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Amanda Leiter

ENVIRONMENT, ENERGY, AND RESOURCES LAW: THE YEAR IN REVIEW 2013: CONSTITUTUIONAL LAW REPORT

Michael Burger
Associate Professor of Law
Sidney F. Ansbacher
Shareholder, GrayRobinson, P.A.
Marcia J. Cleveland
Gary S. Edinger
Partner, Benjamin, Aaronson, Edinger & Patanzo, P.A.
Helen Kang
Associate Professor and Director of the Environmental Law and Justice Clinic, Golden Gate University School of Law
Mark Patrick McGuire
Associate Legal Counsel, Narragansett Bay Commission
Stephen R. Miller
Associate Professor and Director, Economic Development Clinic, University of Idaho College of Law – Boise
Justin Pidot
Assistant Professor, University of Denver Sturm College of Law

ABSTRACT

This chapter from The Year in Review, published by the ABA Section on Environment, Energy and Resources, covers developments during 2013 in the areas of standing, Commerce Clause, political question doctrine, preemption, takings, due process, First Amendment, Tenth Amendment, and state constitutional law.

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Key decisions at the intersection of constitutional law and environmental, energy, and natural resources law in 2013 occurred in the areas of standing, Commerce Clause, political question doctrine, preemption, takings, due process, First Amendment, Tenth Amendment, and state constitutional law.

I. STANDING

Plaintiffs must prove (1) injury in fact, (2) causation, and (3) redressability in order to establish standing under Article III of the Constitution.[2] Plaintiffs generally must also satisfy requirements of prudential standing, including the requirement that they allege an injury that falls within the zone of interest of the relevant statute.

In *Texas v. EPA*, Texas, Wyoming, and industry groups sought review of Environmental Protection Agency (EPA) decisions implementing the Clean Air Act's Prevention of Significant Deterioration (PSD) framework for greenhouse gas (GHG) emissions from stationary sources.[3] The D.C. Circuit dismissed the petitions, holding that the plaintiffs lacked standing. That holding was based on the court's interpretation of Clean Air Act section 165 that requires new and modified major sources of air pollution to secure a pre-construction permit and incorporate the "best available control technology [BACT] for each pollutant subject to regulation under this chapter."[4] The court held that section 165 is "self-executing," meaning that once EPA regulated GHG emissions from cars and trucks, the Act itself imposed technology and permitting requirements absent any regulatory action. Because the petitioners were injured by section 165, and not EPA's rules, the court held that the petitioners lacked standing. In reaching its decision, the court rejected an argument that the two states had standing because of the "special solicitude" owed to them under *Massachusetts v. EPA*.[5] The court suggested that states receive such solicitude only when they seek to enforce a federal statute, rather than impede its application. Moreover, the court explained, notwithstanding any "special solicitude," states must identify "a concrete and particularized injury in fact."[6] On October 15, the Supreme Court granted certiorari in this case.[7]

The Ninth Circuit also considered standing in the context of climate change in *Washington Environmental Council v. Bellon*.[8] In that case, environmental organizations

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[1]This report was edited and authored in part by Michael Burger, Associate Professor, Roger Williams University School of Law, with contributions from Sidney F. Ansbacher, shareholder, GrayRobinson, P.A.; Marcia J. Cleveland; Gary S. Edinger, partner, Benjamin, Aaronson, Edinger & Patanzo, P.A.; Helen Kang, Associate Professor and Director of the Environmental Law and Justice Clinic, Golden Gate University School of Law; Mark Patrick McGuire, Associate Legal Counsel, Narragansett Bay Commission; Stephen R. Miller, Associate Professor and Director, Economic Development Clinic, University of Idaho College of Law – Boise; and Justin Pidot, Assistant Professor, University of Denver Sturm College of Law.

[2]Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

[3]726 F.3d 180 (D.C. Cir. 2013).

[4]42 U.S.C. § 7475(a) (2012).

[5]549 U.S. 497 (2007).

[6]726 F.3d at 199.

[7]726 F.3d 180 (D.C. Cir. 2013), *cert. granted*, No. 12-1269 (Oct. 15, 2013).

[8]732 F.3d 1131 (9th Cir. 2013).

sued Washington environmental agencies alleging that those agencies failed to implement technology based standards to control GHG emissions at the state's five refineries. The Ninth Circuit, assuming without deciding that members of the environmental groups had adequately established injury-in-fact by identifying climate-related harms to their recreational and aesthetic interests, held that plaintiffs lacked standing on causation and redressability grounds. The court rejected as "conclusory," the environmental groups' claim that the state agencies failure to regulate "caused" their injury because regulation would have reduced emissions from the refineries. The court suggested that establishing a "causal nexus" between specific sources and climate injuries is "particularly challenging" because "there is a natural disjunction between Plaintiffs' localized injuries and the greenhouse effect." For those same reasons, the court held that plaintiffs' could not demonstrate redressability. The court distinguished the Supreme Court's decision in *Massachusetts v. EPA*, explaining that plaintiffs' could not avail themselves of a relaxed standing standard because they were private parties and not states. The court also explained that plaintiffs could not even meet the standard for causation provided by *Massachusetts* because the amount of GHGs emitted by the refineries was too small to constitute a "meaningful contribution" to climate change.[9]

The Ninth Circuit and the Second Circuit each issued important opinions addressing probabilistic injury. In *NRDC v. EPA*, the Ninth Circuit found there was standing where an environmental group challenged a conditional registration for pesticides containing small particles of silver—referred to by the name AGS-20—for application to textiles and clothes as an anti-microbial chemical, and alleged that the children of its members would be exposed to it.[10] In so doing, the court did not address the likelihood that exposure to AGS-20 would result in adverse health consequences. Instead, it treated the risk of exposure as an adequate injury and held that NRDC had standing because it had demonstrated a "'credible threat' that a probabilistic harm will materialize."[11]

The Second Circuit took a similar approach in *NRDC v. FDA*.[12] In that case, an environmental group challenged FDA's regulation of two chemicals, triclosan and triclocarban, both used in antiseptic soap. NRDC proffered an affidavit from a member that came into contact with triclosan in the workplace and identified evidence that triclosan can harm human health. The court held that this established injury-in-fact, notwithstanding significant uncertainty about whether and to what extent triclosan is harmful. The court explained that "the injury contemplated by exposure to a potentially harmful product is not the future harm that the exposure risks causing, but the present exposure to the risk." Because NRDC demonstrated a "credible threat" of harm to its member's health by showing that triclosan may be harmful, and the FDA could not determine that it is safe, NRDC adequately demonstrated injury. The court also rejected arguments by the government that NRDC failed to establish causation because its members could purchase non-triclosan antibacterial soap for themselves and bring that soap to work, or could try to persuade their employer to provide such soap. The court explained that the cost of purchasing an alternative soap product would itself constitute injury and that "the failure to take affirmative action to advocate with an employer does not render the exposure to triclosan at the hands of the employer 'self-inflicted' so as to defeat standing." The court took a different view of NRDC's allegations regarding triclocarban. NRDC alleged that approval and subsequent use of triclocarbon could lead

[9] *Id.* at 1142-43, 1145-46.
[10] 735 F.3d 873 (9th Cir. 2013).
[11] *Id.* at 878.
[12] 710 F.3d 71 (2d Cir. 2013).

to antibiotic-resistant bacteria that could infect its members. The court held that allegation too "contingent and far-off" to constitute injury-in-fact.[13]

Two courts also issued important decisions about the zone-of-interest component of prudential standing. In *Ass'n of Battery Recyclers, Inc. v. EPA*, the D.C. Circuit held that one industry petitioner lacked prudential standing to challenge new EPA air standards for certain lead smelters as insufficiently stringent.[14] The petitioner asserted only an interest in increasing regulation on its competitors, and the court held that interest fell outside the zone of interest of the Clean Air Act. The court explained that, although the government did not raise prudential standing, it resolved the issue because the D.C. Circuit treats prudential standing as jurisdictional.[15] Judge Silberman concurred to respond to a recent dissent in another case that had argued that prudential standing is not jurisdictional. Judge Silberman suggested that even if certain prudential standing doctrines lack a jurisdictional character, the zone of interest test is properly understood as a matter of statutory standing and that questions of statutory standing are jurisdictional.[16]

In *Wild Fish Conservancy v. Jewell*, the Ninth Circuit held that an environmental group lacked prudential standing to challenge the Fish and Wildlife Service's operation of a fish hatchery as allegedly in violation of the Reclamation Act.[17] The relevant section of the Reclamation Act requires that federal reclamation projects comply with state water law.[18] The Wild Fish Conservancy alleged that diverting water to operate the hatchery violated Washington water law because the Fish and Wildlife Service had not secured a permit for the diversion from the Washington Department of Ecology and, therefore, the hatchery violated the Reclamation Act. The court explained that Washington water law does not permit citizen suits, but rather, entrusts enforcement to the state government. Because the purpose of the Reclamation Act is to respect state sovereignty, the Conservancy fell outside of its zone of interest when it attempted to use federal law as a means of enforcing a provision of state law for which the state vested exclusive enforcement authority in a state agency.[19]

II. COMMERCE CLAUSE

The Commerce Clause of the United States Constitution provides that "Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States."[20] In its positive form the Commerce Clause is the source of constitutional authority underlying most federal environmental laws. In its negative or "dormant" form it prevents states from adopting protectionist laws that erect barriers to interstate commerce or attempt to control commerce beyond the state's borders.

When the Supreme Court declined to uphold under the Commerce Power the Affordable Care Act's individual mandate to buy health insurance,[21] it inspired analogous challenges to environmental statutes.[22] In *Voggenthaler v. Maryland Square, LLC* the

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[13]*Id.* at 74, 80-81, 84-86.
[14]716 F.3d 667 (D.C. Cir. 2013).
[15]*Id.* at 674.
[16]*Id.* at 675-76 (Silberman, J., concurring).
[17]730 F.3d 791 (9th Cir. 2013).
[18]43 U.S.C. § 383 (2012).
[19]*Id.* at 794, 797-99.
[20]U.S. CONST. art. I, § 8.
[21]Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2585-94 (2012).
[22]United States v. Sterling Centrecorp, Inc., No. 2:08-cv-02556, 2013 WL 3214384 at *21, (E.D. Cal. June 20, 2013).

Ninth Circuit rejected such a challenge to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[23] In that case, the State of Nevada sued under CERCLA to require the owners and operators of a shopping mall to pay for cleaning up groundwater contaminated by discharges of dry cleaning fluids. The defendants argued that CERCLA could not constitutionally apply to this site because the affected groundwater is not in interstate commerce. The Ninth Circuit held that groundwater is an article in interstate commerce and both the dry cleaning business and the remediation of the site are in and affect interstate commerce.[24]

Regarding the dormant Commerce Clause, in *Tarrant Regional Water District v. Herrmann* the Supreme Court denied a claim by a Texas water district that an Oklahoma law limiting water extraction licenses to Oklahoma residents was unconstitutional.[25] The Court held that because the Red River Compact allocates all of the water in the watershed to the participating states, Oklahoma's refusal to let Texas extract water in Oklahoma implements a federally authorized water management scheme and does not impermissibly interfere with interstate commerce.

In *Rocky Mountain Farmers Union v. Corey* the Ninth Circuit upheld California's Fuel Standard against a dormant Commerce Clause challenge.[26] The Fuel Standard implements the transportation part of California's Global Warming Solutions Act, regulating the carbon intensity of fuel blended and sold in California. The law sets decreasing annual caps on carbon intensity of ethanol and crude oil and requires blenders and producers to show that their fuels are under the limit.[27] A blender or producer can comply either by using the average carbon intensity for his region and production method or by calculating the actual carbon intensity of his fuel. The rule specifies averages for different methods of producing ethanol in three regions: California, the Midwest and Brazil. The crude oil rule works in a similar manner, but all but one type of producer must use the averages. [28]

Because the rule groups the carbon intensity averages by region, plaintiffs claimed that it was facially discriminatory and barred by the dormant Commerce Clause. The district court agreed and enjoined the Fuel Standard, but the Ninth Circuit reversed holding that the Fuel Standard discriminated among fuels based on their carbon intensity. Location only affected two components of the calculation and sometimes favored Midwest blenders over California companies. Thus, the fact that the rule used a state boundary to group producers with similar characteristics did not render it facially discriminatory. The court also rejected claims that the crude oil standard had a discriminatory purpose or effect and that the Fuel Standard was an attempt to regulate commerce outside of California.[29] The court remanded the case to the district court to consider whether the ethanol part of the Fuel Standard had a discriminatory purpose or effect that would require strict scrutiny and if not to apply the balancing test set forth in *Pike v. Bruce Church, Inc.*[30]

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[23]724 F.3d 1050, 1059-62 (9th Cir. 2013).
[24]*Id.* at 1058, 1059-60.
[25]133 S. Ct. 2120 (2013).
[26]730 F.3d 1070 (9th Cir. 2013).
[27]"Carbon intensity" is a measure of the carbon emitted by a unit of fuel throughout its lifecycle of production, transportation and use. *See* CAL. CODE REGS. tit. 17, § 95481(a)(16) (2012).
[28]730 F.3d at 1079-84.
[29]*Id.* at 1089-94, 1101.
[30]397 U.S. 137 (1970).

In *Entergy Nuclear Vermont Yankee, LLC v. Shumlin* the Second Circuit held that a dormant Commerce Clause claim was not ripe because the power purchase agreement that the plaintiffs claimed would require them to sell power to Vermont utilities below the market rates for other states had not yet been entered into.[31] The court however expressed grave doubts that such an agreement could pass muster under the dormant Commerce Clause.

III. POLITICAL QUESTION DOCTRINE

Last year's chapter noted that the Fifth Circuit would have an opportunity in 2013 to pass on the possible implications of *American Electric Power Co. v. Connecticut*[32] for applying the political question doctrine to claims that climate change impacts constitute a public nuisance under state law. In *Comer v. Murphy Oil USA* the court declined that opportunity, ruling instead that the re-filed claims made by property owners that certain power and chemical companies' GHGs contributed to climate change, and that climate change in turn exacerbated the harmful effects of Hurricane Katrina, were barred by res judicata.[33]

One district court case bears noting. In *Alaska v. Kerry*, the State of Alaska sued the U.S. Secretary of State and EPA, among others, challenging federal enforcement of low-sulfur fuel requirements for marine vessels operating in certain coastal waters.[34] The Secretary implemented the requirements pursuant to the United States' obligations as a party to the International Convention for the Prevention of Pollution from Ships, under the authority granted him by the Act to Prevent Pollution from Ships. The court applied the multi-factor test established in *Baker v. Carr*[35] and found the state's claims non-justiciable.

IV. DISPLACEMENT AND PREEMPTION

The preemption doctrine relies on the principle that federal law is the "supreme Law of the Land."[36] Preemption of state law by federal legislation can be either express or implied. Express preemption derives from the explicit language of a statute. Preemption may be implied where Congress completely occupies the subject field (field preemption) or else when state law conflicts with federal law (conflict preemption).

In *Tarrant Regional Water District v. Herrmann*, discussed above, the Supreme Court rejected a claim that the Red River Compact created cross-border rights for a Texas water district that preempted Oklahoma water laws and held that the Compact's silence on the issue of preemption reflected an intention among the Compact's drafters to respect state borders.[37] In construing the preemptive reach of the Compact, the Court was persuaded by three factors: "the well-established principle that States do not easily cede their sovereign powers, including their control over waters within their own territories; the fact that other interstate water compacts have treated cross-border rights explicitly; and the parties' course of dealing."[38]

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[31] 733 F.3d 393 (2nd Cir. 2013).
[32] 131 S. Ct. 2527 (2011).
[33] 718 F.3d 460 (5th Cir. 2013).
[34] 3:12-cv-00142, 2013 WL 5269760 (D. Alaska, Sept. 17, 2013).
[35] 369 U.S. 186 (1962).
[36] U.S. CONST. art. VI, cl. 2.
[37] 133 S. Ct. 2120, 2129-2136 (2013); *see* discussion *supra* Section II.
[38] *Id.* at 2132.

In *American Trucking Ass'ns, Inc. v. City of Los Angeles*, the Supreme Court held that the Federal Aviation Administration Authorization Act of 1994 (FAAAA) expressly preempts two contract provisions that the Port of Los Angeles sought to impose on drayage trucking companies as part of the port's Clean Air Action Plan.[39] The provisions, designed to help alleviate community and environmentalist opposition to the port's expansion, required any company providing drayage trucking services to a marine terminal operator at the Port to develop an off-street parking plan and to display specified placards on its vehicles.[40] The FAAAA, however, provides that "a State [or local government] may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."[41] The Ninth Circuit had held that the contract provisions do not have "the force and effect of law" because they reflect the Port's "business interest" and were "designed to address [a] specific proprietary problem," namely community opposition to the Port's plans to increase shipping activity.[42] In a unanimous opinion the Supreme Court reversed, reasoning that because the Port threatened to impose criminal penalties on marine terminal operators for a contracting trucking company's noncompliance the Port was operating in its regulatory capacity and the provisions had the effect of law. Notably, the court also declined to address the potential scope of the market participant exception to statutory preemption in this context.[43]

The Courts of Appeal issued a number of opinions regarding the preemptive reach of different parts of the Clean Air Act. In *Bell v. Cheswick Generating Station*, the Third Circuit held that the Clean Air Act did not preempt private property owners' putative class action tort law claims of nuisance, negligence, and trespass based on the settling of a power plant's flying ash and unburned coal combustion byproducts on private property.[44] The court, consistent with decisions from the Fourth and Sixth Circuits, reasoned that the plain language of the Clean Air Act's savings clause allows states to impose stricter standards than the federal government and that citizens may seek enforcement of any such state emission standard or limitation.[45]

In another case, the Second Circuit held that the Clean Air Act did not impliedly preempt state tort law claims arising from the contamination of groundwater by the organic chemical compound methyl tertiary butyl ether (MTBE).[46] In affirming the district court's decision in the bellwether trial for consolidated multidistrict MTBE litigation, the Second Circuit panel rejected the argument that, as a practical matter, the Act *required* gasoline manufacturers to use MTBE to satisfy the Act's federal oxygenate requirement and therefore it would be impossible to comply with both the statute and state common law. The court also rejected the argument that a tort remedy would pose an obstacle to accomplishment of the Act's objectives in establishing the Reformulated Gasoline Program.[47]

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[39] 133 S. Ct. 2096 (2013).
[40] *Id.* at 2100.
[41] 49 U.S.C. § 14501(c)(1) (2012).
[42] 133 S. Ct. at 2101.
[43] *Id.* at 2102 n.4, 2103-04.
[44] 734 F.3d 188 (3d Cir. 2013).
[45] *Id.* at 195-97.
[46] *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 725 F.3d 65 (2d Cir. 2013).
[47] *Id.* at 97-101, 101-03.

Finally, in *Ass'n of Taxicab Operators USA v. City of Dallas* the Fifth Circuit upheld an incentive program offering taxicabs utilizing compressed natural gas (CNG) "head-of-the-line" privileges at Love Field, a municipally-owned airport, against a preemption challenge.[48] The court held that the program did not establish a "standard" under the plain meaning of section 209(a) of the Clean Air Act. The court also held that plaintiffs had failed to establish by record evidence that the indirect economic effects on non-CNG taxi-owners were sufficiently "acute" to force them to either convert to CNG or else abandon the business.

In *Dominion Transmission Inc. v. Summers*, a case about the preemptive reach of the Natural Gas Act but with Clean Air Act implications, the D.C. Circuit held that state law provisions demanding certification of a gas compressor station's compliance with local zoning and land use requirements, incorporated by reference into Maryland's State Implementation Plan and approved by EPA under the Clean Air Act, were saved from preemption by section 3(d) of the Natural Gas Act.[49]

The Courts of Appeal also weighed in on the preemptive reach of several other laws. In *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin*, the Seventh Circuit held that federal Indian law preempted a Wisconsin village from imposing stormwater management charges on parcels of land owned by the United States in trust for the tribe.[50] And in *Waldburger v. CTS Corp.* the Fourth Circuit held that the discovery rule established by CERCLA extends to state statutes of repose, as well as state statutes of limitation.[51] In the case, a North Carolina law imposed a ten-year limitation on the accrual of real property claims, without regard for the plaintiff's knowledge of harm. Section 9658 of CERCLA, in contrast, establishes that all claims accrue on the date a plaintiff knew or reasonably should have known an injury was caused or contributed to by a hazardous substance or pollutant or contaminant. The court reasoned that the remedial purposes of the statute demanded a liberal construction of the discovery rule's applicability to state timing limitations.[52]

V. FIFTH AMENDMENT TAKINGS CLAUSE

The Fifth Amendment provides that private property shall not be taken "for public use, without just compensation."[53] There are two kinds of Fifth Amendment takings: physical takings and regulatory takings. A physical taking occurs where there is a "direct government appropriation or physical invasion of private property."[54] A regulatory taking may occur where there is no physical taking but government action nonetheless "affect and limit" the use of private property "to such an extent that a taking occurs."[55]

The Supreme Court Term issued two takings decisions in 2013. In *Koontz v. St. Johns River Water Management District*,[56] the Court weighed the argument that the District's request (or demand) for fee in lieu of mitigation to pay for one or the other of two District projects constituted a taking or exorbitant exaction. A 5-4 majority extended

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[48]720 F.3d 534 (5th Cir. 2013).
[49]723 F.3d 238, 243-44 (D.C. Cir. 2013)
[50]732 F.3d 837 (7th Cir. 2013).
[51]723 F.3d 434 (4th Cir. 2013).
[52]*Id.* at 439-41, 443-44 (citing 42 U.S.C. § 9658).
[53]U.S. CONST. amend. V, cl. 4.
[54]Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).
[55]Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).
[56]133 S. Ct. 2586 (2013).

Nollan v. California Coastal Commission,[57] and *Dolan v. City of Tigard*,[58] finding that government exactions must bear an "essential nexus" and be roughly proportionate to the impacts of the development that the exactions seek to mitigate. The majority and dissent agreed to this point.[59] They differed on the import of that analysis. The majority held that a land use exaction fee that goes too far "confiscat[es] property" and may require just compensation.[60] The dissent argued that monetary exactions that go too far require refund of overcharges, not a takings analysis.[61]

Horne v. Department of Agriculture[62] determined that a federal court has jurisdiction to hear a takings challenge to a United States Department of Agriculture (USDA) administrative order that imposed sanctions on alleged raisin handlers under the Agricultural Marketing Agreement Act. The Court remanded to the Ninth Circuit Court of Appeals to consider the Hornes' Fifth Amendment claim that the USDA took their private property by assessing them substantial penalties for refusing to donate a substantial share of their raisin crop for various federal programs in part as a price support mechanism. The Court rejected the federal government argument that the claim was not ripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, even though the Hornes refused to pay the fines.[63]

In *Lost Tree Village v. United States*,[64] the Federal Circuit held that the "relevant parcel" for a takings claim was only the platted parcel for which the developer sought a section 404 dredge and fill permit from the Army Corps. The court refused to "extend [the relevant parcel] to all of a landowner's disparate holdings in the vicinity of the regulated parcel." The court concluded the determinative factor was whether the developer treated other parcels as "part of the same economic unit." Absent that, "the mere fact that the properties are commonly owned and located in the same vicinity is an insufficient basis on which to find they constitute a single parcel for purposes of the takings analysis."[65]

The Fourth Circuit took up two cases weeks apart that dealt with challenges to the Town of Nags Head, North Carolina's declaration that beachfront lands that encroached on public trust lands were abatable public nuisances. In *Town of Nags Head v. Toloczko*,[66] the appellate court reversed the district court's abstention under the *Burford* doctrine.[67] The appellate court noted that state and local land use and zoning are "paradigm[atic]" *Burford* issues, particularly as applied to the state's public trust doctrine established pursuant to its Equal Footing rights, but distinguished the case, because North Carolina law is settled that only the state may bring an action to enforce the state's public trust rights.[68] While the public trust doctrine is an important, state-specific policy issue,

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[57]483 U.S. 825 (1987).
[58]512 U.S. 374 (1994).
[59]*Koontz*, 133 S. Ct. at 2591, 2603 (Kagan, J., dissenting).
[60]*Id.* at 2602.
[61]*Id.* at 2606 (Kagan, J. dissenting) (citing E. Enters. v. Apfel, 524 U.S. 498, 540 (1998)).
[62]133 S. Ct. 2053 (2013).
[63]*Id.* at 2061-62 (citing Williamson Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)).
[64]707 F.3d 1286 (Fed. Cir. 2013).
[65]*Id.* at 1292-93, 1294.
[66]728 F.3d 391 (4th Cir. 2013).
[67]*Id.* at 395-97 (citing Burford v. Sun Oil Co., 319 U.S. 315 (1943)). The Burford Doctrine holds that the federal courts shall not interfere with important, unsettled policy matters that are reserved to the states. *Burford*, 319 U.S. at 333-34.
[68]*Toloczko*, 728 F.3d at 396-97.

the court emphasized that *Burford* abstention does not apply where the state law is settled. Further, while *Williamson*[69] would ordinarily bar the federal claim until state courts deny just compensation, the appellate court waived ripeness and finality to avoid piecemeal litigation.[70] In *Sansotta v. Town of Nags Head*,[71] the court upheld the lower court's refusal to abstain, holding that the town waived *Williamson* by removing the case to federal court, thereby committing "procedural gamesmanship" of "forum manipulation."

VI. DUE PROCESS

As in previous years, due process issues raised as claims[72] or defenses[73] in environmental cases were generally unsuccessful. Again as in the past, due process issues were one of many, and not the principal, arguments in a majority of environmental cases, and thus courts tended to give cursory attention to them.[74]

Due process claims similarly failed where regulated parties claimed that they did not have fair notice of regulations that governed them.[75] In *Wisconsin Resources Protection Council v. Flambeau Mining Co.*,[76] however, in a Clean Water Act citizen suit alleging that a mining company lacked a stormwater discharge permit, the Seventh Circuit held that liability could not be established because the company lacked notice that a permit issued by the state, which is EPA-approved to administer its own national pollution discharge elimination system (NPDES) program, may be potentially invalid. In so holding, the Seventh Circuit reasoned that the permit shield available to NPDES permit holders for compliance with such permits was also available to the mining company.

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[69]473 U.S. 172 (1985).

[70]*Toloczko*, 728 F.3d at 399.

[71]724 F.3d 533 (4th Cir 2013).

[72]*E.g.*, Angelex Ltd. v. United States, 723 F.3d 500, 508 (4th Cir. 2013) (where due process claim are alleged to seek review where the court does not have jurisdiction for such review, claim not allowed as "nothing more than a direct review"); Richter v. City of Des Moines, No. 12-35370, 2013 WL 4406689 (9th Cir. 2013) (no violation for alleged disparate treatment in permitting based on city's predisposed ill feelings for permit applicant's trail building without a prior permit); Miccosukee Tribe of Indians of Fla. v. United States, 716 F.3d 535, 558-59 (11th Cir. 2013) (must allege inadequacy of process); Am. Whitewater v. Tidwell, No. 8:09-2665-MGL, 2013 WL 4038432 (D.S.C. 2013) (no violation of interest in interstate travel and personal movement as travel available by other means); Friends of Maine's Mountains v. Bd. of Envtl. Prot., 61 A.3d 689 (Me. 2013) (no violation because lack of evidence to overcome presumption of good faith of hearing board accused of being partial to opposing party).

[73]Comm'r of Envtl. Prot. v. Farricielli, 59 A.3d 789, 804 (Conn. 2013) (no violation in enforcement of an injunction against a nonparty in privity of a party where nonparty had actual or constructive notice of the injunction).

[74]*E.g.*, Sierra Club v. Moser, 310 P.3d 360 (Kan. 2013) (PSD permit given to Sunflower Electric amidst politically charged proceedings not invalid).

[75]United States v. Exec. Recycling, Inc., 946 F. Supp. 2d 1130 (D. Colo. 2013) (no violation for use of agency guidance in jury instruction); Agency of Natural Res. v. Persons, 75 A.3d 582 (Vt. 2013) (no violation for failure to provide warning before issuing notice of violation and exact information about the location of wetlands).

[76]727 F.3d 700 (7th Cir. 2013).

In another case where substantive due process claims featured more prominently than usual for an environmental case, *Hardesty v. Sacramento Metropolitan Air Quality Management District*, a company regulated by multiple regulatory agencies survived motions to dismiss based on allegations that government agencies acted with improper motive after a competitor exerted influence on the agencies.[77] The case is still pending, with the due process claims not yet adjudged on the merits. The burden to prove that the government was motivated not by legitimate regulatory interests but by illegitimate reasons is "exceedingly high,"[78] and thus whether it succeeds beyond the motion to dismiss stage, where the allegations are accepted as true, remains to be seen. On the other hand, *Pioneer Aggregates, Inc. v. Pennsylvania Department of Environmental Protection*,[79] presenting similar issues of illegitimate interference with business rights, did not survive a motion to dismiss for lack of sufficient allegations.

United States v. South Jersey Clothing Co.,[80] presented a rather unique due process issue. Landowners down-gradient of a Superfund site sought relief from a consent decree incorporating settlement agreements between potentially responsible parties and their insurers. Noting that the landowners did not have notice that their rights might be cut off from releases that insurers were given in the settlement agreement, the court held the consent decree not to bar the landowners' claims against the insurers should the state court determine that the landowners have a protectable interest.

VII. FIRST AMENDMENT

In the past year, there have been no major doctrinal changes in First Amendment jurisprudence as it relates to environmental, energy or natural resources issues. However, readers should be aware of one case that will be decided in 2014: *Sebelius v. Hobby Lobby Stores, Inc.*.[81] *Sebelius* involves a challenge to the Affordable Care Act brought under 42 U.S.C. § 2000cc, the Religious Freedom Restoration Act (RFRA). The Court is expected to decide whether corporations can have religious beliefs and, if so, whether they are entitled to protection under the Free Exercise Clause.[82] If answered in the affirmative, this may dramatically increase litigation brought under the First Amendment, RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA), which uses the same "substantial burden" standard as RFRA.

RLUIPA provides that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person" unless that burden is the least restrictive means to further a compelling governmental interest.[83] Because the statute is written with an intentionally broad scope, it applies to all manner of land use and environmental regulations. A few representative cases address the potential of this statute for breeding litigation in the field: In *Eagle Cove Camp & Conference Center, Inc. v. Town of Woodboro, Wisconsin* the Seventh Circuit turned aside a claim that land use regulations prohibiting a year-round Bible camp

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[77]935 F. Supp. 2d 968 (E.D. Cal. 2013).

[78]Richter v. City of Des Moines, No. 12-35370, 2013 WL 4406689 (9th Cir. 2013)

[79]No. 12-4018, 2013 WL 4647301 (3d Cir. 2013).

[80]No. 96-3166, 2013 WL 5467087 (D.N.J. 2013).

[81]Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, No. 13-354 (Nov. 26, 2013).

[82]The Tenth Circuit held that corporations are "persons" entitled to bring claims under the Religious Freedom Restoration Act and that Free Exercise rights may extend to some for-profit corporations. *See* 723 F.3d 1114 (10th Cir. 2013).

[83]42 U.S.C. § 2000cc.

in a residential zone violated RLUIPA and the First Amendment.[84] The court found that the regulations did not substantially burden the exercise of religion and were also supported by a compelling state interest. In *Washington v. Gonyea*, the Second Circuit held that RLUIPA does not provide a private cause of action against state officials in their individual capacities.[85] The law remains unsettled on this issue, although the national trend seems to be to disallow private causes of action against individual actors. This holding may limit the attractiveness of RLUIPA for many land use and environmental disputes.

Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, Florida principally dealt with the issue of ripeness in the First Amendment context.[86] The plaintiff claimed that the designation of its property as historic (which limited development) violated its rights under RLUIPA. The Eleventh Circuit found that "the mere fact of its designation as a historic landmark satisfy the fitness and hardship requirements of our traditional ripeness jurisprudence."

On the "free speech" side of the First Amendment, there are a few cases of interest. *Chevron Corp. v. Donziger* is an outgrowth of multi-billion dollar litigation in Ecuador concerning the alleged environmental depredations of Chevron.[87] In this case, environmentalists, journalists and bloggers moved to quash a subpoena directed to Google and Yahoo claiming that their First Amendment speech and associational rights would be infringed upon if the servers were required to disclose the identity of those individuals. The court denied the relief finding that the First Amendment claims were attenuated and indefinite.

The plaintiffs in *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Service* claimed that the decision of the Forest Service and a ranger to reduce the number of livestock grazing permits within a national forest was made in retaliation for their earlier protests.[88] The individual claims against the ranger were dismissed, but the court found that the plaintiffs stated a cause of action for declaratory relief against the Forest Service for future violations.

Finally, the 2012 Annual Report included a summary of a district court case involving a floating buffer zone that prohibited protests by environmentalists around vessels engaged in offshore drilling. That decision was affirmed by the Ninth Circuit in *Shell Offshore, Inc. v. Greenpeace, Inc.*.[89] The court wryly observed that free speech was not infringed because "Greenpeace USA has no audience at sea."

VIII. TENTH AMENDMENT

The Tenth Amendment provides that ". . . powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[90]

In *Texas v. EPA*,[91] Texas and Wyoming challenged several rules promulgated by EPA that impose permitting requirements for GHGs under the PSD provisions of the

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[84]734 F.3d 673 (7th Cir. 2013).
[85]731 F.3d 143 (2d Cir. 2013).
[86]727 F.3d 1349 (11th Cir. 2013).
[87]12-mc-80237 CRB (NC), 2013 WL 4536808 (N.D. Cal. 2013).
[88]921 F. Supp. 2d 1137 (D.N.M. 2013).
[89]709 F.3d 1281 (9th Cir. 2013); *see also* Michael Burger, et al., *Constitutional Law*, 2012 ABA ENV'T, ENERGY, & RESOURCES L. YEAR IN REVIEW 338, 346.
[90]U.S. CONST. amend. X.
[91]726 F.3d 180 (D.C. Cir. 2013); *see also* discussion *supra* Section I.

Clean Air Act in states without implementation plans for GHGs as of January 2, 2011. The States argued that the requirements constituted coercion and commandeering of the organs of state government in violation of the Tenth Amendment, and analogized the requirements to Congress' threat to withhold all Medicaid funds from states in the Affordable Care Act provision found unconstitutional under the Spending Clause in *National Federation of Independent Business v. Sebelius*.[92] The D.C. Circuit upheld the rules, finding that federal statutes that allow states to administer federal programs but provide for direct federal administration if a state chooses not to do so have long been held constitutional. Further, even if the new requirements forced a "significant" temporary construction delay for new major emitting facilities the States had not demonstrated such a delay was of the same magnitude and nature as the Medicaid expansion provision, which would have stripped over 10% of a state's overall budget. Moreover, unlike the Medicaid provision, which threatened to "withhold all existing Medicaid funds from [s]tates unwilling to carry out the expansion," EPA assumed authority over only the GHG emissions portion of the states' PSD permitting programs.[93]

IX. STATE CONSTITUTIONAL LAW

In *Rock-Koshkonong Lake District v. State of Wisconsin Department of Natural Resources*,[94] a Wisconsin Supreme Court majority opinion held that the public trust rights of the State lay in lands below the ordinary high water line demarcating the boundary between uplands and navigable, non-tidal waters. A dissenting opinion countered that the public trust doctrine is not so "crabbed" by the common law boundaries.[95] These two opinions provide strong arguments against and for the position of Joseph Sax in his landmark 1970 law review article that advocated expanding the public trust doctrine beyond navigable waters for robust environmental and natural resources protections.[96]

In *Democko v. Iowa Department of Natural Resources*,[97] the Iowa Supreme Court held that distinctions between resident and nonresident landowners in state issued special hunting licenses did not violate the Privileges and Immunities Clause of the United States Constitution. The court emphasized U.S. Supreme Court precedent holding that the Clause "protects nonresidents from discrimination only with respect to 'fundamental' privileges or immunities."[98] The court relied on *Baldwin v. Fish & Game Commission of Montana*,[99] where the U.S. Supreme Court held that recreational hunting is not a fundamental privilege protected by the Constitution. While *Baldwin* addressed the right of nonresidents to a state hunting license, Iowa statutes established the state's "ownership or title in trust, to conserve natural resources for the benefit of all Iowans."[100] The court emphasized that "[t]he clear implication of this unqualified statute is that a landowner has no title to or interest in wildlife [in] the state borders, even if the wildlife is on the

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[92]132 S. Ct. 2566, 2601-06 (2012).
[93]726 F.3d at 196, 197.
[94]833 N.W.2d 800 (Wis. 2013).
[95]*Id.* at 835-842 (Crooks, J., dissenting).
[96]Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).
[97]No. 12-1944, 2013 WL6385733 (Iowa 2013).
[98]*Id.* at *11 (citing United Bldg. & Constr. Trades Council of Camden Cnty. & Vicinity v. Mayor of Camden, 465 U.S. 208, 218 (1984)).
[99]436 U.S. 371 (1978).
[100]*Democko*, No. 12-1944, at *12 (quoting Metier v. Cooper Transp. Co., 378 N.W.2d 907, 914 (Iowa 1985)).

landowner's property."[101] The court concluded that this allowed the State to grant only resident landowners the right to hunt certain wildlife on their lands without violating the Constitution.[102]

In *Robinson Township v. Commonwealth of Pennsylvania*[103] the Pennsylvania Supreme Court struck the controversial Act 13 that had virtually preempted oil and gas regulation to the state, precluding local zoning of such uses. A three justice plurality held that the Act violated the State Constitution's Environmental Rights Amendment, which states that the Commonwealth holds natural resources in a public trust. The plurality seemed to hold that zoning implements a constitutionally stated public trust authority where zoning protects the state's natural resources. The fourth member of the majority issued a concurring opinion stating that the statewide zoning standards violated substantive due process.[104] The dissenting justices contended that the majority violated separation of powers, usurping the legislative fact finding and policy function, and failed to observe the status of local municipalities as creatures of state statute, subordinate to the state.[105]

In *Agency of Natural Resources v. Perrons*,[106] the Vermont Supreme Court rejected due process challenges to civil penalties for wetlands violations. The court held that civil penalties met lower due process thresholds than did criminal action. While no agency detailed the exact location of on-site wetlands, the defendants knew or should have known substantial wetlands existed there. The court emphasized: "As a landowner of protected wetlands, the onus is on him, individually, to ensure that he is conducting permissible activities in permitted areas."[107]

[101]*Id.* (citing IOWA CODE § 481A.2 (2013)).
[102]*Id.* at *13.
[103]Nos. 63 MAP 2012, 64 MAP 2012, 72 MAP 212, 73 MAP 2012, 2013 WL 6687290 (Pa. 2013).
[104]*Id.* at *77-85 (Baer, J., concurring).
[105]*Id.* at *85-91 (Saylor, J., Eakin, J., dissenting).
[106]75 A.3d 582 (Vt. 2013).
[107]*Id.* at 588.