SURVEY OF ILLINOIS LAW: ENVIRONMENTAL LAW

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I. ILLINOIS CASES

The following Illinois case law summary presents a survey of some of the most important environmental law cases decided by Illinois state courts this year. They include decisions regarding the right to intervene in pollution control facility certifications, an analysis of FOIA and Open Meetings Act requirements during Illinois Pollution Control Board administrative proceedings, retroactive application of a remedial amendment to the Illinois Environmental Protection Act, and two cases that hinge on the interpretation of "traditional environmental pollution" in the context of insurance policy pollution exclusion clauses.

A. Pollution Control Facility Certifications: No Third Party Intervention

1. Board of Educ. of Roxana Community School Dist. No. 1 v. Pollution Control Bd., 2013 IL 115473

This dispute arose after WRB Refining, LP ("WRB") completed a variety of major renovations at its oil refinery in Madison County, Illinois, one of the largest refineries in the United States.[1] In October 2010, WRB sought to have the Illinois Environmental Protection Agency ("IEPA") certify twenty-eight of the refinery's systems, methods, devices, and facilities as "pollution control facilities."[2] The term "pollution control facilities" is defined by the Illinois Property Tax Code ("the Code") as "any system, method, construction, device or appliance appurtenant thereto, or any portion of any building or equipment" that eliminates, prevents, or reduces pollution.[3] WRB would benefit from preferential tax treatment if the certifications were granted.[4] The IEPA accepts such applications and recommends approval or denial to the Illinois Pollution Control Board ("IPCB"), which issues the final certification decisions.[5] Accepting the IEPA's recommendations, the IPCB subsequently approved all twenty-eight of WRB's certification applications.[6] Before and in December of 2011, the Roxana Board of Education ("Roxana") petitioned the IPCB to intervene in the certification proceedings to challenge the sufficiency of WRB's applications because it feared losing funding due to decreased tax revenues if the certifications went into effect.[7] The WRB and IEPA objected to Roxana's request to intervene, and the IPCB unanimously rejected Roxana's request to intervene.[8] Roxana sought appellate review of the IPCB's administrative decision pursuant to section 41 of the Illinois Environmental Protection Act ("the Act").[9]

The Fourth District Appellate Court determined that it lacked jurisdiction to consider Roxana's appeal, with one Justice dissenting.[10] Section 41 of the Act is a general provision allowing, *inter alios*, "any party adversely affected by a final order or determination of the [IPCB]" to seek appellate review.[11] After engaging in statutory construction, the Fourth

1. Bd. of Educ. of Roxana Comm. Sch. Dist. No. 1 v. Pollution Control Bd., 2013 IL 115473, ¶ 5 [hereinafter referred as *Roxana II*].
2. *Id.*
3. 35 ILL. COMP. STAT. 200/11–10 (2013).
4. *Roxana II*, 2013 IL 115473, ¶ 5; *see* 35 ILL. COMP. STAT. 200/11-5, 11-15, 11-20.
5. *Roxana II*, 2013 IL 115473, ¶ 6.
6. *Id.* at ¶¶ 6-11.
7. *Id.*
8. *Id.*
9. *Id.* at 11; 415 ILL. COMP. STAT. 5/41 (2013).
10. Roxana Cmty. Unit Sch. Dist. No. 1 v. Envtl. Prot. Agency, 2012 IL App (4th) 120174–U [hereinafter referred as *Roxana I*].
11. *Roxana II*, 2013 IL 115473, ¶ 12.

District determined that any appeal of the IPCB's grant of WRB's certifications could only be brought under a more specific provision of the Code authorizing appeals of the IPCB's "issuance, refusal to issue, denial, revocation, modification or restriction of a pollution control certificate."[12] However, section 11-60 of the Code only authorizes appeals by applicants seeking pollution control facility certification and current holders of certificates.[13] Appeals brought pursuant to the Code must further comply with the Illinois Administrative Procedures Act ("the APA"), which requires appeals to be initiated first in the circuit court.[14]

The Illinois Supreme Court affirmed the Fourth District's determination that it lacked jurisdiction to consider Roxana's appeal but on different grounds.[15] The Supreme Court left open the question of whether the more specific appeals provision of the Code completely supplanted the general provision of the Act in pollution control facility certification cases.[16] The Supreme Court held that precedent and general administrative law principals required the Act's grant of a right to appeal to "any party adversely affected" to be interpreted as applying only to *parties of record* to the underlying administrative proceedings.[17] The Supreme Court noted that a contrary interpretation would result in the untenable and potentially unique situation in which interveners would appeal pollution control facility certification determinations to the appellate court, pursuant to the Act, while parties of record would be required to initiate appeals in the circuit court, pursuant to the Code and the APA.[18] The legislature provided no hint that it intended to create such a dual-track system. Furthermore, nothing in the Illinois Administrative Code allows third party participation in the pollution control facility certification process.[19] The appropriate time for Roxana and other taxing bodies to weigh in on the tax revenue consequences of the certifications is when the Department of Revenue actually assesses the value of the certified facilities.[20] Any person aggrieved by the assessment may then apply for a review and correction in a separate hearing process.[21]

12. *Id.* at 13; 35 ILL. COMP. STAT. 200/11-60.
13. *Roxana II*, 2013 IL 115473, ¶ 12.
14. 735 ILL. COMP. STAT. 5/3–104.
15. *Roxana II*, 2013 IL 115473, ¶ 17.
16. *Id.* at ¶ 19.
17. *Id.* at ¶ 20.
18. *Id.* at ¶¶ 22-23.
19. *Id.* at ¶ 24; *see* 35 ILL. ADMIN. CODE tit. 125, § 200-16 (2013).
20. *Roxana II*, 2013 IL 115473, ¶ 26.
21. 35 ILL. COMP. STAT. 200/8–35(a) (2013); 86 ILL. ADMIN. CODE 110.110.

B. Increased Transparency of Pollution Control Facility Certifications: FOIA and Open Meetings Act

1. Roxana Community Unit School Dist. No. 1 v. Environmental Protection Agency, 2013 IL App (4th) 120825

This case is directly related to and precedes the above-discussed dispute over the tax treatment of oil refinery renovations.[22] While the WRB pursued its "pollution control facility" certifications, Roxana and other taxing bodies sought certain records relating to the consideration of WRB's certification applications from the IEPA pursuant to two sets of Illinois Freedom of Information Act ("FOIA") requests.[23] IEPA failed to provide the requested documents within the statutorily mandated five-business-day deadline and failed to request a five-business-day extension of time to respond.[24] The IEPA did manage to respond within approximately three months and two months of the respective sets of FOIA requests.[25] At various times, the IPCB also prohibited public comment, restricted opportunity for the public to address the IPCB in written filings, and held two closed meetings in January 2012, in which it voted to approve two of WRB's pollution control facility certifications and to reject Roxana's requests to intervene in the certification process.[26] Roxana contended these actions violated the Illinois Open Meetings Act.[27]

Roxana sought declaratory and injunctive relief against the IEPA, IPCB, Department of Revenue, and WRB.[28] Roxana alleged, (1) that the IEPA violated FOIA relating to the untimely responses and (2) that the IPCB violated the Open Meetings Act.[29] The plaintiffs and the defendants filed cross-motions for summary judgment, thereby agreeing that there was no issue of disputed material fact.[30] The trial court held in favor of the defendants on both counts, but was wholly reversed on appeal.[31] The defendants argued that the FOIA dispute was moot because the records had eventually been produced.[32] The Fourth District Appellate Court disagreed.[33] IEPA's production of the requested records had rendered moot the plaintiffs'

22. *Roxana II*, 2013 IL 115473.
23. *Roxana I*, 2013 IL App (4th) 120825, ¶¶ 11-13; *see* 5 ILL. COMP. STAT. 140/1-11.5 (2011).
24. *Roxana I*, 2013 IL App (4th) 120825, ¶¶ 11-13; *see* 5 ILL. COMP. STAT. 140/3(d); 5 ILL. COMP. STAT. 140/3(e).
25. *Roxana II*, 2013 IL App (4th) 120825, ¶¶ 11-13.
26. *Id.* at ¶¶ 14-19.
27. *Id.* at ¶ 19; 5 ILL. COMP. STAT. 120/1-7.5.
28. *Roxana I*, 2013 IL App (4th) 120825, ¶ 19.
29. *Id.*
30. *Id.* at ¶¶ 21, 38.
31. *Id.* at ¶¶ 25, 59.
32. *Id.* at ¶ 40.
33. *Id.* at ¶¶ 40-42.

claims with respect to production but not the plaintiffs' claims for attorney fees and civil penalties related to the late responses.[34]

The Fourth District also considered defendants' argument that an Open Meetings Act exception applied to the IPCB's January 2012 closed meetings.[35] The exception allows closed meetings for the consideration of "[e]vidence or testimony presented in open hearing, or in closed hearing where specifically authorized by law, to a quasi-adjudicative body, as defined in this Act, provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning."[36] The Fourth District found nothing in the record that could be construed as "evidence or testimony" presented in any hearing that would justify the application of this exception to the Open Meetings Act.[37] The Appellate Court took a clear public policy position that the IPCB's consideration of pollution control facility certifications should be more transparent.[38]

C. Landfills—Remedial Amendment to Statute Retroactively Applied to Enjoin Unpermitted Landfill Owners to Remove Waste

1. People ex rel. Madigan v. J.T. Einoder, Inc., 2013 IL App (1st) 113498

This appeal followed a bench trial ruling against several defendant owner-operators of an unpermitted landfill near Lynwood, Illinois.[39] The landfill had been accepting construction and demolition debris ("CCD"), which includes both clean construction and demolition debris ("CCDD") and general construction demolition debris ("GCDD").[40] The Illinois Environmental Protection Act ("the Act") defines CCDD as uncontaminated broken concrete without protruding metal bars, bricks, rock, stone, pavement, or dirt, while GCDD includes such non-hazardous, uncontaminated items as bricks, concrete, wood, and plaster.[41]

The landfill first came to the IEPA's attention in 1995 when an anonymous report was filed regarding open dumping at the site.[42] The IEPA issued a citation, and the defendants continued operation of the site.[43] After obtaining zoning approvals, the defendants began recycling operations in 1996, whereby CCD would be separated, processed, and returned to the

34. *Id.* at ¶ 42.
35. *Id.* at ¶ 53.
36. *Id.*; 5 ILL. COMP. STAT. 120/2(c)(4) (2013); *see* 5 ILL. COMP. STAT. 120/2(d) (definition of quasi-adjudicative body).
37. *Roxana I*, 2013 IL App (4th) 120825, ¶ 55.
38. *Id.* at ¶¶ 52-58.
39. People *ex rel*. Madigan v. J.T. Einoder, Inc., 2013 IL App (1st) 113498, ¶ 1.
40. *Id.* at ¶¶ 5-6.
41. *Id.*; 415 ILL. COMP. STAT. 5/3.160(b) (2011); 415 ILL. COMP. STAT. 5/3.16(a).
42. *Einoder*, 2013 IL App (1st) 113498, ¶ 8.
43. *Id.*

economic mainstream.[44] The IEPA's Bureau of Land sent a letter to the defendants advising them that a recycling facility could operate without a permit under certain, specified conditions but that IEPA had concerns because the defendants had indicated in zoning submissions they would accept nonrecyclable materials.[45] At the time of the landfill's operation, no permit was required for CCDD disposal below-grade.[46] "Grade" is equivalent to elevation above mean sea level.[47] At all relevant times, above-grade CCDD disposal, and any CDD disposal, required a permit.[48] In 1998, the IEPA issued a Notice of Violation to the defendants generally alleging they had conducted dumping and waste disposal operations without a permit in violation of the Act.[49] During subsequent negotiations, IEPA inspections determined that greater than 99.9% of the material unearthed in ten test pits was CCDD, with the remainder being GCDD.[50] IEPA investigations in 1999 and 2000 revealed growing piles of above-grade CCDD, and the vast majority of CCDD at the site was never recycled.[51] At IEPA's request, the Illinois Attorney General finally brought a legal action.[52] In 2001, the Circuit Court issued a preliminary injunction enjoining defendants from further unpermitted dumping and waste disposal operations.[53] The defendants failed to comply with the preliminary injunction and the landfill only ceased operations in 2003 with 700,000 cubic yards of above-grade CCDD at the site.[54]

After a bench trial, the Circuit Court held against the defendants on the unpermitted open dumping and waste disposal counts, issued a mandatory injunction ordering defendants to remove the above-grade waste and to undertake groundwater testing, and imposed a collective $1,773,300 in fines.[55] The First District completely affirmed the Circuit Court on appeal.[56] Two of the individual defendants, principal-officers of the business entities involved, alleged the IEPA never sent those individual notices of intent to pursue legal action as required by the Act and thus the court lacked subject matter jurisdiction.[57] The First District explained that the notices of deficiencies had not prejudiced the defendants and could not be used to

44. *Id.* at ¶¶ 9-10.
45. *Id.* at ¶ 9.
46. *Id.* at ¶ 13.
47. *Id.*
48. *Id.*
49. *Id.* at ¶ 14; *see* 415 ILL. COMP. STAT. 5/21 (2013).
50. *Einoder*, 2013 IL App (1st) 113498, ¶ 16.
51. *Id.* at ¶¶ 17-18.
52. *Id.*
53. *Id.*
54. *Id.* at ¶ ¶ 18, 39.
55. *Id.* at ¶ 1 (note that one fine was reduced on reconsideration).
56. *Id.* at ¶ 79.
57. *Id.* at ¶ 28; 415 ILL. COMP. STAT. 5/31(a)(1) (2013); 415 ILL. COMP. STAT. 5/31(b).

challenge jurisdiction.[58] The Constitution confers circuit courts' jurisdiction over justifiable matters.[59] Statutory notice requirements may only be considered jurisdictional prerequisites in cases of administrative review because in those cases the legislature has statutorily conferred jurisdiction upon the courts and thus may impose conditions precedent to its exercise.[60] The defendants then contended that CCDD did not constitute "waste" under the Act (as in effect during the relevant 1998-2003 time period) and, therefore, the disposal of CCDD at the landfill required no permit.[61] The Appellate Court simply pointed to the plain language of the Act, which stated that un-recycled CCDD did not constitute waste if disposed of *below grade*.[62] Finally, defendants argued that section 42(e) of the Act was not amended to authorize various forms of injunctive relief until 2004 and should not be applied retroactively.[63] Engaging in statutory construction, the First District held that the environmental restoration goals, polluter-pays principals, and explicit "liberal construction" instruction contained in the Act's preamble indicated that the legislature intended that the 2004 amendment be applied retroactively.[64] The First District found support for this approach in *State Oil Co. v. People*, where the Second District applied an amendment retroactively to assign remediation costs to owners of leaking underground storage tanks.[65] The Appellate Court also noted that statutory amendments relating only to remedies or forms of procedure are generally given retrospective application.[66]

D. Insurance Policy "Traditional Environmental Pollution" Exclusions: Concentrated Animal Feeding Operations ("CAFOs") and Odor Nuisance Suits

1. Country Mut. Ins. Co. v. Hilltop View, LLC, 2013 IL App (4th) 130124

Fourteen neighbors of a confined hog farm brought an odor nuisance and negligence suit against the owners and operators of the hog farm and of the surrounding fields upon which the hog manure was applied.[67] Two

58. *Einoder*, 2013 IL App (1st) 113498, ¶¶ 30-34.
59. *Id.* at ¶ 30; ILL. CONST. 1970, art. VI, § 9.
60. *Einoder*, 2013 IL App (1st) 113498, ¶ 30.
61. *Id.* at ¶ 37.
62. *Id.* at ¶¶ 38-39; 415 ILL. COMP. STAT. 5/3.78(a)(i) (2000) (note that the act has since been amended with additional requirements for unpermitted CCDD disposal).
63. *Einoder*, 2013 IL App (1st) 113498, ¶ 55; 415 ILL. COMP. STAT. 5/42(e).
64. *Einoder*, 2013 IL App (1st) 113498, ¶¶ 56-68; *see* 415 ILL. COMP. STAT. 5/2(b), 415 ILL. COMP. STAT. 5/2(c).
65. *Einoder*, 2013 IL App (1st) 113498, ¶ 60; *see also* State Oil Co. v. People, 352 Ill.App.3d 813, 822 N.E.2d 876 (Ill. App. Ct. 2004).
66. *Einoder*, 2013 Ill. App (1st) 113498, ¶ 63 (citing Shoreline Towers Condominium Ass'n v. Gassman, 404 Ill.App.3d 1013, 1023, 936 N.E. 2d 1198 (Ill. App. Ct. 2012)).
67. Country Mut. Ins. Co. v. Hilltop View, LLC, 2013 IL App (4th) 130124, ¶ 1.

defendants to the nuisance action, Hilltop View, LLC ("Hilltop") and Professional Swine Management, LLC ("PSM") had purchased an insurance policy through Country Mutual Insurance Company ("Country") that contained a standard "pollution exclusion" provision.[68] Country sought declaratory judgment asserting that it had no duty to defend the insureds in the underlying nuisance action pursuant to a number of exclusions in the insureds' policy, including the pollution exclusion.[69] On October 26, 2012, the trial court resolved cross-motions for partial summary judgment in favor of Hilltop and PSM, finding that the insurer had a duty to defend notwithstanding the pollution exclusion.[70] The trial court also issued Illinois Supreme Court Rule 304(a) findings, pursuant to which Country filed this appeal.[71]

The Fourth District affirmed the trial court's ruling in part and held that the policy's pollution exclusion did not apply to these circumstances.[72] The Fourth District quoted *American States Insurance Co. v. Koloms* at length in its decision.[73] In that case, the Supreme Court of Illinois had determined that a pollution exclusion did not relieve an insurer of its duty to defend where an allegedly defective furnace had released carbon monoxide into a commercial building.[74] The Supreme Court established the rule that such pollution exclusion provisions, which by their plain language could potentially be applied to an extremely broad array of situations, would only be enforced with respect to "traditional environmental pollution."[75] The Fourth District determined that hog and manure odors were not traditional environmental pollution because hog and manure odors resulted from naturally occurring chemicals rather than synthetic chemicals more commonly associated with environmental pollution and environmental litigation and because hog farming has traditionally been seen as a source of food rather than pollution.[76] Country argued unsuccessfully that under the Illinois Environmental Protection Act and other statutes, the hog and manure odors at issue could constitute air pollution.[77] The Appellate Court found this argument to be irrelevant.[78] Present day definitions of environmental hazards have no bearing on the *Koloms* Court's definition of "traditional environmental pollution."[79] The Fourth District further noted that even if present day

68. *Id*.
69. *Id.* at ¶¶ 1, 7.
70. *Id.* at ¶ 1.
71. *Id*.
72. *Id.* at ¶ 54.
73. American States Ins. Co. v. Koloms, 177 Ill.2d 473 (1997).
74. *Hilltop*, 2013 IL App (4th) 130124, ¶ 29.
75. *Id.* at ¶ 32; *Koloms*, 177 Ill.2d at 494.
76. *Hilltop*, 2013 IL App (4th) 130124, ¶¶ 34, 39.
77. *Id.* at ¶¶ 40-42; 415 ILL. COMP. STAT. 5/1, et seq.
78. *Hilltop*, 2013 IL App (4th) 130124, ¶¶ 40-42.
79. *Id*.

environmental statutes were used to define the phrase, it would not necessarily benefit Country.[80] The Illinois Livestock Management Facilities Act specifically states that the application of livestock waste to the land was an "acceptable, recommended, and established practice in Illinois," i.e., not a form of traditional environmental pollution.[81] Despite affirming the trial court's pollution exclusion ruling, the Fourth District reversed the trial court in part and afforded Country the opportunity to further contest coverage under other exclusions in the insureds' policy.[82]

E. Insurance Policy "Traditional Environmental Pollution" Exclusions: No Duty to Indemnify Village for Intentionally Polluting Tap Water

1. Village of Crestwood v. Ironshore Specialty Ins. Co., 2013 IL App (1st) 120112

At least twenty-five individual and class action lawsuits alleging, *inter alia*, negligence, fraud, failure to warn, willful and wanton misconduct, and breach of contract were brought against the Village of Crestwood.[83] These suits alleged that the Village knowingly and routinely dumped water polluted with perchloroethylene ("PCE") into the municipal tap water supply in order to cut costs.[84] PCE is a synthetic chemical used in dry cleaning that can cause serious health problems such as cancer, liver damage, and neurological impairment.[85] For two decades, Crestwood allegedly provided its 11,000 residents with up to 20% of the city's tap water from the polluted well at issue—all while annually issuing falsified federal Safe Drinking Water Act (42 U.S.C. § 300f et seq.) water quality reports to its customers.[86] The practice was only ended after an anonymous tip led the IEPA to sample the well in 2007.[87]

The Village sought insurance coverage from three insurers under eight policies (effective during various time periods), and the insurers disputed their duty to defend or indemnify.[88] Crestwood filed for declaratory judgment on the issue of the insurers' duty to defend.[89] The Circuit Court granted summary judgment to the insurers, holding that the underlying lawsuits fell within the absolute pollution exclusion clauses contained in each

80. *Id.*
81. *Id.*; 510 ILL. COMP. STAT. 77/20(f).
82. *Hilltop*, 2013 IL App (4th) 130124, ¶ 51.
83. Village of Crestwood v. Ironshore Specialty Ins. Co., 2013 IL App (1st) 120112, ¶ 1.
84. *Id.* at ¶¶ 1, 5.
85. *Id.* at ¶ 5.
86. *Id.*
87. *Id.*
88. *Id.* at ¶ 7.
89. *Id.* at ¶ 1.

of the eight insurance contracts.[90] The absolute pollution exclusion clauses were substantially similar in each of the policies.[91] The Village appealed the Circuit Court's judgment around the same time the United States Seventh Circuit Court of Appeals was holding against the Village in a parallel insurance coverage proceeding involving other insurers.[92] The Illinois First District Appellate Court upheld the Circuit Court's summary judgment ruling for the insurers.[93]

The three insurer-appellees before the First District argued that the federal case should trigger collateral estoppel.[94] However, the Appellate Court concluded it would be manifestly unfair to apply the doctrine because the insurers did not attempt to stay the state court proceedings or remove them to federal court for consolidation.[95] Addressing the merits, the First District noted that absolute pollution exclusions could apply to any theory of liability so long as the underlying damages were allegedly caused by the discharge of a pollutant.[96] Citing *American States Insurance Co. v. Koloms*, Crestwood correctly argued that absolute pollution exclusions are only enforceable for "traditional environmental pollution."[97] The *Koloms* court determined that the purpose of absolute pollution exclusion provisions, and hence the scope of their enforceability, is to avoid "the yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances *into the environment*" that had arisen as a result of the explosion of environmental litigation in the 1970s-80s.[98] However, Crestwood unsuccessfully argued that *Koloms* also required that the underlying complaints depict the insured as a so-called "active polluter" that could be required to pay governmental pollution clean-up costs pursuant to, for example, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (a/k/a CERCLA or Superfund, 42 U.S.C. § 9601 et seq.).[99] This argument had been explicitly rejected before, including by the Seventh Circuit while applying Illinois law in the parallel *Scottsdale* case.[100] The First District explained that Crestwood's mixing of drinking water with chemical-laden groundwater is a "textbook example" of traditional environmental pollution, regardless of any potential CERCLA liability.[101] The Appellate Court used case law to illustrate other examples of traditional

90. *Id.* at ¶ 11.
91. *Id.* at ¶ 9.
92. *Id.* at ¶ 2; Scottsdale Indemnity Co. v. Village of Crestwood, 673 F.3d 715 (7th Cir. 2012).
93. Crestwood v. Ironshore, 2013 IL App (1st) 120112, ¶ 25.
94. *Id.* at ¶ 3.
95. *Id.*
96. *Id.* at ¶ 8.
97. *Id.* at ¶ 13; American States Insurance Co. v. Koloms, 177 Ill.2d 473 (1997).
98. *Crestwood*, 2013 IL App (1st) 120112, ¶ 16 (quoting *Koloms*, 177 Ill.2d at 474 (emphasis original)).
99. *Id.* at ¶ 13.
100. *Id.* at ¶ 14.
101. *Id.* at ¶ 19.

environmental pollution including chemical discharge from a malfunctioning dry cleaning machine into the ground, industrial and landfill contamination migrating onto a nearby public housing development, a child's accidental destruction of a mercury thermometer inside of a residence, and a ruptured gasoline tank discharging into groundwater.[102]

II. ILLINOIS POLLUTION CONTROL BOARD RULEMAKINGS

The following summaries cover rulemakings currently pending and ongoing before the Illinois Pollution Control Board. They include rulemakings regarding coke and coal bulk terminal operations, lead standards for two nonferrous metal production facilities, coal combustion waste ash ponds and impoundments at power generating stations, national ambient air quality standards (NAAQS), confined animal feeding operations and the Clean Water Act, and the current status of the Clean Construction and Demolition Debris (CCDD) Law.

A. R2014-020: In the Matter of: Emergency Rulemaking Regarding Regulation of Coke/Coal Bulk Terminals; 35 Ill. Adm. Code 213

On January 16, 2014, the Illinois EPA (IEPA) filed a motion and proposal for emergency rulemaking to establish more detailed control requirements specific to emissions and discharges from coke and coal bulk terminal operations.[103] The IEPA alleged that undue delay or material prejudice would result if the control measures contained in the proposed amendments were not implemented as soon as possible to address inadequately controlled emissions and discharges from coke and coal bulk terminal operations.[104] On January 17, the Chemical Industry Council of Illinois (CICI) filed a letter urging the Board to reject the IEPA designation of "emergency disaster" and that the IEPA's proposed rules do not rise to the level of "emergency" under Illinois law.[105] The American Fuel and Petrochemical Manufacturers Association also filed a letter stating that by law IEPA cannot finalize a rule without the forty-five-day public comment period and review by the Joint Committee of Administrative Rules.[106] On

102. *Id.* at ¶¶ 17-18.
103. In the Matter of: Emergency Rulemaking Regarding Regulation of Coke/Coal Bulk Terminals; 35 ILL. ADM. CODE 213, PCB 14-20, Initial Filing, Jan. 16, 2014, Proposal and Motion for Emergency Rulemaking.
104. *Id.* at 4.
105. *Id.* Comments of Chemical Industry Council (PC #1).
106. *Id.* Comments of American Fuel & Petrochemical Manufacturers via email to Chairman Glosser (PC# 2).

January 23, the Board denied Agency's motion to adopt an emergency rule and agreed to proceed with the proposal as a general rulemaking.[107]

B. R2014-019: In the Matter of: Standards and Limitations for Certain Sources of Lead: Proposed 35 Ill. Adm. Code 226

On November 13, 2013, the Illinois EPA (IEPA) filed a proposal for standards and limitations for certain sources of lead.[108] This fast-track rulemaking was filed to satisfy Illinois' obligation to submit a State Implementation Plan (SIP) to address requirements under the CAA for sources of lead in nonattainment areas with respect to the 2008 National Ambient Air Quality Standards (NAAQS).[109] The two areas of nonattainment for lead in Illinois are Granite City and Chicago. The Clean Air Act (CAA) provides for the State to address emission sources on an area-specific basis through Reasonably Available Control Measures (RACM) and Reasonably Available Control Technology (RACT).[110] Proposed Rule, First Notice was published on November 21, 2013. IEPA is proposing reasonable and cost-effective lead controls on nonferrous metal production facilities, specifically the H. Kramer and Co. Brass and Bronze Foundry in Chicago and the Mayco Industries, LLC foundry in Granite City.[111] IEPA engaged in significant outreach with both companies each have begun making the requisite changes to their respective operations concurrently with this rulemaking in order to comply with the proposed requirements by the effective date in the proposed regulation.[112] A hearing was held on January 8, but there was no request for second hearing or unresolved objection, so a Certificate of Publication was published on February 10, in the Chicago Sun-Times.

C. R2014-010: In the Matter of: Coal Combustion Waste (CCW) Ash Ponds and Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841

On October 28, 2013, the Illinois EPA (IEPA) filed a proposed rule to add Part 841 to the Board's Subtitle G Waste Disposal Regulations.[113] This rule proposes to monitor coal combustion waste (CCW) surface impoundments and groundwater and develop a process for preventive

107. *Id.* Opinion and Order of the Board by D. Glosser.
108. In the Matter of: Standards and Limitations for Certain Sources of Lead: Proposed 35 ILL. ADM. CODE 226, PCB 14-19, Initial Filing, Nov. 13, 2013, Certification of Required Rule, 1.
109. *Id.* at 3.
110. *Id.* at 2.
111. *Id.* at 13.
112. *Id.* at 15.
113. In the Matter of: Coal Combustion Waste (CCW) Ash Ponds and Surface Impoundments at Power Generating Facilities: Proposed New 35 ILL. ADM. CODE 841, PCB 14-10, Initial Filing, Oct. 28, 2013.

response, corrective action and closure. It will allow each owner or operator to develop a site-specific plan for preventive response, corrective action and closure, which the IEPA will review.[114] This rule will affect twenty-three Illinois power plants, which have used coal, and IEPA is aware of eighty-nine CCW surface impoundments at power generating facilities.[115] On December 16, 2013, the Board published a Notice of Hearings beginning February 26, 2014, in Springfield and continuing May 14, 2014, if needed in Chicago.

D. R2014-009: In the Matter of: Proposed Amendments to Primary Drinking Water Standards: 35 Ill. Adm. Code 611.490

On September 20, 2013, the IEPA filed a proposal to amend the Illinois Primary Drinking Water Standards at Part 611 relating to certification of laboratories analyzing drinking water samples for demonstrating compliance with the National Primary Drinking Water Regulations (NPDWRs).[116] USEPA established the NPDWRs pursuant to the federal Safe Drinking Water Act.[117] These amendments would allow a drinking water supplier to use a laboratory certified by a sister state where no USEPA-certified or Illinois-certified laboratory exists for that parameter. USEPA granted primary enforcement authority to IEPA for enforcement of the NPDWRs in 1979 (44 Fed. Reg. 50648).[118] Public hearings were conducted on November 5, 2013, in Chicago and November 13, 2013, in Springfield. On December 19, 2013, the Board filed its opinion and order regarding the proposed rule and first notice.[119]

E. R2014-006: National Ambient Air Quality Standards Update, USEPA Regulations (Jan. 1, 2013, through June 30, 2013) Identical in Substance Rulemaking—Air

This rulemaking updates the ambient air quality standards in the Board's air pollution regulations (35 Ill. Adm. Code 243) to include revisions to the National Ambient Air Quality Standards (NAAQS) adopted by the United States Environmental Protection Agency (USEPA) pursuant to section 109 of the Clean Air Act (CAA) (42 U.S.C. § 7409 (2011)) during the period January 1, 2013, through June 30, 2013, and on July 3, 2013, and

114. *Id.* Statement of Reasons, 1.
115. *Id.* at 1, 3.
116. In the Matter of: Proposed Amendments to Primary Drinking Water Standards: 35 ILL. ADM. CODE 611.490, PCB 14-09, Initial Filing, Sept. 20, 2013, Statement of Reasons, 1-2.
117. *Id.* at 1.
118. *Id.* at 2.
119. *Id.* Opinion and Order of the Board by J. A. Burke: Proposed Rule, First Notice.

August 5, 2013.[120] On November 21, 2013, the Board adopted the first update to the initial amendments to fulfill a new identical-in-substance mandate adopted in P.A. 97-945 (eff. Aug. 10, 2012) to ensure that Illinois' regulations reflect USEPA's most recent NAAQS.[121] The federal actions that form the basis for Board action are: (1) the January 15, 2013 (78 FR 3086) new 2012 Primary 24-hour and annual average NAAQS for PM 2.5; (2) June 27, 2013, update to List of Designated Methods; (3) July 3, 2013 (78 Fed. Reg. 40000) new FRM for lead; and (4) August 5, 2013, (78 Fed. Reg. 47191) two area designations in Illinois under the 1971 Primary Annual Average and 24-Hr NAAQS for Sulfur Oxides.[122]

The updated version of the List of Designated Methods ("List") included a number of methods that were modified since the last version dated December 17, 2012, including carbon monoxide, nitrogen oxides, ozone, PM 2.5 and sulfur dioxide. The List is not codified, and the Board did not see that USEPA published a notice for the update in the *Federal Register*. Rather, USEPA's usual practice is simply to post a link to the updated version on the Internet (at *www.epa.gov/ttn/amtic/criteria.html*).[123] Thus, the Board found the update in a routine on-line check for an update. The Notice of Adopted Rulemaking was published in Ill. Reg. Vol. 37, Issue 49, p. 19848 on December 16, 2013.[124]

F. R2013-20: In the Matter of: Procedural Rules for Alternative Thermal Effluent Limitations Under Section 316(a) of the Clean Water Act: Proposed New 35 Ill. Adm. Code Part 106, Subpart K and Amended Section 304.141(c)

On June 20, 2013, the Illinois EPA (IEPA) filed a rulemaking proposing procedural rules for establishing alternative thermal effluent limitations under section 316(a) of the Clean Water Act (CWA) and 35 Ill. Adm. Code 304.141.[125] On September 5, 2013, Citizens Against Ruining the Environment (CARE) filed a First Notice Public Comment arguing that the Board should view the alternative thermal effluent limit as a category of variance under Illinois law, that an alternative thermal effluent limit can lead to standards requiring additional thermal controls, and that applicants should be required to conduct analysis that includes all other contributing thermal

120. *National Ambient Air Quality Standards Update, USEPA Regulations (January 1, 2013 through June 30, 2013) Identical in Substance Rulemaking—Air*, PCB R14-06, Opinion and Order of the Board by J. A. Burke: Adopted Rule, Nov. 21, 2013, 1.
121. *Id.*
122. *Id.* 5-6.
123. *Id.* at 9.
124. Ill. Register Vol. 37, Issue 49, 19848, Dec. 16, 2013.
125. In the Matter of: Procedural Rules for Alternative Thermal Effluent Limitations Under Section 316(a) of the Clean Water Act: Proposed New 35 ILL. ADM. CODE 106, Subpart K and Amended Section 304.141(c), PCB R13-20, June 20, 2013.

sources, among other comments.[126] On October 22, 2013, after two hearings the Board ordered that all final comments are due by December 11, 2013.[127] On December 11, 2013, the Illinois Environmental Regulatory Group (IERG) filed comments in response to CARE's. Exelon also filed comments urging the Board to proceed expeditiously due to the fact that this rulemaking is preventing Exelon from obtaining relief for its Quad Cities Station authorized under sections 316(a) and 304.141(c).[128] On January 23, 2014, the Board issued its proposed rule, second notice.[129]

G. R2012-024: In the Matter of: Gasoline Volatility Standards and Motor Vehicle Refinishing; Proposed Amendments to 35 Ill. Adm. Code Parts 211, 215, 218, and 219

On April 2, 2012, Illinois EPA (IEPA) proposed repeal of the state gasoline volatility standards in ozone attainment areas codified at 35 Ill. Adm. Code 215.585, since these have been replaced by federal standards.[130] There is a proposal to repeal the state standards in the Chicago and Metro-East non-attainment areas (respectively, 35 Ill. Adm. Code 218.585 and 35 Ill. Adm. Code 219.585), because they have "essentially been superseded by Illinois participation in the Federal reformulated gasoline (RFG) program."[131] Various clean-up amendments are also proposed, as necessitated by the proposed repeal. The proposal would impact motor vehicle refinishing operations by allowing, in application of spray coatings, alternative use of a High Volume Low Pressure (HVLP) equivalent gun for which USEPA has given written approval (*see* 35 Ill. Adm. Code 218.784 and 219.784) and repeal of a state registration program codified at 35 Ill. Adm. Code 218.792.784 and 219.792 that overlaps with the federal program.[132] On January 24, 2013, the Board adopted a final opinion and order in this docket directing the Clerk to submit the adopted rules to the Secretary of State, to become effective upon filing.[133] Due to non-substantive technical errors, a corrected version was adopted on September 9, 2013, and published in Ill. Reg. Vol. 37 Issue 42, p. 16858 on October 18, 2013.[134]

126. *Id.* First Notice Comments on Behalf of Citizens Against Ruining the Environment (PC# 1), 1, 3, 5.
127. *Id.* Hearing Officer Order/Correspondence, Oct. 22, 2013.
128. *Id.* Exelon Generation's Comments on the Proposed Procedural Rules for Alternate Thermal Effluent Limitations Applications Under Section 316(a) of the Clean Water Act (PC# 4) (electronic filing), Dec. 13, 2013.
129. *Id.* Opinion and Order of J. A. Burke: Proposed Rule, Second Notice, January 23, 2014.
130. In the Matter of: Gasoline Volatility Standards and Motor Vehicle Refinishing; Proposed Amendments to 35 ILL. ADM. CODE 211, 215, 218, and 219, PCB 12-24, Statement of Reasons, 1-2.
131. *Id.* at 2.
132. *Id.*
133. *Id.* Opinion and Order of the Board by C. K. Zalewski: Final Adopted Rule, Jan. 24, 2013.
134. Ill. Register, Vol. 37, Issue 42, 16858, Oct. 18, 2013.

H. R2012-023: In the Matter of: Concentrated Animal Feeding Operations (CAFOs): Proposed Amendments to 35 Ill. Adm. Code Parts 501, 502, and 504

On March 1, 2012, the Illinois EPA (IEPA) filed a proposal to amend Parts 501, 502, and 504 of the Board's agriculture related water pollution regulations.[135] The proposal has two purposes. First, the IEPA seeks to amend Parts 501 and 502 "so that they are consistent with, and as stringent as, the current federal CAFO regulations."[136] IEPA argues that failure to adopt these proposed amendments "could result in withdrawal of federal delegation of the National Pollutant Discharge Elimination System (NPDES) program itself to the State of Illinois."[137] Second, the IEPA seeks "to establish the state technical standards which are mandated by the federal rule, but not prescribed for the states."[138] The United States Environmental Protection Agency has indicated that "Illinois still needs to establish standards that address the rate at which manure, litter, and process wastewater may be applied on crop or forage land where the risk of phosphorus transport is high, as well as standards for land application on frozen soil and snow."[139] On March 15, 2012, the Board accepted the proposal for hearing.[140] On November 7, 2013, the Board adopted a first notice opinion and order.[141] The first notice comment period ended on January 30, 2014, and nearly 1900 first-notice comments were received.[142] A separate docket, R2012-023PC has been opened for the hundreds of public comments. The Board will accept responses and specifically requests response from the Agency on enumerated parts of sections 501 and 502 with a deadline of February 21, 2014.[143] Five hearings have been held and there are over 30 parties listed on the service list in this case, which will surely go on for some time.

135. In the Matter of: Concentrated Animal Feeding Operations (CAFOs): Proposed Amendments to 35 ILL. ADM. CODE 501, 502, and 504, PCB12-23, Hearing Officer Order/Correspondence, March 23, 2012.
136. *Id.*at 2.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* Order of the Board by T. A. Holbrook: Accept for Hearing, Mar. 15, 2012.
141. *Id.* Opinion and Order of the Board by J. A. Burke: Proposed Rule, First Notice, Nov. 7, 2013.
142. *Id.* Hearing Officer Order/Correspondence, Feb. 7, 2014.
143. *Id.*

I. R2012-009(B): In the Matter of: Proposed Amendments to Clean Construction or Demolition Debris (CCDD) Fill Operations: Proposed Amendments to 35 Ill. Adm. Code 1100

On July 29, 2011, the Illinois Environmental Protection Agency (IEPA) filed a proposal to amend the Board's rules for Clean Construction or Demolition Debris Fill Operations to allow for use of uncontaminated clean construction or demolition debris (CCDD) and uncontaminated soil as fill at quarries, mines and other excavations.[144] The Board held four days of hearings in this matter and on August 23, 2012, the Board adopted the proposal with amendments suggested by participants. At second notice, the Joint Committee on Administrative Rules (JCAR) had recommended that the Board give further consideration to whether groundwater monitoring should be required for these facilities.[145] In response to JCAR's recommendation the Board opened a subdocket. On September 21, 2012, the Board stated it would accept comments until December 1, 2012, as to whether or not the Board should amend the rules to provide groundwater monitoring.[146] On March 21, 2013, the Board ordered that additional hearings were necessary on the issue of groundwater monitoring after reviewing the public comments. Hearings were held on May 20 and 21, 2013, in Springfield, Illinois. Public comment period closed on August 1, 2013.[147]

III. FEDERAL CASES

The following federal case summaries include a Seventh Circuit Court of Appeals case regarding construction permits under the Clean Air Act, a citizen suit under the Clean Water Act decided by the United States Supreme Court, and cases regarding water rights in Oklahoma, federal preemption issues and wetlands permits in Florida. These cases represent a broad cross section and sampling of environmental cases heard by the U.S. Supreme Court and other Federal Courts in the past year.

144. In the Matter of: Proposed Amendments to Clean Construction or Demolition Debris (CCDD) Fill Operations: Proposed Amendments to 35 ILL. ADM. CODE 1100, PCB 12-09(B), Opinion and Order of the Board by D. Glosser: Adopted Rule, Final Opinion & Order to amend the Board's rules for Clean Construction or Demolition Debris Fill Operations, Aug. 23, 2012.
145. *Id.* at 4.
146. *Id.* Hearing Officer Order/Correspondence, Sept. 21, 2012.
147. *Id.* Hearing Officer Order/Correspondence, June 12, 2013.

A. Clean Air Act: *United States v. Midwest Generation, LLC*, 720 F.3d 644 (7th Cir. 2013), decided on July 8, 2013

Commonwealth Edison Co. did not obtain construction permits and did not install "the best available control technology" ("BACT") under the Clean Air Act (the "Act"), 42 U.S.C. § 7475(a) when it modified five of its coal-fired power plants, including Crawford and Fisk in Chicago; Powerton in Pekin; Waukegan Station in Waukegan; and Joliet in Joliet, IL.[148] The plant modifications occurred between 1994 and 1999.[149] No one contested Commonwealth Edison's decision that permits were not required within the five year statute of limitations under 28 U.S.C. § 2462.[150]

Commonwealth Edison sold the five plants to Midwest Generation ("Midwest") after it finished the modifications.[151] In 2009, the United States and Illinois sued and contended that Midwest is liable as Commonwealth Edison's successor.[152] The district court dismissed the claim as untimely based on section 7475(a) of the Act and entered a partial final judgment under Fed. R.Civ. P. 54(b) so that the claim under section 7475(a) could proceed to appeal while the parties' remaining disputes were ongoing in the district court.[153]

The court considered whether operating a new or modified plant, despite failure to obtain a construction permit, is a new violation of section 7475(a) of the Act.[154] Commonwealth Edison needed permits before undertaking the modifications; however, the statute of limitations had expired by the time this suit commenced.[155] Plaintiffs argued that failure to obtain a construction permit is a continuing violation and that every day a plant operates without a section 7475 permit is a fresh violation of the Clean Air Act.[156]

The opinion written by Chief Judge Easterbrook noted, "nothing in the text of section 7475 even hints at the possibility that a fresh violation occurs every day until the end of the universe if an owner that lacks a construction permit operates a completed facility."[157] The court held that section 7475 of the Act deals with getting permission for construction, not with a plant's operations.[158] It held that Commonwealth Edison's violations of section 7475 of the Act during the 1990s do not make its current operations a

148. United States v. Midwest Generation, LLC, 720 F.3d 644, 645 (7th Cir. 2013).
149. *Id.* at 646.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 644.
154. *Id.* at 647.
155. *Id.* at 646.
156. *Id.* at 647.
157. United States v. Midwest Generation, LLC, 720 F.3d 644, 647 (7th Cir. 2013).
158. *Id.* at 648.

violation of federal law, so they do not derivatively violate 415 ILCS 5/9.1(d)(2).[159] Once the statute of limitations expired, Commonwealth Edison was entitled to proceed as if it possessed all required construction permits.[160] The plants' ongoing emissions are subject to ongoing regulation under rules other than section 7475 of the Act.[161]

B. Clean Water Act: *Decker, Oregon State Forester, et al. v. Northwest Environmental Defense Center*, 133 S. Ct. 1326 (2013), decided on March 20, 2013

Georgia-Pacific West has a contract with Oregon to harvest timber from Oregon's Tillamook State Forest.[162] Rainfall in mountains of northwest Oregon averages more than 100 inches per year in some areas.[163] Channeled stormwater runoff goes from two logging roads into a system of ditches, culverts, and channels that discharge the water into nearby rivers and streams.[164] The discharges often contain large amounts of sediment, including dirt and crushed gravel, which can harm fish and other aquatic organisms.[165]

In September 2006, Northwest Environmental Defense Center ("NEDC") filed suit against Georgia-Pacific and state and local governments and officials, including Doug Decker in his official capacity as Oregon State Forester.[166] NEDC invoked the Clean Water Act's citizen suit provision, 33 U.S.C. §1365, and the suit alleged that the defendants caused discharges of channeled stormwater runoff into two waterways—the South Fork Trask River and the Little South Fork Kilchis River.[167] The suit alleged defendants violated the Clean Water Act because they had not obtained National Pollutant Discharge Elimination System ("NPDES") permits.[168]

The Supreme Court held in a 7-1 decision that NPDES permits are not required before channeled stormwater runoff from logging roads can be discharged to navigable waters of the United States.[169] The opinion written by Justice Kennedy held that: (a) a citizen suit was the proper vehicle for challenging the application of the EPA Silvicultural Rule in question; and (b) deference consistent with the Court's 1997 decision in *Auer v. Robbins*, 519

159. *Id*.
160. *Id*.
161. *Id*.
162. Decker, Oregon State Forester, et al. v. Northwest Environmental Defense Center, 133 S. Ct. 1326, 1328 (2013).
163. *Id.* at 1333.
164. *Id.* at 1328.
165. *Id.*
166. *Id.* at 1333.
167. *Id.*
168. *Id.*
169. *Id*. at 1338. (Justice Breyer took no part in the consideration or decision of the case).

U.S. 452 (1997) would be given to EPA's interpretation of its own regulation, the Industrial Stormwater Rule, which exempted such stormwater discharges from NPDES regulation.[170]

The Court held an agency's interpretation of its own regulations must be deferred to "unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'"[171] The regulation at issue references "facilities," "establishments," "manufacturing," "processing," and an "industrial plant."[172] Accordingly, the Supreme Court upheld the EPA's interpretation that logging roads were not related to manufacturing or processing of raw materials at an industrial plant so as to require a permit before the logging company defendant could allow storm water runoff from those roads.[173]

Chief Justice Roberts filed a concurring opinion, which was joined by Justice Alito. Justice Scalia filed an opinion dissenting in part and concurring in part.[174]

C. Water Rights: *Tarrant Regional Water District v. Herrmann*, 133 S. Ct. 2120 (2013), decided on June 13, 2013

The Tarrant Regional Water District ("Tarrant"), a Texas state agency serving Dallas-Fort Worth residents, challenged certain laws adopted by the State of Oklahoma which effectively prohibited Tarrant from purchasing water contained within the portion of the Red River basin located in Oklahoma.[175] In 2007, Tarrant applied for a water resource permit from the Oklahoma Water Resources Board ("OWRB") to take water from the Kiamichi River, a tributary of the Red River just north of the border between Texas and Oklahoma.[176]

Oklahoma, Texas, Arkansas, and Louisiana are members of the Red River Compact, 94 Stat. 3305 (the "Compact"), a Congressionally approved agreement by these states to ensure the equitable apportionment of water from the Red River and its tributaries.[177] The Compact negotiations began in 1955, lasted over twenty years, and finally culminated in the signing of the Compact in 1978.[178]

Tarrant knew that Oklahoma would likely deny its permits because Oklahoma had at that time enacted statutes imposing a moratorium on any diversions of water out-of-state.[179] When Tarrant filed its permit application,

170. *Id.* at 1337.
171. *Id.* (citing Chase Bank USA, N.A. v. McCoy 562 U.S. 871, 880 (2011)).
172. *Id.*
173. *Id.* at 1338.
174. *Id.*
175. Tarrant Regional Water Dist. v. Herrmann, 133 S. Ct. 2120, 2125, 2128 (2013).
176. *Id.* at 2128.
177. *Id.* at 2125-26.
178. *Id.* at 2125.
179. *Id.* at 2128.

Tarrant also filed suit in federal district court, arguing that the Oklahoma moratorium violated the dormant Commerce Clause and claiming that it was entitled under the Compact to cross state lines and divert Red River water stored in Oklahoma.[180] Tarrant sought to enjoin enforcement of the Oklahoma water statutes by OWRB and argued that the statutes, and the interpretation of them adopted by Oklahoma's attorney general, were preempted by federal law and violated the Commerce Clause by discriminating against interstate commerce in water.[181]

The lower federal courts rejected Tarrant's claims, as did the Supreme Court in a unanimous opinion written by Justice Sotomayor.[182] The Court interpreted the Compact under contract law principles and held that it did not give cross-border rights to the water that is the subject of the Compact.[183] In footnote eight of the opinion, Justice Sotomayor stated that once a Compact is approved by Congress, it is "transform[ed] . . . into a law of the United States" and the Supremacy Clause, Art. VI, cl.2, then ensures that it pre-empts any state law that conflicts with the Compact.[184] In this case, pre-emption was not an issue.[185]

The Supreme Court determined that the Oklahoma statutes were enforceable since the Compact was silent as to whether a state was precluded from adopting laws prohibiting one state from purchasing water from another state and the Compact permitted Oklahoma to allocate the use of the water subject to certain restrictions.[186] The Compact contained no express pre-emption provision and the Supreme Court refused to read one into the applicable law.[187] The Court permitted Oklahoma to control water within its borders.[188]

D. Federal Preemption

1. *American Trucking Association, Inc. v. City of Los Angeles, California, et. al.*, 133 S. Ct. 2096 (2013), decided on June 13, 2013

The American Trucking Association, Inc. ("American Trucking") is the largest national trade association for the trucking industry and its members include many drayage companies who operate short-haul trucks called "drayage trucks" at the Port of Los Angeles ("Port").[189] The Port is the

180. *Id.* at 2129.
181. *Id*.
182. *Id.*
183. *Id.* at 2135.
184. *Id.* at 2137.
185. *Id.* at 2136.
186. *Id.* at 2135.
187. *Id.* at 2136.
188. *Id.*
189. Am. Trucking Ass'n, Inc. v. City of L.A., Cal., et. al., 133 S. Ct. 2096, 2099 (2013).

largest port in the country and it owns marine terminal facilities, which it leases to terminal operators that load cargo onto and unload it from docking ships.[190] The trucking companies providing those drayage services are all federally licensed motor carriers.[191]

The City's Board of Harbor Commissioners ("Board") runs the Port pursuant to a municipal ordinance known as a tariff, which sets out various regulations and charges.[192] The Board decided to expand the Port's facilities in the late 1990s to accommodate more ships.[193] The expansion faced opposition from neighborhood and environmental groups due to concerns over the impact on traffic, the environment, and safety.[194] In 2007, the Board implemented a Clean Truck Program and devised a standard-form "concession agreement" to govern the relationship between the Port and any trucking company seeking to operate on the premises.[195] The concession agreement compelled trucking companies to affix a placard on each truck with a phone number for reporting concerns and to submit a plan listing off-street parking locations for each truck when not in service.[196] Other provisions in the agreement related to the company's financial capacity, its maintenance of trucks, and its employment of drivers.[197] The Board then amended the Port's tariff to ensure that every drayage company would enter into the concession agreement by making it a misdemeanor, punishable by fine or imprisonment, if a terminal operator granted access to an unregistered drayage truck.[198]

American Trucking filed suit against the Port and the City seeking an injunction against the five provisions in the concession agreement discussed above, as well as the enforcement penalties, as being in violation of section 14501(c)(1) of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA").[199] Section 14501(c)(1) 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" relating to price, route or service of any motor carrier.[200]

The Supreme Court considered whether federal law preempts the placard and parking provisions of the concession agreement.[201] Justice Kagan penned the unanimous Court opinion holding that the FAAAA preempts

190. *Id.*
191. *Id.*
192. *Id.* at 2100.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 2100-01.
201. *Id.* at 2101-02.

those two provisions of the concession agreement, and rejected the City's argument that the concession agreement was not a law but a contract.[202] The Court held that these requirements had the force of law and were therefore preempted by the FAAAA.[203] The Court determined that it was premature to decide whether other provisions of the Clean Truck Program are similarly preempted.[204] Justice Thomas concurred, opining that Congress cannot preempt a state law merely by promulgating a conflicting statute—the preempting statute must also be constitutional, both on its face and as applied.[205] The FAAAA provision giving the federal government authority over *intrastate* commerce raises Constitutional concerns because the Constitution explicitly limits Congress' regulatory power to *interstate* commerce.[206] Justice Thomas joined with the majority opinion since neither party raised a constitutional challenge to the FAAAA.[207]

2. *Koontz v. St. John's River Water Management District*, 133 S.Ct. 2586 (2013), decided on June 25, 2013

In 1972, Coy Koontz, Sr. ("Koontz") purchased an undeveloped 14.9-acre tract of land on the south side of Florida State Road 50, a divided four-lane highway east of Orlando.[208] Florida enacted the Water Resources Act in 1972 (the "Act"), which divided the State into five water management districts and authorized each district to regulate "construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state."[209] Under the Act, a landowner wishing to undertake such construction must obtain a Management and Storage of Surface Water (MSSW) permit, which may impose "such reasonable conditions" on the permit as are "necessary to assure" that construction will "not be harmful to the water resources of the district."[210] In 1984, the Florida Legislature passed the Warren S. Henderson Wetlands Protection Act, which made it illegal for anyone to "dredge or fill in, on, or over surface waters" without a Wetlands Resource Management (WRM) permit.[211] The St. Johns River Water Management District ("District"), which has jurisdiction over petitioner's land, requires that permit applicants wishing to build on wetlands offset

202. *Id.* at 2105.
203. *Id.* at 2103.
204. *Id.* at 2105.
205. *Id.* at 2106 (Thomas, J. concurring).
206. *Id.*
207. *Id.*
208. Koontz v. St. John's River Water Mgmt. Dist., 133 S.Ct. 2586, 2592-93 (2013).
209. *Id.* at 2592 (citing 1972 Fla. Laws ch. 72-299, pt. IV, § 1(5), pp. 1115-16.
210. *Id.* (citing 1972 Fla. Laws § 4(1) 1118).
211. *Id.* (citing 1984 Fla. Laws ch. 84-79, p. VIII, § 403.905(1), pp. 204-05).

environmental damage by creating, enhancing, or preserving wetlands elsewhere.[212]

In 1994, Koontz sought MSSW and WRM permits from the District to develop the 3.7-acre northern section of his property.[213] Under his proposal, Koontz would have raised the elevation of the northernmost section of his land to make it suitable for building, graded the land from the southern edge of the building side down to the elevation of the high-voltage electrical lines, and installed a dry-bed pond for retaining and gradually releasing stormwater runoff from the building and its parking lot.[214] Petitioner offered to deed a conservation easement for the 11-acre southern section of his land to the District in order to mitigate the environmental effects of his proposal.[215]

The District stated it would only approve construction if: (1) the size of the development was reduced to 1 acre and Koontz deeded to the District a conservation easement on the remaining 13.9 acres; or (2) Koontz proceeded with building on 3.7 acres and deeded a conservation easement on the remainder of the property, and also agreed to hire contractors to make improvements to District owned wetlands several miles away.[216] Koontz refused and filed suit in Florida state court seeking money damages for the taking of his property without just compensation arguing that this action by the District conflicted with two Supreme Court unconstitutional takings decisions: *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).[217] In those cases, the Supreme Court held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use.[218]

After being successful in the trial court, Koontz's recovery was reversed by the Florida State Supreme Court holding that the case was not controlled by *Nollan-Dolan* precedents, because in this case the permit was denied, while in *Nollan* and *Dolan* the permit was granted with conditions.[219] The majority acknowledged a division of authority over whether a demand for money can give rise to a claim under *Nollan* and *Dolan*, and sided with those courts that have said it cannot.[220] Recognizing that the majority opinion in the Florida State Supreme Court rested on a question of federal constitutional

212. *Id.*
213. *Id.*
214. *Id.* at 2592-93.
215. *Id.* at 2593.
216. *Id.*
217. *Id.*
218. *Id.* at 2593-94.
219. *Id.*
220. *Id.* at 2595.

law on which the lower courts are divided, the U.S. Supreme Court granted the petition for a writ of certiorari.[221]

In a 5-4 decision delivered by Justice Alito, in which Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined, the U.S. Supreme Court held that its constitutional takings cases apply even when a permit is denied (the *Nollan-Dolan* cases involved the granting of a land use permit with exorbitant demands), and even when a government's demand is for money.[222] The U.S. Supreme Court held that it does not matter whether the conditions being imposed result in the denial of the permit, or whether a permit was granted.[223] The Florida Supreme Court's judgment was reversed, and the case was remanded for further proceedings.[224]

Justice Kagan filed a dissenting opinion in which Justices Ginsburg, Breyer, and Sotomayor joined, and opined that the ruling threatens to subject a broad array of local land-use regulations to heightened constitutional scrutiny and deprives state and local governments of the flexibility they need to ensure environmentally sound and economically productive development.[225]

221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 2598.
225. *Id.* at 2604 (Kagan, J. dissenting).