Spotlight on NAHB Litigation

Winter 2018-19

David Jaffe
Vice President, Construction Liability
202-266-8317 or 800-368-5242,
ext. 8317

Thomas Ward
Vice President, Litigation
202-266-8230 or 800-368-5242,
ext. 8230

Amy Chai
Assistant Vice President
202-266-8232 or 800-368-5242,
ext. 8232

Felicia Watson
Senior Counsel
202-266-82229 or 800-368-5242,
ext. 8229

Jeffrey Augello
Senior Counsel
202-266-8490 or 800-368-5242,
ext. 8490

Devala Janardan
Senior Counsel
202-266-8335 or 800-368-5242,
ext. 8335

NAHB®
National Association of Home Builders

DOCUMENT CONTENTS

Page*(s)*

National Association of Home Builders

Safety and health encompasses a broad range of issues, for employers and employees alike, and include jobsite safety, workers compensation, and employer documentation and reporting requirements. NAHB members deal with compliance issues under the Occupational Safety and Health Administration (OSHA) statutes and regulations. Changes in OSHA regulations or enforcement policies can negatively affect NAHB members when those regulations are not supported by sound science or data, when OSHA policies are unclear, or when such actions are not authorized by Congress in the Occupational Safety and Health Act (OSH Act).

The Fifth Circuit Court of Appeals last week ruled that the Department of Labor can cite general contractors for workplace safety violations that put subcontractors' workers in danger. The case explored the legality of OSHA's multi-employer citation policy

NAHB has been challenging the multi-employer worksite doctrine for years, and filed an *amicus* brief, along with the Texas Association of Builders and other construction groups, in the case decided last week, *Acosta v. Hensel Phelps Construction Co.*

Briefs and pleadings:
http://www.ca5.uscourts.gov/opinions/pub/17/17-60543-CV0.pdf

Opinion and analysis:
https://www.jdsupra.com/legalnews/fifth-circuit-upholds-osha-s-multi-32897/

https://www.environmentalsafetyupdate.com/osha-compliance/fifth-circuit-last-to-uphold-oshas-multi-employer-worksite-doctrine/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original

NAHBNow articles and blog posts:
Court Rules in Favor of OSHA's Multi-Employer Citation Policy
http://nahbnow.com/2018/12/court-rules-in-favor-of-oshas-multi-employer-citation-policy/

The Endangered Species Act ("ESA") "was enacted in 1973 to conserve endangered and threatened species and the ecosystems upon which they depend." The ultimate goal of the ESA is species recovery. Unfortunately, this goal often takes a backseat to another goal – land use regulation. Two sections of the ESA, Section 7 and Section 9, increasingly impact the land use activities of NAHB's members. ESA Section 9 makes it unlawful for landowners to "take" a listed species, and includes significantly modifying critical habitat. ESA section 7 "consultation' requirements apply not to private parties but to federal agencies, but it covers their issuing permits for private activities such as CWA permitting for construction work in U.S. waters or wetlands.

On June 12, 2012, the U.S. Fish and Wildlife Service ("FWS") designated 1,555 acres of private land in Louisiana as unoccupied critical habitat for the endangered Dusky Gopher Frog. FWS admits that the land is not presently occupied and may never become suitable habitat for the Frog. In fact, FWS designated the forested land as critical habitat based on pure speculation; hoping that the land may some day be managed by private landowners for the species' conservation. The only way to make the land suitable for Frog habitat is through controlled burns and revegetation which FWS admits it cannot mandate on privately held land.

The landowners, both NAHB member, filed suit in the U.S. District Court in New Orleans, Eastern District in 2013. An appeal was filed in 2014, and affirmed the district court and upheld the critical habitat designation.

Lastly, in an 8-0 opinion, the Supreme Court disagreed. First, it explained that whether the 1,500 acres could be "critical habitat" depended on whether the area was also "habitat" for the frog. Since the Fifth Circuit had specifically ruled that "critical habitat" did not have to be habitable, the Court remanded that question back to the lower court.

Briefs and pleadings:
http://www.scotusblog.com/case-files/cases/weyerhaeuser-company-v-united-states-fish-wildlife-service/.

Opinion and analysis:
https://constitutioncenter.org/blog/supreme-court-bounces-frog-case-back-to-appeals-court

https://www.nola.com/outdoors/2018/11/supreme-court-kicks-st-tammany-dusky-gopher-frog-case-back-to-lower-court.html

NAHBNow articles and blog posts:
Supreme Court Unanimously Sides with NAHB Members in Dusky Frog Case

http://nahbnow.com/2018/11/u-s-supreme-court-unanimously-sides-with-nahb-members-in-dusky-frog-case/

Supreme Court Hears Members' Dusky Frog Case
http://nahbnow.com/2018/10/supreme-court-hears-members-dusky-frog-case/

Supreme Court Ready to Hear Two Important Cases
http://nahbnow.com/2018/09/supreme-court-ready-to-hear-2-important-cases/

ENVIRONMENTAL | CLEAN WATER ACT

The Clean Water Act provides the federal government with two main avenues to regulate builders – when builders discharge dredge or fill material into waterbodies (including wetlands) and/or when builders discharge other pollutants (including stormwater) into waterbodies. Home builders and developers are impacted whenever the government expands its jurisdiction over waterbodies, or makes it more difficult to legally discharge into them.

Recently, there have been a number of federal Circuit Court decisions concerning the "conduit theory" under the Clean Water Act.

Imagine a pipe discharging pollutants into waterbody covered by the Clean Water Act. The discharge would be illegal unless the person in charge had the appropriate permit(s). Now imagine instead that the pipe is directed into the ground and the pollutants enter the groundwater and then flow from the groundwater into the waterbody covered by the Clean Water Act. Is that still illegal? Under the "conduit theory" the answer is "yes." The groundwater, though not a waterbody covered by the Clean Water Act, is a conduit and since the pollutants still reach a waterbody covered by the Act it is an unlawful discharge – unless the necessary permits are obtained. Under the theory, pollutant discharge that is directed into groundwater and then enters a water covered by the Clean Water Act is illegal.

Recent decisions by both the Fourth and Ninth Circuit Courts of Appeals have accepted the conduit theory and found companies liable for adding pollutants to groundwater that reached covered waterbodies. The Sixth Circuit, however, disagrees. It recently decided that such pollution is not covered by the Clean Water Act.

The defendants in the Ninth Circuit case, *County of Maui, Hawaii v. Hawaii Wildlife* have asked the U.S. Supreme Court to hear their case. As always, NAHB is monitoring the Court's activities and will decide whether to participate if one or both of the cases are accepted for review.

Briefs and Pleadings:
https://www.nacwa.org/news-publications/news-detail/2018/09/11/supreme-court-asked-to-determine-cwa-s-reach-over-groundwater

http://www.scotusblog.com/case-files/cases/county-of-maui-hawaii-v-hawaii-wildlife-fund/.

Opinion and analysis:
https://www.martenlaw.com/newsletter/20180306-discharging-groundwater-wells-cwa-permit

https://www.bna.com/practitioner-insights-maui-n73014476005/

https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2017-2018/march-april-2018/the-clean-water-act-goes-underground/.

NAHBNow articles and blog posts:
WOTUS Confusion Abounds but More Clarity Could Come Soon
http://nahbnow.com/2018/10/wotus-confusion-abounds-but-more-clarity-could-come-soon/

NAHB Recommends WOTUS Definition to OMB
http://nahbnow.com/2018/09/nahb-recommends-wotus-definition-to-omb/

Legal Morass Muddies the Waters on the WOTUS Rule
http://nahbnow.com/2018/09/nahb-recommends-wotus-definition-to-omb/

Ms. Knick owns 90 acres and lives on the property in a single-family residence. At some point, the Township heard from a concerned citizen that the Knick property contained ancient burial grounds. The township has an ordinance which requires landowners to grant public and government access if the private property contains any burial grounds. The penalty for noncompliance is $300-600 per day. In 2013, the Township's Code Enforcement Officer entered Ms. Knick's land without her consent and issued her a notice of violation due to "stones located on [the] property" which resemble grave markers. Ms. Knick disputes that a cemetery exists on her property.

Ms. Knick filed a complaint in state court, which included a takings claim. The court refused to rule on the case for procedural reasons, and Ms. Knick then filed in federal district court. The federal district court also dismissed the case, noting that it was not ripe for review under a Supreme Court case named *Williamson County*.

NAHB has long argued *that Williamson County* should be overturned. NAHB submitted an in house authored *amicus* brief to the Supreme Court on Dec. 4, 2017. On March 5, 2018, the Supreme Court agreed to hear the case. NAHB authored another *amicus* brief on the merits and submitted it to the Court on June 5, 2018. Oral argument was held in October 2018 and will be re-argued in January 2019.

Briefs and pleadings:
http://www.scotusblog.com/case-files/cases/knick-v-township-scott-pennsylvania/.

Opinion and analysis:
http://www.scotusblog.com/2018/10/argument-analysis-weighing-federal-court-access-for-local-takings-plaintiffs/

https://www.eenews.net/stories/1060100425

NAHBNow articles and blog posts:
Supreme Court Hears 'Takings' Arguments
http://nahbnow.com/2018/10/supreme-court-hears-takings-arguments/

NAHB Files Amicus Brief in Supreme Court 'Takings' Case

http://nahbnow.com/2018/07/nahb-files-amicus-brief-in-supreme-court-takings-case/

MISCELLANEOUS | AMERICANS WITH DISABILITY ACT

The 1988 amendments to the Fair Housing Act (FHA) introduced provisions to ensure that homebuilders design and construct developments, model homes, apartments and multi-family housing so that they are accessible for persons with disabilities. For our NAHB members failure to do so may be considered discrimination on the basis of handicap, which may also be a violation of a legally binding code requirement.

In *Robles v. Domino's Pizza* plaintiff alleged that Domino's violated the Americans with Disabilities Act ("ADA") because its website and mobile app had not been designed and maintained in compliance with version 2.0 of the Web Content Accessibility Guidelines ("WCAG"), a third party international consortium that develops web standards. Plaintiff argued that the U.S. Department of Justice's ("DOJ's") repeated use of the WCAG standard means that all businesses subject to the ADA must comply with it.

The District Court granted Domino's Motion to Dismiss because DOJ has not promulgated any regulations with regard to websites, which "are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III" of the ADA. Robles has appealed the decision to the Ninth Circuit.

The primary arguments advanced in our brief are (1) websites are not "places of public accommodation" under the statutory language of ADA Title III and (2) to the extent websites are covered under Title III, requiring businesses to comply with nonexistent "guidelines" violates basic principles of administrative law and due process.

Briefs and pleadings:
https://www.chamberlitigation.com/cases/robles-v-dominos-pizza-llc.

Opinions and analysis:
https://bankingjournal.aba.com/2018/06/lawmakers-seek-clarity-from-sessions-on-ada-website-accessibility/

https://www.fashionapparellawblog.com/2017/03/articles/miscellaneous/robles-v-dominos-pizza/

https://www.chainstoreage.com/operations/winn-dixie-case-puts-spotlight-website-accessibilitycompliance/

NAHBNow articles and blog posts:

NAHB Multifamily Builders Needed for Accessibility Survey
http://nahbnow.com/2017/05/nahb-multifamily-builders-needed-for-accessibility-survey/

ADA and FHA: What Builders Need to Know
http://nahbnow.com/2015/02/ada-and-fha-what-builders-need-to-know/

NAHB Seeks Additional 'Safe Harbor' for Accessibility Requirements
http://nahbnow.com/2018/09/nahb-seeks-additional-safe-harbor-for-accessibility-requirements/

The federal Administrative Procedure Act (APA) (and some state statutes) requires agencies to provide notice and allow the public to comment on "rules". Furthermore, other statutes require agencies to take certain actions whenever they write a rule. When agencies develop rules in contravention of the APA they often fail to account for the real costs of the rule, and the negative impact it has on the home building process. The U.S. Supreme Court on Dec. 10 agreed to hear a case that has widespread implications for how courts handle challenges to all agency regulations.

The case, *Kisor v. Wilkie,* addresses the issue of whether courts should defer to an agency's interpretation of its own regulations, known also as *Auer* deference.

NAHB supported the petitioner with an *amicus* brief as part of a proactive strategy developed to identify cases that put this issue squarely before the Supreme Court.

NAHB has long been concerned with this type of judicial deference because it can create incentives for agencies to avoid formal rulemaking processes or create vague regulations that they can later interpret however they see fit. Either tactic prevents home builders and other industries from participating in the development of rules that govern their activities.

The Supreme Court will hear this case next year, and a decision is expected by the end of June 2019.

Briefs and Pleadings:
http://www.scotusblog.com/case-files/cases/kisor-v-wilkie/

Opinion and analysis:
https://www.environmentalsafetyupdate.com/administrative-procedure-act/supreme-court-to-reconsider-auer-deference/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original

https://www.jurist.org/news/2018/12/supreme-court-to-reconsider-precedent-calling-for-judicial-deference-to-federal-agencies/

NAHBNow articles and blog posts:
Supreme Court to Hear Case Challenging Power of Federal Regulators
http://nahbnow.com/2018/12/supreme-court-to-hear-case-challenging-power-of-federal-regulators/