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ENVIRONMENTAL LAW

Third Circuit's Environmental Opinions in a Busy August

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Special to the Legal

In terms of environmental opinions, the month of August was a particularly productive one for the U.S. Court of Appeals for the Third Circuit, with no less than four precedential opinions with enough meat in them to keep lawyers busy for months hashing out their implications. In the meantime, this article provides a brief survey of some of the key holdings of these opinions.

CLEAN AIR ACT ISSUES

• **Pre-emption:** In April 2012, residents living near a coal-fired electric generation plant initiated a class action in the Allegheny County Court of Common Pleas, alleging that plant operations created dust and powder that continuously landed on plaintiffs' properties. The plaintiffs sought damages and injunctive relief under four state common-law theories. The owner of the plant, located in Texas, removed the case to the U.S. District Court for the Western District of Pennsylvania on diversity grounds, and then moved for dismissal, arguing that the plaintiffs' state law claims were pre-empted by the Clean Air Act. The district court agreed and dismissed the case.

The Third Circuit, in *Bell v. Cheswick Generating Station*, No. 12-4216 (3d Cir. Aug. 20, 2013), reversed and reinstated the action, holding that the CAA did not pre-empt the state law claims. Looking to a 1987 U.S. Supreme Court case decided under the Clean Water Act (CWA) that held that common-law nuisance claims were not pre-empted by the CWA, the Third Circuit determined that "there is no meaningful difference between the CWA and the CAA for the purposes of our pre-emption analysis." As a result, stationary source operators who are acting in full compliance with their permits may nevertheless find themselves subject to tort liability under state law.

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• **Statute of limitations:** A second CAA case decided by the Third Circuit in August was *United States v. EME Homer City Generation LP*, Nos. 11-4406, 11-4407, and 11-4408 (3d Cir. Aug. 21, 2013). At issue in *EME Homer City* was a coal-fired energy plant modified several times in the 1990s without the owner having complied with the CAA's New Source Review (NSR) program, which requires stationary source operators to implement pollution-control technologies and obtain a preconstruction permit before constructing a new facility or making major modifications to existing sources. After the modifications were made, the plant was sold to its current owner, who did receive the necessary operating permit, but one which the U.S. Environmental Protection Agency alleged was facially invalid because it did not include the emissions limits that would have been required of the modified plant under the NSR program. The EPA sued both the former and current owners under the CAA; as against the current owner, the EPA sought daily monetary penalties for violation of the NSR permitting requirement. The owner moved to dismiss that portion of the suit on the ground that the five-year statute of limitations found in 28 U.S.C. § 2462 barred the action. The district court agreed with the defendants and dismissed the claims.

The Third Circuit upheld the dismissal, holding that an action based upon the failure of an operator to comply with the NSR requirements must be brought within five years of the construction and/or modification of the source. The court flatly rejected the EPA's contention that each day the plant operated without an NSR permit constituted a new violation, finding nothing in the text of the NSR rules requiring the facility to obtain an NSR permit to "operate." *EME Homer City* thus throws a substantial lifeline to current and former operators of older power plants who have been recent targets of significant enforcement activity by the EPA.

OPINIONS INVOLVING CERCLA

• **Current operator liability:** In *Litgo New Jersey v. Commissioner of New Jersey Department of Environmental Protection*, Nos. 12-1288 and 12-1418 (3d Cir. Aug. 6, 2013), the corporate owner of a contaminated property, Litgo, and its shareholder, Sheldon Goldstein, sued a former owner of the property and related parties, Alfred Sanzari Enterprises and Mary Sanzari (the Sanzaris), and the federal government, claiming that they were responsible for the remediation of contamination of the property. While the decision is most notable for its holding, discussed below, that federal courts have exclusive jurisdiction over Resource Conservation and Recovery Act (RCRA) claims, it also addresses several aspects

of the Comprehensive Environmental Response, Compensation, and Liability Act, including the definition of who is a "current operator" subject to strict liability as the plaintiff had argued that it was not a "current operator" under CERCLA because it had not contributed to the contamination. The district court disagreed, finding that while CERCLA provides that former owners and operators are liable only if they owned or operated the site "at the time of disposal of any hazardous substance," there is no such qualification for current owners or operators.

The Third Circuit affirmed this aspect of the district court's holdings in the case, finding that "a determination that current operators cannot be held liable unless they have actually engaged in polluting activities would require us to disregard the distinction between past and present operators set out in the statute." Rather, the court held, a current owner must merely "manage, direct, or conduct operations specifically related to pollution."

• **Contribution upon resolution of state claims:** The other key CERCLA opinion issued by the court was *Trinity Industries v. Chicago Bridge & Iron*, No. 12-2059 (3d Cir. Aug. 20, 2013). In this case, the Pennsylvania Department of Environmental Protection initiated an environmental enforcement action against the plaintiff under two state statutes, which resulted in the entry of a consent decree pursuant to which Trinity Industries Inc. agreed to fund and conduct response actions at the site. Trinity then brought an action against Chicago Bridge & Iron Co. (CB&I), a former owner and operator, pursuant to Section 113(f)(3)(B) of CERCLA, which permits "a person who has resolved its liability to the United States or a state for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement [to] seek contribution from any person who is not party to [the] settlement." CB&I filed a motion for summary judgment arguing that Section 113(f)(3)(B) applies only if the party seeking contribution has resolved its CERCLA liability to the federal government or a state. The Western District granted CB&I summary judgment on that basis. The Third Circuit disagreed, holding that "Section 113(f)(3)(B) does not require resolution of CERCLA liability in particular." Noting that limiting the provision only to CERCLA settlements "might easily have been written into the provision" but was not, the Third Circuit instead determined that a response action taken pursuant to a state statute that "bears a strong resemblance to CERCLA" or incorporates CERCLA standards is sufficient to invoke the contribution provision.

The Third Circuit held that federal courts have exclusive jurisdiction over RCRA claims and therefore the Entire Controversy Doctrine did not apply to bar the RCRA claim.

RESOURCE CONSERVATION AND RECOVERY ACT

• **Exclusive federal jurisdiction:** Since CERCLA and the RCRA often come as a boxed set, both *Litgo* and *Trinity* also address the contours of the RCRA. In *Litgo*, the district court granted summary judgment in favor of the Sanzaris on the plaintiffs' RCRA claim on grounds that are somewhat unique to New Jersey. Specifically, a decade earlier, Goldstein had sued the Sanzaris and others in state court for, among other things, failing to properly investigate and remediate the contamination. In the federal action, the district court held that the RCRA claims could and should have been brought in the state court action under New Jersey's Entire Controversy Doctrine, and thus the plaintiffs were barred from raising them against the Sanzaris in the federal action.

The Third Circuit once again reversed the trial court, holding that federal courts have exclusive jurisdiction over RCRA claims and therefore the Entire Controversy Doctrine did not apply to bar the RCRA claim in federal court because it could not have been brought in the state court action. By so holding, the Third Circuit is now in alignment with the majority of other circuit courts that have also found that the language of the RCRA "unambiguously demonstrates" that RCRA claims can only be brought in federal court.

• **Injunctive relief where cleanup is ongoing:** Finally, in *Trinity*, the Third Circuit affirmed the district court's denial of an injunction under the RCRA. The trial court had determined that an injunction against CB&I was not warranted because Trinity was already required by the consent order to remediate the contamination at the site. In upholding the decision, the Third Circuit first noted that mandatory injunctions are "extraordinary remed[ies] that [are] only granted sparingly by the courts." Further, the RCRA permits a court to order a party to undertake remediation only as may be necessary to address the imminent threat; for contamination that is not such a threat, CERCLA provides the appropriate remedies. Since Trinity was already addressing the contamination, and there was no evidence that it was not properly doing so, the Third Circuit held that injunctive relief under the RCRA was not "necessary" to address the threat. •