DALLAS BAR ASSOCIATION

Environmental Law Section

"Environmental Case Law Update: An Idiosyncratic View"

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2010 - 2011 KEY ENVIRONMENTAL CASES

Texas & Fifth Circuit cases

1. *American International Specialty Lines Insurance Company v. 7-Eleven,* Cause No. 3:08-CV-807-M, 2010 WL 184444 at * 5 (N.D. Tex. Jan. 19, 2010)

The Plaintiff insurer sued 7-Eleven alleging that gasoline leaked from an underground storage tank and contaminated an adjacent property which it insured. Plaintiff sought summary judgment on 7-Eleven's responsibility for incurred investigation and remediation costs. The court granted Plaintiff's motion holding that the insurer met each of the five required elements of its private cost recovery claim.

2. *Creedmoor-Maha Water Supply Corp. v. TCEQ,* 307 S.W.3d 505 (Tex. App.—Austin 2010, no pet.)

The Austin Court held that because Creedmoor has not alleged facts demonstrating that it provided or made water service available to the disputed area — and, in fact, Creedmoor's pleadings and the jurisdictional evidence negate that fact — Creedmoor cannot invoke the district court's inherent jurisdiction through its claims under the Supremacy Clause and 7 U.S.C.A. §1926(b).

3. *Lyondell Chemical Co. v. Occidental Chemical Corp.*, 608 F.3d 284 (5th Cir. 2010)

In this suit involving contribution for remediation costs, the district court's admission of a Monte Carlo analysis for allocation — though it produced a statistical range of likely outcomes and not one determinative answer — supports choosing one result over another and certainly assisted the district court in its decisionmaking. However, the court's admission of the Smythe Reports, which the district court used to develop the intermediate estimate of Occidental's Turtle Bayou waste, was an abuse of discretion, and this error was harmful.

4. *Southern Crushed Concrete, LLC. v. City of Houston,* --- S.W.3d ----, 2010 WL 4638417 (Tex. App.—Houston [14th Dist.] no pet.)

On November 17, 2010, the Houston Court of Appeals analyzed whether a Houston ordinance (which prohibited the location of concrete crushing facilities within a certain distance from single family, multifamily residence, schools, or places of worship) was preempted by the Clean Air Act which had different distances and other variables. The court found that the ordinance was not preempted and not unconstitutional and upheld a motion for summary judgment for the City of Houston.

5. *Apache Corp. v. W&T Offshore, Inc*., 626 F.3d 789 (5th Cir. 2010)

The Fifth Circuit held that a "farmout agreement," under which the owner of a federal offshore oil and gas lease transferred its rights to drill to another drilling operator, does not require the operator to bear a proportionate share of the costs of decommissioning an oil platform at the lease site. The lease owner's construction of the term "platform costs"—that it includes "all costs attributable to the platform from cradle to grave, construction to dismantlement"—is unsupported by the agreement. The term includes only fixed, startup costs of constructing a well, not speculative operational expenses.

6. *Aspen Insurance UK Ltd. v. Dune Energy, Inc*., 400 Fed. Appx. 960 (5th Cir. 2010)

The Fifth Circuit held that a pollution exclusion clause contained in an oil well operator's insurance policy bars coverage for cleanup costs of an oil leak on leased land. The operator argued that the exclusion did not apply because the operator leased only mineral rights and that the surface rights to the subject property were not owned, leased, or otherwise in the operator's possession. But the unambiguous language of the policy excludes coverage for "the soil, minerals, water or any other substance on, in or under such owned, leased, rented or occupied property." Because the damage occurred on the physical property that the operator leased, the exclusion applies.

7. *Hanson Aggregates West, Inc. v. Ford*, --- S.W.3d ----, 2011 WL 477043 (Tex. App.—Austin February 2011, no pet.)

Homeowners brought nuisance action against owner of rock quarry, seeking permanent injunctive relief against quarry operations. The jury answered "NO" to each of the questions concerning whether the defendant created an actionable nuisance which requires a showing of either: (1) intentional; (2) negligent; or (3) conduct that was abnormal and out of place in its surroundings. Despite an absence of such findings by the jury, the trial court nonetheless entered a permanent injunction against the defendant based on equity.

The defendant appealed and the court of appeals reversed. The Austin Court reasoned that "Nuisance," that is, a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort and annoyance to persons of ordinary sensibilities, refers to a type of damage or invasion of another's interests that can potentially be actionable in tort; however, the type of invasion that characterizes nuisance is not, in itself, a legal wrong that gives rise to a right to relief, in that similar to many other types of invasions or infringements, the invasion characterizing nuisance becomes tortious and wrongful only when caused by intentional or negligent conduct, or conduct that is abnormal and out of place in its surroundings. In order for district court to have discretion to issue a permanent injunction against the operation of rock quarry near residential neighborhoods, homeowners were required to establish an actionable nuisance and not merely a nuisance, either through conclusive evidence or jury findings.

8. *Kane v. Cameron International, Inc*., 331 S.W.3d 145 (Tex. App.—Houston [14th Dist.] 2011, no *pet*.)

The plaintiff brought a private nuisance case and fear-of-dreaded disease action against a company. Court of appeals sustained trial court's summary judgment for defendant. Court found no evidence to support claim of private nuisance, and held no action under Texas law for fear of dread disease. Of interest, the Court stated the following: "One may create a private nuisance by using property in a way that causes reasonable fear in those who own, lease, or occupy property nearby." *See, e.g., Comminge v. Stevenson*, 76 Tex. 642, 644, 13 S.W. 556, 557 (1890) (powder magazine within four hundred feet of plaintiff's residence and that caused plaintiff apprehension and alarm was a private nuisance); *McMahan v. City of Abilene*, 261 S.W. 455, 455-56 (Tex. Civ. App.—El Paso 1924, writ dism'd w.o.j.) (leaking earthen dam located upstream from plaintiff's property and that caused plaintiff's family "continual fear ... for their lives and property" was a private nuisance).

9. *ACCI Forwarding Inc. v. Gonzalez Warehouse Partnership*, --- S.W.3d ----, 2011 WL 534388 (Tex. *App*.—San Antonio 2011, no pet.)

The landowner filed suit against corporation, and its officers and directors, alleging claims of trespass and nuisance, and sought to recover the costs of removing oilfield chemicals that corporation placed in owner's warehouse and then failed to remove. The San Antonio Court of Appeals held that the trespass and nuisance claims from corporation's failure to remove chemicals in its warehouse and on its land were temporary tort claims, rather than permanent tort claims, and, thus, claims accrued for two-year limitations purposes, not when landowner gave notice to corporation to remove chemicals, but when landowner incurred cost of having them removed.

10. *Railroad Commission v. Texas Citizens for a Safe Future and Clean Water*, --- S.W.3d --- 2011 WL *836827* (Tex. 2011)

The Texas Supreme Court said that it would defer to the RRC for an interpretation of "public interest" when considering whether an application for a permit to operate an injection well. In addition to the well's soundness, Texas Citizens urged the court to consider evidence related to traffic safety issues. The residents argued that large trucks used to haul waste water to and from the well site would damage nearby roads and pose a threat to residents in the area; thus, the well would not serve the "public interest" under § 27.051(b)(1) of the Water Code. The RRC approved the application, finding the well to be in the public interest because it would provide needed disposal capacity in the expanding Barnett Shale field, thereby increasing resource recovery and preventing waste. The Texas Supreme Court held that this limited interpretation of the Water Code by the RRC was reasonable and affirmed the decision which did not include consideration of the traffic safety issues.

11. *Del-Ray Battery Co. v. Douglas Battery Co*., --- F.3d ----, 2011 WL 855800 (5th Cir. 2011)

The Fifth Circuit held that the Superfund Recycling Equity Act (SREA)--an amendment to CERCLA that exempts certain recyclers from liability for cleanup costs under CERCLA and awards costs and fees to any recyclers improperly sued for contribution under CERCLA--does not preempt state law actions. The case arose after two battery recyclers were sued under the Texas Solid Waste Disposal Act (Texas SWDA) in Texas state court for contribution to environmental cleanup costs. The recyclers argued that they should be exempt from liability under the SREA. But the plain language of the SREA conclusively establishes that it applies only to claims asserted under CERCLA, not state law actions. Nor does CERCLA preempt the Texas SDWA. Accordingly, because the SREA on its face does not apply to state law causes of action, and because CERCLA does not preempt the Texas SWDA, the district court properly dismissed the recyclers' claims.

12. *National Pork Producers Council v. United State Environmental Protection Agency*, --- F.3d ----, *2011* WL 871736 (5th Cir. 2011)

The Fifth Circuit vacated portions of EPA's 2008 concentrated animal feeding operations (CAFOs) rule. The rule requires CAFOs that propose to discharge to apply for an NPDES permit. But there must be an actual discharge into navigable waters to trigger the CWA's requirements. EPA, therefore, cannot impose a duty to apply for a permit on a CAFO that "proposes to discharge" or on any CAFO before there is an actual discharge. However, it is within EPA's province to impose a duty to apply on CAFOs that are discharging. The court also vacated a portion of the rule that provides that a CAFO can be held liable for failing to apply for a permit. The imposition of "failure to apply" liability is outside the bounds of the CWA's mandate. But claims challenging provisions of the rule that allow permitting authorities to regulate a permitted CAFO's land application and to include these requirements in a CAFO's NPDES permit were time barred. And the court dismissed petitioners' claims concerning certain EPA guidance letters for lack of jurisdiction.

13. *Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, 630 F.3d 431 (5th Cir. 2011)

The Fifth Circuit reversed a lower court decision that the National Park Service exceeded its regulatory power in violation of the APA in connection with its oil and gas management plan for the Padre Island National Seashore. The case involves a conflict between the Service and the owner of certain mineral estates in the Seashore with respect to the owner's right of ingress and egress over the Seashore's surface. Although the Service's normally broad regulatory authority over park lands is limited by the agreements between Texas and the Service that were made when the Seashore was established, these limitations do not provide the relief the owner now

seeks. The Service is bound by the terms of Texas' concurrence when it deeded its land to the Service. Those terms provide, in relevant part, that owners of private land who convey land to the Service may preserve their mineral rights and the rights of ingress and egress to exploit their mineral estates for themselves and for their successors in title. These provisions, however, do not apply here because the owner is neither a grantor nor a successor in title. And while it is true that the Service must recognize the rights of ingress and egress possessed at the time of Texas' conveyance by those who remove minerals from outside the Seashore's boundaries, the owner's mineral estate is within the Seashore's boundaries. Accordingly, because the mineral estate at issue does not fall under any of the special protections provided in the Enabling Act that created the Seashore, the lower court erred in granting the owner summary judgment in favor of the owner.

14. *Texas v. United States Environmental Protection Agency*, No. 10-60961, 2011 WL 710598 (5th Cir. Feb. 24, 2011)

The Fifth Circuit granted EPA's request to transfer to the D.C. Circuit Texas' petition for review of the Agency's call for revisions to the state's SIP because its prevention of significant deterioration (PSD) provisions fail to control greenhouse gases. Greenhouse gases have not always been part of the PSD program, and states' SIPs thus have not always been required to regulate them. But after EPA determined that greenhouse gases were part of the PSD program, it found that any SIPs that fail to regulate them, including Texas' SIP, were inadequate. The CAA provides that challenges to nationally applicable regulations promulgated under the Act must be filed in the D.C. Circuit. The SIP call at issue in this case makes its national reach clear: it avowedly applies to all states whose implementation plans do not apply the Act's PSD program to greenhouse-gas emitting sources. Further, the 13 states affected by the SIP call span seven different EPA regions, seven different federal circuits, and four different time zones. Thus, the SIP call is not regional. It is a nationally applicable regulation, and the petition challenging it should be heard before the D.C. Circuit.

15. *Sierra Club v. Sandy Creek Energy Associates, L.P.*, 627 F.3d 134, (5th Cir. 2010)

The Fifth Circuit held that an energy company's current and ongoing construction of a coal-fired power plant, for which no maximum achievable control technology (MACT) determination has ever been made, violates CAA §112(g). In ordinary circumstances, there would be no question as to whether §112(g)'s requirement of a MACT determination applied to the plant. But in March 2005, EPA issued a rule removing coal and oil-fired electric utility steam generating units from the list of sources whose emissions are regulated under §112. As a result of EPA's delisting rule, the state environmental agency concluded that a MACT determination was not required, even though the company submitted an application for a MACT determination. But in February 2008, one month after construction of the plant began, the D.C. Circuit vacated EPA's March 2005 delisting rule. Accordingly, because §112(g)(2)(B) prohibits the act of construction, not merely the commencement thereof, the company's current and ongoing

construction of a major source without a final MACT determination violates the plain language of the statute.

16. *City of Waco v. Texas Commission on Environmental Quality*, No. 03-09-00005-CV, --- S.W.3d ----, 2010 WL 3629827, 40 ELR 20261 (Tex. App. Sept. 17, 2010)

A Texas appellate court affirmed the Texas Commission on Environmental Quality's denial of a city's hearing request concerning a dairy's application for a major amendment to its concentrated animal feed operation permit. The amendment would allow the dairy to expand its dairy head capacity, increase its retention control structure capacity, and increase the number of acres used for land application of waste and wastewater. The Commission denied the hearing request after concluding that the city was not an "affected person." The city argued that it is an affected person because there is no dispute that the dairy could potentially discharge phosphorus into the watershed. The question before the Commission, however, was whether to grant the city affected person status with respect to the particular permit at issue. The permit under consideration did not seek to authorize a new dairy, but to modify the operations of an existing one—one that presumably was already discharging some amount of phosphorus into the watershed. The Commission determined that granting this permit would have an overall beneficial environmental impact and therefore would not adversely affect the city. This decision was within their discretion and was supported by substantial evidence. The court also rejected the city's claims that the Commission's decision violates notions of due process and fair play.

Key Cases From Other Jurisdictions

1. *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc*, 596 F.3d 112 (2nd Cir. 2010)

The Second Circuit held that an administrative settlement with the state precludes a cost recovery claim under CERCLA section 107. Settling party is limited to a contribution claim under Section 113. The Second Circuit held that a party seeking contribution "need not establish the precise amount of hazardous material discharged or prove with certainty that a PRP defendant discharged the hazardous material to get their CERCLA claims past the summary judgment stage." Instead, summary judgment is only proper when a defendant establishes it is not liable at all under CERCLA – namely, it is not a PRP under the statute, there is no plausible evidence that it discharged hazardous materials, or it is eligible for one of the three affirmative defenses under § 107. The court's standard makes it easier for CERCLA plaintiffs to put a private contribution case into a settlement posture, and – conversely – makes it more difficult for CERCLA defendants to obtain early dismissal of contribution claims.

2. *N.L. Industries, Inc. v. Halliburton Co.,* Cause No. 10-CV-89A, 2010 WL 4340938 (W.D.N.Y. Nov. 2, 2010)

A district court denied an energy company's motion to dismiss CERCLA claims filed against it for reimbursement costs incurred by the former owner of a contaminated site, but granted its motion to dismiss the owner's contribution claims under CERCLA §113. The former site owner entered into an administrative order on consent (AOC) with EPA that required the owner to reimburse EPA for some response costs and to perform certain removal actions. The AOC settled nothing regarding the owner's ultimate liability. Nor did the AOC prevent EPA from requiring the owner in the future to perform additional activities under CERCLA. Under the plain language of the AOC, then, the owner not only has incurred cleanup costs directly from remedial efforts that it has undertaken but also may have to incur such costs in the future. The owner thus has a legally cognizable claim against the energy company under §107. Absent guidance to the contrary from a higher court, qualified CERCLA plaintiffs do not lose timely access to §107 so long as they have incurred costs directly--i.e., by performing the cleanup work themselves. Any attempt to distinguish direct costs resulting from a judgment, a legal settlement, a consent decree that resolves liability, or an administrative order on consent that does not resolve any liability is mere word play. Conversely, although the former owner might have a contribution claim against the energy company in the future, any attempt to seek contribution under §113 is premature.

3. *Arrow Gear Co. v. Downers Grove Sanitary District,* 629 F.3d 633 (7th Cir. 2010)

The Seventh Circuit reversed a lower court decision dismissing on res judicata grounds a company's CERCLA §113(b) contribution claim against other polluters for costs it incurred after being found liable for groundwater contamination in a class action suit. The parties reached a $16 million settlement agreement in 2006. The defendants then had to allocate the expense among themselves, and they did so in a series of agreements. Each agreement, so far as it relates to the present contribution suit, releases in the broadest possible terms any claims for contribution by any defendant against any other defendant that had been or could have been made "from the beginning of time." But this sweeping release is qualified: the agreement does "not release any claims other than the specified claims and do[es] not release claims that may arise in other litigation or in other contexts related to alleged contamination" at the site. Accordingly, the settlements confine release to claims by defendants against one another concerning the allocation of the $16 million only. The agreements do not release claims concerning costs incurred outside the settlement. Thus, the defendant companies have no defense of res judicata in the present suit.

4. *United States v. Aerojet General Corp.*, 606 F.3d 1142 (9th Cir. 2010)

The Ninth Circuit holds that a non-settling PRP may intervene in litigation to oppose a consent decree incorporating a settlement that, if approved, would bar contribution from the settling PRP. The applicants have significant protectable interests that support intervention as of right. As non-settling PRPs, the applicants are potentially liable for response costs under CERCA §107(a). Because CERCLA §113(f)(2) provides that approval of a consent decree will cut off their contribution rights under §113(f)(1), the proposed consent decree in EPA's suit will therefore directly affect the applicants' interest in maintaining their right to contribution. Further, because nonsettling PRPs may be held liable for the entire amount of response costs minus the amount paid in a settlement, the applicants have an obvious interest in the amount of any judicially approved settlement.

5. *General Electric Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010), *petition for cert. filed*, 79 USLW 3421 (U.S. Dec. 29, 2010)(NO. 10-871)

The D.C. Circuit upheld the constitutionality of EPA's authority under CERCLA to issue unilateral administrative orders (UAOs) directing companies and others to clean up hazardous waste for which they are responsible. A company argued that the statute, as well as the way in which EPA administers it, violates the Due Process Clause because EPA issues UAOs without a hearing before a neutral decisionmaker. The court disagreed. To the extent the UAO regime implicates constitutionally protected property interests by imposing compliance costs and threatening fines and punitive damages, it satisfies due process because UAO recipients may obtain a pre-deprivation hearing by refusing to comply and forcing EPA to sue in federal court. The company argued that the UAO scheme and EPA's implementation of it nonetheless violate due process because the mere issuance of a UAO can inflict immediate, serious, and irreparable damage by depressing the recipient's stock price, harming its brand value, and increasing its cost of financing. But such consequential injuries--injuries resulting not from EPA's issuance of the UAO, but from market reactions to it--are insufficient to merit Due Process Clause protection.

6. *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. 2010)

The Eighth Circuit upheld a lower court decision dismissing an environmental group's CAA citizen suit against a coal-fired power plant for failing to obtain permits for a series of modifications to the plant and exceeding applicable emission limits. Because the last of the modifications at issue was done in 2001 and the group did not file suit until 2008, its prevention of signification deterioration (PSD) civil penalty claims are barred by the five-year statute of limitations. The group argued that the CAA and its regulations impose ongoing operational requirements, but the CAA and its regulations prohibit only construction or modification of a facility without a PSD permit. Nothing in the statute gives any indication that the CAA imposes ongoing operational conditions under the PSD program. The group also argued that the

applicable regulations impose an ongoing duty to employ best achievable control technology (BACT) regardless of whether a facility obtained a PSD permit before construction or modification. But the command to apply BACT is not a freestanding requirement. Rather, it is tied specifically to the construction process.

7. *Sierra Club v. Dairyland Power Co-op*, Cause No. 10-cv-303-bbc, 2010 WL 4294622 (W.D. Wis. October 22, 2010)

The court concludes that plaintiff's claims arising from defendant's failure to obtain a preconstruction permit, failure to apply best available control technology and failure to submit air quality demonstrations are not barred by the statute of limitations because it is impossible to determine from the complaint when plaintiff's claims accrued, and more important, because plaintiff alleges that defendant's violations are ongoing. In addition, I conclude that plaintiff's claims arising from defendant's failure to apply best available control technology and failure to submit air quality demonstrations may be asserted independently of plaintiff's permit claim. Therefore, defendant's motion will be denied with respect to plaintiff's third, fourth and fifth claims.

8. *Raritan Baykeeper v. NL Industries*, 713 F.Supp.2d 448 (D.N.J. 2010)

A district court dismissed, on grounds of abstention, an environmental group's RCRA and CWA citizen suit against a company seeking remediation of contaminated sediments in the Raritan River located adjacent to a site formerly owned by the company. The complaint asks the court to enter an injunction requiring immediate remediation of the contaminated river sediments adjacent to the site. Although a split in authority exists regarding when abstention is appropriate in RCRA and CWA cases, the court found that abstention is appropriate based on the facts of this case. The agency charged with implementation of environmental protection policy in the state has technical expertise in the matter, there exists a substantial danger of inconsistent rulings if the court exercises jurisdiction over the case, and proceedings before the state agency have already begun.

Accordingly, technical and policy considerations weigh in favor of the application of the doctrine of primary jurisdiction, and the matter should be referred to the state agency for resolution. In addition, given the availability of timely and adequate state-court review of the issues raised in this case, and the danger of interference with the important state policies of brownfield rehabilitation and regional remediation of river sediments, abstention under the *Burford* doctrine is appropriate.

9. *U.S. v. Apex Oil Company, Inc.*, 579 F.3d 734 (7th Cir. 2009)

The issue in this case was whether EPA's injunction requiring Apex to clean up land under its former refinery was a claim discharged by Apex Oil's bankruptcy. The Supreme Court refused to hear the case, leaving the EPA injunction in place.

10. *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc*., 746 F.Supp.2d 692 (D. S.C. 2010)

On October 13, 2010, a federal district court in South Carolina issued an opinion which analyzed whether a brownfield site owner could rely on the bona fide prospective purchaser (BFFP) defense to avoid liability for response costs under CERCLA. The opinion is the first reported case which interprets the factors needed to maintain the defense and therefore provides needed guidance to parties involved in this area.

To establish the defense, a party must prove each of the following eight elements by a preponderance of the evidence: (1) all disposal of hazardous substances at the facility occurred before the person acquired the facility; (2) the person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; (3) the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; (4) the person exercises appropriate care with respect to hazardous substances found at the facility; (5) the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions; (6) the person is in compliance with any institutional controls; (7) the person complies with any request for information or administrative subpoena; and (8) the person is not a potentially responsible party or affiliated with persons that are potentially liable for response costs. 42 U.S.C. § 9601(40).

With respect to the first element, the court determined that the site owner's actions in tearing down structures on the property likely caused dispersions of contaminated soil and therefore disposals occurred on the site after its acquisition. With respect to the fourth element, the court reasoned that the owner did not exercise reasonable care because it failed to address impacts from recognized environmental conditions (RECs) that were identified in the Phase I report. The report identified sumps and concrete pads as RECs. The owner demolished all of the above-ground structures but failed to clean out and fill in the sumps, leaving them exposed to the elements which might have exacerbated the conditions. The court also noted that a lack of appropriate care was evident from a pile of debris that had accumulated on the site for over a year. Finally, the court noted the owner failed to exercise reasonable care by not maintaining a required cover on the site.

With respect to the last element, the court noted that the owner had indemnified the prior owners of the site and had discouraged the EPA from recovering response costs covered by the

indemnification. The court claimed that this type of affiliation is the sort that Congress intended to discourage and on this basis found that the site owner failed this element as well. Accordingly, the court found that the site owner failed to meet its burden of proof for the BFPP defense and would be held liable for an equitable share of response costs.

11. *3000 E. Imperial, LLC v. Robertshaw Controls Co*., No. CV 08-3985, 2010 WL 5464296 (C.D. Cal. Dec. 29, 2010)

The buyer purchased a Lynwood, California property in 2006. From its AAI, the buyer knew that the property was impacted by trichloroethylene and benzene that leaked from underground tanks. The buyer filed a complaint against a past owner of the property asserting claims under CERLCA for cost recovery, and the defendant counterclaimed against the buyer for cost recovery and contribution. The buyer claimed that it was not subject to liability because it was a BFPP. The buyer undertook a voluntary cleanup under the direction of the California Department of Toxic Substances Control, which found the buyer to be a BFPP under California's analog to CERCLA. The defendant asserted that the buyer had lost its BFPP protection because it waited two years after its purchase to remove the underground tanks; however, the court rejected this claim because the buyer emptied the tank contents soon after learning they contained solvents. In the end, the court found the defendant jointly and severally liable for approximately $1.2 million of the buyer's costs.

12. *American Electric Power Co. v. Connecticut, et al*, --- U.S. ----, 131 S.Ct. 813, 2010 WL 4922905 (U.S. 2010)

The U.S. Supreme Court granted certiorari addressing whether states and/or private parties can use the federal common law of nuisance as a vehicle to collect damages for injury due to greenhouse gases, and impose court-ordered emissions caps – something Congress has been reluctant to do. Resolution of the case will have major implications for utilities and other large emitters of GHGs.

13. *Board of County Commissioners v. Brown Group Retail, Inc*., --- F.Supp.2d ----, 2011 WL 816792 (D. Colo. Mar. 3, 2011)

A district court dismissed a county's RCRA action against the former owner of contaminated property, but held that the former owner was liable to the county under CERCLA. The county purchased the property, a former rifle lens manufacturing plant, from the former owners. The property was then converted to a county jail. The county's RCRA claims fail because it failed to prove that the contamination may present and imminent and substantial endangerment to health or the environment. The mere exceedance of applicable governmental standards is insufficient to establish that the contamination presents an imminent and substantial endangerment to the environment. However, the court held that the former owner was jointly and

severally liable for its proportional share of the county's past recoverable response costs under CERCLA §107. The county is also entitled to contribution under CERCLA §113.

14. *Los Angeles v. San Pedro Boat Works*, 635 F.3d 440 (9th Cir. 2011)

The Ninth Circuit held that the holder of a revocable permit to use real property is not an "owner" of that real property for purposes of imposing liability under CERCLA for the cleanup of hazardous substances disposed on that property by others. Under California common law, the holder of a revocable permit has only a possessory interest in the real property governed by the permit--an interest that exists as a result of possession, exclusive use, or a right to possession or exclusive use of land unaccompanied by the ownership of a fee simple or life estate in the property. Given this common law distinction between ownership interests and possessory interests, and the juxtaposition of "owner" and "operator" in CERCLA, the court concluded that Congress intended to give "owner" its common law meaning when it enacted CERCLA. Accordingly, owner liability under CERCLA does not extend to holders of mere possessory interests in land, such as permittees, easement holders, or licensees, whose possessory interests have been conveyed to them by the owners of real property who continue to retain power to control the permittees' use of the real property.

15. *United States v. General Electric Co.*, Cause No. 06-cv-354-PB, 2010 WL 4977478 (D.N.H. Dec. 3, 2010)

A district court held that CERCLA's statute of limitations does not bar the United States from recovering certain costs it incurred in 1993 and 1995 responding to soil and ground water contamination at the Fletcher Paint Works and Storage Facility Superfund site in Milford, New Hampshire. After filing suit in 1991, the United States and an electric company entered into a consent decree in February 1994 requiring the company to reimburse the EPA for the response costs it had incurred as of April 30, 1993. The consent decree did not include a finding of liability. The United States then filed the current action in 2006. The case turns on whether the current action is classified as an "initial action" to recover removal costs, which ordinarily must be commenced within three years of the completion of the removal action, or a "subsequent action" for the recovery of such costs, which may be delayed until as late as three years after the date of completion of all response action. The company argued that the entry of a declaratory judgment on liability, or some equivalent court order, is a definitional requirement for an initial action under CERCLA §113(g)(2). But in light of the statutory language, as well as the underlying policies of both CERCLA in particular and statutes of limitations in general, the declaratory judgment requirement in §113(g)(2) is best understood as a directive to courts when an initial action has actually been litigated to conclusion, not as a requirement for creating initial actions in the first place. The United States' 1991 complaint was thus an initial action, and the 2006 claim is a subsequent action as those terms are used in §113. Because response actions at

the site are ongoing, the government's claim for costs stemming from the 1993 and 1995 removal activities is timely.