



Environmental Litigation and Toxic Torts Committee Newsletter

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MESSAGE FROM THE CHAIRS

Peter Condron and Shelly Geppert

Just one month into the 2015–2016 ABA term, your Environmental Litigation and Toxic Torts Committee newsletter editors, Lisa Gerson and Stephen Riccardulli, offer you concise and thoughtful summaries of recent environmental decisions from across the country. Authors Scott Kauff and Nathan Short examine the approval of a controversial \$225 million settlement between the New Jersey Department of Environmental Protection and Exxon Mobil Corporation—purportedly the largest natural resource damages settlement in the state’s history. Author Matthew Thurlow reports on the D.C. Circuit’s recent decision on EPA’s Transport Rule. Author Lisa Cipriano looks at a case in which the “[p]laintiff [sought] to push the frontier of CERCLA’s definition of disposal.” Author Chris Johnson focuses on Seventh Circuit decisions, including one considering whether intervenors were bound by a settlement related to Chicago’s “Deep Tunnel” sewer system. Authors Whitney Jones Roy and Alison Kleaver review a California Supreme Court decision concerning whether a state university was obliged to contribute funds for off-site environmental mitigation. The newsletter also addresses additional noteworthy environmental and toxic tort decisions and will continue to bring you case law summary highlights throughout the year. Also included in this issue is an assessment of a potential trend in courts permitting environmental groups to challenge government action by “back-

dooring” global climate change claims, authored by William Sparks and Malinda Morain; an analysis of EPA’s recent proposal to regulate methane emissions in the oil and gas sector, authored by Jeffrey Dintzer and Nathaniel Johnson; and an in-depth look at EPA’s final technical guide for assessing and mitigating vapor intrusion pathways, authored by Dr. Helen Dawson.

Our committee wants *you* to get more involved this term. We have identified a number of priority topics for ELTT this year, including how recent Supreme Court decisions on class actions may impact environmental cases; TSCA reform; developments in insurance coverage for Superfund liability defense; use of *Lone Pine* orders as a case management tool; updates in coal ash regulation and litigation; the use of chemical fingerprinting in environmental litigation; and the future management of fracking waters. Share your knowledge and experience on these issues with your fellow committee members, and please reach out to us to learn how you can get involved. If you are active in a state or local bar association addressing one of these topics—or other topics that would be of interest to committee members—please let us know so we can try to work with the association on developing a joint program or publication. As incoming chairs, we look forward to working with you and our dedicated team of vice chairs, and we hope to see you at SEER’s Fall Conference in Chicago in late October.

Continued on page 3.

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Toxic Torts Committee Newsletter
Vol. 17, No. 1, October 2015
Stephen Riccardulli and Lisa Gerson, Editors

In this issue:

Message from the Chairs
Peter Condon and Shelly Geppert..... 1

Case Law Highlights
Northeast

**Third Circuit Upholds EPA's 2010 Seven-State
Chesapeake Bay TMDL**
Scott E. Kauff and Nathan Short..... 3

**New Jersey Court Approves Controversial \$225
Million Settlement with Exxon Mobil for Natural
Resource Damages**
Scott E. Kauff and Nathan Short..... 4

**New Jersey Court Approves over \$50 Million in
Fees and Costs for Special Counsel for the State
of New Jersey**
Scott E. Kauff and Nathan Short..... 6

Case Law Highlights
Southeast

**D.C. Circuit Invalidates EPA's Transport Rule
Emissions Budgets for Upwind States**
Matthew Thurlow..... 7

**D.C. Circuit Holds That Citizen Group's
Challenge to Natural Gas Pipeline Falls Outside
"Zone Of Interests"**
Matthew Thurlow..... 9

**West Virginia District Court Dismisses Clean
Water Act Challenge on Jurisdictional Grounds**
Matthew Thurlow..... 10

Case Law Highlights
Mid-Continent

**Sale of Building with Knowledge That It Is
Releasing Hazardous Substances May Constitute
"Disposal" Under CERCLA**
Lisa Cipriano 11

**OPA's Definition of "Responsible Party"
Contemplates That Multiple Parties May Be
Responsible for Costs of Pollution from Oil
Discharges**
Lisa Cipriano 12

Case Law Highlights
Midwest

**Settlement Between Government and
Water Reclamation District Binds Intervening
Environmental Groups**
Chris Johnson..... 13

**Exclusion of Testimony by Plaintiffs' Experts in
Vinyl Chloride Exposure Case Upheld, Summary
Judgment for Manufacturer Affirmed**
Chris Johnson..... 14

Case Law Highlights
Mountain/West Coast

**Tenth Circuit Holds That the Price-Anderson Act
Does Not Preempt State Law Tort Claims**
Whitney Jones Roy and Alison N. Kleaver... 15

**California Agencies Are Required to Mitigate
Environmental Effects of Projects Even Where the
Legislature Does Not Set Aside Money**
Whitney Jones Roy and Alison N. Kleaver... 17

**Court Rejects Public Nuisance Claim Based Upon
Voluntarily Incurred Investigation Costs**
Whitney Jones Roy and Alison N. Kleaver... 18

**Ninth Circuit Allows "Back-Door" Challenge
Based on Global Climate Change**
William Sparks and Malinda Morain..... 19

**Proposed Methane Rules Show EPA Coming
Around on Fracking**
Jeffrey D. Dintzer and
Nathaniel P. Johnson 20

**U.S. Environmental Protection Agency's Final
"Technical Guide for Assessing and Mitigating the
Vapor Intrusion Pathway from Subsurface Sources
to Indoor Air": Key Recommendations and Their
Implications**
Dr. Helen Dawson..... 24

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Newsletter.

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Continued from page 1.

Finally, we offer a huge thanks to outgoing chairs Ben Snowden and Patrick Jacobi. Ben and Patrick reenergized our committee and worked hard to keep content fresh and our membership engaged. We look forward to carrying on this legacy.

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CASE LAW HIGHLIGHTS NORTHEAST

THIRD CIRCUIT UPHOLDS EPA'S 2010 SEVEN-STATE CHESAPEAKE BAY TMDL

Scott E. Kauff and Nathan Short

***American Farm Bureau Federation, et al. v. United States Environmental Protection Agency*, 792 F.3d 281 (3d Cir. 2015).** The Third Circuit upheld a district court's approval of the U.S. Environmental Protection Agency's (EPA's) 2010 "total maximum daily load" (TMDL) program for the Chesapeake Bay (Chesapeake Bay TMDL). *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281 (3d Cir. 2015). The Chesapeake Bay TMDL is the result of a decades-long process involving substantial input from Virginia, West Virginia, Maryland, Delaware, Pennsylvania, New York, and the District of Columbia. This comprehensive framework for pollution reduction in the largest estuary in North America (1) includes, inter alia, limits to agriculture, forest, nontidal atmospheric deposition, on-site septic and urban nonpoint sources; (2) sets 2017 as a target date for the completion of 60 percent of the proposed actions, and sets 2025 as a target date for full completion; and (3) requires "reasonable assurance" that "the states' proposals would actually 'implement the applicable water quality standards.'" *Id.* at 292, 300, 302–03 (citations omitted).

In this pre-enforcement challenge, agricultural and home building organizations (collectively referred to herein as the "Farm Bureau") asserted that the term "total maximum daily load," contained in the Clean Water Act, codified at 33 U.S.C. § 1313(d) (1)(D), is unambiguous—i.e., a TMDL "can consist only of a number representing the amount of a pollutant that can be discharged into a particular segment of water and nothing more." *Id.* at 294. Nonetheless, the court, applying the Supreme Court's two-step analysis in *Chevron v. NRDC*, 467 U.S. 837 (1984), rejected this argument and found that the term "total maximum daily load" is ambiguous.

The court, relying on the statutory canon of surplusage, similarly rejected the Farm Bureau's argument that "total load" "is just a number, like the 'total' at the bottom of a restaurant receipt." *Am. Farm Bureau Fed'n*, 792 F.3d at 297. As such, a reading would have rendered the "word 'total' redundant." *Id.*

Concerning the delegation of authority to EPA, the court found that Congress granted EPA broad regulatory authority to implement the Clean Water Act and "explicitly required the EPA to establish 'total maximum daily loads,' [but did not] prescribe[] *how* the EPA is to do so." *Id.* at 298. In so doing, EPA used notice-and-comment rulemaking to promulgate the Chesapeake Bay TMDL, pursuant to the Administrative Procedure Act (APA), whereby it likely included information sufficient "for the public adequately to comment on the agency's judgment and make suggestions where appropriate." *Id.* (citation omitted). If the Farm Bureau's textual argument that "total maximum daily load" is unambiguous was accepted, EPA would have provided only a number (i.e., a total) without supporting information. *Id.* "It would be strange to require the EPA to take into account [several] considerations but at the same time command the agency to excise them from its final product" (i.e., provide a total maximum daily load, but not provide data supporting that total). *Id.*

While EPA maintains primary responsibility for point sources and states have primary responsibility for nonpoint sources, a TMDL is required where a state cannot meet its water quality standards through point source effluent limitations alone. *Id.* at 299. Therefore, TMDLs "must take into account pollution from both point and nonpoint sources." *Id.* at 300. While the creation of a TMDL is the primary responsibility of the states, "'backstop authority' is vested in the EPA." *Id.* at 289. The court, in denying the Farm Bureau's federalism argument that "the TMDL impermissibly grants the EPA the authority to make land-use and zoning regulations," easily distinguished several prior opinions finding that "the TMDL does not prescribe land use rules that

excessively intrude on traditional state authority." *Id.* at 302, 304.

The court also found that EPA's decision to "seek[] reasonable assurances [by the EPA] from the states that their Watershed Improvement Plans will meet their stated goals . . . [was] []consistent with the purpose and structure of the Clean Water Act." *Id.* at 300. This comports with the requirement that "[t]he TMDL must be set 'at a level necessary to implement the applicable water quality standards.'" *Id.* (citing 33 U.S.C. § 1313(d)(1)(C)).

In sum, "[e]stablishing a comprehensive, watershed-wide TMDL—complete with allocations among different kinds of sources, a timetable, and reasonable assurance that it will actually be implemented—is reasonable and reflects a legitimate policy choice by the agency in administering a less-than-clear statute." *Id.* at 309.

NEW JERSEY COURT APPROVES CONTROVERSIAL \$225 MILLION SETTLEMENT WITH EXXON MOBIL FOR NATURAL RESOURCE DAMAGES

Scott E. Kauff and Nathan Short

***N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp.*, UNN-L-3026-04, consolidated with UNN-L-1650-05 (N.J. Super. Ct. Aug. 25, 2015).**

A New Jersey Superior Court judge approved a controversial \$225 million settlement between the New Jersey Department of Environmental Protection (State or DEP) and Exxon Mobil Corporation. Plaintiff DEP, having already secured in 1991 two voluntary administrative consent orders (hereinafter, 1991 ACOs) with Exxon for the cleanup of both the Linden Bayway refinery (Bayway) and the Bayonne facility (Bayonne), brought suit against Exxon in 2004 for injuries to natural resources at Bayway and Bayonne. *N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp.*, UNN-L-3026-04, consolidated with UNN-L-1650-05 (N.J. Super. Ct. Aug. 25, 2015).

After 11 years of litigation, 66 days of trial and the State's presentation of evidence of \$8.9 billion in damages (which Exxon strongly contested), the State and Exxon proposed a consent decree whereby Exxon reaffirmed its 1991 ACO remedial duties and would be required to pay \$225 million in natural resource damages (NRD). According to the DEP, this was the largest NRD settlement in New Jersey's history. In addition to providing releases from NRD liability for the Bayway and Bayonne sites, the proposed consent decree releases claims for NRD for the following unrelated sites: (1) 1,768 Exxon retail gasoline stations (except for sites with methyl tertiary butyl ether (MTBE)), and (2) 15 other facilities (except for MTBE claims). Numerous environmental groups and state legislators opposed the settlement agreement, asserting, among other concerns, that releases of liability for the unrelated claims were a giveaway. The environmental groups also argued that the settlement amount of \$225 million was "suspiciously low" or an abrupt change of course. *Id.* at 27.

In an 81-page opinion, the court found that the Spill Act was sufficiently analogous to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and therefore drew heavily upon CERCLA precedent in considering whether to approve the proposed consent decree. The court applied the "arbitrary and capricious" standard of review to the inputs (i.e., the trustee's calculations and methods used to support the consent decree) and reviewed the output (i.e., the consent decree itself) for "fairness, reasonableness, faithfulness to the objectives of the governing statute, and public interest." *Id.* at 6.

Applying these standards of review, the court found that both parties faced significant litigation and appellate risks with respect to (1) the application of New Jersey's legislative extension of the NRD statute of limitations to common law strict liability claims; (2) the Spill Act's retroactive application to natural resource injuries that occurred before its 1977 enactment

(*N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp.*, No. UNN-L-3026-04 (N.J. Super. Ct. Jan. 22, 2009)); (3) the dismissal of claims for damages for injuries to natural resources that are the result of physical modifications (*N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp.*, No. UNN-L-3026-04 (N.J. Super. Ct. June 5, 2009)); and (4) the availability of damages under the Spill Act for "[a]ny lands [regardless of ownership] which are contaminated as a result of actions by Exxon or its predecessors" (*N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp.*, No. UNN-L-3026-04 (N.J. Super. Ct. July 24, 2009)). *Id.* at 7.

The court also discussed litigation risks with regard to experts. Exxon moved to exclude seven of DEP's eight experts and DEP filed six motions attacking Exxon's six experts. The parties faced the risk that much of their experts' testimony would ultimately be excluded, as the court had deferred ruling on the motions. The court also detailed how the State's asserted damages at trial could be reduced should certain proofs be determined to be insufficient. Using two "active Excel spreadsheets" created by DEP's expert, the court demonstrated the effects of certain possible post-trial findings.

Additionally, the court considered the history of the parties' settlement negotiations under multiple governors persuasive and noted the consistency in their negotiation positions. The court further reasoned that the proposed settlement reflected a "near 40% improvement over [DEP's] historic average" per-acre recovery. *Id.* at 40–41. The court also approved the inclusion of unrelated sites in the consent decree, citing the discretion vested in DEP by the legislature to bring and settle NRD claims as well as the valuation DEP assigned to the unrelated sites.

Oral arguments regarding an appeal of a denial of certain requests to intervene were held on September 22, 2015, and the parties are awaiting a decision.

NEW JERSEY COURT APPROVES OVER \$50 MILLION IN FEES AND COSTS FOR SPECIAL COUNSEL FOR THE STATE OF NEW JERSEY
Scott E. Kauff and Nathan Short

N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp., UNN-L-3026-04, consolidated with UNN-L-1650-05 (N.J. Super. Ct. Aug. 25, 2015) (letter opinion). A New Jersey Superior Court judge approved over \$50 million in fees and costs for Kanner & Whiteley, L.L.C., special counsel for the state of New Jersey (Special Counsel). *N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp.*, UNN-L-3026-04, consolidated with UNN-L-1650-05 (N.J. Super. Ct. Aug. 25, 2015) (letter opinion). The court reviewed special counsel's application to determine whether the fees and costs were "reasonable in light of all the circumstances" and recognized that the application for over \$50 million in fees and costs dwarfed New Jersey precedent. Nevertheless, the court found that a fee of this "magnitude" did not reach a "tipping point" that rendered it "an unearned windfall."

The court found that in light of Special Counsel's 11 years of legal services under New Jersey's special counsel agreement (which included several interlocutory appeals, a 66-day trial, and extensive post-trial briefing), the complexity of the case and issues addressed, the demands on Special Counsel's time, and the skill required, the fee request more than complied with reasonableness requirements of the Rules of Professional Conduct. *Id.* at 4–5. The court found that given the small size of Special Counsel's firm, it "undoubtedly" was unable to take on numerous additional clients while handling the Exxon litigation. *Id.* at 5. Finding no state court parallel for the attorney fee amount, the court relied on contingent fee agreements provided by the New Jersey attorney general and concluded that there was "ample basis to conclude that an overall 20.4% recovery rate . . . is customary for the New Jersey locality." *Id.* at 6. In light of the complexity of the litigation, the extensive trial, the extraordinary efforts required for settlement, and a \$225-million recovery, the court found the

fees were "in line with the results achieved." *Id.* at 7. The court concluded that Special Counsel's ongoing and seamless work with several administrations and multiple attorneys general and DEP commissioners, in addition to representing New Jersey in other litigation, was in large part responsible for the ultimate outcome in this case. *Id.* at 7–8. Special Counsel's status as a "well-known" environmental firm, coupled with a 34-year presence and notable work involving the BP oil spill and ongoing work with the commissioners and attorneys general satisfied the requirement of appropriate experience, reputation, and skill. *Id.* at 8.

The court highlighted the risks assumed by Special Counsel in taking on the issue of whether "compensatory damages for loss of use of adversely affected natural resources were recoverable under the Spill Act." *Id.* at 9. Further, the court opined that Special Counsel's role in obtaining "this 'loss of use' holding [] is probably the most important ruling in the case's long history because of its far-ranging precedent, now preserved because of the approved settlement." *Id.* The retainer agreement also provided for the attorney general to reduce ultimate fees if they were found to be unreasonable.

In granting the fee application, the court reiterated that even though the fee award is significant in size, it was counterbalanced by the significant risk that Special Counsel bore of never being compensated for the still-ongoing 11 years of work, coupled with the unusual nature of the case.

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CASE LAW HIGHLIGHTS

SOUTHEAST

D.C. CIRCUIT INVALIDATES EPA'S TRANSPORT RULE EMISSIONS BUDGETS FOR UPWIND STATES

Matthew Thurlow

***EME Homer City Generation, L.P. v. United States Environmental Protection Agency*, No. 11-1302 (Consolidated), 2015 U.S. App. LEXIS 13039 (D.C. Cir. July 28, 2015).** On July 28, 2015, the U.S. Court of Appeals for the District of Columbia Circuit granted in part and denied in part challenges brought by state and industry petitioners against the U.S. Environmental Protection Agency's (EPA's) Cross-State Air Pollution Rule (Transport Rule). The court granted petitioners' "as applied" challenges to sulfur dioxide (SO₂) and nitrogen oxide (NO_x) emissions budgets set by EPA in 2014 for upwind states including Texas, Alabama, Georgia, South Carolina, Florida, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Virginia, and West Virginia. *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (Consolidated), 2015 U.S. App. LEXIS 13039 (D.C. Cir. July 28, 2015) (hereinafter, *Homer City II*). The court also denied a number of additional previously unresolved challenges to the Transport Rule including challenges relating to EPA's issuance of federal implementation plans (FIPs), air modeling used to create the Transport Rule, EPA's application of an air "maintenance" provision in the Transport Rule, EPA's methodology for evaluating upwind states that interfered with maintenance of air quality standards in downwind states, and other challenges not properly before the court.

After invalidation of an earlier rule, EPA issued the Cross-State Air Pollution Rule or Transport Rule in 2011. *Id.* at *7. The rule regulates the transport of air pollutants across state lines pursuant to the Clean Air Act's "good neighbor" provision. The "good neighbor" provision is intended to prevent emissions of air pollutants in upwind states that contribute significantly to nonattainment of

national ambient air quality standards (NAAQS) in downwind states. 42 U.S.C. § 7410(a)(2)(D)(i). The Transport Rule applies a two-step approach to regulating cross-state air pollution. First, EPA evaluates which upwind states "contribute significantly" to the nonattainment of air quality in downwind states. If upwind states contribute more than 1 percent of air pollution to downwind states they are deemed to have a "linkage" with the downwind state. Second, EPA calculates the pollution reductions required in these upwind states to prevent them from contributing significantly to nonattainment with NAAQS in the downwind states. *Id.* at *12–13.

Following EPA's issuance of the final Transport Rule, a number of states, municipalities, and industry groups challenged the rule on various bases including EPA's methodology for calculating upwind states' emission reduction obligations and EPA's over-control of the upwind states' emissions. *Id.* at *7. In 2012, the D.C. Circuit agreed with petitioners and invalidated the rule. *See EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 38 (D.C. Cir. 2012) (hereinafter, *Homer City I*). Last year, the Supreme Court overturned the D.C. Circuit's decision and held that these potential problems with the Transport Rule did not require that the rule be overturned, but rather could be addressed through "particularized, as-applied challenges" brought by the individual states. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1609 (2014).

In *Homer City II*, the D.C. Circuit addressed the "particularized, as-applied challenges" previously endorsed by the Supreme Court. *Homer City II*, 2015 U.S. App. LEXIS at *18 ("In evaluating petitioners' as-applied challenges, we thus must determine whether a downwind location would still attain its NAAQS if linked upwind States were subject to less stringent emissions limits. If we answer in the affirmative, EPA has overstepped its authority."). The court first evaluated EPA's 2014 SO₂ emissions budgets for Texas, Alabama, Georgia, and South Carolina, and determined in each case that the Transport Rule required

each state to implement unnecessary emissions controls. *Id.* at *19–23 (“In short, EPA’s 2014 SO₂ emissions budgets for Texas, Alabama, Georgia, and South Carolina require each of those States to reduce emissions by more than the amount necessary to achieve attainment in every downwind State to which it is linked.”). Likewise, the court determined that EPA’s NO_x emissions budgets for Florida, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Virginia, and West Virginia were unnecessary: “For ozone-season NO_x, the only record data showed that the downwind locations to which 10 of those 11 upwind States (all but Texas) were linked would comply with their NAAQS in 2014 even with no good neighbor obligation on the upwind States.” *Id.* at 24. For those 10 states, the court held that EPA’s 2014 NO_x emissions budgets were therefore invalid. *Id.* For Texas, the court agreed that some NO_x emissions reductions were necessary, but EPA should have used lower cost thresholds for emissions reductions. *Id.* at *24–25.

The court rejected EPA’s arguments that petitioners’ objections to over-control of SO₂ and NO_x emissions should fail. First, the court dismissed EPA’s argument that over-attainment is permissible when it results from “incidental benefits” of reductions in upwind states: “The Supreme Court made crystal clear in *EME Homer* that over-attainment in downwind locations is impermissible when that excess attainment is ‘unnecessary.’” *Id.* at *25–26. Second, the court rejected EPA’s argument that it would be “inequitable and contrary to the rationale underlying uniform cost thresholds” to impose stricter regulation on some states than others. *Id.* at *28. The court held that the Supreme Court forbade EPA from reducing emissions by more than the amount necessary to achieve air quality standards, even if this might result in a lack of uniformity in emission reduction cost thresholds across states. *Id.* The court remanded the invalid Transport Rule’s 2014 emissions budgets to EPA without vacatur. Although the court acknowledged the risk that vacatur might cause EPA to “drag its feet and keep in place an unlawful agency rule,” it determined remand without vacatur was

appropriate to avoid “substantial disruption to the trading markets that have developed around the 2014 emissions budgets.” *Id.* at *31.

The court then turned to the other Transport Rule challenges. The court dismissed petitioners’ claim that EPA lacked authority to issue federal implementation plans (FIPs) to 22 of the 27 states covered by the Transport Rule. *Id.* at *32. Although EPA had previously approved state implementation plans (SIPs) for those states under the 2005 Clean Air Interstate Rule (CAIR), those SIPs were invalidated after the D.C. Circuit struck down CAIR. *See North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008). The court held that given these circumstances, EPA was not required to proceed through notice and comment, and the SIPs could be corrected through the “good cause” exception to rulemaking under section 7410(k)(6) of the Clean Air Act “without requiring any further input from the State.” 42 U.S.C. § 7410(k)(6); *Homer City II*, 2015 U.S. App. LEXIS at *34–37. Next, the court dismissed petitioners’ challenges to EPA’s use of air quality data from 2003 to 2007 instead of more recent data because the more recent data would have been impacted by reductions resulting from EPA’s defunct CAIR regulation. *Id.* at *39. The court upheld EPA’s use of predictive modeling despite potential discrepancies between the modeling and real world emissions. *Id.* at *39–40. Likewise, the court rejected petitioners’ challenges that EPA failed to separately evaluate emissions that significantly contributed to nonattainment with NAAQS, and challenges to EPA’s methodology for evaluating whether upwind states interfered with downwind air quality. *Id.* at *41–42. With regard to petitioners’ challenges to EPA’s methodologies, the court agreed that such methodologies could lead to over-control of upwind states, but the Supreme Court had made clear in *EME Homer* that such instances of over-control should be challenged through a “particularized, as-applied challenge” and not through “generalized claims.” *Id.* at *43. Finally, the court dismissed three new arguments by petitioners including challenges to the Transport Rule’s notice and comment process, the timing of

signature of the FIPs by the EPA administrator, and EPA's regulation of upwind states on the basis of linkages to downwind states that had no ambient air quality classification or were in attainment for air quality standards. *Id.* at *44–45. The court held that these arguments should have been brought to EPA first or were otherwise not properly before the court. *Id.*

D.C. CIRCUIT HOLDS THAT CITIZEN GROUP'S CHALLENGE TO NATURAL GAS PIPELINE FALLS OUTSIDE "ZONE OF INTERESTS"

Matthew Thurlow

***Gunpowder Riverkeeper v. Federal Energy Regulatory Commission*, No. 14-1062, 2015 U.S. App. LEXIS 12532 (D.C. Cir. July 21, 2015).** The U.S. Court of Appeals for the District of Columbia Circuit recently denied a citizen group's petition to reverse a Federal Energy Regulatory Commission (FERC) decision authorizing Columbia Gas Transmission, LLC (Columbia) to extend a natural gas pipeline through the Gunpowder River watershed in Maryland. *Gunpowder Riverkeeper v. FERC*, No. 14-1062, 2015 U.S. App. LEXIS 12532 (D.C. Cir. July 21, 2015). FERC issued a certificate to Columbia permitting it to exercise the power of eminent domain to obtain a right-of-way to build and operate the pipeline on private property. *Id.* at *3–4. Gunpowder Riverkeeper's petition sought to overturn FERC's decision as inconsistent with the Natural Gas Act, National Environmental Protection Act (NEPA), and Clean Water Act. FERC challenged Gunpowder Riverkeeper's standing to bring the petition under Article III of the U.S. Constitution and for failure to establish that Gunpowder Riverkeeper's interests in the case fell within the "zone of interests" protected by NEPA and the Clean Water Act.

The court held that in order to maintain their claims, Gunpowder Riverkeeper and its members must establish Article III standing (*id.* at *5), but also that that their claims fall within the "zone of

interests" protected or regulated under the federal statutes at issue in the case. *Id.* at *8–9.

The court held that Gunpowder Riverkeeper and its members established Article III standing because they suffered an injury in fact when they became subject to Columbia's eminent domain proceedings and their injury could be redressed by the court through vacatur of FERC's certificate granting Columbia permission to move forward with the pipeline project. The court rejected FERC's arguments that eminent domain proceedings need to have already commenced for Gunpowder Riverkeeper's members to establish an injury, or that the members would not be injured because the eminent domain proceedings would only take part of their property. *Id.* at *6–7. Likewise, the court held that Gunpowder Riverkeeper had Article III standing as an association bringing the case on behalf of its injured members because its "undisputed purpose is to preserve and protect the Gunpowder River watershed" and its claims "under the NEPA and CWA are clearly germane to that purpose." *Id.* at *7.

Notwithstanding Gunpowder Riverkeeper's standing to bring the case, the court held that it failed to show that its allegations fell within the "zone of interests" contemplated under NEPA or the Clean Water Act. First, the court held that although the property interests of Gunpowder Riverkeeper's members fell within the "zone of interests" of the Natural Gas Act, the Natural Gas Act "does not encompass injuries arising out of violations of other statutes, such as the [Clean Water Act] . . . or the NEPA." *Id.* at *10–11. Because Gunpowder Riverkeeper invoked NEPA and the Clean Water Act as the basis for its petition against the certificate issued by FERC under the Natural Gas Act, the court had to determine whether Gunpowder's interests "came within the zone of interests protected or regulated" under those statutes. *Id.* at *10. The court concluded Gunpowder's allegations did not fall within the zone of interests of NEPA because its allegations were purely based on threats to the property interests of its members: "Because

Gunpowder did not argue that its members would suffer any environmental harm—indeed, it expressly disclaimed the need to do so—we conclude the petitioner does not come within the zone of interests protected by the NEPA.” *Id.* at *12–13. Likewise, the court held that Gunpowder Riverkeeper’s claims fell outside the “zone of interests” protected by the Clean Water Act: “This court has . . . held that claims not aimed at protecting navigable rivers and streams from pollution or at requiring those who desire to discharge pollutants into the waterways to obtain a permit for doing so fall outside the zone of interests protected by the . . . [Clean Water Act].” *Id.* at *13.

Judge Judith Rogers dissented from the majority’s holding that Gunpowder Riverkeeper failed to show its claims fell within the “zone of interests” protected by NEPA and the Clean Water Act, but concurred with the court’s denial of the petition. In parting with the majority, Judge Rogers noted that “[t]he zone of interests test ‘is not meant to be especially demanding,’ and the ‘test forecloses suit only when a petitioner’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that petitioner to sue.’” *Id.* at *15–16. Judge Rogers concluded that the majority “misapplied” the “zone of interests” test because Gunpowder Riverkeeper’s briefs and its members’ affidavits “describe a litany of environmental interests that will be adversely affected by the loss of property through eminent domain.” *Id.* at *20. Notwithstanding her disagreement with the majority on application of the “zone of interests” test, Judge Rogers agreed with the dismissal of Gunpowder Riverkeeper’s petition on the basis that the Clean Water Act does not prohibit the issuance of conditional certificates by FERC, and FERC did not violate NEPA because it prepared a “detailed Environmental Assessment with specific and responsive discussions of issues . . . applying its own observations and reasoning and explaining mitigating steps that the pipeline owner would be required to take to minimize the environmental impacts.” *Id.* at *28–30.

WEST VIRGINIA DISTRICT COURT DISMISSES CLEAN WATER ACT CHALLENGE ON JURISDICTIONAL GROUNDS

Matthew Thurlow

***Murray Energy Corporation v. United States Environmental Protection Agency*, No. 1:15CV110, 2015 U.S. Dist. LEXIS 112944 (N.D. W. Va. Aug. 26, 2015).** On August 26, 2015, the District Court for the Northern District of West Virginia dismissed a lawsuit brought by Murray Energy Corporation (Murray) challenging a new EPA rule defining the jurisdictional scope of the term “waters” under the Clean Water Act. *Murray Energy Corporation v. EPA*, No. 1:15CV110, 2015 U.S. Dist. LEXIS 112944 (N.D. W. Va. Aug. 26, 2015). The court dismissed the challenge on jurisdictional grounds finding that exclusive jurisdiction over the challenge resided with the U.S. Court of Appeals for the Sixth Circuit.

In April 2014, EPA proposed a new definition of “waters of the United States,” in a “Clean Water Rule” slated to become effective on August 28, 2015. *Id.* at *5. Upon publication of the final rule, Monroe brought challenges to the rule against EPA and the Army Corps of Engineers, because the new rule created “expansive new categories of non-primary waters” under the United States’ jurisdiction. *Id.* Monroe filed challenges against the rule in the Northern District of West Virginia and the Sixth Circuit. The United States filed a motion to stay the case in the district court based on its view that exclusive jurisdiction to hear challenges to the Clean Water Rule rested in the U.S. Court of Appeals. *Id.*

Section 509(b)(1) of the Clean Water Act provides that an “Administrator’s action . . . (E) in approving or promulgating any effluent limitation and (F) in issuing or denying any permit under section 1342 of this title” may be done by “the Circuit Court of Appeals of the United States for the Federal judicial district. . . .” 33 U.S.C. § 1369(b)(1). The United States argued that the U.S. Court of Appeals had exclusive jurisdiction over Monroe’s case because the Clean Water Rule constituted an “effluent limitation” and a “permitting

limitation” under section 509(b)(1) of the Clean Water Act. *Id.* at *8. Murray countered that the jurisdictional limitations in section 509(b)(1) of the Clean Water Act did not apply because the Clean Water Rule did not impose any effluent limitations under any of the programs listed under section 509 and its case did not involve the issuance or denial of a permit issued under the Clean Water Act. *Id.*

Applying Fourth Circuit precedent, the court sided with the United States and held that exclusive jurisdiction over the case resided in the Sixth Circuit under section 509(b)(1) of the Clean Water Act. *Id.* at *8–11. First, the court held that there was no dispute that EPA’s Clean Water Rule would impact Murray’s permitting requirements because it “effectively requires Murray to obtain additional permits.” *Id.* at *15. Second, the court held that the Clean Water Rule amounted to an “other limitation” under section 509(b)(1)(E) because the Rule potentially restricts Murray’s discharges into diversion ditches on its property. Finally, the court held that “exclusive appellate jurisdiction over this action” would further the “congressional goal of ensuring prompt resolution of challenges to EPA’s actions.” *Id.* at *17. Rather than simply staying Murray’s case, as had been requested by the United States, the court dismissed Murray’s complaint without prejudice. *Id.* A day after the decision in *Murray Energy*, a district court judge in the Southern District of Georgia likewise held that jurisdictional challenges to the Clean Water Rule must be heard in the U.S. Court of Appeals. See *Georgia v. McCarthy*, No. CV 215-79, 2015 U.S. Dist. LEXIS 114040 (S.D. Ga. Aug. 27, 2015). But a district court judge in North Dakota held that the U.S. Court of Appeals did not have exclusive jurisdiction over the case under section 509(b)(1) of the Clean Water Act and issued a preliminary injunction enjoining the Clean Water Rule. *North Dakota v. EPA*, No 3:15-cv-59, 2015 U.S. Dist. LEXIS 113831 at *6–7 (D.N.D. Aug. 27, 2015).

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CASE LAW HIGHLIGHTS MID-CONTINENT

SALE OF BUILDING WITH KNOWLEDGE THAT IT IS RELEASING HAZARDOUS SUBSTANCES MAY CONSTITUTE “DISPOSAL” UNDER CERCLA

Lisa Cipriano

***Dune Energy, Inc. v. Chevron U.S.A., Inc.*, No.15-0309, 2015 WL 5012145 (E.D. La. Aug. 21, 2015).** The current operator of an oil field with a compressor station sued the former owner/operator of the station and field seeking cost recovery or contribution under sections 9607 and 9613 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as well as state law, for expenses incurred in connection with remediation activities ordered by the Louisiana Department of Natural Resources. 2015 WL 5012145 at *1. The plaintiff was ordered to perform remediation activities as a result of actual or potential releases of asbestos from the station into the surrounding air and water. *Id.* The plaintiff claimed that the defendant had abandoned and subsequently sold the station while in a state of disrepair and had taken no actions to prevent actual or potential releases of asbestos. *Id.* at *1. The defendant moved to dismiss for failure to state a claim.

Pursuant to section 9607 of CERCLA, “a private party has the right to bring a cost-recovery action against ‘responsible persons’ for costs associated with responding to an environmental threat. *Id.* at *2 (internal citations omitted). In order to state a claim, “[a] plaintiff must establish the following four elements to state a prima facie case: (1) that the site is a ‘facility’; (2) that the defendant is a ‘responsible person’; (3) that a release or threatened release of a hazardous substance has occurred; and (4) that the release or threatened release has caused the plaintiff to incur response costs.” *Id.* at *2 (internal citations omitted). The defendant argued that it did not meet the definition of a “responsible person.” *Id.* Under section 9607(a), a “responsible person” includes “any person who at the time of disposal of any hazardous substance owned or operated any facility

at which such hazardous substances were disposed of.” *Id.* (internal quotations and citations omitted). The defendant argued that, under CERCLA, “a mere sale of a property cannot constitute disposal and that some affirmative act was required.” *Id.*

The court noted that the “[p]laintiff seeks to push the frontier of CERCLA’s definition of disposal.” *Id.* at *3. The court acknowledged that some historical cases interpreting the term “disposal” had held that “sale of a property containing hazardous substances does not constitute CERCLA disposal,” and that courts had “tended towards a definition of ‘disposal’ that would limit CERCLA’s grasp to affirmative acts.” *Id.* at *3–4. The court went on to explain, however, that courts had “[begun] to back off of such a bright-line distinction and instead focused more on the nature of the event that occurred.” *Id.* at *4. Examining the plaintiff’s allegations, the court found that the plaintiff had “present[ed] a situation in which an owner or operator abandoned a building with full knowledge that it was degrading, that in doing so it was releasing hazardous substances, and that such substances were being released not only within the building but also into the surrounding environment. Despite this, the owner or operator in this example still chose to take no action to remedy the issue.” *Id.* at *5. The court stated that it was an “open question” as to whether CERCLA liability could apply under such circumstances, and thus, the court denied the motion to dismiss the section 9607 claim on this basis. *Id.* at *5.

The court also disagreed with the defendant’s argument that, in order to recover costs, the plaintiff was required to plead that the plaintiff had incurred the costs “voluntarily,” finding that costs incurred as a result of “a government oversight body’s order” rather than as a result of a “legal judgment or settlement” could be recoverable. *Id.* at *3, 5. The court did, however, grant the motion to dismiss as to the plaintiff’s request for attorney’s fees, as CERCLA “does not provide for the award of private litigants’ attorney’s fees associated with bringing a cost recovery action.” *Id.* at *5 (internal quotations omitted). The court denied the motion to dismiss the plaintiff’s state law claim for similar reasons. *Id.* at *6–7.

With regard to the plaintiff’s claim for contribution under section 9613 of CERCLA, the court stated that section 9613 “provides for a right of contribution ‘from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action.’ . . .” *Id.* at *5 (internal citations omitted). While the plaintiff was not the subject of a lawsuit relating to the asbestos releases from the station, the court noted that “the Supreme Court has held open the question of whether an administrative order or other ‘compelled costs of response’ might constitute a ‘civil action’ for purposes of this statute,” and thus determined that it would “allow Plaintiff to amend its Complaint to clarify whether any administrative order has issued to govern its actions.” *Id.* at *5–6.

OPA’S DEFINITION OF “RESPONSIBLE PARTY” CONTEMPLATES THAT MULTIPLE PARTIES MAY BE RESPONSIBLE FOR COSTS OF POLLUTION FROM OIL DISCHARGES

Lisa Cipriano

United States v. Bros. Enters., Inc., No. 1:13-CV-17, 2015 WL 4039848 (E.D. Tex. June 30, 2015). The federal government brought an action against several defendants, including several former owners of a barge, alleging violations of the Oil Pollution Act (OPA) relating to an oil spill from a barge into waters near Orange, Texas. 2015 WL 4039848 at *1. As a result of Hurricane Ike, the barge had become grounded upon wetlands adjoining a tributary to a river. *Id.* In addition, while grounded, the barge was resting upon high-pressure gas lines. *Id.* The original barge owner hired a marine surveyor to assess the barge’s condition, and the surveyor determined that the barge had historical damage, including various holes. *Id.* While the barge was still grounded, the original owner sold the barge, and the second owner ultimately sold the barge to yet a third owner. *Id.* at *2. Shortly after that sale, the Coast Guard discovered an oil discharge from the barge into the river. *Id.* The government contended that both the original and second owners were liable as “responsible parties” under OPA because, while

grounded, the barge “created a ‘substantial threat of a discharge.’” *Id.* at *2.

Pursuant to OPA, “each responsible party for a vessel . . . from which oil is discharged, or which poses the substantial threat of a discharge of oil . . . is liable for the removal costs.” *Id.* at *4 (internal quotations and citations omitted). “OPA imposes strict liability upon responsible parties,” and in order “[t]o demonstrate that a party is strictly liable, the government must prove that (1) the defendant is a ‘responsible party’ (2) for the ‘facility or vessel’ (3) ‘from which oil was discharged, or from which there was a substantial threat of discharge,’ (4) ‘into or upon the navigable waters or adjoining shorelines’ and (5) that the discharge resulted in ‘removal costs and damages.’” *Id.* (internal citations omitted). In the context of cross-motions for summary judgment, the former barge owners argued, among other things, that they could not be held accountable as responsible parties under OPA because they did not own or operate the barge at the time of the release. *Id.* at *2, 4. Under OPA, a “responsible party” is defined as “any person owning, operating, or demise chartering the vessel.” *Id.* at *4.

The court disagreed, stating that “[i]n the court’s view, the plain language of the statute, in conjunction with the Act’s legislative history, supports a broader interpretation of ‘responsible party’ than that advanced by the defendants. *Id.* The court found that “OPA does not limit the number of responsible parties,” and that “OPA’s definition of ‘responsible party’ contains no temporal indicators suggesting that a prior owner of a vessel is immune from liability once that vessel is sold to another party.” *Id.* at *4–5. Thus, “[t]he plain language of the statute . . . contemplate[d] situations where multiple parties may be responsible for a vessel’s spillage.” *Id.* at *4. Accordingly, “the court decline[d] to hold that [the defendants] were not ‘responsible parties’ as a matter of law.” *Id.* at *5.

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CASE LAW HIGHLIGHTS MIDWEST

SETTLEMENT BETWEEN GOVERNMENT AND WATER RECLAMATION DISTRICT BINDS INTERVENING ENVIRONMENTAL GROUPS

Chris Johnson

***United States v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 792 F.3d 821 (7th Cir. 2015).** Acknowledging that “it is hard to make predictions, especially about the future” (Yogi Berra), the Seventh Circuit Court of Appeals ruled that a settlement among the U.S. Environmental Protection Agency (EPA), the state of Illinois, and the Water Reclamation District of Greater Chicago (the District) concerning the future of Chicago’s “Deep Tunnel” sewer system was reasonable under the circumstances, and thus that environmental groups who intervened in the lawsuit were bound by the settlement. 792 F.3d at 828. The Tunnel and Reservoir Plan (TARP), popularly known as the Deep Tunnel project, has been under construction since 1975 and involves more than 100 miles of concrete tunnels that run as far as 350 feet underground. *Id.* at 822–23. The tunnels and related reservoirs are designed to collect runoff water and sewage during rainfall, and have a current capacity of 5.7 billion gallons. *Id.* at 823. Additional reservoir space that is expected to become operational in stages, from late 2015 until 2029, will bring the system’s total capacity to 17.5 billion gallons. *Id.* Deep Tunnel has not operated as well as expected during the years of its existence, allowing substantial untreated releases of water and sewage. *Id.* This is due, in part, to design issues requiring the District to maintain the system below capacity, and also to the reduced demand for limestone in recent years, causing the limestone quarries that will be the sites of additional reservoirs to remain in use as quarries for an unspecified number of years. *Id.*

In 2011 EPA and the state of Illinois filed suit against the District under the Clean Water Act (CWA), seeking an order requiring the District to improve Deep Tunnel’s performance, including

improved containment and mitigation of overflows, and to accelerate its completion. *Id.* Five environmental organizations were allowed to intervene. *Id.* In 2014, over the protest of the intervenors, the District entered a consent decree negotiated by the original parties and for which negotiations had begun several years before the lawsuit. *Id.* The decree requires the District to, inter alia, complete the project, meet operational criteria, and develop additional compliance measures if needed. It also specifically authorizes untreated discharges when the tunnels are full or in the event of rainstorms so heavy that they would damage the tunnel system if inflow were allowed to continue. *Id.* at 823, 826. The decree remains in force until the district court determines that compliance with the CWA has been achieved—likely until at least 2029. *Id.* at 823. The district court also ruled that the intervenors are bound by the settlement based on res judicata principles. *Id.* at 824.

Although the Seventh Circuit upheld the decision, it disagreed with the district court’s reliance on the doctrine of res judicata. Rather, the court held that the intervenors were bound by the settlement due to the CWA’s provision allowing intervention but precluding private litigation if EPA or a state—i.e., an agency representing the whole public—has “commenced and is diligently prosecuting” a civil action concerning the same matter. *Id.* (citing 33 U.S.C. § 1365(b)(1)(B)). The court rejected the intervenors’ argument that the requirement of “diligent” prosecution was not met because the consent decree was inadequate, required too little from the District in remedying current design flaws, and would not achieve full compliance. *Id.* at 823–25. It acknowledged that compliance goals might be achieved more quickly in the absence of the system’s design limitations, but noted that the decree uses “realistically available options” to cope with the system’s design limitations, and that no one can know what will have happened by 2029. *Id.* at 827–28. The court concluded that the fact that the settlement “takes the world as it exists . . . does not show a lack of diligent prosecution or a substantively unreasonable outcome.” *Id.* It also reminded the intervenors that they retain rights to seek relief

from the district court if the District falls short of the decree’s mandates or to appeal any adverse decisions. *Id.* at 825.

EXCLUSION OF TESTIMONY BY PLAINTIFFS’ EXPERTS IN VINYL CHLORIDE EXPOSURE CASE UPHELD, SUMMARY JUDGMENT FOR MANUFACTURER AFFIRMED

Chris Johnson

C.W. ex rel. Wood v. Textron, Inc., No. 14-3448, 2015 WL 5023926 (7th Cir. Aug. 26, 2015). The Seventh Circuit Court of Appeals upheld summary judgment for Indiana manufacturer Textron, Inc., in a case involving two babies’ exposure to vinyl chloride released by the Textron plant. The court found that the district court properly excluded the plaintiffs’ expert testimony on the basis that it was unreliable and that plaintiffs could not prove their case without expert opinion. The Textron plant, which operated in Rochester, Indiana, from 1954 to 2006, released vinyl chloride gas that seeped into the groundwater, contaminating nearby residential wells. 2015 WL 5023926 at *1. In late 2008, the Wood family moved from their home near the Textron plant after testing by the Indiana Department of Environmental Management showed that their well was contaminated with vinyl chloride at levels ranging from 5 to 9 parts per billion. *Id.* The Woods had adopted two unrelated infants in 2007 and 2008, who lived in the Rochester home for 17 and 7 months, respectively. *Id.* at *1, *6. During that time, the babies suffered from gastrointestinal, immunological, and neurological problems that abated after the family moved. *Id.* at *1. In their lawsuit against Textron, plaintiffs alleged negligence, negligence per se, negligent infliction of emotional distress, and willful and wanton misconduct in connection with the children’s illnesses and increased risk of cancer. *Id.* Defendants removed the state court action to the Northern District of Indiana. *Id.*

Under the substantive law of Indiana, plaintiffs in a toxic tort case must prove both general and

specific causation. *Id.* at *2. The district court excluded the expert testimony offered by plaintiffs on causation, finding that it was unreliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Id.* On appeal, the Seventh Circuit disagreed with appellants' argument that the district court had set an unachievable standard or inflated the importance of published studies on the precise subject of vinyl chloride poisoning in small children. *Id.* at *6. Commending the district court's thorough review of the experts' opinions and the studies on which it relied, the court found that the district judge had properly rejected a number of the studies cited in support of causation on the bases that they involved exposure that was too dissimilar to that suffered by the Wood children, and that the experts had not used any acceptable method to extrapolate the findings. *Id.* at *7. Further, the court found that the experts' differential etiology analyses offered in support of specific causation were flawed—one physician expert relied simply on the absence of any mention of other etiological factors in records from *other* physicians' examinations of the children—and relied too heavily on the timing of the children's illnesses and the mere fact that the levels of vinyl chloride in the Woods' well water exceeded regulatory standards. *Id.* at *8. Given the unreliability of the expert opinions, the court upheld their exclusion and affirmed summary judgment for Textron. *Id.* at *9.

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CASE LAW HIGHLIGHTS MOUNTAIN/WEST COAST

TENTH CIRCUIT HOLDS THAT THE PRICE-ANDERSON ACT DOES NOT PREEMPT STATE LAW TORT CLAIMS

Whitney Jones Roy and Alison N. Kleaver

***Cook v. Rockwell International Corp., et al.*, 790 F. 3d 1088 (10th Cir. 2015).** The Tenth Circuit reversed a lower court ruling, holding that the Price-Anderson Act (the Act) does not preempt state law nuisance claims. The Act provides that lawsuits asserting liability for “nuclear incidents” are federal actions that can be brought in or removed to federal court. When liability is established for a “nuclear incident,” the Act prescribes special rules limiting liability and requiring the federal government to cover any damages not paid by insurance. Plaintiffs initially prevailed at trial on both their Act and state law public nuisance claims. However, the Tenth Circuit found that the jury instructions regarding what constitutes a “nuclear incident” were too permissive and remanded the case for further proceedings. At that point, employing what the court referred to as “a little judicial jiu-jitsu,” plaintiffs abandoned their Act claim and asked the court to enter judgment on the state law nuisance claim alone. The district court, however, ruled that the Act preempted state law claims, even where the plaintiffs alleged, but failed to prove a “nuclear incident,” prompting the instant appeal.

The Tenth Circuit began with the premise that the state's police powers may not be superseded unless clearly stated by Congress and the court must accept an interpretation disfavoring preemption where Congress's statutory direction is subject to different interpretations. *Id.* at 1094. The court noted that preemption is particularly disfavored in areas of law that have traditionally been the subject of state regulation, such as public health and safety. *Id.* Applying this, the court found that “nothing in its language, structure, or history favors the defendants' curious statutory construction over the plaintiffs' prosaic one— let alone favors it so

clearly that we might overcome the presumption against preemption.” *Id.*

Next, the court analyzed the statute’s text, which expressly provides that state substantive rules for decision apply except to the extent they are inconsistent with the statute. The court noted that Congress is more than capable of clearly stating when it intends to preempt a field. *Id.* at 1095. The court found no preemption in the text, finding that at most the Act provides a federal forum for cases and a modest form of conflict preemption while the case is proceeding. These provisions, however, are silent as to “what happens when a nuclear incident is alleged but unproven” and do not dictate that “injured parties in such circumstances are forbidden from seeking or securing traditional state law remedies.” *Id.* The court found further support for its conclusion in the definition of nuclear incident, which clearly contemplated “lesser nuclear ‘occurrences’ that fail to rise to the level of nuclear ‘incidents,’” and the definition of “public liability,” which allows recovery of “‘any’ injuries flowing from that incident, even those that aren’t themselves sufficient to trigger a nuclear incident finding.” *Id.* at 1095–96. Thus, the court concluded “it’s hard to conjure a reason why Congress would allow plaintiffs to recover for a full panoply of injuries in the event of a large nuclear incident but insist they got nothing for a lesser nuclear occurrence.” *Id.*

The court found further support for its conclusion in the larger statutory structure. The court noted that “[l]arger occurrences that qualify as nuclear incidents can threaten to bankrupt nuclear power providers and leave victims un- (or under-) compensated. In those cases, it’s understandable why Congress might intercede to provide liability caps and indemnification.” *Id.* at 1096. Whereas, smaller incidents are less likely to create the same issues, giving Congress less reason to intervene and allowing state law to provide relief in such circumstances. *Id.*

The court also looked to the Act’s history. The court found that “Congress passed the Act to

improve the manageability of complex litigation, to ensure that liabilities arising from large nuclear incidents don’t shutter the nuclear industry, and to guarantee compensation for victims who otherwise might be left trying to squeeze damages out of firms bankrupted by enormous rewards.” *Id.* The 1988 amendments to the Act, which were passed in the wake of the Three Mile Island incident, provided further mechanisms to streamline recovery for victims of such occurrences. *Id.* at 1096–97. Notably, however, under the defendants’ proffered interpretation of the Act, victims of the Three Mile Island incident would have been completely barred from recovery for their injuries because the incident did not rise to the level necessary to establish a “nuclear incident” under the law. *Id.*

The court also rejected an argument that, by passing the Act, Congress had preempted all regulation in the field of nuclear safety, stating that “[o]ften Congress entrusts before-the-fact regulation to a federal agency while leaving at least some room for after-the-fact state law tort suits.” *Id.* at 1098. The court also rejected two Ninth Circuit cases, *Dumonter v. Schlumberger Tech. Corp.*, 543 F.3d 567 (9th Cir. 2008) and *Golden v. CH2M Hill Hanford Grp., Inc.*, 528 F.3d 681 (9th Cir. 2008), which held that “‘any suit seeking compensation for a nuclear incident is preempted by the Act,’” but which failed to cite any authority explaining how or why the Act precludes relief in cases in which the plaintiff fails to prove a “nuclear incident.” *Id.* Finally, the court considered *Cotroneo v. Shaw Env’t & Infrastructure, Inc.*, 639 F.3d 186 (5th Cir. 2011), in which the court reasoned that allowing parties to use state law claims to recover for lesser nuclear occurrences would “‘circumvent the entire scheme governing public liability actions.’” *Id.* at 1098–99. The Tenth Circuit disagreed with the Fifth Circuit’s reasoning, but nevertheless found that defendants had waived the argument by failing to raise the issue in their first appeal. For these reasons, the Tenth Circuit vacated the district court’s ruling that the plaintiffs’ nuisance claim was preempted and remanded for further proceedings.

CALIFORNIA AGENCIES ARE REQUIRED TO MITIGATE ENVIRONMENTAL EFFECTS OF PROJECTS EVEN WHERE THE LEGISLATURE DOES NOT SET ASIDE MONEY

Whitney Jones Roy and Alison N. Kleaver

City of San Diego v. Board of Trustees of the California State University, 61 Cal. 4th 945 (2015). The California Supreme Court reviewed and clarified dictum in *City of Marina v. Board of Trustees of California State University*, 39 Cal. 4th 341 (2006) regarding the California State University's (CSU) obligation to contribute funds for off-site environmental mitigation related to expansion activities under the California Environmental Quality Act (CEQA). The court found that state agencies are obligated to mitigate the environmental effects of their projects even when the state legislature does not set aside money for mitigation.

CSU is one of the largest universities in the country with campuses located throughout California. The board of trustees for CSU (the Board) undertook several large construction projects on 55 acres adjacent to the San Diego State University (SDSU) including a hotel, student and faculty housing, several buildings for academic, research and medical use, a conference center, and renovation of the student union. In the draft environmental impact report (EIR), the Board estimated that the project would contribute significantly to cumulative traffic congestion off-campus in the San Diego area. The Board offered no assurance that it would pay SDSU's fair share of the mitigation costs. Instead, citing to dictum in *Marina*, the Board stated that the university's fair-share funding commitment was necessarily conditioned upon requesting and obtaining funds from the California legislature. The Board further stated that if the legislature did not provide funding or if the funding was significantly delayed, all identified significant impacts would remain significant and unavoidable. The Board concluded that although the environmental impacts were unavoidable, they were nevertheless acceptable because of the

project's overall benefits satisfying the statewide education demand, creating jobs, and fueling economic growth. Accordingly, the Board certified in its final EIR that the EIR was in compliance with CEQA despite not allocating funding for mitigation.

Plaintiffs City of San Diego, San Diego Association of Governments, and the Metropolitan Transit System filed a petition for writ of mandate in the San Diego Superior Court challenging the Board's decision to certify the EIR and the issue eventually made its way to the California Supreme Court. The main issue before the court was whether the dictum in *Marina* supported the Board's assumption in the EIR that CSU may avoid contributing its fair share to mitigate off-campus environmental effects of campus expansion unless the legislature makes an appropriation for that specific purpose. After reviewing the issues, the court rejected the Board's assumption as well as other arguments made by the Board.

Reviewing the court's prior decision in *Marina*, the court reiterated that CEQA requires a public agency to mitigate or avoid its projects' significant effect not just on the agency's own property, but also on the environment. *Id.* at 957. The court explained that an agency is not limited to spending only money specifically earmarked by the legislature for mitigation and, instead, has the discretionary powers over its projects to use other funding sources. *Id.* at 959–60.

The court further observed that the Board's interpretation of the rule would lead to unreasonable consequences, essentially requiring the legislature to sit as a standing environmental review board to decide on a case-by-case basis whether state agencies' projects will proceed despite unmitigated off-site environmental effects. *Id.* at 962. The court noted that CEQA has never been applied in this manner nor should it be. *Id.* The court also found that there is no statute or regulation that would permit CSU to be treated differently than other agencies under CEQA. *Id.* at 961–62. Next, the court stated that the Board's

position unfairly shifted the burden of mitigating the environmental impacts to other local and regional agencies. *Id.* at 962.

The court concluded that the court of appeal correctly directed the issuance of the writ of mandate ordering the Board to vacate its decision certifying the EIR.

COURT REJECTS PUBLIC NUISANCE CLAIM BASED UPON VOLUNTARILY INCURRED INVESTIGATION COSTS

Whitney Jones Roy and Alison N. Kleaver

Alcoa, Inc., et al. v. APC Inv. Co., et al., No. CV-14-6456-GW (Ex) (C.D. Cal. Aug. 12, 2015).

The U.S. District Court for the Central District of California dismissed a claim for continuing public nuisance on the grounds that voluntarily incurred investigation costs cannot constitute special injury. Plaintiffs, each of whom allegedly sent chemicals to a Superfund site, brought suit against various business and individuals that owned properties, operated businesses, or arranged for treatment of wastes at said properties or businesses near the Superfund site seeking response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), and California Civil Code sections 3479 and 3480. Certain defendants moved to dismiss plaintiffs' public nuisance claim on the grounds that voluntarily incurred investigation costs cannot constitute a special injury.

Under California Civil Code section 3493, "A private person may maintain an action for public nuisance, if it is specially injurious to himself, but not otherwise." Plaintiffs argued that *Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125 (1991) and *Westwood Pharmaceuticals v. National Fuel Gas District*, 737 F. Supp. 1272, 1281 (W.D.N.Y. 1990) allow recovery of environmental investigation costs, regardless of whether they have been compelled by an agency. In rejecting this argument, the court noted that *Mangini* addressed

only recovery of costs for required testing and thus, only "stands for the proposition that costs incurred as a result of *required* testing are sufficient to constitute special injury." *Id.* at 1. The court next examined *Westwood Pharmaceuticals*, in which investigation costs incurred "consistent with the National Contingency Plan" were found to constitute special injury. While the court noted that it was unclear whether the investigation costs in *Westwood* were compelled, the fact was ultimately irrelevant in light of the fact that *Mangini* clearly only addressed required investigation costs. *Id.* at 1–2. The court found support for its interpretation in *Rose v. Union Oil Co. of California*, No. 97-cv-3808-FMS, 1999 WL 51819 (N.D. Cal. Feb. 1, 1999), in which the district court found that plaintiffs who had not been required to conduct environmental testing could not assert a public nuisance claim. *Id.* at 2. Accordingly, the court dismissed plaintiffs' public nuisance claim, holding that voluntarily incurred investigation costs cannot constitute a special injury.

The court also dismissed plaintiffs' public nuisance claim because the plaintiffs had not suffered an injury to any right held in common with the public. The court noted that the Ninth Circuit relies on the Restatement (Second) of Torts § 821C, which states that "[i]n order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." *Id.* at 3. However, plaintiffs argued that recent case law, including *Schaeffer v. Gregory Village Partners, L.P.*, No. 13-CV-04358-JST, 2015 WL 2267813 (N.D. Cal. May 14, 2015) improperly imposed a new "common interest requirement" on public nuisance claims. Under plaintiffs' theory, public nuisance claims would be defined by the interference with a right held by the general public, but there would be no requirement that the plaintiff asserting such claim has suffered interference with the same right. The court found that "[a] more logical reading is that a public nuisance plaintiff must not only allege that it has suffered harm to rights held in common with the

public, but also that the harm it has suffered is of a different kind than that suffered by the public.” *Id.* Because the plaintiffs had not sustained an injury to rights “held in common with the public,” plaintiffs lacked standing to pursue a public nuisance claim. *Id.*

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NINTH CIRCUIT ALLOWS “BACK-DOOR” CHALLENGE BASED ON GLOBAL CLIMATE CHANGE

William Sparks and Malinda Morain

This summer, the Ninth Circuit decided *Montana Environmental Information Center v. United States Bureau of Land Management*, No. 13-35688, 2015 WL 5093001 (9th Cir. Aug. 31, 2015). In doing so, it aligned itself with a recent decision out of the District Court for the District of Columbia, *Wildearth Guardian v. Jewell*, 738 F.3d 298, 302 (D.C. Cir. 2013). These two decisions indicate a potential trend in courts permitting environmental group plaintiffs to challenge government action by “back-dooring” global climate change claims into actions based primarily on unrelated local environmental impacts. In other words, even if the government’s action is not tied to the injury conferring standing—the local impact—climate change claims can be brought in the same suit.

In *Montana Environmental Information Center*, plaintiffs, several environmental groups, challenged the Bureau of Land Management’s (BLM) decisions to offer certain oil and gas leases on federal lands. Their challenge was based largely on environmental assessments (EAs), which BLM had prepared in conjunction with those lease sales. In written comments to the EAs, plaintiffs challenged BLM’s alleged failure to consider

alternatives that would impose lease stipulations or other mandatory measures requiring methane capture technologies.

The District Court of Montana found that the plaintiffs failed to meet both the injury-in-fact and causation requirements for Article III standing. *Montana Env’tl. Info. Ctr. v. U.S. Bureau of Land Mgmt.*, slip op., No. CV-11-15-GF-SEH (D. Mont. June 14, 2013). As to injury-in-fact, the district court found that plaintiffs failed to demonstrate it was reasonably probable that BLM’s alleged failure to follow proper National Environmental Policy Act (NEPA) procedures would result in an environmental threat to their concrete interests. *Id.* at 16. The district court found that the injuries alleged were uniformly local, while the effects of greenhouse gas (GHG) emissions were diffuse and unpredictable. *Id.* As to causation, the district court found that environmental plaintiffs failed to show that methane emissions from the lease sites at issue would make a meaningful contribution to global GHG emissions or global warming.

In an August 31, 2015, decision, the Ninth Circuit reversed and remanded, finding that the district court erred by focusing solely on the climate-change effects caused by development of the challenged leases, and failing to consider surface harms—i.e., local impact. The Ninth Circuit held that although plaintiffs’ challenge related to BLM’s alleged failure to consider climate-change effects, their injuries need not be a result of that conduct. *Montana Env’tl. Info. Ctr.*, 2015 WL 5093001, at *1. That is, once plaintiffs alleged an injury-in-fact that was concrete and particularized, they could bring any other challenge to the leasing decision, whether or not causally related to their injury. *Id.*

Therefore, the Ninth Circuit held that plaintiffs may have standing to challenge the government’s sale of oil and gas leases on the basis of any concrete injury—including local surface injuries—that ultimately is caused by the challenged lease sale and which would likely be remedied by the sale’s invalidation. *Id.* The Ninth Circuit remanded the case to the district court for a determination of

which leases, if developed, would harm the specific areas of land alleged to be enjoyed by plaintiffs' members. *Id.*

This case indicates a likely shift in the Ninth Circuit toward allowing climate change challenges of government actions. In a previous decision, the Ninth Circuit held that plaintiffs lacked standing to bring suit under the Clean Air Act to require state and regional agencies to regulate greenhouse gas emissions. See *Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1135 (9th Cir. 2013). Although plaintiff environmental organizations submitted declarations attesting to specific aesthetic and recreational injuries they alleged resulted from climate change caused by the state and regional agencies' failure to control greenhouse gas emissions, the Ninth Circuit held that plaintiffs failed to satisfy the traceability and redressability prongs of Article III standing. Specifically, the court found plaintiffs failed to show (1) a causal connection between their asserted injuries and the agencies' failure to set greenhouse gas standards, and (2) redressability—i.e., that a court order requiring the agencies to set the requested standards would meaningfully reduce pollution. *Washington Environmental* was in line with other court decisions finding plaintiffs lacked standing to bring global climate change challenges. See, e.g., *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 475–79 (D.C. Cir. 2009). As noted by defendants in *Montana Environmental*, the recent decision has the potential to greatly expand the ability of environmental plaintiffs, at least within the Ninth Circuit, to “back-door” global climate change challenges into actions where the plaintiff can assert any unrelated surface impact of a government decision. Courts should expect to see many more of these challenges in the coming years.

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PROPOSED METHANE RULES SHOW EPA COMING AROUND ON FRACKING

Jeffrey D. Dintzer and Nathaniel P. Johnson

On August 18, 2015, the U.S. Environmental Protection Agency (EPA) released its proposal to regulate methane emissions from new and modified sources in the oil and gas sector. *Oil and Gas Sector: Emission Standards for New and Modified Sources*, EPA (Aug. 18, 2015) (to be codified at 40 C.F.R. pt. 60) (hereafter, Proposed Rule). The Proposed Rule aims to support the ambitious goal announced by the Obama administration to cut methane emissions from the oil and gas sector by 40 to 45 percent of 2012 levels by 2025. To do so, the Proposed Rule employs a variety of regulatory programs to address methane emissions emanating from oil and natural gas production, processing, transmission and storage operations. However, despite all EPA has to say about methane emissions, the Proposed Rule is just as significant for what it does not say—in contrast to the recent public outcry over hydraulic fracturing, the Proposed Rule is expected to have minimal effect on this area of the American energy industry. In these authors' opinion, EPA is wise to support the continued self-regulation of hydraulic fracturing.

Background

With nearly 30,000 new injection wells being drilled each year, hydraulic fracturing, or “fracking,” is a rapidly expanding method of oil and gas extraction that underlies the recent growth of the American energy sector. Fracking is the high-pressure injection of a mix of fluids and substances called “proppants” (usually sand) into an oil and gas reservoir, thereby fracturing the

reservoir rock, and allowing otherwise inaccessible oil or gas to flow back to the well as proppants hold the fractures open. Conventional fracking techniques have been common in the United States for over 60 years. However, recent technological advances have drastically increased the amount of oil and gas accessible by fracking wells. The benefits to the American economy and environment have been remarkable.

Natural gas from underground shale deposits, for example, now constitutes roughly one-third of the country's natural gas production, with the United States leading the world in shale gas production. Such deposits simply are not accessible without fracking. By opening new supply possibilities, fracking has been primarily responsible for the dramatic decrease in natural gas prices in the United States. Lower gas prices have helped the energy sector transition from the production and use of polluting coal technologies to relatively environmentally benign natural gas. According to Secretary of Energy Ernest Moniz, "About half of that progress we have made on [greenhouse gas emissions] is from the natural gas boom." Moreover, fracking has driven the strong growth in domestic oil production over the past several years. Since 2012, the United States has been the world's leading oil producer, producing more oil than it imports for the first time in nearly two decades.

Despite its essential contributions to the American energy industry, fracking has faced nearly constant criticism for its supposed negative effects on the surrounding environment. Local, state, and federal regulators, in turn, have been quick to consider draconian regulations and, in extreme cases, outright prohibitions on fracking. While much of the criticism has centered on alleged threats to groundwater, fracking has recently come under fire for contributions to American methane pollution.

Like conventional oil and gas production techniques, fracking results in the release of methane. As EPA noted in the preamble to the Proposed Rule, EPA "is including requirements for methane emissions in this proposal because

methane is a greenhouse gas (GHG), and the oil and natural gas category is currently one of the country's largest emitters of methane." Proposed Rule, at 1. EPA's concern with greenhouse gases, including methane, stems from a 2009 endangerment finding by EPA "that by causing or contributing to climate change, GHGs endanger both the public health and the public welfare of current and future generations." *Id.* Based on data from 2013, EPA estimates that nearly 29 percent of the total methane emissions in the United States come from the oil and natural gas industries. *Id.* at 350–51. This is not surprising, as such emissions are prevalent in both industries. On the one hand, when oil is produced from a reservoir, associated natural gas is produced and, if not captured or combusted, vents into the open air. The natural gas industry, on the other hand, contributes to methane emissions that "primarily result from normal operations, routine maintenance, fugitive leaks and system upsets." *Id.* at 80. Natural gas is, after all, principally composed of methane.

Development of the Proposed Methane Rule

The process that led to the development of the Proposed Rule is not entirely indicative of the final product. In the early stages, EPA appeared to single out the fracking industry. For example, it solicited peer review of its technical white paper titled *Oil and Natural Gas Sector Hydraulically Fractured Oil Well Completions and Associated Gas During Ongoing Production*, and in a published fact sheet, touted regulation of methane emissions from fracking operations as a primary benefit of the Proposed Rule. Given the public furor regularly generated by fracking, this focus was not surprising.

However, the finished product is more restrained with respect to fracking—a positive result, as even EPA's own data suggest the focus was misplaced. The most recent data from EPA's Greenhouse Gas Reporting Program indicate that the largest reduction in methane emissions since 2011 has come from hydraulically fractured natural gas

wells, which experienced a 73 percent decrease in emissions reductions during the study period. Notably, the reduction in methane emissions has occurred while fracking production has been on the rise.

Balanced Final Product

Perhaps recognizing the extremely limited utility of new methane emission regulations on the fracking industry, EPA's Proposed Rule achieves emission reductions largely in non-fracking sectors. Indeed, to achieve the goals of the Obama administration, EPA is predominantly proposing controls and work practice standards for methane emissions that already are employed in the oil and gas industry pursuant to the 2012 new source performance standards for volatile organic compounds (VOCs). In fact, because the new methane regulations build on the existing regulatory program for VOCs, the methane standards will often be satisfied by the same equipment and best practices already required under the VOC program. Even for situations not already covered by the existing VOC regulatory regime, the requirements are familiar to the oil and gas industry.

While the cornerstone of the Proposed Rule is the revised performance standards addressing VOCs for new and modified oil and gas sources, EPA's regulatory plan also provides additional guidance to states on reducing VOC emissions in ozone nonattainment areas and the ozone transport region. Further, the EPA proposal includes a Source Determination rule defining "adjacent" for purposes of determining what activities or emission sources must be considered as a "group" when evaluating permitting requirements for new sources. However, neither the additional VOC guidance for nonattainment areas nor the Source Determination rule is specifically intended to regulate fracking.

Instead, the new methane regulations proposed by EPA should have a relatively limited effect on the fracking industry. As noted above, EPA has proposed an expansion of existing new source

performance standards for VOCs to cover methane emissions. This expansion will affect the fracking industry in two primary ways, depending on the type of fracked well. For "hydraulically fractured gas well completions," EPA has proposed simply extending the new source performance standards for VOCs to include methane emissions. Fracked natural gas wells already are subject to the new source performance standards for VOCs and, consequently, such wells will not be substantively affected by the new methane regulations. Alternatively, for "hydraulically fractured oil well completions," EPA has proposed standards that "are the same as the requirements finalized for hydraulically fractured gas well completions" under the VOC rules. Proposed Rule, at 17.

Although the methane regulations for fracked oil wells are new, the requirements mirror the VOC regulations already in place for fracked natural gas wells. EPA's proposed requirements for new and modified fracked oil wells are twofold, depending on the subcategory of well at issue. For "non-exploratory and non-delineation wells," EPA has proposed requiring owners and/or operators to use "reduced emissions completions" (RECs). RECs are utilized by "separating flowback water, sand, hydrocarbon condensate, and natural gas to reduce the portion of natural gas and VOC vented to the atmosphere, while maximizing recovery of salable natural gas and condensate." *Id.* at 202. In essence, by requiring RECs, EPA has acknowledged the incredible value of natural gas to achieve emissions reductions by urging oil and gas producers to capture more of it. EPA has also proposed requiring "completion combustion devices," which are defined as "any ignition device, installed horizontally or vertically, used in exploration and production operations to combust otherwise vented emissions from completions." *Id.* at 571. According to EPA, use of RECs in combination with a completion combustion device should result in 95 percent reduction of both methane and VOC emissions, which EPA believes is the "option [that] maximizes gas recovery and minimizes venting to the atmosphere." *Id.* at 204.

In contrast, EPA has proposed a more limited set of requirements for “exploratory and delineation wells.” In doing so, EPA recognized that RECs are not an option for such wells due to the lack of infrastructure to bring natural gas recovered from the wells to market. Thus, EPA has proposed restricting the requirements for exploratory and delineation wells to completion combustion devices, which EPA estimates should still result in a 95 percent emission reduction in the category.

Conclusion

Ultimately, EPA has proposed a narrow suite of regulations for fracking, all of which should be familiar to the oil and gas industry following implementation of the 2012 new source performance standards for VOCs. Most significantly, EPA has demonstrated a lack of concern with methane emissions from existing fracked oil and natural gas wells, as the new requirements only apply to new and modified sources. EPA’s decision to limit the methane regulations to existing sources is an important victory for the oil and gas industry, as compliance costs for updating existing sources tend to be significantly higher than incorporating changes into plans for new or modified sources. By crafting such minimal regulations for methane emissions from fracked wells, EPA has once again acknowledged the environmental sustainability of the nation’s most important well stimulation technique.

This is not the first time this year EPA has shown signs of accepting the value of fracking to the American economy and environment. In June, EPA aligned itself with fracking industry advocates by releasing its long-awaited assessment of the impacts of fracking on drinking water, *Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Sources*, EPA (June 2015). After evaluating the conceivable mechanisms by which fracking could affect drinking water supplies, EPA found no evidence that fracking has led to widespread, systemic change in the quality or quantity of drinking water in the United States. The only evidence

EPA cited of drinking water contamination came from isolated incidents, almost all of which were traceable to a small subset of fracking wells that fail to meet current industry safety standards.

However, while EPA’s decision to spare the oil and gas industry from more onerous regulations is heartening, the new methane regulations do not come without a cost. Implementing REC protocols for new fracked oil well completions and installing completion combustion devices will cost the industry millions of dollars. The compliance costs associated with the Proposed Rule could not come at a worse time for the oil and gas industry, which has recently suffered through the consequences of its own success, as the falling prices of oil and natural gas have forced some contraction. EPA would be well served to heed its instincts by allowing this industry to continue its positive experience with voluntary regulation. Unnecessary regulation of the fracking industry threatens to derail the substantial economic and environmental progress that has accompanied the industry’s growth.

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U.S. ENVIRONMENTAL PROTECTION AGENCY'S FINAL TECHNICAL GUIDE FOR ASSESSING AND MITIGATING THE VAPOR INTRUSION PATHWAY FROM SUBSURFACE SOURCES TO INDOOR AIR: KEY RECOMMENDATIONS AND THEIR IMPLICATIONS

Dr. Helen Dawson

The U.S. Environmental Protection Agency's (EPA's) June 2015 *Technical Guide for Assessing and Mitigating the Vapor Intrusion Pathway* (hereinafter, Vapor Intrusion Guide) provides a baseline framework that reflects the current state of vapor intrusion (VI) assessment and mitigation, yet permits the use of innovative methods. As such, it represents a significant update to EPA's recommendations for addressing the vapor intrusion pathway.

A key difference between EPA's 2002 vapor intrusion guidance and the new 2015 version is that the latter recommends collecting and weighing multiple lines of evidence when making decisions about whether the VI pathway is complete and/or poses an unacceptable risk.

Additional key policies and recommendations in EPA's 2015 Vapor Intrusion Guide address:

- Site investigation planning;
- Soil vapor, sub-slab soil vapor, and indoor air sampling;
- Background sources and impacts on indoor air and sub-slab vapor data interpretation;
- Generic attenuation factors and their use in interpreting site data;
- Risk-based screening levels incorporating updated generic attenuation factors, toxicity values, and chemical properties;
- Risk-based decision making to account for short-term health effects;
- Considerations for non-residential settings; and
- Considerations for petroleum hydrocarbons.

EPA's 2015 Vapor Intrusion Guide also includes many clarifying text additions and footnotes to

address the public comments received by EPA. A more detailed discussion of the new policies and recommendations contained in the Vapor Intrusion Guide is provided below.

Multiple Lines of Evidence

EPA stresses the importance of assessing multiple lines of evidence and the value of concordance among lines of evidence when making decisions as to whether vapor intrusion pathways pose an unacceptable risk to human health. Additionally, EPA emphasizes the importance of an adequate conceptual site model (CSM) to guide vapor intrusion investigations and recommends updating the CSM as additional information becomes available. Multiple lines of evidence are particularly important for supporting "no-further-action" decisions regarding the vapor intrusion pathway. It is likely that EPA's focus on multiple lines of evidence will lead regulators to require additional sampling. The common experience of discordant results from different lines of evidence emphasizes the need for informed selection of appropriate lines of evidence, including lines of evidence that are not based on concentration measurements, to evaluate the vapor intrusion pathway defensibly.

Site Investigation Planning

EPA continues to recommend using 100 feet to define an "initial lateral inclusion zone" for vapor intrusion assessment. However, EPA also acknowledges evidence that buildings in some settings may be affected by vapor intrusion at distances greater than 100 feet due to the presence of significant preferential pathways, referred to as "preferential migration routes." Attention to significant preferential pathways will likely lead to a greater focus on the evaluation of utility corridors and connections to buildings, as well as requests for sampling within utility corridors. However, it is important to recognize that the generic attenuation factors used by EPA to develop generic subsurface screening levels inherently account for the presence of standard utility connections. Additionally, EPA

recognizes that data from sub-slab and exterior soil gas sampling and indoor air testing can delineate or confirm areas within which buildings are potentially subject to vapor intrusion beyond the 100-foot buffer zone and have been impacted by preferential pathways. The need to evaluate, identify, or rule out significant preferential pathways emphasizes the need for alternative approaches, such as building depressurization and tracer testing, to identify the magnitude and locations of vapor transport in the building.

Soil Vapor, Sub-slab Soil Vapor, and Indoor Sampling

Soil vapor sampling: EPA continues to consider external soil vapor sampling a potentially valid and useful line of evidence for evaluating the vapor intrusion pathway. To assist investigators, the 2015 Vapor Intrusion Guide provides specific recommendations for best practices for soil vapor sampling. EPA emphasizes that a sufficient density of soil vapor sampling locations is needed. Thus, EPA recommends collecting soil vapor samples at multiple locations and depth intervals (including “near source” soil vapor samples) between the vapor source and buildings.

Sub-slab sampling: EPA recommends collecting multiple sub-slab vapor samples per building, and notes that three sub-slab samples have been collected in a number of EPA investigations of typically sized (less than 1500 square feet in area) residential buildings or commercial buildings. Furthermore, EPA recommends collecting multipoint, vertically distributed sub-slab samples to support data interpretation. If buildings are of atypical size, more than one type of foundation type exists, or fewer surrounding buildings are being sampled, EPA recommends a site-specific determination of the number of samples to collect. The sampling needs to take into account contaminant distribution and the features of the building, but does not prescribe how to perform the site-specific evaluation to select an alternate number of samples. The greater sub-slab sampling densities EPA recommends point to the value

of using alternative approaches to conventional sampling, such as performing sub-foundation depressurization testing on potentially affected buildings, which can greatly decrease the number of samples needed.

Indoor air sampling: EPA recommends collecting multiple rounds of indoor air samples to address temporal variability in indoor air concentrations and the probability that limited indoor air samples tend to provide a low-biased estimate of chronic and, especially, acute exposures. This recommendation is likely to lead to increased regulatory requests for continued indoor air sampling, even when an initial risk assessment supports a conclusion that the human health risks are acceptable. As an alternative, EPA recommends using time-integrated indoor air sampling methods, which will likely result in increased use of passive samplers. Also of importance, EPA recommends measuring the pressure difference between indoor and subsurface, ideally starting several days before sampling and throughout the sampling period. This method provides a complementary line of evidence about the likelihood that indoor air concentrations are due to vapor intrusion (from building under-pressurization) rather than background sources.

Background Sources

The Vapor Intrusion Guide clarifies its risk management policy for considering background levels at vapor intrusion sites, and it provides examples of methods for evaluating background contributions to indoor air concentrations. These methods include the comparison of indoor air and sub-slab concentrations; comparison of indoor air and outdoor air concentrations; comparison to literature values of background indoor air concentrations; and building over-pressurization. For example, if measured indoor air concentrations exceed sub-slab concentrations or are similar to outdoor air concentrations, there is a greater likelihood that the indoor air concentrations may be the result of background sources. In such situations, response actions for vapor intrusion generally are not warranted.

Generic Attenuation Factors

EPA clarifies that its recommended generic attenuation factors used to develop risk-based screening levels provide an estimate of potential upper bound, or “worst case,” indoor air concentrations that may arise from vapor intrusion. EPA highlights that the exceedance of a subsurface screening level does *not* mean that indoor air necessarily poses an unacceptable health risk. It means only that there is a *potential* for an unacceptable health risk and that additional investigation is warranted. EPA continues to recommend applying the generic attenuation factors developed based on its compilation of residential buildings to nonresidential buildings, but now allows consideration of appropriate building-specific data, information, and analyses when evaluating vapor intrusion into large nonresidential buildings.

Risk-based Screening Levels

EPA provides a Vapor Intrusion Screening Level (VISL) calculator with generic groundwater and soil/sub-slab vapor screening levels based on default target risks and exposure scenarios. The VISL calculator also can be used to derive site-specific screening levels and/or candidate cleanup levels based on user-defined target risk levels, exposure scenarios, and semi-site-specific or site-specific attenuation factors. The VISL calculator is updated approximately every six months, generally when EPA’s regional screening levels (RSLs) are updated, and therefore accounts for any updates to toxicity values or chemical properties incorporated in the RSLs. In EPA’s June 2015 update of the RSLs, the criteria for determining volatility were revised, resulting in the addition of over 100 chemicals to those classified as “volatile.” However, the “new” volatile chemicals are not commonly of concern at vapor intrusion sites; thus this change is not anticipated to substantially affect vapor intrusion investigations.

Risk-based Decision Making to Account for Short-term Health Effects

EPA’s Vapor Intrusion Guide recommends considering the potential for adverse, non-cancer health effects from short-duration exposures (i.e., acute, short-term, or subchronic exposure durations) due to vapor intrusion. Where short-term exposures are considered to pose an unacceptable risk, EPA recommends prompt actions such as sealing major soil gas entry points; over-pressurizing nonresidential buildings; increasing building ventilation; treating indoor air; and/or temporary relocation as an option of last resort. These recommendations have important ramifications for VI assessment and mitigation because of the difficulty of identifying potential short-term impacts and implementing prompt actions. These difficulties are amplified at sites with trichloroethylene (TCE), as current regulatory practice utilizes a 2011 controversial and highly conservative chronic reference concentration (RfC) to evaluate all short-term exposures to TCE.

Nonresidential Settings

EPA now asserts and provides the basis for its authority to assess and mitigate (if deemed necessary) vapor intrusion in nonresidential settings. However, EPA allows for consideration of the relative contributions of vapors from background sources and any existing or planned engineering or institutional controls for the building. As described above, if background sources are primarily responsible for indoor air concentrations, then response actions for vapor intrusion generally are not warranted. This policy still leaves unresolved the large differences between permissible exposure limits (PELs) under the Occupational Safety and Health Act, when vapor intrusion is not an exposure pathway, and risk-based target levels (e.g., as calculated by EPA’s Vapor Intrusion Screening Level calculator) for commercial settings, when the vapor intrusion pathway is deemed complete.

Petroleum Hydrocarbons

EPA released a companion guidance document for assessing vapor intrusion from petroleum hydrocarbons released from underground storage tank (UST) systems. This document, the *Technical Guide for Addressing Petroleum Vapor Intrusion at Leaking Underground Storage Tank Sites*, also can be used at non-UST sites that are similar in size to a typical Subtitle I UST release. For sources other than Subtitle I USTs, EPA recommends using the general 2015 Vapor Intrusion Guide. Examples of petroleum hydrocarbon releases to which EPA considers the 2015 Vapor Intrusion Guide would be applicable include petroleum hydrocarbons that are mixed with other types of volatile hazardous chemicals; subsurface releases of petroleum, petroleum derivatives, and petroleum hydrocarbons from refineries; bulk storage facilities; oil exploration and production sites; chemical manufacturing facilities; former manufactured gas plants; creosote facilities; large-scale fueling and storage operations; and dry cleaners that use petroleum solvents. Because these two guidance documents suggest slightly different approaches for evaluating vapor intrusion impacts from petroleum hydrocarbons, there is likely to be confusion about the assessment of petroleum hydrocarbons. Informed selection of appropriate approaches that take into account the differences between petroleum hydrocarbons and non-petroleum compounds can minimize the impact of any contradictory guidance.

Helen Dawson, Ph.D., has more than 30 years of experience in private practice, academia, and public service; she is a recognized leader in vapor intrusion. Dr. Dawson was the primary author of the U.S. EPA's Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils in 2002. She also was the primary author of two key technical documents that support vapor intrusion assessment: one on background indoor air concentrations in residences, and another on the subsurface-to-indoor air attenuation at vapor intrusion sites. Dr. Dawson may be contacted at HDawson@geosyntec.com or (202) 753-5006.

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