COVINGTON

August 2015

IN BRIEF
by Theodore L. Garrett

CERCLA

ASARCO v. Celanese Chemical Co, 2015 WL 4154041 (9th Cir. July 10, 2015).
http://cdn.ca9.uscourts.gov/datastore/opinions/2015/07/10/12-16832.pdf

The 9th Circuit rejected an argument by ASARCO that the Superfund statute of limitations for contribution claims could be restarted by ASARCO's subsequent bankruptcy settlement. ASARCO's predecessor owned a smelter in California and leased a portion to CNA's predecessor for a sulfur dioxide plant. ASARCO settled a cost-recovery lawsuit by Wickland Oil Company in 1989 and ASARCO agreed to pay $33 million to the state in a 2008 bankruptcy settlement. The 9th Circuit affirmed the district court's decision dismissing ASARCO's 2011 contribution suit, stating that "ASARCO's new contribution claim via the 2008 Bankruptcy Settlement is for exactly the same liability ASARCO assumed in the 1989 Wickland Agreement, and is therefore time barred." The court noted that if ASARCO could restart the statute of limitations through a bankruptcy settlement, ASARCO "would receive a benefit that it had not paid for in that bankruptcy settlement" and such a ruling "would encourage tardy parties to use bankruptcy to revive their expired claims."

AIR QUALITY

EME Homer City Generation L.P. v. EPA, 2015 WL 4528137 (D.C. Cir. July 28, 2015).
http://www.epa.gov/crossstaterule/pdfs/EME%20Homer%20City%20v%20EPA%207_28_15%20Opinion.pdf

The D.C. Circuit remanded the Cross-State Air Pollution Rule budgets for 13 states to EPA while upholding the sulfur dioxide and nitrogen oxides emissions trading program. The panel concluded that the 2014 emission budgets for SO2 are invalid because they require upwind states to reduce emissions more than needed to allow downwind states to meet regulatory standards for ozone, and the budgets for NOx are invalid because the downwind states would comply even with no good neighbor obligation on the upwind states. The court rejected EPA's argument that imposing less stringent budgets on upwind states would be contrary to the rationale underlying EPA's uniform cost thresholds, stating that "EPA's uniform cost thresholds have required States to reduce pollutants beyond the point necessary to achieve downwind attainment."

Sierra Club v. EPA, et al., 2015 WL 4231713 (6th Cir. July 14, 2015).
http://www.ca6.uscourts.gov/opinions.pdf/15a0149p-06.pdf

The Sixth Circuit vacated EPA's decision to approve plans to re-designate portions of the Cincinnati-Hamilton area from nonattainment to attainment for fine particulates because the plans did not include reasonably available control technology (RACT) for industrial sources. The court's opinion states that plans to demonstrate attainment of EPA national ambient air quality standards (NAAQS) must include reasonably available control technology (RACT)

"even if those measures are not strictly necessary to demonstrate attainment" of the NAAQS. However, the court rejected the Sierra Club's argument that states may not use cap-and-trade programs to satisfy the requirement that emissions controls be permanent and enforceable. The opinion states that the "heart of this dispute is really where the sources that reduce their emissions must be located," holding that EPA has discretion to conclude that permanent emissions reductions in a SIP will be achieved from a regional trading program in a broader geographic area.

WATER QUALITY

Florida Wildlife Federation (FWF), et al. v. EPA, et al, 2015 WL 4081495 (11th Cir. July 7, 2015)
http://law.justia.com/cases/federal/appellate-courts/ca11/14-10987/14-10987-2015-07-07.html

The 11th Circuit upheld a consent decree regarding Florida's Clean Water Act criteria for nutrients, rejecting environmentalists' claim that the trial court abused its discretion by modifying the terms of a consent decree. The original consent decree required EPA to promulgate strict numeric nutrient limits for Florida, but the consent decree was later modified to reflect less-stringent rules developed by the state and accepted by EPA. "[I]f the conservationists had wanted to challenge EPA's determination that the regulations do satisfy the CWA, the proper way would have been in a proceeding under the Administrative Procedure Act ." the opinion states.

American Farm Bureau Federation (AFBF), et al. v. EPA, 2015 WL 4069224 (3d Cir. June 6, 2015).
http://www2.ca3.uscourts.gov/opinarch/134079p.pdf

The 3d Circuit upheld EPA's multi-state Chesapeake Bay cleanup plan, rejecting industry challenges to the total maximum daily load (TMDL) plan that included allocations for permitted point sources and nonpoint pollution from sectors including agricultural and urban stormwater. Rejecting the Farm Bureau's arguments, the court concluded that preventing EPA from establishing separate TMDL allocations for point and nonpoint sources and requiring "reasonable assurance" that the states will achieve those allocations would frustrate the goals of the statute. The court also rejected the Farm Bureau's argument that the TMDL infringes on state land-use policies, stating that TMDLs "exists within a cooperative federalism framework " and the TMDL makes "no actual, identifiable, land-use rule." The panel concluded that the Farm Bureau's reading of the Act "would shift the burden of meeting water quality standards to point source polluters, but regulating them alone would not result in a clean Bay."

United States et al. v. Metropolitan Water Reclamation District Of Greater Chicago, 2015 WL 4127035 (7th Cir. July 9, 2015).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2015/D07-09/C:14-1777:J:Easterbrook:aut:T:fnOp:N:1584600:S:0

A district court's approval of a settlement agreement to reduce a city's combined sewer overflows (CSOs) was upheld on appeal. The 7th Circuit concluded that the settlement was "reasonable" and that federal water law does not require the elimination of all overflows. Rejecting the claims of environmental groups, the court stated "The EPA anticipates working out details as time passes and additional reservoir capacity becomes available . . . and if the District does not cooperate the court can afford supplemental relief."

ENERGY

Energy & Environment Legal Institute v. Epel, 2015 WL 4174876 (10th Cir. July 13, 2015). https://www.ca10.uscourts.gov/opinions/14/14-1216.pdf

The 10th Circuit rejected Constitutional challenge to Colorado's renewable energy standard, which requires utilities to obtain 30 percent of their electricity from renewable sources . Plaintiffs argued that the Colorado standard limits out-of-state coal-fired utilities plants from selling electricity because Colorado is tied to an electric grid that covers 11 states. The court concluded that the suit was "a novel lawmaking project" and that the Colorado standard was not unconstitutional because "it doesn't link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters."

Energy Future Coalition, et al. v. EPA, 2015 WL 4216549 (D.C. Cir. July 14, 2015) http://www.cadc.uscourts.gov/internet/opinions.nsf/B34BB7A0B0D97AFA85257E82005269AE/$file/14-1123-1562380.pdf

The D.C. Circuit upheld the Tier III fuel and vehicle air regulations governing emission tests for new vehicles that included a revision to a prior fuels compliance testing rule. Biofuel producers, who want EPA to approve fuels containing 30% ethanol, argued that EPA's regulations create a catch-22 because this fuel is not "commercially available" as required by the regulations. The court concluded that the statutory scheme adopted by Congress requires that fuels be tested under "actual current driving conditions … including conditions relating to fuel," and it was not arbitrary and capricious "for EPA to fulfill that statutory mandate by requiring that test fuels be 'commercially available.'"

EPA Inaction

In Re Pesticide Action Network North America, 2015 WL 4718867 (9th Cir. Aug. 10, 2015). http://cdn.ca9.uscourts.gov/datastore/opinions/2015/08/10/14-72794.pdf

The 9th Circuit issued an order of mandamus requiring EPA to issue a proposed or final revocation of the pesticide cloropyrifos or a final response to the petition filed by environmental groups seeking a ban no later than October 31, 2015. The opinion states that "filibustering ..is frowned upon in administrative agencies tasked with protecting human health," and that EPA's delay of nearly nine years "is egregious and warrants mandamus relief."