

Environmental Litigation and Toxic Torts Committee Newsletter

Vol. 18, No. 3

May 2017

MESSAGE FROM THE CHAIRS

Peter Condron and Shelly Geppert

We are kicking off the second quarter of 2017 by highlighting the environmental cases coast-to-coast that should be on your radar. We start out West with a Tenth Circuit decision on CERCLA contribution claims and a California Court of Appeal ruling regarding some stinky neighbors, both addressed by Whitney Jones Roy and Alison Kleaver. Moving to the Midwest, Sonia Lee discusses two putative class action lawsuits, and Ameri Klafeta updates us on a recent settlement relating to the lead detected in Flint's drinking water. In the Mid-Continent, we look at a case filed under the Clean Water Act citizen suit provision and a Southern District of Mississippi case addressing numerous tort claims, both summarized by Lisa Cipriano. Turning to the Southeast, Matt Thurlow and Laura Glickman examine a Fourth Circuit decision affirming the conviction of former Massey Energy Company CEO Donald Blankenship; a Fourth Circuit decision concerning the Commonwealth of Virginia's ban on uranium mining and interaction with the federal Atomic Energy Act; and a recent decision by the U.S. District Court for the District of Columbia denying a preliminary injunction sought by the Cheyenne River Sioux Tribes in the ongoing battle over the Dakota Access Pipeline. Finally, Steven German reviews a New Jersey Appellate Division decision holding that a potential contributor of contamination can compel other potential contributors to share in the costs of environmental investigations; a putative class action suit filed in New Jersey Superior

Court alleging that historic smelting operations caused widespread contamination; and a study released by the Pennsylvania Department of Environmental Protection linking earthquakes to fracking activities. In addition, Charles Dennen offers readers an in-depth look at CERCLA actions brought against the federal government.

We also invite you to catch up on programming you may have missed, including our podcast (and related PowerPoint) on the Dakota Access Pipeline, featuring Troy A. Eid, and our program call updating you on the National Flood Insurance Program and proposed CERCLA financial assurance regulations. You can access both these programs and accompanying materials on our Committee webpage. Our Section has also taken on the colossal task of identifying the legislative, regulatory, and judicial developments pertaining to all things environmental in its *Transition of Administrations Tracker*. Be sure to bookmark the tracker, accessible on our Section's homepage, which is routinely updated with the latest information.

Peter Condron is a partner in the Washington, D.C., office of Sedgwick LLP. His practice focuses on environmental, toxic tort, product liability, and energy litigation. He may be reached at peter.condron@sedgwicklaw.com.

Shelly Geppert is an attorney at Eimer Stahl LLP in Chicago. Shelly concentrates her practice in civil litigation with a focus on environmental, products liability, and toxic tort matters. She may be reached at sgeppert@eimerstahl.com.

Environmental Litigation and
Toxic Torts Committee Newsletter
Vol. 18, No. 3, May 2017
Lisa Gerson and Stephen Riccardulli,
Editors

In this issue:

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

Case Law Highlights: Mountain/West Coast
Whitney Jones Roy and
Alison N. Kleaver.....3

Case Law Highlights: Midwest
Sonia H. Lee6

Case Law Highlights: Mid-Continent
Lisa Cipriano8

Case Law Highlights: Southeast
Matt Thurlow and Laura Glickman10

Case Law Highlights: Northeast
Steven German16

Flint Plaintiffs Obtain Unprecedented Settlement for Water Line Replacement
Ameri R. Klafeta.....20

A Valuable Contribution: CERCLA Cost Recovery and Contribution against the Federal Government
Charles J. Dennen.....22

About the Editors

Lisa Gerson is a partner in the New York office of McDermott Will & Emery LLP. Her practice focuses on product liability, environmental, toxic tort, and commercial litigation. She may be reached at lgerson@mwe.com.

Stephen Riccardulli is a partner in the New York office of Norton Rose Fulbright. His practice focuses on product liability, environmental, and toxic tort litigation. He may be reached at stephen.riccardulli@nortonrosefulbright.com.

**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

CALENDAR OF SECTION EVENTS

June 15, 2017
EBA Energizer: A Legal Review of State Incentives for Nuclear Power
Washington, DC
Primary Sponsor: Energy Bar Association

October 18-21, 2017
25th Fall Conference
Baltimore Waterfront Marriott
Baltimore, MD

April 16-18, 2018
36th Water Law Conference
Hilton Bonnet Creek
Orlando, FL

April 18 - 20, 2018
47th Spring Conference
Hilton Bonnet Creek
Orlando, FL

October 17- 20, 2018
26th Fall Conference
Marriott Marquis San Diego Marina
San Diego, CA

**For full details, please visit
www.ambar.org/EnvironCalendar**

Copyright © 2017. American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. Send requests to Manager, Copyrights and Licensing, at the ABA, by way of www.americanbar.org/reprint.

Any opinions expressed are those of the contributors and shall not be construed to represent the opinions or policies of the American Bar Association; the Section of Environment, Energy, and Resources; or the editors of the Environmental Litigation and Toxic Torts Committee Newsletter.

CASE LAW HIGHLIGHTS: MOUNTAIN/ WEST COAST

TENTH CIRCUIT FINDS CERCLA CONTRIBUTION CLAIM NOT BARRED BY BANKRUPTCY APPROVAL OF A SETTLEMENT ESTIMATING LIABILITY FOR THE SITE

Whitney Jones Roy and Alison N. Kleaver

Asarco LLC v. Noranda Mining, Inc., 844 F.3d 1201 (10th Cir. 2017). In a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) contribution action, the Tenth Circuit ruled that a mining company, whose liability for a contaminated site had been resolved in a settlement agreement approved by the bankruptcy court, could still seek contribution against other potentially responsible parties (PRPs), claiming that it overpaid its fair share of cleanup costs for the site. *Id.* at 1208. The Tenth Circuit also determined that contribution claims are permitted even against a party to a prior consent decree so long as the claims were not specifically resolved by the consent decree. *Id.* at 1211–12.

Asarco, a mining, smelting, and refining company, filed an action against Noranda in 2013 seeking contribution under CERCLA for two related sites near Park City, Utah, known as the Lower Silver Creek/Richardson Flat Site (Site), which were contaminated by lead and silver ore mining operations that had taken place at the Site for more than one hundred years. The district court granted Noranda's summary judgment motion in its entirety. *Id.* at 1204. The district court found that judicial estoppel barred Asarco's claims, relying on statements Asarco made years earlier in bankruptcy proceedings concerning its liability for the Site. *Id.* at 1208. The district court also found that a consent decree between Noranda and the Environmental Protection Agency regarding pre-2006 claims at a portion of the Site protected Noranda from liability for Asarco's contribution claim here. *Id.* at 1211. The Tenth Circuit Court of Appeals reversed. *Id.* at 1204.

Asarco filed for Chapter 11 bankruptcy in 2005. Four years later, the bankruptcy court approved a comprehensive settlement agreement in which Asarco agreed to pay \$1.79 billion to resolve numerous claims at contaminated sites, including \$7.4 million to resolve claims at the Site. *Id.* at 1204–05. In reviewing the settlement agreement, the bankruptcy court acknowledged it was bound by two different legal standards: (1) Bankruptcy Rule 9019(a), which directs the court to approve a settlement when it is “fair, equitable, and in the best interests of the estate,” and (2) CERCLA, which requires the court to ensure that settlements are procedurally and substantively fair, “reflect a reasonable compromise of the litigation,” and roughly correlate to a reasonable estimate of the parties' liability. *Id.* The bankruptcy court found the evidence submitted by Asarco demonstrated that the \$7.4 million settlement was fair under both Bankruptcy Rule 9019(a) and CERCLA and approved the settlement. *Id.* at 1206. The bankruptcy court also approved a reservation of rights by Asarco preserving claims against non-settling parties related to the Site. *Id.*

The Tenth Circuit rejected Noranda's first argument that Asarco was judicially estopped from claiming it had overpaid its share of cleanup costs at the Site because Asarco previously told the bankruptcy court that \$7.4 million was a fair and reasonable estimate of Asarco's share of liability at the Site. *Id.* at 1209. Asarco's positions were not clearly inconsistent because Asarco had told the bankruptcy court that the \$7.4 million figure represented Asarco's joint and several liability share, although it failed to artfully articulate this point on one occasion before the bankruptcy court. *Id.* at 1208–09. Furthermore, the settlement could not establish an exact dollar amount for Asarco's liability because settlements before a full trial on the merits are necessarily estimates and account for some uncertainty in the viability of the claims. *Id.* The Tenth Circuit concluded that judicially estopping a party from pursuing contribution claims in the future based upon an estimate of liability for settlement purposes would discourage

settlements and conflict with CERCLA's policy encouraging settlements. *Id.* at 1209.

Additionally, the Tenth Circuit concluded that the bankruptcy court was not duped or otherwise misled by Asarco's statements, noting that Asarco did inform the bankruptcy court that \$7.4 million represented joint and several liability for the Site and that the bankruptcy court specifically permitted Asarco to preserve its contribution rights against other potentially responsible parties. *Id.* at 1209–10. Furthermore, the Tenth Circuit rejected Noranda's argument that allowing the contribution claim would give Asarco an unfair advantage. *Id.* at 1210–11. The court distinguished this situation from those in which a debtor "conveniently" forgets to inform the court of key information because there was no evidence that Asarco attempted to deceive the bankruptcy court. Rather, Noranda's argument was based upon one vaguely worded sentence that Asarco had correctly clarified elsewhere. *Id.*

The Tenth Circuit rejected Noranda's second argument that its prior consent decree with the EPA barred Asarco from seeking contribution. *Id.* at 1211–12. The consent decree barred only those claims against Noranda for the matters specifically identified therein. The Tenth Circuit determined that the claims asserted in Asarco's complaint were different, both geographically and temporally, from the claims resolved in the consent decree, and thus were not barred. *Id.*

Finally, the Tenth Circuit rejected Noranda's third argument that Asarco could not, as a matter of law, establish it overpaid for the Site. *Id.* at 1212. The court concluded that the evidence Asarco submitted to the bankruptcy court for settlement approval did not conclusively determine Asarco's exact share of liability for the Site. Further, the court found that Asarco had raised a genuine issue of material fact and should be permitted to present evidence as to why it overpaid for the Site. *Id.*

CALIFORNIA COURT OF APPEAL REJECTS CITIZENS GROUP NUISANCE CASE REGARDING SEA LION STENCH

Whitney Jones Roy and Alison N. Kleaver

Citizens for Odor Nuisance Abatement v. City of San Diego, 8 Cal. App. 5th 350 (Cal. Ct. App. 2017). The Fourth Appellate District of the California Court of Appeal concluded that the City of San Diego could not be held liable for public nuisance associated with the stench created by sea lions because the City did not create the nuisance.

The lawsuit was asserted by the Citizens for Odor Nuisance Abatement (CONA) after residents and business owners near La Jolla Cove complained of foul and noxious animal waste odors, describing the area as "a place that is beautiful but stinks." *Id.* at 353. The sea lion population at La Jolla Cove has grown exponentially in recent years, resulting in significant sea lion waste buildup on the bluffs. *Id.* The buildup affected local residents and business owners who complained that the noxious odors affected their businesses and property values. *Id.* Although the City's contractor successfully treated and eliminated odors associated with bird guano in the area, the treatment did not resolve the sea lion waste odors. *Id.*

Because the City did not remove the sea lion odor, CONA filed suit in San Diego Superior Court against the City and its former mayor, alleging causes of action for public nuisance, injunctive relief, declaratory relief, and a writ of mandate. *Id.* CONA alleged that the City caused the odors by constructing a fence that denied human access to the rocks adjacent the cove, thereby encouraging sea lion and bird habitation. *Id.*

The City moved for summary judgment, arguing there was no triable issue of fact on several issues including whether the City owed a duty to control wild animals and whether the City's conduct was a substantial factor in causing the alleged nuisance. *Id.* at 354. The City supported its motion with an expert declaration from a marine ecologist who

concluded that the exponential sea lion growth at La Jolla Cove was due to natural population dynamics and not the fence atop the bluffs. *Id.* The City also offered declarations from longtime lifeguards and City employees noting that, although the area had been fenced since 1971, the sea lions began to congregate around 2008. *Id.*

The trial court granted summary judgment finding that, as a matter of law, the City did not have a duty to control an alleged nuisance caused by wild animals. *Id.* at 355. The trial court further found there was “no legitimate factual dispute as to whether the City’s actions caused the alleged nuisance.” *Id.*

The California Court of Appeal affirmed the trial court’s ruling. In doing so, the court summarized key components of California’s public nuisance law. The court observed that “[t]o qualify as a public nuisance, the interference must be both substantially and objectively unreasonable.” *Id.* at 358. Further, the court noted that “[c]ausation is an essential element of a public nuisance claim. A plaintiff must establish a ‘connecting element’ or a ‘causative link’ between the defendant’s conduct and the threatened harm.” *Id.* at 359 (internal citations omitted.) The court also stated that “[p]ublic nuisance liability does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; *the critical questions is whether the defendant created or assisted in the creation of the nuisance.*” *Id.* (italics in original, internal punctuation and citations omitted). Finally, the court acknowledged that a plaintiff must demonstrate that the defendant’s conduct was a “substantial factor” in causing the alleged harm. *Id.* at 361.

Focusing on the issue of whether a city can be held liable for the harm caused by wild animals, the court rejected the implication in *Butler v. City of Palos Verdes Estates*, 135 Cal. App. 4th 174 (2005) that a public entity can never be liable for nuisance linked to wild animals. *Id.* at 359–360. Instead, the court observed that “[t]here could be circumstances

in which a public entity’s actions in connection with wild animals give rise to public nuisance liability, though we do not find those circumstances here.” *Id.* at 360. The court’s conclusion turned on the issue of causation. The court explained that the fact that sea lions are wild animals is not dispositive of the City’s liability and that the City could be found liable if CONA were to demonstrate that the City’s conduct was a substantial factor in causing the alleged harm. *Id.* at 361.

The Court of Appeal then assessed the causation evidence. The court concluded that the City’s proffered evidence that the fence had been in place for decades long before large numbers of sea lions began congregating in La Jolla Cove shifted the burden to CONA to provide evidence of causation in order to survive summary judgment. *Id.* at 361–363. The court found CONA’s evidence inadequate, noting that, at best, it merely established that “perhaps between 15 and 30 years ago, there was no fence and no odor.” *Id.* at 363. The court noted that CONA failed to submit evidence that the fence *created* the odor. *Id.* at 363–364. Accordingly, the Court of Appeal affirmed the trial court’s summary judgment ruling.

Whitney Jones Roy is the office managing partner of the Los Angeles office of Sheppard Mullin Richter & Hampton LLP, specializing in complex business litigation and environmental litigation. **Alison N. Kleaver** is University Counsel for the California State University with primary responsibility for the Humboldt State University campus. They can be reached at wroy@sheppardmullin.com and akleaver@calstate.edu.

CASE LAW HIGHLIGHTS: MIDWEST

KENTUCKY DISTRICT COURT TOSSES PLAINTIFFS' SOLE REMAINING FEDERAL CLAIM UNDER TITLE V OF THE CLEAN AIR ACT IN PUTATIVE COAL ASH CLASS ACTION LAWSUIT

Sonia H. Lee

Little v. Louisville Gas & Elec. Co., No. 3:13-cv-1214, 2017 U.S. Dist. LEXIS 20351 (W.D. Ky. Feb. 14, 2017). The U.S. District Court for the Western District of Kentucky granted partial summary judgment to PPL Corporation (PPL) and its subsidiary, Louisville Gas and Electric Company (LG&E), on the sole remaining federal claim against them in a putative class action lawsuit filed by local residents living near the Cane Run Generating Station (Plant) operated by LG&E. The plaintiffs originally filed suit in 2013 based on alleged contamination of their properties and exposure to dust and coal ash emitted from the Plant. They brought federal claims under the Resource Conservation and Recovery Act (RCRA) and the Clean Air Act (CAA) and state law claims for negligence, nuisance, and trespass. In a prior ruling, the court dismissed all the plaintiffs' claims under RCRA and the CAA, except for a Title V claim under the CAA arising out of the defendants' alleged operation of the coal plant without a Title V operating permit.

In granting the defendants' partial motion for summary judgment on the plaintiffs' Title V operating permit claim, the court observed that LG&E had submitted a timely application for renewal of its operating permit to the Louisville Metro/Jefferson County Air Pollution Control District (APCD) prior to its expiration date of October 30, 2007. Although the APCD did not issue to LG&E a renewed permit until November 18, 2014, the court ruled that the regulations permitted LG&E to continue operating the Plant under the expired permit. The court concluded: "LG&E was permitted to operate the Cane Run Generation Station under the 2002 permit until the 2014 permit was issued. Because Cane Run had a valid Title V Operating Permit at all times relevant to the claims asserted in this case, the Plaintiffs' claim that LG&E operated Cane Run without a

valid permit must fail. Therefore, the Defendants are entitled to summary judgment on the Plaintiffs' Title V permit claim." *Id.* at *13.

Title V of the CAA requires operators of "major stationary sources of air pollution" to obtain operating permits. *Id.* at *5–6. Under Title V and the federal regulations promulgated under it, each state is required to develop and submit for U.S. Environmental Protection Agency approval an operating permit program. In connection with this requirement, Kentucky created an air pollution control district in every county, with each district responsible for issuing permits. The Louisville Metro/Jefferson County APCD—the district responsible for issuing permits to LG&E—enacted Regulation 2.16, entitled "Title V Operating Permits," governing permit issuance and renewal procedures. *Id.* at *6. Section 5.3.3 of Regulation 2.16 provides that an entity may continue operating under an expired permit, subject to the submission of a timely and complete application for a permit renewal.

The plaintiffs argued that, even if LG&E were initially permitted to operate under the 2002 permit beyond its expiration in 2007, it had lost any such protection when it failed to timely respond to three additional requests for environmental information issued by the APCD. The court found this argument unavailing and declined to disturb the APCD's conclusion that LG&E complied with Regulation 2.16. The court further observed that the APCD had the authority to withdraw any such protection under the 2002 permit for LG&E's failure to supplement its renewal application but that the APCD never took such action. Applying the clearly erroneous standard, the court found that the plaintiffs had "not presented any evidence demonstrating that the APCD's interpretation or its conclusion based on [its] interpretation, meets that standard." *Id.* at *12–13.

On these grounds, the court concluded that the plaintiffs' Title V permit claim "must fail." *Id.* at *13. Because the Title V permit claim was the only remaining claim against defendant PPL, the court dismissed PPL as a party to the action. With respect to the remaining state law claims, the court ordered additional briefing on whether it should exercise supplemental jurisdiction.

INDIANA DISTRICT COURT DENIES MOTION FOR LONE PINE CASE MANAGEMENT ORDER IN PUTATIVE CLASS ACTION LAWSUIT ARISING OUT OF ALLEGED GROUNDWATER CONTAMINATION

Sonia H. Lee

***Hostetler v. Johnson Controls, Inc.*, No. 3:15-cv-226, 2017 U.S. Dist. LEXIS 10006 (N.D. Ind. Jan. 25, 2017).** The Northern District of Indiana denied a motion for a Lone Pine case management order in a putative class action lawsuit for personal injury and property damage arising out of alleged groundwater contamination caused by toxic chemicals, including trichloroethylene (TCE), originating from a manufacturing plant in Goshen, Indiana (Plant) formerly owned by defendant. In so holding, the court observed that the case, involving exposure and property damage claims, did not “present sufficiently exceptional circumstances to warrant a Lone Pine order.” *Id.* at *16.

“Lone Pine orders are case management orders, used typically in complex mass tort litigation, that require plaintiffs to produce prima facie evidence in support of their claims or risk dismissal of their case.” *Id.* at *9–10. The court noted that the basic purpose of a Lone Pine order is to “identify and cull potentially meritless claims and streamline litigation in complex cases involving numerous claimants[.]” *Id.* at *10.

The defendant contended that “exceptional circumstances” warranted a Lone Pine order in the action because, *inter alia*, the complaint failed to “articulate the specific injuries” sustained from alleged exposure to toxic chemicals migrating from the Plant, the plaintiffs produced “virtually no evidence of cognizable personal injury,” and the plaintiffs “could not have suffered from decreased property values” because they were not owners of the homes where they were allegedly exposed to toxic chemicals. *Id.* at *12–13.

The plaintiffs maintained that a bifurcated case management plan was more appropriate, arguing

that efficiencies are gained by seeking class certification on the issues of liability and general causation before turning to discovery and litigation related to the specific damages of the named plaintiffs.

In response, the defendant countered that “neither the Court nor a jury can reach any conclusion about liability and general causation if there is no evidence of damages.” *Id.* at *14. The defendant also noted that “a Lone Pine order will streamline litigation of this complex tort case, which it contends cannot be resolved in Plaintiffs’ favor without evidence of Plaintiffs’ actual exposure and their actual injuries as well as evidence linking the injuries to the exposure.” *Id.* at *15.

In deciding whether to impose a Lone Pine order, the court considered the following factors: “(1) the posture of the action, (2) any peculiar case management needs of the case, (3) external agency decision that may bear on the case, (4) the availability, by statute or rule, of other procedural devices, and (5) the type of injury alleged and its causes.” *Id.* at *12 (citations omitted).

The court found that its review of the five factors collectively counseled against the imposition of a Lone Pine order on the basis that, *inter alia*, (1) although the case was no longer in its earlier stages, there was still discovery to be completed, as the parties failed to conduct sufficient meaningful discovery due to delays caused by, among others, remand and motion practice; (2) while complex, the case did not include hundreds of plaintiffs; (3) although the defendant had previously entered into a Voluntary Remediation Agreement with the Indiana Department of Environmental Management (IDEM) to remediate contamination at the Plant, there were no regulatory decisions issued by IDEM indicating the Plant was free of contamination; (4) the defendant did not exhaust the range of normal procedural mechanisms available to address plaintiffs’ evidentiary shortfall, such as a motion for summary judgment; and (5) element of causation was likely to be highly contentious and involve expert testimony, and accordingly, the

parties would have the opportunity to challenge such evidence of causation through *Daubert* hearings and motion *in limine* practice. Based upon its analysis of the five factors, the court concluded that a Lone Pine was not warranted in the action.

Sonia H. Lee is an associate in the New York office of Norton Rose Fulbright US LLP. Her practice focuses on product liability, environmental, toxic tort, and complex civil litigation. She may be reached at sonia.lee@nortonrosefulbright.com.



**The
Section
is now on
iTunes
and
Google
Play!**

Subscribe to our podcast on topics in environmental, energy, and resources law.

Episodes include career advice from senior lawyers and updates on upcoming Section conferences and publications.

Also, all episodes, along with additional audio content, can be found at www.ambar.org/environpodcast.

Subscribe Now!

CASE LAW HIGHLIGHTS: MID-CONTINENT

FEDERAL COURTS HAVE SUBJECT MATTER JURISDICTION OVER CLEAN WATER ACT CITIZEN SUITS WHERE A CONTINUOUS OR INTERMITTENT VIOLATION IS ALLEGED IN GOOD FAITH

Lisa Cipriano

***Louisiana Oystermen Ass’n, Inc. v. Hilcorp Energy Co.*, No. 16-10171, 2017 WL 396289 (E.D. La. Jan. 30, 2017).** The plaintiff, the Louisiana Oysterman Association, brought an action against the defendant energy company pursuant to the citizen suit provision of the Clean Water Act (CWA). The plaintiff alleged that the defendant had engaged in dredging near one of the plaintiff’s wells without a permit. 2017 WL 396289 at *1. The plaintiff sought injunctive relief preventing the defendant from engaging in further dredging without a permit and also requested that the court impose civil penalties and order the defendant to restore the alleged damage caused by the dredging. *Id.* The defendant moved to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that the court lacked subject matter jurisdiction because the defendant’s alleged misconduct occurred entirely in the past. *Id.*

As an initial matter, the court noted that it “must grant a motion to dismiss for lack of subject matter jurisdiction when it does not have the requisite statutory or constitutional power to adjudicate the case.” *Id.* at *2 (internal citations omitted). More specifically with regard to the CWA’s citizen suit provision, the court stated that “[c]itizens may enforce the Act, in the absence of federal or state action, by bringing suit on their own behalf against polluters ‘alleged to be in violation of (A) an effluent standard or limitation under [the Act] or (B) an order issued by the Administrator or State with respect to such a standard or limitation.’ 33 U.S.C. § 1365(a)(1) (emphasis added).” *Id.* (first set of brackets added). “The Supreme Court of the United States has interpreted the ‘to be in violation’ language of § 1365 to require that citizen-plaintiffs “allege [in good-faith] a state of continuous

or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future.” *Id.* (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987)). Accordingly, “the federal courts do not have subject matter jurisdiction to consider citizen suits for wholly past violations.” *Id.* (internal citations and quotations omitted). The federal courts do, however, “have jurisdiction to review citizen suits that allege either continuous or intermittent violations.” *Id.* at *3 (internal citations omitted). Finally, the court noted “that at the pleading stage of the litigation” it is only required that “a continuous or intermittent violation be alleged in good faith—not proven. *Id.* at *2 (internal citations omitted).

Under the CWA, “[a] continuous violation applies where the conduct is ongoing, rather than a single event,” while “[a]n intermittent violation . . . simply requires a reasonable likelihood that a past polluter will continue to pollute in the future.” *Id.* at *3 (internal citations and quotations omitted). Of particular note, the court stated that “evidence of past violations can help prove a continuing violation as well as establish the likelihood of future violations.” *Id.* Applying these standards, the court found that it had subject matter jurisdiction because plaintiff had alleged in good faith both continuous and intermittent violations. *Id.* The plaintiff alleged that the defendant was “in a state of continuous violation because it has not remedied the purported damage, and . . . in a state of intermittent violation because the unpermitted dredging is likely to resume when vessels access the well.” *Id.* The plaintiff’s allegations were supported by several pieces of evidence, as well as “knowledge of [defendant]’s past environmental transgressions.”

FEDERAL DISTRICT COURT HOLDS THAT CLAIM FOR NEGLIGENCE *PER SE* CANNOT BE BASED ON ALLEGED RCRA VIOLATION, BUT PLAINTIFF MAY PROVIDE EXPERT TESTIMONY ON VALUE OF PLAINTIFF’S PROPERTY AFTER CONTAMINATION

Lisa Cipriano

***Hollingsworth v. Hercules, Inc.*, No. 2:15-CV-113, 2016 WL 7409130 (S.D. Miss. Dec. 22, 2016).** The plaintiffs, who owned property near the site of a chemical plant, brought an action against the former operator of the plant, alleging that the defendant operator had “improperly disposed of numerous hazardous waste products,” which ultimately “contaminated the soil, air, and groundwater of [plaintiffs] property.” 2016 WL 7409130 at *1. The plaintiffs asserted claims for negligence, gross negligence, and nuisance. The plaintiffs sought damages for alleged property damage, loss of income, and emotional distress. *Id.* The defendant filed a motion for partial summary judgment. The court granted in part and denied in part the defendant’s motion, making several notable rulings under Mississippi law, as well as relating to the Resource Conservation Recovery Act (RCRA).

The court found that several of the plaintiffs’ claims failed under Mississippi law. First, the court granted the defendant’s motion with regard to the plaintiffs’ trespass claim because “[i]t appears to be undisputed that Plaintiffs have no evidence of contaminants in the groundwater on their property,” and “evidence of groundwater contamination on property immediately adjacent to [plaintiffs’]” was not “sufficient to create a genuine dispute of material fact as to their groundwater trespass claims” because “Mississippi law requires evidence of an actual physical invasion of the plaintiff’s property.” *Id.* at *1–2 (internal citations and quotations omitted).

The court also granted the defendant’s motion to the extent that the plaintiffs’ sought to recover damages for emotional distress based upon the

defendant's alleged negligence. The plaintiffs' claimed that they "suffered emotional distress because 1) the contamination of their property caused a decrease in their rental revenue, and 2) they fear for their own health." *Id.* at *3. First, the court stated that "the Mississippi Supreme Court has never allowed or affirmed a claim of emotional distress based solely on a fear of contracting a disease or illness in the future, however reasonable." *Id.* (internal citations and quotations omitted). In addition, the court noted that "[t]o recover emotional damages on an ordinary negligence claim, the plaintiff must prove some sort of injury or demonstrable harm, whether it be physical or mental, and that harm must have been reasonably foreseeable to the defendant." *Id.* (internal citations and quotations omitted). Because "[p]laintiffs made no attempt to demonstrate that they have suffered any reasonably foreseeable physical or mental harm as a result of Defendant's alleged negligence . . . the Court grant[ed] Defendant's motion for summary judgment as to any claim for emotional damages in connection with Plaintiffs' negligence claims." *Id.* at *4.

The court also granted the defendant's motion as to the plaintiff's claims for negligence per se and for strict liability for ultrahazardous activity. The plaintiffs' claim for negligence per se was based solely "on Defendant's alleged violations of" RCRA. *Id.* at *5. While "RCRA creates a private right of action . . . it limits the available remedies to civil penalties, injunctive relief, and attorney's fees." *Id.* (internal quotations and citations omitted). While "[t]he Fifth Circuit has not addressed whether RCRA violations can provide the basis for a negligence per se claim under state law," the court noted that "a majority of federal district courts have held that allowance of a negligence per se action based on violation of RCRA would contravene the clear legislative intent of the statute not to allow for damages based on violation of its provisions." *Id.* (internal quotations and citations omitted). "The Court elect[ed] to follow the majority rule," finding that when claims for negligence per se were "premised solely on a RCRA violation, they are effectively RCRA

claims for compensatory damages, which are not permitted." *Id.*

Finally, the court found that Mississippi law defines "ultrahazardous activity" narrowly and that "strict liability for ultrahazardous activity has only been found by Mississippi courts in cases involving the use and transport of explosives in populated areas." *Id.* The court further stated that "both the Fifth Circuit and Mississippi Supreme Court have declined to extend the definition of 'ultrahazardous activity' to include trespass claims like those asserted here," and thus granted the defendant's motion on this ground as well. *Id.* (internal citations omitted).

The court did, however, deny several portions of the defendant's motion. As to the damages sought by the plaintiffs, the "Defendant also argue[d] that Plaintiffs have insufficient evidence to support a claim of decreased property value caused by the alleged contamination," because "Plaintiffs cannot maintain a claim of decreased property value without also presenting an expert opinion of the properties' value after contamination." *Id.* at *2. The court rejected the defendant's argument because the plaintiffs had "represent[ed] that they intend[ed] to provide their own expert testimony as to the contaminated, 'as is' value of their properties." *Id.* The court noted that "the opinion testimony of a landowner as to the value of his land is admissible without further qualification." *Id.* (internal quotations and citations omitted). Under Federal Rule of Evidence 702, "[t]he fields of knowledge which may be drawn upon for expert testimony extend to all specialized knowledge, including "landowners testifying to land values." *Id.* (internal quotations and citations omitted).

Finally, the court denied the defendant's motion with regard to the plaintiffs' claim for intentional infliction of emotional distress. Under Mississippi law, "[a] plaintiff may recover on a claim for intentional infliction of emotional distress [w] here there is something about the defendant's conduct which evokes outrage or revulsion, done intentionally . . . even though there has been no

physical injury.” *Id.* at *4 (internal quotations and citations omitted, brackets and ellipses in original). “The defendant’s conduct must be so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Id.* (internal quotations and citations omitted). The court disagreed with the defendant’s argument that “[p]laintiffs have no evidence of conduct outrageous enough to constitute intentional infliction of emotional distress,” and “conclude[d] that Plaintiffs have presented sufficient evidence to create a genuine dispute of material fact as to whether Defendant’s actions were outrageous enough to constitute intentional infliction of emotional distress.” *Id.* The plaintiffs had presented documents “tend[ing] to show 1) that Defendant knew for decades that hazardous waste was escaping its impounding basin and sludge pits, 2) that Defendant knew for decades that it was in violation of environmental regulations, 3) that Defendant considered proposals for measures to prevent further contamination, and 4) that Defendant failed to implement any of said proposals.” *Id.*

Lisa Cipriano is a commercial litigation attorney at the Chicago office of Eimer Stahl LLP. Lisa’s experience includes environmental and products liability matters, class action securities fraud cases, accountants’ liability cases, and contract disputes. She may be reached at lcipriano@eimerstahl.com.

ambar.org/
environwotus

**Keep current on the ever
changing landscape of
CWA jurisdiction.**

This site provides you with curated information, including key background documents, cases, and links to other resources to help you keep informed in this pivotal moment in the history of one of the nation’s most significant environmental laws.

CASE LAW HIGHLIGHTS: SOUTHEAST

FOURTH CIRCUIT AFFIRMS CONVICTION OF FORMER MASSEY COAL CEO DONALD BLANKENSHIP

Matt Thurlow and Laura Glickman

***United States v. Donald L. Blankenship*, 846 F.3d 663 (4th Cir. 2017).** On January 19, 2017, the U.S. Court of Appeals for the Fourth Circuit affirmed the conviction of former Massey Energy Company (Massey) CEO Donald Blankenship for conspiring to violate the Federal Mine Safety and Health Act of 1977 (MSA) and its regulations. *United States v. Donald L. Blankenship*, 846 F.3d 663 (4th Cir. 2017). The court rejected Blankenship’s argument that the district court erred in instructing the jury that the term “willfully” included “reckless” conduct.

Blankenship was Massey’s CEO at the time of a 2010 accident at the Upper Big Branch coal mine in West Virginia that killed 29 miners. *Id.* at 666. Prior to the accident, Massey had repeatedly been cited by the Mine Safety & Health Administration for violations at Upper Big Branch, including 549 violations in 2009 alone. *Id.* Blankenship received daily reports of safety violations beginning in mid-2009 and had received warnings from a senior Massey official about the serious safety risks posed by the violations. *Id.* at 667. Blankenship nevertheless adopted the view that it was “cheaper to break the safety laws and pay the fines than to spend what would be necessary to follow the safety laws.” *Id.* Blankenship was convicted in 2015 of conspiring to violate federal mine safety laws, sentenced to one year imprisonment, and assessed a \$250,000 fine. *Id.*

On appeal, Blankenship argued that the district court had erred in instructing the jury regarding the meaning of “willfully” violating MSA standards. *Id.* at 670. The district court had defined “willfully” to include “reckless disregard for whether that action or failure to act will cause a mandatory safety or health standard to be violated.” *Id.* at 671. Blankenship argued such a definition was

not permitted by the Supreme Court’s decisions in *Bryan v. United States*, 524 U.S. 184 (1998), and *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007). *Id.* The court found, however, that neither case supported Blankenship’s position. *Id.* at 672. “*Bryan*—upon which *Safeco* entirely relied—expressly recognized that ‘conduct marked by careless disregard’ constitutes ‘willfulness.’” *Id.* Moreover, the Supreme Court had held in 1945 that reckless disregard can amount to a “bad purpose” for the determination of criminal willfulness. *Id.*, citing *Screws v. United States*, 325 U.S. 91, 101–04 (1945). Post-*Bryan* and *Safeco*, the Fourth Circuit also had repeatedly held that reckless disregard can constitute criminal willfulness. *Id.* In particular, in *RSM, Inc. v. Herbert*, which addressed the meaning of “willfully” in federal gun control laws, the Fourth Circuit concluded that, “when determining the willfulness of conduct, we must determine whether the acts were committed in deliberate disregard of, or with plain indifference toward, either known legal obligations or the general unlawfulness of the actions.” *Id.* at 673, quoting 466 F.3d 316, 320 (4th Cir. 2006). The court found that the government’s theory in this case mirrored the government’s theory in *RSM*, where the defendant repeatedly failed to comply with federal gun laws despite warnings by federal officials. *Id.*

The court held that recklessness constituted willfulness for the purposes of the MSA, which makes it unlawful for any mine operator to “willfully violate[] a mandatory [mine] health or safety standard.” 30 U.S.C. § 820(d). Blankenship had urged the court to disregard its decision on that issue in *United States v. Jones*, 735 F.2d 785 (4th Cir. 1984), because at the time the MSA required a “knowing” as opposed to willful *mens rea* requirement. *Id.* at 674. However, the text of Section 820(d) is “substantively identical” to a provision in the Coal Mine Health and Safety Act of 1969 (CMSA), which the MSA replaced. *Id.* When Congress enacted the MSA, the Sixth Circuit had already interpreted “willfully” in terms of “reckless disregard” in the CMSA. *Id.*, citing *United States v. Consol. Coal Co.*, 504 F.2d 1330, 1335 (6th Cir. 1974). The court presumed that

Congress intended “willfully” in the MSA to have the same meaning in the MSA. *Id.*

That Congress enacted the Mine Safety Act because it believed the penalties available under the Coal Act had proven insufficient to deter safety violations further evidences that Congress did not intend for courts to construe ‘willfully’ in the Mine Safety Act more strictly than they had interpreted the term in the parallel provision in the Coal Act.” *Id.*

The court also pointed to other statements in the MSA’s legislative history that further showed that Congress intended for the term “willfully” to encompass reckless disregard. *Id.* at 675.

Finally, the court held that the district court had not reversibly erred (1) in not dismissing Blankenship’s indictment, (2) in denying Blankenship the opportunity to examine on re-cross examination the employee in charge of Upper Big Branch, and (3) providing a so-called “two-inference” jury instruction. Accordingly, Blankenship’s conviction was affirmed.

ambar.org/
environtransition

Visit the Transition of Administrations Tracker Resources Page.

Providing you with the most current and sophisticated analyses of the fast-paced legislative, regulatory and judicial developments occurring under the new administration.

FOURTH CIRCUIT AFFIRMS DISMISSAL OF CHALLENGE TO VIRGINIA URANIUM MINING BAN

Matt Thurlow and Laura Glickman

Virginia Uranium, Inc. v. Warren, 848 F.3d 590 (4th Cir. 2017). On February 17, 2017, the U.S. Court of Appeals for the Fourth Circuit affirmed in a split decision the dismissal of a complaint alleging that the Commonwealth of Virginia’s ban on uranium mining was preempted by the federal Atomic Energy Act (AEA) and requesting an injunction that would have forced Virginia to grant uranium mining permits. *Virginia Uranium, Inc. v. Warren*, 848 F.3d 590 (4th Cir. 2017).

The plaintiffs are owners of the largest-known uranium deposit in the United States, which is located in Pittsylvania County, Virginia. *Id.* at 593. The deposit has never been mined because Virginia law bans uranium mining “until a program for permitting uranium mining is established by statute,” and no such program has ever been established. *Id.*, quoting Va. Code Ann. § 45.1-283. The U.S. District Court for the Western District of Virginia granted Virginia’s motion to dismiss, finding that the AEA “does not . . . regulate nonfederal uranium deposits or their conventional mining,” and thus Virginia’s uranium mining ban is not preempted. *Id.* at 594, quoting *Virginia Uranium, Inc. v. McAuliffe*, 147 F. Supp.3d 462, 471 (W.D. Va. 2015).

First, the court found that conventional uranium mining is not an “activity” under Section 2021(k) of the AEA, which permits states to “regulate activities for purposes other than protection against radiation hazards.” *Id.* at 595, quoting 40 U.S.C. § 2021(k). The court turned to Supreme Court precedent on the AEA establishing that “the test of pre-emption is whether the matter on which the state asserts the right to act is in any way regulated by the federal government.” *Id.*, quoting *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n*, 461 U.S. 190, 213 (1983). If the activity regulated by a state is in fact

regulated by the AEA but there is a “non-safety rationale” for the state rule, then the state law is not preempted. *Id.* Here, Virginia conceded that it lacked a non-safety rationale for its uranium mining ban but argued that Section 2021(a) is inapplicable because conventional uranium mining is not an “activity” regulated by the AEA. *Id.* The AEA is silent on the National Regulatory Commission’s (NRC) power to regulate uranium mining occurring on non-federal lands, which the NRC interprets as a lack of power to carry out such regulation. *Id.* at 596. Moreover, traditionally the power to regulate mining had been left to the states. *Id.* As such, the court found that the text of the AEA does not indicate an intent by Congress for the NRC to displace states in regulating conventional uranium mining. *Id.* at 596–97. Conventional uranium mining, therefore, was not an “activity” regulated by the AEA. *Id.* at 597.

Second, the court held that, although uranium-ore milling and tailings storage were “activities” under Section 2021(k) because they are regulated by the NRC, they were not preempted by the AEA. *Id.* at 597. Although states may not regulate millings and tailings storage except for purposes other than protection against radiation hazards, the plain language of Virginia’s uranium mining ban does not mention milling or tailings storage. *Id.* The court declined to evaluate whether Virginia’s legislature was motivated to pass the uranium mining ban by a desire to regulate milling or tailings storage. *Id.* In doing so, the court distinguished this case from others in the Tenth and Second Circuits. *Id.* at 598 (discussing *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004), and *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393 (2d Cir. 2013)).

Third, the court found that Virginia’s uranium mining ban was not preempted as “an obstacle” to the implementation of the AEA’s objective of promoting the safe use and development of atomic energy in the United States. *Id.* at 599. However, the court found that Virginia’s ban—or a hypothetical ban by all states—would have

little impact on the accomplishment of the AEA's objectives because most of the United States' uranium is imported, and 18 uranium mines were licensed by the NRC. *Id.* Accordingly, the district court's dismissal was affirmed.

Judge William Traxler dissented, finding that the Virginia uranium mining ban both improperly encroached on the field of nuclear safety concerns, which is exclusively occupied by the federal government, and thwarted the objectives of the AEA. *Id.* at 600.

2017 Call for Nominations



ABA Lifetime Achievement Award in Environmental, Energy, or Resources Law and Policy

This award recognizes and celebrates the accomplishments of major practitioners in environmental, energy, or resources law and policy in the United States.

ABA Award for Excellence in Environmental, Energy, and Resources Stewardship

This award recognizes and honors the accomplishments of a person, organization, or group that has distinguished itself in environmental, energy, and resources stewardship. Nominees must be people, entities, or organizations that have made significant accomplishments or demonstrated recognized leadership in the areas of sustainable development, energy, environmental, or resources stewardship.

Nomination deadline: July 17, 2017.

These awards will be presented at the 25th Fall Conference in Baltimore in October 2017.

For further details about these awards, please visit the Section website at

www.ambar.org/EnvironAwards

DISTRICT COURT DENIES LAST-DITCH EFFORT TO BLOCK DAKOTA ACCESS PIPELINE

Matt Thurlow and Laura Glickman

***Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, No. 16-1534 (JEB), 2017 U.S. Dist. LEXIS 31967 (D.D.C. Mar. 7, 2017).**

On March 7, 2017, Judge James Boasberg of the U.S. District Court for the District of Columbia denied a motion for preliminary injunction brought by the Cheyenne River Sioux Tribes (Cheyenne River or Tribe) seeking to enjoin the Army Corps of Engineers' (Corps) grant of an easement to Dakota Access, LLC (Dakota Access) under Lake Oahe near tribal lands on the border of South Dakota and North Dakota. *See Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, No. 16-1534 (JEB), 2017 U.S. Dist. LEXIS 31967 (D.D.C. Mar. 7, 2017). The Tribe argued that the grant of the easement under Lake Oahe would violate the Religious Freedom Restoration Act (RFRA) because it would harm Tribal members' exercise of religious freedom. *Id.*; 42 U.S.C. § 2000bb. The court denied the Tribe's motion on the grounds of laches and because the motion was unlikely to succeed on the merits.

The Dakota Access Pipeline is an 1,100 mile underground oil pipeline that stretches from the Bakken shale oil fields of North Dakota through South Dakota, Iowa, and Illinois. The pipeline was publicly announced in June 2014 and has been under construction for the past three years by Dakota Access, a subsidiary of Energy Transfer Partners. Several American Indian tribes have brought legal challenges seeking to block the construction of the pipeline. The tribes initially brought claims against the Corps under the National Historic Preservation Act (NHPA), National Environmental Protection Act (NEPA), Clean Water Act (CWA), Rivers and Harbors Act (RHA), and Administrative Procedure Act (APA). The tribes also sought a preliminary injunction under the NHPA, arguing that the clearing and grading of land for the pipeline would desecrate sacred sites. *Standing Rock*, 2017 U.S. Dist. LEXIS 31967, at *7.

Following the denial of this injunction, in mid-November 2016, the Departments of Justice, Interior, and Army under President Barack Obama issued a joint statement to the parties, that “construction of the pipeline on Army Corps land bordering or under Lake Oahe [would] not go forward” until the Army could determine whether reconsideration of any of its previous decisions regarding the Lake Oahe crossing under NEPA or other federal laws was necessary.” *Id.* at *8. On December 4, the Department of the Army announced that it would not grant the easement for pipeline construction under Lake Oahe to Dakota Access and recommended preparation of an Environmental Impact Statement to consider other alternatives. But following Donald Trump’s election, the federal government’s position abruptly shifted, and the Corps issued an easement on February 8, permitting Dakota Access to drill under Lake Oahe. Cheyenne River filed a motion for preliminary injunction and an application for a temporary restraining order the next day under RFRA. *Id.* at *9.

The court focused on only two of the defenses brought by the Corps and Dakota Access against the Tribe’s motion for preliminary injunction: laches and the Tribe’s failure to demonstrate that the grant of the easement imposed a substantial burden on Tribal members’ religious exercise. *Id.* at *13–14. Laches is an equitable defense that applies where a plaintiff has shown a lack of diligence in asserting a claim, and the untimeliness of a claim has caused prejudice to the defendant. *Id.* at *14.

Although RFRA has a four-year statute of limitations, the court held that the Tribe still had not been diligent in bringing its RFRA claim because it had notice of the pipeline’s route in October 2014 and Dakota Access’ requests to the Corps to drill at Lake Oahe in July 2016. The Tribe raised other religious objections to construction of the pipeline, but it did not raise the specific religious objections in its motion for preliminary injunction until February 2017. *Id.* at *16. Judge Boasberg was also unsympathetic to the delay caused by the federal government’s radical shift in

position on the easement between November 2016 and February 2017. *Id.* at *22. But the court was sympathetic to the impact of halting completion of the pipeline, which it called “an extraordinary and drastic remedy.” *Id.* at *24. Because of the court’s concerns regarding the Tribe’s delay in raising its specific religious-exercise objections, and the potentially negative impact of that delay on Dakota Access’ ability to begin immediate operation of the pipeline, the court concluded that the Tribe’s motion for a preliminary injunction should be denied. *Id.*

The court also held that the Tribe failed to demonstrate a likelihood of success on the merits of its RFRA claim. RFRA prohibits the federal government from “substantially burden[ing]” a “person’s exercise of religion” unless the government can establish that the burden is (1) in furtherance of a “compelling government interest”; and (2) the least restrictive means of furthering that interest. *Id.* at *27. In order to establish a viable RCRA claim, a party must meet the initial burden of proving that (1) the government’s action implicates the party’s religious exercise; (2) the religious exercise is grounded in a sincerely held religious belief; and (3) the government’s action substantially burdens that exercise. *Id.*

In this case, there was no dispute that the Tribe’s performance of water-based religious ceremonies constituted a religious exercise under RFRA. *Id.* at *27–28. But defendants still argued that the Tribe failed to meet their burden under RFRA because it was Dakota Access’ operation of the pipeline, rather than the government’s grant of an easement, that implicated the Tribe’s exercise of its religious rights. Although the court appeared somewhat skeptical of the Tribe’s religious objections to the oil pipeline because Lake Oahe is a man-made lake and a natural gas pipeline already exists beneath the lakebed, the court declined to find that the Tribe had not met its burden of proving that its religious objections constituted either a “religious exercise” or that they were “sincerely held religious beliefs” under RFRA. *Id.* at 28–34.

But the court did determine that the Tribe had not established that the government’s decision to grant an easement to Dakota Access would substantially burden the Tribe’s exercise of religious freedom: “The government action here — *i.e.*, granting the easement to Dakota Access and thereby enabling the flow of oil beneath Lake Oahe — does not impose a sanction on the Tribe’s members for exercising their religious beliefs, nor does it pressure them to choose between religious exercise and the receipt of government benefits.” *Id.* at 36. The court distinguished cases involving prisoners’ rights from the Tribe members’ rights to use the water of Lake Oahe, which the court concluded would cause no physical or economic harm to the Tribe. *Id.* at 45–47 (“If a Jewish prisoner is denied kosher meals and adheres to his belief that he cannot consume non-kosher food, he will starve. . . . But if the Tribe persists in its belief that DAPL [the pipeline] will render the waters of Lake Oahe spiritually impure, it suffers no collateral consequence.”). Finally, the court rejected the Tribe’s argument that the case was distinguishable from other religious exercise cases because the Tribe had an ownership interest in the waters of Lake Oahe. Although the court recognized the Tribe’s rights to use the Lake, it held that the case was not distinguishable from earlier Supreme Court precedent holding that rights to religious exercise “do not divest the Government of its right to use what is, after all, its land.” *Id.* at *55–58; *citing Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 453 (1988). Accordingly, the court held that the Tribe’s RFRA claim was unlikely to succeed on the merits and dismissed the motion for preliminary injunction. *Id.* at *59.

Matthew Thurlow is a senior associate at Latham & Watkins LLP. Matt worked as a trial attorney in the Environmental Enforcement Section at the U.S. Department of Justice from 2008 to 2011. He may be reached at Matthew.Thurlow@lw.com.

Laura Glickman is an associate in the Environment, Land & Resources Department at Latham & Watkins LLP. She may be reached at laura.glickman@lw.com.

CASE LAW HIGHLIGHTS: NORTHEAST

NEW JERSEY APPELLATE DIVISION RULES THAT ALL PRPS SHOULD SHARE IN INVESTIGATION COSTS, EVEN BEFORE LIABILITY DETERMINED

Steven German

***Matejek v. Watson*, 2017 WL 836176 (N.J. Super. Ct. App. Div. Mar. 3, 2017).** On March 3, 2017, the New Jersey Appellate Division held that the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10–23.11 to –23.24 (Spill Act) and the Site Remediation Reform Act, N.J.S.A. 58:10C–1 to –29 of 2009, allow one potential contributor of contamination to compel other potential contributors to share in the cost of environmental investigations, even before there is a finding of liability for the contamination.

In response to the discovery of oil in a tributary, the New Jersey Department of Environmental Protection (NJDEP) removed five underground storage tanks, one from each of five adjoining condominium units in 2006. Other than visiting the site a few months later to confirm the absence of oil in the tributary, the NJDEP took no further action to investigate the source of contamination. NJDEP’s file remained open, thereby constituting an encumbrance on title to all five condominium units. During this time, the legislature amended the Spill Act to transfer responsibilities for resolving site contamination issues to Licensed Site Remediation Professionals (LSRPs) retained by private property owners.

Approximately seven years after the removal of the tanks, and with their title still clouded, the Matejeks—owners of one of the impacted units—filed a complaint against the owners of the other four units seeking a judgment that would obligate all owners to equally share in the environmental investigation and, if necessary, remediation. Despite the lack of any firm evidence as to the precise source of the contamination, or any proof linking any particular defendant’s property to the

contamination, the trial judge ordered all of the other condominium owners to pay equally for the investigation and any required remediation.

Defendants appealed, arguing that one potential contributor could seek relief only from the other potential contributors after the NJDEP's acceptance of the LSRP's findings as to the source of pollution. The Appellate Division affirmed the lower court's decision, rejecting what it characterized as the defendant's "narrow" reading of the Spill Act, which would render the Act "ineffectual" by allowing a private action only upon proof that another party caused contamination. *Id.* at 2. The Appellate Court explained that the plaintiffs' title was encumbered, and, if the defendants' arguments were accepted, the plaintiffs would have no way to remove that encumbrance other than to solely bear the expense of investigation and remediation. "Such a scenario leaves plaintiffs with no adequate remedy at Law," said the court. *Id.* "In such circumstances, a court may provide a remedy that fairly and justly alleviates the inequitable burden that a narrow interpretation of the Spill Act would impose." *Id.*

Absent the crafting of an appropriate remedy, plaintiffs would have been left with the prospect of either doing nothing or proceeding on their own in gathering evidence necessary to seek contribution from other dischargers. This circumstance strongly suggests the need for a remedy that would fairly burden all the potential dischargers with an investigation into the actual cause, the remediation of the property if necessary, and the fixing of responsibility for the discharge on those truly responsible.

Id. Requiring a single potential contributor to shoulder the investigation costs would, moreover, "render unduly burdensome a greater examination into the situation" and would not be "in the best interest of the health, safety and welfare" of the state. *Id.*

The decision is a departure from prior New Jersey court decisions requiring Spill Act contribution plaintiffs to establish a nexus between the defendant and the contamination at issue. It shows that, under the Spill Act and the Site Remediation Reform Act, potential contributors may be compelled to share in the costs of an investigation, even without a concrete finding of liability for contamination. The Appellate Division acknowledged that while the Matejeks' lawsuit varied from what the legislature "likely anticipated when authorizing a private cause of action for contribution," the Spill Act's general approach has since been altered by the Site Remediation Reform Act to allow for earlier claims. *Id.*

The court's decision also expressly "assume[s] the likelihood of additional litigation in the future." *Id.* at 3. Contribution claims between the parties will continue, as in the past. There may also be lawsuits to recoup investigation costs incurred by parties who may be exonerated during the investigation and to allocate liability among the actual dischargers. *Id.*

The division of investigations costs across all potential contributors could, on the one hand, benefit parties with limited funds who could not afford the full investigation costs. On the other hand, it could impose on other parties potentially substantial investigative costs without any showing they contributed to the contamination.

ambar.org/annual



NEW JERSEY RESIDENTS FILE CLASS ACTION ALLEGING EXPOSURE TO SMELTER CONTAMINANTS

Steven German

Juan Duarte, et al., v. United States Metals Refining Company, et al., 2:17-cv-01624 (D.N.J.).

On January 30, 2017, residents of Carteret, New Jersey, filed a putative class-action lawsuit against U.S. Metals Refining Company (USMR), Freeport-McMoRan Copper & Gold (FCX) and Amax Realty Development, Inc. (Amax), alleging that the three defendants' historic smelter operations in Carteret caused widespread property contamination and human exposure to smelter contaminants, including arsenic and lead. The lawsuit was filed in New Jersey Superior Court, Middlesex County, and alleges private nuisance, strict liability, trespass, battery, and negligence. The plaintiffs seek compensatory and punitive damages, medical monitoring, property inspection, and remediation.

The plaintiffs seek to certify three separate classes, each on behalf of "current residents of New Jersey." The classes include (1) a "property damage class" comprising residential properties located within a particular geographic section of Carteret (the "Class Area"); (2) a "lead exposure medical monitoring class" comprising persons who lived within the Class Area for at least one year when they were six years old or less and are currently 20 years old or less;" and (3) a "Carcinogen Exposure Medical Monitoring Class" comprising persons who lived within the Class Area for at least two years and are currently 60 years old or less.

According to the Complaint, USMR engaged in primary and secondary copper smelting and metals refining from the early 1900s to approximately 1991 in Carteret. FCX acquired USMR and its smelter operations. Amax owned or operated a portion of the smelter property, during which time smelter contaminants were generated and released into the Class Area. Pursuant to an agreement with the Borough of Carteret, USMR undertook a residential property testing program, which revealed the presence of smelter-related

contaminants in the Class Area. The Complaint alleges that "[i]n the 2016–17 timeframe, defendants notified plaintiffs, for the first time, that soil at their residential properties surrounding defendants' smelter contain hazardous and toxic substances associated with defendants' smelter operations in Carteret." According to letters sent out to residents by USMR, arsenic and lead both exceeded safe levels, requiring the excavation and removal of contaminated yard soil. The Complaint further alleges that "[t]he concentrations exist above safe levels, requiring excavation and removal. Prior to this time, Plaintiffs were unaware, and had no basis to be aware, of the presence of these contaminants on their properties."

The plaintiffs allege that the defendants contaminated their property, thereby causing the plaintiffs and class members to "suffer damage to their property and personal finance, loss of the use and enjoyment of their property, unreasonable annoyance and inconvenience." The plaintiffs additionally claim to suffer "fear of adverse health effects, including cancer and other serious illness, including childhood mental, physical, developmental and cognitive harms and an increased risk of serious future latent illness, disease and mental, physical, developmental and cognitive illness and delays" necessitating medical monitoring.

On March 9, 2017, the defendants filed a Notice of Removal with the U.S. District Court for the District of New Jersey pursuant to the Class Action Fairness Act, 28 U.S.C. §§ 1332(d). In their Notice, the defendants challenge plaintiffs' allegation that USMR and Amax each maintain their respective principal place of business in New Jersey for purposes of CAFA's local controversy exception. The defendants rely principally on *The Herz Corp. v. Friend*, 130 S. Ct. 1181 (2010), and affidavits submitted by an individual who "developed personal knowledge" of the activities of USMR and Amax, claiming that each respective defendant maintains its corporate headquarters in Arizona, from which their "high-level officers have made the decisions regarding [their] activities." As of this writing, the plaintiffs have not moved for remand.

PENNSYLVANIA REGULATORS TO ADDRESS FRACKING-INDUCED EARTHQUAKES AFTER REPORT CONFIRMS LINK

Steven German

On February 17, 2017, the Pennsylvania Department of Environmental Protection (PADEP) released its findings of a study that looked at what caused small earthquakes in Lawrence County between April 25 and 26, 2016. Regulators found that earthquakes “had a marked temporal/spatial relationship to natural gas hydraulic fracturing activities” by Hilcorp Energy Company at its North Beaver Development well pad. The report can be found at http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-116109/8100-RE-DEP4711_new.pdf.

According to the report, seismometers recorded up to five earthquakes, reaching between a 1.8 and 2.3 on the Richter scale. “Our analysis . . . is that these events are correlated with the activity of the operator,” according to PADEP Acting Secretary Patrick McDonnell. Pennsylvania Regulators are now pledging to monitor and address the seismic activities.

The seismic events began while Hilcorp operators were using a fracking technique known as “‘zipper fracturing’ to simultaneously treat two adjacent wellbores while holding pressure in the reservoir.” This technique creates more pressure in a formation and is thought to be a key factor in the induced seismic activity. Hilcorp was targeting the Utica Shale in an area where basement rock is shallow and closer to the formation. The Utica is roughly 7,900 feet below the surface there, while the basement rock is between 9,500 and 10,000 feet. According to the report, induced earthquakes occur when the separation between Utica Shale and basement rocks is lessened during drilling operations. When someone drills too close to basement rocks, there can be earthquakes. PADEP said that seems to have been the case in Lawrence County, where the basement rock is shallow compared to other areas in the state. The agency

has, therefore, recommended that Hilcorp stop using zipper fracturing in such vulnerable areas.

PADEP has also recommended a “stop-light” procedure for Hilcorp to monitor and respond to seismic activity associated with Utica Shale Formation gas wells within North Beaver, Mahoning, and Union Townships in Lawrence County Pennsylvania. The “stop-light” procedure allows for early seismic event detection, prompt reporting, early response, and shut down of stimulating activity. Specifically, Hilcorp must maintain its own seismic monitoring network. It must notify the PADEP of any seismic activity within six miles of any wellbore within 10 minutes electronically and by phone within one hour. It must close drilling operations if multiple seismic events occur in a given time period.

Although the requirements presently apply only to new permits requested by Hilcorp within the referenced townships, PADEP recommends other operators in this area follow similar plans and intends to extend this framework to create a more comprehensive regulatory program—known as an area of alternative methods. This type of rulemaking enables PADEP to make area-specific regulations in certain parts of the state. “The agency does plan to use this general framework as a foundation for a more comprehensive regulatory program referred to as an ‘area of alternative methods’ for Utica Shale development,” stated PADEP. “The plan is to condition future permits in the referenced townships with these recommendations moving forward” so as to mitigate risks in those areas that are more susceptible.

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.*

FLINT PLAINTIFFS OBTAIN UNPRECEDENTED SETTLEMENT FOR WATER LINE REPLACEMENT

Ameri R. Klafeta

Plaintiffs in one of the pending federal class actions arising out of the Flint water crisis recently reached a settlement with the State of Michigan and the City of Flint for the unprecedented replacement of water lines across the City.

On March 28, 2017, the United States District Court for the Eastern District of Michigan approved the settlement in *Concerned Pastors for Social Action v. Khouri*, No. 16-10277, which was brought by the Natural Resources Defense Council, American Civil Liberties Union of Michigan, Concerned Pastors for Social Action, and Flint resident Melissa Mays. The settlement agreement requires the State to provide funding for the City to replace lead or galvanized steel water lines with copper lines. It also provides for tap water monitoring, faucet filter installation and maintenance, the phase-down of bottled water distribution, continuing health programs and services, and attorneys' fees.

Service Line Replacement

The State of Michigan has agreed to pay \$87 million to replace water lines in Flint over the next three years. The City of Flint is to excavate to identify the service line material from the main line to the curb box, and from the curb box to the household water meter, for at least 18,000 households legally served by the Flint water system. If all or part of the main line to the household water meter is discovered to be lead or galvanized steel, the City will replace it with a copper service line at no cost to the resident. To be eligible, a household must have an active water account and must not be an abandoned property. The settlement agreement explains that partial lead service line replacement is frequently associated with short-term elevated lead levels in drinking water. Accordingly, if the property owner refuses to give permission to replace the portion of lead or galvanized steel lines underneath private property,

the City will not replace any portion of the service line.

The parties agreed to a three-year schedule for the City to complete the excavations and line replacements. The State of Michigan agreed to allocate \$87 million to reimburse the City for these activities. It may use any source of funds, including federal appropriations or grants. The State agreed to undertake reasonable efforts to obtain additional funding if necessary, including if it is reasonably likely that there are more than 18,000 lead and galvanized steel service lines at eligible households. The City is also required to notify property owners and residents if it discovers that a household has premise plumbing made of lead or galvanized steel.

Tap Water Monitoring

The City of Flint and the State of Michigan agreed to monitor tap water distributed through Flint's system for lead, in compliance with the Lead and Copper Rule, 40 C.F.R. § 141.86, for consecutive six-month periods until at least one year after service line replacement is complete for a minimum number of sites. They also agreed not to seek reduced monitoring until one year after the service line replacement is completed. All household tap water samples are to be collected without pre-stagnation flushing. In addition, an independent third-party will monitor tap water for three years, with results made publicly available. Funding may cease for the independent monitor if the 90th percentile lead level of samples collected is below the lead action level for two consecutive six-month periods. The City and State also agreed to continue to provide testing kits to residents who want to test their tap water for lead for one year after the completion of service line replacement.

Filter Installation, Maintenance, and Education

After a service line replacement is completed, the City of Flint and the State of Michigan are to make

good-faith efforts to ensure that each household has a properly installed faucet filter. The agreement also requires them to continue a filter inspection and education program and to provide replacement faucet filters to residents.

Bottled Water Distribution

At the time the parties entered into settlement, the State was continuing to push back against a preliminary injunction that the federal district court entered requiring the State to deliver bottled water door-to-door to Flint residents. *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 settlement agreement requires the State to continue to operate at least nine points of distribution for bottled water, as well as filters, filter cartridges, and testing kits. It also provides, however, for a process to begin to wind down the services provided at those distribution points beginning May 1, 2017. The State may begin to close those pick-up sites that have 20 or fewer average daily bottled water pick-ups. The State may also begin to close points of distribution if the 90th percentile lead level of tap water samples for a six-month period is below the lead action level. Residents may also request bottled water delivery through a State of Michigan helpline, with free delivery provided within 24 hours. This service may also be discontinued if the 90th percentile lead level of tap water samples for a six-month period is below the lead action level.

Continued Funding of Health Programs

The State of Michigan agreed to continue to fund at current levels various programs, such as the Medicaid expansion for pregnant women and children, elevated blood lead level case management services, and others. Continued operation of these programs remains subject to federal law, necessary federal approvals, and availability of necessary federal monies.

Release and Litigation Costs

The plaintiffs released the claims alleged in their complaint, as well as claims that could have been resolved by the plaintiffs against the City or State regarding the Flint water system's compliance with the Lead and Copper Rule's requirements. The plaintiffs did not, however, release any claim or remedy arising under any law other than the Safe Drinking Water Act. The State of Michigan agreed to pay the plaintiffs \$895,000 in litigation costs, including attorneys' fees and expert costs.

Although the nature of the settlement affords broad relief to residents of Flint, additional class action cases remain pending in state and federal court. Plaintiffs did not release any claims currently pending in any other civil case.

Updates on Additional Flint Issues

Status of Federal Funds for the Flint Water Crisis

In December 2016, Congress passed legislation that President Obama signed authorizing \$100 million of federal aid to Flint. The U.S. Environmental Protection Agency (EPA) has approved this funding. EPA will start to distribute the initial \$31.5 million dollars. The remaining funding will be released after Flint and State of Michigan officials submit further information regarding the projects to be funded.

Michigan Civil Rights Commission Study

After a year-long investigation, including public hearings, in February 2017 the Michigan Civil Rights Commission released a report with its findings regarding whether the contamination of the Flint water system abridged any civil rights. The report concludes that the causes of the Flint water crisis are historical, dating back nearly a century. Although the people involved in making decisions regarding Flint's water may not have intended to treat the city differently because it is primarily made up of people of color, the report concluded that "the disparate response is the result of systematic racism that was built into

the foundation and growth of Flint.” The report details several recommendations, including actions addressing implicit bias, providing environmental justice for all people, and replacing Michigan’s emergency manager law. It is available at <http://www.michigan.gov/mdcr>.

Recently Filed Litigation

The American Civil Liberties Union of Michigan and the Education Law Center filed a complaint in the Eastern District of Michigan in October 2016 on behalf of Flint schoolchildren. *See D.R. v. Michigan Department of Education*, No. 2:16-cv-13694. The action asserts that Flint public schools fail to provide appropriate services to students with disabilities and that the situation will be made worse because lead is known to cause cognitive, developmental, and behavioral impairment in children. Plaintiffs allege claims for “systemic violations” of the Individuals with Disabilities Education Act, discrimination based on disability in violation of the Rehabilitation Act and the Americans with Disabilities Act, and a Michigan special education statute.

In addition, in January 2017, a group of 1,700 Flint residents filed an action in federal court against the United States regarding EPA’s alleged delay in responding to concerns about Flint’s water. *See Burgess v. United State of America*, No. 2:17-cv-10291. The plaintiffs assert claims for negligence for failure to take actions required by the Safe Drinking Water Act, negligent performance regarding timely investigations, and negligence regarding EPA’s duty to warn the public of environmental risks. The plaintiffs seek \$722 million for personal injuries and property damage.

Ameri R. Klafeta is an attorney with Eimer Stahl LLP in Chicago. She has broad experience in complex and class action litigation, including environmental and mass tort matters. She may be reached at aklafeta@eimerstahl.com.

A VALUABLE CONTRIBUTION: CERCLA COST RECOVERY AND CONTRIBUTION AGAINST THE FEDERAL GOVERNMENT

Charles J. Dennen

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is a strict liability statute that imposes liability upon responsible parties for costs associated with environmental cleanup and remediation. The statute provides a mechanism for holding the persons actually responsible for the contamination accountable for the cleanup costs. The United States Government is included among CERCLA’s definition of a “person,” meaning the federal government may potentially be liable for cost recovery or contribution under CERCLA. However, CERCLA actions against the federal government have considerations that standard private-party actions do not.

Waiver of Sovereign Immunity

It is well settled that the United States enjoys sovereign immunity from suits and, therefore, may only be sued if it has waived that immunity. “Waivers of sovereign immunity must be ‘unequivocally expressed’ in the statutory text and ‘any such waiver must be strictly construed in favor of the United States.’” *Beneficial Consumer Discount Co. v. Poltonowicz*, 47 F.3d 91, 93–94 (3d Cir. 1995). Therefore, asserting an action against the federal government requires an unequivocal waiver of sovereign immunity.

The plain language of CERCLA contains the necessary unequivocal waiver of sovereign immunity to maintain an action against the federal government. CERCLA Section 9620(a)(1) permits a court to find the federal government liable for a release of hazardous waste in the same manner and to the same extent as non-governmental entities. *See* 42 U.S.C. § 9620(a)(1); *U.S. v. Ottati & Gross*, 900 F.2d 429, 443 (1st Cir. 1990); *U.S. v. Shell Oil*, 294 F.3d 1045, 1053 (9th Cir. 2002). Similarly,

Section 9620(a)(4) allows suits against the United States pursuant to state environmental statutes. *See* 42 U.S.C. § 9620(a)(4); *Redland Soccer Club, Inc. v. Dept. of the Army of the U.S.*, 801 F. Supp. 1432, 1436 (M.D. Pa. 1992).

Jurisdiction

Even though CERCLA allows the United States to be sued pursuant to state environmental statutes, CERCLA explicitly provides for exclusive federal jurisdiction. 42 U.S.C. § 9613(b). The two exceptions to exclusive federal jurisdiction are (1) the review of regulations promulgated under CERCLA, and (2) challenges to a removal or remedial action selected under Section 9604, with certain enumerated exceptions. 42 U.S.C. § 9613(a); (h). One exception to challenges to a removal or remedial action is for an action under Section 107 to recover response costs or damages or for contribution. 42 U.S.C. § 9613(h)(1). Numerous courts have recognized the exclusive jurisdiction of federal courts over CERCLA claims. *See, e.g., O'Neal v. Dep't of the Army of the U.S.*, 742 A.2d 1095, 1099 (Pa. Super. Ct. 1999); *Barnet Aluminum Corp. v. Reilly*, 927 F.2d 289, 292 (6th Cir. 1991). Practically speaking, a CERCLA action against the federal government brought in state court pursuant to a state environmental statute bears a significant risk of being dismissed for lack of subject matter jurisdiction.

CERCLA Liability Generally

CERCLA provides two distinct remedies, and each is dependent on the PRP's "procedural circumstances." *U.S. v. Atl. Research Corp.*, 551 U.S. 128, 139 (2007). The first remedy is a right to cost recovery under Section 107(a), and the second is a separate right to contribution under Section 113(f). *Id.*

In order to establish liability for cost recovery or contribution, a plaintiff must meet the following four elements: (a) that hazardous substances were disposed of at a "facility"; (b) a "release" or "threatened release" of a "hazardous substance"

from the site has occurred; (c) the release or threatened release has caused the United States to incur response costs; and (d) the defendants fall within at least one of the four classes of responsible parties under § 9607(a). *U.S. v. CDMG Realty Co.*, 96 F.3d 706, 712 (3d Cir. 1996) (citing 42 U.S.C. § 9607(a)); *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252, 258–59 (3d Cir. 1992)).

CERCLA makes four classes of persons liable for response costs or contribution: (1) the current owner or operator of a facility, 42 U.S.C. § 9607(a)(1); (2) any person who owned or operated the facility "at the time of disposal" of a hazardous substance, § 9607(a)(2); (3) any person who arranged for disposal or treatment, or arranged for transport for disposal or treatment of hazardous substances at the facility, § 9607(a)(3); and (4) any person who accepts or accepted hazardous substances for transport to sites selected by such person, § 9607(a)(4). *CDMG Realty Co.*, 96 F.3d at 713. A person falling into at least one of these four categories is strictly liable for response costs that result from a "release" or "threatened release" of a hazardous substance from the facility, regardless of fault. Due to CERCLA's definition of "person" including the "United States Government," the federal government may be liable in the same manner and to the same extent as a non-governmental "person." *See* 42 U.S.C. § 9601(21).

Federal Government Liability

To be eligible for a cost-recovery or contribution action under CERCLA, the United States must fall under at least one of the classes of responsible parties. One possible basis for holding the federal government liable is as an "operator" of a "facility." CERCLA provides little guidance as to what persons qualify as operators of a facility. Thus, courts have been left to determine the criteria for facility operators.

Some courts have adopted the "actual control" test to determine who qualifies as an operator for liability purposes under CERCLA. The "actual control" test means exercising "substantial control"

over the facility where the hazardous substance was disposed of, as demonstrated through “active involvement in the activities” related to the disposal of the hazardous substance. *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221–22 (3d Cir. 1993); *U.S. v. Vertac Chem. Corp.*, 46 F.3d 803, 808 (8th Cir.), *cert. denied*, 515 U.S. 1158 (1995); *but cf. Nurad, Inc. v. Wm. E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir.), *cert. denied sub nom. Mumaw v. Nurad, Inc.*, 506 U.S. 940 (1992) (applying the “authority to control” test). The “actual control” test has been used to impose CERCLA liability on the federal government. *See, e.g., FMC Corp. v. U.S. Dep’t of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994); *U.S. v. Twp. of Brighton*, 155 F.3d 307 (6th Cir. 1998). However, determining whether a governmental entity qualifies as an operator or is merely acting in a regulatory capacity—which may not be sufficient to impose CERCLA liability—is a fact-intensive inquiry. *Brighton*, 155 F.3d at 315 n.9; *Vertac*, 46 F.3d at 808.

More recently, the viability of the “actual control” test has been called into question. In *United States v. Bestfoods*, 524 U.S. 51 (1998), the United States Supreme Court described the “actual control” test as too broad and stated a narrower standard for operator liability. Instead of actual control, “an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.” *Id.* at 66; *see also Exxon Mobil Corp. v. U.S.*, 108 F. Supp. 3d 486 (S.D. Tex. 2015) (relying on *Bestfoods* to address federal government’s liability for refineries). Despite the decision in *Bestfoods*, some courts still follow the actual control test. *See City of Waukegan v. Nat’l Gypsum Co.*, 560 F. Supp. 2d 636, 641 (N.D. Ill. 2008) (finding the *FMC* decision applying the actual control test “to be consistent with *Bestfoods* and thus still viable as legal authority”).

Another potential basis for holding the federal government liable is to argue that they were an

“arranger” under CERCLA. Arranger liability applies to “any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person . . . at any facility[.]” 42 U.S.C. § 9607(a)(3). The Supreme Court has explained that arranger liability requires intentional steps to dispose of a hazardous substance; knowledge alone is insufficient. *Burlington N. & Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 611–12 (2009).

In *Vertac*, the successor to a manufacturer of Agent Orange sought to impose CERCLA liability on the United States as an arranger. The Eighth Circuit explained that “a governmental entity may not be found to have owned or possessed hazardous substances under § 9607(a)(3) merely because it had statutory or regulatory authority to control activities which involved the production, treatment or disposal of hazardous substances.” *Vertac*, 46 F.3d at 810. There, the United States did not immediately supervise or have direct responsibility for the transportation or disposal of any hazardous substances generated at the facility. The court also refused to apply arranger liability because the United States did not supply the raw materials to the manufacturer and did not own or possess the raw materials or the work in process. *Id.* at 811.

Conversely, the federal government was found liable as an arranger where the following three elements were satisfied: the federal government (1) owned the hazardous substance; (2) had the authority to control the disposal of that substance; and (3) exercised some actual control over the disposal of that substance. *See Nu-West Mining, Inc. v. U.S.*, 768 F. Supp. 2d 1082, 1088–89 (D. Idaho 2011).

CERCLA Remedies

The federal government may be liable under either a Section 107 cost-recovery action or a Section 113 contribution action. The Supreme Court has recognized the “complementary yet distinct nature” of the rights established in Sections 107(a) and 113(f). *Atl. Research*, 551 U.S. at 138.

Under Section 107(a), a PRP that voluntarily incurs response costs may recover cleanup costs from a statutorily defined responsible party, without any establishment of liability to a third party. *Id.* at 139. On the other hand, a PRP that pays to satisfy a settlement agreement or a court judgment is precluded from suing another party under Section 107(a), but instead must seek contribution under Section 113(f). *Id.* Section 113(f) provides two means for obtaining contribution: (1) Section 113(f)(1) provides PRPs who have been sued under Section 107 a right of contribution from other PRPs, including the plaintiff, and (2) Section 113(f)(3)(B) provides a right of contribution to PRPs that have settled their liability with a state or the United States through either an administrative or judicially approved settlement. 42 U.S.C. §§ 9613(f)(1); 9613(f)(3)(B). In short, a party uses contribution to get reimbursed for having to pay more than its fair share of costs and uses cost recovery to get reimbursed for cleanup costs voluntarily incurred. *Atl. Research*, 551 U.S. at 139 n.6. By reimbursing response costs paid by other parties, a PRP has not incurred its own response costs and, therefore, may not bring a cost-recovery action under Section 107(a). *Id.* at 139.

The Ninth Circuit has rejected the federal government's argument that a private party who has been sued in a Section 107(a) cost-recovery action should be limited to a contribution action for all expenses at the site. *Whittaker Corp. v. U.S.*,

825 F.3d 1002, 1008-11 (9th Cir. 2016). Instead, the court held that a private party was not required to bring a contribution claim under Section 113(f)(1) against the federal government because the Section 107(a) claim was seeking to recover expenses separate and apart from those for which liability had already been established.

However, the Southern District of Texas has found that contribution under Section 113(f) is the exclusive remedy against the federal government for a PRP who has incurred cleanup costs in response to an administrative settlement with a state. *See Exxon Mobil Corp. v. U.S.*, 108 F. Supp. 3d 486 (S.D. Tex. 2015). The court further struck down the arguments that a PRP may sue for cost recovery under Section 107(a) for costs incurred before the settlement with the state was signed and for costs outside the scope of the settlement. Notably, the court did explain that Congress did not limit Section 113(f)(3)(B) to administrative settlements resolving only CERCLA liability. *Id.*; *see also Trinity Indus., Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013).

Charlie Dennen is an associate in the Environmental Law Group at Archer & Greiner in Haddonfield, New Jersey. Charlie has experience in all areas of toxic tort and environmental law and has been involved in all stages of litigation in complex multiparty matters in both federal and state courts. He is a graduate of Rutgers University – New Brunswick and Rutgers Law School.

The advertisement features the ABA logo in blue and the word 'BLUEPRINT' in large, white, outlined letters. Below the logo, the text reads 'All of the services and products you need to run your firm, all in one place. Build your practice.' Four icons represent different services: a computer monitor for 'TECHNOLOGY', a target for 'MARKETING', a shield for 'INSURANCE & RETIREMENT', and a headset for 'OFFICE & VIRTUAL ASSISTANCE'. At the bottom, there is a red button with the text 'LEARN MORE' and a right-pointing arrow, followed by the website address 'www.abablueprint.com'.

ENVIRONMENT, ENERGY, AND RESOURCES LAW

25th Fall Conference

BALTIMORE

OCTOBER 18-21, 2017

Baltimore Waterfront Marriott

Join us for this post-election conference as we celebrate 25 years of providing the premier forum to explore, educate, and discuss cutting edge topics, and creating unparalleled networking opportunities.



SHOPABA.ORG/ENVIRONFALL