ENVIRONMENTAL LIABILITY, ENFORCEMENT & PENALTIES REPORTER™

Volume 25, Number 9
August/September 2015

FOR LAWYERS, CONSULTANTS, AND LENDERS WHO COUNSEL BUSINESS, COMMERCIAL, AND REAL ESTATE CLIENTS

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Subscription Rate: 1 year (11 issues) $765.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 506; Auburn, CA 95604-0506; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

ENVIRONMENTAL NEWS

TEXAS GOVERNOR FILES *AMICUS* BRIEF OPPOSING HOUSTON AIR QUALITY ORDINANCE

Texas Governor Greg Abbott filed an *amicus* brief in support of an industry challenge to a Houston ordinance currently pending before the Texas Supreme Court. The challenge seeks to overturn the appellate court's decision to uphold the ordinance. The Governor's brief argues that ordinance, which generally requires pollution-emitting entities to register with the city, is preempted by state law. Specifically, Governor Abbott argues that the city's ability to enforce its ordinance through criminal citations conflicts with state law. [*BCCA Appeal Group, Inc. v. City of Houston*, Case No. 13-0768 (Texas Supreme Court).]

Factual Background

Under Texas law, the Texas Commission on Environmental Quality (TCEQ) is responsible for administering the Texas Clean Air Act (TCAA), including some provisions of the Texas Water Code (TWC) that govern enforcement of the TCAA. Importantly, under the TCAA, the TCEQ has the sole authority to authorize air emissions, including the authority to issue permits for air containment sources. The TCAA is authorized to adopt and impose fees to fund its regulatory program.

Despite this broad grant of the authority, the TCAA also expressly permits local enforcement and regulation. Specifically, the TCAA allows municipalities to "enact and enforce an ordinance for the control and abatement of air pollution." However, these ordinances must be consistent with the TCAA and the TCEQ's orders and regulations. Localities also have the authority to enforce the TCAA itself, provided that TCEQ must be included as an indispensable party in any civil suit and the locality and TCEQ must share any resulting civil penalties.

In 2007 and 2008, Houston substantially amended its air quality ordinance to add a city-specific air quality program. In part, the ordinance requires pollution-emitters to register with the city and pay a fee. It also requires emitters to comply with various TCAA provisions so that violations of the TCAA are also violations of the ordinance. In addition to civil suits as noted above, any violation of the ordinance can be prosecuted criminally.

The BBCA (Business Coalition for Clean Air) Appeal Group, Inc. (Group) filed a lawsuit to invalidate the ordinance, arguing that it was preempted by state law. The parties ultimately filed cross-motions for summary judgment, and the trial court granted the Group's motion and denied the city's. The city appealed, and the appellate court reversed.

Lower Court Decisions

The appellate court determined that the ordinance was not preempted by state law. Under Texas law, home-rule cities like Houston possess police powers and may regulate any subject unless prevented from doing so by the Texas Legislature. Preemption may be express or implied.

In its decision, the appellate court considered a number of arguments raised by the Group. Applicable to the Governor's *amicus* brief, the Group argued that the enforcement provisions of the ordinance were duplicative of TCEQ's enforcement and could lead to inconsistent enforcement decisions. The Group also argued that the ordinance impermissibly allows the city to enforce ordinance violations criminally.

The appellate court rejected each argument. First, while the ordinance did incorporate some provisions of the TCAA so that TCAA violations would also be ordinance violations, the ordinance would not lead to inconsistent enforcement decisions. Pollution emitters have an important affirmative defense under the ordinance. If their conduct is permitted under the TCAA or by the TCEQ, it cannot be a violation of the ordinance.

Second, the ordinance did not conflict with the TCAA by allowing criminal prosecutions. While the TCAA requires cities to include the TCEQ as an indispensable party in civil suits under the TCAA, this is not cities' exclusive enforcement procedure.

Under the TCAA, cities expressly have the ability to enforce their local air quality programs. This unambiguous language includes criminal prosecutions.

The Group appealed this decision, and the case is currently pending before the Texas Supreme Court.

The Governor's Amicus Brief

Governor Abbott filed an *amicus* brief in support of the Group. The brief focuses exclusively on the enforcement question, urging the Supreme Court to overturn the ordinance as it "turns state law-torts into local crimes." The brief outlines four arguments in opposition to the ordinance.

First, the brief notes that the ordinance's criminal enforcement provisions conflict with state law preferences for strict liability civil tort penalties. The Governor's executive branch has a strong preference for enforcing most minor TCAA violations civilly. The brief argues that once the executive branch makes this selection, it cannot be second-guessed by cities.

Second, the Governor is concerned that the prospect of criminal penalties may interfere with settlement and other efforts at achieving voluntary compliance.

Third, the ordinance would interfere with TCEQ's calculation of civil penalties, which include stiff penalties for violators with past convictions for environmental crimes. Allowing criminal enforcement in the ordinance would make environmental convictions the norm.

Fourth, the ordinance will harm small and local businesses. While large refineries may be able to survive a single criminal violation given its high volume of inspections and other regulatory interactions, a criminal conviction would likely lead to a small business being classified as "unsatisfactory" by TCEQ. This would disqualify the business from participating in TCEQ programs and would lead to higher civil penalties for future violations. In short, the city's criminal enforcement approach conflicts with the state's graduated enforcement approach, causing major problems for companies with relatively minor violations.

Conclusion and Implications

In conclusion, this case is noteworthy for a few reasons. First, while most climate change regulation has focused on national or state action, localities may play an important part in future regulation. Second, this case is a reminder that when localities do regulate in this area, there can be clear tension with federal or state regulators. In those cases, the extent of the local agencies' powers under state law is important and likely dispositive.

A copy of the brief is available at: http://gov.texas.gov/files/pressoffice/TXDepartmentEnvironmentalQuality_Amicus.pdf
(Mala Subramanian)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements—Air Quality

•Philip Joseph Rivkin, a.k.a. Felipe Poitan Arriaga, pled guilty to Clean Air Act (CAA) false statement and mail fraud as part of his role in a scheme to defraud EPA by falsely representing that he was producing millions of gallons of biodiesel fuel. Under the terms of the plea agreement, Rivkin faces more than ten years in prison and will be responsible for $51 million in restitution. Rivkin admitted that from July 2010 to July 2011, he devised a biodiesel fraud scheme to falsely generate renewable fuel credits (renewable identification numbers or RINs) and sold them to oil companies and brokers for more than $29 million. EPA issued Green Diesel, LLC a notice of violation in April 2012, alleging that the company generated more than 60 million invalid biomass-based diesel RINs without producing any qualifying renewable fuel and transferred the majority of these invalid RINs to others. Rivkin was arrested in June 2014 after being expelled from Guatemala for having fraudulently secured Guatemalan citizenship. Rivkin was charged with 68 counts of CAA false statements, wire fraud, mail fraud, and for engaging in monetary transactions in property derived from unlawful activity. The indictment included a notice of forfeiture for $29 million in cash, a Lamborghini, Maserati, a Bentley, a Canadair LTD airplane, and millions of dollars worth of artwork.

•Pioneer Valley Refrigerated Warehouse will settle with EPA for alleged violations of the CAA chemical release prevention requirements, related to its handling of anhydrous ammonia at its Chicopee, Massachusetts cold storage warehouse. Pioneer will pay $41,000 in penalties and spend $322,100 on environmental projects to improve the safety of the surrounding community. Pioneer has already spent $158,000 to bring its facility into compliance with the CAA Risk Management Program (RMP) regulations. The Commonwealth of Massachusetts issued a $33,718 penalty against Pioneer for failure to notify the state of a release of anhydrous ammonia in August 2008 and for failure to respond to a request for information about the release. Under the settlement, Pioneer will provide emergency response equipment to emergency responders within the City of Chicopee, including two types of gas detectors, and funding for five years of calibrating the units. Pioneer will upgrade certain refrigeration equipment to a more protective model and install a computerized control system at the facility. The company will also replace two ammonia liquid pumps at the facility with hermetically sealed pumps, which nearly eliminate the potential for ammonia releases from pump failure. The alleged violations resulted from an onsite inspection by Massachusetts Department of Environment Protection and EPA, which found that Pioneer failed to comply with management requirements of the RMP regulations; failed to accurately evaluate off-site consequences in release scenarios; failed to adequately identify, evaluate, and control hazards; failed to comply with safety information, operating procedures, training, mechanical integrity, compliance audit, and contractor requirements; and failed to have an adequate emergency response program. The EPA action resulted from the Massachusetts Urban Compliance Initiative and followed a referral from the Massachusetts.

•On June 24, 2015, the U.S. Environmental Protection Agency and the U.S. Department of Justice (DOJ) announced a federal Clean Air Act settlement with several Arizona and New Mexico-based utility companies to install pollution control technology to reduce harmful air pollution from the Four Corners Power Plant located on the Navajo Nation near

Shiprock, New Mexico. The settlement requires an estimated $160 million in upgrades to the plant's sulfur dioxide (SO2) and nitrogen oxide (NOx) pollution controls. The settlement also requires $6.7 million to be spent on three health and environmental mitigation projects for tribal members and payment of a $1.5 million civil penalty.

•On June 25, 2014, EPA and the DOJ lodged in U.S. District Court for the Northern District of Alabama a proposed modification of a prior 2006 consent decree with Alabama Power Company. Revisions to the 2006 Consent Decree will require further reductions of sulfur dioxide (SO2) and nitrogen oxide (NOx), from three of the company's coal-fired power plants in Alabama. The proposed modifications, if approved by the court, will resolve the remaining claims in a long-running case that alleged violations of the Clean Air Act's New Source Review program. The pollution reductions will be achieved through the conversion of four units from the use of coal to natural gas, and the retirement of three other units. Alabama Power will also pay a $100,000 penalty and will spend at least $1.5 million on providing electrical charging infrastructure for electric airport service vehicles and passenger cars.

Pursuant to a settlement announced July 15, 2015, the EPA and DOJ will require Interstate Power and Light, a subsidiary of Alliant Energy, to install pollution control technology and meet stringent emission rates to reduce air pollution from the company's seven coal-fired power plants in Iowa. The settlement also requires Interstate Power and Light to spend a total of $6 million on environmental mitigation projects, and pay a civil penalty of $1.1 million to resolve alleged violations of the Clean Air Act. The State of Iowa, Linn County, Iowa, and the Sierra Club joined the United States as co-plaintiffs in the case.

Civil Enforcement Actions and Settlements—Water Quality

•On July 2, 2015, BP announced an agreement in principle with the United States and the five Gulf states to settle the civil claims against the company arising out of the Deepwater Horizon oil spill. BP announced the value of the settlement to be approximately $18.7 billion. The principle financial terms of the agreement are as follows:

A $5.5 billion Clean Water Act penalty, 80 percent of which will go to restoration efforts in the affected states pursuant to a Deepwater-specific statute, the RESTORE Act. This is the largest civil penalty in the history of environmental law.

$8.1 billion in natural resource damages (this includes $1 billion BP already committed for early restoration). BP will also pay an additional $700 million specifically to address any future natural resource damages unknown at the time of the agreement and assist in adaptive management needs. The natural resource damages money will fund gulf restoration projects as designated by the federal and state natural resource damage trustees.

$5.9 billion to settle claims by state and local governments for economic damages they have suffered as a result of the spill.

A total of $600 million for other claims, including claims for reimbursement of natural resource damage assessment costs and other unreimbursed federal expenses due to this incident.

The payments to the United States will be made over time, with interest, and will be subject to parent company guarantees with BP Corporation North America Inc. as the primary guarantor and BP p.l.c. as the secondary guarantor.

A final agreement will take the form of a proposed consent decree that will be submitted for public comment and then court approval.

Indictments Convictions and Sentencing

•On July 8, 2015, Valerii Georgiev, 42, a Russian citizen, and the former chief mate of the ocean cargo vessel M/V Murcia Carrier, was sentenced to a term of three months prison for failing to maintain an accurate oil record book in violation of the Act to Prevent Pollution from Ships (APPS). APPS requires vessels like the M/V Murcia Carrier to maintain a record known as an oil record book in which all transfers and disposals of oil-contaminated waste, including the discharge overboard of such waste, must be fully and accurately recorded.

On April 27, 2014, at the direction of Georgiev, crew members on board the M/V Murcia Carrier dumped overboard several barrels containing some hydraulic oil. While Georgiev disputes the number of barrels dumped into the sea, the government believes that approximately 20 barrels of hydraulic oil were dumped overboard. The dumping occurred in international waters off the coast of Florida while the

vessel was in transit from Costa Rica to New Jersey. The dumping was not recorded in the ship's oil record book. During the course of the Coast Guard boarding, Georgiev denied that dumping occurred and instructed crew members on board the vessel to deny that dumping had occurred.

•On June 17, 2015, Norbulk Shipping UK Ltd, a company in Glasgow, United Kingdom and operator of the M/V Murcia Carrier pleaded guilty failing to maintain an accurate oil record logbook and providing false statements with respect to the vessel's garbage record book. The company was sentenced to pay a fine of $750,000 and placed on probation for three years. The case was investigated by U.S. Coast Guard Sector Delaware Bay and the U.S. Coast Guard Investigative Service. The case was prosecuted by Joel La Bissonniere of the Environmental Crimes Section of the Department of Justice and Assistant U.S. Attorneys Kathleen O'Leary and Matthew Smith of the U.S. Attorney's Office of the District of New Jersey.

On June 26, 2015, Calumite Company LLC, a manufacturer of an additive used in the production of glass, was sentenced to pay a $325,000 fine, serve a two year term of probation and implement an environmental compliance plan that includes an annual environmental compliance training program. The sentence was a result of its September 2014 plea of guilty to two Clean Air Act false statement violations.

Calumite, located near the shores of Lake Michigan in Portage, Indiana, manufactures and sells a powdery substance of the same name to various glass manufacturers. The facility was subject to a Title V Clean Air Act Operating Permit issued by the Indiana Department of Environmental Management (IDEM). Among other things, the permit required that Calumite operate, maintain and monitor several "baghouses" on site that are used to control and minimize emissions of a fine particulates. From Dec. 5, 2008, through late July 2009, Calumite employees filled out daily logs that falsely reflected monitoring readings that were within the range allowed by the permit and caused false information to be submitted to IDEM in the company's quarterly reports. (Andre Monette)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT OVERTURNS EPA'S POWER PLANT AIR TOXICS STANDARDS

Michigan v. U.S. Environmental Protection Agency ___U.S.___, 135 S.Ct. 2699 (June 29, 2015).

The U.S. Supreme Court recently ruled that the U.S. Environmental Protection Agency (EPA) did not properly account for the costs of its emissions regulations on power plants before determining whether regulation of the plants was appropriate and necessary under the Clean Air Act (CAA). In doing so, the Court overturned EPA's emissions standards for power plants.

Background

In 2012, EPA established mercury and air toxics standards (MATS) for coal- and oil-fueled power plants, with the intent of reducing mercury, arsenic, and acid gas emissions. Under the Clean Air Act, EPA is directed to study the air toxics' potential for public health hazards. If EPA finds regulation of these power plants to be "appropriate and necessary after considering the results of the study," then the CAA directs EPA to regulate the power plants under the hazardous air pollutants program in the CAA's § 7412.

EPA completed the necessary study in 1998, and in 2000 concluded that regulation of coal- and oil-fired power plants was "appropriate and necessary." EPA found regulation "appropriate" because power plant emissions of mercury and other hazardous air pollutants posed risks to human health and the environment, and controls were available to reduce these emissions. EPA found regulation "necessary" because the imposition of the CAA's other requirements did not eliminate these risks. EPA also concluded that costs should not be considered as part of the determination of whether power plants should be regulated. Nonetheless, EPA issued a "Regulatory Impact Analysis" alongside its regulation, which estimated that the regulation would cost power plants approximately $9.6 billion per year. EPA could not fully quantify the benefits of reducing power plant emissions of hazardous air pollutants, but to the extent that it could, it estimated that these benefits were worth $4 to $6 million per year. However, the ancillary benefits of the regulation, which include cutting emissions of particulate matter and sulfur dioxide, substantives that are not considered "hazardous air pollutants," resulted in a total benefit of $37 to $90 billion per year. EPA stated that in making its "appropriate and necessary" finding, it did not consider the Regulatory Impact Analysis. After determining that regulation was appropriate and necessary, EPA went on to divide power plants into subcategories and promulgate emissions standards for each.

Petitioners, including 23 states, challenged EPA in the Court of Appeals for the D.C. Circuit on grounds that EPA should have considered costs when deciding whether to regulate power plants. The Court of Appeals upheld EPA's decision not to consider costs. The Supreme Court then granted *certiorari*.

The Supreme Court's Decision

In a 5-4 decision, the Supreme Court ruled for petitioners, holding that EPA acted in error when it did not consider costs at the first step of its regulatory process, determining that regulation of power plants was appropriate and necessary. Justice Scalia wrote the majority decision, in which Justices Roberts, Kennedy, Thomas and Alito joined. Justice Thomas also filed a concurring opinion. Justice Kagan filed the dissenting opinion, in which Ginsburg, Breyer, and Sotomayor joined.

'Reasoned Decisionmaking' Requires Consideration of Costs

The majority decision began with the tenet that federal administrative agencies must engage in "reasoned decisionmaking" and consider all relevant factors when taking action. The Court framed EPA's position as refusing to consider whether the costs of its

decision to reduce power plant emissions of hazardous air pollutants outweighed the benefits. EPA's disregard of costs rested, the Court said, on its interpretation of § 7412 directing EPA to regulate power plants if it finds such regulation appropriate and necessary. Reviewing this interpretation under the standard set out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, which directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers, the Court nonetheless noted that even under this deferential standard agencies must operate within the bounds of reasonable interpretation.

"Appropriate" is a broad and all-encompassing term, the Court reasoned, that naturally and traditionally includes consideration of all the relevant factors. Under this definition of "appropriate," an agency may not entirely fail to consider an important aspect of the problem. Here, because the regulation would result in an economic cost several times the environmental and health benefit, the Court held that cost was a relevant factor and an important aspect of the problem. Failure to consider cost when determining whether to regulate power plants under § 7412 was therefore in error.

EPA argued that it was not required to consider cost when first deciding to regulate power plants, because it can and did consider cost when setting specific emissions thresholds later on. The Court disagreed:

> The question before us . . . is the meaning of the 'appropriate and necessary' standard that governs the initial decision to regulate. And as we have discussed, context establishes that this expansive standard encompasses cost.

EPA's Appropriate and Necessary Finding Cannot Be Supported by Ancillary Benefits that EPA Admits It Did Not Consider

While EPA estimated that benefits to health and the environment from the reduction of hazardous air pollutants were worth approximately $4 to $6 million per year, EPA also estimated that ancillary benefits that would occur as a result of the regulation would total between $37 to $90 billion per year. When ancillary benefits are included, the ratio of economic cost ($9.6 billion per year) to health and environmental benefit (up to $90 billion per year) would theoretically support EPA's finding that regulation was appropriate and necessary, even when considering costs.

However, this was not enough for the Court, which instead stated:

> …we may uphold agency action only upon the grounds on which the agency acted. Even if [EPA] *could* have considered ancillary benefits when deciding whether regulation is appropriate and necessary . . . it plainly did not do so here.

Because EPA stated that it did not consider costs or ancillary benefits when making its "appropriate and necessary" finding, the Court would not consider this argument either. Instead, it concluded that EPA interpreted § 7412 unreasonably when it deemed costs irrelevant to the threshold decision to regulate power plants, and reversed the judgment of the Court of Appeals for the D.C. Circuit.

Conclusion and Implications

EPA's power plant MATS rule is considered a landmark regulation. The Supreme Court's reversal and remand means that that the Court of Appeals must now decide what happens to the MATS rule next. The Court of Appeals may vacate EPA's regulation entirely, or it may ask EPA to address specific issues in the procedural process, while leaving the MATS rule intact for the most part. While this decision is certainly a roadblock to implementation of the regulation, the decision notably does not call into question EPA's authority to regulate power plants under the Clean Air Act's hazardous air pollutants program. Instead, the Supreme Court ruled only that EPA must consider costs before it decides to regulate power plants in this way. Therefore, the MATS rule is most likely not dead, and is expected to be issued again in the coming years, this time with a cost benefit analysis supporting any appropriate and necessary finding.

The Supreme Court's decision is available online at: https://scholar.google.com/scholar_case?case=13651378523071723154&hl=en&as_sdt=6&as_vis=1&oi=scholarr
(Mala Subramanian)

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THIRD CIRCUIT AFFIRMS EPA'S ISSUANCE OF A MULTI-STATE CLEAN WATER ACT TMDL FRAMEWORK FOR REDUCING POLLUTION TO THE CHESAPEAKE BAY

American Farm Bureau Federation v. U.S. Environmental Protection Agency, ___F.3d___, Case No. 13-4079 (3rd Cir. July 6, 2015).

The Third Circuit Court of Appeals has upheld the U.S. Environmental Protection Agency's (EPA) comprehensive pollution-reduction framework for the Chesapeake Bay (Bay) watershed, holding that EPA's Total Maximum Daily Load (TMDL) for nitrogen, phosphorous, and sediment in the watershed was a legitimate policy choice within EPA's statutory authority. A number of trade associations and organizations representing agricultural industries (petitioners) challenged the TMDL for the Cheasapeake Bay, arguing that it impermissibly encroached on states' rights. The Third Circuit rejected these arguments, finding that EPA has authority under the federal Clean Water Act (CWA) to implement a TMDL program aimed at coordinating outflows in multiple states.

Background

The CWA establishes a "cooperative federalism" framework for regulating discharges of pollutants into waters of the United States. Pollution is categorized as coming from two types of sources—"point" and "nonpoint" sources. Point sources are discrete sources of pollutants such as discharges from a wastewater treatment plant. Nonpoint sources are diffuse sources such as runoff from farms or roads. The CWA bestows primary responsibility for regulating point sources on EPA, requiring EPA to establish "effluent limitations." States generally regulate nonpoint sources.

States also are required under the CWA to set water quality standards for the waters within their borders and to provide EPA with a list of waters for which point source limitations are not sufficient to bring the water body within the applicable standards. The CWA provides that for each body of water on this list, the state must submit to EPA for review and approval a proposed TMDL that accounts for both point and nonpoint sources. If EPA disapproves the proposed TMDL, EPA assumes responsibility for ensuring the applicable water quality standards are met.

EPA and the seven states comprising the Chesapeake Bay watershed—Virginia, West Virginia, Pennsylvania, Maryland, Delaware, New York, and the District of Columbia (Watershed States)—agreed that EPA would draft the TMDL for the Bay in the first instance. In 2010, EPA published the TMDL for the Bay, a comprehensive framework for pollution reduction designed with the specific intent of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity" of the Bay. In 2011, the Farm Bureau sued EPA, claiming that EPA's TMDL for the Bay exceeded EPA's statutory authority by going beyond a single number to include a timeline for reducing the levels of pollutants discharged into the Bay, by including allocations in the TMDL, and requiring "reasonable assurances" from the seven impacted states that they could meet the standards outlined in the TMDL. The district court granted summary judgment in favor of EPA.

The Court of Appeals' Decision

On appeal, the petitioners argued that the CWA is unambiguous in its definition of "total maximum daily load" and that a TMDL:

> …can consist only of a number representing the amount of a pollutant that can be discharged into a particular segment of water and nothing more.

According to the petitioners, even if allocations, target dates, and reasonable assurances are useful in calculating the TMDL, the final TMDL may not:

> …specify a distribution of pollutants from point and nonpoint sources or deadlines for meeting the target reductions in pollutant discharge, nor may the EPA in drafting the document obtain any assurance from states that they will meet the targets.

The Third Circuit unanimously disagreed.

Chevron Analysis

After first confirming *sua sponte* both petitioners' standing to challenge the TMDL and the ripeness of the dispute, the Third Circuit began by noting that its review was governed by the two-step analysis for reviewing agency actions articulated in *Chevron v. NRDC*, 467 U.S. 837 (1984). Under this analysis, the court first examines whether the intent of Congress is clearly articulated in the statute. If the statutory language is unambiguous, the analysis ends, and the agency must follow the clear and unambiguous dictates the statute. If the statute is ambiguous, then the agency's interpretations will be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."

The Third Circuit found that the CWA was silent on a number of the key issues presented, including: (i) how the agency can account for point and nonpoint sources; (ii) whether EPA can consider and express a timeframe to attain water quality standards; and (iii) whether EPA can require reasonable assurances from the states that they will meet goals set by the TMDL. The court also concluded that the word "total" is susceptible to numerous meanings and that interpreting "total maximum daily load" as only requiring a single number (and nothing more) is "in tight tension" with the CWA's goal of "providing cooperative framework for states and the federal Government to work together to eliminate water pollution."

The court additionally rejected petitioners' contention that the words "total maximum daily load" could not be interpreted as done by EPA without a clear statement of Congressional intent allowing federal involvement in the realm of state policymaking. Petitioners argued the TMDL impermissibly granted EPA authority to make land-use and zoning regulations—traditionally a power vested with the states. The court found this argument to be illogical because the TMDL:

> (1) makes no actual, identifiable land-use rule and (2) proposes regulatory actions that are specifically allowed under federal law.

The court thus concluded under the first step of the *Chevron* analysis that the statutory language was ambiguous and susceptible to the interpretation adopted by EPA.

Under step two of the *Chevron* analysis, the Third Circuit concluded that establishing a comprehensive, watershed-wide TMDL, complete with allocations among different kinds of sources, a timetable for implementation, and reasonable assurances that the plan will actually be implemented, was "reasonable and reflects a legitimate policy choice by the agency in administering a less-than-clear statute." The court further found that petitioners' reading of the CWA would "stymie" EPA's ability to coordinate among the competing possible uses of resources that affect the Bay. The court reasoned that it could not conclude that Congress had proffered authority under the CWA that was inadequate to achieve with reasonable effectiveness the purpose for which the statute was enacted: to protect the nation's waters.

Conclusion and Implications

In its opinion, the Third Circuit upheld EPA's interpretation of ambiguous provisions of the CWA to permit implementation of a multi-state framework for reducing pollution to the Chesapeake Bay. The Court did so over the objections of the petitioners that EPA's statutory interpretation encroached on state's rights without express Congressional authorization. The Court's decision may support similar action by EPA under the CWA in other parts of the country. The Court's decision also may be relied on in the future as supporting EPA actions that arguably encroach on states' rights in the absence of express Congressional authorization.

(Drew Clearly Jordan, Duke K. McCall, III)

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NINTH CIRCUIT FINDS PRIVATE-PARTY JUDICIALLY APPROVED SETTLEMENT MAY TRIGGER CERCLA'S STATUTE OF LIMITATIONS FOR CONTRIBUTION CLAIMS

Asarco, LLC v. Celanese Chemical Company, ___F.3d___, Case No. 12-16832 (9th Cir. July 10, 2015).

On March 23, 2011, plaintiff Asarco LLC (Asarco) filed suit against CNA Holdings LLC (CNA) only alleging a cause of action under the Comprehensive Environmental Response, Compensation and Liability Act, (CERCLA) § 113(f). Asarco was a corporate successor to a former owner of a Superfund site; CNA a corporate successor to a lessee that operated a sulfur dioxide plant located on the same site. Previously in 1989, Asarco, and its predecessor-in-interest, entered into a judicially-approved settlement concerning the same environmental response costs for which Asarco was pursuing via its contribution action against CNA. CNA filed a motion in summary judgment alleging that Asarco's claim was untimely under CERCLA § 113(g)(3)(B), providing that contribution actions cannot be commenced more than three years after entry of judicially-approved settlement "with respect to such costs." Asarco alleged that its 1989 settlement did not trigger the statute of limitations as it was not a judicially-approved settlement including the United States or a state, and that if its claim was subject to the statute of limitation, Asarco's claim was revived by its subsequent 2008 bankruptcy settlement with the California Department of Toxic Substances Control (DTSC) that "fixed the costs of such a cost-recovery settlement." The U.S. District Court granted summary judgment to CNA, and the Ninth Circuit affirmed.

Background

Asarco's former smelter site consisted of some 66 acres on San Pablo Bay in Contra Costa, California. The smelter operated until 1970, depositing smelting byproducts on Asarco's property and the tideland leased from the California State the Lands Commission (Lands Commission). After the smelter closed, Asarco leased a 1.33-acre parcel containing a sulfur dioxide plant that Asarco had previously operated to Virginia Chemicals, a corporate successor to CNA. CNA leased and operated the sulfur dioxide plant from 1972 to September 1977. As a result of CNA's operation, the soil at the site was contaminated with sulfuric acid, as discovered by the Regional Water Quality Control Board (RWQCB) in April 1976. RWQCB issued a cleanup and abatement order in August 1976.

In 1977, Asarco sold its portion of the former smelter site to Wickland Oil Company, which transferred title to its subsidiary, Wickland Oil Terminals (Wickland). Subsequent state agency requests for further investigation of the former smelter site led to a determination that hazardous substances were present on this site, and further investigation and remediation were required.

In 1983, Wickland filed suit in U.S. District Court alleging a CERCLA § 107(a) environmental response cost recovery claim against Asarco and the Lands Commission. On January 16, 1989, Wickland, Asarco, and the Lands Commission entered into a settlement that was presented to the District Court as an "Agreement for Entry of Consent Judgment." The 1989 settlement was approved by the District Court and was entered as a Consent Judgment on March 13, 1989.

The 1989 Wickland settlement encompassed the allocation of costs required to remediate the Virginia Chemicals acid-affected area. The settlement provided that the settling parties:

> …desire to settle and compromise the [Wickland lawsuit], and to establish a procedure for allocating past and future costs attributable to the events and conditions underlying the [Wickland lawsuit].

On August 9, 2005, Asarco filed for relief under Chapter 11 of the U.S. Bankruptcy Code, ceasing to pay its allocated response cost share under the 1989 Wickland settlement. In response, the Lands Commission and DTSC asserted claims for Asarco's share of past and future smelter site environmental response costs, including those arising from the Virginia Chemicals acid-affected area.

In January 2008, Asarco moved for approval of a negotiated settlement of the response costs claims as-

serted by the Lands Commission and DTSC.

Notably, Asarco's parent company filed an objection to the settlement, contending that the settlement included costs to remediate contaminated groundwater that Asarco had nothing to do with.

Asarco's parent withdrew the objection after negotiating a stipulation with the parties regarding the $33 million Asarco was to pay DTSC under the 2008 Bankruptcy settlement. The Bankruptcy Court approved this settlement on March 31, 2008.

On March 23, 2011, Asarco filed its lawsuit against CNA. CNA moved for summary judgment on the ground that Asarco's sole contribution cause of action was barred by the statute of limitations under CERCLA § 113(g)(3)(B). On June 6, 2012, the District Court granted summary judgment in favor of CNA.

The Ninth Circuit's Decision

CERCLA § 113(g)(3)(B) provides in relevant part:

> No action for contribution for any response costs or damages may be commenced more than 3 years after…(B)…entry of a judicially-approved settlement with respect to such costs or damages.

Federal courts have consistently relied on the unambiguous words of § § 113(g)(3)(B) to bar untimely CERCLA § 113(f) contribution actions. In *Detrex v. Ashland Chemical*, 2002 U.S. Dist. LEXIS 27214 (E.D. Mich. 2002), aff'd 85 Fed. Appx. 462 (6th Cir. 2003) (*per curiam*), the District Court held that:

> The clear language in § 113(g)(3)(B) is that the three-year statute of limitations begins to run when a court enters a judicially approved settlement. There is no dispute that the court entered a judicially approved Consent Decree, signed by plaintiff, in November 1996. One of the triggering events in § 113(g)(3)(B) has occurred. Plaintiff's contribution claim began to accrue when the Court entered the Consent Decree. (*Detrex, supra*, 2002 U.S. Dist. LEXIS 27214 at 16-17.)

The *Detrex* court further held that:

> …[t]he statute of limitations for contribution claims is three-years from the date a judgment, order or judicially-approved settlement is entered. Plaintiff's claims under CERCLA are time-barred.

In *RSR Corp. v. Commer. Metals Co.*, 494 F. Supp.2d 690 (S.D. Ohio 2006), aff'd 496 F.3d 552 (6th Cir. 2007), the District Court stated:

> It bears emphasis that, 'if the words of the statute are unambiguous, the judicial inquiry is at an end, and the plain meaning of the text must be enforced.' *United States v. Plavcak*, 411 F.3d 655, 661 (6th Cir. 2005) (internal quotation marks and citation omitted)...the express language of § 113(g)(3) unambiguously provides that an action for contribution under CERCLA cannot be initiated more than three years after the date of the entry of a judicially-approved settlement with respect to response costs or damages. (*RSR Corp.*, *supra*, 494 F. Supp.2d at 695.)

The District Court concluded:

> …that § 113(g)(3) is applicable and that it began to run on April 12, 1999, more than three years before this litigation was initiated. Therefore, Plaintiff's claim for contribution is barred by the statute of limitations.

The Ninth Circuit here found that:

> Asarco argues that only judicially approved settlements involving the United States or a State may trigger the statute of limitations under § 9613(g)(3)(B), and that private-party judicially approved settlements cannot trigger the…[three year] statute of limitations. We hold that private-party judicially approved settlements may trigger…[the three year] statute of limitations.

Examining the Settlements in *Asarco*

The Ninth Circuit held that in examining the statute as a whole:

> …the plain language of the statute of limitations does not limit triggering 'judicially approved settlements' to those involving the United States or a State….[the triggering event

includes] judicially approved settlements involving the United States or a State, but is not limited to those types of settlements on its face.

The court's reading of the statute would not result in superfluity. The Ninth Circuit found Asarco's arguments "…are distinct in that they confer certain rights upon parties that settle their liability with the government. These rights may encourage parties to settle with the government early…" to facilitate cleanup efforts that CERCLA was designed to promote. The court further founds that settlements that do not involve the United States or a state do not confer settlement protection "Whether or not a private party 'judicially approved settlement' is also a 'judgment' that would trigger…" the statute of limitations "does not necessarily render the provision superfluous."

Here, the court found Asarco's contribution cause of action against CNA sought contribution for any response costs or damages. The 1989 Wickland Settlement addressed a broad scope of "response costs and damages" to include costs to investigate and/or abate actual or threatened environmental contamination caused by or related to the Virginia Chemicals Area. Recovery of such costs would trigger CERCLA's three-year statute of limitations for contributions claims based on the 1989 Wickland Settlement.

The Ninth Circuit also rejected Asarco's allegation that its 2008 bankruptcy settlement revived its barred contribution claim, or created a new one against CNA. The response costs Asarco sought contribution for arose out of its payment of $33 million to DTSC under the 2008 Bankruptcy Settlement—such were already allocated in the 1989 Wickland Settlement. Asarco admitted as much and had to face the fact that its bankruptcy settlement could not revive a contribution claim, which was barred in 1992.

Conclusion and Implications

Asarco's costs were allocated pursuant to the 1989 Wickland Settlement. The court found that the only fact that changed when Asarco went into bankruptcy was that Asarco got to liquidate its one-third cost under the 1989 Wickland Settlement. In the end, the court found that shile a bankruptcy proceeding may permit the discharge of some or all claims against a debtor—it is not a means for reinvigorating an untimely contribution claim.
(Thierry Montoya)

NINTH CIRCUIT DENIES PETITION FOR REVIEW CLEARING THE WAY FOR EPA TO RETROACTIVELY REVISE CLEAN AIR ACT STATE IMPLEMENTATION PLANS

Association of Irritated Residents v. U.S. Environmental Protection Agency, 790 F.3d 934 (9th Cir. 2015).

Earlier this summer, the Ninth Circuit Court of Appeals denied a petition for review of the U.S. Environmental Protection Agency's (EPA) retroactive correction to ozone-related New Source Rules (NSR) for agricultural sources in California's State Implementation Plan (SIP) pursuant to the federal Clean Air Act.

Background

Prior to 2003, California law exempted major agricultural sources from the Clean Air Act's New Source Review requirements. In 2003, legislation was enacted in California to amend the California Health & Safety Code, to narrow the regulatory exemptions to certain minor agricultural sources. Agricultural operations produce volatile organic compounds (VOCs) which are a category of precursor pollutants for ground-level ozone. California's San Joaquin Valley (Valley) is out of attainment for the federal 8-hour ozone standard. In developing its ozone reduction strategy, the San Joaquin Valley Unified Air Pollution Control District (Air District) issued NSR Rules 2020 and 2201. The Rules affected all new and modified sources of air pollution whether major or minor agricultural operations and they were submitted as part of the California SIP. In other words, the Air District's NSR Rules failed to reflect the changes codified by the 2003 legislation and over-regulated agriculture. EPA approved the NSR Rules in 2004.

The Citizen Suit

Under § 304 of the CAA, plaintiffs filed citizen suits against dairy farms that were minor agricultural sources, alleging that they were violating the EPA-approved California SIP rules in the Valley. California then submitted SIP revisions to EPA, and in 2013, EPA retroactively revised the scope of its 2004 approval, after receiving an interpretation from the California Attorney General that the 2003 state legislation did not give the Air District the authority to apply the 2004 NSR Rules to certain minor agricultural sources. EPA cited CAA § 110(k)(6) as authority to make these changes. Petitioners challenged this action and asked the court to vacate the amended rule, 40 C.F.R. § 52.245. Representatives of several agricultural interests intervened in the case.

Petitioners requested that the Court of Appeals vacate 40 C.F.R. on two grounds. First, petitioners claimed that § 110(k)(6) of the CAA authorizes the EPA to correct only its own erroneous approval or disapproval and does not give the EPA authority to retroactively limit or amend a SIP. Second, petitioners asserted that even if the EPA has authority retroactively to revise its approval of the 2004 SIP, it did not need to correct the approval because (a) the plain meaning of the 2003 legislation does not exempt minor agricultural sources from obtaining permits and offsets under the District Rules and (b) the legislation's Savings Clauses grant the District with the authority to regulate minor agricultural sources regardless of the other provisions.

The Ninth Circuit's Ruling

The Ninth Circuit Court of Appeals resolved two issues in favor of EPA: (i) whether EPA's initial determination that it had erred in approving the 2004 SIPs had not violated the plain meaning of the statute and (ii) whether EPA reasonably interpreted CAA § 110(k)(6) to authorize a retroactive amendment to the SIP.

The Issue of Error in Approving the 2014 State Implementation Plan

As to the error issue, the Court found that the provisions at issue—the legislation's offset provision and saving clauses—were ambiguous. Applying *Chevron* deference, the court limited itself to the question of whether EPA's interpretation was reasonable. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). The court held that while it need not defer to either the California Attorney General's or the California Air Resources Board's legal opinions, these opinions formed a permissible basis for EPA's determination that its approval of the 2004 SIP was error.

Retroactive Amendment to the State Implementation Plan

The Court of Appeals also affirmed EPA's authority to retroactively amend its SIP approvals, noting that it was an issue of first impression. Section 110(k)(6) authorizes EPA to correct its erroneous approval, disapproval, or promulgation of SIP actions "in the same manner" as the approval, disapproval, or promulgation. Petitioners argued that the CAA only authorizes approvals or disapprovals of plans—not retroactive amendments. The court held that the EPA's interpretation that "in the same manner" was a procedural and not substantive requirement was reasonable and that the statute did authorize EPA to retroactively amend the SIP so long as the correction occurred in a consistent manner pursuant to the statute.

Conclusion and Implications

How EPA will respond to this case is yet to be seen. From a credibility and efficiency standpoint, arguably it is in EPA's best interest to be a scrutinizing agency in each of its rule making processes and only utilize retroactive corrections when necessary. However, this case does seem to provide EPA with a "second chance" position in its rulemaking processes.

The court's order is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2015/06/23/13-73398.pdf
(Kristin Garcia)

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FOURTH CIRCUIT HOLDS THAT CASINO CANNOT ASSERT NPDES PERMIT SHIELD DEFENSE TO DEFEAT RCRA CITIZEN SUIT

Bruce Goldfarb v. Mayor and City Council of Baltimore, Maryland, ___F.3d___, Case No. 14-1825, (4th Cir. July 1, 2015).

Plaintiffs filed a citizen suit pursuant to the federal Resource Conservation and Recovery Act (RCRA) seeking to force defendants to cleanup environmental contamination, which allegedly posed an "imminent and substantial endangerment to human health and the environment." Defendant, CBAC Gaming, purchased the site from the City of Baltimore to construct the Horseshoe Casino (Casino), part of the city's attempt to revitalize the area. The Horseshoe Casino site had been the location of various industrial uses over the years, including Maryland Chemical Co., Inc.'s (Maryland Chemical) previous ownership where it conducted "chemical manufacturing and/or bulk chemical storage, repackaging and distribution." Based on environmental assessments performed in the 1990s and early 2000s, plaintiffs alleged that hazardous water contaminates portions of the Horseshoe Casino site and has been migrating to the middle branch of the Patpsco River. The city, CBAC Gaming, and Maryland Chemical (collectively: defendants) moved to dismiss plaintiffs' complaint under Rule 12(b) alleging, in relevant part, that CBAC Gaming's NPDES permit and other construction-related approvals preclude plaintiffs' RCRA action. The U.S. District Court granted defendants' motion to dismiss; the Court of Appeals reversed and remanded. The Court held that the lower court erred in viewing the RCRA anti-duplication provision as a jurisdictional restriction, rather:

> …the anti-duplication provision is more in the nature of an affirmative defense like the statute of limitations or the failure to exhaust administrative remedies, which are to be timely asserted by a defendant who chooses to do so. (internal citations omitted.)

Background

Plaintiffs' complaint sought injunctive relief and penalties against defendants to address imminent and substantial endangerment presented by chlorinated volatile organic compounds (VOCs), and heavy metal contamination in soil vapors and groundwater at or under the Horseshoe Casino which had been left unremediated, and which has, and will continue to, migrate off-site. Plaintiffs' complaint alleged that as the current owners and operators of the Horseshoe Casino: CBAC, Baltimore City, and Maryland Chemical are still subject to RCRA's hazardous water management requirements.

Plaintiffs also alleged that defendants contributed and/or are contributing to the ongoing contamination at Horseshoe Casino by excavating, moving, mixing, backfilling and/or grading contaminated soils and/or groundwater at the Casino Site, which allegedly exacerbated the contamination in soils, soil vapors and/or groundwater.

RCRA's citizen suit provision, set forth at 42 U.S.C. § 6972, authorizes private citizens to file two types of actions: (1) actions for an alleged violation of a RCRA regulation, standard, requirement, prohibition, permit or order (hereinafter an "§ 6972(a)(1)(A) claim"), and (2) actions to address solid or hazardous waste which "may present an imminent and substantial engenderment to health or the environment" (hereinafter an § 6972(a)(1)(B) claim). 42 U.S.C.A. § 6972(a)(1). There are two "mandatory conditions precedent to commencing suit under the RCRA citizen suit provision" which are enumerated at 42 U.S.C. § 6972(b): (1) pre-suit notice and (2) the diligent prosecution bar. (*Hallstrom v. Tilamook Cty.*, 493 U.S. 20, 31 (1989); *Chesapeake Bay Foundation, Inc. v. Severstal Sparrows Point, LLC*, 794 F.Supp.2d 602, 613-14 (D. Md. 2011).):

> Thus, a suit pursuant to subsection (a)(1)(A) must be based on an *ongoing violation*, whereas a suit under (a)(1)(B) may be predicated on a [qualifying] *past [or present]* violation. (quoting from *Sanchez v. Esso Standard Oil Co.*, 572 F.3d 1, 7 (1st Cir. 2009).)

The Fourth Circuit's Decision

Claims against CBAC

Plaintiffs alleged that although:

> CBAC agreed to engage in certain remedial activities as part of the construction of the casino and its ancillary facilities, those undertakings did not comply with RCRC and so did not adequately address contamination at the Casino Site. …[and that]…CBAC's construction activities would continue to contribute to and exacerbate existing contamination in soil and groundwater.

CBAC alleged that these claims should be dismissed under RCRA's anti-duplication provision. (42 U.S.C. § 6905(a).):

> Nothing in this chapter shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act..., the Safe Drinking Water Act..., the Marine Protection, Research and Sanctuaries Act of 1972..., or the Atomic Energy Act of 1954...except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts. (42 U.S.C. § 6905.)

Pursuant to § 6905(b):

> The Administrator [of the U.S Environmental Protection Agency (EPA)] shall integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of the Clean Air Act..., the Federal Water Pollution Control Act..., the Federal Insecticide, Fungicide, and Rodenticide Act..., the Safe Drinking Water Act..., the Marine Protection, Research and Sanctuaries Act of 1972..., and such other Acts of Congress as grant regulatory authority to the Administrator. Such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed in this chapter and in the other acts referred to in this subsection. (42 U.S.C. § 6905.)

Courts have interpreted the anti-duplication provision as preventing simultaneous and inconsistent regulation of a particular activity or substance under RCRA and another environmental statut—such as the Clean Water Act. (citing to *Coon v. Willet Dairy, LP.*, 536 F.3d 171, 174 (2nd Cir.2008).)

Accordingly, the anti-duplication provision:

> …is more in the nature of an affirmative defense like the statute of limitations or the failure to exhaust administrative remedies, which are to be timely asserted by a defendant who chooses to do so. (citing to *Hosanna-Tabor Evangelical Lutheran Church & Sch. V. EEOC* 132 S.Ct. 694, 709 no.4 (2012).)

In the end, the Court of Appeals found that it would have been in error to dismiss the complaint as to CBAC for lack of subject matter jurisdiction as a defense to liability under RCRA based on section 6905(a) as that statute does not implicate jurisdiction

Claims against the City

Baltimore City claims that all of the allegations against it with respect to plaintiffs' § 6972(a)(1)(B) claims are based on "mere passive conduct" and therefore fails to state a claim for relief as a matter of law. Here, however, the complaint includes extensive factual allegations regarding Baltimore defendants' active involvement in the construction activities at the Horseshoe Casino Site and their contribution to the imminent and substantial engagement that is present at the Horseshoe Casino Site and Waterfront Parcels. Specifically, plaintiffs' complaint alleged that on or before March 2009 through December 31, 2009, and during the city's ownership and operation of the Horseshoe Casino Site, the city excavated, moved, mixed, stockpiled, backfilled and/or graded contaminated soils and groundwater at the Horseshoe Casino Site in order to, among other things, address abandoned pits used during previous industrial operations which contained contaminated groundwater and/or rainwater and remove at least one UST located at the Russell Street Properties. (complaint at 28, 117, 121-125.)

The court found that these allegations:

> …assert specific, identifiable actions attributed to the city that allegedly violated RCRA-based mandates, have gone uncorrected, and continue unabated such that the city is still 'in violation of' those mandates.

Claims against Maryland Chemical

The Court of Appeals also held that plaintiffs' complaint sufficiently alleged that Maryland Chemical's past operations led to the current contamination of the site, which migrated off-site.

Conclusion and Implications

The Fourth Circuit Court of Appeals find that plaintiffs' complaint was sufficiently pled to proceed on allegations that defendants were required to comply with RCRA's hazardous waste laws and regulations.
(Thierry Montoya)

D.C. CIRCUIT SUSTAINS 'AS-APPLIED' CLEAN AIR ACT CHALLENGES TO EPA REGULATION GOVERNING INTERSTATE POLLUTION

EME Homer City Generation, L.P. v. U.S. Environmental Protection Agency, ___F.3d___, Case No. 11-1302 (D.C. Cir. July 28, 2015).

The U.S. Court of Appeals for the District of Columbia Circuit held that a U.S. Environmental Protection Agency (EPA) regulation setting emissions controls on certain states that release pollution into neighboring states was invalid as applied to those states. The D.C. Circuit heard the consolidated petitions for review, which included a number of states as petitioners, on remand from the U.S. Supreme Court. Although the Supreme Court rejected a facial challenge to the regulation in an earlier opinion, that opinion expressly authorized petitioners to argue that the regulation set overly strict standards as applied to particular states. The petitioners did so on remand, and the D.C. Circuit agreed with their arguments. The court granted the petitions for review on those issues and remanded the case to the EPA without *vacatur*.

Background

The D.C. Circuit's opinion involved the interaction between a statute, a regulation, and an earlier Supreme Court opinion in the same case. In 2011, the EPA promulgated the regulation at issue, known as the "Transport Rule," pursuant to its authority from Congress in the Clean Air Act. The federal Clean Air Act (CAA) authorizes the EPA to set individual National Ambient Air Quality Standards (NAAQS) for particular pollutants. The EPA then identifies "nonattainment areas" within states that have not attained those standards. The EPA identifies those particular areas by setting up different receptor sites in each state that measure different kinds of pollutants in the air. States with nonattainment areas must then (a) address the nonattainment problem in a State Implementation Plan (SIP) submitted for the EPA's approval, or (b) accept a Federal Implementation Plan (FIP) from the EPA.

The Transport Rule

The Transport Rule implements a provision of the Clean Air Act that addresses pollution traveling from one state to another. The state emitting the pollution is known as an "upwind state" and the state receiving the pollution is known as a "downwind state." The "good neighbor provision" of the Clean Air Act requires all SIPs from upwind states to contain adequate provisions prohibiting emissions into a downwind state if those emissions will "contribute significantly" to the downwind state's nonattainment of NAAQS. The good neighbor provision also requires SIPs to contain provisions prohibiting upwind states from emitting pollution if the pollution "interfere[s] with maintenance" of NAAQS in downwind states. The "contribute significantly" prong of the good neighbor provision received the majority of the court's attention.

The Transport Rule focuses on three particular pollutants, and it contains a two-step process to deter-

mine whether and to what extent a state must reduce those pollutants pursuant to the good neighbor provision. First, the EPA identified the upwind states that are "contributing significantly" to another state's nonattainment. The EPA defined "contributing significantly" as causing more than 1 percent of the pollution at a nonattainment receptor site in another state. If an upwind state was contributing significantly to a receptor site's nonattainment in a downwind state, then the EPA considered that state "linked" to the receptor. Second, the EPA determined how much those linked states must reduce their emissions. The EPA implemented those reductions by imposing uniform reductions on all of the upwind states linked to any receptors in downwind states. The EPA calculated how much pollution each upwind state could eliminate if its pollution sources applied reduction technologies at different cost thresholds, then set particular thresholds for each of the three pollutants covered by the Transport Rule.

These uniform requirements led the petitioners to bring a facial challenge the Transport Rule, arguing, among other things, that the rule could potentially lead to "over-control" of emissions beyond what was necessary for the downwind states to achieve attainment of the NAAQS. A divided panel of the D.C. Circuit sustained that facial challenge the first time around. The Supreme Court then reversed, reasoning that the EPA must have some leeway to balance the possibilities of over-controlling and under-controlling interstate emissions. However, the Supreme Court did note, in language repeatedly quoted by the D.C. Circuit in the instant opinion, that if:

> …any upwind State concludes it has been forced to regulate emissions . . . beyond the point necessary to bring all downwind States into attainment, that State may bring a particularized, as-applied challenge to the Transport Rule. *EPA v. EME Homer City Generation, L.P.*, __ U.S. __, 134 S. Ct. 1584, 1609 (2014).

Petitioners accepted that invitation and brought as-applied challenges on remand. They also raised other, ultimately unsuccessful challenges.

The D.C. Circuit's Decision

The court began its analysis by setting up the framework prescribed by the Supreme Court's earlier opinion. The Supreme Court stated that the good neighbor provision of the Clean Air Act only authorizes the EPA to prohibit emissions if the emissions contribute significantly to a downwind state's nonattainment of a NAAQS. This means that the EPA cannot require an upwind state to reduce emissions by more than necessary for all downwind states to which the upwind state is linked to achieve attainment. An upwind state is over-controlled by the EPA if all of its linked downwind receptor sites would achieve attainment even if the Transport Rule imposed less stringent emission controls on the upwind state.

The court then applied this framework to the individual states using the EPA's data regarding the costs of emission controls and their concomitant reductions in emissions. The court determined that, according to the EPA's own data, the Transport Rule's application to many upwind states were impermissible under the Supreme Court's framework.

The EPA argued that the court should nonetheless reject the petitioners' challenges. It argued that a receptor site exceeding a NAAQS may be the result of incidental effects not related to the over-control of upwind states. It also argued that imposing less stringent controls on certain states would undermine the benefits from uniformity in the Transport Rule. The court rejected both of these arguments, simply stating that they conflict with the clear command in the Supreme Court's earlier opinion. Under the court's application of the Supreme Court's framework, certain states were over-controlled regardless of the arguments that the EPA raised. The Transport Rule's controls over those states were thus impermissible.

Rather than vacating the emissions budgets that the court held invalid, the court decided to remand the case without *vacatur*. The court did so because vacating those budgets could substantially disrupt the trading markets developed around emissions budgets set in the Transport Rule. The court did note, though, that it expects and urges the EPA to move promptly in revising the invalidated budgets.

Conclusion and Implications

The D.C. Circuit ultimately held that the uniform controls imposed on many states under the Transport Rule were invalid as applied to those states. The court did not vacate those emissions budgets, instead opting to have the EPA promptly revise them on re-

mand. When doing so, the EPA must ensure that the Transport Rule does not impose emissions controls on an upwind state beyond the minimum required to achieve NAAQS attainment in its linked downwind states.
(Danielle Sakai, John Balla)

TENTH CIRCUIT FINDS COLORADO'S RENEWABLE ENERGY MANDATE DOES NOT VIOLATE COMMERCE CLAUSE

Energy and Environment Legal Institute v. Epel, ___F.3d___, Case No. 14-1216 (10th Cir. July 13, 2015).

The U.S. Court of Appeals for the Tenth Circuit has held that Colorado's Renewable Energy Standard does not violate the Commerce Clause of the U.S. Constitution, rejecting a challenge to the law by the Energy and Environment Legal Institute (EELI). EELI argued that by promoting renewable energy sources Colorado's renewable energy law harms out-of-state coal producers that supply out-of-state electric utilities. EELI claimed this was so because Colorado imports a portion of its electricity needs from outside the state. Concluding that these claimed effects on out-of-state coal producers did not violate the commerce clause, the Tenth Circuit affirmed the district's court's grant of summary of judgment.

Background

Colorado's Renewable Energy Standard requires electricity generators to ensure that 20 percent of the electricity they sell to Colorado consumers comes from renewable sources. Because Colorado is a net importer of electricity, the statute applies both to utilities in Colorado and out-of-state utilities that supply electricity to the grid serving eleven states and parts of Mexico and Canada. Because of its effects on commerce outside the state, EELI argued that the law ran afoul of the Commerce Clause of the U.S. Constitution.

The Commerce Clause vests the U.S. Congress with the power to "regulate Commerce [...] among the several states." The U.S. Supreme Court has interpreted this language as prohibiting state laws that unduly interfere with interstate commerce, "a sort of judicial free trade policy." The line of Supreme Court cases establishing this doctrine are generally referred to as the Court's "dormant" commerce clause jurisprudence and can be divided into three categories.

First, beginning with *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the Supreme Court has held that state laws, which have a negative effect on interstate commerce are invalid if the law doesn't provide sufficient offsetting local benefits. This requires the courts to perform:

> …[an] 'ineffable', all-things-considered sort of test, one requiring [...] compar[ing] wholly incommensurable goods for wholly different populations (measuring the burdens on out-of-staters against the benefits to in-staters).

Second, the Court has held in cases such as *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), that state laws which "'clearly discriminate' against out-of-staters" are invalid, when the discrimination is not demonstrably justified by a valid factor unrelated to economic protectionism.

In a third line of precedent that finds its roots in *Baldwin v. G.A.F. Selling, Inc.*, 294 U.S. 511 (1935), the Court has held that state laws are *per se* invalid under the Commerce Clause then they contain:

> (1) a price control or price affirmation regulation, (2) linking in-state prices to those charged elsewhere, with (3) the effect of raising costs for out-of-state consumers or rival businesses.

The *Pike* test is considered as a "kind of a 'rule of reason' balancing test providing the background rule of decision" while *Philadelphia* and *Baldwin* tests apply to a subset of cases where the challenged conduct is almost always likely to prove problematic and a more laborious, all-things-considered inquiry is not necessary.

EELI challenged Colorado's renewable energy law under all three tests in U.S. District Court, which rejected each challenge. On appeal, EELI limited its challenge to the argument that the law was unconstitutional under *Baldwin* and its progeny.

The Tenth Circuit's Decision

Examining Colorado's Renewable Energy Standard, the Tenth Circuit found that it did not share any of the three essential characteristics that mark cases like *Baldwin*: It is not a price control or price affirmation regulation, it does not link in-state energy prices to prices charged outside Colorado, and it is not clear that it will disadvantage out-of-state consumers or businesses. Colorado's renewable energy mandate only requires that a portion of the energy that utilities feed in Colorado's power grid must be produced from renewable sources. The court noted that, as non-price regulation, the law might be amenable to scrutiny under the generally applicable *Pike* balancing test or reviewed for discrimination issues under *Philadelphia*, but *Baldwin's per se* rule only applies to state laws explicitly regulating prices and discriminating against out-of-state consumers or producers—only such obvious inimicality to interstate commerce would warrant scrutiny under the *Baldwin* test.

With respect to the likely effects on interstate commerce, the court concluded that negative price effects for out-of state consumers or producers not could not be expected. Indeed, the only effect of Colorado's law might be to raise prices for in-state consumers. The court noted that the law will hurt all fossil-energy producers serving Colorado (both within and outside state) equally, while all renewable energy producers serving Colorado's power grid will benefit equally. Out-of-state consumers of fossil fuel generated energy might even benefit from the law because the higher demand for renewable energy in Colorado might reduce the demand for and price of fossil-fuel generated electricity.

The Tenth Circuit rejected EELI's attempts to read *Baldwin* more broadly to prohibit all state regulation with the effect of controlling conduct beyond the boundaries of the state. According to the Tenth Circuit, such an expansive reading of *Baldwin* would raise the question whether the courts:

> have to strike down [all] state health and safety regulations that require out-of-state manufacturers to alter their design or labels."

The court also noted that the U.S. Supreme Court had emphasized in *Pharm. Research & Mfrs. Of Am. v. Walsh*, 538 U.S. 644, 699 (2003) that the *Baldwin* line of cases applies only to price-regulation statutes, a conclusion the Ninth Circuit also recently reached in *Assoc. des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013).

Conclusion and Implications

The Tenth Circuit declined to interpret the *Baldwin* line of cases as advocated by EELI, which in the court's view would turn the *Baldwin* test "into a weapon far more powerful than *Pike* or *Philadelphia*." The court did not reach the question whether Colorado's Renewable Energy Standard might run afoul of the other Dormant Commerce Clause tests. But based on the court's discussion of the laws interstate effects, it appears that any such challenge is unlikely to succeed.

(Bastian Laemmermann, Duke K. McCall, III)

D.C. CIRCUIT FINDS CLEAN AIR ACT VEHICLE EMISSION STANDARDS MUST BE BASED ON 'COMMERCIALLY AVAILABLE' FUEL

Energy Future Coalition v. U.S. Environmental Protection Agency,
___F.3d___, Case No. 14-1123 (D.C. Cir. July 14, 2015).

Several biofuel producers (petitioners) sued the U.S. Environmental Protection Agency (EPA) to approve E30, a biofuel containing some 30 percent ethanol, as a test fuel. EPA adopted regulations requiring vehicle manufacturers to test the emissions of new vehicles. Vehicle manufacturers must conduct emissions testing using a "test fuel." (40 C.F.R. § 1065.701(a).) Under that regulation, the test fuel must be fuel that is "commercially available." This regulation requires that vehicles are tested under circumstances which reflect the actual current driving conditions under which motor vehicles are used, including conditions relating to fuel Although petitioners admit that E30 is not yet "commercially available," they allege that EPA's test rule is arbitrary and capricious. The D.C. Circuit denied the petition.

Background

The Clean Air Act (CAA) authorizes EPA to regulate air pollutant emissions from "new motor vehicles or new motor vehicle engines." (42 U.S.C. §§ 7521-7590.) Automobile manufacturers cannot sell new motor vehicles without certificates of conformity, [§ 7522(a)(1)], which can only be obtained from EPA through testing proving that the vehicles will meet applicable emission standards. (*Id.*, 7525(a)(1).) The CAA requires EPA:

> …to insure that vehicles are tested under circumstances which reflect the actual current driving conditions under which motor vehicles are used, *including conditions relating to fuel*, temperature, acceleration, and altitude. (42 U.S.C. § 7525(h).)

To meet this mandate, EPA has issued regulations governing emissions test and test fuel specifications--encompassing an array of engines and vehicle types. (*See,* 40 C.F.R. Parts 86, 1065, and 1066.) Manufacturers must test within these limits to include use of fuel specified by EPA or and EPA authorized alternative fuel. (*See,* 40 C.F.R. §§ 86.113-94(g), 1065.701(c).)

EPA has the limited ability to issue a waiver to approve a fuel that is not "commercially available." (*See*, 42 U.S.C. § 7545(f)(4).) Specifically, EPA may issue a waiver if it finds:

> ….that such fuel or fuel additive ... will not cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission standards with respect to which it has been certified pursuant to §§ 7525 and 7547(a) of this title. (*Id.*; *see also*, *Motor Vehicle Mfrs. Ass'n v. U.S. EPA,* 768 F.2d 385, 387-90 (D.C. Cir. 1985) (waiver depends on proof that fuel will not damage emissions systems of any "vehicles in the national fleet.")

A blend of gasoline of 10 percent ethanol, commonly referred to as "E10," is now the predominant fuel in this country. Here, petitioners sought to compel EPA to approve E30, a fuel containing about 30 percent ethanol, for use as a test fuel—fuel, admittedly, not "commercially available," as defined by EPA's test rule.

The D.C. Circuit's Decision

Petitioners prevailed on the threshold questions of standing and ripeness.

Regarding the merits, the court upheld EPA's requirement that test fuels be "commercially available."

EPA's emissions program is designed to ensure that testing accurately reflects the vehicle's performance under actual driving conditions. (*See,* 79 Fed. Reg. at 23,421 (stating goal of "making test fuel more representative of expected real-world fuel.")

> The mobile source program would not function as Congress intended unless, when EPA certifies that a vehicle meets applicable emission standards, there is reasonable assurance that the vehicle actually will do so when driven on the Nation's roadways. This is how EPA's program prevents vehicles from contributing to excessive air pollution." (Respondent's Brief, 2015 WL 661312, page 40.)

The court shot down petitioners' argument that the test fuel regulation creates a catch-22. The argument failed because EPA's test fuel regulation is not the source of any "catch-22," rather:

> …to the extent a so-called catch-22 exists-which has been neither established nor concede-it is the result of the statutory scheme adopted by Congress.

Conclusion and Implication

Petitioners argued that EPA's foundationless interpretation of the test fuel rule will harm their ability to produce next-generation vehicles without the fear that EPA will prevent them from certifying the fuel efficiency of such vehicles on grounds that the fuel is not yet commercially available. As the court noted, however, the "catch-22" nature of EPA's determination is not based on its own regulations, but comes from the CAA itself.

(Thierry Montoya)

D.C. CIRCUIT REFUSES TO REVIEW CLEAN AIR ACT EARLY CHALLENGES TO CLEAN POWER PLAN

In re Murray Energy Corp., 788 F.3d 330 (D.C. Cir. 2015).

The U.S. Court of Appeals for the D.C. Circuit has recently denied a petition seeking to enjoin the U.S. Environmental Protection Agency (EPA) from issuing a final rule restricting carbon dioxide (CO_2) emissions from existing power plants under the federal Clean Air Act (CAA). Murray Energy Corporation (Murray), later joined by additional parties (together: petitioners), filed a petition for a writ of prohibition and judicial review on the same day the EPA published the proposed emissions rule, arguing that EPA's actions were both extraordinary—promulgating a regulation that would reorder the country's electrical power system, impact reliability and electricity costs, and impose immediate obligations on states—and illegal. Petitioners asserted that the court's intervention was warranted prior to the issuance of a final rule because the agency's actions were *ultra vires* and contained legal conclusions that were final and reviewable. The court disagreed.

Background

On June 18, 2014, EPA published a proposed rule under § 111(d) of the CAA establishing state-specific CO_2 standards and requiring states to develop plans to address greenhouse gas emissions from existing fossil fuel-fire electric generating units. The rule undertakes to reduce CO2 emissions from the power sector to 30 percent of 2005 levels by 2030. EPA received over two million comments on the proposed rule.

EPA previously had promulgated, in February 2012, rules establishing a national emission standard for hazardous air pollutants from coal- and oil-fired electric generating units under § 112 of the CAA. Challenges to this standard for hazardous air pollutants were rejected by the D.C. Circuit two months before EPA published the proposed rule for CO_2 emissions. Although the CAA, as published in the U.S. Code appears to prohibit EPA from mandating under § 111(d) state-by-state emissions from a source category already regulated under § 112, EPA stated in the preamble to the § 111(d) rule that it has authority to regulate CO_2 emissions from electric generating units already regulated under § 112 for hazardous air pollutants pursuant to the EPA's "construction of the ambiguous provisions in CAA § 111(d)(1)(A)(i)." The referenced ambiguities stem from drafting errors that arose when both House and Senate drafts of the 1990 CAA Amendments were enacted despite differing and conflicting language. Only the House version, which prohibits double regulation of existing sources, was published in the U.S. Code. Nevertheless, EPA asserted it may correct this clerical error and construe the ambiguous provision to authorize the regulation of CO_2 under CAA § 111(d).

Under these circumstances, Murray Energy Corporation, the largest privately-owned coal company in the United States and the fifth largest coal producer in the country, petitioned the Court on June 18, 2014 to issue a writ prohibiting EPA from promulgating the final rule and to hold unlawful and set aside the EPA's legal conclusions regarding its authority to regulate existing sources under both § 111(d) and § 112.

The court consolidated these challenges with claims brought by various states separately challenging a 2011 CAA settlement agreement among EPA and several other states and environmental groups, which established a timeline for EPA to decide whether to issue a rule restricting CO_2 emissions from existing power plants.

The Court of Appeals' Decision

The Majority's Analysis

The majority concluded, in an opinion authored by Judge Kavanaugh, that it did not have authority to hear the petitoners' challenges because petitioners sought review of proposed rules. Both the CAA and the Administrative Procedure Act provide that a court only has jurisdiction to review final agency action. Under *Bennett v. Spear*, 52 U.S. 153 (1997), final agency action necessarily entails (1) the consummation of the agency's decision making process; and (2) the determination of rights or obligations or imposition of legal consequences. Noting that peti-

tioners are "champing at the bit to challenge EPA's anticipated rule," and asking the Court of Appeals to "do something they candidly acknowledge [it has] never done before," the majority rejected all three arguments proffered by petitioners to overcome the Court of Appeals' long-standing finality rule.

Petitioners first contended that the Court of Appeals has authority under the All Writs Act to issue an extraordinary writ when an administrative agency is acting beyond its authority, notwithstanding the general principle that affected parties may only appeal final agency actions. Petitioners further emphasized the urgency of early review because "they [were] already incurring costs in preparing for the anticipated final rule." The Court of Appeals rejected this argument holding that issuance of extraordinary writs under the All Writs Act must be *in aid of* the Court of Appeals' jurisdiction, as the act does not enlarge the issuing court's jurisdiction. The Court of Appeals had no jurisdiction to review the proposed agency action, even if hardship may result from delay.

Second, petitioners argued that EPA's statements regarding its legal authority to regulate CO_2 emissions in the preamble to the proposed rule and accompanying legal memoranda constitutes final agency action subject to judicial review. The Court of Appeals found this argument to be without merit holding instead that the agency's statements about its legal authority—still open to public comment at the time of their publication—were merely proposed views of the law.

The Court of Appeals also rejected petitioners' third and final argument in favor of review stemming from the states' separate challenge to the 2011 CAA settlement agreement. The state petitioners contended that the settlement agreement obligated the EPA to issue a final rule restricting CO_2 emissions from existing power plants, thus constituting a final agency action and allowing for "a backdoor ruling from the Court of Appeals that EPA lacks legal authority." The Court of Appeals found that the settlement did not obligate EPA to issue a rule, but merely established a timeline for doing so. The Court of Appeals further concluded that the state petitioners lacked standing because they were not parties to the agreement and their challenge was untimely, exceeding the statute of limitations by nearly two years.

The Concurring Opinion

Judge Henderson filed a concurring opinion to distance herself from the majority's "cramped view" of the Court of Appeals' extraordinary writ authority. Judge Henderson opined that:

> …once an agency has initiated 'a proceeding of *some* kind' that may result in an appeal to [the] Court of Appeals, the matter is 'within [its] appellate jurisdiction—however prospective of potential that jurisdiction might be.

She thus concluded that because the D.C. Circuit would have authority to review the final rule, it had authority to issue a writ of prohibition in the interim given its "potential jurisdiction." Judge Henderson nevertheless found that it would be inappropriate to do so given the circumstances of the case because EPA could promulgate a final rule before the Court of Appeals' opinion issued, effectively negating petitioners' claims that delaying review would be inconvenient and costly.

Conclusion and Implications

The D.C. Circuit declined to reach the merits petitioners' challenges to the proposed rule. Petitioners' case was predicated on the extreme and unusual nature of the proposed rule at issue—not only was the proposed rule unprecedented, according to petitioners, "fundamentally reordering the way we use energy, from plant to plug," but it was *ultra vires* under the plain language of the U.S. Code. While the Court of Appeals was unpersuaded by these arguments, Judge Henderson's concurrence does leave open the possibility that the Court of Appeals might hear a challenge to a proposed rule under the right circumstances in the future. Because EPA released the final rule, known as the "Clean Power Plan," on August 3, 2015, shortly after the D.C. Circuit's denial of the challenge to the proposed rule in this case, it is likely the court will have an opportunity to address the legal merits of EPA's rule in the near future.

(Kelly M. Gorton, Duke K. McCall, III)

SEVENTH CIRCUIT UPHOLDS CONSENT DECREE REQUIRING WATER DISTRICT TO SATISFY WATER-QUALITY REQUIREMENTS RELATED TO CONSTRUCTION OF TUNNEL AND RESERVOIR PROJECT

U.S., et al. v. Metropolitan Water Reclamation District of Greater Chicago, ___F.3d___, Case Nos. 14-1776 & 14-1777 (7th Cir. July 9, 2015).

The Seventh Circuit Court of Appeals has held a Consent Decree requiring the Metropolitan Water Reclamation District of Greater Chicago (District) to meet certain water-quality requirements under the federal Clean Water Act (CWA) was a reasonable settlement that demonstrated diligent prosecution under 33 U.S.C. § 1365(b)(1)(B). Therefore, the intervening plaintiffs, which were all private environmental organizations, were not only bound by the Consent Decree but also precluded from litigating the same matters covered by the Consent Decree.

Background

In 1975, the District began constructing the Tunnel and Reservoir Plan (TARP) to impound water until it could be cleaned up and safely released. The TARP consists of large-diameter underground tunnels to collect runoff water and sewage during rainfall and several reservoirs that are currently under construction. The CWA prohibits the District from discharging "pollutants" unless authorized by permits. The permits governing releases from the District's system impose three kinds of conditions: (1) discharged water must have minimum oxygen levels; (2) must keep solid matter under a specific level, and (3) must provide some form of rudimentary treatment.

Pursuant to §§ 301 and 309 of the CWA, the United States and the State of Illinois (collectively: plaintiffs) filed suit against the District, alleging that some of the District's water overflows did not meet one or more of the three conditions. Plaintiffs sought an order requiring the District to improve the TARP's performance, accelerate the TARP completion date, and increase the containment and mitigation of overflows in the interim. After the complaint was filed, the District Court permitted the Alliance for the Great Lakes and four other environmental organizations (collectively: Alliance) to intervene.

The complaint was accompanied by a proposed Consent Decree that had been negotiated between the District and pollution-control agencies. The Consent Decree required the District to finish the TARP, satisfy operational criteria after construction, monitor the system's performance, create additional measures if needed to comply with the CWA and applicable requirements in the interim, and maintain the decree in force until the District Court concludes that the District has complied with the CWA. The Alliance opposed this decree, arguing that it "requires the District to do too little and takes too long even for what it accomplishes." The District Court, however, approved the proposed decree and held that it bound the Alliance.

The Seventh Circuit's Decision

The Seventh Circuit began its analysis by affirming the U.S. District Court's decision that the decree binds the Alliance. Under § 1365(b)(1)(B), no private litigation may be "commenced" if the EPA or a state "has commenced and is diligently prosecuting a civil…action" involving the same matter the private litigant wants to raise. The court held that a Consent Decree demonstrates diligent prosecution if it is a reasonable settlement that is likely to bring about compliance with the CWA.

The Alliance argued that the decree was unreasonable and not likely to bring about compliance with the CWA. First, the Alliance, citing a 1994 study and testimony from one of the District's consultants, claimed that heavy rainfall would overwhelm the TARP. The court, however, noted a recent EPA study, which indicated the TARP would work during average and above-average rainfall years, and recent data that suggested an average of less than two overflow events a year in the Chicago area. In light of these competing predictions, the court stated that the best way to decide between such predications is to see what happens. Therefore, the court held that the District Court's wait-and-see approach was reasonable.

Second, the Alliance argued the Consent Decree itself concedes that the TARP will not work because it authorizes untreated discharges under certain

circumstances, which the Alliance claimed would occur during heavy rainstorms. The court, however, looked to the CWA itself, which allows for discharges when authorized, which means that if the EPA and Illinois Pollution Control Board authorize untreated discharges when there is no alternative, then there is no violation of the CWA.

Third, the Alliance argued that the decree would not work because it permits the release of floatables in excess of the allowable quantity under the EPA's Combined Sewer Overflow Control Policy adopted in 1994. The court held that the District Court's decision, which concluded that the District would be in compliance with the CWA after completing the TARP, was not clearly erroneous. Given the limitations imposed by the design of the District's sewer system and the TARP, the court held that the decree sought to use realistically available options to deal with floatables. In addition to the District's two pontoon boats, the decree requires it to add two uniquely-designed skimmer boats to keep floatables under control and to add a boom around one outfall that has frequent discharges. The court held that in light of the current infrastructure, such requirements did not show "a lack of diligent prosecution or a substantively unreasonable outcome."

The Court of Appeals also noted several other requirements under the decree, including requirements that the District complete the reservoirs on schedule or pay as much as $5,000 a day for failure to do so, provide enough on-site water treatment capacity, adopt a "green infrastructure" program that will reduce the amount of water flowing into the system when it rains, and install extra pumps if necessary to move water faster from reservoirs to treatment plants. If monitoring reveals that these goals and requirements are not being met, the decree requires the District to create and implement a new plan that will. Given the terms and conditions of the decree, the court held that the District Court did not abuse its discretion in holding that the decree "carried a reasonable prospect of success." The court concluded that the Consent Decree demonstrates diligent prosecution under § 1365(b)(1)(B), and thus the outcome of the government suit filed by plaintiffs was equally conclusive for private claims asserted by intervenors like the Alliance.

Conclusion and Implications

The Seventh Circuit's holding affirms that § 1365(b)(1)(B) applies to private litigants such as intervenors in a government suit. It also reveals some of the factors courts will use when addressing whether a settlement or Consent Decree demonstrates diligent prosecution under § 1365(b)(1)(B), especially in the context of water quality requirements related to the containment and discharge of wastewater and runoff from rainfall. These factors include the current infrastructure and limitations of the existing system, the limits of knowledge as to what will happen once a system is fully constructed, and the costs of proposed alternatives. The court's analysis, in particular, provides parties involved in similar suits with guidance as to how they can arrive at settlements or Consent Decrees that satisfy § 1365(b)(1)(B), and thereby protect their ability to settle disputes without later interference from private parties seeking to litigate the same matters.
(Danielle Sakai, Thomas Oh)

DISTRICT COURT FINDS GOVERNMENT CONTRACTOR LIABLE UNDER CERCLA FOR 100 PERCENT OF REMEDIATION COSTS AT DEFENSE MANUFACTURING SITE

TDY Holdings, LLC et al. v. U.S., et al.,
___F.Supp.3d___, Case No. 3:07-CV-787-CAB-BGS (S.D. Cal. July 29, 2015).

The U.S. District Court for the Southern District of California entered judgment in favor of the United States, the U.S. Department of Defense, and the Secretary of Defense (collectively: the Government) ruling that 100 percent of the past and future remediation costs at a manufacturing site for government defense contracts in San Diego (Site) be allocated to TDY Holdings, LLC and TDY Industries, LLC (collectively: TDY). TDY sought an equitable allocation of the response costs it had and will incur for the cleanup of the Site from the Government under the Comprehensive Environmental Response Compensa-

tion and Liability Act (CERCLA). The Government counterclaimed for an equitable allocation of the response costs.

Background

Ryan Aeronautical Company (TDY's predecessor) manufactured aircraft parts at the Site starting in 1939. Ryan was a prime and subcontractor to the Government during World War II and continued to solicit military contracts through the end of the 20th century.

Following closure of TDY's manufacturing operations in 1999, the California Regional Water Quality Control Board (RWQCB) ordered a Site-wide investigation to identify areas requiring remediation because the Site had become contaminated with three hazardous substances—chromium compounds, chlorinated solvents, and polychlorinated biphenyls (PCBs)—during its six decades of manufacturing operations.

TDY acknowledged its responsibility for the costs incurred to investigate and remediate the Site under CERCLA but sought contribution from the Government as an "owner of the facilities" for the Government's equitable share of those expenses. In 2011, the District Court granted TDY's motion for partial summary judgment finding that the Government was a "past owner" of the Site as defined by CERCLA. This matter was set for a 12-day bench trial to allocate response costs between TDY and the Government, after which the District Court issued the instant ruling.

The District Court's Decision

The District Court entered judgment in favor of the Government by allocating 100 percent of the past and future responses costs to TDY for the remediation of the Site. In making this judgment, the District Court relied on a lengthy findings of fact dealing with the nature and source of the contaminants at issue and applied three "Gore" factors used to determine the equitable allocation of costs. The "Gore" factors used were the contribution and involvement of each party in the discharge, release, or disposal of hazardous material, and the care exercised by the parties with respect to the hazardous materials concerned.

Owner/Operator Liability Analysis

The District Court first acknowledged that it was undisputed that the Government benefitted from TDY's manufacturing at the Site, owned some of the equipment related to the contamination, and knew of TDY's production processes and maintenance practices that released contaminates into the environment. The critical issue for the District Court, however, was control over the disposal of the contaminants at the Site. Even though the Government owned equipment used by TDY to manufacture products, the District Court found that it was not the equipment itself that caused contamination but the manner in which equipment was operated and maintained that resulted in the contamination.

Chromium contamination, for instance, occurred because TDY personnel under the direction of TDY management did not actively prevent spills of chromium solutions or remove spilled chromium solutions from the floor while processing parts. The Government owned equipment itself neither caused the contamination nor was contamination the inevitable result of the Government's requirement that chromium processing be employed in the manufacture of parts.

Likewise, the cause of the chlorinated solvent contamination was determined to be TDY's careless storage practices, its failure to clean up spills of the liquid solvent during the manufacturing process, and poor maintenance of a sewer line used to dispose the solvents. The Government recommended the use of chlorinated solvents to degrease parts and owned vapor degreasers used by TDY, but those facts standing alone were not the direct cause of the contamination. PCB contamination, lastly, occurred primarily due to inadequate maintenance and repair of Government-owned transformers by TDY such as the failure to promptly clean leaks, construction of berms that were insufficient to contain leaks, and not taking adequate steps to prevent fluids flowing into storm drains.

The District Court also rejected TDY's efforts to portray the Government as an "operator" of Site facilities directing all manufacturing operations that resulted in the contamination. The evidence was not persuasive that the Government managed the operation of the Site, particularly with regard to operations having to do with the leakage and disposal

of hazardous waste. Government personnel did not supervise plant management and the Government lacked responsibility for plant maintenance, waste management, the disposal of chemical waste, and the implementation and enforcement of environmental compliance policies and procedures at the Site.

No evidence was offered, in addition, suggesting that the TDY plant was directly operated by the Government. TDY was never ordered to operate as a military defense plant. TDY, to the contrary, voluntarily sought Government work by repeatedly bidding on military contracts for TDY's own financial benefit. TDY's own witnesses, moreover, testified that TDY controlled production processes and TDY had responsibility for the use, storage, and disposal of hazardous materials.

Acknowledgment of Liability

The District Court concluded by addressing TDY's remaining arguments suggesting that the Government's payment of TDY's expenses to comply with environmental costs constituted an acknowledgement of the Government's responsibility for remediation costs and that contamination resulting from services performed in support of a national defense program should be borne by the Government. These arguments were dismissed by the District Court as meritless. Customers who indirectly pay for a businesses' environmental fee by purchasing a product do not acknowledge responsibility for remediation expenses if the business discharges pollutants into the environment. Furthermore, unlike cases where the Government commandeered a manufacturing plant or the United States was made aware that byproducts were pollutants and sanctioned disposal of waste, the situation here is not comparable because TDY sought out the Government contracts and the contaminants were not known to be harmful at the time of use.

Manufacturing Operations and Maintenance Trumped other Facts

In sum, although both the Government and TDY were "owners of facilities," the District Court ultimately found that the contaminants at issue entered the environment as result of manufacturing operations, maintenance and disposal policies, and storage practices on the Site. Accordingly, TDY's role as the Site operator responsible for handling, storage, and disposal of the contaminants was the most relevant factor in allocating all of the response costs to TDY.

Conclusion and Implications

The District Court found that TDY was responsible for 100 percent of all remediation costs associated with the Site. In making this determination, the District Court looked beyond the facts that the Government was an "owner" of the Site and Government contract specifications required manufacturing processes involving the contaminants, and instead focused on each party's role in causing the contamination of the Site. This case, therefore, demonstrates that a strong factual record attributing the causes of contamination to a respective party can result in the assignment of full liability to the party responsible for causing the contamination.
(Danielle Sakai, Benjamin Lee)

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