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In Brief
by Theodore L. Garrett

FOIA

***American Farm Bureau Federation v. EPA,* 836 F.3d 963 (8th Cir. 2016).**
The Eighth Circuit reversed a district court decision dismissing a "reverse" Freedom of Information Act (FOIA) suit challenging the Environmental Protection Agency's (EPA's) disclosure of information concerning concentrated animal feeding operations (CAFOs). In response to FOIA requests by three environmental organizations concerning CAFOs, EPA released information gathered from 19 states and from EPA's data systems. The Farm Bureau brought an action under the Administrative Procedure Act to prevent EPA from making additional information available and requiring EPA to recall the information it has already released. In particular, plaintiffs complained that the information included personal information about CAFO owners, such as names, home addresses, telephone numbers, GPS coordinates, and information from which financial information could be gleaned. The court rejected EPA's argument that FOIA Exemption 6 does not apply because the information was available in the public domain, stating CAFO owners "still have a privacy interest in preventing the mass aggregation and release of their personal information." The court also rejected the government's argument that the privacy interest was outweighed by the public's interest in disclosure, stating that the disclosure of names, phone numbers, etc. "does not directly shed light on the agency's performance of its statutory duties." The opinion noted that other records, some in redacted form, could address public interests without invading personal privacy.

CERCLA

***DMJ Associates, L.L.C. v. Capasso,* No. 97-CV-7285 (DLI)(RML), 2016 WL 5255673 (E.D.N.Y. Sept. 22, 2016).**
A district court ruled that claims against a third-party defendant were not discharged by bankruptcy. ExxonMobil and Quanta settled a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cleanup claim with plaintiff DMJ and then sued Revere Copper Products and others for contribution under CERCLA. Revere Copper then moved for summary judgment based on a 1982 filing for bankruptcy by Revere's corporate predecessors and a 1985 order by the Bankruptcy Court approving Revere's plan of reorganization. Revere argued that the ExxonMobil and Quanta third-party plaintiff claims arose from contamination that predated the filing for bankruptcy. The district court denied Revere's motion on the grounds that the claim did not arise before the bankruptcy petition for several reasons. First, the court noted that the contribution provision Section 113(f) of CERCLA had not been enacted at the time the contamination occurred or even before the 1985 bankruptcy confirmation order. Second, the opinion noted that Section 107(a) did not clearly permit a direct cost recovery suit by private parties against another potentially responsible party until the Supreme Court's decision in *United States v. Atlantic Research Corp*, 551 U.S. 128, 139-41 (2007). Finally, the opinion stated that ExxonMobil and Quanta lacked any knowledge of the existence of a claim at the time Revere filed its bankruptcy claim.

***United States v. Boston and Maine Corporation*, No. 13-10087-IT, 2016 WL 5339573 (D. Mass. Sept. 22, 2016).**

A district court held that the CERCLA statute of limitations for cost recovery did not run until a Record of Decision (ROD) was issued, even though cleanup had been completed previously and the ROD concluded that no further action and land use controls were the remedies for two facilities at a CERCLA site. In 1999, the government prepared a draft action memorandum and began work to address contamination, which was completed in 2000. In 2002, the U.S. Army prepared a draft "no further action" report for the "roundhouse" facility and concluded that contamination in the "plow shop pond" facility would be addressed in a separate study. Work to address additional contamination in the "plow shop pond" facility was completed in 2013. In 2013, the government filed a CERCLA complaint against Boston and Maine Corp. In 2015, the Army issued a ROD selecting no further action for the "plow shop" facility and land use controls for the "roundhouse" facility. Defendant moved for summary judgment based on the statute of limitations. The court rejected defendant's argument that the government's cleanup activities were removal actions subject to a statutory period triggered by the initiation of construction activities. The court noted that the 1999 action memo expected that the proposed activities would provide a long-term solution, holding that the thrust of the actions was to remove hazardous substances, even though it took the United States six years to develop and begin implementing a strategy. The court then considered the requirement in CERCLA Section 113(g)(2)(A) that an initial action to recover costs for a removal action be commenced within three years after the completion of removal action and agreed with the government that the statute did not run until the Army ROD was issued in 2015. The court was not persuaded by defendant's argument that the government's position would afford the government too much discretion over when the statute of limitations begins to run, concluding that in this case a final determination could not be made until the plow shop facility was further studied and addressed.

Air Quality

***Murray Energy Corp. v. McCarthy*, No. 5:14–CV–39, 2016 WL 6083946 (W.D. Va. Oct. 17, 2016).**

A district court granted summary judgment to plaintiff coal companies and held that EPA must provide a plan and schedule for complying with Clean Air Act Section 321(a) by evaluating the effects of its regulations on the coal industry, including loss of employment or plant closures. The court held that in enacting Section 321, Congress intended to impose a mandatory duty upon EPA, rejecting EPA's argument that Section 321 is discretionary. The opinion also concludes that plaintiffs have standing to sue, noting that plaintiffs have alleged that EPA's actions have had a coercive effect on the power generating industry "effectively forcing them to discontinue the use of coal." The court also found that the injuries are redressable because the results of compliance with Section 321(a) might have the effect of convincing EPA, Congress, or the public to relax or alter EPA's prior decisions. Finally, the court concluded that EPA has failed to comply with Section 321(a), noting "repeated admissions" by EPA to Congress that EPA is not conducting the evaluations described by that statutory provision. The court concluded that EPA must "fully comply" with Section 321(a): "Due to the importance, widespread effects, and the claims of the coal industry, it would be an abuse of discretion for the EPA to refuse to conduct a Section 321(a) evaluation on the effects of its regulations on the coal industry."

Related decision: In re: Gina McCarthy, 636 Fed.Appx. 142 (4th Cir. Dec. 9, 2015)(reversing prior district court order requiring deposition of EPA Administrator Gina McCarthy).

***Helping Hand Tools v. U.S. Environmental Protection Agency*, 836 F.3d 999 (9th Cir. 2016).**
The Ninth Circuit upheld an EPA permit issued pursuant to the Clean Air Act to Sierra Pacific Industries for construction of a new biomass power plant at its lumber mill in California. The court rejected claims by plaintiff environmental groups that EPA should have considered solar power and a greater natural gas mix as clean fuel technologies in the best available control technologies (BACT) analysis. The court focused on the fact that Sierra Pacific's project was based on using its own wood waste as fuel as "an inherent design" of the unit. Regarding plaintiffs' claim that a greater natural gas mix should have been considered, the court concluded that burning natural gas is incidental to the company's business purpose of using its on-site source of biomass as the fuel for the new facility. The court found that EPA took the requisite hard look at the plant's proposed design and the key purpose of burning its own biomass waste and that EPA reasonably concluded that consideration of solar or increased natural gas would disrupt that purpose and redefine the source.

Water Quality

***Sierra Club v. BNSF Railway Company*, No. C13-967-JCC, 2016 WL 6217108 (W.D. Wash. Oct. 25, 2016).**
A federal district judge held that rail cars can be considered "point sources" subject to Clean Water Act (CWA) discharge permit requirements. The Sierra Club and other environmental groups brought a suit alleging that BNSF Railway Company violates the CWA by allowing its rail cars to discharge coal and other pollutants into waters in Washington state. The court disagreed with BNSF's argument that aerial and windblown discharges from railcars into waters are nonpoint discharges. The court concluded that it is undisputed that BNSF's trains run directly next to and over many of the waterways at issue and thus that the railcars are a discrete conveyance under the CWA. Defendant is thus liable for such aerial point source discharges if plaintiffs establish that these kinds of discharges occurred. The court agreed with BNSF, however, that coal emissions to land and then from land to water are not point source discharges under the CWA "because they are not a discrete conveyance directly to water." The court denied plaintiffs' motion for summary judgment because of the presence of disputed issues of material fact.

***Natural Resources Defense Council, Inc. v. of Los Angeles*, No. 15-55562, 2016 WL 6407422 (9th Cir. Oct. 31, 2016).**
A district court's dismissal on mootness grounds of claims for injunctive relief against the County of Los Angeles (County) was reversed by the Ninth Circuit on interlocutory appeal. Plaintiffs filed suit in 2008 alleging that the County was discharging stormwater in violation of its National Pollutant Discharge Elimination System (NPDES) permit. While litigation was pending, in 2012 the County received a new NPDES permit. The new permit contains a safe harbor provision that deems the County in compliance with receiving water and Total Maximum Daily Load requirements if the County develops and implements voluntary watershed management programs. In 2015 the County filed a motion to dismiss the suit on mootness

grounds. The district court denied the motion with regard to civil penalties for past violations but granted the motion with respect to injunctive relief. The Ninth Circuit held that a new permit, even if the standards are relaxed, does not in itself moot a cause for injunctive relief. The court of appeals found no evidence that the County would not violate receiving water limits in the future, noted in *dicta* that the safe harbor permit provisions were currently being challenged in state court, and in any event depended on the County's actually implementing the watershed management program.

TSCA

***Crystal Good v. American Water Works Co. Inc.*, No. 2:14-013742016 WL 5939344 (S.D. W.Va. Oct. 12, 2016).**
A district court dismissed for lack of standing a suit by residents and workers to restrain violations of the Toxic Substances Control Act (TSCA) resulting from a spill of a coal processing chemical from a storage tank operated by Freedom Industries. Plaintiffs allege that the spill contaminated the Elk River and interrupted the water supply to 300,000 customers. Plaintiffs sought relief against Eastman Chemical Co., which allegedly submitted an insufficient Pre-Manufacturing Notice to EPA. The court ruled that plaintiffs have not shown the existence of a continuing or threatened injury to plaintiffs that would be addressed by the relief sought by their TSCA claims. Where the risk of future injury is speculative or subjective, the threat of such injury cannot support standing, the opinion states. Moreover, the relief sought by plaintiffs, namely for defendant to correct its reporting and recordkeeping, would not redress the alleged threat of exposure or injury to plaintiffs. Thus, the court concludes that none of the injuries claimed by plaintiffs, even if sufficient to support standing, would be redressed by the relief sought by plaintiffs.

Energy

***Zero Zone, Inc. v. United States Dept. of Energy*, 832 F.3d 654 (7th Cir. 2016).**
The Seventh Circuit upheld Department of Energy (DOE) regulations aimed at improving the energy efficiency of commercial refrigeration equipment pursuant to the Energy Policy and Conservation Act. The court held that DOE had the authority to take into account the costs of the carbon dioxide emissions that would occur in the absence of regulation, including changes in agricultural production, flood risk, and human health. The court concluded that DOE reasonably determined that the standard was economically justified.

RCRA

***Hanford Challenge v. Moniz*, No. 4:15-cv-05086-TOR, 2016 WL 6902416 (E.D. Wash. Nov. 3, 2016).**
A district court in Washington denied a motion to dismiss a Resource Conservation and Recovery Act (RCRA) lawsuit by citizen plaintiffs and the state alleging that the storage, handling, and treatment of hazardous waste at the Hanford Nuclear Site presents an imminent and substantial danger to human health and the environment and seeking declaratory and injunctive relief. DOE moved for judgment on the pleadings arguing that the state lacks standing as *parens patriae* and has failed to establish injury to itself sufficient to establish Article III

standing. The court first held that the RCRA citizen suit provision grants states the authority to sue the United States as long as Article III standing requirements are satisfied. With respect to the Article III requirements, the court concluded that the state's interest in the well-being of its citizens and residents working at the Hanford site is sufficient for *parens patrie* standing.

Evidence

***Malashock v. Jamison*, No. SC95606, 2016 WL 6441285 (Mo. Sup. Ct. Nov. 1, 2016).**
The Supreme Court of Missouri held, *en banc*, that designating an expert witness does not, standing alone, irrevocably waive the protections afforded by the work product doctrine. The work product doctrine is a defense to pretrial discovery, which protects conclusions or opinions commissioned by counsel in preparation for litigation. The issue was whether, for purposes of pretrial discovery, the work product doctrine is waived when a party designates an expert witness and then rescinds the designation without disclosing the expert's analysis or conclusions. The court held that in this case, plaintiff did not waive the work product doctrine by listing an individual as an expert witness because the expert's opinions and conclusions were never disclosed and the expert is not expected to testify at trial.

***Pollitt Drive, LLC v. Engel*, No. A-4833-13T3, 2016 WL 6407280 (N.J. Supr. Ct. App. Div. Oct. 31, 2016).**
The New Jersey Appellate Division held in a *per curiam* opinion that a plaintiff landowner seeking to recover costs expended to remediate property it purchased was guilty of spoilation when it failed to preserve physical evidence relevant to the source and timing of contamination. In particular, during the course of cleanup, plaintiff's contractor removed a lateral pipe beneath a building and also excavated the sump pit and concrete floor of the building before experts had an opportunity to examine them. The court concluded that it was not possible for defendants to refute plaintiff's theories about the source and timing of discharges without examining these site features. However, the court held that the trial court erred in dismissing the complaint because it did not consider whether less severe sanctions, including an adverse inference, could have negated the prejudice to defendants. The case was reversed and remanded.