



MWCC Environmental Conference
Legal Update - Environmental Legal Issues in Missouri

Steve Jeffery, Jeffery Law Group
Bruce Morrison, Great Rivers Env'tl Law Center
Gene P. Schmittgens, Rouse Frets Gentile Rhodes

July 16, 2018

I. Federal Legislative/Administrative/Executive

- Executive Order 13807 (August 15, 2017)
“Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure.”
- EPA Notice of Proposed Rulemaking (December 28, 2017) “State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units”

Federal Legislative/Administrative/Executive

- Supplemental Notice: Definition of “Waters of the United States” - Recodification of Preexisting Rule – EPA and the Department of Army (June 29, 2018)
- U.S. Environmental Protection Agency’s FY 2018 – FY 2022 Strategic Plan (February 12, 2018)

Federal Legislative/Administrative/Executive

Department of Justice Guidance on Settlement Payments to Third Parties in Environment and Natural Resources Division Cases (January 9, 2018)

Department of Justice Memorandum, “Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases” (January 25, 2018)

II. Federal Cases

- A. Suits Against EPA
- B. Suits By the United States

Federal Cases – Suits Against EPA

- By the Numbers
 - 389 Pending Suits Against EPA
 - Common Issues:
 - Unlawful Delay in Implementation of a Final Rule
 - Unlawful Replacement or Revocation of an Existing Rule

Suits Against EPA – Unlawful Delay

- In re A Cmty. Voice, 878 F.3d 779 (9th Cir. 2017)

News Releases from Headquarters › Office of the Administrator
(AO) - **EPA** Administrator Pruitt Invites the Nation's Leaders to Join
EPA Efforts to Reduce Childhood Lead Exposure
02/05/2018

- **WASHINGTON** - U.S. Environmental Protection Agency (EPA) Administrator Scott Pruitt is taking action to address lead contamination across America by formally inviting his colleagues and fellow Cabinet members to join with EPA in developing a federal strategy to reduce childhood lead exposure and associated health effects. "Lead exposure is a significant health and safety threat to children across the country," said EPA Administrator Scott Pruitt. "EPA is committed to taking action to address this threat, and improve health outcomes for our nation's most vulnerable citizens – our children."

Federal Register, Vol. 83, No. 127

Monday, July 2, 2018

- EPA is proposing to change the dust-lead hazard standards from 40 $\mu\text{g}/\text{ft}^2$ and 250 $\mu\text{g}/\text{ft}^2$ to 10 $\mu\text{g}/\text{ft}^2$ and 100 $\mu\text{g}/\text{ft}^2$ on floors and window sills, respectively.

Suits Against EPA - Unlawful Replacement or Revocation of an Existing Rule

- State of New York v. Pruitt, No. 18-1174 (D.C. Cir. Filed June 26, 2018)

Federal Cases – Suits By the United States (Settled)

Numbers of Cases Settled

2018 - 12

2017 - 40

2016 - 47

2015 - 50

2014 - 56

National Enforcement Initiatives

FY 2018 – FY 2022 Strategic Plan

Federal Cases – Suits By the United States

The National Enforcement Initiatives

- 1. Keeping Industrial Pollutants Out of the Nation's Waters.
- 2. Reducing Risks of Accidental Releases at Industrial and Chemical Facilities.
- 3. Cutting Hazardous Air Pollutants.
- 4. Reducing Air Pollution from the Largest Sources.
- 5. Ensuring Energy Extraction Activities Comply with Environmental Laws.
- 6. Keeping Raw Sewage and Contaminated Stormwater Out of the Nation's Waters.
- 7. Preventing Animal Waste from Contaminating Surface and Ground Water.

Reducing Risks of Accidental Releases at Industrial and Chemical Facilities

- **Reference News Release: Justice Department, EPA Reach Settlement with MFA Incorporated and MFA Enterprises Incorporated to Address Alleged Chemical Accident Prevention Violations**

07/02/2018

Cutting Hazardous Air Pollutants

- WASHINGTON – The U.S. Environmental Protection Agency (EPA) reached a settlement agreement with Decostar Industries, Inc. (Decostar) to address violations of the Resource Conservation and Recovery Act.

06/13/2018

Keeping Raw Sewage and Contaminated Stormwater Out of the Nation's Waters

- Middletown, Ohio Clean Water Act Settlement
02/09/2018

Preventing Animal Waste from Contaminating Surface and Ground Water

- Gulfstream Park Racing Association, Inc. Clean Water Act Settlement

05/01/2017

U.S. Environmental Protection Agency's FY 2018 – FY 2022 Strategic Plan (February 12, 2018)

- **APG-3: Accelerate the pace of cleanups and return sites to beneficial use in their communities.**
By September 30, 2019, EPA will make an additional 102 Superfund sites and 1,368 brownfields sites ready for anticipated use (RAU). (EPA will facilitate prompt site cleanup and use an “enforcement first” approach.)
- **APG-5: Increase environmental law compliance rate.**
Through September 30, 2019, EPA will increase compliance by reducing the percentage of Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permittees in significant noncompliance with their permit limits to 21% from a baseline of 24%.

U.S. Environmental Protection Agency's FY 2018 – FY 2022 Strategic Plan (February 12, 2018)

- EPA takes the overwhelming majority of its enforcement actions in programs that are: (1) not delegable to a state or tribe; (2) in states or tribes that have not sought authorization to implement a delegable program; or (3) in states or tribes that do not have the resources or expertise, or that seek assistance from the Agency.

U.S. Environmental Protection Agency's FY 2018 – FY 2022 Strategic Plan (February 12, 2018)

- For states and tribes with authorized programs, EPA, states, and tribes share enforcement responsibility, with primary enforcement responsibility residing with the state or tribe.
- Even in states or tribes authorized to implement a program, EPA serves a critical role in addressing serious national noncompliance problems, such as those affecting multiple states or tribes, and in serving as a backstop for instances when a state or tribe does not timely or appropriately address serious noncompliance.

Programs not Delegable

- Magnolia Waco Properties, LLC, settlement over violations of the Toxic Substances Control Act (TSCA) Lead Renovation, Repair and Painting Rule (RRP Rule).

06/05/2018

Shared Enforcement Responsibility

- Magnolia Valley Clean Water Act Settlement
03/23/2018

Programs Not Delegable

- Amazon FIFRA Violations Settlement
02/15/2018

Shared Enforcement Responsibility

- NCR Corporation Superfund Site Settlement

08/23/2017

III. Missouri

Legislative/Administrative/Executive

MWCC Conference

2018 Legislation Passed and Signed by the
Governor

MWCC Conference

2018 Legislation Passed and Signed by
the Governor

Senate Bills 627/925

MWCC Conference

2018 Legislation Passed and Signed by the Governor

Section 266.600. 1. No political subdivision shall adopt or enforce any ordinance, rule, or regulation relating to the labeling, cultivation, or other use of seeds or fertilizers as such terms are defined or used in sections 266.021 and 266.291, respectively.

MWCC Conference

2018 Legislation Passed and Signed by the Governor

Senate Bills 627/925

The provisions of this section shall not apply to any ordinance, rule, or regulation enacted prior to August 28, 2018.

2. This section shall not apply to rice seed.

MWCC Conference

2018 Legislation Passed and Signed by the Governor

Senate Bills 782

MWCC Conference

2018 Legislation Passed and Signed by the Governor

260.242. 1. The department shall have the authority to promulgate rules for the management, closure, and post-closure of coal combustion residual (CCR) units in accordance with Sections 1008(a)(3) and 4004(a) of the Resource Conservation and Recovery Act (RCRA) and to approve site-specific groundwater criteria.

MWCC Conference

2018 Legislation Passed and Signed by the Governor

3. No later than December 31, 2018, the department shall propose for promulgation a state CCR program, including procedures regarding payment, submission of fees, reimbursement of excess fee collection, inspection, and record keeping.

MWCC Conference

2018 Legislation Passed and Signed by the Governor

260.262 – Lead acid battery fee
extended for five years from 2018
through 2023.

MWCC Conference

2018 Legislation Passed and Signed by the Governor

260.380 – Hazardous waste fees
extended through 2024.

MWCC Conference

2018 Legislation Passed and Signed by the Governor

260.558. 1. There is hereby created in the state treasury the "Radioactive Waste Investigation Fund."

MWCC Conference

2018 Legislation Passed and Signed by the Governor

Upon written request by a local governing body expressing concerns of radioactive waste contamination in a specified area within its jurisdiction, the department of natural resources shall use moneys in the radioactive waste investigation fund to develop and conduct an investigation, using sound scientific methods, for the specified area of concern.

MWCC Conference

2018 Legislation Passed and Signed by the Governor

319.140 - Creates PSTIF Task Force to review the sustainability of PSTIF, the administration of PSTIF, the availability of private insurance for ASTs and USTs, and the necessity of insurance subsidies created through the PSTIF.

MWCC Conference

2018 Legislation Passed and Signed by the Governor

644.059 - Agricultural storm water discharges and return flows from irrigated agriculture shall be exempt from permitting requirements set forth in sections 644.006 to 644.141.

MWCC Conference

2018 Legislation Passed and Signed by the Governor

Agricultural storm water discharges and return flows from irrigated agriculture include storm water and snow melt runoff, drainage, and infiltration, including water that leaves land as a result of the application of irrigation water, both surface and subsurface, from standard farming industry practices.

MWCC Conference

2018 Legislation Passed and Signed by the Governor

Senate Bill 917 – gives DNR authority over coal combustion residual (CCR) impoundments and landfills.

Similar to Senate Bill 782.

MWCC Conference

2018 Legislation Passed and Signed by
the Governor

Senate Bill 659

MWCC Conference

2018 Legislation Passed and Signed by the Governor

- Extends PSTIF through 2025.
- Extends lead acid battery fee through 2023.
- Gives DNR authority to promulgate rules for the management, closure, and post-closure of coal combustion residual (CCR) units.

MWCC Conference

2018 Legislation Passed and Signed by the Governor

414.032 - The Director of Agriculture may waive specific requirements or may establish temporary alternative requirements for fuels in the event of an extreme and unusual fuel supply circumstance as a result of a petroleum pipeline or petroleum refinery equipment failure, emergency, or a natural disaster as determined by the director.

IV. Missouri Cases

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

In August 2014, Missouri voters amended the Missouri Constitution to adopt Article I, section 35.

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy.

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Section 35. That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Article VI of the Missouri Constitution
concerns:

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Article VI of the Missouri Constitution
concerns:

- Counties

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Article VI of the Missouri Constitution concerns:

- Counties
- Local Governments

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Article VI of the Missouri Constitution concerns:

- Counties
- Local Governments
- Special Charters

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Article VI of the Missouri Constitution concerns:

- Counties
- Local Governments
- Special Charters
- City and County of St. Louis

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Cases Interpreting Scope of Article
I, section 35

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Cases Interpreting Scope of Article I,
section 35

- *Vimont v. Christian County Health Dep't*, 502 S.W.3d 718 (Mo. App. S.D. 2016)

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Cases Interpreting Scope of Article I, section
35

- *Vimont v. Christian County Health Dep't*,
502 S.W.3d 718 (Mo. App. S.D. 2016)
- *State v. Shanklin*, 534 S.W.3d 240 (Mo.
banc 2017)

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Cases Interpreting Scope of Article I, section 35

- *Vimont v. Christian County Health Dep't*, 502 S.W.3d 718 (Mo. App. S.D. 2016)
- *State v. Shanklin*, 534 S.W.3d 240 (Mo. banc 2017)
- *Hill v. Mo. Dep't of Conservation*, Case No. SC 96739 (Mo. banc July 3, 2018)

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Vimont v. Christian County Health Dep't

“RSMo § 192.300 empowers county commissions and boards of county health centers to promulgate orders and ordinances to enhance public health and combat disease, provided such enactments do not conflict with state rules or regulations.”

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Vimont v. Christian County Health Dep't

“Citing this statutory authority, the Christian County Commission ... enacted an amended Food Order ordinance (“CCFO”) regulating raw milk sale and distribution .”

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Vimont v. Christian County Health Dep't

After County ordered Vimont to cease sale and distribution of raw milk, he sued asserting the County health regulation was barred by the “Right-to-Farm” Amendment.

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Vimont v. Christian County Health Dep't

“... under article VI, the County Commission was authorized to manage all legal county business, exercising such powers as the legislature saw fit to delegate or those fairly implied by powers expressly granted.”

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Vimont v. Christian County Health Dep't

“The legislature saw fit to delegate to county commissions, via RSMo § 192.300, power to promulgate public-health rules and ordinances.”

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

State v. Shanklin

“... statutes prohibiting marijuana cultivation and possession are unconstitutional ... because article I, section 35 of the Missouri Constitution protects ‘the right of farmers and ranchers to engage in farming and ranching practices....’”

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

State v. Shanklin

“This Court's primary goal in interpreting Missouri's constitution is to ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted.”

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

State v. Shanklin

“The amendment includes no language suggesting Missouri voters intended to nullify or curtail longstanding laws regulating or prohibiting possession, cultivation, and harvest of controlled substances.”

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Hill v. Mo. Dep't of Conservation

“This case concerns the regulatory authority of the Commission, which was created by an amendment to the Missouri Constitution first approved by the voters in 1936.”

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Hill v. Mo. Dep't of Conservation

“Under this amendment, the Commission has authority over the ‘control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state.’ Mo. Const. art. IV, § 40(a).”

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Hill v. Mo. Dep't of Conservation

In 2015, Hill sued MDC to enjoin regulations designed to eradicate chronic wasting disease in cervids (deer).

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Hill v. Mo. Dep't of Conservation

Gasconade County Circuit Court enjoined enforcement of regulations on basis of Article I, section 35 - “Right-to-Farm” Amendment.

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Hill v. Mo. Dep't of Conservation

“The precise contours of ‘farming and ranching practices’ protected by article I, section 35, are difficult to identify, as is the nature of the protection afforded by that provision.”

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Hill v. Mo. Dep't of Conservation

“But neither question needs to be answered in this case. Instead, . . . nothing in the language of article I, section 35, suggests it was intended to limit the Commission's constitutional authority under article IV, section 40(a)”

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Hill v. Mo. Dep't of Conservation

“The Court cannot conclude the voters intended to overthrow this longstanding regulatory pattern by adopting article I, section 35, when there is no language in this provision to suggest they did so”

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Conclusions:

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Conclusions:

- DNR has constitutional authority under Article IV, section 47 since 1972 to: “administer the programs of the state as provided by law relating to environmental control and the conservation and management of natural resources.”

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Conclusions:

- Counties and local governments have constitutional authority under Article VI and separate statutory authority to enact health-based regulations on agriculture.

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Conclusions:

- “Right-to-Farm” Amendment does not restrict DNR exercising its constitutional and statutory authority.

MWCC Conference

Legal Effects of the “Right-to-Farm” Amendment

Conclusions:

- “Right-to-Farm” Amendment does not restrict a County or County health center board from exercising constitutional authority and statutory authority under section 192.300, RSMo.

Missouri Cases - Exhaustion of Remedies

- Because judicial review pursuant to § 536.150.1 is statutorily restricted to when a governmental agency decision is not “subject to administrative review,” aggrieved parties must exhaust all their administrative remedies before seeking judicial review in a non-contested case.

State ex rel. Robison v. Lindley-Myers, No. SC 96719, 2018 WL 2927735 (Mo. June 12, 2018)

Missouri Cases - Procedural Due Process

- Procedural due process requires the opportunity to be heard at a meaningful time and in a meaningful manner.

State ex rel. Mason v. Cty. Comm'n of Franklin Cty., No. ED 104766, 2018 WL 2207786 (Mo. Ct. App. E.D. May 15, 2018)