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September 16, 2014

Supreme Court Roundup: Recent Environmental Law Rulings and Pending Cases

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Scaling back considerably from the October 2012 Term, the United States Supreme Court issued only a few rulings affecting environmental law during the October 2013 Term. With significant pronouncements regarding EPA's Clean Air Act regulatory authority among them, however, the October 2013 Term was far from uneventful. Several more cases slated for the October 2014 Term presage rulings across a broad spectrum of environmental and administrative law issues.

I. Major Environmental Cases Decided This Term.

Two Clean Air Act rulings, *EPA v. EME Homer City Generation* and *Utility Air Regulatory Group v. EPA*, attracted widespread interest. Both cases are expected to dramatically affect U.S. EPA's and the States' administration of the Clean Air Act in the Cross-State Pollution, State and Federal Implementation Plans and Greenhouse Gas regulation.

A. The Clean Air Act Cases.

In *Environmental Protection Agency v. EME Homer City Generation, LP*, 134 S. Ct. 1584, issued April 24, 2014, the Court reversed the DC Circuit, which had vacated EPA's latest attempt to develop a rule implementing the "Good Neighbor Provision" of the Clean Air Act. The Good Neighbor Provision obligates EPA to protect downwind states against air pollutants emitted by plants located in "upwind" states. EPA's latest revision was known as the "Cross-State Air Pollution" or Transport Rule. The DC Circuit had held that the regulation exceeded EPA's authority by vesting too much responsibility in EPA relative to the states. Justice Ginsburg, writing for the Court in a 6-2 decision, held that EPA had reasonably interpreted the "Good Neighbor Provision," and this interpretation was entitled to *Chevron* deference, referring to the 1984 Supreme Court case that directed courts to defer to federal agencies' statutory interpretations unless they are unreasonable. Moreover, the Act gives 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 the states would face in implementing the Transport Rule, the Court rejected this argument, stating that "the practical difficulties cited by the Court of Appeals do not justify departure from the Act's plain text." Without elaboration, the Court did also note that there are limits on how far EPA can go to compel reductions in upwind states.

The case was remanded to the DC 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 EPA's regional "cap and trade" program, which could also reinvigorate the Act's policy of cooperative and collaborative federalism.

On June 23, 2014, the Court issued its ruling in a companion case, *Utility Air Regulatory Group v. EPA,* 134 S. Ct. 2427. In an opinion authored by Justice Scalia, the Court held that EPA exceeded its statutory authority under the Clean Air Act when it interpreted the Act to require stationary sources of air pollution to obtain Clean Air Act PSD or Title V permits solely on the basis of their Greenhouse Gas (GHG) emissions. Following the Court's decision in *Massachusetts v. EPA*, 549 US 497 (2007), EPA promulgated GHG emission standards for new motor vehicles, and determined that these "mobile source" GHG emissions standards would automatically apply to stationary sources emitting GHGs, thus triggering permitting requirements under EPA's PSD and Title V programs. The Court held that this interpretation was at such odds with the text of the Act that "it does not merit *Chevron* deference." Consequently, the "Tailoring Rule," which was issued to ameliorate the consequences of EPA's GHG permitting requirements, was set aside. However, the Court agreed with EPA that it could require a source to apply Best Available Control Technology (BACT) 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 Clean Air Act decisions suggest little tolerance for interpretations of the Clean Air Act that stray meaningfully from its plain text.

B. An Important CERCLA Decision.

In *CTS Corporation v. Walburger*, 134, S. Ct. 2175, decided June 9, 2014, the Court issued an important ruling that affects the ability of litigants to recover personal injury or property damages resulting from the release of a hazardous substances, pollutants or contaminants subject to the provisions of CERCLA (or Superfund). CERCLA Section 9658 preempts the application of state statutes of limitations to state tort claims in certain circumstances. Reversing the Court of Appeals for 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 Court (in an opinion by Justice 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 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 it 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.

C. An Important Federal Lands Decision.

In *Marvin Brandt Revocable Trust v. US*, 134 S. Ct. 1257, decided March 10, 2014, the Court, in an opinion written by Chief Justice 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 who had acquired the land underlying the right of way. Consistent with a 1942 decision of the Court, the 1875 Act 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, by which the Congress sought to retain title to abandoned or forfeited railroad rights of way in order to develop a "rails to trails" program. The Court noted that this change of policy was ineffective regarding rights of way subject to the 1875 Act: "That policy shift cannot operate to create an interest in land that the Government had already given away."

II. Cases to be Decided in the October 2014 Term.

A. *Yates v. US*.

In a case involving the "anti-shredding" provisions of the Sarbanes-Oxley Act, the Eleventh Circuit Court of Appeals held that these provisions apply to a commercial fisherman who allegedly destroyed certain undersized and protected fish after he had received a federal civil directive not to destroy this evidence. Sarbanes-Oxley was enacted in the wake of the Enron financial collapse, and the question is whether it also applies in an environmental regulatory context. The Eleventh Circuit opinion is reported at 733 F.3d 1059 (CA11, 2013).

B. *Perez, Secretary of Labor v. Mortgage Bankers Association*.

The DC Circuit held that interpretative rules which 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. The DC Circuit opinion is reported at 720 F.3d 966 (CADC, 2013).

C. *US Department of Transportation v. Association of American Railroads*.

The issue is whether the DC Circuit was correct in holding that Section 207 of the Passenger Rail Improvement Act of 2008 effects an unconstitutional delegation of legislative power to a private entity (in this case, Amtrak). The DC Circuit opinion is reported at 721 F.3d 666 (CADC, 2013).

III. Significant Environmental Cases in Which Review was Denied Last Term.

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

A. *U.S. Sugar v. Friends of the Everglades*, and *EPA v. Friends of the Everglades*.

The Court refused to review the Eleventh Circuit's decision not to consider challenges to EPA's "water transfer" NPDES rules, thus subjecting the rule to challenges in the federal district courts. Thereafter, a New York federal district court issued a ruling vacating these rules, and it appears

there will be an appeal to the Second Circuit. The district court's opinion is reported at 2014 WL 1284544 (*Catskill Mountains v. EPA*).

B. *Citgo Asphalt Refining v. Frescati*.

The 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. The decision of the Third Circuit is reported at 718 F.3d 184 (CA3, 2013).

C. *ExxonMobil Corporation v. New York City*.

The 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 MTBE remediation. The lower court's opinion is reported at 725 F.3d 65 (CA2, 2013). On June 20, 2014, ExxonMobil paid the $100 million judgment in full.

D. *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 NPDES violations. See 725 F.3d 1194 (CA9, 2013). The Court had earlier reversed a Ninth Circuit ruling in this municipal stormwater management case.

E. Genon Power Midwest, C.P. v. Kristie Bell.

The Court refused to review a Third Circuit's ruling that the Clean Air Act does not preempt the state law pollution remedies of property owners. The Third Circuit's opinion is reported at 734 F.3d 188 (CA3, 2013).

F. *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. See 740 F.3d 507 (CA9, 2013).

G. *Drakes Bay Oyster Company vs. Jewell*.

The 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. See 747 F.3d 1073 (CA9, 2013).

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

The Court refused to review the DC Circuit's ruling that EPA acted in conformity with its oversight authority by withdrawing a CWA § 404 permit that had been approved some years earlier by the Army Corps of Engineers. See 714 F.3d 608 (CADC, 2013).

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.

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