In this update:

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Article One

Petitioner's Challenge to EPA's 2010 Regulation Allowing Argentine Biofuel Producers to Use Certain Recordkeeping Practices Denied

National Biodiesel Board v. Environmental Protection Agency

(Case No. 15-1072, D.C. Cir. Dec. 20. 2016)

Petitioners are a trade association representing the biofuel industry. Petitioners challenged EPA's 2010 decision to allow a group of Argentine biofuel companies, and others, to use certain recordkeeping practices in connection with their sales of biofuels in the United States. This case presented an international issue - whether EPA was meeting its responsibility to protect against harmful global land-use changes resulting from the United States' demand for renewable fuels-however, the Court did not have to address this issue. The Court denied Petitioner's challenge as it was untimely, and EPA's decision to grant Argentine application was neither arbitrary nor capricious as the decision "rests upon the kind of highly technical judgments to which we owe agencies great deference." *Id.*

Background

Congress enacted the Renewable Fuel Standard Program ("RFS") in 2005 which requires that transportation fuel, as used in cars and sold at gasoline stations, include a specified amount of renewable fuel derived form planted crops, trees, animal waste, algae, as alternatives to traditional fossil fuels. Congress amended the RFS in 2007 to significantly increase the use of renewable fuel and to ensure that this increase would reduce greenhouse-gas emissions to "lower the risk of climate change." *Id.* Over concerns that the increased demand for renewable fuels could lead to land-use changes, such as deforestation, Congress mandated the use of renewable fuel from planted crops come from agricultural land cleared or cultivated before the 2007 amendment.

To implement the RFS, EPA adopted a program by which an "independent third party conduct[s] a comprehensive program of annual compliance surveys…to be carried out in accordance with a survey plan which has been approved by EPA." *Id.* In 2012, the Argentine Chamber of Biofuels ("CARBIO"), a nonprofit association of biodiesel producers, soybean growers, warehouses, and oil-crushing mills, submitted a comprehensive survey proposal for EPA's approval as an alternative tracing program. As part of its review of CARBIO's proposal, EPA requested that CARBIO provide additional program information, and submit additional program materials in the form of seven addenda. While EPA was considering CARBIO's proposal, Petioners sent a letter to EPA expressing concern about the viability of enforcing an alternative tracking program abroad and requesting that EPA "provide the public with notice and comment on any proposed survey plan for foreign feedstocks and production before EPA takes any action." *Id.* However, on January 27, 2015, EPA approved CARBIO's proposal and responded to Petitioners stating that "[g]iven the significant notice and comment process used to develop [the recordkeeping] regulations," EPA "[d]id not find it appropriate to create additional notice and comment processes for each plan approval as [Petitioners] suggested in [their] letter." *Id.*

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Article One (cont.)

Petitioner's Challenge to EPA's 2010 Regulation Allowing Argentine Biofuel Producers to Use Certain Recordkeeping Practices Denied

Petitioners filed its challenge seeking review of the 2010 Rule establishing the alternative tracking program.

Court's Rationale

Standing

EPA challenged Petitioner's standing. Petitioners alleged standing on behalf of its domestic producer members who would "suffer injury as a result of increase competition from Argentine biodiesel." *Id.* The Court held that Petitioners had standing as alleged as similarly decided in *Delta Construction v. EPA*, 783 F.3d 1291 (D.C. Cir. 2015) (*per curiam*), in which this Court held that an importer and seller of vegetable-based fuel suffered constitutional injury as a result of "EPA regulations that incentivize[d] other renewable fuels like electricity sold by its competition." *Id.* at 1299. Here, Petitioners' declarations confirmed that its members would compete with imports in the United States biodiesel market.

Clean Air Act Challenge

The Clean Air Act requires that a petition for review of any nationally applicable regulations be filed within sixty days from the promulgation of a rule. Petitioners' challenge to the Rule some five years after notice was promulgated-despite commenting during the rulemaking process and intervening on behalf of EPA in support of the Rule in a lawsuit within this circuit. Petitioners relied on the holding in *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F3d 102, 129-32 (D.C. Cir. 2012), aff'd in part, rev'd in part sub nom. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), in which the D.C. Circuit held that the sixty-day statutory limitations deadline did not bar industry petitioners' challenge to a longstanding EPA program when a new rule expanded the program "to never-regulated sources" operated by those industries. *Id.* at 130. "The new rule gave petitioners 'newly ripened' claims against the program because…prior to its expansion the prospect that the program would injure petitioners was too speculative to confer jurisdiction on the court." *Id.* at 131. In this case, however, Petitioners were subject to the Rule from its outset, which is why Petitioners participated in the rulemaking process and intervened in the litigation challenging the Rule-defending rather than challenging the Rule. As a result, Petitioners' challenge was untimely.

CARBIO Proposal

Regarding EPA's approval of the CARBIO proposal, Petitioners alleged that EPA was required to use the notice-and-comment rulemaking process rather than the informal adjudication process it selected. As a general matter, "agencies have 'very broad discretion whether to proceed by way of adjudication or rulemaking.'" *Id.*, quoting from *Qwest Services Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007). The Court granted EPA its discretion finding that the nature of the proceeding "reflect[ed] a highly fact-specific, case-by-case style" characteristic of adjudication. *Id.*

Conclusion

Concerning Petitioners' claims that EPA's approval was arbitrary and capricious, the Court held that its decision was within the ambit of its regulations and rested on the kind of highly technical judgments to which courts generally defer to agencies.

Article Two

EPA's Approval of Rhode Island's TMDL Reports Did Not Constitute a Determination of any Stormwater Discharges

Conservation Law Foundation v. United States Environmental Protection Agency
(Case No. 15-165-ML, D. RI Dec. 13, 2016)

Conservation Law Foundation ("Plaintiff") sued EPA alleging that it failed to carry out its non-discretionary duties under the Clean Water Act ("CWA") - specifically failing to notify dischargers that contributed to water quality violation of their obligation to obtain discharge permits under the State's NPDES program, and to provide such dischargers with permit applications. Petitioner alleged that EPA's approval of the State's TMDLs for certain Rhode Island waterbodies constituted a determination by EPA that stormwater discharges from certain commercial and industrial facilities contributed to violations of water quality standards as to bacterial and phosphorus concentrations in the water bodies, and that stormwater controls were necessary from these facilities. EPA filed a motion to dismiss for lack of jurisdiction and for failure to state a complaint alleging that, in approving the TMDLs at issue, it did not make a determination that NPDES permits were required, and that there was not legal requirement for it to notify dischargers of permit requirements or to send them permit applications.

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Article Two (cont.)

EPA's Approval of Rhode Island's TMDL Reports Did Not Constitute a Determination of any Stormwater Discharges

The court granted EPA's motion holding that in approving the TMDL reports, EPA made no determination of any stormwater discharges contributing to water quality violations - its review was limited to ascertaining that and how the respective TMDL reports met the statutory and regulatory requirements of TMDLs in accordance with CWA section 303(d).

Background

The CWA requires each state to develop TMDLs for all waterbodies identified on their Section 303(d) list of impaired waters, according to their priority ranking on that list. A TMDL is a calculation of the maximum amount of a pollutant allowed to enter a waterbody so that the waterbody will meet and continue to meet water quality standards for that particular pollutant. A TMDL determines a pollutant reduction target and allocates load reductions necessary to the source[s] of the pollutant.

States develop TMDLs and then submit them to EPA for approval. Under the CWA, EPA reviews and either approves or disapproves the TMDL. If EPA disapproves a state TMDL, EPA must develop a replacement TMDL.

The CWA also prohibits the discharge of any pollutant from a point source unless authorized by an NPDES permit. NPDES permits "bring both state ambient water quality standards and technology-based effluent limitations to bear on individual discharges of pollution…and tailor these to the discharger through procedures laid out in the CWA and in EPA regulation." *Id*. quoting from *Upper Blackstone Water Pollution Abatement Dist. v. U.S. E.P.A.*, 690 F.3d 9, 14 (1st Cir. 2012). Together with the CWA requirement of state-established water quality standards, TMDLs in part, that protect against degradation of the physical, chemical, or biological attributes of the states' waters, "[the] most important component of the Act is the requirement that an NPDES permit be obtained." *Id*., quoting from *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1294 (1st Cir. 1996).

The Rhode Island Department of Environmental Management ("RIDEM") developed TMDLs for six waterbodies at issue in this case. These waterbodies were listed as impaired based on a host of bacterial factors and phosphorus. EPA approved the TMDLs for all six waterbodies.

Court's Rationale

An NPDES for stormwater discharges is required under the following circumstances:

(C) The Director, or in States which approved NPDES programs either the Director of the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" [TMDLs] that address the pollutant[s] of concern; or

(D) The Director, or in States with approved NPDES programs either the Director of the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of water quality standard or is a significant contributor of pollutants to waters of the United States." *Id.* citing to 40 C.F.R. section 122.26(a)(9)(i)(C),(D).

Based on these regulations, Plaintiff alleges that EPA's approval of TMDL reports submitted by RIDEM constituted an exercise of EPA's residual designation authority.

EPA's approval documentation for the respective TMDLs submitted was limited to reviewing and ascertaining that and how the respective TMDL reports met the statutory and regulatory requirements for TMDLs as set forth in Section 303(d) of the CWA. Nothing in EPA's approval document indicated that: "(1) EPA [had] conducted its own analysis or fact finding; …(2)…EPA [had] made an independent determination that the stormwater discharge into Mashapaug Pond contributes to a violation of water quality standards; and/or (3)… additional NPDES permits should be required for stormwater discharges into Masapaug Pond." *Id.*

Mashapaug Pond was specifically sites as representative of the level and nature of EPA's review. As to all reports, EPA's approval documentation did not contain any independent determinations that any stormwater discharges contributed to water quality violations or that they constituted significant contributors of pollutants to those waters. Moreover, EPA's approval documents stopped short of approving or taking action on the implementation plan contained in the TMDL reports, and did not call for the issuance of any NPDES permits.

All that could be said of EPA's approval was that it appeared limited to a summary of the TMDL reports and an acknowledgment that the TMDLs met the statutory and regulatory requirements.

Conclusion

The Court denied Plaintiff's based on a lack of jurisdiction. In the absence of an independent determination by the EPA that the stormwater discharges contributed to water quality standard violations, the EPA's decision not to require permits for the discharges doesn't constitute a CWA violation, so the court has no jurisdiction over the matter.

"CLF cannot close the gap between [the Rhode Island Department of Environmental Management's] assessments of the impaired waterbodies and the EPA's alleged duty to notify stormwater dischargers of … permit requirements or to provide them with permit applications," *Id.*

Given the extensive amount of TMDL-related cases, this decision is important.

Article Three

RCRA Does Not Create A Private Right to Recover Damages

Hollingsworth v. Hercules, Inc.,
(Case No. 2:15-CV-113-KS-MTP, S.D. Miss., Dec. 22, 2016)

Plaintiffs filed a toxic tort case alleging that defendant, Hercules, Inc. ("Defendant") improperly disposed of hazardous waste products thereby contaminating the soil and groundwater beneath its facility. Plaintiffs further contended that the hazardous waste products migrated to contaminate the soil, air, and groundwater of their property. Defendant moved for partial summary judgment on seven of Plaintiffs' claims; the District Court granting and denying in part.

Background

Plaintiffs' complaint asserted counts of negligence, gross negligence, nuisance, and trespass, and alleged that they suffered property damage, loss of income, and emotional distress.

Defendant moved for partial summary judgment on seven of Plaintiffs' claims. The District Court for the Southern District of Mississippi granted Defendant's motion for partial summary judgment as to (1) Plaintiffs' claims of trespass with respect to the groundwater on their properties; (2) Plaintiffs' claim for emotional damages based on the fear of future health problems; (3) Plaintiffs' claim for emotional damages in connection with their negligence claims; (4) Plaintiffs' negligence *per se* claim; and (5) Plaintiffs' claim of strict liability for ultrahazardous activity. The Court further denied Defendant's motion for partial summary judgment as to (1) Plaintiffs' claims of decreased property values and (2) Plaintiffs' claim for intentional infliction of emotional distress.

Court's Rationale

A. Plaintiffs' Claim of Trespass with Respect to Groundwater

The Court recognized that trespass under Mississippi law requires evidence of an "'actual physical invasion of the plaintiff's property.'" *Id.* quoting *Prescott v. Leaf River Forest Prods*., 740 So. 2d 301, 310 (Miss. 1999). Recognizing that Plaintiffs had put forth no evidence of contaminants in the groundwater on their property, the Court granted Defendant's motion for summary judgment as to any trespass claim with respect to the groundwater on Plaintiffs' property.

B. Plaintiffs' Claims of Decreased Property Value

As Plaintiffs' expert only provided appraisals of the properties' values without any contamination, Defendant argued that Plaintiffs could not maintain a claim of decreased property value without also presenting an expert opinion of the properties' values after contamination. Plaintiffs' contended that they could provide their own expert testimony as to the contaminated, "as is" value of their properties, and the Court agreed, reasoning that "opinion testimony of a landowner as to the value of his land is admissible without further qualification." *Id.* quoting *LaCombe v. A-T-O, Inc.*, 679 F.2d 431, 434 (5th Cir. 1982). Although Defendants also contended that Plaintiffs had failed to disclose their opinions regarding the value of the properties, the Court stated that Defendants had failed to challenge Plaintiffs' inadequate disclosures per the thirty day discovery deadline under the local rules, and thus waived any argument regarding Plaintiffs' testimony regarding the value of their own properties. *Id.* Denying Defendant's motion for partial summary judgment as to Plaintiffs' claims of decreased property values, the Court reasoned that Plaintiffs could demonstrate a diminution in their properties' values by combining their opinion as to the properties' values as is with the appraiser's estimates of the properties' unimpaired values. *Id.*

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About Thierry R. Montoya

Thierry R. Montoya has achieved successful results for both public and private sector clients in a variety of complex environmental, land use, construction, and eminent domain matters. Thierry's practice includes environmental litigation under CERCLA, RCRA, the Clean Water Act, Proposition 65, and state and federal and common law.

Thierry also represents clients in natural resources issues involving water, oil and gas interests, air and water permitting and violations including NPDES and Title V.

On the land use side, Thierry provides permitting, zoning, CEQA/NEPA, and eminent domain expertise. Thierry also represents public and private sector clients in construction biddings, contracting, and litigation.

Article Three (cont.)

RCRA Does Not Create A Private Right to Recover Damages

C. Plaintiff's Claim for Negligence Per Se

Defendant argued that Plaintiffs' claim of negligence per se, which was based on Defendant's alleged violations of the Resource Conservation Recovery Act ("RCRA"), was not permitted as RCRA does not create a private right of action for damages. The Court recognized that RCRA creates a private right of action, but that the available remedies are limited to "civil penalties, injunctive relief, and attorney's fees." *Id.* quoting *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1574 (5th Cir. 1988). Stating that the Fifth Circuit had not yet addressed the issue of whether RCRA violations could provide a basis for a negligence per se claim under state law, the Court elected to follow the majority of federal district courts that have held that "allowance of a negligence per se action based on violation of RCRA would contravene the clear legislative intent of the statute not to allow for damages based on violation of its provisions." *Id.* quoting *Coastline Terminals of Conn., Inc. v. USX Corp.*, 156 F. Supp. 2d 203, 210-11 (D. Conn. 2001).

With regard to the RCRA's savings clause, which expressly provides that "[n]othing in this section shall restrict any right which any person…may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of…hazardous waste, or to seek any other relief…." 42 U.S.C. § 6972(f), the Court recognized that other federal courts addressing this issue have held that despite the savings clause, such suits are "designed to achieve an end run around [on] the strict limitations placed by Congress on private damages actions under RCRA," and that plaintiffs may not use " RCRA as a springboard to obtain damages via common law claims." *Id.* The Court granted Defendant's motion for partial summary judgment as to Plaintiffs' negligence per se claim, reasoning that such claim was premised solely on an RCRA violation, which was "…effectively RCRA claims for compensatory damages, which [was] not permitted." *Id.*

D. Plaintiffs' Claim of Strict Liability for Ultrahazardous Activity

Last, with regard to Plaintiffs' claim of strict liability for ultrahazardous activity, the Court recognized that Mississippi law requires participation in a narrowly defined "ultrahazardous activity" before strict liability can be imposed for harm from industrial operations. *Id.* quoting *Bradley v. Armstrong Rubber Co.*, 130 F.3d 168, 174 (5th Cir. 1997). The Court further found that strict liability for ultrahazardous activity in Mississippi courts and the Fifth Circuit had only been found in cases involving the use and transport of explosives in populated areas. *Id.* (internal citations omitted). Reasoning that both the Fifth Circuit and the Mississippi Supreme Court have decline to extend the definition of "ultrahazardous activity" to include trespass claims like the ones asserted by Plaintiffs', the Court granted Defendant's motion with respect to Plaintiffs' claim of strict liability for ultrahazardous activity.

Conclusion

This case represents a common blend of federal and state law claims in environmental disputes. Missing is a nuisance claim which is a frequently pled as a state law claim in such matters. The state law claims provide for a basis to seek compensatory-type damages as opposed to penalties, costs, injunctive relief and attorneys' fees that are afforded under the federal claims.

About AlvaradoSmith

AlvaradoSmith is experienced in all facets of public and private project development and implementation, environmental review and compliance, and natural resource law. We represent public utilities, public agencies, private developers, commercial property owners, and private landowners in major facilities and infrastructure development projects, land acquisition, pipeline development, soil and groundwater cleanups, and renewable energy projects. We know the ins and outs of environmental and natural resource law compliance.

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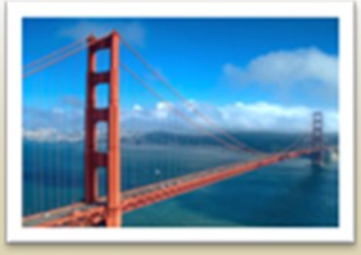

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