"Environmental Case Law Update—Anything Goes"

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In keeping with the theme of this year's presentation of the Environmental Law Case Update "Anything Goes," the following represents an idiosyncratic review of environmental law cases for the past year.

SUPREME COURT

Takings

The U.S. Supreme Court held that moratoria on development imposed during the process of devising a comprehensive land use plan do not constitute a per se taking of property requiring compensation under the takings clause of the U.S. Constitution. Unable to meet deadlines in a compact designed to protect and preserve a lake, a regional land planning agency issued development moratoria until the permanent land use plan required by the compact was developed. Property owners in the area brought suit against the planning agency claiming that the moratoria and the final plan constituted takings of the land owners` property without just compensation. The Court granted certiorari limited to whether the moratoria ordered by the planning agency were per se takings of property requiring compensation under the takings clause and held that they were not. The Court has repeatedly recognized the distinction between physical takings, which involve application of per se rules, and regulatory takings, which are characterized by factual inquiries designed to examine and weigh all the relevant circumstances. Here, the property owners incorrectly applied physical takings rationale to regulatory cases to argue for a categorical rule that whenever the government imposes deprivation of all economically viable use of property, no matter how brief, it effects a taking. Supreme Court cases concerning regulatory takings have implicitly rejected the property owners` categorical approach. Moreover, these cases have not resolved the question of whether a regulation prohibiting any economic use of land for a period of time must be compensated. However, property owners` attempt to claim that all economically beneficial use of their land was deprived by focusing exclusively on the time the moratoria were in place must fail, the Court held, because to sever a portion of time from the fee simple estate and then ask whether the segment has been taken in its entirety ignores the Court`s admonition to focus on the property as a whole. Further, fairness and justice will not be better served by a categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking. That rule would apply to numerous normal delays and would require changes in practices that have long been considered permissible exercises of police power. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, No. 00-1167, 122 S.Ct. 1465 (S. Ct. Apr. 23, 2002).

Environmental Crimes

The United States Supreme Court has denied certiorari from an Eleventh Circuit case affirming felony convictions of two corporate officials of the conspiracy to commit environmental crimes and violations of the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and

Liability Act (CERCLA). The petition for a writ of certiorari posed questions as to whether the responsible corporate officer doctrine (1) permitted felony convictions of defendants who no longer had authority or the capacity to prevent the violations and were not in a decision-making role at the time the violations occurred and (2) required defendants to have actual knowledge of each element charged in the offense. The petition also asked whether corporate officers and employees of a corporation in bankruptcy may be liable for violations of environmental statutes despite bankruptcy restrictions that deprive them of authority to act to correct or prevent violations. The Supreme Court also denied certiorari on a companion petition brought by another defendant in the same case. *U.S. v. Hansen*, 262 F.3d 1217, cert. denied, 122 S.Ct. 2326, 23227 (Jan. 3, 2002).

OTHER FEDERAL CASES

In addition to the Supreme Court, several lower federal courts issued environmental opinions of significance or interest in the past year. Cases below are organized generally by subject matter and include cases from both the Federal Courts of Appeal as well as some district court opinions of interest.

SOLID HAZARDIOUS WASTE (CERCLA, RCRA)

Solid Waste

The Fifth Circuit affirmed a district court holding that a city was liable for contributing to illegal dumping at two garbage dumps in violation of RCRA, and that the director of the state environmental agency could not be held liable for RCRA violations. Residents brought a citizen suit against the city for illegally contributing to open dumping at two sites and against the director for failing to classify the dumps on EPA`s Open Dumping Inventory (ODI) in violation of RCRA. The district court did not err in finding that the city could be held liable under RCRA §7002(a)(1)(B) for contributing to dumping at the sites. Even after the city`s attorneys learned that a demolition company hired by the city was illegally dumping at one of the sites, the city continued to work with the company. Additionally, it was not clear error for the district court to infer that the city`s waste went to the dump in question. Further, because §7002(a)(1)(B) applies to both past and present acts, the city can still be held liable under RCRA for continuing violations even though it stopped using the second site in question as a municipal landfill in 1972 and RCRA was not enacted until 1976. In addition, the district court correctly concluded that the residents did not prove that the director violated RCRA by failing to classify the dumps on EPA`s ODI. Contrary to the director`s arguments, the residents had standing to bring their suit and were not barred from suing the director by the Eleventh Amendment. The residents failed, however, to prove that the director`s actions contravened the statutory provisions and regulations of RCRA. The state`s plan, submitted to and approved by EPA, met RCRA requirements to provide for the classification of existing solid waste disposal facilities, the closing or upgrading of all existing dumps, and long-term monitoring and contingency plans. *Cox v. City of Dallas*, No. 99-11029, 256 F.3d 281 (5th Cir. June 26, 2001).

CERCLA—Prior Owner

The Fourth Circuit reversed and remanded a district court decision that improperly relieved previous owners of any liability under CERCLA for the cleanup of a parcel of land contaminated with trichloroethylene (TCE). After purchasing the property, the current owner discovered a waste dump on the site with 55-gallon drums, most of which contained a mixture of asphalt and TCE. The individual reported his findings to the state environmental agency and, under their supervision, cleaned up the site. The district court found the previous owners not liable for any of the response costs because the current owner failed to establish that the previous owners had placed the TCE on the property. The district court, however, incorrectly interpreted CERCLA`s requirements by holding that liability could not attach under CERCLA §107(a) unless the current owner showed that the previous owners placed or dumped TCE on the site, and unless there was evidence linking the TCE used by the previous owners and the TCE buried in drums at the site. These legal assumptions overlooked the strict liability imposed by CERCLA for any owner or operator of land at which hazardous waste is in fact leaking into the environment. The uncontroverted evidence showed that TCE was routinely used at the site beginning in 1979, that a waste mixture of asphalt and TCE was placed in 55-gallon drums at the site, and that TCE was found in the soil and groundwater at the site, thereby easily supporting the liability of the previous owners. *Crofton Ventures Limited Partnership v. G & H Partnership*,

No. 00-1517, 258 F.3d 292 (4th Cir. July 24, 2001).

CERCLA—Consent Decrees

The First Circuit affirmed, with one exception, a district court decision that entered consent decrees formalizing the settlement of several PRPs and that entered a declaratory judgment holding other PRPs liable for response costs at a Rhode Island CERCLA site. The district court had jurisdiction to approve the consent decrees even though the settlements included parties not sued by the United States because unpleaded claims are allowed as part of consent decrees. Moreover, the consent decrees were procedurally and substantively fair and were reasonable in light of their role in expediting remediation work, the government`s substantial cost recovery, and the strength of the cases against the PRPs. Further, the decrees are faithful to CERCLA`s purposes even though the nonsettling PRPs may bear disproportionate liability due to the bar on seeking contribution from settling PRPs. The consequence of nonsettlers bearing disproportionate liability is consistent with CERCLA`s encouragement of early settlement. In addition, the district court did not err in its declaratory judgment when it found the nonsettling PRPs liable for response costs at the site. Since evidence in the record supports the district court`s factual findings and inferences, they are not clearly erroneous and cannot be overturned. Similarly, the district court did not err in admitting and crediting the deposition testimony of an ill witness who received payment for his testimony and did not err in excluding a chart that one PRP prepared for the testimony of that PRP`s corporate designee. Additionally, in determining the quantity and hazardous quality of waste disposed of by the nonsettling PRPs, the district court drew a reasonable inference based on the evidence, which supports the finding that each nonsettling PRP deposited waste and that the waste likely contained hazardous substances found at the site in excess of background levels. Moreover, CERCLA permitted the district court to issue a declaratory judgment even though no response costs had yet been incurred because CERCLA §113(g)(2) allows for declaratory relief and applies to contribution actions for both past and future response costs. Further, the district court properly imposed successor-in-interest liability against two companies for waste disposed of by two PRPs. The district court also properly held that a waste hauler was not liable under CERCLA as a transporter or as an arranger and that a city was not liable as an arranger. However, the district court improperly explained its decision to hold the primary PRP responsible for $6 million of the government`s response costs, and, therefore, the case was remanded for clarification of the issue. *United States v. Davis*, Nos. 00-1234 et al., 261 F.3d 1 (1st Cir. Aug. 17, 2001).

CERCLA—Contribution

The Fifth Circuit affirmed a district court holding that a current owner of contaminated property could not seek CERCLA §113 contribution against a previous owner of the property unless the current owner had incurred or at least faced liability under a CERCLA §106 administrative abatement action or a CERCLA §107 cost recovery action. The plain language of CERCLA §113(f)(1) requires a party seeking contribution to be or to have been a defendant in a §106 or §107 action. Although §113(f)(1) states that any person may seek contribution during or following a §106 or §107 action, the word "may" establishes an exclusive cause of action and means " shall" or " must." Likewise, the CERCLA §113(f)(1) savings clause, which states that nothing in §113(f) shall diminish the right of any person to bring a contribution action in the absence of a §106 or §107 action, does not allow contribution suits regardless of whether the parties are defendants in a §106 or §107 action. The §113(f) savings clause merely states that the statute does not affect a party`s ability to bring contribution actions based on state law. A contrary interpretation would impermissibly nullify that part of §113(f)(1) that requires a party seeking contribution to face a §106 or §107 action. Moreover, the legislative history of CERCLA reinforces the analysis that parties found liable under §106 or §107 have a right to contribution. In addition, the majority of the courts addressing §113(f)(1) have held that a §106 or §107 action must be pending or adjudicated for a party to seek contribution. Therefore, because the current owner conceded that it did not file its §113(f)(1) contribution claim during or following a §106 or §107 action, the district court properly dismissed the current owner`s contribution action against the previous owner. *Aviall Services Inc. v. Cooper Industries Inc.*, No. 00-10197, 263 F.3d 134 (5th Cir. Aug. 14, 2001), rehearing en banc granted, 278 F.3d 416 (5th Cir., 2001).

CERCLA—Prior Owner

The Sixth Circuit upheld a district court decision that a previous owner of property is not liable under CERCLA for any cleanup costs. The district court correctly found that there was no evidence that any release that occurred during the previous owners` ownership of the property caused any increase in the response costs incurred by the current owners. Additionally, there is no evidence that any active human conduct on the part of the previous owners resulted in any additional contamination to the property. Further, the failure of the previous owner to prevent passive migration of hazardous substances during their ownership does not constitute a disposal and does not make them liable under CERCLA. *Bob`s Beverage, Inc. v. Acme, Inc.*, No. 00-3045, 264 F.3d 692 (6th Cir. Sept. 4, 2001).

CERCLA – Prior Owner

The Ninth Circuit reversed a district court`s grant of summary judgment in favor of a petroleum company and the federal government in a suit filed against them for cleanup costs incurred by the current owner of a mobile home park, but affirmed the district court`s grant of summary judgment in favor of prior owners of the park. The prior owners of the park also used it as a mobile home park. Before their ownership, a petroleum production company owned the site. After cleaning up contamination at the park, the current owner sued the prior park owners, the petroleum company, and the government under CERCLA, state nuisance law, indemnity, and various other statutes. The district court dismissed all claims, and the owner appealed. The district court erred in granting summary judgment to the government and the petroleum company on the CERCLA claim. Genuine issues of material fact preclude summary judgment on whether the response costs were "necessary." The touchstone for determining the necessity of response costs is whether there is an actual threat to human health or the environment; that necessity is not obviated when a party also has a business reason for the cleanup. Here, the district court erroneously focused on the ulterior business motive for remediation. As to the prior park owners, however, the district court properly granted summary judgment in their favor on the CERCLA issue. Based on the plain meaning of the statute, there was no disposal during their ownership. Of the terms defining "disposal," the only one that might describe the passive soil migration during their ownership is "leaking," but there was no leaking under the plain and common meaning of the word. Congressional intent further supports this interpretation. Therefore, they are not PRPs and are not subject to liability. However, the district court erred in granting the prior park owners` motion for summary judgment on the current owner`s indemnity claim based on the sales agreement because there are genuine issues of material fact as to the necessity of the owner`s response costs. In addition, the district court properly dismissed the owner`s state nuisance claim against the government for water contamination because the claim is precluded by state law. *Carson Harbor Village, Ltd. v. Unocal Corp.*, Nos. 98-55056 et al., 270 F.3d 863 (9th Cir. Oct. 24, 2001), cert. denied 122 S.Ct. 1437 (Apr. 1, 2001).

CERCLA – Allocation

The Sixth Circuit affirmed a district court decision finding an automotive parts manufacturer liable under CERCLA for discharging PCBs into a river but declining to allocate any response costs to the manufacturer. A group of paper manufacturers, found by EPA and the state environmental agency to be liable under CERCLA for the contribution of PCBs into the river, brought suit against the manufacturer for contribution under CERCLA. Although the district court determined that the manufacturer was liable under CERCLA after finding that the manufacturer released PCBs in measurable or detectable quantities, this finding did not obligate the district court to allocate response costs to the manufacturer irrespective of the court`s specific analysis of the relative amount of PCBs released by the manufacturer versus the group. A holding of potential liability does not preclude a zero allocation of response costs. Rather, in allocating these costs, a district court may consider any equitable factors it deems appropriate. Additionally, the district court did not err in finding that the manufacturer had released an inconsequential amount of PCBs in comparison to the amount of PCBs released by the members of the group. Further, the district court did not err in determining that the factors concerning the relative toxicity of the PCBs released by the parties and the cooperation of the parties with the regulatory authority did not favor any particular allocation of response costs. *Kalamazoo River Study Group v. Rockwell International Corp.*, No. 00-1774, 274 F.3d 1043 (6th Cir. Dec. 18, 2001).

Causation

The Fifth Circuit affirmed a district court holding that individuals failed to provide sufficient evidence of causation and damages to reach the jury on either water or soil pollution claims brought against an oil company. The individuals own the surface estate of a ranch. The mineral estate of the ranch is separate from the surface estate and owned by an oil company. The individuals sued the oil company claiming that the company`s negligent operations contaminated the ranch`s soil as well as an aquifer that provided drinking water for the ranch. The individuals` two expert witnesses on water contamination, however, failed to present sufficient evidence that the company caused the pollution of the aquifer and failed to show the extent of the damage resulting from that contamination. Similarly, the individuals` experts on soil contamination failed to establish a legally sufficient evidentiary basis for a reasonable jury to find for the individuals on essential elements of their soil pollution claims. Rather, any finding of liability would require the jurors to speculate as to both the cause of the pollution and the extent of the damage to the surface estate. Therefore, the district court`s dismissal of the individuals` claims was affirmed. Anthony v. Chevron USA, Inc., No. 00-50710, 284 F.3d 578 (5th Cir. Mar. 1, 2002).

CERCLA -- Jurisdiction

The Fifth Circuit held that a district court lacked jurisdiction under CERCLA and the All Writs Act to hear landowners` land contamination claim against various corporations that owned and operated hazardous waste sites. After being sued by the federal government under CERCLA, the corporations entered a consent decree that involved the cleanup and remediation of the sites. The landowners subsequently brought suit in state court against the corporations alleging negligence and strict liability under state tort law. The case was removed to federal district court, which found in favor of the corporations, and the landowners appealed. The district court, however, erred in holding that it had jurisdiction pursuant to CERCLA. Although the landowners alleged that one of the corporations was in violation of both state and federal, this is not sufficient to render the action as one arising under federal law. Here, state law provides a cause of action under which the landowners can attempt to prove that the corporations tortuously caused damage to their land and can demand the relief they seek. Additionally, various courts have held that the CERCLA saving clauses preserve parties` rights arising under state law. Thus, CERCLA does not completely preempt the landowners` claims under state law. Moreover, the circumstances of the case are not so extraordinary that they demand the removal under the All Writs Act to protect the integrity of the consent decree. The landowners seek compensatory damages under state tort law for alleged injuries to their land. They do not claim violations of the consent decree or allege that the actions complained of are in conformity with the consent decree; nor do they seek any changes to the consent decree. The district court`s decision was therefore vacated and remanded with directions that the case be returned to state court. *MSOF Corp. v. Exxon Corp.*, No. 01-30122, 2002 WL 1339874 (5th Cir. June 20, 2002).

CERCLA – Attorneys Fees

In a follow-up to the 7th Circuit's case in *United States v. Tarkowski*, 248 F.3d 596 (7th Cir., 2001), which held that EPA had exceeded its authority under Section 104 of CERCLA in seeking access to a property because EPA's test results did not indicate that the contamination posed an environmental hazard, the district court first denied the government's request to deny the landowner's petition under the Equal Access to Justice Act ("EAJA") for attorneys fees, *United States v. Tarkowski*, No. 99 C 7308, 2001 WL 1512539, 53 ERC 1958 (N.D. Ill. Nov. 26, 2001) (Kennelly, J.), and then, subsequently awarded the landowner approximately $95,000 in fees and expenses holding that the government's action under CERCLA was not justified. *United States v. Tarkowski*, No. 99 C 7308 (N.D. Ill. Mar. 26, 2002).

RCRA – Jurisdiction

A district court denied a concentrated animal feeding operation`s (CAFO`s) motion to dismiss an environmental group`s claims that the CAFO violated various provisions of the CWA and RCRA. The CAFO failed to obtain an NPDES permit before discharging pollutants, and the text and structure of the CWA taken as a whole support the court`s conclusion that the CWA subjects the CAFO to the NPDES permit requirement. The CAFO`s argument that sprayfields at its operations cannot fall within the definition of a point source because animals are not confined in the sprayfield area is nonsensical. Excluding parts of the waste management system from the definition of a CAFO by limiting the CAFO area to the land underneath the feeding areas would compromise the goals of the CWA by allowing widespread pollution by industrial feedlots pumping waste into other areas of their farms. The sprayfield areas are a vital part of the CAFO`s operations and

cannot be separated from the confinement areas merely because the waste has been moved from one area of the farm to another. In addition, question of whether the CAFO returns animal waste to the soil for fertilization purposes or instead applies waste in such large quantities that its usefulness as organic fertilizer is eliminated, and, therefore, a solid waste under RCRA, is a question of fact. This reasoning has been propounded by EPA in recent administrative actions against CAFOs in EPA Region 6. *Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.*, Nos. 4:01-CV-27-H(3), -30-H(3) 2001 WL 1715730 (E.D.N.C. Sept. 20, 2001).

RCRA/CERCLA Interaction

A district court held that individuals` RCRA and state law claims against a gasoline corporation that spilled 600,000 gallons of gasoline onto the individuals` property and a surrounding lake and creek are not barred because the state has not engaged in a CERCLA §104 removal action pursuant to RCRA statutory requirements. RCRA citizen suits are only barred to the extent of the scope and duration of a CERCLA cleanup order. Although the state was supervising remediation efforts at the site, there was no agreement between the state and the federal government pertaining specifically to the action and to the site, which is necessary for the state action to be conducted pursuant to CERCLA §104. Additionally, the state`s authorization for its hazardous waste management program does not conclusively show that the state was using Superfund money under CERCLA §104 to supervise remediation at the site. Further, the individuals` allegation that present contamination to the land and water surrounding their property continues to pose imminent and substantial endangerment is sufficient to support their claim of a redressable injury. Finally, because the landowners may proceed with their RCRA claim, the court asserted supplemental jurisdiction over the individuals` state law claims. *Abundiz v. Explorer Pipeline Co.*, No. Civ.3:00-CV-2029-H (2002 WL 663573) (N.D. Tex. Apr. 19, 2002) (Sanders, J.).

CLEAN WATER ACT

Judicial Review

The Fifth Circuit vacated a district court`s references for summary judgment and other liability issues under the CWA to a special master. Two environmental groups sued EPA and the state of Louisiana for failure to comply with CWA §303(d)`s TMDL requirements. The district court referred the case to a special master and subsequently adopted the findings of the special master. However, that the case was pending for two years and had voluminous filings containing highly technical documents were not exceptional conditions justifying references to a special master. Similarly, the court`s crowded docket and unfamiliarity with the subject matter hardly excused the court`s obligation to carry out its judicial function. Further, there were no findings or conclusions by the district court revealing a de novo review of the reports, and, thus, the circuit court was unable to perform a meaningful review of the district court`s judgment. Therefore, the orders of reference, the orders adopting the special master`s reports, and the final judgment were vacated and remanded to the district court. *Sierra Club v. Browner*, No. 99-31299, 257 F.3d 444 (5th Cir. July 9, 2001).

Judicial Review

The Tenth Circuit affirmed a district court`s dismissal of individuals` CWA and APA claims alleging that Oklahoma failed to submit TMDLs to EPA for review and that EPA failed to fulfill its nondiscretionary duty to develop TMDLs after Oklahoma`s constructive submission of no TMDLs. The individuals` theory, that Oklahoma`s failure to submit TMDLs resulted in a constructive submission of no TMDLS that triggered EPA`s nondiscretionary duty to approve or disapprove of the TMDLs, is not supported by the evidence. The theory of constructive submission only applies when the state`s actions clearly and unambiguously express a decision to submit no TMDL for a particular impaired waterbody. Here, the uncontradicted evidence is that Oklahoma submitted a number of TMDLs and is making progress toward completing about 1,500 TMDLs over a 12-year period. Additionally, the individuals` APA claim, that EPA failed to fulfill its nondiscretionary duty to develop its own TMDLs after Oklahoma`s constructive submission of no TMDLs, duplicates the one the individuals brought under the CWA and should be dismissed. *Hayes v. Whitman*, No. 00-5113, 264 F.3d 1017 (10th Cir. Aug. 29, 2001).

Judicial Review

The Ninth Circuit held that the EPA Administrator`s failure or refusal to find a CWA violation or to take enforcement action against an Arizona wastewater treatment plant are discretionary decisions that are not subject to review under the CWA. After the treatment plant`s NPDES permit expired in 1996 and 128 permit violations were reported between 1995 and 2000, an environmental group brought a CWA §505(a)(2) citizen suit against EPA seeking to compel the Agency to initiate an enforcement action. Suits against EPA are barred by sovereign immunity unless there has been a waiver of that immunity. Congress has waived immunity in CWA §505(a)(2) only for suits alleging a failure to perform a nondiscretionary duty. The group claims that CWA §309(a)(3) creates a mandatory duty of the EPA Administrator to make enforcement findings when presented with information suggesting a violation. However, CWA §309(a)(3) contains no language suggesting that the Administrator has a duty to make findings. Instead, §309(a)(3) merely states what follows a finding of a violation by the Administrator. Moreover, the CWA`s purpose is to restore and maintain the national waters, and requiring EPA to investigate all complaints, irrespective of their environmental magnitude, could hinder the Administrator`s ability to investigate and enforce the most serious violations. Further, although CWA §309(a)(3) states that the Administrator " shall" issue a compliance order or commence a civil action upon finding a violation, the use of the term "shall" does not implicitly impose a mandatory requirement on the Administrator. The term "shall" usually denotes a mandatory duty, but it sometimes is the equivalent of "may." An analysis of the CWA`s language, structure, and legislative history leads to the conclusion that CWA §309(a)(3) does not create mandatory enforcement duties. Because there is no nondiscretionary duty that the Administrator failed to perform, CWA §505(a)(2) does not authorize suit against EPA. Thus, there has been no waiver of sovereign immunity and the group`s action must be dismissed for lack of subject matter jurisdiction. *Sierra Club v. Whitman*, No. 00-16895, 268 F.3d 898 (9th Cir. Oct. 2, 2001).

Permit Shield

The Fourth Circuit reversed a district court decision that even though a county waste treatment plant`s NPDES permit did not prohibit the discharge of heat, the plant violated the CWA when it discharged warm water to a stream since the NPDES permit did not expressly authorize such a discharge. The permit shield defense to an alleged CWA discharge violation applies as long as the NPDES permit holder complies with the express terms of the permit, complies with the CWA`s disclosure requirements, does not make a discharge of pollutants that was not within the reasonable contemplation of the permitting authority at the time the permit was granted. Here, the language of the plant`s permit does not bar the discharge of heat. Although a footnote to the plant`s permit states that "discharge of pollutants not shown shall be illegal," the footnote is ambiguous considering that it can be read to mean either that it is illegal to discharge pollutants not listed or that it prohibits only those pollutants that were not disclosed to the state environmental agency during the permitting process. Given this ambiguity, extrinsic evidence must be evaluated, and this evidence reveals that during the NPDES permit issuance, it was contemplated that the plant would discharge pollutants other than those listed. In addition, the plant adequately disclosed the plant`s discharge of heated water to the state environmental agency and the plant`s discharges were reasonably anticipated by the state agency. Therefore, the judgment of the district court is vacated. *Piney Run Preservation Ass`n v. County Commissioners of Carroll County*, No. 00-1283, -1322, 268 F.3d 255 (4th Cir. Oct. 10, 2001), cert. denied, 122 S.Ct. 1960 (May 20, 2002).

Elements of Criminal Violation

The Seventh Circuit held that a district court properly interpreted the CWA in concluding that the number of violation days are a sentencing factor and not an element of the crime and, therefore, upheld the fines imposed against a scrap metal factory for illegally discharging wastewater in violation of the CWA. Relying on the U.S. Supreme Court`s decision in *Apprendi v. New Jersey*, 530 US 466 (2000), the company argued that it had to be charged in the indictment with each day of violation and that the number of days of violation had to be proven by the government beyond a reasonable doubt. However, the plain meaning of CWA §309(c)(2)`s language expresses Congress` unambiguous intent that the number of violation days is a sentencing factor and not an element of a CWA offense. Section 309(c)(2)`s "shall be punished by" clause indicates that the language following it sets forth the terms of punishment for a CWA violation, and the terms of punishment for a CWA violation include a fine that depends on the number of days of violation. Additionally, the "per day of violation" language in §309(c)(2) qualifies the term of punishment by indicating that there is a "violation" defined elsewhere

in the CWA and that the punishment received for this violation depends on the number of days that the violation occurred. Thus, the number of days that the violation occurred is a factor to be determined after a violation has been established, and it was proper for the district court to apply sentencing factors based on a preponderance of the evidence. *United States v. Chemetco, Inc.*, No. 00-3940, 274 F.3d 1154 (7th Cir. Dec. 17, 2001).

Administrative Appeals

The EPA Environmental Appeals Board (EAB) denied a city`s petition for review of its EPA-issued NPDES permit to operate a municipal separate storm sewer system. The city argued that several of the permit conditions require it to regulate, legislate, and use its enforcement powers in violation of the Tenth Amendment`s principles of federalism. The city also objected to permit conditions requiring it to develop training and education programs targeted to reduce storm water pollution, arguing that the conditions compel it to speak to its citizens and deliver a message chosen by EPA in violation of its First Amendment right to free speech. As a general rule, constitutional questions of the kind at issue here are reserved for the federal courts. Moreover, the permit provisions in question fall within the immediate contemplation of both the CWA and its implementing regulations. Thus, the city is actually challenging the validity of the statutory and regulatory provisions themselves rather than the manner in which they were applied when EPA wrote the permit. The regulations authorizing appeals to the EAB contemplate review of conditions of permits, not review of the statutes and regulations that are predicates for such conditions. Thus, because nothing in the city`s petition or the administrative record presents circumstances sufficiently compelling to overcome the presumption against nonreviewability of Agency rules in the context of EAB proceedings, the proper forum for the city`s challenge lies with the federal courts. In addition, the city failed to demonstrate how other permit conditions evidence error, abuse of discretion, or other unlawful action by the Agency. *In re Irving, Texas, Municipal Separate Storm Sewer System*, NPDES Appeal No. 00-18 (EPA EAB July 16, 2001).

RULEMAKING

CAA-HAPS

The D.C. Circuit remanded EPA- promulgated HAPs emission standards for hazardous waste combustors to the Agency because they failed to reflect the emissions achieved in practice by the best performing sources as required by the CAA. Acting pursuant to CAA §112(d)(3), EPA set emission floors for new and existing sources using maximum achievable control technology (MACT). However, EPA violated CAA §112(d)(3) by setting the floors using MACT technology. While standards achievable by all sources using the MACT control might also ultimately reflect what the statutorily relevant sources achieve in practice, EPA may not deviate from §112(d)(3)`s requirement that floors reflect what the best performers actually achieve by claiming that floors must be achievable by all sources using MACT technology. Additionally, the MACT approach does not measure what the best performing sources actually achieve. Further, because factors other than MACT technology affect emissions, emissions of the worst performing MACT source may not reflect what the best performers actually achieve. EPA did not err, however, in relying on worst case data to derive the standards and did not violate the Regulatory Flexibility Act. *Cement Kiln Recycling Coalition v. Environmental Protection Agency*, Nos. 99-1457 et al. 255 F.3d 855 (D.C. Cir. July 24, 2001).

FIFRA Reporting

A district court upheld an EPA regulation extending FIFRA §6(a)(2), which requires that pesticide registrants report to EPA on an ongoing basis factual information regarding a pesticide`s unreasonable adverse effects on the environment, to opinions regarding unreasonable adverse effects rendered by a registrant`s employees or agents. An association challenging the regulation argued that the regulation undermines the availability of the work product doctrine and the attorney-client privilege to pesticide registrants to the extent the regulation requires registrants to report the opinions of lawyers or of non-testifying expert witnesses prepared in preparation of litigation. The association, however, failed to present any facts to which this argument might be applied. The issue, therefore, is not ripe for decision. Consequently, because the record failed to provide any indication that EPA`s construction of FIFRA §6(a)(2) is unreasonable or contrary to law, the court upheld the regulation. *American Crop Protection Ass`n v. U.S. Environmental Protection Agency*, No. CIV A

00-0811, 182 F. Supp.2d 89 (D.D.C. Jan. 31, 2002) (Robertson, J.).

CAA-NAAQS

The D.C. Circuit upheld EPA`s promulgation of NAAQS for ozone and for PM having an aerodynamic diameter of 2.5 microns or less (PM2.5) against challenges from industry and environmental groups that the NAAQS were arbitrary and capricious. Previous decisions in the case addressed only whether the CAA adequately limits EPA`s discretion, and, thus, are not dispositive of whether EPA reasonably exercised that discretion, the question at issue here. As to that issue, industry`s claims that the PM2.5 NAAQS must be vacated because EPA did not apply any legal standard, much less the correct standard, must fail. In a passage that industry cited as evidence that EPA failed to identify a safe level of PM2.5, the Agency merely disclaimed any obligation to set primary NAAQS by means of a two-step process. Nothing in the statement implied that EPA failed to determine safe levels for fine PM; indeed, the Agency`s establishment of new primary NAAQS demonstrates that it did reach a conclusion regarding safe PM2.5 levels. Additionally, another passage in the regulations documents EPA`s rejection of lower standards, demonstrating that the Agency not only recognized, but acted upon, its statutory obligation to set the primary NAAQS at levels no lower than necessary to reduce public health risks. Further, EPA`s inability to guarantee the accuracy or increase the precision of the PM2.5 NAAQS in no way undermines the standard`s validity. And, contrary to industry`s contention, EPA did not err in not considering whether reducing atmospheric concentrations of fine particles would increase levels of ozone or a different fine particle component. Moreover, EPA should not have set a stricter daily PM2.5 NAAQS rather than relying almost exclusively on the stringent annual standard as environmental groups claimed. Not only does the court owe deference to an agency`s determination regarding the reliability of scientific evidence, but the environmental groups gave no reason to question EPA`s judgment regarding the reliability of the risk assessment relied upon in setting the standard. Finally, EPA acted properly in promulgating the ozone NAAQS. The record is replete with studies demonstrating the inadequacies of the old one-hour averaging standard, EPA discussed at length the advantages of a longer averaging time, and the selection of a 0.08 parts per million standard was not arbitrary or capricious. *American Trucking Ass`n v. Environmental Protection Agency*, Nos. 97-1440 et al., 283 F.3d 355 (D.C. Cir. Mar. 26, 2002).

CAA, -- BART, Regional Haze

The D.C. Circuit held that the Best Available Retrofit Technology (BART) provisions of EPA`s regional haze rule violate the CAA, but that the rule`s natural visibility goal and no degradation requirement are not arbitrary or capricious. The regional haze rule calls for states to play the lead role in designing and implementing regional haze programs to clear the air in various national parks and wilderness areas. Under the regional haze rule, once a state has decided that a major stationary source is subject to BART and is considering what BART controls to place on the source, the state must analyze four of the five statutory factors under CAA §169A(g)(2) on a source-specific basis. The fifth factor is considered on a group or areawide basis. In effect, EPA bifurcated the states` determination of the appropriate BART emission limitations for specific sources. The text and structure of the CAA, however, indicate that EPA`s bifurcation of the BART determination is impermissible. The language of CAA §169A(g)(2) can be read no other way than to indicate that all five factors inform the states` inquiries into what BART controls are appropriate for particular sources. To treat one of the five statutory factors in such a dramatically different fashion distorts the judgments Congress directed the states to make for each BART-eligible source. Additionally, the regional haze rule`s BART provisions are inconsistent with CAA provisions giving the states broad authority over BART determinations. Therefore, the regional haze rule`s BART provisions were remanded to EPA. The natural visibility goal and the no degradation requirement, however, were properly promulgated and are not arbitrary or capricious. Further, the court`s decision to invalidate the BART provisions rendered unripe an environmental group`s claims that EPA did not go far enough with the rule. *American Corn Growers Ass`n v. Environmental Protection Agency*, Nos. 99-1348 et al., 291 F.3d 1 (D.C. Cir. May 24, 2002).

TSCA -- Guidance

The D.C. Circuit vacated a PCB risk assessment guidance document because the court found it to be a rule improperly published without notice-and-comment. The guidance document issued by EPA was ripe for review. The document is final agency action because it marks the consummation of EPA`s decision making process and determines the rights and obligations of both applicants and EPA. Additionally, the document is a rule under TSCA §19(a)(1)(A) and, thus, is subject to the court`s review. The document gives substance to the vague language of 40 C.F.R. §761.61(c), does so in an obligatory manner, and is treated by EPA as controlling in the field. Further, the document is binding because it facially requires an applicant for a risk-based variance to calculate toxicity using a certain total toxicity factor. Because the document binds EPA to accept the use of a certain toxicity factor, it follows that the document imposes further obligations on the Agency. And even though the document gives applicants the option of calculating risk in either of two ways, it still requires them to conform to one or the other. Moreover, EPA did not contend that in practice it had not treated the document as binding in the ways described above. Consequently, because EPA issued the document without providing notice-and-comment, the document was vacated. *General Electric Co. v. Environmental Protection Agency*, No. 00-1394, 290 F.3d 377 (D.C. Cir. May 17, 2002).

CAA-Diesel Engines

Engine manufacturers, automobile makers, and fuel refiners petitioned for judicial review of Environmental Protection Agency (EPA) rule requiring reductions in diesel engine exhaust emissions. The Court of Appeals held that: (1) rule requiring diesel engine manufacturers to substantially reduce both particulate matter and nitrous oxide emissions over several year period was not arbitrary or capricious; (2) rule requiring diesel engine fuel to have only 15 parts per million (ppm) of sulfur was not arbitrary or capricious; (3) EPA lawfully revised its "averaging, banking, trading" program for credits earned by diesel engine manufacturers for producing engines that exceeded emission standards; and (4) challenge to fuel rule, on ground that it did not require new fuel soon enough to satisfy automobile manufacturers` obligations under prior rule mandating lower vehicle emissions, was in fact untimely challenge to prior rule. Petitions denied. *National Petrochemical & Refiners Ass`n v. E.P.A.*, 287 F.3d 1130 (D.C. Cir. May 3, 2002).

CAA-SIP

In a challenge by the Sierra Club to the State Implementation Plan ("SIP") for the District of Columbia, the Court of Appeals for the D.C. Circuit held that EPA exceeded its authority in extending the attainment deadline for the Washington, D.C. area because the Washington area did not fit into the limited circumstances allowing an extension under the statute, nor did EPA reclassify the non-attainment area as "severe." The Court also rejected the SIP because of EPA's failure to determine reasonably available control measures ("RACM"),the SIP did not provide for rate of progress reductions for years after 1999, and the SIP did not include required contingency measures. *Sierra Club v. Environmental Protection Agency*, (D.C. Cir., July 2, 2002 Nos. 01-1070 & 01-1158).

TSCA -- Lead-Based Paint

The D.C. Circuit denied housing industry associations` petition to review EPA`s decision to include all hazardous lead-containing dust and soil, regardless of source, within a TSCA rule--known as the Lead Rule--that requires the disclosure of lead-based paint hazards. The associations claim that EPA acted arbitrarily and capriciously and contrary to congressional intent by including dust and soil contaminated by sources other than lead-based paint dust within the Lead Rule`s disclosure requirements. However, the Lead-Based Paint Hazard Reduction Act, which amended TSCA, requires EPA and HUD to take action to protect the public from lead-based paint hazards by reducing such hazards, and by requiring owners of housing built before 1978 to disclose any lead-based hazards. The Lead-Based Paint Hazard Reduction Act defines "lead-based paint hazard" as any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, or lead-contaminated paint or surfaces that would adversely impact human health. The Act does not define lead-contaminated dust and lead-contaminated soil to require the lead contamination in each to be derived from paint. Therefore, Congress did not unambiguously express their intent to limit lead-based paint hazards to contamination the source of which is lead paint. Moreover, EPA`s interpretation of lead-based paint hazards to include lead-contaminated dust and lead-contaminated soil from sources other than lead paint is a permissible construction of the statute. EPA explained

that its decision to cover lead in dust or soil regardless of the source of the lead was based on the fact that there is no good technical basis to determine how much of lead in dust or soil in a specific room or dwelling originated from lead paint. Moreover, the associations conceded that current technology cannot ascertain where lead contamination derives from. In light of this technological limitation, EPA reasonably required disclosure of all lead-contaminated soil and dust regardless of source. *National Multi Housing Council v. United States Environmental Protection Agency*, No. 01-1159, 2002 WL 1232954 (D.C. Cir. June 7, 2002).

PROCEDURAL AND INFORCEMENT ISSUES

EPCRA – Penalty Policy

The Sixth Circuit affirmed an administrative law judge`s (ALJ`s) use of EPCRA`s enforcement response policy (ERP) in assessing penalties against a metal manufacturer for failure to file timely reports regarding its processing of toxic chemicals. The ALJ understood that the ERP was only a policy, not a rule, and that it had discretion to depart from the ERP if there was reason for doing so. The ALJ also gave detailed reasons for applying the ERP in this case and correctly concluded that the manufacturer`s lack of culpability was not a reason for departing from the ERP-recommended penalty, especially given the strict liability nature of EPCRA. Further, the ALJ`s comment that there were no extraordinary circumstances in the case that would suggest deviation from the ERP does not indicate that the ALJ applied too exacting a standard for deviating from the ERP. The ALJ`s statement that the case does not involve extraordinary circumstances must be read as meaning only that this case does not present circumstances that raise policy issues not accounted for in the ERP, and, thus, that departure from the ERP is not warranted. Moreover, the manufacturer misconstrued the substantial evidence standard of review in arguing that the ERP should not have been applied. The manufacturer argued that there was substantial evidence on the record to support its position that the ERP should not have been applied at all, rather than challenging specific factual determinations in the record. Under the substantial evidence standard, the court`s review of the ALJ`s factual determinations is limited to deciding whether those determinations are supported by substantial evidence on the record as a whole--not whether there was substantial evidence in the record for a result other than that arrived at by the ALJ. *Steeltech, Ltd. v. United States Environmental Protection Agency*, No. 00-2008, 273 F.3d 652 (6th Cir. Nov. 28, 2001).

Consent Decree – Stipulated Penalties

The Seventh Circuit affirmed a district court decision ordering a corporate farm to pay penalties it stipulated to in a consent decree it entered with EPA for the restoration of wetlands destroyed by the farm`s construction of a drainage ditch system without a CWA permit. The farm invoked the decree`s dispute resolution clause and sought to modify the consent decree. The district court did not find adequate grounds for modification and imposed penalties against the farm. The stipulated penalty provision in the consent decree is not void as a matter of public policy because it allows for penalties to accrue while the parties engage in the dispute resolution process. Although the farm offers precedent allegedly supporting its claim that the dispute resolution provision is against public policy because it inhibits its right of access to the courts, that precedent does not control and is notably distinguishable from the present case in that the parties in those cases fully remedied the environmental harm, and the accrued penalties at issue were unrelated to continuing environmental violations. In fact, controlling precedent requires imposition of the penalties against the farm. Moreover, the farm cannot now escape the consequences of the consent decree with a public policy argument. The stipulated penalty accrual provision does not apply to a successful dispute resolution claim. Unfortunately for the farm, its claim was unsuccessful, but to excuse it from the stipulated penalties would undermine the consent decree and provide any party to a consent decree a method of delaying performance. In addition, the farm cannot claim that the stipulated penalties were unreasonable since the delay in completion of the work was due to weather conditions beyond its control. The consent decree included a force majeure provision allowing delay due to weather, but the provision required the farm to provide EPA with written notice of such delay. No notice was provided, and the farm cannot now claim that compliance with the schedule was not possible due to the weather. *United States v. Alshabkhoun*, No. 01-1380, 277 F.3d 930 (7th Cir. Jan. 18, 2002).

Attorney-Client Privilege, Work Product

A district court held that an electric utility need not reveal to the federal government calculations and analyses of the utility`s emissions that its scientist and attorneys prepared in response to an EPA suit against it for allegedly violating the CAA`s NSR requirements, but that the utility must reveal calculations performed in the ordinary course of business and the nature of all defenses it will offer to the government`s suit. The utility spent more than $300 million to rebuild eight plants, but it did not seek an NSR permit or comply with the NSR requirements. The government brought suit claiming that the utility`s actions constituted a major modification that triggered NSR requirements, but the utility argued it was exempt from the NSR requirements because the projects did not increase power generation or emissions. During discovery, the government sought the utility`s interpretation of its emissions calculations, analyses, witness testimony, and documents relating to the calculation of utility emissions; the criteria used to determine if the utility`s rebuilding activities resulted in net emissions increases; and the methods used to calculate utility emissions. The utility refused to disclose the information and sought a protective order. The attorney client privilege clearly encompasses the utility`s communication to the attorney for the purpose of obtaining legal advice, and thus covers the communications that the utility`s scientist had with utility attorneys. Similarly, the work product exception applies to the calculations and analyses prepared to evaluate the utility`s possible defenses to the government`s suit. Moreover, the requested documents are not discoverable under the work product hardship exception because the exception only applies to facts, and the documents at issue contain opinions or theories generated from emissions calculations. However, as part of its case management powers, the court can order the disclosure of strategic decisions, and no discovery rule allows a party to withhold preparation and selection of defenses because the defenses may have arisen from attorney-client communications or work product documents. Thus, the utility must provide to the government the basis for its defense by selecting a corporate designee to give a deposition on and produce documents supporting the utility`s interpretation of its emissions calculations and analyses. Further, the designee must provide witness testimony and documents relating to the calculation of utility emissions, the criteria used to determine if the utility`s rebuilding activities resulted in net emissions increases, and the methods used to calculate utility emissions. The corporate designee need not be the utility`s scientist and the designee need not reveal past confidential communications or documents, but the designee must be fully prepared to reveal the utility`s defenses. In addition, the utility cannot withhold revelation of its defenses until the time for expert reports and depositions. *United States v. Duke Energy Corp.*, No. 1:00CV1262, 2002 WL 12717932002 (D.N.C. June 7, 2002) (Eliason, J.).

Expert Witnesses

The Seventh Circuit affirmed a district court`s disqualification of an expert witness and dismissal of a company`s third-party CERCLA complaint against a manufacturer for the reimbursement of cleanup costs stemming from groundwater contamination. At his deposition, the company`s expert witness admitted that he was not an expert in mathematical models of groundwater flow and that the modeling on which he relied for his conclusion that the manufacturer`s plant was within the capture zone for the contamination was done by the expert`s assistants. After the manufacturer moved that the expert be barred from testifying, the company responded with affidavits from the assistants. The district court properly struck the affidavits under Fed. R. Civ. P. 37(c)(1) on the ground that the company`s disclosure of additional expert witnesses was untimely. The district judge was reasonable in regarding the affidavits as expert reports. An expert witness is permitted to use assistants in formulating his expert opinion, and normally they need not themselves testify. Here, however, the assistants exercised professional judgment that was beyond the expert`s ken. Although the expert could have testified that if the manufacturer`s plant was within the capture zone some of the contamination may have come from that plant, the expert could not testify that the plant was within the capture zone. A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty. Further, it is apparent from the affidavits that the expert`s assistants did not merely collect data for him or otherwise perform routine procedures, and that the expert himself lacks the necessary expertise to determine whether the techniques were appropriately chosen and applied. Moreover, the district court was correct in finding that the filing of the expert reports was untimely. There was no justification for not disclosing to the manufacturer the opinions of the assistants. The company should have known that the expert`s expertise did not extend to scientific issues crucial to the prima facie case and was likely to be contested, and the suit was in its seventh year when the judge acted. To have reopened discovery to give the manufacturer its crack at the additional experts would have unreasonably extended the litigation and burdened the manufacturer. Because the affidavits were properly

struck, the expert witness could not testify. And without the expert`s testimony, the company had no case. The district court, therefore, properly granted summary judgment for the manufacturer. *Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, No. 01-1081, 285 F.3d 609 (7th Cir. Apr. 4, 2002).

Judicial Review -- Ripeness

The Fifth Circuit vacated a district court decision holding that the ESA`s take provision was a valid exercise of Congress` enumerated powers because the case does not present a case or controversy under Article III of the U.S. Constitution. An individual that pumps water from the Edwards Aquifer in Texas alleged that the U.S. government and an environmental organization threatened to sue area water pumpers for ESA violations based upon the theory that the pumping of water from the Edwards Aquifer harmed endangered and threatened species and was a "take" under the ESA. The district court concluded that the case was ripe for review and that the individual had standing. On the merits, it held that Congress validly exercised its Commerce Clause and treaty powers in enacting the ESA`s take provision. This suit, however, does not present justiciable issues. The individual failed to demonstrate that there was a specific and concrete threat of litigation against him sufficient to render his declaratory action an actual controversy and thus ripe for judicial review. A notice of intent to sue the individual individually as distinguished from the Edwards Aquifer board could be a sufficiently specific and concrete threat, but the individual failed to demonstrate that he received such a notice. The district court, therefore, was without jurisdiction to decide the case and its decision was vacated. *Shields v. Norton*, No. 00-50839, 289 F.3d 832(5th Cir. Apr. 26, 2002).

Environmental Justice

The Third Circuit held that because Title VI proscribes only intentional discrimination, residents of a predominantly minority community do not have a right to enforce through 42 U.S.C. §1983 EPA`s Title VI §602 disparate impact discrimination regulations against a state agency that issued an air permit to a cement plant. The community already has two Superfund sites and more than twice the number of permitted facilities already emitting air pollution than exist in typical New Jersey zip code areas. Residents of the community filed a complaint against the agency alleging that the agency intentionally discriminated against them in violation of §601 of Title VI by issuing the air quality permit and further asserted that the facility would have an adverse disparate impact on them in violation of §602. A district court granted a preliminary injunction to the residents and found that §602 and EPA`s implementing regulations contained an implied private right of action. Five days later, the U.S. Supreme Court issued *Alexander v. Sandoval*, 532 US 275 (2001), in which it held that Title VI did not create a private right of action to enforce regulations promulgated under §602. The district court then allowed the residents to amend their complaint to enforce §602 through §1983 and issued a supplemental order and opinion continuing the preliminary injunction based on the residents` §1983 claim, holding that *Sandoval* did not bar the plaintiffs from using §1983 to enforce the federal rights in EPA`s Title VI §602 disparate impact regulations. However, disparate impact regulations promulgated under §602 do not create a right that may be enforced through a §1983 action. Based on *Sandoval* and previous Supreme Court cases, the only right conferred by §601 is to be free of intentional discrimination, and §602 limits agencies to effectuating rights already created by §601. Thus, §602 does not grant a right to be free from disparate impact discrimination. Additionally, EPA`s regulations at issue here do more than define or flesh out the content of a specific right conferred on the residents by Title VI. Instead, EPA`s regulations implement Title VI to give the statute a scope beyond what Congress contemplated and, therefore, are too far removed from congressional intent to constitute a federal right enforceable under §1983. *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, Nos. 01-2224, -2296 274 F.3d 771 (3rd Cir. Dec. 17, 2001), cert. denied, 2002 WL 706516, 70 U.S.L.W. 3669 (U.S. June 24, 2002) (No. 01-1547).

TEXAS CASES

In addition to the federal cases, there were state court cases of note, including an opinion from the Houston Court of Appeals construing the state’s Solid Waste Disposal Act.

Supreme Court

Peanut farmers brought action against herbicide manufacturer alleging strict liability, breach of express and implied warranties, and violations of the Deceptive Trade Practice-Consumer Protection Act (DTPA) arising out of claims that mixed application of herbicides damaged peanut crop. The 91st Judicial District Court, Eastland County, Steven R. Herod, entered summary judgment for manufac