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Environmental Law Forecast: What Issues to Expect in 2014

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Special to the Legal

As we ring in the New Year, here is a preview of the top environmental issues that are expected to take center stage in 2014:

CLEAN AIR ACT REGULATORY CHALLENGES AT SUPREME COURT

Two key cases are pending in the U.S. Supreme Court's current term that may significantly impact the regulation of stationary sources of air emissions, such as electric generation units and certain industrial facilities.

On Dec. 10, oral argument was held in the first case, *Environmental Protection Agency v. EME Homer City Generation*, No. 12-1182, which challenges the EPA's Cross-State Air Pollution Rule (CSAPR), a regulation vacated by the U.S. Court of Appeals for the D.C. Circuit last year on the basis that the EPA had exceeded its regulatory authority under the Clean Air Act. CSAPR was set to replace the Clean Air Interstate Rule, or CAIR, which was also struck down by the D.C. Circuit in 2008. CSAPR seeks to enforce the so-called "good neighbor" provision of the Clean Air Act, which prohibits air emissions in one state from significantly contributing to nonattainment or interfering with attainment of the national ambient air quality standards in another state. The legal issues before the Supreme Court in the *Homer City* case that may have broader implications include the amount of deference given to the EPA's interpretation of a statute under the famous *Chevron*



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U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984), Supreme Court case, as well as the "cooperative federalism" structure of the Clean Air Act, where states and the federal government share regulatory authority for curbing air pollution. In *Homer City*, the EPA has argued that courts should defer to the EPA's reasonable construction of the Clean Air Act's "contribute significantly" provision as well as the EPA's methodology for assigning responsibility for interstate pollution, and that the EPA can take several factors into account, including the cost-effectiveness and feasibility of proposed pollution reduction regulations. In challenging CSAPR, upwind states and industry petitioners have argued that the EPA must first allow the states to determine which strategies and methods are best for limiting cross-state air pollution from their state before adopting a federally driven plan. The focus of oral argument was regarding how the phrase "contribute significantly" should be interpreted, as the term is not otherwise defined in the Clean Air Act. An opinion in *Homer City* is expected some time this spring.

The second case, *Utility Air Regulatory Group v. EPA*, No. 12-1146, also comes out of the D.C. Circuit, and focuses on the EPA's proposed regulation of greenhouse gas emissions (including, notably carbon dioxide) from stationary sources. At issue is whether the Supreme Court's previous interpretation of the term "air pollutant" to include greenhouse gases in its 2007 *Massachusetts v. EPA*, 549 U.S. 497 (2007), decision, which focused on the EPA's authority to place limits on greenhouse gas emissions from motor vehicles under Title II of the Clean Air Act, also allows the EPA to regulate such emissions from stationary sources under the EPA's Title I Prevention of Significant Deterioration (PSD) and Title V stationary source permitting programs. Industry petitioners argue the EPA's issuance of new proposed greenhouse gas limits for stationary sources under the PSD and Title V programs was improper, as the *Massachusetts* decision only allowed the EPA to regulate greenhouse gas emissions from motor vehicles. Industry petitioners argue that applying the same definitional interpretation of "air pollutant" to include greenhouse gases in stationary source permitting programs does not comport with the Clean Air Act's general regulatory scheme that segregates regulations for stationary and mobile sources of air pollution. The EPA argues that its regulation of greenhouse gas emissions for new motor vehicles triggered parallel permitting requirements for stationary sources that also emit the same type of pollution—greenhouse gases. Industry petitioners note

that should the EPA's proposed greenhouse gas stationary source emission regulations stand, thousands of small non-industrial facilities, such as schools and hospitals, would become subject to EPA air permitting requirements based solely on their carbon dioxide emissions, an outcome that Congress never intended when promulgating the Clean Air Act. Oral argument before the Supreme Court is set for Feb. 24.

EPA 2014 RULEMAKING

• New ASTM Phase I standard.

In November, the American Society for Testing and Materials (ASTM) issued a revised Standard Practice for Environmental Site Assessments: Phase I, E1527-13, the standard used by most consultants when performing environmental due diligence prior to a real estate transaction. On Dec. 30, the EPA issued a final amendment to the All Appropriate Inquiries (AAI) Rule, which governs the method by which prospective purchasers perform "all appropriate inquiries" to establish the bona fide prospective purchaser and innocent landowner defenses to liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The prior version of the AAI Rule provided that complying either with the previous 1993 version of the ASTM Phase I standard (ASTM E1527-05) or the regulatory standards listed at 40 C.F.R. § 312 would satisfy the "all appropriate inquiries" requirement. Now, a party wishing to avail itself of the bona fide prospective purchaser or innocent landowner CERCLA defense can opt to follow (1) the new ASTM E1527-13 standard, (2) the 1993 ASTM E1527-05 standard, or (3) the provisions listed at 40 C.F.R. § 312. However, in enacting the amendment to the AAI Rule, the EPA also stated that it will be issuing a proposed rule in the near future that will eliminate all references to the 1993 ASTM E1527-05 standard, and that therefore the EPA

recommends environmental professionals and prospective purchasers should immediately begin to utilize the new ASTM E1527-13 standard for all Phase I activities.

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• Revisions to construction stormwater management rule.

In 2009, the EPA promulgated the Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category, which requires owners and operators of construction and development sites to adopt various stormwater controls during active construction, including erosion and sediment controls and soil stabilization. Following promulgation of the rule, industry petitioners challenged the numeric limitation on the allowable level of turbidity of stormwater discharges from certain construction sites, culminating in litigation consolidated before the Seventh Circuit. As part of the settlement of the Seventh Circuit litigation, on April 1, the EPA issued proposed revisions to the existing rule, including removing the numerical limits on turbidity, as well as defining the term "infeasible." In several provisions of the rule, owners

and operators can be exempted from implementing specific stormwater controls where such measures are deemed to be "infeasible," which the proposed rule defines as "not technologically possible, or not economically practicable and achievable in light of best industry practices." Under the terms of the settlement, the EPA must take final action on the proposed rule by Feb. 28.

• Cooling water intake structures rule.

Section 316(b) of the Clean Water Act requires that cooling water intake structures—commonly used by power plants and manufacturing facilities to draw water from natural bodies adjacent to their facilities to cool process water and equipment—reflect "best technology available for minimizing adverse environmental impact." These facilities can affect fish and other aquatic organisms that may get trapped by water intake screens or drawn into the industrial process itself. The EPA has issued several proposed regulations and technology standards for cooling water intake structures, the most recent of which was issued April 20, 2011. The EPA is expected to issue a final cooling water intake structures rule on or before Jan. 14.

• EPA vapor intrusion guidance.

Over the last several years, the EPA has been in the process of preparing final technical guidance documents for subsurface vapor intrusions from contaminated groundwater and soils. In the spring of 2013, the EPA submitted drafts of two guidance documents for public comment—one for vapor intrusion from all compounds, and one that focused on petroleum hydrocarbons released from underground storage tanks. Public comments on these documents closed June 24 and the EPA is expected to issue final guidance documents this year. •

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