IN BRIEF
by Theodore L. Garrett

CERCLA

***Pakootas v. Teck Cominco Metals, Ltd.*, 2016 WL 4011196 15-35228 (9th Cir. No. 15-35228, July 27, 2016)**

Reversing a district court's decision, the Ninth Circuit held that the owner of a smelter in Canada is not liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for hazardous substances emitted into the air that resulted in contamination of land and water in the state of Washington. The issue for the court was whether the owner that emitted contaminants through a smokestack can be said to have arranged for the "disposal" of those contaminants under section 9607(a)(3) of CERCLA. Noting that CERCLA's definition of "disposal" refers to the definition in the Resource Conservation and Recovery Act (RCRA), the *Teck* panel found persuasive the Ninth Circuit's decision in *Center for Community Action v. BNSF Railway*, 764 F.3d 1019 (9th Cir. 2014), which held that emitting diesel particles from railroad locomotives in rail yards into the air and allowing the particles to be transported by wind onto the land and water did not constitute "disposal" under RCRA. Congress knew how to use the word "emit" when it wanted to, the Court found. The *Teck* panel also stated it was bound by the Ninth Circuit's *en banc* decision in *Carson Harbor Vill. Ltd. v. Unocal Corp*, 270 F.3d 863 (9th Cir. 2001), holding that the term "deposit" under CERCLA is akin to "putting down, or placement" and does not include "chemical or geologic processes or passive migration." Thus, although the panel concluded that plaintiffs had presented an "arguably plausible" construction of "disposal," the decision in *Carson Harbor* compelled the panel to hold otherwise. The *Teck* panel rejected the argument that excluding the smelter emissions would thwart the overall statutory scheme, and noted that if "aerial depositions" were to give rise to liability, then "'disposal' would be a never-ending process, essentially eliminating the innocent landowner defense." Finally, the panel's opinion notes that it has not been presented with an agency interpretation of "deposit" to which it might owe deference.

Constitutional law

***GG Ranch, Ltd. v. Edwards Aquifer Authority*, No. 15-50505, 2016 WL 2609800 (5th Cir. May 5, 2016).**

The Fifth Circuit summarily affirmed the dismissal of a Fifth Amendment takings suit by property owners complaining of the denial of permits to withdraw groundwater located beneath their properties. The court agreed with the reasons in the district court's order, which held that the 10-year statute-of-limitations for the takings claims began in 1996 when plaintiffs lost their historical access to the water rights and instead had to apply for a permit to continue using water under a new Texas water use law. The district court was not receptive to plaintiffs' argument that the 10-year clock should have started running when their permit applications were denied in 2014 and the Fifth Circuit affirmed the district court's position.

***Western Watersheds Project v. Michael,* No. 15-CV-00169, 2016 WL 3681441 (W.D. Wyo. July 6, 2016).**
A district court in Wyoming dismissed a lawsuit by public interest groups challenging the constitutionality of both civil and criminal Wyoming data-gathering or trespass statutes that prohibit the collection of "resource data" on private land without express permission or authorization by the landowner. In this case, plaintiffs Western Watersheds Project and other environmental groups sought to collect water samples designed to prove that overgrazing of the land by the cattle industry was polluting the water supply. The district court concluded that the plaintiffs' claims are erroneously premised on a perceived First Amendment right to enter upon private property in order to collect resource data. The opinion noted that the Supreme Court has not recognized a free speech right on privately owned property, citing *Lloyd Corp. Ltd. v. Tanner*, 407 U.S. 551, 558 (1972) and concluded: "The ends, no matter how critical or important to a public concern, do not justify the means, violating private property rights." Finally, the court declined to rule on plaintiffs' challenge to the statutory provision requiring the expunging of data collected in violation of the statutes, concluding that such restrictions on publication of information should be addressed on an "as applied" basis not presented here.

International organizations

***Jam v. International Finance Corp.*, No 15-cv-00612, 2016 WL 1170936 (D.D.C. Mar. 24, 2016), *appeal pending* No. 16-7051.**
A district court dismissed a lawsuit by fishermen and farmers against the International Finance Corporation (IFC), which provided a $450 million loan for construction of a coal-fired power plant in India. Plaintiffs alleged that the power plant caused various environmental impacts including warm water discharges that depress the fish catch, causing salt water intrusion into groundwater making it unusable for drinking or irrigation, and emissions degrading air quality. The IFC's Ombudsman issued a report concluding that the IFC failed to adequately consider the environmental and social risks posed by the power plant, but was unable to provide relief to plaintiffs, who subsequently filed suit. The district dismissed the suit because the IFC has immunity under the International Organizations Immunities Act, 22 U.S.C. 288 et seq. and the IFC has not waived its immunity from suit.

Air quality

***Sierra Club v. U.S. Environmental Protection Agency*, No. 1:10-cv-01541, 2016 WL 3281244 (D.D.C., June 14, 2016).**
A district court issued an order directing EPA to file a schedule for proposing and completing action on a Clean Air Act "good neighbor" federal implementation plan (FIP) for Texas with respect to particulate matter (PM) 2.5. The district court rejected EPA's argument that EPA performed its duty to promulgate an interstate transport FIP for Texas for PM 2.5 by promulgating the cross-state air pollution rule (CSAPR). Plaintiffs also alleged that EPA failed to

promulgate an interstate transport FIP for Texas with respect to PM 2.5. EPA argued that plaintiffs' Texas PM 2.5 interstate transport claim is moot in light of *EME Homer*, which invalidated the sulfur dioxide emission budgets for Texas in the CSAPR. *EME Homer City Generation v. EPA*, 795 F.3d 118, 128–29 (D.C. Cir. 2015). The district court was not persuaded, noting that the D.C. Circuit urged EPA to "move promptly on remand." *Id*. at 132. The court held plaintiffs' interstate transport claim in abeyance until completion of EPA action adopting a valid PM 2.5 good neighbor FIP for Texas.

Water quality

***Wyoming v. U.S. Department of Interior*, No. 2:15-cv-00043, 2016 WL 3509415 (D. Wyo. June 21, 2016), *related prior ruling appeal pending*, Nos. 15-8126, 15-1834 (10th Circuit).**
A district court followed its earlier ruling on a preliminary injunction and issued a final order setting aside the Bureau of Land Management's (BLM) 2015 rule relating to hydraulic fracturing on federal and Indian lands. The BLM rule focused on well bore construction, chemical disclosures, and water produced during operations. Lawsuits were filed by industry groups, two states, and an Indian Tribe. The district court found that Congress has not delegated to the Department of the Interior the authority to regulate hydraulic fracturing. The court was not persuaded by BLM's argument that the fracking rule simply supplements existing requirements for oil and gas operations, noting that BLM previously took the position that it lacked the authority to regulate hydraulic fracturing. Congress delegated regulatory authority over groundwater to EPA, the opinion states. Although the Federal Land Policy and Management Act authorizes BLM to take action to prevent degradation of public lands, the statute at core is a "land use planning statute" and provides no specific authority for the BLM to regulate fracking. Finally, the court concluded that *Chevron* deference to BLM was not warranted since this case does not involve an agency construction of a specific statutory provision where the agency had clearly been granted regulatory authority: "If this court were to accept [the BLM and environmental groups'] argument, there would be no limit to the scope or extent of Congressionally delegated authority BLM has, regardless of topic or subject matter." The district court had earlier issued a preliminary injunction against the BLM rule, and that earlier ruling has been briefed to the United States Court of Appeals for the Tenth Circuit.

***In re: City of Taunton Department of Public Works*, NPDES No. 15-08 (EPA Environmental Appeals Board May 3, 2016).**
EPA's Environmental Appeals Board (EAB) denied a petition for review filed by the City of Taunton challenging a National Pollutant Discharge Elimination System permit issued by EPA to the city. The city challenged the need for a nitrogen limit and the specific limit imposed. The city also challenged the permit's copper limits, the decision not to set separate wet weather limits, and EPA's authority to limit flow. Regarding the nitrogen limit, the EAB held that EPA reasonably found that there was a "reasonable potential" to cause an exceedance of water quality standards even though the river was not on the Massachusetts list of impaired waters and even though EPA did not show actual impairment. The EAB also found that EPA reasonably

determined a nitrogen limit taking into account the flow of the river, the reductions needed, and the limits of technology.

NEPA

***Public Employees for Environmental Responsibility v. Town of Barnstable*, No. 14-5301, 2016 WL 3606363 (D.C. Cir. July 5, 2016).**
The D.C. Circuit reversed a district court judgment that upheld a decision of the Bureau of Ocean Energy Management to issue a lease for a wind project off the coast of Massachusetts. The proposed project called for 130 wind turbines to generate electricity for Cape Cod and surrounding islands. The court of appeals agreed with plaintiffs that the Bureau violated the National Environmental Policy Act (NEPA) when it issued the lease without obtaining sufficient site specific geological data concerning seafloor and subsurface hazards. The court of appeals vacated the impact statement and required the Bureau to supplement it, but did not vacate the project lease or other regulatory approvals based on this NEPA violation. The court of appeals also vacated the incidental take statement under the Endangered Species Act because the Fish and Wildlife Service disregarded plaintiffs' submissions concerning the "feathering" of turbines to minimize the impact on listed species of birds when it reopened the record to consider the views of an in-house economist concerning the reasonableness of feathering.

FIFRA

***Mendoza v. Monsanto Co.*, No. 1:16-cv-00406, 2016 WL 3648966 (E.D. Cal. July 8, 2016).**
A district court denied a motion by Monsanto to dismiss a lawsuit by an individual who claims to have developed non-Hodgkin lymphoma as a result of using Monsanto's Roundup® product. The lawsuit seeks damages based on strict liability, failure to warn, negligence, and breach of express and implied warranty. Monsanto moved to dismiss, arguing that the claims were preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), citing various statements by EPA. The district court found that documents cited by Monsanto did not support Monsanto's claims. The court also concluded that plaintiffs' state law claims, if successful, would not necessarily impose any additional requirements beyond FIFRA's requirement that the product not be misbranded, and that a registration under FIFRA is not conclusive as to whether or not a product is misbranded. Finally, the court rejected Monsanto's argument that the design defect claims were barred by comments to the Restatement of Torts (Second) section 402A.

Endangered species

***National Wildlife Federation v. National Marine Fisheries Service*, No. 3:01-cv-00640-SI, 2016 WL 2353647 (D. Or. May 4, 2016).**
A district court granted the summary judgment motions of plaintiff environmental groups with respect to claims that the National Marine Fisheries Service (NMFS) violated the Endangered

Species Act (ESA) and the Administrative Procedure Act when it issued a biological opinion concerning the operations of the Federal Columbia River Power System. NMFS had concluded that the operations do not violate the ESA based on 73 "reasonable and prudent" alternatives described in the biological opinion. The court found that the no jeopardy conclusion relied on actions that are not reasonably certain to occur or have uncertain benefits, including habitat mitigation, and found NMFS's "trending toward recovery" standard to be arbitrary and capricious. The court concluded that NMFS failed to properly evaluate the degree to which climate change will cause added harm and reduce the effectiveness of mitigation measures. The court also held that the Army Corps of Engineers and the Bureau of Reclamation violated NEPA by failing to prepare an environmental impact statement with respect to the 73 reasonable and prudent alternatives described in the biological opinion. The court directed NMFS to file a new biological opinion with the court by March 1, 2018. The court also retained jurisdiction to ensure that the federal defendants develop appropriate mitigation measures, produce a biological opinion that complies with the ESA, and prepare an EIS that complies with NEPA.