

# HIGH COURT ROUNDUP: RECENT, PENDING ENVIRONMENTAL CASES

This article was originally published on *Law360* on September 19, 2014.

by Anthony B. Cavender and Amanda G. Halter



**Anthony B. Cavender**

Environment, Land Use & Natural Resources  
+1.713.276.7656  
anthony.cavender@pillsburylaw.com



**Amanda G. Halter**

Environment, Land Use & Natural Resources  
+1.713.276.7665  
amanda.halter@pillsburylaw.com

Anthony Cavender is Senior Counsel and Amanda Halter is a Senior Associate in Pillsbury Winthrop Shaw Pittman's Houston office.

Scaling back considerably from its 2012 term, the U.S. Supreme Court issued only a few rulings affecting environmental law during last year's term. With significant pronouncements regarding the U.S. Environmental Protection Agency's Clean Air Act regulatory authority among them, however, the Supreme Court's Term was far from uneventful. Several more cases slated for its upcoming term presage rulings across a broad spectrum of environmental and administrative law issues.

**Major Environmental Cases Decided this Term**

Two CAA rulings, *EPA v. EME Homer City Generation LP* and *Utility Air Regulatory Group v. EPA*, attracted widespread interest. Both cases are expected to dramatically affect the EPA and states' administration of the CAA over cross-state pollution, state and federal implementation plans and greenhouse gas regulation.

**Clean Air Act Cases**

In *EPA v. EME Homer City Generation*, issued April 24, 2014, the Supreme Court reversed the D.C. Circuit, which vacated the EPA's latest attempt to develop a rule implementing the "Good Neighbor Provision" of the CAA. The Good Neighbor Provision obligates the EPA to protect downwind states against air pollutants emitted by plants located in "upwind" states.

The EPA's latest revision was known as the Cross-State Air Pollution, or Transport Rule. The D.C. Circuit held the regulation exceeded the EPA's authority by vesting too much responsibility in the agency relative to the states. Justice Ruth Bader Ginsburg, writing for the majority in a 6-2 decision, held the EPA reasonably interpreted the Good Neighbor Provision and that its interpretation was entitled to Chevron deference, which directs courts to defer to federal agencies' statutory interpretations unless they are unreasonable.

Moreover, the CAA gives the EPA the discretion to employ a "cost-effective" approach to reduce the amount of pollutants emitted by upwind states. Although the lower court cited a number of practical difficulties such states would face in implementing the Transport Rule, the Supreme Court rejected this argument, stating that "the practical difficulties cited by the D.C. Circuit do not justify departure from the CAA's plain text." Without elaboration, the Supreme Court also noted that there are limits to how far the EPA can go to compel reductions in upwind states.

The case was remanded to the D.C. Circuit, and the court observed that there are additional challenges to the Transport Rule pending in the federal courts of appeal. The most important implication of this

decision may well be its potential to breathe new life into the EPA's regional cap-and-trade program, which could also reinvigorate the CAA's policy of cooperative and collaborative federalism.

On June 23, 2014, the Supreme Court issued its ruling in a companion case, *Utility Air Regulatory Group v. EPA*. In an opinion authored by Justice Antonin Scalia, the Supreme Court held that the EPA exceeded its statutory authority under the CAA when it interpreted the law to require stationary sources of air pollution to obtain CAA Prevention of Significant Deterioration, or Title V, permits solely on the basis of their GHG emissions.

Following the Supreme Court's decision in *Massachusetts v. EPA*, the EPA promulgated GHG emission standards for new motor vehicles and determined that these "mobile source" standards would automatically apply to stationary sources emitting GHGs, thus triggering permitting requirements under the EPA's PSD and Title V programs. The Supreme Court held that this interpretation was at such odds with the text of the CAA that "it does not merit Chevron deference."

Consequently, the Tailoring Rule, which was issued to ameliorate the consequences of the EPA's GHG permitting requirements, was set aside. However, the Supreme Court agreed with the EPA that it could require a source to apply Best Available Control Technology to GHG emissions from major stationary sources that are subject to the agency's PSD and Title V permitting programs. Even so, Justice Scalia noted that the application of the BACT regulation was subject

to reasonable limitations. "BACT cannot be used to order a fundamental redesign of the facility," nor can it be used to require "reductions in a facility's demand for energy from the electric grid."

Both these CAA decisions suggest little tolerance for interpretations of the law that stray meaningfully from its plain text.

### **An Important CERCLA Decision**

In *CTS Corp. v. Walburger*, decided June 9, 2014, the Supreme Court issued an important ruling that affects the ability of litigants to recover personal injury or property damages resulting from the release of hazardous substances, pollutants or contaminants subject to the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act.

CERCLA Section 9658 preempts the application of state statutes of limitations to state tort claims in certain circumstances. Reversing the Fourth Circuit, the Supreme Court held that Section 9658 does not preempt state statutes of repose. A number of states have enacted statutes of repose, which automatically terminate a cause of action after the passage of a specified number of years, regardless of when the plaintiff may have discovered his injury. The Supreme Court, in an opinion by Justice Anthony Kennedy, noted that CERCLA provides a federal cause of action to recover cleanup costs from a culpable entity, but it does not create a federal cause of action for personal injury or property damage; these matters are left to state law.

The Supreme Court observed that statutes of limitation and statutes of

repose serve different purposes and objectives. Carefully parsing Section 9658, Justice Kennedy concluded that Congress could have preempted statutes of repose, but failed to do so and noted that the states are "independent sovereigns" in the federal system; accordingly their police powers are not preempted absent "clear and manifest" congressional purpose.

### **An Important Federal Lands Decision**

In *Marvin Brandt Revocable Trust v. U.S.*, decided March 10, 2014, the Supreme Court, in an opinion written by Chief Justice John Roberts, held that a railroad's abandonment of a right of way created by the General Right of Way Act of 1875 terminated an easement created by the right of way. Once the easement had been terminated by a 1996 abandonment, the property had passed to the private party that acquired the land underlying the right of way. Consistent with a 1942 decision from the high court, the 1875 law granted only an easement and not a fee interest, and the abandonment conferred on the property owner, the Brandt Revocable Trust, the rights to that abandoned property.

This case takes on more significance because of the enactment of the National Trails System Improvements Act of 1988, which Congress passed in order to retain title to abandoned or forfeited railroad rights of way in order to develop a "rails-to-trails program." The Supreme Court noted that this change of policy was ineffective regarding rights of way subject to the 1875 law. "That policy shift cannot operate to create an interest in land that the government had already given away."

## Environmental Cases Pending in 2014

### *Yates v. U.S.*

In a case involving the “anti-shredding” provisions of the Sarbanes-Oxley Act, the Eleventh Circuit held these provisions apply to a commercial fisherman who allegedly destroyed certain undersized and protected fish after he received a federal civil directive not to destroy this evidence. SOX was enacted in the wake of the Enron scandal and the question is whether it also applies in an environmental regulatory context.

### *Perez v. Mortgage Bankers Association*

The D.C. Circuit held interpretative rules that significantly alter and affect an earlier interpretative rule are themselves subject to the notice and commitment provisions of the Administrative Procedure Act. This could be an important APA case.

### *U.S. Department of Transportation v. Association of American Railroads*

The issue is whether the D.C. Circuit was correct in holding that Section 207 of the Passenger Rail Improvement Act of 2008 affects an unconstitutional delegation of legislative power to a private entity (in this case, Amtrak).

## Significant Environmental Cases Denied Review Last Term

The Supreme Court also declined to review a number of significant cases decided by the lower courts.

### *U.S. Sugar v. Friends of the Everglades;* *EPA v. Friends of the Everglades*

The Supreme Court refused to review the Eleventh Circuit’s decision not

to consider challenges to the EPA’s “water transfer” NPDES rules, thus subjecting the rule to challenges in district courts. Thereafter, a New York district court issued a ruling vacating these rules, and it appears there will be an appeal to the Second Circuit.

### *Citgo Asphalt Refining v. Frescati*

The Supreme Court rejected Citgo’s appeal of a Third Circuit ruling that it was responsible for an oil spill in federal waters in its capacity as a terminal operator.

### *ExxonMobil Corp. v. New York City*

The Supreme Court refused to review the Second Circuit’s affirmance of a state law tort, multi-million dollar judgment against Exxon for the predicted costs of future Methyl tert-butyl ether remediation. On June 20, 2014, Exxon paid the \$100 million judgment in full.

### *Los Angeles County Flood Control District v. NRDC*

On remand from the Supreme Court, the Ninth Circuit held that there was sufficient evidence of exceedances to establish National Pollutant Discharge Elimination System violations. The Supreme Court earlier reversed a Ninth Circuit ruling in this municipal stormwater management case.

### *Genon Power Midwest C.P. v. Kristie Bell*

The Supreme Court refused to review a Third Circuit’s ruling that the CAA does not preempt the state law pollution remedies of property owners.

### *Rocky Mountain Farmers v. Corey*

The Supreme Court declined to review the Ninth Circuit’s decision rejecting certain dormant Commerce Clause challenges to California’s Low Carbon Fuel Standard.

### *Drakes Bay Oyster Company v. Jewell*

The Supreme Court refused to review the Ninth Circuit’s affirmance of the Secretary of the Interior’s decision not to renew the operating permit of an oyster company.

### *Mingo Logan Coal Company v. EPA*

The Supreme Court refused to review the D.C. Circuit’s ruling that the EPA acted in conformity with its oversight authority by withdrawing a CWA Section 404 permit that had been approved some years earlier by the U.S. Army Corps of Engineers.

## Conclusion

The Supreme Court is obviously reluctant to take cases where there are no conflicts among the circuit courts to resolve, or the immediate issues do not represent, in the court’s view, significant matters of overwhelming national importance. In the future, the high court is likely to take another look at the way lower courts are responding to its recent rulings on CERCLA cost recovery actions, as well as the complicated administration of the CAA.

