Environment, Land Use
& Natural Resources

July 16, 2013

Recent U.S. Supreme Court Decisions Impacting Environmental and Regulatory Law

By Anthony B. Cavender, Alina J. Fortson, and Amanda G. Halter

The recent term of the United States Supreme Court featured several rulings on environmental and other regulatory issues. This update highlights the major environmental decisions this term, as well as some of the issues the Court will consider next term.

2012–2013 Decisions

Clean Water Act

***Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.,* 133 S. Ct. 710, decided January 8, 2013.**

In this matter, the Supreme Court issued a unanimous ruling in a municipal stormwater control case involving the stormwater management of the Los Angeles and San Gabriel Rivers. The Court held that there was no "discharge of a pollutant" into navigable waters under the Clean Water Act ("CWA") when contaminated water "flows from one portion of a river that is a navigable water of the United States through a concrete channel or other engineered improvement in the river, and then into a lower portion of the same river." Justice Ginsburg's opinion notes that in *South Florida Water Management District v. Miccosukee Tribe*,[1] the Court held that the transfer of contaminated water between two parts of the same water body does not constitute the regulated discharge of pollutants.

The Court's opinion clarifies the concept of a discharge of a pollutant—the linchpin of the CWA's permitting programs—in the context of the operations of a large and complicated municipal wastewater control agency. In addition, this ruling relieves some of the uncertainties regarding the scope of large municipal stormwater management systems.

***Decker, Oregon State Forester, et al. v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, decided March 20, 2013.**

The Court held in a 7-1 decision that CWA National Pollutant Discharge Elimination System ("NPDES") permits are not required for stormwater runoff from logging roads. The opinion, written by Justice Kennedy,

[1] 541 U.S. 95 (2004).
See http://www.pillsburylaw.com/publications/supreme-court-limits-reach-of-alien-tort-statute-leaves-some-issues-unresolved

held that: (a) a citizen suit was the proper vehicle for challenging the application of the EPA rule in question; and (b) deference consistent with the Court's 1997 decision in *Auer v. Robbins*[2] would be accorded to EPA's interpretation of its own regulation, the Industrial Stormwater Rule, which exempted such stormwater discharges from NPDES regulation.

Water Rights

***Tarrant Regional Water District v. Herrmann*, 133 S. Ct. 2120, decided June 13, 2013.**

Oklahoma, Texas, Arkansas, and Louisiana are members of the Red River Compact, a Congressionally approved agreement by these states to ensure the equitable apportionment of water from the Red River and its tributaries. The Tarrant Regional Water District, seeking new sources of water for North Texas, filed a lawsuit claiming that it was entitled under the Compact to cross state lines and divert Red River water stored in Oklahoma. The lower federal courts rejected Tarrant's claims, as did the Supreme Court in a unanimous opinion written by Justice Sotomayor. Interpreting the Compact under contract law principles, the Court held that it did not give cross-border rights to the water that is the subject of the Compact. In a footnote, Justice Sotomayor wrote that once such a Compact is approved by Congress, it is transformed into federal law and the Supremacy Clause ensures that it preempts any conflicting state law; however, preemption was not an issue in this case.

Takings Clause

***Arkansas Game and Fish Commission v. U.S.,* 133 S. Ct. 511, decided December 4, 2012.**

This case involves the U.S. Army Corps of Engineers' management of a flood control plan that, over a period of six years, resulted in the release of large quantities of water that temporarily flooded downstream hardwood lands owned by the Arkansas Game and Fish Commission. The results were devastating, and the Commission filed a takings claim against the U.S. in the Court of Claims.

In a unanimous opinion, the Court (Justice Ginsburg writing) held that the Corps of Engineers' implementation of a Water Control Manual that resulted in substantial temporary flooding could give rise to a takings claim and possible compensation. The Court was not overly concerned that its decision would hamper large-scale government flood control programs in the future—each takings case is fact-specific. Thus, recurrent government-induced flooding, albeit only temporary, can support liability under the Takings Clause of the U.S. Constitution.

***Horne, et al. v. Department of Agriculture*, 133 S. Ct. 2053, decided June 10, 2013.**

Under a law enacted during the Great Depression to stabilize prices for agricultural commodities, federal regulations require "handlers" of raisins to abide by Department of Agriculture reserve-tonnage requirements, which keep a certain percentage of raisins off the open market. As a defense to an enforcement proceeding initiated by the Department of Agriculture, the petitioners argued that these restrictions amount to an unconstitutional taking of their property and requested relief from the federal courts. The Ninth Circuit denied relief, holding that Congress had not withdrawn jurisdiction over takings claims in such instances and that therefore the claim must be brought in the Court of Federal Claims.

Reversing the Ninth Circuit, the Court held, in a unanimous opinion written by Justice Thomas, that jurisdiction had been withdrawn from the Court of Claims, that the federal courts could decide the takings claim, and that a takings-based defense may be reviewed in an enforcement proceeding initiated by the

[2] 519 U.S. 452 (1997).

Department of Agriculture. The rationale of this decision may pave the way for takings-based defenses in enforcement proceedings by other agencies.

***Koontz v. St. John's River Water Management District*, 2013 WL 3184628, decided June 25, 2013.**

In a 5-4 decision, the Court held that an unconstitutional taking of property can occur when an agency conditions the issuance of a land-use permit upon the applicant's financing of wetlands improvements located at some distance from the vicinity of the proposed project. A Florida property owner applied for permits from the St. John's River Management District to develop a section of land that, because it contained wetlands, required two separate land-use permits. To mitigate the environmental impacts of the development, the owner offered to deed a conservation easement covering several acres to the District, but this offer was refused. Instead, the District informed the owner that it would approve construction if the owner reduced the size of the planned development, placed a conservation easement on the remainder of the property, and hired contractors to make improvements on District-owned wetlands located several miles away. The owner refused, and filed a complaint in Florida state court, arguing that this action by the District conflicted with two Supreme Court unconstitutional takings decisions: *Nollan v. California Coastal Commission*[3] and *Dolan v. City of Tigard*.[4] The Florida Supreme Court denied relief, holding that a demand for money cannot give rise to a claim under the *Nollan-Dolan* precedents.

The U.S. Supreme Court held that its constitutional takings cases apply even when a permit is denied (the *Nollan-Dolan* cases involved the granting of a land use permit with exorbitant demands), and that a government's demand for money (in this case, to pay for the work of outside contractors working on District-owned land) must satisfy the "nexus" requirements of *Nollan-Dolan*. The Court's "unconstitutional conditions" doctrine also applies to extortionate demands for property in the land-use permitting context, which violate the takings clause because they impermissibly burden the constitutional right not to have property taken without just compensation. In dissent, Justice Kagan opined that the ruling threatens to subject a vast array of land-use regulations and permitting fees applied daily in states and localities throughout the country to heightened constitutional scrutiny, and will deprive local governments of the flexibility they need to ensure environmentally sound and economically productive development.

Agency Deference

***City of Arlington, Texas, et al. v. Federal Communications Commission*, 133 S. Ct. 1863, decided May 20, 2013.**

The Court held, in an opinion written by Justice Scalia, that courts must apply the decisional framework established in *Chevron v. NRDC* [5] when reviewing an agency's interpretation of the scope of its own jurisdiction. Under the Telecommunications Act, the FCC has the power to regulate the construction of towers serving wireless communications companies. An association representing wireless providers complained to the FCC that local governments were taking far too long to process applications to build these towers, and asked the FCC to commit to a reasonable time for these local governmental bodies to act on the applications. The FCC, in a declaratory ruling, opined that the rebuttable limit should be 90 days. The City of Arlington filed a lawsuit in the Fifth Circuit, arguing that the FCC had no power to issue such a ruling. The majority applied the *Chevron* framework and held that Congress had given the FCC clear authority to act in such matters. Justice Scalia's opinion is especially notable because it dismisses the suggestion that the application of *Chevron* changes depending on whether the agency is interpreting its jurisdiction under the statute or some other element of statutory scheme, concluding that "the question a

[3] 483 U.S. 825 (1987).

[4] 512 U.S. 374 (1994).

[5] 467 U.S. 837 (1984) (articulating the deference standard applied to agency interpretations of statutes).

court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority."

The dissent, written by the Chief Justice, argued that the proliferation of federal agencies and their powers warrants a less deferential implementation of *Chevron*. The dissent urged courts to be more vigilant in questioning whether the agency has the challenged power in the first place, and not routinely defer to an agency's claims that an ambiguous statute authorizes the exercise of the power at issue.

Federal Statute of Limitations

***Gabelli v. Securities and Exchange Commission*, 133 S. Ct. 1216, decided February 27, 2013.**

The Court held, in a unanimous decision written by the Chief Justice, that the federal five-year statute of limitations[6] applies to this SEC enforcement action as well as many other federal enforcement actions. The Court reasoned that the statute begins to run from the time the allegedly illegal action began and not when it was discovered. Following this decision, two Clean Air Act ("CAA") enforcement actions have been dismissed by lower courts, on the grounds that they were not timely filed.[7]

Federal Preemption

***American Trucking Association, Inc. v. City of Los Angeles, California, et. al.,* 133 S. Ct. 2096, decided June 13, 2013.**

Justice Kagan, writing for a unanimous Court, held that the Federal Aviation Administration Authorization Act of 1994 preempts two provisions of a contract between trucking companies and the City of Los Angeles that the trucking companies must sign before they can transport cargo at the Port of Los Angeles. The contract provisions were required under the City's "Clean Truck Program," which was adopted by the Port to address safety and environmental concerns prompted by the expansion of the Port's facilities. The Port required short-haul trucks to affix a placard with specified language on each truck, and to submit a plan listing off-street parking locations for each truck.

The Court held that these requirements had the force of law and were therefore preempted by the federal Act. The Court determined that it was premature to decide whether other provisions of the program are similarly preempted. Justice Thomas concurred but would have gone further, opining that by purporting to regulate intrastate commerce, a provision of the Act was constitutionally flawed.

Admiralty Law

***Lozman v. City of Riviera Beach, Florida*, 133 S. Ct. 735, decided January 15, 2013.**

The City of Riviera Beach, invoking the provisions of admiralty law in order to terminate a dispute with the petitioner, seized, sold, and destroyed the petitioner's floating home. The Supreme Court, in an opinion written by Justice Breyer, held that the petitioner's floating home was not a "vessel" under 1 U.S.C. § 3 for federal maritime law purposes and therefore the federal courts lack admiralty jurisdiction. *Lozman* may have implications for whether other floating structures fall within federal admiralty law.

Alien Tort Statute

***Kiobel, et al. v Royal Dutch Petroleum Co., et al*., 133 S. Ct. 1659, decided April 17, 2013.**

[6] 28 U.S.C. § 2462.

[7] *New Jersey v. RRI Energy Mid-Atlantic Power Holdings LLC*, 2013 WL 1285456 (E.D. Pa. March 28, 2013); U.*S. v. Midwest Generation, LLC*, 2013 WL 3379319 (7th Cir. July 8, 2013).

The Court held, in a unanimous opinion written by the Chief Justice, that the presumption against the extraterritorial application of laws enacted by Congress applies to claims filed in American federal courts under the 1789 Alien Tort Statute ("ATS"). The plaintiffs, Nigerian nationals who received asylum in the U.S., sued Royal Dutch Petroleum under the ATS claiming that its subsidiary, Shell Petroleum Development Company of Nigeria, conspired with the government of Nigeria to violate their human rights and the law of nations in connection with Shell's oil and gas exploration and production operations in Nigeria. The Second Circuit dismissed the claim, holding that the law of nations did not apply to the actions of corporations.

The Court affirmed the Second Circuit's ruling but on much narrower grounds, holding that a presumption against the extraterritorial application of ambiguous laws enacted by Congress compelled the Court to rule that the ATS does not allow the courts to recognize a cause of action for alleged violations of the law of nations for acts occurring within the territory of a foreign sovereign.

Following the issuance of this opinion, a similar action, alleging the destruction of the natural environment and massive human rights violations taking place in Bougainville, Papua New Guinea, has been dismissed with prejudice by the Ninth Circuit.[8]

Cases to Be Heard in the Upcoming Term

***EPA v. EME Homer City Generation,* No. 12-1182 and *American Lung Association v. EME Homer City Generation,* No. 12-1183, cert. petitions granted June 24, 2013.**

These cases have been consolidated for purposes of oral argument. In *EPA v. EME*, the Court will consider the Cross-State Air Pollution Rule (the "Transport Rule"). The CAA's so-called "good neighbor" provisions require states to prohibit emissions that significantly contribute to a downwind state's ability to meet the National Ambient Air Quality Standards. The Transport Rule is one aspect of the good neighbor implementation scheme. Under the Transport Rule, EPA considers air quality impacts and cost in determining what emission controls are necessary in upwind states. The D.C. Circuit rejected this approach,[9] reasoning that the EPA's rule resulted in upwind states reducing their emissions by more than their contribution to downwind state pollution, and that such a requirement was beyond EPA's statutory authority. The D.C. Circuit also held that EPA exceeded its jurisdiction in requiring Federal rather than State Implementation Plans ("FIPs" and "SIPs," respectively) to achieve reductions under the Transport Rule.

In addition to considering whether the D.C. Circuit lacked jurisdiction to hear the case, the Supreme Court granted certiorari on the following questions: (a) whether states should be allowed to revise their SIPs to incorporate good neighbor provisions following EPA's determinations under the Transport Rule and (b) whether EPA's consideration of cost under the Transport Rule is permitted by the statute.

The American Lung Association is also challenging the D.C. Circuit's decision. The Court will consider another jurisdictional issue, i.e., whether the Court of Appeals improperly reviewed challenges to EPA's Transport Rule that were not sufficiently raised during the public comment period. The Court will also decide whether the D.C. Circuit overstepped the boundaries of judicial review in imposing its own methodologies for EPA's implementation of the good neighbor provisions. Finally, the Court will hear arguments concerning the obligations of upwind states absent a determination by EPA regarding the upwind state's impact.

[8] See *Sarei v. Rio Tinto*, No. 02-56256 (9th Cir. 2013); Sarei v. Rio Tinto 671 F.3d 736 (9th Cir. 2011).
[9] *EME Homer City Generation LP v. EPA*, 696 F.3d 7 (D.C. Cir. 2012).

Because the Court will again be reviewing agency decisionmaking, the Transport Rule cases are likely to have implications for the regulated community generally, in addition to being important for entities subject to the CAA.

Pending Certiorari Petitions

***EPA v. Friends of the Everglades*, No. 13-10 and *U.S. Sugar Corp. v. Friends of the Everglades*, No. 13-6.**

The Solicitor General and the U.S. Sugar Corporation have filed petitions for certiorari seeking review of the Eleventh Circuit's decision not to consider challenges to EPA's water transfer rules despite the requirements of 33 U.S.C. § 1369. In response to an earlier decision[10] holding that water transfers between distinct water bodies that result in the addition of pollutants require a permit, EPA promulgated a rule exempting water transfers from CWA permitting.[11] The Eleventh Circuit, in a consolidated case involving ten petitions for review of this rule, applied *Chevron* deference principles and upheld EPA's exemption.[12] However, in view of the fact that earlier district court challenges to a decision of the South Florida Water Management District to allow the transfer of water into Lake Okeechobee without an NPDES permit had been stayed, that stay expired after the 2009 decision of the Eleventh Circuit. Fearing that challenges to individual permit actions could be renewed under the citizen suit provisions of 33 U.S.C. § 1365, the U.S. Sugar Corporation urged the Eleventh Circuit to exercise what the Circuit Court described as "hypothetical jurisdiction" over these challenges. The Eleventh Circuit refused to do so, holding that it lacked jurisdiction under 33 U.S.C. § 1369 and therefore individual challenges in disparate federal trial courts under the CWA citizen suit provisions could proceed.

In its petition for certiorari, the Solicitor General argues that subjecting the water transfer rule to challenges in the district court and the six-year statute of limitations in § 1365 is in conflict with a number of other circuit court rulings regarding the direct review of such rules in the federal courts of appeal.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Anthony B. Cavender (bio)
Houston
+1.713.276.7656
anthony.cavender@pillsburylaw.com

Alina J. Fortson (bio)
San Francisco
+1.415.983.7311
alina.fortson@pillsburylaw.com

Amanda G. Halter (bio)
Houston
+1.713.276.7665
amanda.halter@pillsburylaw.com

[10] *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 2006 WL 3635465 (S.D. Fla. Dec. 11, 2006).
[11] 73 Fed. Reg. 33697 (June 9, 2008).
[12] *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (2009).