

Environmental Litigation and Toxic Torts Committee Newsletter

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MESSAGE FROM THE CHAIRS

Peter Condron and Shelly Geppert

Dear Members:

The year 2017 promises to be one of significant change in environmental and toxic tort law. The change in administrations will, of course, lead to wholesale changes within the Environmental Protection Agency, the Department of the Interior, the Department of Justice, and a host of other federal agencies with responsibility for environmental, energy, and natural resource issues. Agency and departmental priorities are sure to change, and federal policies regarding issues ranging from climate change to endangered species regulation, from energy policy to waters of the United States, will be undergoing review, revision, and possibly wholesale replacement. Likewise, Congress appears poised to make significant changes in the environmental and administrative law fields, including enacting legislation to overturn the long-standing doctrine of *Chevron* deference to agency interpretation of enabling statutes, which could have significant ramifications in environmental litigation. Our committee, and in particular our newsletter, will strive to keep our members apprised of the latest developments affecting environmental, energy, and natural resource issues, and to provide a forum for discussion of significant events.

As always, we'll also do our best to keep you apprised of significant developments in the courts. This month is no exception. The regular contributors to our award-winning newsletter offer their insights into a variety

of significant decisions from across the country, including a decision addressing endangered species status on the basis of long-term climate change projections, an Ohio decision addressing "cancerphobia" claims, the existence of subject matter jurisdiction in a lawsuit by customers alleging that their water utility provided tainted water, federal jurisdiction under the Class Action Fairness Act, and the effect of the statute of repose on water contamination claims at a Marine Corps base.

In addition, contributor Malinda Morain provides an interesting analysis of the state of New Mexico's effort to invoke the U.S. Supreme Court's original jurisdiction in a dispute against the state of Colorado arising out of the Gold King Mine spill, and Ameri Klafeta provides an update on the ongoing water crisis in Flint, Michigan, and related litigation. We think you'll find these and all of our other articles informative and timely.

Wishing you all the best for 2017.

Pete and Shelly

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Lisa Gerson and Stephen Riccardulli,
Editors

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CASE LAW HIGHLIGHTS: MOUNTAIN/ WEST COAST

NINTH CIRCUIT FINDS “THREATENED” DESIGNATION FOR BEARDED SEALS PROPER BASED ON NEW LONG-TERM PROJECTIONS

Whitney Jones Roy and Alison N. Kleaver

Alaska Oil and Gas Ass’n et al. v. Pritzker et al., 840 F.3d 671, 2016 U.S. App. LEXIS 19084 (9th Cir. 2016). Plaintiffs Alaska Oil and Gas Association, the state of Alaska, and North Slope Borough (collectively, Plaintiffs) challenged the National Marine Fisheries Service’s (the Service) determination that a subspecies of Pacific bearded seal, known as the “Beringia distinct population segment” (Beringia DPS), is threatened and entitled to protection under the Endangered Species Act (the Act). The state of Alaska also claimed the Service failed to adequately respond to its public comments, as required by the Act’s state cooperation provisions. The Ninth Circuit rejected Plaintiffs’ claims, finding that the Service’s decision to list the Beringia DPS as threatened was not arbitrary, capricious, or otherwise in contravention of the applicable law, and that the Service complied with its obligations to respond to the state of Alaska’s public comments.

In December 2012, the Service added the Beringia DPS to the list of threatened species under the Act. In making its decision, the Service reviewed the “best scientific and commercial data available” regarding bearded seals and found that bearded seals require year-round access to shallow waters and that their preferred habitat is non-contiguous sea ice floes over shallow water, the latter of which allows them to hunt organisms on the sea floor and provides protection from predators, among other things. *Id.* at *9–10. The Service then assessed the magnitude of climate change’s effect on sea ice to determine whether there was a threat to the Beringia DPS. In doing so, the Service utilized the Intergovernmental Panel on Climate Change’s predictive models and compared them to observational data to assess reliability. The models indicated that sea ice in several areas where

Beringia DPS live will have disappeared entirely during mating, nursing, and birthing season by 2095. *Id.* at *10–12.

As an initial matter, Plaintiffs took issue with the Service’s use of long-term climate projections as a basis for endangered species listing decisions. The court rejected this challenge on the grounds that an agency’s interpretation of complex scientific data is owed deference as long as the agency provides a reasonable explanation for the approach it adopts and explains any limitations of that approach. *Id.* at *17. The court found that the Service adequately did so. In particular, the court noted that data on present-day emissions supported the results of the Service’s predictive modeling for the 2007 to 2050 period. *Id.* at *18. Furthermore, with respect to the period 2050 through 2100, the court refused to prohibit reliance on predictive modeling simply because it may be volatile. The court noted that “[t] here is no debate that temperatures will continue to increase over the remainder of the century and that the effects will be particularly acute in the Arctic. The current scientific consensus is that Arctic sea ice will continue to recede through 2100, and [the Service] considered the best available research to reach that conclusion.” *Id.* Moreover, the court found that the majority of independent peer reviewers agreed with the Service’s conclusions. *Id.* at *20.

Regarding the Service’s Beringia DPS listing decision, specifically, Plaintiffs asserted three additional challenges. First, Plaintiffs argued that the Service improperly departed from its established practice setting the outer boundary of its “foreseeable future” analysis at the year 2050. The court noted that an agency may adopt new policies so long as it provides “a reasoned explanation for adoption of its new policy—including an acknowledgement that it is changing its position and if appropriate, any new factual findings that may inform that change.” *Id.* at *24. Here, the court found that the Service adopted its new foreseeability analysis based on 2009 guidance from the Department of the Interior, which notified agencies that the “interpretation of

‘foreseeable future’ must be supported by reliable data regarding ‘threats to the species, how the species is affected by those threats, and how the relevant threats operate over time.’” *Id.* at *25. In its final listing decision, the Service noted that it had changed its interpretation based upon the 2009 guidance and provided “a thorough and reasoned explanation for its recommendation that the Service adopt a data-driven threat analysis for future harm.” *Id.* Accordingly, the court ruled that the Service’s decision to adopt a new “foreseeable future” analysis was neither arbitrary nor capricious. *Id.* at *26.

Second, Plaintiffs argued that the Service did not provide an evidence-based explanation for the relationship between habitat loss and bearded seals’ survival because the Service failed to establish a nexus between loss of sea ice and risk of future extinction, and because there had been no population loss to date. The court rejected Plaintiffs’ argument, finding that the Act requires only that the agency make its decision “based on the best data available at the time of listing.” The court disagreed with Plaintiffs that the Service could not make its listing decision “until it had quantitative data reflecting a species’ decline, its population tipping point, and the exact year in which that tipping point would occur before it could adopt conservation policies to prevent that species’ decline.” *Id.* at *27–28. The court further found that the Service had not relied solely on habitat loss in justifying its listing decision, but also relied on “existing research to explain how habitat loss would likely endanger the bearded seal.” *Id.* at *29. Thus, the Service’s listing decision complied with the Act’s requirements.

Third, Plaintiffs contended that the Service failed to demonstrate that the Beringia DPS will “likely become an endangered species within the foreseeable future,” as required by the Act. Plaintiffs argued that the Service was required to make a specific determination that the impact of climate change on the Beringia DPS “will be of a magnitude that places the species ‘in danger of extinction’ by the year 2100.” The court rejected Plaintiffs’ argument that the Service was required

to “quantify population losses, the magnitude of risk, or a projected ‘extinction date’ or ‘extinction threshold.’” *Id.* at *30–31. The court held that Plaintiffs misinterpreted the Act’s requirement and that the Service properly based its decision on one or more of the factors set out in 16 U.S.C. § 1533(a)(1). Thus, the Service did not misinterpret the word “likely” in concluding that the Beringia DPS was “likely to become an endangered species.” *Id.* at *31.

Finally, the court addressed the state’s argument that the Service did not comply with its duty to provide the state with a written justification for its failure to adopt regulations consistent with the state’s public comments. The court rejected this argument, citing its recent decision in *Alaska Oil and Gas Association v. Jewell*, 815 F.3d 544 (9th Cir. 2016) (holding that the Act did not impose a separate notification duty on federal agencies and that a federal agency may respond to several state agencies with one letter). It found that the Service had complied with its obligation to respond to the state’s comments in writing by sending a letter to Alaska’s lead agency, notifying them of the listing decision, and identifying sections of the final listing rule where the Service addressed the state’s comments. *Id.* at *33.



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DISTRICT COURT FINDS CLEAN WATER ACT LAWSUIT MAY PROCEED FOR DISCHARGES TO WATERWAYS FROM PASSING RAIL CARS

Whitney Jones Roy and Alison N. Kleaver

***Sierra Club et al. v. BNSF Railway Co.*, 2016 U.S. Dist. LEXIS 147786 (W.D. Wash. Oct. 25, 2016).** Environmental advocacy organizations (collectively, Plaintiffs) brought a Clean Water Act citizen suit against BNSF Railway Co. (BNSF) seeking relief for BNSF’s alleged unpermitted discharge of coal pollutants from its railcars into protected waterways. Plaintiffs alleged that “each time a BNSF train carrying coal travels through the state of Washington it discharges coal pollutants ‘through holes in the bottoms and sides of the rail cars and by spillage or ejection from the open tops of the rail cars and trains.’” *Id.* at *3–4. Both sides sought summary judgment, which the court denied. *Id.* at *2. The court rejected BNSF’s argument that Plaintiffs lacked standing, and determined that there were disputed issues of fact as to whether BNSF had committed Clean Water Act violations.

BNSF challenged Plaintiffs’ standing on the grounds that Plaintiffs were improperly proceeding in a representative capacity despite their failure to establish standing for all water bodies in the state, and because each discharge constitutes a separate violation of the Clean Water Act. The court rejected BNSF’s argument, instead adopting the holding in *Alaska Center for the Environment v. Browner*, 20 F.3d 981 (9th Cir. 1994), that a plaintiff seeking statewide environmental relief under the CWA was not required to demonstrate harm over the entire state, but was only required to establish that a representative number of areas were adversely affected. *Id.* at *10, 12. Despite this standard, however, the court found that Plaintiffs “must establish with specific facts that (1) at least one Plaintiff has standing to sue on behalf of its members by meeting the three standing requirements (injury in fact, causation, and redressability) and (2) the specific and representative waterways the Plaintiffs have alleged standing for provide a ‘concrete factual context’ to establish standing for the remaining waterways.” *Id.* at *12.

The court ruled that Plaintiffs presented sufficient facts to overcome summary judgment with respect to each of the three standing requirements. First, Plaintiffs sufficiently demonstrated injury in fact by showing their pleasure and use of the waterways were diminished because of concerns about violations of environmental laws. The court determined that “[c]essation of use was not a prerequisite for an injury to confer standing.” *Id.* at *17–18. Second, Plaintiffs met the causation requirement by showing that their “injuries at the allegedly representative waterways were traceable to [BNSF], not that [BNSF] caused an injury at each waterway at issue.” *Id.* at *19. In so holding, the court found that Plaintiffs could rely on circumstantial evidence, including that “BNSF is the sole transporter of coal in Washington over and adjacent to the navigable waters at issue.” *Id.* Third, the Plaintiffs met the redressability requirement by showing their injuries would be redressed by a favorable decision. *Id.* at *20.

The court also determined that Plaintiffs had sufficiently presented facts in opposition to summary judgment that the “specific and representative waterways provide a ‘concrete factual context’ to establish standing for the remaining, unsupported waterways.” The court noted, among other facts, that “the parties stipulated that ‘many of the waterways for which Plaintiffs have not identified standing witnesses are tributaries, hydrologically connected waterways, or have a significant nexus with waterways for which Plaintiffs have identified standing witnesses.’” *Id.* at *21–22.

Having established that Plaintiffs had standing to pursue their claims, the court moved to the existence of a genuine dispute as to BNSF’s liability for violating the Clean Water Act. To establish BNSF’s liability, Plaintiffs would be required to prove BNSF “is (1) a person that has (2) discharged (3) a pollutant (4) from a point source (5) into navigable waters (6) without a National Pollution Discharge Elimination System (“NPDES”) permit.” *Id.* at *24. Only the point source discharge element was disputed by

the parties. Thus, before reaching the ultimate issue, the court first had to determine whether the Plaintiffs' claims are actionable point source discharges under the Clean Water Act. *Id.*

Plaintiffs alleged that BNSF made two types of discharges that constituted violations of the Clean Water Act: (1) emissions to land and from land to water; and (2) aerial and windblown emissions. The court rejected Plaintiffs' argument that coal discharges to land, which then move to the water are point source discharges because there was no evidence that BNSF caused the coal to move to the water. Thus, the court determined BNSF could be liable only for "coal that is discharged directly into the navigable waters at issue if Plaintiffs establish that these kinds of discharges actually occurred." *Id.* at *29. Regarding aerial and windblown emissions, however, the court held that "coal particles allegedly discharged by BNSF trains that travel adjacent to and above the waters at issue are point source discharges because there is a discrete conveyance." *Id.* at *32.

After clarifying which discharges could serve as the basis for Plaintiffs' Clean Water Act claims, the court found a dispute of material fact as to whether BNSF's discharged coal in violation of the Clean Water Act. The court cited extensive evidence on both sides that could lead a reasonable trier of fact to find for either Plaintiffs or BNSF. *Id.* at *35. Accordingly, the court denied both sides' motions for summary judgment.

CALIFORNIA COURT OF APPEAL HOLDS ORDINANCE REGULATING MARIJUANA DISPENSARIES NOT SUBJECT TO ENVIRONMENTAL QUALITY ACT REVIEW

Whitney Jones Roy and Alison N. Kleaver

Union of Medical Marijuana Patients, Inc. v. City of San Diego, 4 Cal. App. 4th 103 (2016).

The Union of Medical Marijuana Patients, Inc. (UMMP) brought a petition for writ of mandate against the City of San Diego (City), claiming the City failed to comply with the California Environmental Quality Act (CEQA) when it enacted an Ordinance (No. O20356) regulating the establishment and location of medical marijuana cooperatives within the City. UMMP argued that the Ordinance was a project under CEQA as a matter of law, and that the City failed to consider the reasonably foreseeable environmental impacts of the Ordinance prior to its adoption. The court of appeal rejected UMMP's arguments, finding that the Ordinance was not a project under CEQA and that the alleged environmental impacts were not reasonably foreseeable.

The Ordinance, which the City adopted in 2014, allows up to four cooperatives in each of the City's nine City Council districts. The Ordinance further provides that no cooperative may be located within 1000 feet of public parks, churches, childcare centers, playgrounds, minor-oriented facilities, residential care facilities, schools, or other cooperatives, or within 100 feet of a residential zone. The Ordinance also establishes certain lighting, security, signage, and operating hours requirements for permitted cooperatives. *Id.* at 109. The City's mapping and data analysis, however, found that one of the nine City Council districts could not accommodate any cooperatives due to the Ordinance's limitations, and two other districts could accommodate only three. Thus, although the Ordinance provided for up to 36 cooperatives, only 30 actually could be located in the City. *Id.*

UMMP argued that, because the Ordinance was a zoning ordinance and, thus, specifically identified

under California Public Resources Code section 21080(a), it constituted a project as a matter of law and required CEQA review, including an environmental impact report. Furthermore, UMMP argued that the City failed to consider the reasonably foreseeable indirect physical impacts of the Ordinance. *Id.* at 110–11.

The court rejected UMMP’s first argument that the Ordinance was a project as a matter of law. The court acknowledged the ambiguity in Public Resources Code section 21080(a), which states that “[e]xcept as otherwise provided in this division, this division shall apply to discretionary projects proposed to be carried out or approved by public agencies, including but not limited to, the enactment and amendment of zoning ordinances. . . .” It noted that the statute could mean either that that the examples cited in the statute are illustrations of activities that are “discretionary projects proposed to be carried out or approved by public agencies,” or that the examples are illustrations of activities “proposed to be carried out or approved by public agencies,” but that not all such activities are “discretionary projects.” In harmony with the rest of CEQA, the court found the latter interpretation to be “the most reasonable.” *Id.* at 115–16. This interpretation also agrees with the CEQA guidelines, which identify the “enactment and amendment of zoning ordinances” as an example of only the second requirement that the activity be one directly undertaken by any public agency. *Id.* at 116.

Having concluded that the Ordinance was not a project as a matter of law, the court next examined whether a CEQA review was nevertheless required because of the reasonably foreseeable physical impacts of the Ordinance on the environment. *Id.* at 119. UMMP argued the Ordinance would cause three indirect physical impacts to the environment: (1) increased air pollution and traffic caused by patients traveling across the City to access cooperatives; (2) increased electricity consumption by patients setting up private indoor grow facilities because it is too difficult to travel to faraway cooperatives to obtain marijuana; and (3) new construction of facilities to house the cooperatives.

First, the court rejected UMMP’s claim that the Ordinance would cause increased traffic and air pollution. The court noted that “[u]nder the CEQA guidelines, ‘[a] change which is speculative or unlikely to occur is not reasonably foreseeable.’” *Id.* at 119. The court found no evidence in the record to support UMMP’s claim. In fact, the court noted that the purpose of the Ordinance was to increase patients’ access to medical marijuana in the City and did nothing to increase the City’s existing efforts to shut down illegal cooperatives. *Id.* at 121–22.

Second, the court rejected UMMP’s argument that the Ordinance would cause an increase in private indoor cultivation of marijuana. The court found this argument was based on the same “unwarranted assumption” that the Ordinance would make it more difficult for patients to access medical marijuana. The court also found no evidence that patients would grow their own marijuana if it were too difficult for them to travel to the cooperatives. *Id.* at 122–23.

Finally, the court rejected UMMP’s argument that the Ordinance would result in new construction activity. The court found no evidence that cooperatives could not simply occupy existing buildings. Furthermore, the court noted that cooperatives would be required to apply for a conditional use permit, which would trigger a CEQA review to the extent the permit application included new construction. *Id.* at 123–24.

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CASE LAW HIGHLIGHTS: MIDWEST

SIXTH CIRCUIT REVERSES U.S. DEPARTMENT OF LABOR'S AWARD OF BLACK LUNG BENEFITS TO COAL MINE WORKER

Sonia H. Lee

***Aberry Coal, Inc. v. Fleming*, No. 15-3999, 2016 U.S. App. LEXIS 21457 (6th Cir. Dec. 1, 2016).**

The Sixth Circuit reversed a U.S. Department of Labor (DOL) ruling that awarded benefits to a coal miner under a provision of the Black Lung Benefits Act (BLBA), 30 U.S.C. § 921(c)(4), which entitles a worker with more than 15 years of coal-mining employment to a presumption of total disability and an award of benefits. In finding the claimant was not eligible for the automatic disability presumption because he had failed to establish an employment history that extended beyond 15 years, the court observed that “[t]he evidence presented at the hearing did not and could not have established that [claimant] had over sixteen years of coal-mine employment, or even the fifteen necessary for the presumption of total disability.” *Id.* at *2. Instead, “[a] reasonable calculation based on the substantial evidence presented would allow the [administrative law judge] to conclude that [claimant] had no more than fourteen years and two months . . . of coal-mine employment. [Claimant] is therefore not entitled to the presumption of total disability under the BLBA, and his claim must be assessed without that presumption.” *Id.* at *10–11.

Between 1970 and 1991, claimant Joseph Fleming (Fleming) worked sporadically for 25 different coal-mining employers, and in 2010 filed for benefits under the BLBA. *Id.* at *2. The DOL’s Office of Workers’ Compensation found Fleming was employed as a coal miner for nine and one-quarter years between 1970 and 1991, and that he had contracted pneumoconiosis as a result of his coal-mine employment. *Id.*

Aberry Coal, Inc. (Aberry), Fleming’s last coal-mining employer, was designated as the party responsible for payment of Fleming’s benefits under the BLBA. *Id.* In 2011, Aberry requested a formal hearing before an administrative law judge (ALJ),

and in 2013, the ALJ found that Fleming engaged in coal-mining employment for at least 15 years. *Id.* at *3. The ALJ determined that Fleming established that he had either been paid under the table or did not retain proper employment records during his career. *Id.* Thus, the ALJ concluded Fleming was entitled to a presumption of total disability under the BLBA and determined that Fleming was owed benefits dating from July 2010. *Id.* at *4.

The Benefits Review Board reversed and remanded the decision, noting the ALJ had failed to resolve conflicting testimony and evidence pertaining to Fleming’s coal-mining employment history. *Id.* Following additional evidentiary submissions by Aberry and Fleming, the ALJ found Fleming had worked for more than 15 years in coal-mining employment and was entitled to a presumption of total disability and an award of black lung benefits. *Id.* at *7. This time, the Benefits Review Board affirmed the ALJ’s ruling, which led to Aberry’s appeal to the Sixth Circuit. *Id.* at *7.

The Sixth Circuit found that the ALJ had committed several errors in calculating Fleming’s coal-mining employment history. The appeals court observed that a claimant can only be credited with one year in a given year in coal-mine employment, regardless of the method used to determine whether a claimant’s evidence and testimony establish that he or she worked for that year. *Id.* at *8. However, the ALJ committed error in finding that Fleming had 16 and one-half years of coal-mining employment between 1970 and 1991, “largely by expanding Fleming’s coal-mine employment history to cover any period of employment not otherwise accounted for during that period (and even a few that were).” *Id.* at *10. The court opined that “[b]asic reason compels us to exclude two double-counted years of coal-mine employment in 1971 and 1989. It also compels us to exclude at least four months of work, one in 1970 and three in 1991, because no evidence shows that Fleming was employed in coal-mine work during that time.” *Id.* The court went on to conclude that Fleming had no more than 14 years and two months of coal-mining employment. *Id.* at *10–11. Accordingly, the Sixth Circuit reversed the award of benefits by the Benefits Review Board. *Id.* at *11.

OHIO DISTRICT COURT RULES PLAINTIFF CANNOT RECOVER FOR DISEASE FEAR CLAIM IN DUPONT C-8 MULTIDISTRICT LITIGATION

Sonia H. Lee

Vigneron v. E. I. du Pont de Nemours & Co. (In re E. I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.), No. 2:13-md-2433, 2016 U.S. Dist. LEXIS 154828 (S.D. Ohio Nov. 7, 2016). The U.S. District Court for the Southern District of Ohio granted summary judgment to defendant E. I. du Pont de Nemours and Company (DuPont) on the first non-bellwether plaintiff's claim to recover damages for suffering anxiety over the fear of contracting certain diseases caused by his alleged exposure to ammonium perfluorooctanoate (C-8). "Here, [plaintiff] does not offer evidence to show that his alleged anxiety or fear of developing any other Probable Link diseases relate to the physical injuries for which he seeks to hold DuPont liable. The evidence offered regarding other Probable Link diseases is that he has a statistical increased likelihood of developing it not because of his prior testicular cancer, but because of his C-8 exposure." *Id.* at *1185.

Plaintiff Kenneth Vigneron Sr. (Vigneron) alleges he is a member of a class of individuals who are permitted under a contractual agreement (Leach Settlement Agreement) to file claims against DuPont based upon injuries allegedly caused by exposure to C-8 discharged from DuPont's Washington Works plant into the river that separates Ohio and West Virginia. *Id.* at *1165. The Leach Settlement Agreement established a panel of epidemiologists, which delivered probable link findings ("Probable Link") for six human diseases that were "more likely than not" linked to exposure to C-8: kidney cancer, testicular cancer, thyroid disease, ulcerative colitis, diagnosed high cholesterol (hypercholesterolemia), and pregnancy-induced hypertension and preeclampsia. *Id.* at *1167. As a part of the Leach Settlement Agreement, DuPont agreed to not contest general causation of the Probable Link diseases. *Id.* at *1168.

In 1997, Vigneron was allegedly diagnosed with

testicular cancer and sought to recover damages for both "cancerphobia" as well as for emotional distress over a general fear of developing other Probable Link diseases. *Id.* at *1170. The court found that while Vigneron could proceed to trial with his damages claim for his mental anxiety and distress over contracting cancer in the future, he was precluded from bringing claims that he suffered from emotional distress related to the fear of developing other undiagnosed Probable Link diseases. *Id.* at *1183, 1186.

With regard to Vigneron's cancerphobia claim, the court concluded that Vigneron presented evidence sufficient from which a reasonable jury could find that Vigneron "was aware that he possesses an increased statistical likelihood of developing cancer, and from this knowledge and his experience with cancer and chemotherapy, sprang a reasonable apprehension which manifested itself as emotional distress." *Id.* at *1183. As a result, the court denied DuPont summary judgment on Vigneron's request for damages for his mental anxiety and distress over contracting cancer in the future. *Id.*

In rejecting Vigneron's claim for damages over his alleged fear of contracting other undiagnosed Probable Link diseases, the court observed that "[t]he alleged mental distress and anxiety must be directly connected to the physical injury," which in Vigneron's case, was cancer and metastasis of cancer. *Id.* at *1186. It also agreed with DuPont that "[a]ny claim that Mr. Vigneron suffers from emotional distress related to fear of developing other undiagnosed Probable Link diseases as a result of his historic C8 exposure is also wholly unsupported and should be dismissed." *Id.* at *1184 (alteration in original). Therefore, the court held DuPont was entitled to summary judgment on the portion of Vigneron's claim for damages based upon the fear of contracting undiagnosed Probable Link diseases.

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CASE LAW HIGHLIGHTS: MID-CONTINENT

LOUISIANA STATE COURTS HAVE SUBJECT MATTER JURISDICTION TO ADJUDICATE DISPUTES BETWEEN A PUBLIC UTILITY AND ITS CUSTOMERS REGARDING ALLEGED WATER CONTAMINATION

Lisa Cipriano

***Henry v. Greater Ouachita Water Co.*, No. 50,750-CW, 2016 WL 5929255 (La. Ct. App. Oct. 12, 2016).** Plaintiffs, customers and/or household members of homes serviced by defendant water service provider, filed an action in a Louisiana district court seeking damages relating to defendant's alleged provision of contaminated water. *Henry v. Greater Ouachita Water Co.*, No. 50,750-CW, 2016 WL 5929255, at *1 (La. Ct. App. Oct. 12, 2016). Plaintiffs brought various common law claims against defendant, as well as claims under the Louisiana Products Liability Act and various state environmental laws. *Id.* Plaintiffs sought damages for, among other things, alleged personal injuries from drinking contaminated water, property damage, diminution in property value, and the costs of alternative water supplies and water treatment systems. *Id.* at *1–2.

Defendant sought to stay plaintiffs' claims, arguing that the district court lacked subject matter jurisdiction because "exclusive jurisdiction over plaintiffs' claims rested with the [Louisiana Public Service Commission (LPSC)], which has jurisdiction over claims related to water service as granted by Louisiana constitutional and statutory law." *Id.* at *1. In addition, defendant argued "that because plaintiffs alleged in their amended petition that the water was unsafe to drink, such a determination fell within the jurisdiction of the Louisiana Department of Health and Hospitals (LDHH), as the enforcer of the Safe Drinking Water Act and the State Sanitary Code." *Id.* at *2. The district court agreed with defendant and stayed all of plaintiffs' claims. *Id.* at *2. The Louisiana Court of Appeals granted plaintiffs' request for a supervisory review, converted it to an appeal, and reversed the district court's decision. *Id.* at *2–4.

"Plaintiffs argue[d] that the district court erred in granting defendant's exception because the Louisiana Constitution of 1974 grants jurisdiction over all civil matters to the district courts," and "that because the Louisiana Constitution grants jurisdiction over only the certification of water service providers, assignment of water service territories, and fixing of water service rates to the LPSC, the courts retain jurisdiction to hear" civil claims for "damages regarding a dispute between customers and water service providers." *Id.* at *2. In addition, "[p]laintiffs also contend[ed] that the Louisiana Constitution does not grant any authority to the LDHH to hear civil matters. . . ." *Id.* at *3. Defendant, on the other hand, contended "that the LPSC has exclusive jurisdiction over the quality of service provided by a water service provider," that "for the district court to determine whether defendant breached a contractual or tort duty, the LPSC and LDHH must first determine the standard of service for public drinking water utilities and the drinking water standards, respectively," and that because "the LPSC has exclusive authority to regulate the services provided by public drinking water utilities, and the LDHH has exclusive authority to regulate and determine public drinking water standards . . . to allow the duty for public drinking water service and standards to be determined by the courts would result in inconsistent results." *Id.* at *3.

The court of appeals first noted that "[t]he district courts are vested with original jurisdiction of all civil and criminal matters under La. Const. art. V, § 16(A), unless otherwise authorized in the constitution," but that "[t]he manner in which plaintiffs couch their claims does not automatically vest jurisdiction in the district court; rather, the nature of the relief demanded is dispositive. *Id.* at *3. Conversely, the court of appeals noted that while "[j]urisdiction over public utilities in general and rates in particular is vested in the LPSC under La. Const. art. IV, § 21(B) . . . the fact that one party is a public utility does not consequentially divest the district court of original jurisdiction." *Id.* The court discussed the Louisiana Supreme Court's examination of "the framework for choosing

between the district court’s authority to apply and implement Louisiana laws and the LPSC’s authority to regulate rates and service,” which found that “[t]he Legislature has never provided by law for the [L]PSC to exercise jurisdiction over other subject matters and areas of litigation in which public utilities are involved, such as tort actions and contract disputes.” *Id.* at *4 (internal citations omitted, brackets in original). Because plaintiffs were “seek[ing] damages for breach of contract and tortious misconduct, claims which the Louisiana Supreme Court has stated fall under the jurisdiction of the district courts,” the court of appeals held that “plaintiffs [were] not required to exhaust their administrative remedies prior to seeking relief from the court.” *Id.*

FEDERAL DISTRICT COURT STRIKES DOWN CHALLENGES TO STATE DIESEL FUEL LAW

Lisa Cipriano

***Minnesota Auto. Dealers Ass’n v. Stine*, No. 15-2045, 2016 WL 5660420 (D. Minn. Sept. 29, 2016).** Plaintiffs, various trade associations representing oil, gas, auto, and truck manufacturers, and including the American Fuel & Petrochemical Manufacturers association (AFPM), sued Minnesota state officers who were “connected to the implementation and enforcement of the Minnesota Mandate,” a state law requiring diesel fuel sold to consumers in Minnesota to contain a specific percentage of biodiesel, “a clean energy alternative to petroleum-based diesel fuel.” *Minnesota Auto. Dealers Ass’n v. Stine*, No. 15-2045, 2016 WL 5660420, at *1–3 (D. Minn. Sept. 29, 2016). The Minnesota Mandate (“the Mandate”) would require increasing percentages of biodiesel over time assuming the necessary factual findings regarding “the state’s readiness” by commissioners of certain state agencies (the “Commissioner Defendants”). *Id.* at *2–3. The “Director Defendant” (the director of the Minnesota Department of Commerce’s Weights and Measures Division) was responsible for enforcing the Mandate. *Id.* Three years after the Mandate was passed, “Congress enacted the Renewable

Fuel Standard (‘RFS’),” and “[t]he current version of the RFS requires fuel ‘refineries, blenders, and importers’ to sell or ‘introduce[] into commerce in the United States’ each year an aggregate minimum volume of ‘biomass-based diesel.’ 42 U.S.C. § 7545(o)(2)(A)(i).” *Id.* at *3. Plaintiffs filed suit, alleging that the Mandate conflicted with the RFS, and therefore was preempted by the Supremacy Clause of the U.S. Constitution. *Id.* at *1, 4. In addition, plaintiffs “argu[ed] that the Commissioner Defendants violated or will violate various rulemaking procedures contained in MAPA [the Minnesota Administrative Procedures Act]” in making their factual findings about the Mandate. *Id.* at *4, 12. The parties filed various motions, and the Minnesota federal district court granted the defendants’ motions for judgment on the pleadings on both the preemption and MAPA claims. *Id.* at *1.

As an initial matter with regard to the preemption claim, the court determined whether the plaintiffs had standing to pursue such a claim with regard to each category of defendant, noting that “[p]laintiffs in this action are trade organizations seeking to sue on behalf of their members. An association has standing to sue on behalf of its members if (1) its members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization’s purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit,” and that “[i]n evaluating whether an association’s members would have standing to sue in their own right, the Court employs the traditional three-part standing test: (1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) the likelihood that a favorable decision by the court will redress the alleged injury.” *Id.* at *5 (internal quotations and citations omitted). The court further noted that it would have “jurisdiction to consider the merits so long as at least one Plaintiff demonstrates standing to sue.” *Id.*

The court found that AFPM had standing with respect to the conduct of the Director Defendant and, therefore, did not address the standing of the

other plaintiffs. *Id.* at *6. As to AFPM’s standing, the parties did not dispute that AFPM met the second and third prongs of the associational standing test, and the court determined that AFPM met the first prong—its members would have standing to sue in their own right. The alleged harms were “concrete and particularized harms” because “AFPM alleges that it has members that are regulated by the RFS and the Minnesota Mandate, and that the Minnesota Mandate—by way of the biodiesel content requirement—forces these members to modify their business practices, incur additional costs, and alter their RFS compliance strategies. *Id.* at *5–6. In addition, the alleged harms were “fairly traceable to the Director Defendant,” and “AFPM ha[d] sufficiently established that declaratory and injunctive relief would redress its member organizations’ alleged injuries” because, “[i]f the Court were to declare that the RFS preempts the Minnesota Mandate and enjoin the Director Defendant from utilizing her enforcement power, this would alleviate the need for AFPM member organizations to modify their business practices, incur additional costs, and alter their RFS compliance strategies.” *Id.* at *6.

In contract, the court found that none of the plaintiffs had standing to sue the Commissioner Defendants because in order “to establish fairly traceable causation, Plaintiffs must show that the Commissioner Defendants have some connection with the enforcement of [the] state law.” *Id.* at *7 (internal quotations and citations omitted). The court stated that “[p]laintiffs have not, and cannot, make this showing” as “making statutorily predetermined factual findings is an administrative and ministerial act connected solely to the implementation rather than the enforcement of” the Mandate’s requirements. *Id.*

With regard to the substance of the preemption claim, the court found that the Mandate was not preempted by the RFS. “The general law of preemption is grounded in the Constitution’s command that federal law ‘shall be the supreme Law of the Land.’” *Id.* at *9 (internal quotations and citations omitted). “Whether a particular

federal statute preempts state law depends upon congressional purpose,” and “[p]reemptive intent may be indicated through a statute’s express language or through its structure and purpose.” *Id.* “Conflict preemption exists when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.*

The court disagreed with AFPM’s contention that the Mandate conflicts with the RFS. AFPM argued that “Congress, by enacting the RFS, intended to create a flexible market-based credit system in which obligated parties would have ‘unfettered discretion as to where and when to blend biofuels and in what proportion,’” and that “the Minnesota Mandate stands as an obstacle to the execution of this unfettered market-based mechanism and frustrates the means that Congress selected to implement the RFS, because the state law imposes content, geographic and timing restrictions on the blending of biodiesel that restrict obligated parties’ discretion to determine how, where, and when best to blend biodiesel into petroleum diesel.” *Id.* “AFPM also argue[d] that Minnesota Mandate frustrates Congress’s intent to diversify[] the nation’s energy portfolio.” *Id.* at *10 (internal quotations and citations omitted). In considering these arguments, the court first found that neither the text nor the legislative history of the RFS reflected “any indication that Congress intended for obligated parties to have undisturbed compliance flexibility, as AFPM argues,” despite the fact that Congress knew about the Mandate when it enacted the RFS. *Id.* at *10–11. In addition, “the RFS and the Minnesota Mandate regulate entirely different entities”—“[t]he RFS only applies to fuel producers, refiners, and importers, whereas the Minnesota Mandate applies to fuel retailers.” *Id.* at *11. Finally, the court found that the Mandate actually complemented the RFS “because it creates a market for biodiesel,” and “by requiring all gallons of diesel fuel sold at retail to contain a minimum percentage of biodiesel, the Minnesota Mandate generates demand for biodiesel and incentivizes RFS obligated parties to produce, acquire, or blend biodiesel. . . .” *Id.*

Finally, the court granted the defendants' motions for judgment on the pleadings with regard to plaintiffs' MAPA claims, finding that "Defendants are immune from the lawsuit under the Eleventh Amendment," which "bars federal court jurisdiction over state law claims against unconsenting states or state officials when the state is the real, substantial party in interest." *Id.* at *12 (internal quotations and citations omitted). The court reasoned that plaintiffs were "seek[ing] declaratory and injunctive relief against the State Defendants, state officials, based on purported and prospective state law violations, and the State of Minnesota is the real, substantial party in interest." *Id.* at *12. Because Minnesota has not waived immunity, plaintiffs' MAPA claims were barred by the Eleventh Amendment. *Id.*

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CASE LAW HIGHLIGHTS: SOUTHEAST

D.C. DISTRICT COURT CLOSES COURTHOUSE DOOR TO STATE AND INDUSTRY INTERVENORS

Matt Thurlow and Laura Glickman

Environmental Integrity Project v. McCarthy, No. 16-4842 (JDB), 2016 U.S. Dist. LEXIS 159892 (D.D.C. Nov. 18, 2016). On November 18, 2016, the U.S. District Court for the District of Columbia denied motions to intervene brought by the state of North Dakota and oil and gas industry associations (movants) in a citizen suit challenging the Environmental Protection Agency's (EPA) regulations and guidelines for disposal, storage, transportation, and handling of oil and gas waste under the Resource Conservation and Recovery Act (RCRA). *See Env'tl. Integrity Project v. McCarthy, No. 16-4842 (JDB), 2016 U.S. Dist. LEXIS 159892 (D.D.C. Nov. 18, 2016).* The Environmental Integrity Project (EIP) brought suit with other environmental citizens groups (Environmental Plaintiffs) to force EPA to review its RCRA guidelines for oil and gas wastes. The court denied movants' motions to intervene as of right and for permissive intervention under Federal Rule of Civil Procedure 24 (FRCP 24).

Environmental Plaintiffs brought a citizen suit challenging EPA's regulation of oil and gas wastes including EPA's RCRA Subtitle D regulations establishing criteria for classification of solid waste disposal facilities and "open dumping," and EPA's development and implementation of state solid waste management plans. 42 U.S.C. § 6944. Environmental Plaintiffs alleged that EPA had breached its obligation to review and, if necessary, update the Subtitle D classification criteria and state guidelines every three years. *Id.* at *5. Environmental Plaintiffs asked the court to order EPA to issue revisions or review and revise the Subtitle D classification criteria, and review and revise the state solid waste guidelines. *Id.* at *6. North Dakota and the oil and gas associations sought to intervene pursuant to FRCP 24 on the basis that they had critical interests at stake in the litigation, including the costs of implementing new regulations. *Id.* at *6-7.

The D.C. Circuit considers four factors in evaluating whether a party may intervene “as of right” under FRCP 24 including “(1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest; and (4) whether the applicant’s interest is adequately represented by the existing parties.” *Id.* at *7 (citing *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003)). In addition, the party seeking intervention as of right under FRCP 24 must establish that it has Article III standing by showing (1) that the party has suffered “an injury in fact;” (2) a causal connection between the conduct in question and the party’s injury; and (3) that a decision on the merits would provide redress for the injury. *Id.* at *8 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). Finally, FRCP 24 allows permissive intervention that allows “the district court discretion to permit intervention by movants who have a ‘claim or defense’ that shares a ‘common question of law or fact’ with the main action.” Fed. R. Civ. P. 24(b)(1).

In evaluating whether North Dakota and the oil and gas industry associations could intervene as of right, the court skipped the D.C. Circuit’s four-factor test for intervention and immediately turned to whether movants had Article III standing in the case. *Id.* at *9. EPA and Environmental Plaintiffs opposed the movants’ attempt to intervene on the basis that they did not have standing because the pending action can only “result in an order setting a ‘date certain’ by which the EPA must make decisions about its Subtitle D classification criteria and state plan guidelines” and the pending litigation did not address the “substantive content of those decisions.” *Id.* at *11–12. Movants countered that they had standing because Environmental Plaintiffs sought an order “requiring the Administration to issue necessary revisions” under Subtitle D. *Id.* at *12.

The court agreed with Environmental Plaintiffs, in part, because “Plaintiffs, as the masters of their complaint, deny that they are seeking . . . expansive

relief.” *Id.* at *13. According to the court, the case was indistinguishable from other recent D.C. Circuit precedents denying motions to intervene: “[M]ovants have failed to convince the Court that this is more than a case about scheduling, and hence controlled by the Defenders of Wildlife and its progeny.” *Id.* at *14. The court also rejected as “pure speculation” the industry associations’ arguments that if Environmental Plaintiffs prevailed, the court might award additional relief. *Id.* at *15–16. Likewise, the court dismissed the industry associations’ concerns that the litigation might raise substantive legal issues in the future that they might have an interest in as insufficient to confer standing: “Movants do not have standing to participate in this case merely because it relates to their policy goals or because it may create precedent contrary to their preferred interpretation of the law.” *Id.* at *18. The court held that the industry associations also did not have standing because of the potential for “procedural injuries” stemming from the possibility of a compressed notice-and-comment rulemaking schedule. *Id.* at *20–22. Finally, none of the movants had standing on the basis of the possibility of “new and stricter” RCRA regulations because such regulations were only a possibility: “But as of the time being all that exists is the ‘possibility of potentially adverse regulation,’ which does not rise to the level of a concrete and imminent injury-in-fact for purposes of Article III.” *Id.* at *23–24.

The court declined to address whether it was necessary for movants to establish standing in order to obtain permissive intervention under FRCP 24(b) because it denied permissive intervention on other grounds. *Id.* at *25. The court denied permissive intervention on the basis that the case did not concern “the substantive content of federal regulation” and the court therefore did not think movants’ “input will be particularly helpful in achieving the just resolution of the narrower procedural question posed here.” *Id.* at *27. Moreover, the court concluded that the “[m]ovants’ desire to inject their substantive concerns” into the case threatened “to delay resolution of the claims pending between the original parties.” *Id.* Accordingly, the court denied the movants’ motions to intervene under FRCP 24.

GEORGIA DISTRICT COURT HOLDS THAT CAMP LEJEUNE TOXIC TORT CLAIMS ARE BARRED BY NORTH CAROLINA STATUTE OF REPOSE

Matt Thurlow and Laura Glickman

***In re Camp Lejeune North Carolina Water Contamination Litigation*, No. 1:11-MD-2218-TWT, 2016 WL 7049038 (N.D. Ga. Dec. 5, 2016).** On December 5, 2016, in an unpublished opinion, the U.S. District Court for the Northern District of Georgia dismissed claims against the U.S. government by service members and their family members who claim that they were exposed to toxic chemicals while living at Marine Corps Base Camp Lejeune in North Carolina. Applying Eleventh Circuit precedent, and ignoring a conflicting Fourth Circuit decision, the district court held that plaintiffs' claims were barred by North Carolina's 10-year statute of repose. *See In re Camp Lejeune N.C. Water Contamination Litig.*, No. 1:11-MD-2218-TWT, 2016 WL 7049038 (N.D. Ga. Dec. 5, 2016).

The statute of repose at issue, N.C. General Statutes section 1-52(16), bars claims for personal injury more than 10 years from the last act or omission of the defendant giving rise to the cause of action. *Id.* at *2. In 2011, the district court held that CERCLA section 9658 preempted North Carolina's statute of repose, but allowed the U.S. government to file an interlocutory appeal to the Eleventh Circuit. *Id.* Before the Eleventh Circuit heard the appeal, however, the Supreme Court held in an unrelated case that CERCLA section 9658 did not preempt North Carolina's statute of repose. *Id.* (citing *CTS v. Waldburger*, 573 U.S. ___, 134 S. Ct. 2175 (2014)). After the Supreme Court's ruling, the North Carolina legislature amended its statute of repose to exclude any claims filed after June 20, 2014, for personal injury caused by exposure to "water supplied from groundwater contaminated by a hazardous substance, pollutant, or contaminant." *Id.* at *3 (quoting N.C. Stat. Ann. § 130A-26.3). The Eleventh Circuit subsequently found that the statute of repose did not contain an exception for

latent disease, and that the legislature's recent amendment did not apply retroactively to plaintiffs' claims. *Id.* (citing *Bryant v. United States*, 768 F.3d 1378 (11th Cir. 2014)). In a separate, more recent case involving a child's exposure to toxic solvents, the Fourth Circuit—which includes North Carolina—addressed the same statute of repose at issue here. *Id.* (citing *Stahle v. CTS Corp.*, 817 F.3d 96 (4th Cir. 2016)). In *Stahle*, the Fourth Circuit found that North Carolina's statute of repose did not apply to claims arising from disease, and noted its disagreement with the Eleventh Circuit's opinion in *Bryant*. *Id.*

Plaintiffs subsequently moved to transfer the case to North Carolina and argued that the district court should apply *Stahle*, not *Bryant*. The district court denied the motion to transfer, and found that, as a federal district court, it was bound by Eleventh Circuit law. *Id.* at *4. The district court noted that the Fourth Circuit was not the final word on North Carolina law simply because it sits in that state: "The Fourth Circuit—like all federal courts across the country—is charged with making an Erie prediction as to what the highest court of North Carolina would say about North Carolina state law." *Id.* at *4. The Fourth Circuit's decision is not binding on other federal courts of appeal or on North Carolina state courts. *Id.*

Plaintiffs argued that the district court should apply *Stahle* using the "transferee/transferor" theory and because most of the underlying cases in the multidistrict litigation (MDL) were filed in North Carolina. *Id.* at *5. However, the plaintiffs' claims had been brought under the Federal Tort Claims Act, and as such, original federal question jurisdiction and not diversity jurisdiction was the basis of the district court's jurisdiction. *Id.* The rule that the MDL court must apply the law of the transferor forum only applies in diversity actions, and thus was inapplicable here. *Id.* The Federal Tort Claims Act requires the district court to apply "the law of the place where the action or omission occurred." *Id.* at *6 (quoting 28 U.S.C. § 1346(b) (1)). In this case, it is undisputed that all plaintiffs resided in North Carolina at the time they allegedly

were exposed to contaminated water. *Id.* at *7. The district court noted that “the fact that federal law points to state law for its choice of law does not mean that the cause of action arises under state law. This is not a distinction without a difference, as this very case shows. . . . The court does not ignore the fact that—as it turns out—the Eleventh and the Fourth Circuit have reached different conclusions as to the interpretation of North Carolina law to be applied to this federal question under the FTCA.” *Id.* The district court further concluded that “[o]nce the determination was made to put these cases into an MDL assigned to the United States District Court for the Northern District of Georgia, that choice was fixed as to the Eleventh Circuit’s interpretation.” *Id.*

The district court found that, in addition to being barred by North Carolina’s statute of repose, claims by service members that accrued while they were service members were barred by the *Feres* doctrine. *Id.* at *17. Finally, the district court also found that the discretionary function exception applied to whether plaintiffs should have been warned of their exposure to contaminated water, because there were no federal statutes or regulations in place that removed discretion from government actors. *Id.* at *33–34. Accordingly, plaintiffs’ claims were dismissed with prejudice.



Trends is the Section's bimonthly newsletter. In the Jan/Feb 2017 issue, Seth Davis discusses the future for environmental, energy, and resources law in Views from the Chair. Also: LNG exports, Desert Renewable Energy Conservation Plan, Superfund mega-sites, Water and Spring Conferences, In Brief, and People on the Move.

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NORTH CAROLINA DISTRICT COURT HOLDS THAT CHANGES IN U.S. FISH AND WILDLIFE SERVICE MANAGEMENT OF RED WOLVES VIOLATED ESA AND NEPA

Matt Thurlow and Laura Glickman

***Red Wolf Coalition v. U.S. Fish and Wildlife Service*, No. 2:15-CV-42-BO, 2016 WL 5720660 (E.D.N.C. Sept. 28, 2016).** On September 28, 2016, in an unpublished opinion, the U.S. District Court for the Eastern District of North Carolina granted a request for a preliminary injunction to prevent the U.S. Fish and Wildlife Service (USFWS) from authorizing or conducting the take of wild red wolves on private property except where the wolf has been demonstrated to be a threat to humans, pets, or livestock. *Red Wolf Coal. v. U.S. Fish and Wildlife Serv.*, No. 2:15-CV-42-BO, 2016 WL 5720660 (E.D.N.C. Sept. 28, 2016).

The red wolf was once common in the eastern and southern United States, but was designated as endangered in 1967 under the precursor to the ESA and declared extinct in the wild by 1980. *Id.* at *1. Under section 10(j) of the Endangered Species Act (ESA), four pairs of red wolves were released in 1987 as an experimental population in the Alligator River National Wildlife Refuge. *Id.*

Section 4 of the ESA requires that the red wolf rules be carried out in a way that conserves the species. *Id.* at *5. Section 7 requires each federal agency to consult with the Secretary of the Interior to ensure that agency action is not likely to threaten the continued existence of any species listed as threatened or endangered under the ESA. *Id.* Plaintiffs’ ESA claims centered on their allegation that, prior to 2014, USFWS interpreted its red wolf rules to allow only for the authorized take of “problem wolves” that had been demonstrated to be a threat to pets or livestock or had exhibited inappropriate behavior such as tolerance of people. *Id.* Plaintiffs allege that, beginning in 2014, USFWS shifted its management of the red wolf population in response to pressure from the North Carolina Wildlife Commission and local landowners who opposed the red wolf program.

Id. In 2015, USFWS announced plans to halt both the reintroduction of red wolves in the area and its adaptive management program to prevent red wolf-coyote hybridization. *Id.*

The court held that plaintiffs sufficiently demonstrated that USFWS' actions after 2014 "fail to adequately provide for the protection of red wolves and may in fact jeopardize the population's survival in the wild in violation of Sections 4 and 7 of the ESA." *Id.* at *6. USFWS' shift in its interpretation of the red wolf rules had increased the number of intended and unintended mortalities. *Id.* As an example, USFWS authorized the legal take of a red wolf because the owner of the land on which the red wolf was found refused to allow USFWS to enter the property to capture the animal. *Id.* The court also noted that after growing steadily since reintroduction, the wild red wolf population had dropped by approximately half since November 2013. USFWS could offer no alternative explanation for the decrease besides plaintiffs' suggestion that the shift in management and rule interpretation was responsible for the change. *Id.* For these same reasons, the court also held that USFWS' revisions to its interpretation of the red wolf rules "are likely to have a significant effect on the red wolf population, and as defendants have failed to conduct any assessment of its policy changes plaintiffs are likely to succeed on their [National Environmental Policy Act] NEPA claim." *Id.* at *7. The court further held that plaintiffs had met their burden for a preliminary injunction because they had shown irreparable harm, and that the balance of equities and public

interest weigh in favor of issuing the preliminary injunction. *Id.* at *8.

Finally, the court denied USFWS' motion to prohibit discovery outside of the administrative record, but granted its motion to apply the Administrative Procedure Act's (APA) arbitrary and capricious standard. *Id.* at *3. On the first issue, the court noted that plaintiffs had not challenged the red wolf regulations themselves; instead, plaintiffs challenged the way in which USFWS interpreted and implemented those regulations under the ESA's citizen suit provision. *Id.* Citing Ninth Circuit case law, the court found that limiting its review to the administrative record may not provide a sufficient basis upon which to evaluate USFWS' actions. *Id.* at 4. On the second issue, the court found that the APA's arbitrary and capricious standard applied because the ESA and NEPA do not provide standards for review. *Id.* at *4.

In sum, the court granted plaintiffs' motion for a preliminary injunction, permitted discovery outside the scope of the administrative record, and found that the APA's arbitrary and capricious standard applied.

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The logo for the American Bar Association's 2017 Annual Meeting. It features a stylized red and green geometric shape on the left. The text "AMERICAN BAR ASSOCIATION" is in black, "2017 ANNUAL MEETING" is in large red letters, and "AUGUST 10-15 • NEW YORK CITY" is in black. A red box on the right contains the text "SAVE THE DATE" in white. The American Bar Association logo is at the bottom right.

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CASE LAW HIGHLIGHTS: NORTHEAST

N.J. FEDERAL JUDGE DISMISSES WITHOUT PREJUDICE MERCEDES “DEFEAT DEVICE” CLASS ACTION FOR LACK OF STANDING

Steven German

In re Mercedes-Benz Emissions Litig., No. CV 16-881, 2016 WL 7106020 (D.N.J. Dec. 6, 2016).

On December 5, 2016, a federal judge in Newark dismissed a lawsuit by Mercedes-Benz owners alleging their clean diesel vehicles used “defeat devices” to cheat on emissions tests, finding that the plaintiffs lacked Article III standing, but granting leave to replead the case. U.S. District Judge Jose Linares held that the plaintiffs failed to meet the “traceability” prong of standing because their complaint “does not contain sufficient facts to allege that plaintiffs’ injuries were fairly traceable to any of defendants’ representations.” *In re Mercedes-Benz Emissions Litig.*, No. CV 16-881, 2016 WL 7106020 *8 (D.N.J. Dec. 6, 2016).

Plaintiffs alleged that Mercedes unlawfully misled consumers into purchasing certain “clean diesel” vehicles by misrepresenting the environmental impact of these vehicles. According to plaintiffs, Mercedes’ advertisements, promotional campaigns, and public statements representing that the vehicles had high fuel economy and lower emissions than comparable diesel vehicles were false and misleading, thereby denying them the “benefit of the bargain.” They brought claims for breach of contract, fraudulent concealment, and violations of consumer protection laws.

Defendants moved to dismiss on several grounds, including plaintiffs’ failure to allege the existence of any defect in the emissions profile of the make and model of the vehicles plaintiffs owned or leased; that plaintiffs’ allegations as to damage were not particularized, speculative, and not plausibly pled and that plaintiffs failed to show that their injury was fairly traceable to defendants’ conduct.

To have standing, plaintiffs must first have suffered an “injury-in-fact”—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—i.e., the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). At the pleading stage, although general factual allegations of injury resulting from the defendant’s conduct may suffice, the complaint must still clearly and specifically set forth facts sufficient to satisfy Article III.

The court found that plaintiffs adequately pled an injury-in-fact by pleading that the vehicles did not live up to the claims made by defendants. Plaintiffs did not, however, adequately plead traceability.

Defendants argued that plaintiffs failed to identify any specific misrepresentations they relied upon in purchasing or leasing their vehicles, or that any of the advertisements related to the specific models plaintiffs purchased or leased, prerequisites of standing under plaintiffs’ “Benefit of the Bargain” theory.

Plaintiffs countered that they need not demonstrate their reliance on specific advertisements because they each pled (i) that they relied on pervasive advertisements touting the benefits of the clean diesel engines and, (ii) but for those advertisements, plaintiffs would not have purchased those vehicles.

The court found that plaintiffs adequately pled an injury-in-fact by pleading that the vehicles did not live up to the claims made by defendants. Plaintiffs did not, however, adequately plead traceability.

While the court agreed that plaintiffs did not need to identify the specific advertisements they relied

upon, their vague reference to “advertisements and representations” was “insufficient to prove reliance (or ‘causation’) on any alleged misrepresentations.” *Id.* at 7. Citing *In re Gerber Probiotic Sales Practices Litig.*, 2013 WL 4517994 (Aug. 23, 2013), the court found that although plaintiffs referenced numerous specific advertisements throughout the complaint, no plaintiff alleged that she actually relied on any those specific advertisements in deciding to lease or purchase her vehicle, thereby failing to plead the causative link:

Plaintiffs allege that they purchased or leased their vehicles “in part, because of the BlueTEC Clean Diesel system, as represented through advertisements and representations made by Mercedes. Plaintiff recalls that the advertisements and representations touted the cleanliness of the engine system for the environment and the efficiency and power/performance of the engine system.” . . . Plaintiffs have not alleged that they actually viewed any category of advertisements—i.e., Defendants’ website, press releases, etc.—that contained the alleged misrepresentations. Accordingly, the Court finds that the [class action complaint] does not contain sufficient facts to allege that Plaintiffs’ injuries were fairly traceable to any of Defendants’ representations.

The court did not address the “redressability” requirement.

DISTRICT OF NEW HAMPSHIRE DENIES REMAND UNDER CAFA’S LOCAL CONTROVERSY EXCEPTION

Steven German

***Brown v. Saint-Gobain Performance Plastics Corp.*, No. 16-CV-242-JL, 2016 WL 6996136 (D.N.H. Nov. 30, 2016).** On November 30, 2016, the United States District Court for the District of New Hampshire denied plaintiffs’ motion to remand two related class action lawsuits alleging that Saint-Gobain Performance Plastics and its

Merrimack, New Hampshire, facility general manager, Gwenael Busnel, contaminated water wells with the chemical perfluorooctanoic acid (PFOA).

The lawsuits were originally filed in New Hampshire state court. One lawsuit was brought on behalf of “[a]ll persons who own residential properties with private groundwater wells within two miles of the property boundary of the Saint-Gobain site,” and sought damages for diminution in property value. The other lawsuit was brought on behalf of “[a]ll persons who reside or have resided on residential properties with private groundwater wells within two miles of the property boundary of the Saint-Gobain site,” and sought medical monitoring relief. Defendants **removed the case** to federal court under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2) (CAFA). Plaintiffs moved to remand, citing CAFA’s local controversy exception.

CAFA provides federal courts with jurisdiction over class actions where (1) there are at least 100 members of the putative class; (2) in the aggregate, the amount in controversy exceeds \$5 million; and (3) any class member is a citizen of a state different from any defendant. While many large-scale class actions meet the above requirements, CAFA contains exceptions that allow certain types of class actions—those which are more local in nature—to remain in state court. Specifically, the “Home State” exception provides that federal courts *may* decline federal jurisdiction where (1) between one-third and two-thirds of the class members are from the forum state; and (2) “the primary defendants” are from the state. 28 U.S.C. § 1332(d)(3). Additionally, the “Local Controversy” exception provides that federal courts *shall* decline to exercise jurisdiction where more than two-thirds of the class members are from the forum state; and *either* the primary defendants are from the state *or* (if the primary defendants are not from the state) all of the following three conditions are met: (1) a significant defendant is from the state; (2) the principal injuries were incurred in-state; and (3) “during the 3-year period preceding the filing of that class action, no

other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.” 28 U.S.C. § 1332(d)(4).

Plaintiffs argued that the local controversy exception applied because Busnel is a New Hampshire citizen; the pollution originated in New Hampshire and the principal injuries were to people and properties in New Hampshire.

Defendants conceded that plaintiffs likely satisfied most of the local controversy elements, but that several cases alleging similar facts were filed in New York and Vermont during the three years prior to these actions, thereby defeating plaintiffs’ motion to remand.

Plaintiffs responded that those cases did not involve “similar allegations” because the New York and Vermont cases did not address any harm caused in New Hampshire by the Merrimack plant. The district court held that plaintiffs failed to demonstrate that the local controversy exception applied.

As a preliminary matter, the court held that jurisdiction is determined from the complaint as it stood at the time of removal, meaning the plaintiffs could not rely retroactively on the allegations in their second amended complaint to establish the factual basis for a local controversy. *Brown v. Saint-Gobain Performance Plastics Corp.*, 2016 WL 6996136, at *4 (D.N.H. Nov. 30, 2016).

The court then found that the cases involved sufficiently similar allegations to defeat remand: “[T]he statute does not require . . . that the claims in both cases be identical or nearly identical, nor that they arise out of the same occurrence or under the law of the same state, nor that the plaintiffs be citizens of the same state.” *Id.* at 4. The court found that the claims in each of the actions arose from “effectively the same conduct,” “albeit conduct affecting different plaintiffs and different localities. This renders the factual allegations sufficiently similar to meet this requirement.” *Id.*

Although this ruling disposed of plaintiffs’ motion, the court, “for the sake of thoroughness,” considered the remaining requirements of the local controversy exception.

The classes in each of the two class actions differed, and these differences informed the court’s analysis. For example, the court found strong evidence that the class of current property owners would satisfy the requirement that more than two-thirds of the members of the proposed class are citizens of New Hampshire. But a “murkier” picture existed for the medical monitoring class because plaintiff offered no evidence demonstrating how many of these class members no longer resided in New Hampshire.

The court reached similar conclusions with respect to the local defendant criteria. Plaintiffs named Busnel as the local defendant. The claims against the manufacturer dated back to 2000, but Busnel did not become plant manager until 2012. The court therefore found that Busnel’s alleged conduct was a “substantial basis” for the property damage claims of current property owners, but not necessarily for the medical monitoring claims of former residents who moved away before he became plant manager in 2012. *Id.* at 7.

For the same reasons, the court found that the property damage class sought “significant relief” from both defendants, but that plaintiffs had not established that the medical monitoring class also sought significant relief from Busnel because the class period might have begun before he became plant manager. In reaching this conclusion, the court rejected plaintiffs’ argument that the “significant relief” requirement depends on a defendant’s ability to pay. Acknowledging disagreement in the courts on that issue, the court concluded that the statute unambiguously focuses on whether significant relief is sought from the local defendant, not on whether the defendant has the capacity to satisfy a judgment. *Id.* at 8.

NEW JERSEY TOWNSHIP FILES \$1 BILLION LAWSUIT AGAINST DUPONT ALLEGING PERSISTENT ISRA VIOLATIONS

Steven German

Carneys Point Township v. E.I. DuPont De Nemours and Company, and Sheryl A. Telford, Superior Court of New Jersey Chancery Division, Salem County (Civ. No. C-13-16). The complaint is available at <http://courthousenews.com/wp-content/uploads/2016/12/dupont-min.pdf>.

On December 12, 2016, New Jersey's Carneys Point Township filed a lawsuit against chemical giant DuPont and its Director of the DuPont Corporate Remediation Group in New Jersey Superior Court, alleging violations of New Jersey's Industrial Site Recovery Act (ISRA). The Township asked the court to award it over \$1 billion in daily penalties, disgorgement of economic gains and the establishment of a Remediation Trust Fund.

The lawsuit alleges that DuPont's Chambers Works, where DuPont manufactured dyes, synthetic plastic, and rubber, released over 100 million pounds of toxic chemicals into the water and ground from the late 19th century until the early 1970s. The lawsuit alleges that DuPont spun off its Chambers Works property in an attempt to avoid more than \$1 billion needed to clean up the pollution. Chambers Works was among a group of properties transferred to another company, Chemours, in 2014 and 2015 ahead of a proposed merger with Dow Chemical. According to the suit, the transfer was carried out to avoid cleanup liability and to make DuPont a "more attractive merger partner" to Dow. The transfer shifted most of DuPont's environmental liabilities to Chemours, according to the lawsuit. The suit alleges that DuPont failed to remediate the property before the transfer in violation of ISRA. Saddled with the massive liability related to the cleanup, Chemours, which is far smaller than DuPont, would likely go bankrupt, leaving Chambers Works "a rusting industrial nightmare that the residents of New Jersey will be left to clean up without the funds to do so."

According to the lawsuit, ISRA requires the owners and operators of contaminated industrial property to remediate that property prior to (1) the transfer of the property; (2) the transfer of the assets and stock of the industrial business; or (3) the merger of the industrial business, among other "ISRA Triggers." If the remediation cannot be completed before the transfer of ownership, ISRA alternatively allows owners and operators to provide the New Jersey Department of Environmental Protection (NJDEP) with the calculated cost to remediate the site and to post that amount as a remediation funding source (RFS). The owners and operators can then complete their business transfer prior to remediation and the RFS can be used to perform the remediation thereafter. Failure to comply may result in daily penalties until compliance is achieved and the owners and operators must disgorge the economic gain realized as a result of their ISRA violations. Corporate officers and managers also face personal liability for penalties for knowingly violating ISRA.

Carneys Point says the merger triggered ISRA, which required DuPont to clean up its hazardous waste site before transferring the property or stock or entering into a merger agreement. It claims that DuPont failed to comply with ISRA and that the Director of the DuPont Corporate Remediation Group never told New Jersey regulators in a 2015 letter after the spinoff that the company had transferred the real estate deed, which would have triggered ISRA. By failing to act and omitting that information, DuPont hoped to "saddle the cost of cleaning up the site on the state of New Jersey and residents of Carneys Point in order for DuPont to save expenses and reap profits," the Township said.

Steven German is a partner at German Rubenstein LLP in New York where he handles environmental and toxic tort matters. He also teaches environmental and toxic tort litigation at Pace Law School. He can be reached at www.germanrubenstein.com.

NEW MEXICO INITIATES LEGAL ACTION AGAINST COLORADO REGARDING GOLD KING MINE WATER DISCHARGE INCIDENT

Malinda Morain

The Gold King Mine discharged approximately three million gallons of acid mine water on August 5, 2015, some of which flowed downstream along the Animas and San Juan Rivers from southwest Colorado through New Mexico. According to the Environmental Protection Agency's (EPA) fact sheet on the incident, the discharged waters contained heavy metals, including aluminum, lead, zinc, cadmium, copper, iron, and manganese, which precipitated from the mine shafts due to the acidic nature of the mine water.

Following the discharge, the state of New Mexico initiated a legal action against the state of Colorado. The state of New Mexico's June 20, 2016, motion for leave to file a bill of complaint against the state of Colorado alleged violations of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the Resource Conservation and Recovery Act (RCRA), and for actions under common law. New Mexico's suit seeks compensatory, consequential, and punitive damages as well as declaratory relief requiring the state of Colorado to abate the alleged public nuisance of the Upper Animas Mining District and Animas River in Colorado. New Mexico's motion requests that the Supreme Court exercise its jurisdiction to hear controversies between states under 28 U.S.C. § 1251(a).

The Parties' Briefs

New Mexico's motion asserts that the Gold King Mine incident is on par with other intrastate contamination cases in which the Supreme Court exercised its exclusive jurisdiction, such as *New York v. New Jersey*, 256 U.S. 296 (1921) and *Missouri v. Illinois*, 180 U.S. 208 (1901). In both of those cases, the Supreme Court exercised its jurisdiction over suits between two states involving the discharge of

sewage, which allegedly impacted the health of the citizens of the plaintiff state.

Interestingly, New Mexico also proposes the appointment of a Special Master in the U.S. District Court for the District of New Mexico for all discovery and pre-trial proceedings in the prospective Supreme Court case. The District of New Mexico is the current forum for another case brought by the state of New Mexico against EPA, the contractor Environmental Restoration LLC, and the owners of the Gold King and Sunnyside Mines regarding the Gold King Mine incident.

The state of Colorado opposes New Mexico's motion. In its response, Colorado asserts that the original and exclusive jurisdiction of the Supreme Court to hear "all controversies between two or more States" is extremely limited, and requests that the Court decline to exercise jurisdiction here. 28 U.S.C. § 1251(a); *see also* Art. III, § 2, cl. 2 (granting jurisdiction to the Supreme Court in all cases in which a state is a party). The exercise of the Supreme Court's jurisdiction to hear cases involving two states is often described as being appropriate only in cases of *casus belli*, that is, "an act or circumstance that provokes or justifies war." *Black's Law Dictionary* (7th ed.). Colorado asserts that is not New Mexico's case.

Colorado also asserts that the Supreme Court's jurisdiction clashes with jurisdictional provisions of CERCLA and RCRA granting "exclusive original jurisdiction over all controversies" arising under those statutes to United States district courts for the district in which the alleged violation occurred. Anticipating this argument, New Mexico's motion argues that the Supreme Court's jurisdiction "trumps" the district court's jurisdiction over these claims, and asserts that the congressional grant of exclusive jurisdiction to the district courts under CERCLA and RCRA cannot deprive the Supreme Court of jurisdiction over state-versus-state controversies.

Colorado further asserts that New Mexico's public nuisance and negligence claims have been displaced by the comprehensive federal statutory

frameworks of the Clean Water Act, CERCLA, and RCRA, and that the issues raised in New Mexico's claims will be resolved in New Mexico's federal district court case.

Colorado also requests that if the Supreme Court grants New Mexico's motion, the Court set a schedule for Colorado to file a dispositive motion because, it alleges, each of New Mexico's claims suffers from "significant legal flaws," which are case-dispositive. Finally, Colorado asserts that New Mexico's request to appoint a Special Master in the District of New Mexico is unprecedented and should be denied as unfair and contrary to the design of the Supreme Court's original jurisdiction as a neutral forum.

In its reply, New Mexico asserts that Colorado's assertions as to the strength of New Mexico's claims are irrelevant, and that the only issue properly before the Court is jurisdictional. It reasserts that New Mexico's citizens have suffered harms, and that no alternative forum exists to address its claims against Colorado.

Supreme Court Conference Consideration

In November, the case was distributed for conference, and the Supreme Court subsequently requested the Solicitor General exercise his "gatekeeper" role and file a brief expressing the views of the United States regarding the case. *See* Supreme Court Order List (Nov. 28, 2016). More often than not, the Supreme Court follows the recommendation of the Solicitor General.

Related Litigation

In addition to New Mexico's lawsuits, the Navajo Nation has also filed a lawsuit against EPA, its contractor Environmental Restoration LLC, as well as the owners of the Gold King and nearby Sunnyside Mines.

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MICHIGAN ORDERED TO PROVIDE DOOR-TO-DOOR BOTTLED WATER TO FLINT RESIDENTS

Ameri R. Klafeta

Late last year, a federal court took the unprecedented step of ordering the state of Michigan to deliver bottled water door-to-door to certain households served by the Flint water systems. *See Concerned Pastors for Social Action v. Khouri*, No. 16-10277, 2016 WL 6647348 (E.D. Mich. Nov. 10, 2016), *motion to stay denied*, No. 16-2628, 2016 WL 7322351 (6th Cir. Dec. 16, 2016). The dispute brings to the forefront the tension in allocating resources between short-term relief and long-term solutions to address lead in Flint's water.

Ongoing Issues Preventing Access to Safe Water for All Residents

As part of the remediation efforts in Flint, water filters and cartridges have been made available to residents throughout the city. Despite these ongoing efforts, some residents state that they continue to lack access to safe drinking water. For example, plaintiffs in the pending litigation complain that filters may not be installed properly, either because of problems with faucets and pipes or issues such as inability to read installation instructions. *See Concerned Pastors*, 2016 WL 6647348, at *11. In addition, Flint households may have been given incorrect instructions about the need to change cartridges in the filters or how to maintain them properly. *Id.*

Some Flint residents also are unable to access bottled water that has been made available to them at various points of distribution. For example, a Flint resident testified at the evidentiary hearing that she lives with her 40-year-old disabled son and does not have a car. *Id.* at *13. She is able to carry only one case of bottled water at a time on a bus, which may last only half a day. *Id.* Water deliveries to her home are infrequent, and her efforts to

obtain more frequent deliveries—by calling the designated phone number—were unsuccessful. *Id.* Although the resident had a water filter installed, her faucet broke and she was unaware that she could get free assistance to fix it. *Id.* Another Flint resident, a 67-year-old veteran with serious medical conditions, testified that he was unable to carry bottled water up his front steps. *Id.* at *14. He tosses the bottles up the steps and his daughter, who also suffers from medical problems, picks them up and carries them into the house. *Id.*

The District Court's Decision

On November 10, 2016, after an evidentiary hearing, the Eastern District of Michigan issued a preliminary injunction requiring water delivery to all Flint households that meet certain criteria. *See Concerned Pastors*, 2016 WL 6647348, at *17. The district court found the factors for a preliminary injunction—likelihood of success on the merits, irreparable injury absent an injunction, no harm to others from an injunction, and the public interest—weighed in favor of relief. Calling the state's efforts to provide safe water “commendable,” it nonetheless found that plaintiffs credibly showed that the distribution network is “not completely effective.” *Id.* at *13.

With respect to likelihood of success on the merits, the district court found sufficient plaintiffs' claims of violations of the federal Safe Drinking Water Act's (SDWA) Lead and Copper Rule corrosion control and monitoring requirements. *Id.* at *4–6. It also held that the injunction was properly directed to state of Michigan officials because state emergency managers acted in place of local government. *Id.* Accordingly, the state would have significant involvement with compliance.

The Flint plaintiffs also satisfied the irreparable harm factor, despite defendants' evidence of the efforts that have been made to bring safe drinking water to Flint households. Pointing to plaintiffs' anecdotal evidence demonstrating the

insufficiency of those efforts, the district court pointed out that “Flint has been struggling to access safe drinking water for the better part of a year.” *Id.* at *15.

As to the third factor for injunctive relief—harm to others—the Flint defendants argued that requiring door-to-door water delivery would cause great financial harm. They estimated a cost of \$9.4 million per month and argued that the benefit was not worth the cost. *Id.* at *15. The district court found this unpersuasive, noting that \$100 million of state money appropriated to Flint remains unspent. *Id.* The court also noted that defendants could alleviate the stated monetary burden by monitoring and verifying the effectiveness of filters installed in residents' homes. *Id.*

Finally, the district court rejected defendants' argument that granting the preliminary injunction would result in resources being allocated away from restoring the water system. *Id.* at *16. The defendants argued that restoration is the most critical priority, and taking money and personnel away from it would prolong the water crisis. The district court held that there was no evidence that restoration would be halted. Further, it held that in any event, “it is in the public interest to address the immediate health and safety needs of residents before addressing the long-term needs.” *Id.*

The preliminary injunction ordered the state to provide door-to-door bottled water delivery unless a household (1) affirmatively opted out, (2) refused to permit installation and maintenance of a filter, (3) verified the existence of a properly installed and functioning filter, or (4) was unoccupied. *Id.* at *17. The district court denied the defendants' motion to stay the injunction. *See Concerned Pastors for Social Action v. Khouri*, No. 16-10277, 2016 WL 7030059 (E.D. Mich. Dec. 2, 2016).

The Sixth Circuit's Opinion

In a per curiam 2-1 order, the Sixth Circuit rejected defendants' arguments that the injunction was overbroad and lacked evidentiary support. *See Concerned Pastors*, 2016 WL 7322351, at *1.

It held that the door-to-door delivery of water was not the central component of the injunctive relief. Rather, it is only ordered where homes lack a proper filter. *Id.* The Sixth Circuit also characterized the claims of the monthly expense of bottled water—which on appeal defendants stated was \$10.5 million per month—as “disingenuous.” *Id.* The Sixth Circuit concluded that this calculation greatly overestimated the number of homes that would require either verification of filters or water delivery.

The Sixth Circuit expressed concern that, without the injunction, it was unclear how the state would ensure that every resident has safe drinking water. *Id.* at *2. It concluded that “[a]lthough there may be no known precedent for the door-to-door delivery of bottled water, there is also no precedent for the systematic infrastructure damage to a water delivery system that has caused thousands of people to be exposed to poisonous water.” *Id.*

Sixth Circuit Judge Jeffrey Sutton dissented. He voiced concern that the injunction was not tailored to the identified harm because it did not address monitoring or sampling methods—which was the SDWA regulatory violations at issue. *Id.* at *5. Judge Sutton concluded that “[a]n order unconnected to ongoing violations of federal law that prioritizes the wrong remedies—at a cost of \$10.5 million a month—will do more harm than good for the community.” *Id.* at *7.

The State’s Compliance with the Injunction

The parties’ district court fight continues—now with respect to compliance with the injunction. In addition to moving to vacate the injunction, the defendants have submitted status reports in which they discuss the significant logistical difficulties of and expense incurred with compliance. In response to these submissions, plaintiffs filed an emergency motion to force the state to begin complying with the injunction. The district court has scheduled a hearing on defendants’ motion to vacate the injunction for January 2017.

Update on Federal Aid to Flint

Before breaking for the election, Congress left in limbo two conflicting bills that would have provided federal aid to Flint. In December 2016, Congress finally approved legislation that will provide \$170 million to address concerns regarding lead in drinking water, including \$120 million of aid to Flint. President Obama signed the bill into law, along with the government’s end-of-year spending bill that appropriated the funds. *See* Water Infrastructure Improvements for the Nation, Pub. L. No. 114-322 (2016); Further Continuing and Security Assistance Appropriations Act, 2017, Pub. L. No. 114-254 (2016).

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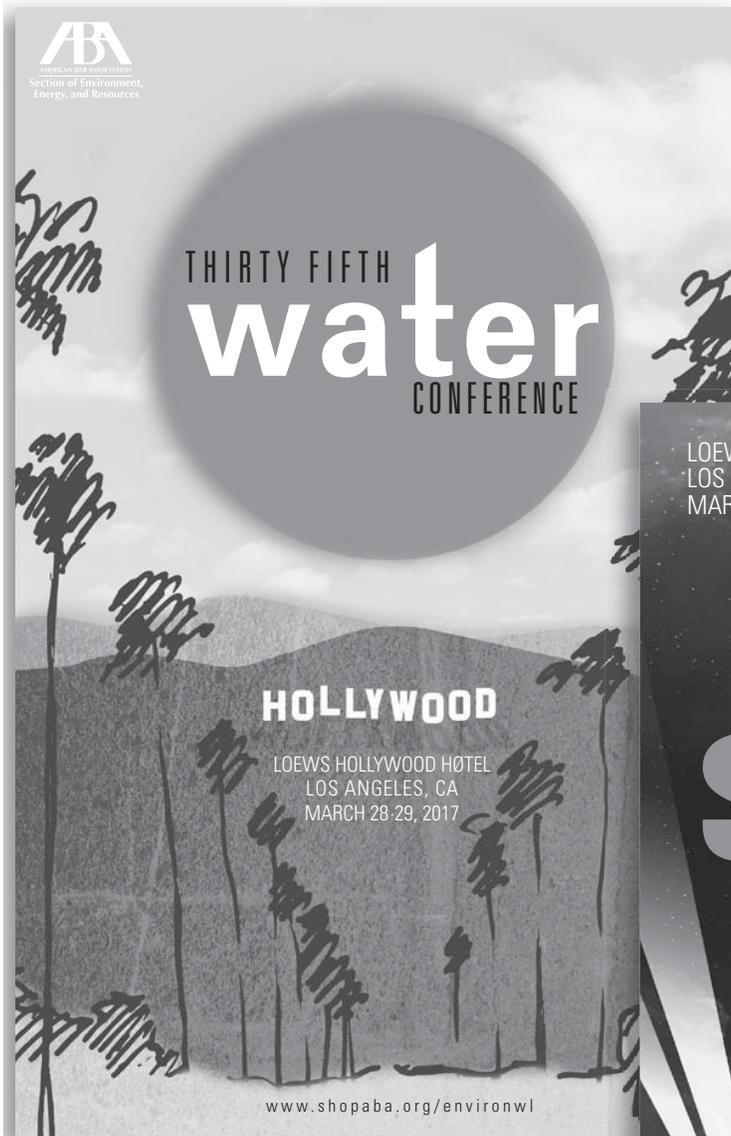
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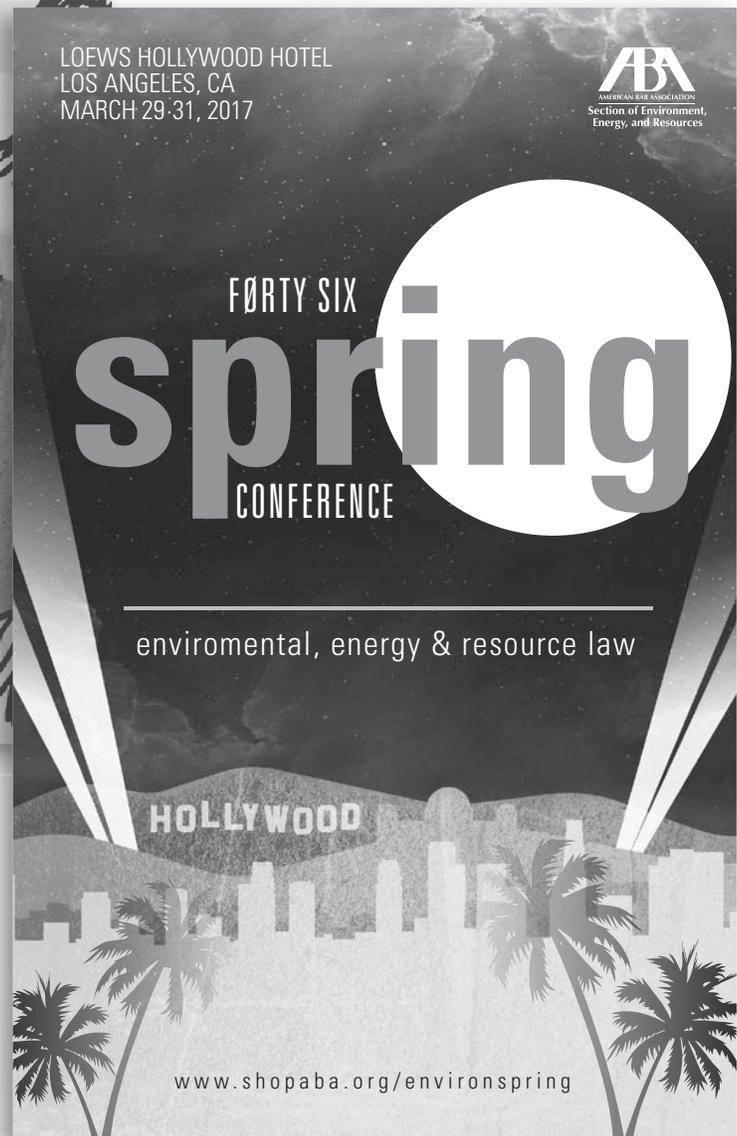
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