitrary and capricious because Constitution had, in fact, provided sufficient information by indicating that the threshold, thirty feet wide or larger, for consideration of trenchless crossings is an "industry recognized standard." *Id.* at 102.

The crux of the court's reasoning in refuting Constitution's *ultra vires* argument hinged upon an analysis of FERC's obligations under NEPA, the extent of the Natural Gas Act's (NGA) limitations on states' rights, and a state's authority to deny WQCs for federally permitted interstate activities under § 401 of the CWA. First, the court noted that NEPA does not affect FERC's statutory obligations to act or refrain from acting contingent upon obtaining state agency certification. *Id.* at 100. Second, the court looked to the Natural Gas Act (NGA) and found that it does not prevent states from exercising specifically enumerated rights under the CWA. *Id.* Finally, the court turned to the CWA and noted that

it explicitly allows a state to condition the grant of a WQC upon a demonstration of compliance with the state's water quality standards. *Id.* at 100-01.

The court indicated that, although NEPA requires federal agency review of any possible environmental effect of a proposed interstate project, nothing within NEPA affects the specific statutory obligations of a federal agency to act, or refrain from acting, contingent upon the certification of any State agency. *Id.* at 100. Even though the NGA generally preempts state laws, it nonetheless does not affect the rights granted to states under the CWA. *Id.* Thus, NEPA does not affect FERC's obligation to grant a permit such as the one requested by Constitution contingent upon a state's § 401 WQC. *Id.* at 100-01. Notably, § 511 of the CWA carves out a specific right for states to determine the issues of a planned project's effect on water quality. *Id.* Section 401 requires entities to obtain from each state a certification that any potential discharge from interstate pipelines complies with the affected state's EPA-approved water quality standards. *Id.*

The court found that NYSDEC's denial of Constitution's § 401 WQC application, based on Constitution's failure to provide sufficient information to demonstrate compliance with the state's EPA-approved water quality standards, was squarely within the law. *Id.* at 101. NYSDEC indicated that Constitution failed to demonstrate compliance with the best usages of the state's waterbodies, as well as the state's narrative water quality standards. *Id.*

Furthermore, the court found that NYSDEC was entitled to conduct its own review of the pipeline's likely effects on New York's waterbodies and whether the pipeline would comply with the state's water quality standards. Even if the result of that analysis required NYSDEC to effectively veto the pipeline, the fact that Constitution had already secured approval from FERC was insignificant. *See id.* at 101. In coming to this conclusion, the court recognized that Congress intended that states invoking § 401 "would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval." *Id.*

The court punted an important question regarding whether NYSDEC exceeded its statutory authority by demanding information on possible alternative routes, blasting plans, and burial depths for the planned pipeline, which could have avoided or minimized impacts to an extensive number of water resources within the state. *Id.* Although Constitution contended that these requests exceeded NYSDEC's statutory authority, the Second Circuit deflected, finding that it "need not

address all of these contentions" by merely indicating that "a state's consideration of a possible alternative route that would result in less substantial impact on its waterbodies is *plainly* within the state's authority." *Id.* (emphasis added).

After finding that NYSDEC was acting within its lawful authority in requesting, at the very least, information regarding alternative routes, the court held that the denial was not arbitrary and capricious. *Id.* at 103. It noted that Constitution failed to provide relevant information regarding this alternative, as well as information regarding site-by-site feasibility of the trenchless method at most of the 251 stream crossings. *Id.* at 102-03.

A decision is not arbitrary and capricious if sufficient evidence in the record provides rational support for the agency's decision. *Id.* at 102. Typically, an agency's decision hinges on whether the applicant's submission of the *relevant* information allows the agency to evaluate the environmental impacts of a proposed pipeline on the state's waterbodies in light of that state's water quality standards. *See id.* Here, however, Constitution failed—despite numerous requests—to provide NYSDEC the sought after information that would allow for an informed evaluation of the pipeline's compliance with the state's water quality standards. *Id.* Specifically, Constitution refused to provide information on construction methods and site-specific project plans for each stream crossing; alternative routes; pipeline burial depths below streambeds; blasting procedures and safety measures; its plan to avoid, minimize, or mitigate discharges into navigable waters; and the cumulative impacts to those waterbodies. *Id.* Thus, the data Constitution provided, which addressed only two waterbodies, was insufficient. *Id.* at 103.

The court rejected Constitution's contention that it provided NYSDEC with "sufficient" information and that the use of trenchless crossing methods at streams less than thirty feet wide is "an industry recognized standard." *Id.* at 102. The court discarded this argument, stating that "[i]ndustry preferences do circumscribe environmental relevance." *Id.* at 103.

D. Analysis

With the extraction of shale natural gas in the Northeast on the rise, and a federal government that seemingly turns a blind eye to climate change, we find ourselves relying on individual states to eliminate or mitigate the environmental impact of activities such as pipeline construction, extraction, and transportation of natural gas and the effects these activities have upon our drinking water, aquatic habitats, and fishing activities. Accordingly, states have begun to play a greater role in

assessing, granting, or denying WQC permits to natural gas projects and have taken advantage of their authority to unilaterally veto federally permitted interstate projects. Constitution's proposed natural gas pipeline was not the only pipeline prevented from imposing possibly devastating consequences upon New York's waterbodies. NYSDEC denied another interstate gas pipeline just last year, once again asserting its statutory authority under § 401 of the CWA. N.Y. State Dep't of Envtl. Conservation, NYSDEC Permit No. 9-9909-00123 (Notice of Denial Apr. 7, 2017), http://www.dec.ny.gov/docs/permits_ej_operations_pdf/northaccesspipe42017.pdf.

Moving forward, however, it is unclear just how far these state agencies may go to request environmentally relevant information to determine whether a natural gas pipeline complies with the state's water quality standards. In the instant case, the court decided not to address Constitution's claim that NYSDEC exceeded its statutory authority by requesting the barrage of information it sought. The court sidestepped addressing the issue of whether any of this information was irrelevant to the decision to approve or deny the WQC application. Instead, it merely noted that NYSDEC's demand for information regarding an alternative route that could have mitigated the pipeline's impacts upon the state's water bodies was clearly relevant. Therefore, it held that NYSDEC acted lawfully by denying the application when Constitution failed to provide information to which the agency was entitled. The court saw no need to address whether NYSDEC was entitled to the additional information that it requested and that Constitution failed to provide because Constitution's failure to provide information regarding the alternative route was sufficient to deny Constitution's claim that NYSDEC acted outside of its authority in requesting this information.

Thus, the exact breadth of information that states may request in order to determine whether a proposed project would violate its water quality standards is unclear. A pressing question, therefore, remains: does this ruling suggest that state agencies are allowed to request a broad range of information from an applicant, as long as the requested information can be shown to bear upon the agency's determination as to whether the proposed project complies with the state's water quality standards? The impact of this decision looms large in environmental law, and this is only the beginning.

Shaun Abreu

II. CLIMATE CHANGE STANDING

Protecting Prosperity in Juliana v. United States*: When Does Judicial Intervention in Environmental Policy Constitute Judicial Overreach?*

In 2015, a group of young activists concerned about the environment sued the United States government for environmental violations in *Juliana v. United States*. Complaint at *46, *Juliana v. United States* (No. 6:15-cv-01517-TC), 2015 WL 4747094 (D. Or. Aug. 12, 2015).

Since filing the initial complaint, the plaintiffs have steadfastly defended their right to sue while defeating a number of procedural roadblocks including motions to dismiss and interlocutory appeals. *See Major Court Orders and Filings, Landmark U.S. Federal Climate Lawsuit*, OUR CHILD. TR., https://www.ourchildrenstrust.org/court-orders-and-pleadings/ (last visited Sept. 23, 2017). In June 2017, plaintiffs experienced another victory when the Eugene Division of the United States District Court for the District of Oregon denied defendants' motions to certify the district court's order and opinion for interlocutory appeal and to stay any proceedings pending certification. *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705, at *1 (D. Or. June 8, 2017). These requests, if granted, would have permitted the defendants to challenge the district court's earlier denial of the defendants' motion to dismiss. *See id.*

A. Background

On August 12, 2015, a group of plaintiffs filed a complaint in the Eugene Division of the United States District Court for the District of Oregon for declaratory and injunctive relief against the United States government. Complaint at *46, *Juliana v. United States* (No. 6:15-cv-01517-TC), 2015 WL 4747094 (D. Or. Aug. 12, 2015).

At the time of filing, plaintiffs to this action included twenty-one individual youth between the ages of eight and nineteen years old, Earth Guardians, an association of young environmental activists, and Dr. James Hansen, acting as guardian on behalf of future generations of American youth. Complaint at *4-17, *Juliana v. United States* (No. 6:15-cv-01517-TC), 2015 WL 4747094 (D. Or. Aug. 12, 2015). Defendants to this action included the United States government, President Barack Obama, and various executive agencies and directors of agencies within the federal government. *Id.* at *17-24.

The complaint alleged that the federal government has been aware of the hazardous impact of fossil fuels on the environment and the risk posed to plaintiffs for fifty years, yet it engaged in policies and procedures that permitted and even encouraged the exploitation of fossil fuels. *Id.* at *41-42. Plaintiffs further alleged that, as beneficiaries of the federal public trust, they were harmed by the defendants' failure to regulate carbon pollution and mitigate climate change. *Id.* at *45; *Juliana v. United States*, No. 6:15-CV-1517-TC, 2016 WL 183903, at *1 (D. Or. Jan. 14, 2016). According to plaintiffs, defendants' actions violated the equal protection principles of the Fifth and Fourteenth Amendments, because the youth and future generations represented by plaintiffs are "suspect classes in need of extraordinary protection" who lack political power to challenge the actions of the defendants and who will be disproportionately affected by the harm caused by the defendants. Complaint at *43-44, *Juliana v. United States* (No. 6:15-cv-01517-TC), 2015 WL 4747094 (D. Or. Aug. 12, 2015).

On January 14, 2016, Magistrate Judge Coffin granted a request to intervene to the National Association of Manufacturers, the American Fuel and Petrochemical Manufacturers, and the American Petroleum Institute. *Juliana v. United States*, No. 6:15-CV-1517-TC, 2016 WL 183903, at *5 (D. Or. Jan. 14, 2016). Additionally, on February 9, 2017, Donald Trump and members of his administration were added as defendants. Benjamin Hulac, *Trump Named as Defendant in Landmark Climate Suit,* SCI. AM. (Feb. 10, 2017), https://www.scientificamerican.com/article/trump-named-as-a-defendant-in-landmark-climate-lawsuit/.

The federal government and the intervenor defendants from the oil and gas industry filed motions to dismiss for lack of subject matter jurisdiction and failure to state a claim; however, Magistrate Judge Coffin recommended that the court deny those motions and referred the matter to District Court Judge Aiken for review. *Juliana v. United States*, 217 F. Supp. 3d at 1233 (D. Or. 2016).

On November 10, 2016, Judge Aiken issued an order and opinion adopting Judge Coffin's recommendation to deny the federal defendants' and intervenor defendants' motions. *Id.* at *1263. In her opinion, Judge Aiken acknowledged that "[t]his is no ordinary lawsuit." *Id.* at *1234. It is not every day that a group of youth sue the United States government; however, in this instance, it is not the parties that distinguish this case, but rather the legal questions presented, including "whether plaintiffs may challenge defendants' climate change policy in court, and whether [the] Court can direct defendants to change their policy without running afoul of the separation of powers doctrine." *Id.*

In March 2017, the federal defendants and the intervenor defendants filed motions requesting that the District Court certify the November 10, 2016, order and opinion for immediate appeal pursuant to 28 U.S.C. § 1292(b) and the motions to stay the proceedings until after the determination of the motions to certify. Defendants' Memorandum in Support at *15, *Juliana v. United States* (No. 6:15-cv-01517-TC), 2017 WL 1100598 (D. Or. Mar. 7, 2017); Intervenor-Defendants' Memorandum in Support at *1, *Juliana v. United States* (No. 6:15-cv-01517-TC), 2017 WL 1100539 (D. Or. Mar. 10, 2017); *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. June 8, 2017). 28 U.S.C. § 1292(b) provides that a Court of Appeals may permit an appeal of an otherwise unappealable order upon a finding by the district judge that the "order involves a controlling question of law as to which there is substantial ground for difference of opinion" and an "immediate appeal . . . [would] . . . materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (2012).

B. The Court's Decision

On June 8, 2017, Judge Aiken denied the federal defendants' and intervenor defendants' motions to certify the November 10, 2016, order and opinion for interlocutory appeal, as well as their motion to stay pending consideration of the motions to certify. *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705, at *1 (D. Or. June 8, 2017).

Judge Aiken began her analysis by responding to the defendants' notice for pending motions, in which the defendants requested expedited review of the pending motions and stated that if the motions were not resolved by June 9, 2017, the defendants would seek relief from the United States Court of Appeals for the District of Oregon. *Id.* Judge Aiken acknowledged that she granted the defendants expedited consideration; however, she also addressed the "[d]efendants' threat to run directly to the Ninth Circuit if this Court does not abide by a unilaterally imposed 'deadline.'" *Id.* at *2. Judge Aiken informed the defendants that the district court had sole discretion as to whether to grant expedited consideration, and that the defendants cited insufficient reasons to support their request. *Id.* She noted the irony of the defendants' belief that they were entitled to a grant of expedited consideration on a motion the defendants submitted only three months before the hearing and after the defendants waited "four months to file the request for interlocutory certification in the first place." *Id.*

Judge Aiken next addressed the certification issue. *Id.* She acknowledged that the "standard to apply to a district judge's review of a

magistrate judge's recommendation regarding a 1292(b) certification presents a difficult and novel question of statutory interpretation." *Id.* Nonetheless, she stated that there was no need to decide whether the court should apply the *de novo* standard or the clear error standard because under either standard she would agree with Judge Coffin's determination that certification for interlocutory appeal was inappropriate in the instant case. *Id.* Judge Aiken then denied the defendants' motions to certify the November 10, 2016, order and opinion for interlocutory appeal and denied the motion to stay as moot because the motion to certify was no longer pending. *Id.*

C. Additional Developments

Since the June 8, 2017, decision denying the defendants' motions to certify the November 10, 2016, order and opinion, a number of significant developments have occurred in *Juliana v. United States*. On June 9, 2017, the federal government requested a writ of mandamus and a stay of the proceedings while the mandamus petition was pending. *Juliana v. United States*, No. 6:15-cv-01517-TC-AA (D. Or.). Then, on June 28, 2017, the district court granted all three intervenors permission to withdraw from the lawsuit. *Juliana v. United States*, No. 6:15-cv-1517-TC, 2017, at *5 (D. Or. June 28, 2017). On July 28, the U.S. Court of Appeals for the Ninth Circuit granted the petitioner's request for a stay, pending resolution of the petition for the writ of mandamus. *In re* United States v. U.S. District Court (Eugene), No. 17-71692 (D. Or. July 28, 2017). The parties are still awaiting the court's decision on the petition for the writ of mandamus, and no court date has been set at the time of this writing.

D. Conclusion

To date, the youth activists in *Juliana v. United States* have overcome many procedural hurdles in order to maintain their suit against the United States government. Although they have been consistent and, thus far, successful in their demand for a trial, it is still not clear if they will actually receive one. Their ability to gain a trial and any ensuing outcome will have massive implications in the field of environmental law and may drastically alter the way in which plaintiffs seek relief for environmental causes from the United States government through the public trust doctrine. If this case goes to trial, these young activist plaintiffs will set legal precedent by establishing whether the judicial system is an appropriate avenue for challenging federal climate change

policy and whether the separation of powers doctrine permits the intervention of the judiciary in federal environmental policy.

Claris Smith

III. EXECUTIVE ORDER 13,807: ENVIRONMENTAL REGULATION AND INFRASTRUCTURE

Making America Great Again: President Trump on Infrastructure

A. Background

The status of American infrastructure was a recurring discussion topic during the United States' most recent presidential election. On the campaign trail, then-candidate Donald Trump lambasted the state of the nation's roads, bridges, and dams, while broadcasting his plan to inject billions of dollars in infrastructure spending into the economy. Russell Berman, *Donald Trump's Big-Spending Infrastructure Dream*, ATLANTIC (Aug. 9, 2016), https://www.theatlantic.com/politics/archive/2016/08/donald-trumps-big-spending-infrastructure-dream/494993/. Donald Trump pledged to spend nearly twice what Hillary Clinton pledged to spend on infrastructure. *Id.* This was only one part of his promise to "Make America Great Again."

Every four years, the American Society of Civil Engineers (ASCE) issues a report card detailing the state of the nation's infrastructure. James Cook, *America's $4tn Infrastructure Time Bomb*, BBC NEWS (Mar. 28, 2017), http://www.bbc.com/news/world-us-canada-39410561. The report stated that if the United States does not move quickly to correct its countless structural deficiencies, it "risks becoming a '19th century country.'" *Id.* In March 2017, four months after President Trump's victory, ASCE issued a report and gave the United States a "D+." AM. SOC'Y OF CIVIL ENG'RS, 2017 INFRASTRUCTURE REPORT CARD (2017), https://www.infrastructurereportcard.org/. The report card included an amount of spending necessary to bring infrastructure to an acceptable standard—the figure in this year's report was nearly $4.6 trillion. *Id.* While the ASCE's report card was not available in its 2017 form during the 2016 presidential election, the structural integrity of older projects has long weighed heavily on the American psyche. The 2007 bridge collapse in Minneapolis, Minnesota, spurred reviews of similar infrastructure nationwide and brought the issue to the forefront of the domestic policy debate. David Schaper, *10 Years After Bridge Collapse, America Is Still Crumbling*, NPR (Aug. 1, 2017), http://www.

npr.org/2017/08/01/540669701/10-years-after-bridge-collapse-america-is-still-crumbling. President Donald J. Trump, in Executive Order 13,807 on infrastructure, has taken action to correct the problem. Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 15, 2017).

B. The Text of the Order

Section 1, aptly titled "Purpose," introduces the idea behind the order: reduce government inefficiencies in order to revitalize American infrastructure that is currently in "poor condition." *Id.* § 1. The section highlights the importance of reversing structural deterioration in order to enhance economic competiveness. *Id.* Section 2 is entitled "Policy" and summarizes eight federal policies important to achieving the goal of the executive order. *Id.* § 2. One of these federal policies is to "develop infrastructure in an environmentally sensitive manner." *Id.* § 2(c). Another federal policy, which imposes an administrative deadline, calls for federal agencies to "make timely decisions with the goal of completing all Federal environmental reviews and authorization decisions for major infrastructure projects within 2 years." *Id.* § 2(h).

Section 3 lists definitions of words and phrases used in §§ 4 and 5 of the executive order; relevant to this summary are the definitions of "CAP Goals" in § 3(b), "Infrastructure project" in § 3(d), and "Major infrastructure project" in § 3(e). *Id.* § 3. The order defines "CAP Goals" as cross-agency priority goals, meaning those "Federal Government Priority Goals" set forth in the Government Performance and Results Act Modernization Act of 2010. *Id.* § 3(b). The order defines "Infrastructure Project" as "a project to develop the public and private physical assets that are designed to provide or support services to the general public in [several] sectors," which include surface transportation, aviation, ports, and energy production, among others. *Id.* § 3(d). The order finally defines "Major infrastructure project" as a

> project for which multiple authorizations by Federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. [§] 4321 et seq., and the project sponsor has identified the reasonable availability of funds sufficient to complete the project.

Id. § 3(e). The sections communicating the substance of the executive order are §§ 4 and 5. *Id.* §§ 4-5.

Section 4, labeled "Agency Performance Accountability," establishes goals for agency cooperation and calls on the Director of the

Office of Management and Budget (OMB), together with the Federal Permitting Improvement Steering Council, to set a CAP Goal on Infrastructure Permitting Modernization within 180 days of the order. *Id.* § 4(a)(i). The section repeats the theme of streamlined and predictable review processes, reducing the time of federal environmental reviews for new projects "to not more than an average of approximately 2 years, measured from the date of publication of a notice of intent to prepare an environmental impact statement." *Id.* § 4(a)(i)(B). Within 180 days of the establishment of the aforementioned CAP Goal, or longer if the Director of the OMB deems necessary, the OMB must issue guidance on "a performance accountability system" in furtherance of the CAP Goal. *Id.* § 4(b). Such a system must include, *inter alia*, whether there is a permitting timetable, whether agencies are meeting the timetable, the time required for review of the project, and the costs associated with review. *Id.* § 4(b)(i). Agencies are scored on how well they achieve the CAP Goal. *Id.* § 4(b)(ii). If the agencies cannot meet the goal, the agencies must submit an estimate of the delay to OMB, and "OMB will consider each agency's performance during budget formulation." *Id.* § 4(b)(ii)(C)−(D).

Last, § 5, titled "Process Enhancements," reiterates the point of a unified environmental review and authorization process. *Id.* § 5. To accomplish this goal, the order directs agencies to develop and follow a timetable for permits, "follow an effective process that automatically elevates instances where a permitting timetable milestone is missed or extended . . . to appropriate senior agency officials," and use One Federal Decision (OFD). *Id.* § 5(a)(i)-(iii). The OFD requirement makes one federal agency responsible for navigating major infrastructure projects through the environmental review and authorization process. *Id.* § 5(b). Only the lead agency need complete a Record of Decision (ROD), unless the lead federal agency believes one would not further the goal of completing this lengthy process. *Id.* § 5(b)(ii). If the final EIS is adequately detailed, then authorization decisions for major infrastructure projects will be issued within ninety days of the ROD. *Id.* § 5(b)(iii). This time limit is subject to the lead agency's discretion in extending the time period if necessary. *Id.* Further, within thirty days of the order, the Council of Environmental Quality is tasked with creating a list of actions necessary to enhance and modernize the review process. *Id.* § 5(b)(iv).

C. Analysis

Since the election and through the beginning months of his presidency, President Trump's perceived position on environmental protection policies has alarmed commentators. It seems, however, that the president has decided to strike a balance between efficiency and environmentalism with this executive order. President Trump has long discussed the importance of infrastructure investment; this order provides a window into possible common ground on the subject.

Perhaps controversially, this order revokes President Obama's Executive Order 13,690 (Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input). *Id.* § 6. That order gave agencies discretion in setting flood elevation and hazard areas for construction projects, allowing use of best-available climate science to build projects above the 100-year flood elevation or to build to the 500-year flood elevation. *See generally* Exec. Order No. 13,690, 80 Fed. Reg. 6,425 (Jan. 30, 2015). While this may cause concern that the White House currently does not give credence to climate science, the executive order makes clear that maintaining a healthy environment and environmental sensitivity during development projects is a governmental priority. Further, NEPA is still valid law. The lead federal agency on a major infrastructure project must still compete an EIS, as required by NEPA. The President is simply requiring agencies to apply NEPA in an increasingly efficient way in order to accelerate the environmental review process. An efficient and more simplified environmental review scheme, the President hopes, might encourage more project development, increased predictability, and greater agency accountability, while remaining true to American environmental values. This is just the beginning of the plan to "Make America Great Again."

Christopher M. Halbohn

IV. THE FIRST AMENDMENT AND STATE FUNDED ENVIRONMENTAL PROGRAMS

Trinity Lutheran Church of Columbia, Inc. v. Comer*:* *Recycling and the Separation of Church and State*

A. Background

First Amendment inquiries that involve the separation of church and state are especially interesting when they implicate state-funded environmental programs. The Supreme Court of the United States ended its previous term with a key decision that touches on both the First Amendment and the environment. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). Established in 1980, the Trinity Lutheran Church Child Learning Center (Center) is a preschool and daycare center open to students of any religion. *Id.* at 2017. The Center—operated by Trinity Lutheran Church—serves working families in Boone County, Missouri, and the surrounding area. *Id.* At the heart of *Trinity Lutheran Church* is a playground: the Center has a play area, the surface of which is made from course, sharp, pea gravel. *Id.* The surface can injure children if they fall. *Id.* In 2012, concerned about this potential hazard, the Center decided to apply for Missouri Department of Natural Resources' (Department) Scrap Tire Program (STP), a program designed to reduce the number of old tires in landfills. *Id.* The STP offers reimbursement grants to qualifying nonprofit organizations that purchase playground surfaces created from the recycled tires. *Id.* The program itself is funded by a statewide tax on the purchase of new tires. *Id.*

Because of limited resources, the STP is a competitive program; the Department is only able to provide grants to some of the organizations that apply. *Id.* To decide which organizations should receive the funding, the Department considers a variety of criteria ranging from the poverty level of the population in the geographic area to the applicant's plan to promote recycling. *Id.* In its application, the Center highlighted how it would benefit from a grant. *Id.* at 2018. Specifically, a grant would allow the Center to increase playground access for all children, including disabled children, to provide a safe playground surface, and to improve Missouri's environment by putting the tires to a positive use. *Id.* Out of the forty-four applicants in 2012, the Center ranked fifth overall. *Id.* The Department ultimately granted funding to fourteen of the forty-four applicant-organizations. *Id.* However, despite its high ranking, the Center was not selected. *Id.* The Center was deemed categorically

ineligible to participate in the STP, because, according to the Department, the Department was unable to directly provide financial assistance to a church. *Id.*

Trinity Lutheran sued the Director of the Department, alleging that the Department's policy of refusing to give grants to religiously affiliated applicants violated the Free Exercise Clause of the First Amendment. *Id.* Granting the Director's motion to dismiss, the district court found that while the Free Exercise Clause prohibits the government from impeding on the practice or exercise of religion, it generally does not require the conferral of an affirmative benefit on account of religion. *Id.* The district court analogized the case to *Locke v. Davey*. *Id.* (citing *Locke v. Davey*, 504 U.S. 712 (2004)). In *Locke*, the Supreme Court upheld the State of Washington's decision to not fund degrees in devotional theology as part of a scholarship program. *Locke*, 540 U.S. at 725. Agreeing that the circumstances were similar to *Locke*, the United States Court of Appeals for the Eighth Circuit affirmed. *Trinity Lutheran Church*, 137 S. Ct. at 2018. The Eighth Circuit noted that while the Department *could* have granted Trinity Lutheran the funding without violating the U.S. Constitution, it was permitted to rely on the religious status of the organization in denying the application—given the antiestablishment principle in Missouri's own Constitution. *Id.* at 2018-19. The United States Supreme Court granted certiorari *sub nom* and ultimately reversed. *Id.* at 2019.

B. Court's Decision The First Amendment states, *inter alia*, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. In analyzing whether Missouri's categorical denial of providing funding to Trinity Lutheran for the playground violated the Free Exercise Clause, the Supreme Court first noted that denying a generally available benefit solely on account of religious affiliation requires a compelling state interest—setting the stage for a potential strict scrutiny analysis. *Trinity Lutheran Church*, 137 S. Ct. at 2019. In essence, as a threshold matter, the Court needed to decide whether the Department's policy expressly discriminated against the church solely because of its religious character. *See id.* Setting up its analysis, the Court began by giving examples of what constitutes permissible and impermissible state action. *See id.* at 2019-21. The Court made sure to highlight the difference between facially neutral laws applicable without regard to religion (which tend to be permissible) and laws which single out the religious for disfavored treatment (which are subject to the highest scrutiny). *Id.* at 2020. For

example, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), Native American Tribes argued the federal government's plan to build infrastructure and harvest timber on certain sacred sites would interfere with individuals' abilities to pursue their religious beliefs, and thus was contrary to the Free Exercise Clause. *Id.* In *Lyng*, the Supreme Court acknowledged that the project would significantly interfere with individuals' abilities to pursue spiritual fulfillment. *Id.* at 449. However, the Court found no free exercise problem because no one was being directly coerced by the government to violate personal beliefs. *See id.* In coming to its decision, the Court emphasized an equal protection concept: the government did not penalize religious activity by denying anyone a benefit, right, or privilege enjoyed by other citizens. *Id.* at 440. Essentially, while government programs may incidentally interfere with religious activity, the government may not categorically deny benefits or opportunities solely on the basis of religious status. *See id.*

The *Trinity Lutheran Church* bench found that in light of the Court's prior decisions, it was clear the Department's policy expressly discriminated against the church because of its religious nature. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017). Because the church was ineligible for the STP program due to its religious nature, it was forced into an impossible choice: participate in a program for which it was otherwise qualified and forgo its identity as a church, or remain a church. *Id.* at 2021-22. The Court explained that Missouri's conditioning of a benefit in this way abrogated freedom. *Id.* at 2022. While the church was certainly "free" to stop operating as a church in the traditional sense of the word, conditioning otherwise available benefits upon the recipient's willingness to surrender its religious activity was precisely what the Free Exercise Clause was intended to protect against. *Id.* (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978)).

To support its conclusion that it could not award the STP grant to a religious institution, the Department made two primary, related arguments. It first argued that declining to give funds to the church did not prohibit the church from exercising its religious rights. *Id.* However, in rejecting this contention, the Court emphasized that the Free Exercise Clause extends beyond outright prohibitions on the free exercise of religion and "protects against 'indirect coercion and penalties'" as well. *Id.* (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). The fact that Trinity Lutheran was not claiming any *entitlement* to a subsidy was key to the Court's analysis. *Id.* Rather,

the church asserted its right to be able to *participate* in the program. *Id.* Essentially, the problem with the Department's approach was not that it denied the grant, but that it refused to allow the church to compete with secular organizations for the grant, solely because it was a church. *Id.*

The Department next argued that the free exercise issue was controlled by *Locke*. *Id.* at 2022-23. However, the Court found *Locke* clearly distinguishable. *Id.* at 2023. In *Locke*, the plaintiff was denied a government-funded scholarship not because of who he was but because of what he proposed to do—use the state funds to prepare for the ministry. *Id.* Here, Trinity Lutheran was denied a grant simply because of what it was—a church. *Id.* What the funds would go toward—a playground—had nothing to do with religion itself. *See id.*

Applying strict scrutiny, the Court found the Department's only stated interest—that Missouri had a policy preference of steering clear from religious concerns—uncompelling. *Id.* at 2024. The state's goal of achieving a further separation of church and state than what the U.S. Constitution mandates was restricted by the Free Exercise Clause. *See id.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)). However, in ultimately holding the Department's policy of categorically denying funding to religious institutions violated the Free Exercise Clause, the Court emphasized Missouri had gone too far because it had pursued the policy to the point of denying a qualified religious entity a public benefit solely because of its religious character. *Id.* While the consequence of Missouri's policy likely would have been, at worst, "a few extra scraped knees," it could not withstand Constitutional scrutiny. *Id.* at 2024-25. Justice Thomas, Justice Gorsuch, and Justice Breyer filed concurring opinions. *Id.* at 2025 (Thomas, C., concurring); *id.* at 2025 (Gorsuch, N., concurring); *id.* at 2026 (Breyer, S., concurring). Justice Sotomayor wrote a passionate dissent. *Id.* at 2027 (Sotomayor, S., dissenting).

C. Analysis

Trinity Lutheran Church is notable for several reasons. Most importantly, while the facts of the case are somewhat unremarkable, the holding further obscures the division between church and state. As Justice Sotomayor promulgated in her dissenting opinion, the Court profoundly changed the relationship between church and state "by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church." *Id.* (Sotomayor, S., dissenting). Justice Sotomayor emphasized that although the funding involved only the STP, this was ultimately a case about whether Missouri could decline to fund improvements to the facilities the church uses to

spread its religious views. *Id.* at 2028. While the majority opinion only mentioned the Establishment Clause in passing, Justice Sotomayor's emphasis on that clause, as opposed to the Free Exercise Clause, is interesting: Sotomayor argued the Establishment Clause did not allow Missouri to grant the STP request because Trinity Lutheran uses its Learning Center, including its playground, in conjunction with its religious mission. *See id.* at 2027-28.

Despite the importance of this decision in terms of First Amendment jurisprudence, the case may not have far-reaching implications. In fact, the Court was careful to limit its holding to playground resurfacing alone. *Id.* at 2024. In footnote three (to which Justice Gorsuch and Justice Thomas did not join), the Court stated that "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." *Id.* The brevity of the footnote leaves some questions unanswered. For example, may nonprofit religious institutions apply for playground resurfacing funding of any sort, or is this limited to recycling programs, such as the STP? Does the *Trinity Lutheran Church* holding open the door for funding to religious institutions for other types of recycling programs? And, if so, where is the line drawn between permissible and impermissible funding? Overall, encouraging participation in recycling and other beneficial waste-management programs and opening participation in such programs to all groups—including those with a religious identity—may lead to a heightened awareness of environmental concerns and a healthier environment for all. However, while providing grants to religious institutions for recycling programs is acceptable, separation of church and state is a key underpinning of U.S. society and government, and it is essential that taxpayer dollars are not used to fund religious activity, even indirectly.

Amy Fudenberg