COUNTRY REPORT: UNITED STATES

With Gridlock in Congress, Agencies and Courts Take Center Stage

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Introduction

With the U.S. Congress sharply divided on environmental issues, most significant environmental developments in the United States in 2013 occurred in the agencies and the courts. Reinforced by the release of President Barack Obama's Climate Action Plan in June 2013, the U.S. Environmental Protection Agency (EPA) has moved aggressively to regulate emissions of greenhouse gases (GHGs) using its existing regulatory authority under *the Clean Air Act* [74 Fed. Reg. 66,496 (2009); 75 Fed. Reg. 17,004 (2010); 75 Fed. Reg. 25,324 (2010); 75 Fed. Reg. 31,514 (2010)]. These and other regulatory actions by EPA have been challenged by industry groups in the courts. With a few exceptions the judiciary has upheld EPA's actions to strengthen U.S. environmental regulation. However, the U.S. Supreme Court itself remains sharply divided in environmental cases with Justice Anthony Kennedy usually serving as the deciding swing vote with four of the other eight Justices highly skeptical of environmental regulation and four generally supportive of it.

Climate Change and Air Pollution

President Obama's Climate Action Plan

In June 2013, President Obama announced a comprehensive *Climate Action Plan* that concentrates on actions the executive branch can take without new legislation from Congress. Noting that U.S. carbon emissions in 2012 fell to the lowest level in two decades, the Plan promises to build on this progress. The Plan directs the EPA Administrator to expedite the issuance of strict standards to control carbon emissions from new and existing power plants. It pledges to tighten fuel economy standards and to improve energy efficiency

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in American homes and businesses. To promote the goal of doubling electricity generation from renewable sources by 2020, the Plan instructs the Secretary of Interior to issue permits for an additional 10 gigawatts of renewable energy production on public lands by 2020. The Plan also seeks to prepare the U.S. to adapt to the impacts of climate change by improving the resiliency of energy infrastructure, conserving land and water resources, managing drought, reducing wildfires, and preparing for floods. It promises that the U.S. will provide leadership in international efforts to address climate change by promoting free trade in clean energy technologies and a worldwide transition to cleaner sources of energy.

EPA Regulation of GHG Emissions – Supreme Court Agrees to Partial Review

On September 20, 2013, the EPA proposed new source performance standards (NSPSs) for new fossil-fueled powerplants that are widely viewed as precluding the construction of new coal-fired powerplants unless they employ expensive carbon capture and storage technology. The EPA is also preparing to regulate existing sources of greenhouse gas emissions pursuant to §111(d) of *the Clean Air Act*, which allows the agency to require states to regulate a pollutant for which it has established an NSPS if it is not already regulated as a criteria air pollutant with a national ambient air quality standard (NAAQS) or as a hazardous air pollutant subject to a national emissions standard for hazardous air pollutants (NESHAP).

On October 15, 2013 the U.S. Supreme Court announced that it will review one portion of the D.C. Circuit's June 2012 decision that upheld EPA's initial regulation of emissions of GHGs. The Court limited its review to a single question:

> *"Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases."*

This means that the Court will not review EPA's crucial finding that emissions of GHGs endanger public health or welfare or its regulation of mobile sources under the Clean Air Act. The focus in the Supreme Court instead will be on whether EPA can use the prevention of significant deterioration (PSD) permit program to regulate new sources of greenhouse gas emissions. The Court has set the date for the oral argument in this case for February 24, 2014. A decision from the Court is expected by the end of June 2014.

Constitutionality of State Actions to Control Greenhouse Gas Emissions

In *Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013)*, a divided panel of the U.S. Court of Appeals for the Ninth Circuit rejected a constitutional attack on California's ambitious effort to reduce carbon emissions in the state. The court found that California's Low Carbon Fuel Standard (LCFS), which requires a ten percent reduction in the carbon intensity of fuels used in the state, did not violate the dormant commerce clause. Even though the LCFS used the location from which fuel was transported as one factor in calculating lifecycle carbon intensity of fuels, the court found that the legislation was not facially discriminatory against interstate commerce because the location where fuels originate is only one factor that is considered and it is considered properly with respect to location's impact on each fuel's carbon footprint. The court found that the law had no protectionist purpose and that it disadvantaged California corn ethanol producers because they had to transport the corn they used into the state while Brazilian ethanol producers were advantaged because their products were efficiently shipped to California by sea even though they traveled greater distances.

The Ninth Circuit panel also rejected the notion that the LCFS tries to control extraterritorial conduct in a manner that violates the dormant commerce clause.

> *"The Commerce Clause does not protect Plaintiffs' ability to make others pay for the hidden harms of their products merely because those products are shipped across state lines. The Fuel Standard has incidental effects on interstate commerce, but it does not control conduct wholly outside the state."*

The court held that §211(c)(4)(B) of *the Clean Air Act*, which waives for California the express preemption provisions of the Act, did not insulate the state from liability if it otherwise violated the dormant commerce clause. Having rejected the facial discrimination claim, the court remanded the case back to the lower court to assess whether the law unduly burdened interstate commerce under the *Pike v. Bruce Church* test. The dissenting judge would have held that the law was facially discriminatory because it used location as one factor in calculating carbon intensity.

The Role of Science in Revising Air Quality Standards – the Ozone NAAQS

On July 23, 2013, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit unanimously upheld EPA's revised primary national ambient air quality standard (NAAQS) for ozone. Primary NAAQS are required by law to be set at a level "requisite to protect the public health" with "an adequate margin of safety." In Mississippi v. EPA, 723 F.3d 246 (D.C. Cir. 2013), the court rejected industry claims that it should not have replaced the old 8-hour primary standard of 0.08 ppm with the lower standard of 0.075 ppm that it promulgated. It also rejected arguments by environmental groups and state governments that EPA should have accepted the lower level of 0.070 ppm recommended by its Clean Air Scientific Advisory Committee (CASAC), instead of the 0.075 ppm standard it promulgated.

The court explained that:

> *"Although CASAC stated that 'overwhelming scientific evidence' supported its recommendation that the standard be set no higher than 0.070 ppm, it never explained whether this proposal was based on its scientific judgment that adverse health effects would occur at that level or instead based on its more qualitative judgment that the range it proposed would be appropriately protective of human health with an adequate margin of safety."*

The court stated that if CASAC had concluded that adverse health effects were like to occur at the 0.070 level, then EPA would have been required "to explain why it disagreed with this scientific conclusion." However, "because CASAC never made clear the precise basis for its recommendation, all we know for certain is this: both CASAC and EPA believed the existence of adverse health effects to be certain at the 0.08 ppm level and reached differing conclusions about what level below 0.08 ppm was requisite to protect the public health with an adequate margin of safety."

The court went on to remand for reconsideration EPA's secondary standard for ozone, which the agency had set at the same level as the primary standard. Secondary standards are required by law to be set at a level "requisite to protect the public welfare from any known or anticipated adverse effects". The court concluded that the agency had failed to explain why the standard was requisite to protect public welfare, as required by the statute.

U.S. Supreme Court Upholds EPA Regulation of Interstate Transport of SO_2 and NO_x

For more than a decade EPA has sought to implement new rules to require further reductions in emissions sulfur dioxide (SO_2) and nitrogen oxide (NO_x) to reduce interstate transport of pollutants that interfere with the ability of downwind states to meet their NAAQSs. In May 2005 EPA adopted the Clean Air Interstate Rule (CAIR) that directed 28 states in the eastern and Midwestern parts of the country to reduce their emissions of SO_2 and NO_x. After the CAIR was struck down in court in 2008, EPA replaced it in July 2011 with new regulations that came to be known as the *"Cross-State Air Pollution Rule" (CSAPR)*. The *CSAPR* was adopted by EPA to correct the deficiencies the court found in the CAIR. In August 2011 it also was struck down in what some observers believed to be a breathtaking example of judicial activism. *EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012).* At the behest of EPA, the U.S. Supreme Court agreed in June 2013 to review the decision striking down the CSAPR. On April 29, 2014, the Court reversed the lower court and upheld EPA's regulations. The decision in EPA v. EME Homer City Generation, L.P., 134 S.Ct. 1584 (2014), represents a huge victory for the agency. Observers believe that it is particularly significant that Chief Justice Roberts and Justice Kennedy, who often are part of a conservative block of five Justices, joined the four other Justices who usually are sympathetic to environmental regulation to make the decision a 6-2 ruling (Justice Alito was recused from the case). The Court held that EPA had not violated the Clean Air Act by basing states's obligation to control transboundary pollution on what measures could be undertaken most cost-effectively.

D.C. Circuit Upholds EPA's Regulation of Mercury and Air Toxics from Power Plants

On April 15 a divided panel of the U.S. Court of Appeals for the D.C. Circuit upheld EPA's regulations limiting emissions of mercury and other air toxics from oil- and coal-fired power plants. White Stallion Energy Center, LLC v. EPA, 2014 WL 1420294 (D.C. Cir. 2014). The regulations, issued in 2012, require power plants to reduce emissions of mercury, chromium, arsenic and other air pollutants. Writing for the majority, Judge Judith Rogers concluded that the agency properly focused on the public health hazards caused by these emissions. In dissent, Judge Brett Kavanaugh argued that the agency erred by failing to consider the costs of the regulations.

Impact of Clean Air Act on State Common Law Actions

On August 20 the U.S. Court of Appeals for the Third Circuit held that a power plant's compliance with the Clean Air Act does not insulate it from liability for nuisance, negligence and trespass under Pennsylvania common law. The decision in *Bell v. Cheswick Generating Station* reversed a lower court decision that had dismissed a class action lawsuit by 1,500 people living within a mile of a coal-fired powerplant. The plaintiffs initially filed suit in Pennsylvania state court, alleging that emissions from the plant had caused ash and other contaminants to land on their property. The company that owned the plant, GenOn Power Midwest, L.P., had removed the case to federal court and filed a motion to dismiss, arguing that the Clean Air Act preempted the lawsuit because it imposed extensive regulations on the plant's operations. In support of its decision the Third Circuit cited *the Clean Air Act's* "savings clauses" in both the citizen suit provision, 42 U.S.C. §7604(e), and 42 U.S.C, § 7416. While noting that the plant's federal permit mandates that it prevent emissions from harming others, the court also noted that the permit itself has a savings clause providing that it shall not be construed as impairing state common law remedies.

The court concluded that its decision was mandated by the Supreme Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), which had cited similar savings clause provisions in holding that *the Clean Water Act*, 33 U.S.C. § 1365(e), did not preempt state tort litigation based on the law of the source state. Rejecting the company's arguments that this could cause conflicting state regulatory standards, the Third Circuit concluded that, like *the Clean Water Act, the Clean Air Act* serves *"as a regulatory floor, not a ceiling, ... that states are free to impose higher standards on their own sources of pollution, and that state tort law is a permissible way of doing so."*

Disposal of High Level Radioactive Waste

On August 13, 2013, a divided panel of the U.S. Court of Appeals for the D.C. Circuit ruled that the Nuclear Regulatory Commission (NRC) must decide on whether or not to issue a permit for the Yucca Mountain nuclear waste disposal facility. The court majority held that the NRC "is simply defying a law enacted by Congress" and "doing so without any legal basis." The court took the extraordinary step of issuing a writ of mandamus directing the NRC to act. In dissent, Judge Merrick Garland argued that mandamus was not appropriate and that the court was ordering the NRC to do a useless act because there were insufficient funds appropriated to complete the licensing process. The court majority noted that $11.1

million had been appropriated by Congress for processing the licensing application and deemed this to be a mandate to proceed. It recognized, however, that Congress was under no obligation to appropriate additional funds for the licensing process. (In re Aiken County, 725 F.3d 255 (D.C. Cir. 2013)).

Protection of Water Quality

Federal Jurisdiction to Protect Wetlands

In June 2006 a badly divided U.S. Supreme Court split 4-1-4 in deciding a case, *Rapanos v. U.S.*, involving the breadth of federal jurisdiction to protect wetlands. Because no interpretation of *the Clean Water Act* commanded a majority of the Justices, confusion has reigned concerning the breadth of federal authority under § 404 of *the Clean Water Act*, which requires a permit to discharge dredged or fill material in the "waters of the United States." In September 2013 EPA's Science Advisory Board released for public comment a new draft scientific report on "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence." When finalized, the report, which is based on review of more than 1,000 scientific studies, will serve as the basis for a new EPA rulemaking to clarify the scope of federal jurisdiction under *the Clean Water Act*.

Regulation of Stormwater Discharges from Logging Roads

In March 2013 the U.S. Supreme Court reversed a decision by the U.S. Court of Appeals for the Ninth Circuit that had required the operators of logging roads to obtain NPDES permits for stormwater discharges from them. The Ninth Circuit had held that such stormwater discharges were not exempt because they were the product of "industrial activity" covered by the Act. The Supreme Court held that EPA's determination that the term "associated with industrial activity" covers only discharges "directly related to manufacturing, processing or raw materials storage areas at an industrial plant" was entitled to deference*. (Decker v. Northwest Environmental Defense Center, 133 S.Ct. 1326 (2013)).*

Wetlands Mitigation and Regulatory Takings – the Koontz Decision

On June 25, 2013, the U.S. Supreme Court decided *Koontz v. St. Johns River Water Management District, 133 S.Ct. 2586 (2013).* By a 5-4 vote the Court held that a government agency could not require the funding of offsite mitigation projects on public lands as a condition for obtaining a permit to develop wetlands unless the government's mitigation

demand had an "essential nexus" to, and was "roughly proportional" in magnitude, to the expected impact of the development. This decision extended the "essential nexus" and "rough proportionality" requirements of regulatory takings law that previously had only applied to permit conditions requiring a dedication of a portion of real property to public use to monetary exactions. These decisions are based on the U.S. Constitution's requirement that private property cannot be "taken" by government for public use without the payment of just compensation, known as the Takings Clause. In his majority opinion Justice Alito dismissed arguments that the decision will jeopardize land use regulation, noting that many states already apply similar limits on monetary exactions sought from developers. In dissent Justice Kagan claimed that the decision will subject local government to a flood of litigation by extending the Takings Clause "into the very heart of local land-use regulation and service delivery." Justice Alito emphasized that the decision "does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners."

International Environmental Law

U.S. Signs and Accepts New Minimata Convention on Mercury

On October 10, 2013 representatives from 92 nations signed the Minimata Convention on Mercury. The signing ceremony was held in Minimata, Japan, site of horrendous mercury poisoning caused by a chemical plant dumping mercury into the harbor of the small fishing village during the 1950s and 1960s. Countries signing the treaty pledged to control emissions of mercury from new power plants and to phase out the use of mercury in many products by the year 2020. All mercury mining is to be ended in 15 years. The treaty will take effect when ratified by 50 countries, which is expected to occur in three to four years. Representatives of the U.S., who helped negotiate the treaty, could not participate in the October 10th signing because of the temporary shutdown of the U.S. federal government due to a budget dispute.

On November 6, 2013 the U.S. signed the Minimata Convention on Mercury, and it also became the first nation to deposit its "instrument of acceptance" of the Convention with the United Nations. The State Department explained why it formally accepted the Minimata Convention without seeking Senate ratification in the following statement:

> *"The United States has already taken significant steps to reduce the amount of mercury we generate and release to the environment, and can implement Convention obligations under existing legislative and regulatory authority. The Minimata Convention complements domestic measures by addressing the transnational nature of the problem."*

In 2008 Congress passed, and President George W. Bush signed into law *the Mercury Export Ban Act,* Pub. L. 110-414, 122 Stat. 4341, that added §§ 6(f) and 12(c) to the Toxic Substances Control Act to prohibit the sale, distribution, transfer and export of elemental mercury. Coupled with *EPA's Mercury and Air Toxics (MATS) regulations* under *the Clean Air Act*, which set limits on mercury emissions from power plants, the Obama administration does not believe that it needs any new legislation on mercury to implement the Minimata Convention. Thus it can be accepted by the President as an executive agreement that does not require congressional approval.