

## Environmental Litigation and Toxic Torts Committee Newsletter

Vol. 19, No. 2

April 2018

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### MESSAGE FROM THE CHAIRS

Peter Condron and Shelly Geppert

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Dear Members:

Welcome to the latest edition of the Environmental Litigation and Toxic Tort Committee's award-winning newsletter. In addition to our usual complement of case summaries from our team of authors around the nation reporting on the latest developments in environmental and toxic tort litigation, we have a timely article from Matt Thurlow, Russ Abell, and Stephen Zemba on an extremely hot topic in environmental law—developing regulation and lawsuits concerning the presence of perfluorinated compounds in groundwater and drinking water. Matt, Russ, and Stephen presented a webinar on the topic last year, and their article provides further information on the issues that will keep all of our members up-to-date on this emerging issue.

For those of you who have been enduring “bomb cyclones” and blizzards, and are looking to get a jump on spring (or this year's CLE credits), we encourage you to attend SEER's upcoming Spring Conference in Orlando, Florida, from April 18 to 20. The conference will feature expert panels with nationally renowned practitioners discussing a number of important issues, including one panel moderated by our own Shelly Geppert. Programs will examine developments in environmental law under the Trump administration, report on the latest trends in federal and state regulation, and survey the litigation landscape. It's also a great opportunity

to meet and network with your fellow SEER and ELTT members. We'd love to see you there.

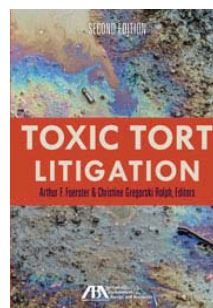
Finally, we're always looking for new members. SEER and ELTT membership enhances practitioners' knowledge of their field, presents a forum for discussing and debating ideas and trends in environmental law, and provides an opportunity to give back to the profession and the community. Encourage your colleagues to join and experience the many benefits SEER and ELTT provide.

Until next issue,

Pete and Shelly

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Toxic Torts Committee Newsletter  
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Stephen Riccardulli, Editor

*In this issue:*

**Message from the Chairs**

Peter Condron and Shelly Geppert.....1

**Case Law Highlights: Mountain/West  
Coast**

Whitney Jones Roy, Whitney Hodges, and  
Alison N. Kleaver.....3

**Case Law Highlights: Midwest**

Sonia H. Lee .....7

**Case Law Highlights: Mid-Continent**

Brian Wauhopp.....9

**Case Law Highlights: Southeast**

Laura Glickman and  
Bridget R. Reineking .....11

**Case Law Highlights: Northeast**

Steven German .....15

**PFAS Contamination Remains a Hot-  
Button Issue: Overview of Recent  
Regulatory, Litigation, and Technical  
Developments**

Matthew Thurlow, Russ Abell, and  
Stephen Zemba.....19

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

**CALENDAR OF SECTION EVENTS**

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

June 7-10, 2018

**ABA 2018 Paris Sessions**

Paris, France

August 2-7, 2018

**ABA Annual Meeting**

Chicago, IL

October 17-20, 2018

**26th Fall Conference**

Marriott Marquis San Diego Marina  
San Diego, CA

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## CASE LAW HIGHLIGHTS: MOUNTAIN/ WEST COAST

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### **NINTH CIRCUIT HOLDS NATIONAL PARK SERVICE HAS THE AUTHORITY TO REGULATE NAVIGABLE WATERS IN ALASKA'S NATIONAL PARKS AND PROHIBIT THE USE OF HOVERCRAFT (AGAIN)**

Whitney Jones Roy, Whitney Hodges, and Alison N. Kleaver

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*Sturgeon v. Frost, et al.*, 872 F.3d 927 (9th Cir. 2017). In September 2011, moose hunter John Sturgeon brought an action against the National Park Service (“Park Service”), alleging it inappropriately banned him from using a hovercraft to hunt moose on the Nation River in the Yukon-Charley Rivers National Preserve (“National Preserve”). Id. at 929. On remand from the Supreme Court, the decision analyzes which entity is permitted to decide this matter after the Supreme Court rejected an earlier circuit decision supporting the ban. The court’s ruling affirms congressional intent to permit Park Services authority to manage navigable waters in Alaska’s national parks, especially those parks meant to preserve wild rivers, and describes the balance between state and federal jurisdiction.

Sturgeon’s claims rested on the argument that the Nation River belongs to the state of Alaska, which permits the use of hovercraft on its waterways, and that the Alaska National Interest Lands Conservation Act (ANILCA) precluded the Park Service from regulating activities on state-owned lands and navigable waters within national parks. Id. at 929, 932. On remand from the Supreme Court, the Ninth Circuit Court of Appeals again affirmed the district court’s summary judgment in favor of the Park Service, stating the federal government properly exercised its authority to regulate or, in this case, prohibit the use of hovercraft upon the rivers within a conservation system. Id. at 936. Specifically, the court found that ANILCA and prior case law provided the United States with an implied reservation of water rights, which rendered the Nation River within the

purview of the National Preserve’s “public land” and subject to its regulation. Id.

The Submerged Lands Act released and relinquished all of the federal government’s right, title, and interest in the land adjacent to and beneath the New River to the state of Alaska when it attained statehood. Id. at 933. But, as the court pointed out, lands submerged beneath inland waterways are distinct from the waterways themselves. Id. at 932. Under the Submerged Lands Act, “[t]he United States retains all its navigational servitude and rights in and powers of regulation and control of [submerged] lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs.” Id.

Prior case law analyzed the United States’ interest in navigable waters in Alaska under the reserved water rights doctrine. Id. at 933. Under this doctrine, when the federal government “withdraws its land from the public domain and reserves it for a federal purpose,” the government impliedly “reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.” Id. The reserved right in unappropriated water vests on the date of the reservation and is superior to the rights of future appropriations. Id. As pointed out by the court, “[t]he United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes,” including ANILCA, and thereby has “implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations.” Id. The court, bound under precedent, determined that because the body of water at issue is “actually situated within the boundaries of federal reservations,” it is “reasonable to conclude that the United States had an interest in such waters for the primary purposes of the reservations.” Id. at 934.

After finding the United States had an implied reservation of water rights with regard to waters within the National Preserve in Alaska, which thereby rendered the Nation River “public land” as

defined by ANILCA and subject to Park Service regulations, the court then emphasized President Carter’s reservation of the National Preserve prior to the enactment of ANILCA. *Id.* at 934–35. Per this reservation, the National Preserve was to be managed “for the protection of . . . historical, archeological, biological, [and] geological . . . phenomena,” including habitat for “isolated wild populations of Dall sheep, moose, bear, wolf, and other large mammals.” *Id.* The court determined the Park Service’s prohibition of hovercraft, which can provide virtually unlimited access to park areas and introduce a mechanical mode of transportation into locations where the intrusion of motorized equipment by sight or sound is generally inappropriate, is consistent with congressional intent. *Id.* at 935. Specifically, the hovercraft ban serves the purpose of keeping waterways in their undeveloped natural condition to protect wildlife habitat. *Id.*

In a concurring opinion, Circuit Judge Nelson states this case has “has nothing to do” with the reserved water rights doctrine and should have been addressed under the Commerce Clause. *Id.* at 937. Even under the Commerce Clause, the concurrence is of the opinion the federal regulation of Alaska’s navigable water is proper. *Id.* at 938.

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**NINTH CIRCUIT FINDS DISTRICT COURT SHARPLY DEVIATED FROM EXISTING AUTHORITY ON CERCLA CLEANUP COSTS BETWEEN MILITARY CONTRACTOR AND U.S. GOVERNMENT WHEN IT ALLOCATED 100 PERCENT OF LIABILITY TO MILITARY CONTRACTOR**

Whitney Jones Roy, Whitney Hodges, and Alison N. Kleaver

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*TDY Holdings v. United States, et al.*, 872 F.3d 1004 (9th Cir. 2017). TDY brought suit for contribution under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against the U.S. government relating to environmental contamination at TDY’s manufacturing plant.

The district court granted judgment in favor of the government after a 12-day bench trial and allocated 100 percent of past and future CERCLA costs to TDY. On appeal, the Ninth Circuit held that the district court sharply deviated from the two most “on point” decisions regarding allocation of cleanup costs between military contractors and the U.S. government when it determined the cases were not comparable, clarified the applicability of those cases, and remanded the case to reconsider the appropriate allocation of cleanup costs between TDY and the U.S. government.

From 1939 through 1999, TDY (formerly known as Ryan Aeronautical Company) owned and operated a manufacturing plant near the San Diego airport. TDY’s primary customer was the U.S. government—99 percent of TDY’s work at the plant between 1942 and 1945, and 90 percent of the work thereafter was done pursuant to contracts with the U.S. military. The United States also owned certain equipment at the site from 1939 to 1979. *Id.* at 1006. Chromium compounds, chlorinated solvents, and polychlorinated biphenyls (PCBs) were released at the site as a result of their use during manufacturing operations. *Id.* In some cases, the government’s contracts required the use of chromium compounds and chlorinated solvents. *Id.* After passage of the Clean Water Act and other environmental laws classifying these chemicals as hazardous substances in the 1970s, TDY began environmental remediation and compliance at the site and billed the government for the “indirect costs” of that work, which the government paid. *Id.* at 1006–07. TDY incurred over \$11 million in response costs at the site. *Id.* at 1007. Until the plant’s closure in 1999, the government reimbursed 90 to 100 percent of TDY’s cleanup costs at the site. *Id.* at 1007, 1010.

In 2004, the San Diego Unified Port District brought CERCLA claims against TDY. TDY and the Port District entered into a settlement agreement in March 2007 in which TDY agreed to cleanup releases at the site. TDY then brought suit for contribution under 42 U.S.C. § 9613(f)(1)

and declaratory relief against the United States. *Id.* at 1007. The district court granted TDY’s motion for partial summary judgment declaring that the United States was liable as a past owner of the site under CERCLA. *Id.* After a 12-day bench trial on equitable allocation of costs, the district court held that the contamination caused by the hazardous substances at issue was attributable to TDY’s storage, maintenance, and repair practices, as well as spills and drips that occurred in the manufacturing process, rather than to the government’s directives to use the chemicals. *Id.* Accordingly, the district court allocated 100 percent of the past and future response costs for remediation of the three hazardous substances to TDY. *Id.* at 1008.

On appeal, TDY argued that the district court erred (1) when it allocated liability according to “fault”; (2) that the government’s role as owner rather than operator should not have been a dispositive factor in the court’s allocation, and (3) that the government should bear a greater share of response costs because it specifically required use of the chemicals at the site. *Id.* The court of appeals summarily rejected TDY’s first two arguments, but found that the district court did err in its analysis and application of binding authority on point: *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002) and *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 299 F.3d 1019 (9th Cir. 2002). *Id.* at 1008–09. *Shell Oil and Dow Chemical* each produced products to support the U.S. military during World War II and incurred liability for contamination caused by hazardous chemicals that the government required to be used. In both cases, the Ninth Circuit affirmed the district courts’ allocation of 100 percent of cleanup costs to the government because “the contractors’ costs were ‘properly seen as part of the war effort for which the American public as a whole should pay.’” *Id.* at 1009.

The Ninth Circuit disagreed with the district court’s conclusion that *Shell Oil* and *Cadillac*

*Fairview* were not comparable, but agreed that some deviation from their allocations were appropriate. *Id.* The Ninth Circuit agreed that the government exercised less control over TDY than it did over *Shell Oil Co.* or *Dow Chemical*. In support of this determination, the court noted that the government was an operator, rather than an owner, of TDY’s site, that the government-owned equipment was removed from the site 20 years before TDY ceased operations, and that TDY’s own practices at the site caused the contamination. *Id.* at 1010. Furthermore, the district court properly determined that “industrial operations undertaken for the purpose of national defense, standing alone, did not justify allocating all costs to the government.” *Id.*

However, the Ninth Circuit held that, in allocating 100 percent of cleanup costs to TDY, the district court failed to consider that the government required TDY to use two of the three chemicals at issue beginning in the 1940s, when the need to take precautions against environmental contamination from these substances was not known. *Id.* Furthermore, the Ninth Circuit determined that “[t]he court’s acknowledgement of the evolving understanding of environmental contamination caused by these chemicals, and TDY’s prompt adoption of practices to reduce the release of hazardous chemicals into the environment once the hazards became known, further undercuts the decision to allocate 100 percent of the costs to TDY.” *Id.* The district court also failed to consider the parties’ lengthy course of dealing through 1999, when the government paid between 90 and 100 percent of cleanup costs at the plant. *Id.* Although “a customer’s willingness to pay disposal costs . . . cannot be equated with a willingness to foot the bill for a company’s unlawful discharge of oil or other pollutants,” the Ninth Circuit nevertheless determined it should have been a relevant factor in the allocation analysis. *Id.*

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**NINTH CIRCUIT DETERMINES THAT, IN LIMITED CIRCUMSTANCES, WHALES AND SEALS ARE FISH (NOT MAMMALS)**

Whitney Jones Roy, Whitney Hodges, and Alison N. Kleaver

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*Makah Indian Tribe, et al. v. Quileute Indian Tribe et al.*, 813 F.3d 1157 (9th Cir. 2017).

Defying the universal notion that whales and seals are, in fact, mammals, the Ninth Circuit recently affirmed in part, and reversed in part, the Western District Court of Washington’s judgment determining that such species qualify as fish in limited circumstances relating to tribal fishing rights in western Washington. *Id.* at 1159. While the direct determination that the use of the word “fish” may occasionally include some marine mammals may not be universally enlightening, this case painstakingly details the rules to be utilized when interpreting sovereign treaties—a tool helpful to almost any jurisdiction. (The opinion also quotes from the television show “Seinfeld,” validating George Costanza’s proclamation that whales are fish.)

The origins of this specific matter date back to July 1855 when the Quileute Indian Tribe (“Quileute”) and the Quinault Indian Tribe (“Quinault”) (collectively, the “Tribes”) signed the Treaty of Olympia (“Treaty”) with the United States, thereby protecting the Tribes’ “rights of taking fish at all usual and accustomed grounds and stations.” *Id.* at 1159–60. More recently, in 2009, the Makah Indian Tribe (“Makah”), alleging the Quileute and Quinault’s hunting of whales and seal adversely impacted their ability to do the same, followed procedures to invoke the district court’s continuing jurisdiction to determine “the location of any of a tribe’s usual and accustomed fishing grounds not specifically determined” in prior case law. *Id.* at 1160. Specifically, the Makah asked the district court to adjudicate the western boundary of the Quileute’s usual and accustomed grounds and stations and Quinault’s usual and accustomed grounds and stations in the Pacific Ocean and to determine whether the Treaty permits the Tribes’ fishing of whales and seals. *Id.*

In response to these issues, the Ninth Circuit issued the following affirmative holdings: (1) the Treaty reserved the Tribes’ right to take whales and seals; (2) evidence of whaling and sealing was appropriate to establish usual and accustomed grounds and stations under the Treaty; (3) the district court properly looked to the Tribes’ evidence of taking whales and seals to establish the usual and accustomed grounds and stations for the Quileute and Quinault, and did not err in its interpretation of the Treaty; and (4) the Tribes were not required to identify specific locations for “grounds and stations,” and, as such, adequately identified the “grounds and stations” where they engaged in whaling and sealing. *Id.* at 1162–67. The court did not stop there, though, and reversed the district court’s order imposing longitudinal boundaries on where the Tribes could fish because they did not match the district court’s usual and accustomed grounds and stations determinations for the Tribes. *Id.* at 1168. Noting the law does not dictate any particular approach or remedy that the court should institute, the matter was remanded with direction to the district court to draw boundaries that are fair and consistent with the its prior findings. *Id.* at 1169–70.

In reaching its ultimate determinations, the Ninth Circuit employed the Indian Canons of Construction. *Id.* at 1163. Per these canons, which are rooted in the unique trust relationship between the United States and the sovereign tribes, treaties involving Indian tribes “are to be construed, so far as possible, in the sense in which the Indians understood them.” *Id.* Ambiguous provisions are to be interpreted to a tribe’s benefits. *Id.* The court found that these rules apply to treaty language reserving hunting, fishing, and gathering rights. *Id.* Relying on these principles, the Ninth Circuit determined that as a non-signatory party, the Makah cannot usurp application of the Indian canon with respect to the Treaty solely because an alternative interpretation of the word “fish” would adversely affect the Makah. *Id.* “Such an incursion would undermine tribal sovereignty and the signatory tribes’ government-to-government relations.” *Id.*

At the time of signing the Treaty, “fish” was ambiguous, having multiple meanings of varying breadth, some of which would include whales and seals, and some of which would exclude such mammals. *Id.* at 1162. Using the above-described canons to ascertain the Tribes’ understanding, the court looked beyond the written words to history of the Treaty, the negotiations, and the practical construction adopted by the parties. The Ninth Circuit highlighted the district court’s 23-day bench trial and 83 pages of findings of fact and conclusions of law as sufficient evidence to establish the Treaty intended “fish” to include whales and seals. *Id.* at 1164.

Last, the court also implemented the “reserved rights doctrine.” *Id.* at 1166. Pursuant to this doctrine, absent clear written indication, courts are reluctant to conclude a tribe has forfeited previously held rights “because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights.” *Id.* at 1166–67. The court determined this doctrine favors reading the “right of taking fish” to include the Tribes’ established historical whaling and sealing, particularly because there are independent indications that “fish” was understood that expansively. *Id.* at 1167.

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## CASE LAW HIGHLIGHTS: MIDWEST

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### KENTUCKY DISTRICT COURT DISMISSES COMPLAINT ALLEGING VIOLATIONS OF RESOURCE CONSERVATION AND RECOVERY ACT AND CLEAN WATER ACT

Sonia H. Lee

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*Kentucky Waterways All. v. Kentucky Utilities Co., No. 5:17-292-DCR, 2017 WL 6628917 (E.D. Ky. Dec. 28, 2017).* A Kentucky federal judge dismissed a citizen enforcement action brought by Kentucky Waterways Alliance and Sierra Club (plaintiffs) against Kentucky Utilities Co. (“Kentucky Utilities”), in which plaintiffs alleged Kentucky Utilities violated the Resource Conservation and Recovery Act (RCRA) and Clean Water Act (CWA) in connection with its operation of a three unit coal-fired plant located on the banks of Herrington Lake in Harrodsburg, Kentucky. In granting dismissal, the court agreed with Kentucky Utilities that plaintiffs lacked standing to bring their RCRA claim and that their CWA case failed to state a claim.

Plaintiffs filed the action on July 27, 2017, alleging violations of RCRA and the CWA. The RCRA claim contended, *inter alia*, that Kentucky Utilities failed to take adequate remedial steps to address its “handling, storage, treatment, transportation, or disposal of solid waste” at the coal plant that allegedly presented “an imminent and substantial endangerment to human health and the environment.” *Id.* at 4. Plaintiffs’ CWA claim alleged that Kentucky Utilities had been discharging pollutants into a navigable water without a permit, causing irreparable harm to the plaintiffs’ members and their communities.

As to plaintiffs’ RCRA claim, the court concluded that plaintiffs lacked standing to bring suit because “the requested injunctive relief is not available to redress the alleged injuries.” *Id.* The court began by noting that, just three months before plaintiffs filed the instant lawsuit, Kentucky Utilities entered into an agreement with the Kentucky Energy and Environment Cabinet (“Cabinet”) to

“address any threat or potential threat to human health and the environment.” *Id.* at \*3. The court rejected plaintiffs’ contention that the remedial actions required by the Cabinet are “unnecessary, flawed, and unaccompanied by any commitment to implement effective remedial action,” and that the court could redress their members’ injuries by “issuing more appropriate relief,” such as ordering Kentucky Utilities to “excavate the buried coal ash or to clean up the pollution in Herrington Lake.” *Id.* at \*8. This amounted to “little more than an invitation to ‘second-guess’ the state regulatory authority and to award relief on ‘more stringent terms’ than it has imposed,” the court observed. *Id.* The court found that accepting such an invitation would fail to “respect the statute’s careful distribution of enforcement authority.” As a result, the court dismissed plaintiffs’ RCRA claim for lack of jurisdiction, as the plaintiffs’ members lacked standing to bring an RCRA citizen suit at this time.

With respect to the CWA claim, the court held that “the discharge of pollutants to a navigable water via hydrologically connected groundwater” is not subject to the CWA’s National Pollutant Discharge Elimination System (NPDES) permit requirement. “Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that ground water is eventually or somehow ‘hydrologically connected’ to navigable surface waters,” the court observed. *Id.* at \* 11. Accordingly, the court found plaintiffs’ allegations were insufficient to state a claim for the unlawful “discharge of a pollutant” without a permit under the CWA and dismissed plaintiffs’ CWA claim.

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## SIXTH CIRCUIT REVERSES DISMISSAL OF PLAINTIFFS’ CONTAMINATION LAWSUIT AGAINST REFINERY

Sonia H. Lee

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***Cole v. Marathon Oil Corp.*, No. 16-2660, 2017 WL 4857544 (6th Cir. Oct. 26, 2017).**

In an unpublished opinion, a three-judge panel reversed and remanded a case arising out of an oil

refinery’s alleged discharge of noxious pollutants that allegedly contaminated residents’ property, finding that the district court erred in dismissing the residents’ nuisance and negligence claims on statute-of-limitations grounds.

On February 22, 2016, residents living near a refinery in Detroit, Michigan, sued Marathon Petroleum Company (“Marathon”), asserting nuisance and negligence claims and alleging their “properties have been contaminated with toxic and hazardous substances released” from Marathon’s refinery. *Id.* at \*1.

Marathon moved to dismiss on, inter alia, statute of limitations grounds, arguing that Michigan’s three-year statute of limitations foreclosed recovery because “[p]laintiffs do not plead any facts from which the Court can infer that their alleged injuries first occurred less than three years ago.” *Id.* at \*2. In response, the plaintiffs countered that “Marathon’s ‘present,’ ‘continuing’ and ‘ongoing acts’ give rise to [their] claims.” *Id.* The district court dismissed the complaint as time-barred and plaintiffs appealed.

On appeal, the Sixth Circuit observed that “[t]he district court erred when it concluded that all of Plaintiffs’ claims accrued at the first incident of Marathon’s allegedly wrongful conduct, even though the conduct and resultant harm continue to the present day.” *Id.* at \*2. In so ruling, the court noted that, under Michigan law, “each alleged violation . . . [is] a separate claim with a separate time of accrual.” *Id.* Accordingly, the court held that any claims for alleged discharge occurring prior to February 22, 2013 (i.e., three years prior to the filing of plaintiffs’ complaint), were time-barred, while any claims for alleged discharge occurring after February 22, 2013, were timely.

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## CASE LAW HIGHLIGHTS: MID-CONTINENT

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### BARGE OWNER CANNOT AVOID LIABILITY FOR CLEANUP COSTS USING “THIRD-PARTY” EXEMPTIONS IN OIL POLLUTION ACT

Brian Wauhop

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*United States v. American Commercial Lines, L.L.C.*, 875 F.3d 170 (5th Cir. 2017). The Fifth Circuit Court of Appeals held that a barge owner could not assert the third-party defense in the Oil Pollution Act for liability stemming from a collision that caused 300,000 gallons of oil to spill into the Mississippi River. American Commercial Lines (“ACL”) owned the tugboat M/V MEL OLIVER and contracted out operation of the tugboat to DRD Towing Company (“DRD”). *Id.* at 172. Under the contract between these parties, DRD was obligated to crew the tugboat and charter its service back to ACL. *Id.* On July 23, 2008, a barge under tow by the M/V MEL OLIVER (being operated by DRD crew) collided with an ocean-going tanker spilling 300,000 gallons of oil into the river. *Id.* at 173. At the time of the collision, the captain of the tugboat was not on board and the steersman operating the tugboat had been working for nearly 36 hours straight (he was found unresponsive and slumped over the controls immediately following the collision). *Id.*

Following the spill, DRD and the captain and crew of the M/V MEL OLIVER pleaded guilty to criminal violations of federal environmental law. *Id.* ACL incurred \$70 million in cleanup costs and the United States incurred \$20 million in cleanup costs. The government sued ACL and DRD under the Oil Pollution Act (OPA) to recover the \$20 million in cleanup costs. Accordingly, DRD declared bankruptcy, and the district court granted the government’s motion for summary judgment against ACL. *Id.* On appeal, the Fifth Circuit affirmed the district court’s ruling, reasoning that ACL could not invoke two exemptions to liability contained in OPA.

First, ACL argued that it was not liable because the collision was caused by DRD, a third party. Under OPA, a responsible party is not liable when the spill is caused by the “. . . omission of a third party, other than an employee or agent of the responsible party or a third whose act or omission occurs in connection with any contractual relationship with the responsible party . . .,” 33 U.S.C. § 2703(a) (3). The government argued that because DRD had a contract with ACL for chartering the tugboat, the third-party defense was not available to ACL because DRD’s conduct occurred in connection with a contractual relationship. *Id.* at 175. The Fifth Circuit agreed, reasoning, in a matter of first impression that the phrase “in connection with,” viewed in context of OPA’s policy of broad liability, results in a “but-for” analysis regarding the significance of the contractual relationship between a responsible party and the third party. *Id.* The court reasoned that if the third party’s conduct that caused the spill would not have occurred “but for” the contractual relationship, then the third party’s conduct occurred “in connection with” the contractual relationship. *Id.* at 176. Under this analysis, the court concluded that but for the contract between ACL and DRD, the spill would not have occurred, and therefore, the third-party exemption was inapplicable to this case. *Id.* at 177.

The Fifth Circuit also rejected ACL’s other arguments that under 33 U.S.C. § 2704 its liability is capped due to DRD’s gross negligence and willful misconduct. The court reasoned that ACL could not limit its liability under that section because the limit does not apply if the spill was caused by “. . . gross negligence or willful misconduct of . . . or . . . violation of an applicable Federal safety, construction, or operating regulation by . . . a person acting pursuant to a contractual relationship with the responsible party . . .,” 33 U.S.C. § 2704(c)(1). *Id.* at 177. The Fifth Circuit reasoned the liability cap was unavailable to ACL because the collision occurred while DRD was acting “pursuant to” the contractual relationship with ACL. *Id.*

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## EIGHTH CIRCUIT HOLDS THAT PRICE-ANDERSON ACT CLAIMS PREEMPT STATE-LAW TORT CLAIMS

Brian Wauhop

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*Michael Dailey, et al. v. Bridgeton Landfill, LLC, Docket No. 4:17-CV-24 (E.D. Mo. Oct. 27, 2017).* The District Court for the Eastern District of Missouri held that the Price-Anderson Act is the sole avenue for recovery for public liability stemming from a nuclear incident. In 1999, the plaintiffs purchased a home and real property adjacent to a landfill containing radioactive “mill tailings” generated from research related to the Manhattan Project. The landfill was subject to the Environmental Protection Agency regulation under the Comprehensive Environmental Response, Liability, and Compensation Act. The plaintiffs learned that soil from their yard and dust in their home contained elevated levels of radioactive particles; trees in the vicinity contained radiological contamination; and surface water runoff that migrates from the landfill to their property contained radioactive contamination.

In 2016, the plaintiffs filed suit in St. Louis County, Missouri, asserting state-law tort theories against six defendants, made up of owners and operators of the landfill, generators of the radioactive waste, and entities involved in disposing the waste. The defendants removed the case to federal court arguing that the allegations arise under the Price-Anderson Act, 42 U.S.C. § 2210 (“PAA”), which provides a federal compensation regime for damages resulting from a nuclear incident. After the plaintiffs filed an amended complaint adding a PAA claim to their state-tort claims, defendant Mallinckrodt LLC (“Mallinckrodt”), a generator of the radioactive waste, filed a motion to dismiss arguing that the PAA preempts state-tort claims.

Relying on the holdings from other federal jurisdictions that have considered this issue, the court agreed with Mallinckrodt that the PAA creates an exclusive federal cause of action for damages resulting from nuclear incidents. The court rejected

the plaintiffs’ attempt to “. . . have their cake and eat it too . . .” by “. . . seek[ing] to maintain their state tort claims just in case their PAA claim fails.”

Despite dismissing the plaintiffs’ state-tort claims, the court did not dismiss all the PAA claims. The court reasoned that because the plaintiffs did not allege physical injury, their PAA claims for medical monitoring and emotional damages would be dismissed. But the court found that the plaintiffs alleged a cognizable PAA claim against Mallinckrodt by pleading that the radioactive contamination found on their property contains the same chemical fingerprint as the waste created by Mallinckrodt.

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## CASE LAW HIGHLIGHTS: SOUTHEAST

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### D.C. CIRCUIT AFFIRMS PARK SERVICE'S GRAND TETON ELK REDUCTION PLAN

Laura Glickman and Bridget R. Reineking

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*Timothy Mayo, et al. v. Michael T. Reynolds, et al.*, 875 F.3d 11 (D.C. Cir. 2017). On November 7, 2017, the U.S. Court of Appeals for the D.C. Circuit upheld the National Park Service's ("Park Service") decision to authorize recreational hunting of elk in Wyoming's Grand Teton National Park ("Grand Teton") without an annual assessment of whether and to what extent hunting was necessary for the management and protection of the elk. *Mayo v. Reynolds*, 875 F.3d 11, 14 (D.C. Cir. 2017). Two wildlife photographers challenged the Park Service's elk hunting program in 2014, arguing that the Park Service was required to prepare a new National Environmental Policy Act (NEPA) analysis every year that it implemented a 15-year elk-reduction program, analyzing the unique environmental effects of each year's hunt. The district court denied the photographers' motion for summary judgment and granted the Park Service's cross-motion for summary judgment in 2016. One of the wildlife photographers appealed the decision. *See Mayo v. Jarvis*, 177 F. Supp. 3d 91, 107–24 (D.D.C. 2016).

Appellant sought to protect the "Jackson herd," one of the largest concentrations of elk in North America. *Mayo*, 875 F.3d at 14. The herd has a home in the Grand Teton and the National Elk Refuge ("Refuge"). Two federal agencies share primary responsibility for managing the Jackson herd: the Park Service, which has jurisdiction over Grand Teton, and the U.S. Fish and Wildlife Service (FWS), which manages the Refuge. In 2007, the two agencies, acting together, adopted a 15-year plan ("2007 plan") to manage the Jackson herd. The 2007 plan set objectives to reduce the population size of the herd, limit its risk of disease, and conserve its habitat. In conjunction with the 2007 plan, the agencies also issued a final environmental impact statement (EIS), as required by NEPA. *Id.*

The 2007 plan analyzed six alternative long-term strategies for managing the Jackson herd. The EIS assessed the environmental risks posed by the alternative strategies. The agencies ultimately adopted "alternative four," an elk-reduction program pursuant to which the Park Service would authorize elk hunting as needed to attain the plan's population objectives. *Id.* at 17. The program also contemplated that FWS would reduce supplemental feed given to the elk during winter months on the Refuge. *Id.*

Between 2007 and 2015, the Park Service adhered to the elk-reduction program in determining the number of elk authorized for harvest and the number of hunters deputized to participate in a hunt. As a result, from 2007 to 2015 the size of the herd decreased, as did the number of deputized hunters and the number of elk authorized for harvest. During this same period, FWS failed to meet the 2007 plan's objective to wean the herd from supplemental feed. Appellant argued that the Park Service was in violation of NEPA by relying on the 2007 plan instead of preparing a new NEPA analysis every year that it implemented the 15-year elk-reduction program. Appellant also contended that FWS's failure to reduce supplemental feeding in line with the plan's goals necessitated the preparation of a supplemental EIS. FWS was not named as a party to the action.

The court first addressed appellant's argument regarding the Park Service's reliance on the 2007 plan in lieu of annual NEPA review. The D.C. Circuit determined that NEPA did not require the Park Service to conduct a NEPA analysis in order to implement a step of a previously studied action, so long as the impacts of that step were contemplated and analyzed by the earlier analysis. Once an agency has taken a "hard look" at "every significant aspect of the environmental impact" of a proposed major federal action, it is "not required" to repeat its analysis simply because the agency makes subsequent discretionary choices in implementing the program. *Id.* at 23 (citations omitted). The court explained that, per the "rule of reason" set forth in *Marsh v. Oregon*

*Natural Resources Council*, 490 U.S. 360 (1989), subsequent “site-specific” NEPA analyses are required only for “those localized environmental impacts that were not fully evaluated in the program statement.” *Id.* (citing *Scientists’ Inst. for Pub. Info. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1093 (D.C. Cir. 1973)). The Park Service’s 2007 plan contemplated that the Park Service would authorize annual elk-reduction programs, and the 2007 EIS accompanying that plan specifically analyzed the effects of such programs. Accordingly, the Park Service’s actions satisfied the rule of reason. As a result, the court found no violation under NEPA.

Finally, the court addressed appellant’s claim that FWS’s failure to cut back on supplemental feeding was unlawful. Appellant argued that although FWS never committed to ending supplemental feeding by any specific date, its failure to decrease supplemental feeding was not in keeping with one of the goals of the plan. The court found two “glaring problems” with the argument: first, substantively, the court found that FWS’s failure to cut back on supplemental feeding did not indicate that the 2007 plan had failed with respect to elk hunting. *Mayo*, 875 F.3d at 24. Second, the court held that the case did not “directly challenge supplemental feeding” because FWS, not the Park Service, is responsible for the supplemental feeding program, which takes place on the Refuge, not in the park. *Id.* at 25. To the second point, appellant argued that if supplemental feeding is not reduced, then hunting necessarily must continue in order to ensure that the size of the elk herd does not exceed the projections of the 2007 plan, so the Park Service must publish new NEPA analyses evaluating whether hunting continues to be necessary in light of the fact that supplemental feeding has not declined. *Id.* at 25. The court rejected the logic of the argument, explaining that the EIS “clearly and exhaustively contemplated the continuation of the elk-reduction program over the life of the fifteen-year Plan.” *Id.* And, even assuming that the Park Service might have authorized more hunting than the 2007 plan contemplated because of the FWS’s failure to

decrease supplemental feeding, the court found that the record “refute[d] this assumption.” *Id.* The court found that if appellant wanted to challenge FWS’s actions with respect to supplemental feeding, he would need to bring suit against FWS. *Id.* Accordingly, the D.C. Circuit affirmed in full the district court’s judgment on the NEPA issues.

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#### **FOURTH CIRCUIT AFFIRMS DISMISSAL OF SUIT UNDER THE FEDERAL TORT CLAIMS ACT RELATING TO WASTE DISPOSAL PRACTICES AT ARMY BASE**

Laura Glickman and Bridget R. Reineking

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***Pieper v. United States*, No. 16-2035, 2017 U.S. App. LEXIS 20796 (4th Cir. 2017).** On October 20, 2017, the U.S. Court of Appeals for the Fourth Circuit affirmed the District of Maryland’s dismissal of a complaint brought under the Federal Tort Claims Act (FTCA) by current and former residents of Frederick, Maryland, for damages allegedly caused by the Army’s disposal and remediation practices at the Fort Detrick base in Frederick. *Pieper v. United States*, No. 16-2035, 2017 U.S. App. LEXIS 20796 (4th Cir. 2017). The court held that it lacked subject matter jurisdiction because the plaintiffs’ claims were barred by the discretionary function exemption to the FTCA. *Id.*

From 1955 to the early 1970s, the Army disposed of trichloroethylene (“TCE”), tetrachloroethylene (“PCE”), and other hazardous chemicals by burying them in unlined pits at Fort Detrick. *Id.* at \*3. At the time, this method of disposal was standard industry practice. *Id.* Groundwater monitoring by the Army later detected PCE and TCE from the waste disposal pits in groundwater under neighboring land. *Id.* A subsequent \$25 million removal action successfully reduced TCE and PCE concentrations in the groundwater, but further remediation was estimated at nearly a billion dollars and ultimately rejected by the Army as too costly. *Id.* Instead, the Army installed protective caps to contain the waste, at a cost of \$5.5 million. *Id.* Current and former residents of Frederick brought suit against the government in

district court under the FTCA, alleging that the Army was negligent both in its initial disposal of toxic materials and in its failure to fully correct the resulting contamination. *Id.* at \*4. The plaintiffs alleged that they and their family members had contracted, or feared contracting, various diseases caused by their exposure to the toxic waste. *Id.*

The United States moved to dismiss the suit under Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that the district court lacked subject matter jurisdiction to hear the case because it was barred under the discretionary function exception to the FTCA. *Id.* The FTCA grants only a “limited waiver” of the federal government’s sovereign immunity, and contains several exceptions to the federal government’s waiver of immunity, including the discretionary function exemption. *Id.* at \*4–5 (citing 28 U.S.C. §§ 1346(b), 2680). The discretionary function exemption retains the United States’ immunity from suit as to any claim “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” *Id.* (quoting 28 U.S.C. § 2680(a)). Because waivers of sovereign immunity must be strictly construed, an FTCA plaintiff bears the burden of proving that the government conduct in question does not fall within the discretionary function exception. *Id.* (citations omitted).

The district court had addressed similar questions of law in an earlier FTCA suit by an adjacent landowner that challenged the same Army conduct at issue in this case. *Id.* at \*6 (citing *Waverley View Inv’rs, LLC v. United States*, 79 F. Supp. 3d 563 (D. Md. 2015)). The Fourth Circuit found that the district court’s decision in *Pieper* was guided by its thorough analysis in *Waverley View*, which was decided shortly before *Pieper* was filed. *Id.* *Waverley View* applied the two-step inquiry established by the Supreme Court in *Berkovitz v. United States*, 486 U.S. 531 (1988), for determining whether government conduct falls within the FTCA’s discretionary function

exception. 2017 U.S. App. LEXIS 20796 at \*6. The first step of the inquiry is whether the challenged conduct “involves an element of judgment or choice.” *Id.* To succeed on the first step, the plaintiffs must show that the Army “lacked discretion regarding its waste management practices” because a “federal statute, regulation, or policy specifically prescribe[d] a course of action” that it was required to follow. *Id.* (citation omitted). If the conduct at issue does involve an element of judgment or choice, the plaintiffs can nevertheless succeed in the second step of the inquiry if those judgments were not “based on considerations of public policy” or “susceptible to policy analysis.” *Id.* at \*7 (citation omitted).

Applying the two-step analysis, the district court in *Waverley View* concluded that the plaintiff had not identified any mandatory legal provision regarding either waste disposal or remediation that eliminated the Army’s discretion to exercise judgment or choice. *Id.* (citing *Waverley View*, 79 F. Supp. 3d at 570–74, 576–77). In addition, the district court found that disposal and remediation determinations required the consideration of multiple policy factors, including environmental impact and resource constraints. *Id.* at \*8. Accordingly, the district court found that the plaintiff had not shown that the Army’s conduct fell outside of the scope of the discretionary function exception, and granted the government’s motion to dismiss. *Id.*

The *Pieper* plaintiffs pointed to additional documents that they claimed provided the mandatory and specific duties the court had found to be missing in *Waverley View*. *Id.* The district court found, however, that the documents identified by the plaintiffs were too general and lacked “specified instructions” that the Army was required to follow. *Id.* at \*9. The district court also held that the plaintiffs could not satisfy the second step of the *Berkovitz* analysis because the Army’s waste and remediation decisions involved the balancing of multiple factors. *Id.*

The Fourth Circuit agreed with the district court’s reasoning. *Id.* at \*10. Accordingly, it affirmed

the district court's dismissal of the plaintiffs' claims in full.

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## D.C. CIRCUIT DISMISSES CHALLENGE TO 2015 GUIDANCE FOR MEASURING PARTICULATE MATTER IN CONFORMITY DETERMINATIONS FOR TRANSPORTATION PROJECTS

Laura Glickman and Bridget R. Reineking

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***Sierra Club v. EPA*, 873 F.3d 946 (D.C. Cir. 2017).** On October 24, 2017, the U.S. Court of Appeals for the District of Columbia dismissed environmental petitioners' petition for review of the Environmental Protection Agency's (EPA) revised methodology for the calculation of particulate matter (PM) in the evaluation of proposed transportation projects. *Sierra Club v. EPA*, 873 F.3d 946 (D.C. Cir. 2017). The petitioners alleged that EPA violated the Administrative Procedure Act (APA) and the Clean Air Act (CAA) by modifying in 2015, without notice and comment, the agency's prior method of measuring a proposed transportation project's impact on ambient levels of PM<sub>2.5</sub> and PM<sub>10</sub>. *Id.* at 947–48. The court found that the petitioners lacked standing to challenge the revised 2015 Guidance as to PM<sub>2.5</sub> and that the court lacked jurisdiction as to PM<sub>10</sub>. *Id.* at 948.

Under the CAA, EPA has established National Ambient Air Quality Standards (NAAQS) for various pollutants, including PM<sub>2.5</sub> and PM<sub>10</sub>. *Id.* In order to prevent uses of federal funds that would take an area out of compliance with NAAQS, the CAA bars the federal support of any project that “does not conform” to the applicable state implementation plan (SIP). *Id.* The CAA defines “conformity” of a project as including assurance that the project will not, in any area, contribute to any new violation of NAAQS, increase the severity of an existing violation, or delay the timely attainment of any NAAQS. *Id.* (citing 42 U.S.C. § 7506(c)(1)(B)). Under the CAA, EPA is charged with promulgating criteria and procedures for ensuring conformity. *Id.* EPA issued guidance in

2010 following notice and comment that specified procedures for measuring PM. *Id.* at 949. The 2015 Guidance, issued without notice and comment, “at the margin [] tends to reduce the likelihood of a non-conformity finding.” *Id.*

The court found that the petitioners lacked standing to challenge the 2015 Guidance regarding PM<sub>2.5</sub> because they had not shown that the change in methodology from the 2010 to the 2015 Guidance would result in a different conformity determination. *Id.* at 950. The petitioners pointed to possible impacts of the change in guidance on the legal viability of three highway projects: (1) I-70 East in Colorado, (2) South Mountain Freeway in Arizona, and (3) I-710 in California. *Id.* The court found that the environmental petitioners had failed to produce evidence that the change in Guidance would have any effect on any of these projects. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The first two projects were not located in a nonattainment area or maintenance areas for PM<sub>2.5</sub>, thus ending the matter as to those projects. *Id.* The I-710 project was within a nonattainment zone for PM<sub>2.5</sub>; however, the petitioners did not make a showing that the methodology from the 2015 Guidance would be applied by the project sponsors or that applying the methodology would make any difference in the conformity determination. *Id.*

The court found that it lacked jurisdiction to hear petitioners' challenge to the 2015 Guidance regarding PM<sub>10</sub> because EPA's action was not final. *Id.* at 951. Under the Clean Air Act, the court lacks jurisdiction over administrative actions that are not final agency actions. *Id.* at 951. For a guidance document, the relevant inquiry is “whether the challenged agency action is best understood as a non-binding action, like a policy statement or interpretive rule, or a binding legislative rule.” *Id.* (quoting *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015)). In making that inquiry, the court reviews (1) the actual legal effect of the agency action, (2) “the agency's characterization of the guidance,” and (3) whether the agency itself has applied the guidance

in a binding manner. *Id.* (citing *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252–53 (D.C. Cir. 2014)). In both 2010 and 2015, EPA explained that the recommended PM<sub>10</sub> methodology was a “recommendation,” and that EPA was open to considering better calculation methods. *Id.* EPA did just that in 2014, when it permitted use of another calculation method that later appeared in the 2015 Guidance. *Id.* at 952. Finally, the court rejected the petitioners’ contention that the 2010 Guidance was a legislative rule; if the 2010 Guidance had been a legislative rule, modification also would have been legislative in nature. *Id.*

Because the court found that the petitioners lacked standing as to PM<sub>2.5</sub>, and that the court lacked jurisdiction as to PM<sub>10</sub>, the court dismissed the petition for review.

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## CASE LAW HIGHLIGHTS: NORTHEAST

### DISTRICT OF NEW HAMPSHIRE ALLOWS PROPERTY DAMAGE CLAIMS TO PROCEED; DISMISSES UNJUST ENRICHMENT; QUESTIONS VIABILITY OF MEDICAL MONITORING IN PFOA EXPOSURE CASE

Steven German

***Brown v. Saint-Gobain Performance Plastics Corp. et al.*, No 1:16-cv-00242 (D.N.H.)**. A New Hampshire federal judge denied Saint-Gobain Performance Plastics and Gwénaél Busnel’s (together, “Saint-Gobain”) motion to dismiss a putative class action lawsuit seeking recovery for diminution of property value, loss of use and enjoyment, medical monitoring, unjust enrichment, and remediation costs. The lawsuit arises from St. Gobain’s alleged release of PFOA from its Merrimack, N.H., plant into nearby public and private drinking water wells.

As to plaintiffs’ medical monitoring claim, St. Gobain advanced a two-pronged argument in support of its motion to dismiss. Citing *White v. Schnoebelen*, 18 A.2d 185, 186 (N.H. 1941) and *Dumas v. Hartford Acc. & Indem. Co.*, 26 A.2d 361, 362 (N.H. 1942), St. Gobain first argued that (1) tort claims cannot be based on the possibility of future harm; a tort claim will only accrue if and when injury actually occurs and (2) a necessary precondition to medical monitoring damages is a present physical injury, which plaintiffs failed to allege:

Plaintiffs do not plead any present physical injury to their persons, such as a medical condition allegedly caused by PFOA, that would allow them to sustain a request for medical monitoring. Instead, Plaintiffs allege that in the future they might possibly develop an illness or disease caused by PFOA exposure and are thus at an “increased risk” of “disease or disease process. . . .”

Citing a well-established line of medical monitoring case law (e.g., *Ayers v. Jackson Twp.*, 525 A.2d 287, 312 (N.J. 1987) and its progeny),

plaintiffs countered that the very essence of medical monitoring is the risk of future—rather than present—physical injury, and that plaintiffs’ exposure to increased levels of PFOA, coupled with the risk of disease and needed testing, constitutes legal injury. Although the physical manifestations of plaintiffs’ exposure may not appear for years, “those exposed have suffered legal detriment: the exposure to the toxin itself, the risk of disease and the concomitant cost of the needed medical testing constitute an injury,” they argued.

The court recognized that numerous states allow recovery for medical monitoring costs for exposure to toxic chemicals. Yet it expressed concern that other states have rejected such claims through “an expansion of negligence doctrine to encompass potential, not present, physical injury.” Because “neither New Hampshire’s legislature nor its Supreme Court has spoken on the question,” the court denied St. Gobain’s motion to dismiss the claim, without prejudice, suggesting that it would eventually certify the question to the New Hampshire Supreme Court for resolution.

In deciding the motion as to plaintiffs’ property damage claims, the court delivered plaintiffs a more decisive victory. St. Gobain argued that plaintiffs’ property damage claims failed because plaintiffs did not allege a physical injury or intrusion to their property because “[p]laintiffs do not own the groundwater that they allege contains PFOA.” “As a public resource,” the state, not private parties, manage groundwater “in the public trust and interest,” defendants argued. Citing *State v. Hess Corp.*, 161 N.H. 426, 437 (2011), the court found that plaintiffs’ claims for “diminution in value of private property, lost business expenditures and other business and economic losses resulting from contamination properly belong to private parties,” rather than the state as trustee of those waters. So too, the cost of mitigating contamination through filters and alternative water supplies, property value loss, loss of use and enjoyment, annoyance, discomfort, and inconvenience are private claims. *Id.*

Last, the court did dismiss plaintiffs’ unjust enrichment claim. Plaintiffs alleged that St. Gobain unjustly enriched itself by failing to spend money “to limit or prevent the release of toxic PFAS into the environment and Plaintiffs’ water supplies” and to investigate, mitigate, and remediate those impacts. By failing to incur these costs, said plaintiffs, St. Gobain received a benefit that would be inequitable for it to retain. The court held that New Hampshire does not recognize claims for “negative unjust enrichment.” *Id.* at 10.

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## FUKUSHIMA, JAPAN, RESIDENTS SUE GE FOR NEGLIGENCE DESIGN AND CONSTRUCTION OF NUCLEAR PLANT

Steven German

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### *Shinya Imamura et al. v. General Electric Co. and Does 1-100*, Case No. 1:17-cv-12278 (D. Mass.).

Citizens and businesses of Fukushima, Japan, filed a putative class action lawsuit against General Electric Co. in the District of Massachusetts, accusing the company of negligence that led to the catastrophic 2011 meltdown of the Fukushima Daiichi Nuclear Power Plant it designed and built (the “Plant”) A 9.0-magnitude earthquake off the coast of Japan caused a massive tsunami that triggered a cascade of failures at the Plant. Radioactive fallout forced roughly 150,000 people from the largely still uninhabitable area and devastated local businesses. “GE designed and largely constructed the entire failed [Plant],” the lawsuit claimed, “and for many years, directly or indirectly through its affiliates, was responsible for [its] maintenance.”

According to the complaint, GE negligently designed and built the Plant and the reactors. For instance, the complaint alleges that in a cost-saving measure, GE lowered a natural protective coastal cliff by more than 60 feet, thereby placing the entire Plant in a known earthquake and tsunami region too close to sea level, “dramatically increas[ing] the flood risk.” The complaint further alleges that GE placed seawater pumps and emergency diesel generators, needed to continue reactor core cooling in the event of power loss, in



basement locations that were not protected against flooding. Power and thus cooling capacity failed, ultimately causing the meltdown. The complaint also references three past accidents at GE-built nuclear plants. It also alleges failure to warn its customers, residents, and other interested parties of the risks associated with the operation of the Plant in a known earthquake and tsunami zone. All of these defects should have been remedied during the operational life of the Plant, according to the lawsuit.

Plaintiffs seek certification of two classes:

**Citizen Class:** Homeowners in and around the evacuation zone (as defined by the Japanese government) who suffered articulable and discrete economic injury as a result of the Fukushima Nuclear Disaster that began on March 11, 2011.

**Business Class:** All businesses, . . . in and around the evacuation zone (as defined by the Japanese government) who suffered articulable and discrete economic injury as a result of the Fukushima Nuclear Disaster that began on March 11, 2011. . . .

The complaint contains eight separate claims including negligence for construction and design; strict products liability for manufacturing and design defects; strict liability for ultra-hazardous activities; damage to real property and numerous claims under the Civil Code of Japan.

GE has publically stated that liability rests with the Plant's operator, Tokyo Electric Power Company (TEPCO), which has been named in separate lawsuits. GE's motion to dismiss must be filed no later than March 6, 2018.

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## FIRST CIRCUIT AFFIRMS DISMISSAL OF MONSANTO PCB LIABILITY SUIT

Steven German

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***Town of Westport v. Monsanto Co. et al.*, No. 17-1461 (1st Cir.)**. The U.S. Court of Appeals for the First Circuit affirmed a District of Massachusetts

decision dismissing a product liability lawsuit against Monsanto Co. and its successor, Pharmacia Company, on summary judgment.

The town of Westport filed suit seeking to recover the cost of remediating Westport Middle School (WMS) after discovering polychlorinated biphenyls (PCBs) in a school building. When the school was built in 1969, the contractor—who was not a defendant in the suit—used caulk that contained PCBs. Although Monsanto did not make the caulk, it sold PCB-containing plasticizers—a component of caulk—to the third-party manufacturer who did. Westport alleged that defendants were liable for the property damage from the PCB contamination, totaling over \$23 million needed to investigate, abate, and encapsulate the PCBs. The claims included breach of implied warranty of merchantability for failure to warn and negligent marketing.

The district court entered judgment against Westport on all counts of alleged tort liability. Westport appealed dismissal of the breach of warranty and negligent marketing claims only. The First Circuit affirmed dismissal of both claims reasoning that Monsanto did not breach the implied warranty of merchantability because “it was not reasonably foreseeable in 1969 that there was a risk PCBs would volatilize from caulk at levels requiring remediation—that is, levels dangerous to human health.” Further, the court added that, “as a matter of state law, a negligent marketing claim cannot be maintained independent of a design defect claim on these facts.”

Specifically, the First Circuit ruled that the district court applied the correct standard of foreseeability: “whether Monsanto should have reasonably known, in 1969, that there was risk PCBs would volatilize out of caulk at levels harmful to human health.” Westport failed, the court continued, “to proffer any scientific studies evidencing a risk that PCBs volatilize from caulk at harmful concentrations when inhaled, much less that such a risk was known to Pharmacia before 1969.” “The evidence unequivocally supports the

conclusion that the risk PCBs would volatilize from caulk at harmful levels was not reasonably foreseeable in 1969.” Therefore Monsanto could not have foreseen the harm, the court said. Simply proving that PCBs were present does not prove property damage because under Massachusetts law, the school would have to prove that the PCBs decreased its property value, requiring proof of a health risk, the court said. Additionally, once Monsanto knew of the risks, it didn’t necessarily have to warn Westport, as the town was an end user of Monsanto’s product, not a direct buyer like the company which produced the caulk used at the Middle School.

“Given Monsanto’s complex supply chain, tracing the caulk used at WMS back to [the caulk manufacturer] (based on documents containing WMS’s specifications and communications from WMS’s contractor) is not the same as being able to identify WMS as an end user in the first place. As such, Westport’s assertion that WMS was an identifiable end user is mere speculation.

The court also held that Westport could not bring a negligent marketing claim because in Massachusetts such a claim is contingent on a design defect claim, which Westport did not pursue.

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## **PFAS CONTAMINATION REMAINS A HOT-BUTTON ISSUE: OVERVIEW OF RECENT REGULATORY, LITIGATION, AND TECHNICAL DEVELOPMENTS**

Matthew Thurlow, Russ Abell, and Stephen Zemba<sup>1</sup>

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Following the Environmental Protection Agency's (EPA) release of new drinking water health advisory standards for PFOS (perfluorooctane sulfonate) and PFOA (perfluorooctanoic acid, also known as "C8") in the spring of 2016,<sup>2</sup> there has been a surge in state regulation of PFAS (per- and polyfluoroalkyl substances) and litigation. PFAS have emerged as a contaminant of concern at scores of sites across the country, and there has been renewed focus on regulating the chemicals and litigating their cleanup by EPA, states, municipal water providers, and plaintiffs' attorneys. But there appears to be little new scientific support that justifies newfound concern regarding this class of chemicals. Indeed, some of the new data appear to indicate that PFAS pose a lower risk to human health and the environment than previously believed. Regulators have long known about PFAS and their unique properties—which can result in their dispersion at low concentrations into the environment, slow degradation, and absorption and residence in the human body.

### **Regulation of PFAS Under TSCA**

PFAS have been the subject of EPA study and regulation for almost 20 years. Following the discovery of PFAS in the U.S. population's blood in the 1990s, EPA initiated a rigorous scientific review of PFAS.<sup>3</sup> Since that time, PFAS have been primarily regulated under the Toxic Substances Control Act (TSCA). Section 4 of TSCA requires testing of chemicals that may present an unreasonable risk to human health or the environment. Section 5 allows EPA to issue significant new use rules (SNURs) that govern the use of particular chemicals, and requires notification and information sharing with EPA. Section 8 allows EPA to gather information

regarding chemical manufacturing and processing, including allowing EPA access to unpublished and confidential chemical studies and risk reports.<sup>4</sup> In 2016, Congress amended TSCA in an effort to speed EPA's evaluation of the safety of chemicals, and shifted TSCA's approach from cost benefit balancing to the elimination of unreasonable risks.<sup>5</sup>

In 2000, manufacturers voluntarily agreed to phase out PFOS production in the United States.<sup>6</sup> In 2002, EPA issued a SNUR requiring manufacturers and importers of 75 different PFAS chemicals to notify EPA before any future use of the chemicals.<sup>7</sup> In 2006, EPA helped develop a PFOA stewardship program with the goal of phasing out PFOA by 2015.<sup>8</sup> In 2013, EPA issued new SNURs regulating the use of PFOA in carpet.<sup>9</sup> In 2015, EPA proposed another SNUR requiring companies to report any new uses of PFOA or PFOA-related chemicals to EPA at least 90 days before the chemicals' use or import.<sup>10</sup> PFOS and PFOA have now been phased out of manufacturing in the United States, but some PFAS chemicals remain in circulation.

### **Regulation of PFAS Under Safe Drinking Water Act**

Since at least 2009, EPA has identified PFAS as a potential candidate for regulation under the Safe Drinking Water Act (SDWA). EPA's Office of Water issued a provisional health advisory for PFOA of 400 ppt (parts per trillion), and a health advisory of 200 ppt for PFOS, to protect against short-term exposure to these chemicals in drinking water.<sup>11</sup> As an unregulated contaminant, large municipal drinking water agencies were required to test for PFAS and report their findings to customers. Following additional study, EPA issued revised guidance for PFAS in 2016 and established a Lifetime Health Advisory (LHA) for PFOA and PFOS (combined) in drinking water of 70 ppt.<sup>12</sup> The LHA is a non-enforceable guideline intended to provide technical guidance to state agencies and other public health officials regarding the possible health effects of PFOA and PFOS. The LHA is conservative by design, and is based on long-term exposure to the most vulnerable populations.

Importantly, the LHA assumes that drinking water contributes only 20 percent of exposure to PFAS, which for most people likely overestimates other sources of PFAS exposure (including ingestion of PFAS through food and inhalation from airborne sources including household dust).<sup>13</sup> More realistic estimates of background exposure would increase the acceptable level of PFAS to levels greater than the 70 ppt LHA. The EPA Regional Screening Level (RSL) Calculator, which does not consider background exposure, predicts an acceptable level of 400 ppt for either PFOA or PFOS.<sup>14</sup>

### Developments in the New Administration

While it is unclear whether EPA will continue to focus on PFAS in the Trump administration, there are preliminary indications that the chemicals remain a priority for EPA. On December 4, EPA announced that it would form a new cross-agency working group to address PFAS. The working group has been tasked with coordinating with states, tribes, local communities, and federal partners on PFAS research, information sharing, and risk communication.<sup>15</sup> During his confirmation hearing, new EPA Administrator Scott Pruitt appeared to commit to moving forward on PFAS regulation under TSCA and the SDWA. In response to questioning from New York Senator Kristin Gillibrand, Mr. Pruitt stated that “PFOA needs to be addressed quickly,” and agreed to do so.<sup>16</sup> Michael Dourson, the administration’s nominee for assistant administrator for the EPA Office of Chemical Safety and Pollution Prevention, has come under fire from Republican and Democratic senators for his prior work on PFAS, and may not be confirmed as a result.<sup>17</sup> Given the current political pressure, at a minimum, it appears likely that EPA will continue to evaluate PFOA and PFOS for potential regulation as drinking water contaminants under the SDWA. If EPA decides to regulate PFAS under the SDWA, it will first publish a preliminary regulatory determination in the *Federal Register*. Following public comment, EPA may then issue nationally enforceable drinking water standards or maximum contaminant limits for PFAS.

Finally, PFAS has also been reported to EPA at a minimum of 14 different Superfund sites during CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act) five-year reviews,<sup>18</sup> and is likely to be addressed as a contaminant of concern at a number of private Superfund sites as well as current and former CERCLA federal facilities, including military bases. In September 2017, a group of Democratic senators lobbied and were successful in inserting a provision for funding to assess, investigate, and remediate PFAS contamination at a military facility under the draft National Defense Authorization Act.<sup>19</sup>

Even if EPA’s renewed focus on PFAS becomes sidetracked in the new administration, it appears likely that states, municipalities, and private citizens will fill any perceived void in regulation and enforcement. Fifteen states, including New Hampshire, New Jersey, Vermont, and Pennsylvania, have already used EPA’s new health advisory guidelines to set or propose new enforceable drinking water standards for PFAS. Several of the standards are well below EPA’s 70 ppt health standard including New Jersey (14 ppt, proposed) and Vermont (20 ppt).<sup>20</sup> In August 2017, a group of state health departments (including New York, Alaska, Michigan, New Hampshire, Pennsylvania, and Vermont) sent a letter to the U.S. Center for Disease Control and Prevention calling on the Agency for Toxic Substances and Disease Registry to conduct a nationwide community health study analyzing the health effects of exposure to PFAS.<sup>21</sup> Many municipal drinking water agencies also have been closely tracking PFAS in drinking water supplies, and some have spent millions of dollars removing the chemicals from public water. The Water Authority in Suffolk County, New York, recently filed suit in federal court against PFOA and PFOS manufacturers alleging contamination in its drinking water.<sup>22</sup> More litigation by municipal water providers appears likely in the near future. To date, PFAS has been found above health advisory levels by at least 66 public water utilities serving approximately six million people.<sup>23</sup> PFAS has also been detected in an unknown number of private drinking water wells.

## Litigation

EPA's release of the new health guidelines has coincided with a dramatic resurgence in PFAS litigation across the country, primarily against PFAS manufacturers. The litigation has also ensnared other secondary users of PFAS, including firefighting foam manufacturers and municipal solid waste (MSW) landfill owners and operators.

### Hoosick Falls Litigation

The investigation of PFOA in the drinking water supply of the village of Hoosick Falls, New York, has drawn significant national attention, and spurred renewed interest in PFAS regulation across the country. In the summer of 2014, a local citizen raised the alarm about PFOA following the death of his father from kidney cancer.<sup>24</sup> The citizen conducted sampling and found high levels of PFOA in the village's drinking water supply.<sup>25</sup> Lawsuits were filed by the village and local residents against Saint Gobain Performance Plastics and Honeywell International, which owned and operated a nearby facility that created laminates for circuit boards and fiberglass for over 50 years.<sup>26</sup> In February 2017, Judge Lawrence Kahn allowed most of the class claims to proceed including negligence, strict liability, and trespass claims based on property damage.<sup>27</sup> Judge Kahn dismissed some of the private nuisance claims, and he certified medical monitoring claims for appeal. The village settled its lawsuit in December 2016, but the class claims and other litigation remain pending.<sup>28</sup>

In May 2017 the state of New York published a health study finding that there was no statistically significant evidence of elevated cancer risk from PFOA in the Hoosick Falls drinking water supply.<sup>29</sup> The study tracked exposure to PFOA over several decades and found that none of the cancers associated with PFOA including kidney, testicular, bladder, and prostate cancers were higher than expected in the local population.<sup>30</sup> (Epidemiological studies in small populations are difficult to interpret, however, because statistical

power is limited.) Despite the state's findings of no increased incidence of cancer, on August 3, 2017, EPA designated Hoosick Falls as a Superfund site.<sup>31</sup>

### Other Litigation

In addition to the Hoosick Falls litigation, there have been a number of other PFAS lawsuits filed across the country. In a long-running case brought by the Minnesota attorney general against 3M set for trial in February 2018, the state is seeking approximately \$5 billion in damages.<sup>32</sup> In another case brought by a private citizens group in Alabama also slated for trial next year, PFOA and PFOS manufacturers and a landfill owner are fending off claims under the Resource Conservation and Recovery Act.<sup>33</sup>

Plaintiffs are not only pursuing the manufacturers of PFAS, but are also pursuing companies that used PFAS in their products. Plaintiffs have filed a number of cases against firefighting foam manufacturers as well as municipalities that used the foam at fire training facilities.<sup>34</sup> Plaintiffs have also targeted landfill owners and operators based on alleged releases of PFAS in landfill leachate. As public interest in PFAS continues to spike and states and municipalities investigate, treat, and remediate PFAS contamination, further litigation appears likely. Within the past few weeks, significant new PFAS litigation has been filed in New York and Michigan by municipal and class plaintiffs. PFAS litigation is pending or has been recently settled in a number of other states including North Carolina, Pennsylvania, Ohio, West Virginia, Colorado, New Jersey, New Hampshire, and Massachusetts.

### Technical Developments

National awareness and concern over PFAS continue to grow. Blood sampling in communities affected by PFAS in drinking water has found concentrations of PFAS in blood above national background levels, although definitive evidence of adverse health effects has not been found.<sup>35</sup>

The Interstate Technology Regulatory Council (ITRC), a respected national public-private coalition of stakeholders, is developing a series of six fact sheets designed to summarize current knowledge concerning PFAS. ITRC's intent is to document and disseminate consensus-based information regarding PFAS. The names and highlighted contents of the first three fact sheets, recently made available at <http://pfas-1.itrcweb.org/>, are:

- Naming Conventions and Physical and Chemical Properties
- There are many PFAS beyond PFOA and PFOS, and concerns may expand as more of these compounds are studied. This ITRC fact sheet sets forth suggested conventions for naming individual PFAS and documents knowledge of their unusual physical and chemical properties.
- Regulations, Guidance, and Advisories
- EPA's issuance of its LHA guidance puts the onus on states to establish enforceable groundwater and drinking water standards. In response, states have been busy creating and updating these values. This ITRC fact sheet is accompanied by an up-to-date compendium of state-specific standards and guidelines.
- History and Use
- PFAS have been in commerce for decades and have been applied widely by manufacturers in consumer products. This ITRC fact sheet describes the different methods used to chemically produce PFAS (of potential use in environmental forensics), industries known to have used PFAS as components or manufacturing aids, and consumer products known to contain PFAS.

Additional ITRC fact sheets forthcoming by early 2018 will cover:

- Environmental Fate and Transport
- Site Characterization Tools, Sampling Techniques, and
- Laboratory Analytical Methods, and Remediation Technologies and Methods.

ITRC will also be developing and issuing a detailed Technical and Regulatory Guidance Document, with the stated goal of assisting state regulatory program personnel tasked with making informed and timely decisions regarding PFAS-impacted sites and providing a clearinghouse of information to all stakeholders.

## Summary

PFAS continue to garner heightened attention by regulators and citizens groups in several states with ongoing litigation. Regulators are transitioning their focus from PFAS manufacturing facilities to other potential sources of PFAS discharges into the environment including MSW landfills, other industrial facilities with incidental use, and fire training locations. With the likelihood of additional action at the federal level by EPA, state legislatures and regulators are proposing bills to lower PFAS groundwater standards in a number of states (e.g., New Hampshire and New Jersey) or add release reporting requirements and groundwater standards (e.g., Massachusetts). Based on this continued focus and public concern, it appears that PFAS response actions and litigation may continue to increase and spread to other states, with state agencies taking the lead on setting policy and regulations to address PFAS contamination.

## Endnotes

- 1 The views expressed in this article are the authors' own and do not reflect the opinions or positions of BakerHostetler LLP or its clients.
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- 4 *Id.*
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# ENVIRONMENT, ENERGY, AND RESOURCES CALL FOR NOMINATIONS

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The *Law Student Environment, Energy, and Resources Program of the Year Award* will be given in recognition of the best student-organized educational program or public service project of the year addressing issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2017 calendar year [consideration may be given to allowing projects that occurred in the 2016-2017 or 2017-2018 academic years]. Nominees are likely to be law student societies, groups, or committees focused on environmental, energy, and natural resources issues.

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