

Environmental Litigation and Toxic Torts Committee Newsletter

Vol. 18, No. 1

November 2016

MESSAGE FROM THE CHAIRS

Peter Condron and Shelly Geppert

Dear Members:

Leaves are turning, the temperature is dropping, school is back in session and the pumpkin spice latte has made its long awaited return—in other words, a new SEER term has begun. Before jumping into the 2016–2017 term, we’d like to take a moment to recognize our accomplishments over the past year. Our committee was named “Best Committee” at the SEER 24th Fall Conference. As if that wasn’t enough, our newsletter, edited by Lisa Gerson and Stephen Riccardulli, was named “Best Environmental Newsletter.” Lisa and Stephen work with an amazing team of regular contributors (authoring the case law highlights section) including Lisa Cipriano, Alison Kleaver, Matthew Thurlow, and Whitney Roy, who are all returning as regular contributors for the 2016–2017 term alongside new contributors Steven German and Sonia Lee. Our newsletter would not be what it is without in-depth articles examining everything from forensic engineering to the class action cases related to the Flint, Michigan, water crisis, and we would like to extend a big thanks to these authors for lending their expertise to our readers. We hope readers enjoy this issue, which includes Ameri Klafeta’s article on Flint’s difficult path to federal aid, Matthew Thurlow and Laura Glickman’s article on the unanimous U.S. Supreme Court decision concerning final agency action, Steven German’s article on the Pennsylvania Supreme

Court striking down provisions of Pennsylvania’s Oil and Gas Act, and much, much more.

This term our committee plans to focus on case law and related developments concerning vapor intrusion, talc powder, lead in drinking water, coal ash, and insurance coverage for environmental and toxic torts claims. If there is another topic you would like us to look at, please e-mail us and share your idea. If you would like to get involved in writing or speaking on any of these topics, please don’t hesitate to reach out.

It was great to meet so many of our members at the Fall Conference in Denver, and we hope to catch up with more members at SEER’s 46th Spring Conference (March 29–31, 2017, in Los Angeles). More information about the Spring Conference will be provided shortly. We look forward to hearing from you and can’t wait to see what our members will accomplish this year.

Pete Condron and Shelly Geppert

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Toxic Torts Committee Newsletter
Vol. 18, No. 1, November 2016
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
Ninth Circuit Issues Major CERCLA Decision
Finding That Arranger Liability Cannot Be
Based on Contamination Deposited on a Site
by the Wind
Whitney Jones Roy and Alison N. Kleaver... 3

Ninth Circuit Issues Precedential Opinion
Restricting the Navy's Peacetime Use of Sonar
Whitney Jones Roy and Alison N. Kleaver... 4

California Supreme Court Affirms Public
Entities' Right to Conduct Environmental Testing
on Private Property But Revises Statute to Allow
Jury Trial on Damages
Whitney Jones Roy and Alison N. Kleaver... 5

Case Law Highlights: Midwest
Kentucky Appeals Court Rules Mere Possibility
of Exposure to Manufacturers' Asbestos-
Containing Products Insufficient for Plaintiff's
Toxic Tort Suit to Proceed to Trial
Sonia H. Lee 7

Michigan District Court Dismisses Property
Buyer's \$9.75m Access Claim Against
Responsible Party for Alleged Failure to Timely
Remediate Contamination
Sonia H. Lee 8

Case Law Highlights: Mid-Continent
District Court Lacked Subject Matter
Jurisdiction Over Clean Air Act Citizen Suit
Where Repeated Or Ongoing Violations Not
Alleged and State Regulatory Authority Had
Issued Permit to Alleged Violator
Lisa Cipriano 10

State and Maritime Law Personal Injury Claims
Against "Responsible Party" Not Preempted
Under Clean Water Act
Lisa Cipriano 11

Case Law Highlights: Southeast
U.S. Supreme Court Holds That Approved
Jurisdictional Decision Is Final Agency Action
Matthew Thurlow and Laura Glickman..... 12

D.C. Circuit Reverses FERC Decision on Crude
Oil Valuation
Matthew Thurlow and Laura Glickman..... 13

Eleventh Circuit Affirms Corps' Nationwide
Permit for Discharge of Mining Waste
Matthew Thurlow and Laura Glickman..... 15

Case Law Highlights: Northeast
Appeal Seeks To Raise Bar on Environmental
Class Action Settlements
Steven German 17

District Of Massachusetts Rules EPA Press
Release Insufficient To Trigger Statute of
Limitations; *American Pipe* Tolling Preserves
Class Claims
Steven German 18

Pennsylvania's Act 13 Oil and Gas Law Ruled
Unconstitutional by Pennsylvania Supreme
Court
Steven German 19

Flint's Difficult Path to Federal Aid
Ameri R. Klafeta..... 21

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CASE LAW HIGHLIGHTS: MOUNTAIN/ WEST COAST

NINTH CIRCUIT ISSUES MAJOR CERCLA DECISION FINDING THAT ARRANGER LIABILITY CANNOT BE BASED ON CONTAMINATION DEPOSITED ON A SITE BY THE WIND

Whitney Jones Roy and Alison N. Kleaver

***Pakootas v. Teck Cominco Metals*, No. 15-35228, 2016 U.S. App. LEXIS 13662 (9th Cir. July 27, 2016).** The Ninth Circuit issued an important Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) decision that will likely have broad impact in limiting the scope of arranger liability. The Confederated Tribes of the Colville Reservation and the state of Washington (collectively, plaintiffs) brought suit against Teck Cominco Metals, Ltd. (Teck), a smelter located ten miles north of the U.S.-Canada border and alleged to have contaminated a site on the upper Columbia River. Under plaintiffs' theory, the smelter contaminated the Columbia River site by emitting hazardous substances, including lead, cadmium, and mercury, into the air, which were then carried by air currents to the contaminated site. A three-judge panel was asked to determine if a smelter that releases hazardous substances through a smokestack can be held liable for cleanup costs and natural resources damages under CERCLA, 42 U.S.C. § 9607(a) (3), where the released substances contaminate land or water located downwind. All parties agreed that "the answer turns on whether the smelter owner-operator can be said to have arranged for the 'disposal' of those hazardous substances within the meaning of CERCLA." *Id.* at *4. The Ninth Circuit concluded that CERCLA liability could not be based on the gradual spread of contaminants via aerial deposition without human intervention—i.e., a defendant could not be said to have arranged for the "disposal" of hazardous substances under CERCLA that were emitted to the air and then contaminated land or water located downwind. *Id.*

The Ninth Circuit's analysis focused on the definition of the term "disposal." CERCLA

does not define the term "disposal" and instead cross-references the definition of the term in the Resource Conservation and Recovery Act (RCRA, 42 U.S.C. § 6903(3)). *Id.* at *11. Plaintiffs argued that they had properly alleged the "deposit" of hazardous substances into land or water at the Columbia River site, one of the verbs used to define "disposal" in RCRA. Plaintiffs' "aerial deposition" theory depended on the deposit occurring by wind as opposed to the defendant directly depositing the substances at the site. In support of their claim, plaintiffs referenced dictionary definitions involving the slow deposit of layers of material via natural forces. *Id.* at *16.

Although the Ninth Circuit found plaintiffs' theory reasonable if they were working from a blank slate, the court acknowledged that it was also bound to consider and follow the decisions in *Carson Harbor* and *Center for Community Action*. *Id.* at *17–18. In *Carson Harbor Village Limited v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001), the court held that the term "deposit," as used in CERCLA, "is akin to putting down or placement by someone." *Pakootas*, 2016 U.S. App. LEXIS 13662, at *18 (internal quotations and citations omitted). The court also had found that nothing in the context of CERCLA or the term "disposal" suggests that Congress meant to include chemical or geologic processes or passive migration, "i.e., the gradual spread of contaminants without human intervention." *Id.* Furthermore, in *Center for Community Action & Environmental Justice v. BNSF Railway Co.*, 764 F.3d 1019 (9th Cir. 2014), the court had determined that Congress knew how to use the word "emit" when it wanted to and that, based on its use of "disposal" and "emit" or "emitting" in various places in RCRA, Congress did not intend for mere emission to be included in the term "disposal." *Pakootas*, 2016 U.S. App. LEXIS 13662, at *18–19. Plaintiffs failed to persuade the Ninth Circuit to distinguish either *Carson Harbor* or *Center for Community Action*. *Id.* at *19. Although the court agreed that *Center for Community Action* did not foreclose a different interpretation of "disposal" under CERCLA, it found the textual analysis of *Center for Community Action* more persuasive. *Id.*

The Ninth Circuit also rejected plaintiffs' claim that excluding aerial deposition from the definition of "disposal" would thwart the overall regulatory scheme. *Id.* at *21–22. The court observed that if it were to accept plaintiffs' "aerial deposition" theory, "disposal" would be a never-ending process, essentially eliminating the innocent landowner defense. Finally, the court found no relevant legislative history for guidance, nor were there any useful agency interpretations of "deposit" to which the court might owe *Chevron* deference. *Id.* at *24.

NINTH CIRCUIT ISSUES PRECEDENTIAL OPINION RESTRICTING THE NAVY'S PEACETIME USE OF SONAR

Whitney Jones Roy and Alison N. Kleaver

Natural Resources Defense Counsel, Inc., et al. v. Pritzker, et al., No. 14-16375, 2016 U.S. App. LEXIS 13021 (9th Cir. July 15, 2016).

In a significant decision, the Ninth Circuit invalidated the National Marine Fisheries Service's (Fisheries Service) 2012 final agency decision (Final Rule) permitting the Navy's peacetime use of Surveillance Towed Array Sensor System Low Frequency Active sonar (LFA sonar). At certain frequencies, LFA sonar can harm marine mammals and/or cause short-term disruption or abandonment of natural behavior patterns. Plaintiffs, environmental advocates including the Natural Resources Defense Council, the Humane Society of the United States, and Jean-Michel Cousteau, among others, brought suit against the Fisheries Service, the Department of Commerce, the Navy, and the National Oceanic and Atmospheric Administration (collectively, defendants) on the grounds that the Final Rule did not comply with the Marine Mammal Protection Act (the Act) because it failed to include mitigation measures that would have the least practicable adverse impact on marine mammals. The district court granted summary judgment to defendants. On appeal, the Ninth Circuit reversed, holding that the Final Rule was required to include mitigation measures that "effect[] the least practicable adverse impact on' marine mammal species, stock, and

habitat, as is specifically required by the [Act]" and that the Fisheries Service failed to demonstrate that the selected mitigation measures met this standard. *Id.* at *44–45.

The Act grants the Fisheries Service the ability to authorize the take (meaning the harassment, hunting, capture, or killing) of a small number of marine mammals incidental to a specified activity for a five-year period if the Fisheries Service (1) determines that the total authorized take "will have a negligible impact on such species or stock;" and (2) imposes regulations setting forth "permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds and areas of similar significance." *Id.* at *8. In 2012, the Fisheries Service authorized the incidental take of marine mammals from the Navy's use of LFA sonar subject to three mitigation measures, including prohibiting the Navy from creating sonar pulses at certain frequencies near designated "offshore biologically important areas" (OBIA's). *Id.* at *13–16. The court acknowledged that, although federal courts should give deference to agency decisions, it is not required to rubber-stamp an agency's decisions without the appropriate scrutiny. *See id.* at *16, 18.

The court first examined whether the Fisheries Service was required to apply the "least practicable adverse impact" standard in selecting mitigation measures. Looking to the Act's text, the court concluded that "mitigation sufficient to achieve the 'least practicable adverse impact' standard [was] not a mere secondary issue, but rather an independent, threshold statutory requirement" that must be satisfied. *Id.* at *18–19. The court also dismissed the Fisheries Service's contention that the mitigation requirement was superfluous due to the Act's requirement that the Fisheries Service first determine that the specified activity will have a "negligible impact" on marine mammals. *Id.* at *19–20.

The court next examined whether the Fisheries Service's selected mitigation measures satisfied

the “least practicable adverse impact” standard. The court noted that “a mitigation measure that is practicable in reducing the impact of military readiness activities on marine mammals must be both effective in reducing impact, but also not so restrictive of military activity as to unduly interfere with the government’s legitimate needs for military readiness activities.” *Id.* at *22. The court found that the Fisheries Service was required to analyze whether its selected mitigation measures reduce the effects of LFA sonar to the “least practicable adverse impact,” but the Final Rule failed to include any such meaningful analysis beyond a mere recitation of the statute’s language. *Id.* at *24–25. Moreover, the court found that the evidence before the Fisheries Service did not support the conclusion that the selected mitigation measures met the “least practicable adverse impact” standard. The court noted that although OBIAAs were a “central component of the Final Rule’s mitigation measures,” the Fisheries Service excluded many recommended OBIAAs due to insufficient data regarding those areas. This decision directly contravened the Fisheries Service’s own subject matter experts, who advised that excluding OBIAAs based on lack of data risked under-protection, and made non-designation the default without any scientific support. *Id.* at *27–31. Furthermore, the Fisheries Service failed to explain the reasoning for its decision to exclude data-poor OBIAAs and ignore other recommended criteria for designating OBIAAs. *Id.* at *32–38. Finally, the court rejected the Fisheries Service’s conclusion that the Final Rule complied with the “least practicable adverse impact” standard because it allowed, but did not require, Fisheries Service and the Navy to consider additional data should it become available in the future. *Id.* at *43–44. Stated the court, “The mere possibility of changing the rules to accommodate new information does not satisfy the [Act’s] strict requirements for mitigating the effects of incidental take.” *Id.* at *44.

CALIFORNIA SUPREME COURT AFFIRMS PUBLIC ENTITIES’ RIGHT TO CONDUCT ENVIRONMENTAL TESTING ON PRIVATE PROPERTY BUT REVISES STATUTE TO ALLOW JURY TRIAL ON DAMAGES

Whitney Jones Roy and Alison N. Kleaver

Property Reserve, Inc. v. Superior Court; Nichols v. Superior Court; and Department of Water Resources Cases, 1 Cal. 5th 151 (2016). The California Supreme Court clarified that public entities have the right to conduct environmental studies and geological testing on private property in order to determine the suitability of such property for government projects, including to assess the potential effects of proposed projects on biological, environmental, geological, and archeological resources as required by state and federal environmental laws, including the California Environmental Quality Act, the National Environmental Policy Act, the California Endangered Species Act, the Federal Endangered Species Act, the Federal Clean Water Act, and the California Porter-Cologne Water Quality Act. However, the court exercised its authority to reform—rather than invalidate—the relevant statutes to provide property owners the opportunity for a jury trial on damages caused by such activities.

In 2008, the California Department of Water Resources (the Department) began an investigation of the feasibility of constructing a new tunnel or canal in the Sacramento-San Joaquin Delta to deliver fresh water to central and southern California. *Id.* at 168. The Department sought to conduct environmental and geological studies and testing on more than 150 privately owned properties that the state might acquire for the project, either through negotiations with the landowners or eminent domain. *Id.* In particular, the Department sought to conduct mapping and surveys relating to plant and animal species, habitat, soil conditions, hydrology, cultural and archeological resources, utilities, and recreational uses, as well as conduct drilling and boring to

determine subsoil conditions. *Id.* at 169. Utilizing the precondemnation entry and testing procedures set forth in California Civil Code section 1245.010 et seq., the Department filed petitions in superior court seeking entry to the properties to conduct the geological and environmental studies and testing. *Id.* at 168–69. The trial court granted the Department entry to conduct environmental studies and testing on the properties subject to certain specified limitations, but denied entry to conduct geological testing (i.e., drilling and boring) on the ground that the Department must initiate a classic condemnation action to conduct these more invasive activities on private property. *Id.* at 169–73. The court of appeal reversed the trial court’s order allowing entry for environmental testing and affirmed the order denying entry for geological testing. *Id.* at 173–74. The California Supreme Court reversed on both issues, authorizing the Department to conduct both environmental and geological testing. *Id.* at 213. The court also reformed section 1245.010 et seq. to allow property owners the right to a jury trial on damages, consistent with the California takings clause. *Id.* at 208–09.

California Civil Code section 1245.010 et seq. sets forth a procedure by which public entities may obtain an order authorizing entry onto private property for purposes of conducting testing as a precursor to a future condemnation action. The California Supreme Court concluded that the environmental and geological testing activities were within the scope of the existing precondemnation entry and testing statutes, which specifically authorized activities, including “borings.” *Id.* at 177–78. Having concluded that the precondemnation statutes were intended to, and did, apply to the activities at issue, the court examined whether the orders sought by the Department violate either the federal or state takings clause. The court determined that the statutes satisfied the federal takings clause because they establish a compensation procedure and preserved the property owner’s right to pursue and obtain damages in a statutorily authorized civil action or an ordinary inverse condemnation action. *Id.* at 185–87. The court discussed four

factors in concluding that the statutes also satisfied the state takings clause. First, the statutes require a public entity to initiate a judicial proceeding prior to entering a property for precondemnation investigation or testing. Second, the statutes require the trial court to limit the permitted activities to only those activities that are “reasonably necessary to accomplish the public entity’s investigatory purpose.” Third, the statutes require that, prior to entering the property, the public agency deposit funds equal to, in the court’s estimation, the probable amount of just compensation for the activities that will be undertaken. Fourth, the statutes provide a procedure by which the property owner can promptly obtain compensation for any loss actually incurred. *Id.* at 200–02.

While the court found that the measure of damages set forth in the precondemnation entry and testing statutes was adequate, it nevertheless determined the statute deficient because it failed to afford property owners the right to a jury trial on the amount of damages actually incurred, as required by the California takings clause. *Id.* at 208. Rather than invalidate the entire statute, however, the court concluded that the appropriate remedy is to “reform the precondemnation entry statutes so as to afford the property owner the option of obtaining a jury trial on damages at the proceeding.” *Id.* The court found this to be proper in light of the legislative history demonstrating an intent to adopt a procedure that satisfied the California takings clause. *Id.* Moreover, the court noted that affording the property owner the right to a jury trial on damages would not interfere with or undermine the “fundamental purposes or policies of the precondemnation entry and testing legislation.” *Id.*

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CASE LAW HIGHLIGHTS: MIDWEST

KENTUCKY APPEALS COURT RULES MERE POSSIBILITY OF EXPOSURE TO MANUFACTURERS' ASBESTOS-CONTAINING PRODUCTS INSUFFICIENT FOR PLAINTIFF'S TOXIC TORT SUIT TO PROCEED TO TRIAL

Sonia H. Lee

***Mannahan v. Eaton Corp.*, No. 2013-CA-002005-MR, 2016 Ky. App. LEXIS 120 (Ky. July 15, 2016).** The Court of Appeals of Kentucky upheld a circuit court's grant of summary judgment to manufacturers of asbestos-containing products and affirmed dismissal of a coal worker's asbestos-induced mesothelioma case where the plaintiff failed to establish sufficient evidence to support causation, which would have left the jury to "resort to speculation as to exposure and causation." *Id.* at *36. In so ruling, the court observed that plaintiff's argument—i.e., that defendants' asbestos-containing products were installed on equipment worked on by plaintiff, and therefore, defendants' products caused plaintiff to contract mesothelioma—without more, constituted a "post hoc, ergo propter hoc" fallacy because "it makes an assumption based on the false inference that a temporal relationship proves a causal relationship." *Id.* at *23.

From 1967 to 1986, plaintiff Hershel Mannahan worked for Peabody Coal, in which he held many positions, including as a mechanic. *Id.* at *2. While employed as a mechanic, plaintiff performed brake repairs, which required plaintiff to sand and grind asbestos-containing brake parts, clear debris out of brake units, and hammer brake pads and drums into place, all of which sent asbestos-filled dust particles into the air. *Id.* at *3. In November 2011, plaintiff was diagnosed with mesothelioma, and three years later, passed away as a result of the disease. *Id.* at *3–4. Before his death, plaintiff and his wife brought the underlying tort action against manufacturers and sellers of asbestos-containing products, alleging his exposure to such products contributed to his illness. *Id.* at *4.

The defendants moved for summary judgment, arguing plaintiff failed to produce evidence from which a jury could reasonably infer a probable link between the defendants' asbestos-containing products and plaintiff's disease. *Id.* The circuit court granted summary judgment to each moving defendant, and plaintiff's appeal followed. *Id.*

On appeal, the court of appeals reiterated that, in order to prove causation in an asbestos-induced mesothelioma case, the plaintiff must show, for each defendant, through direct or circumstantial evidence, that (1) the plaintiff was exposed to the defendant's product; and (2) the product was a substantial factor in causing the plaintiff's disease. *Id.* at *10. The court observed that while "the first hurdle—exposure to defendant's product—is easily cleared" in many asbestos cases, that was not the case here, where plaintiff failed to produce sufficient circumstantial evidence from which a jury could reasonably infer that he was exposed, at all, to any of the defendants' asbestos-containing products. *Id.*

The court considered the circuit court's specific rulings as to each defendant and concluded that no reversible error was committed. First, as to defendant Palmer, which manufactured asbestos-containing friction products used for brakes, the court agreed with the circuit court's conclusion that, at best, the evidence established that Palmer's asbestos-containing products "likely made it to Peabody's sites" but that "the evidence as to the use of the specific parts on machines [plaintiff] encountered points to the possibility of exposure rather than the probability." *Id.* at *12. The court's finding rested on the fact that while plaintiff could identify the machine or vehicle he worked on, he could not identify the manufacturer of the brakes he installed. *Id.* at *16. In so ruling, the court also declined to adopt market share liability in the asbestos context and rejected plaintiff's argument that Palmer was the biggest supplier of friction products, and as a result, it was more likely that a Palmer product, and not a competitor's product, was incorporated in the machines on which

plaintiff performed brake work. *Id.* at *23–24. “This argument fails, however, because it leaves too much to chance[,]” the court opined. *Id.* at *24.

Second, with regard to defendant Eaton, which like Palmer also manufactured asbestos-containing brakes and brake components, the court agreed with the circuit court that “there was no proof that any specific equipment supplied to and used by Peabody contained an asbestos-containing product manufactured by Eaton.” *Id.* at *11. Because neither plaintiff nor any other witness could testify as to the manufacturer of any brake or brake components present at Peabody, “there [was] nothing from which a jury could directly or inferentially distinguish Eaton from any other manufacturer that supplied such products to [plaintiff’s] employer.” *Id.* at *29.

Finally, as to defendant Rockwell, the court observed that, like his theories advanced against Palmer and Eaton, plaintiff’s “post hoc, ergo propter hoc” argument against Rockwell must also fail, as evidence that Rockwell supplied asbestos-containing material that could have made its way to Peabody was insufficient for a jury to reasonably infer plaintiff was exposed to Rockwell’s asbestos-containing products.

In its concluding remarks, the court reiterated: “We must never lose sight of the applicable causation standard involving circumstantial evidence. . . . In sum, [plaintiff] has failed to identify evidence from which a reasonable jury could infer he encountered a [defendant’s] product and not some other product while working at Peabody Coal. Absent such evidence, we agree with the circuit court that a jury would be left to resort to speculation as to exposure and causation.” *Id.* at *35–36.

MICHIGAN DISTRICT COURT DISMISSES PROPERTY BUYER’S \$9.75M ACCESS CLAIM AGAINST RESPONSIBLE PARTY FOR ALLEGED FAILURE TO TIMELY REMEDIATE CONTAMINATION

Sonia H. Lee

Newell Brands, Inc. v. Kirsch Lofts, LLC, No. 1:15-CV-597, 2016 U.S. Dist. LEXIS 125987 (W.D. Mich. Sept. 15, 2016). The U.S. District Court for the Western District of Michigan ruled that damages for lost use of property related to a court’s grant of access to a party to conduct remediation efforts on property owned by another are not recoverable under Michigan’s Natural Resources and Environmental Protection Act, Mich. Comp. Laws Ann. § 324.20135(a)(1) (Access Statute). “In effect, what [the property owner] is seeking is compensation for the impact of continued contamination on its property, not for the incremental damage triggered by access necessary to remediate it.” *Id.* at *15. Instead, damages recoverable under the Access Statute are limited to an award for “a reasonable estimate of the damages fairly traceable to that grant as distinguished from any damages inherent in the ongoing presence of contamination itself.” *Id.*

In 1997, plaintiff Newell Brands, Inc. (Newell) acquired a large industrial site and assumed responsibility for remediation activities under a consent decree that required cleanup of trichloroethylene (TCE) to a level not greater than 100 parts per million. *Id.* at *2. In 2009, Newell sold a parcel of the site to a third party, which then resold it to defendant Kirsch Lofts, LLC (Kirsch) for commercial and residential development (Property). *Id.*

After Kirsch began construction on the Property, the Michigan Department of Environmental Quality requested that Kirsch suspend work on its development. *Id.* at *5. Following unsuccessful negotiations between Newell and Kirsch, Newell filed a complaint in 2015, seeking a court order for access to Kirsch’s property to perform its

government-mandated remediation activities. *Id.* at *10. Kirsch filed a counterclaim, seeking \$9.75 million in damages under the Access Statute against Newell. *Id.*

At issue was interpretation of the statutory phrase, “damages related to the granting of access to the property, including compensation for loss of use of the property.” *Id.* at *13. Newell argued that the statutory phrase includes only those damages “directly caused” by access. *Id.* Conversely, Kirsch argued that the Access Statute permits broader categories of recovery, including “any damages suffered because of the timing of the any access ordered by the [c]ourt.” *Id.*

The court rejected both parties’ statutory construction. It disagreed with Newell’s narrow interpretation and found that damages are “related to” an access grant if they are “fairly traceable or connected to the ongoing access of the responsible party.” *Id.* at *14. With regard to the statute’s language regarding recovery for “loss of use of the property,” the court rejected Kirsch’s broad reading, noting that Kirsch “attempts to stretch the statutory language to provide compensation for a responsible party’s failure to remediate, rather than for the access incursion necessary to effect remediation.” *Id.* at 16. Instead, under Access Statute, damages are limited to an award for “a reasonable estimate of the damages fairly traceable to that grant as distinguished from any damages inherent in the ongoing presence of contamination itself,” the court found. *Id.* at 15.

Accordingly, Kirsch’s claim for damages in the amount of \$9.75 million—which included losses attributable to tax credits, grants, return on investment, carrying costs, depreciation, and increased construction costs—was not recoverable under the Access Statute as “related to [the court’s] granting of access.” *Id.* at *17. Rather, such damages were based on Newell’s alleged failure to remediate contamination on the Property in a responsible and timely manner, which was not compensable under the statute. *Id.*

The court did, however, award Kirsch \$73,000 in damages, which represented the incremental cost of access that Newell would need to complete its anticipated remediation activities. *Id.* at *18. The \$73,000 amount was quantified by Newell’s uncontroverted expert, who testified that, based upon the market value of the Property, the \$73,000 calculation constituted a reasonable estimate of compensation for a license to access the Property for the 65 months necessary for Newell to remediate the contamination. *Id.*

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CASE LAW HIGHLIGHTS: MID-CONTINENT

DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER CLEAN AIR ACT CITIZEN SUIT WHERE REPEATED OR ONGOING VIOLATIONS NOT ALLEGED AND STATE REGULATORY AUTHORITY HAD ISSUED PERMIT TO ALLEGED VIOLATOR

Lisa Cipriano

Nucor Steel-Arkansas v. Big River Steel, LLC, 825 F.3d 444 (8th Cir. 2016). Plaintiffs, two steel mill companies, brought a citizen suit under the Clean Air Act (CAA) against a competitor, seeking to enjoin the competitor from constructing a new steel recycling and manufacturing facility. *Nucor Steel-Arkansas v. Big River Steel, LLC*, 825 F.3d 444, 446–47 (8th Cir. 2016). The competitor already had received a preconstruction permit from the Arkansas Department of Environmental Quality (ADEQ). *Id.* In connection with that permitting process, plaintiffs had submitted comments, sought an administrative review of the decision to issue the permit, and ultimately appealed the decision to the Arkansas Circuit Court, which affirmed the ADEQ’s decision. *Id.* at 448. At the same time, plaintiffs challenged the ADEQ’s issuance of a related operating permit with the Environmental Protection Agency (EPA). *Id.* When EPA declined to object to the issuance of the permit or respond to the petition, plaintiffs filed suit in the U.S. District Court for the District of Columbia seeking to compel EPA’s response. *Id.* While that case was pending, plaintiffs filed its citizen suit, alleging “that Big River’s permit was invalid and that the continued construction of the steel mill thus violates the CAA” and related regulations. *Id.*

The district court dismissed the citizen suit for lack of subject matter jurisdiction, “conclud[ing] that Nucor’s suit amounted to a collateral attack on a facially valid air permit and that the CAA did not authorize such an attack.” *Id.* at 448. Reviewing the district court’s decision pursuant to a de novo standard, the Eighth Circuit affirmed the dismissal. *Id.*

As an initial matter, the court noted that “[i]n 1977, Congress amended the CAA to add the Prevention of Significant Deterioration (‘PSD’) program. The PSD program created preconstruction requirements for major emitting facilities that obligate them to obtain a permit ‘setting forth emission limitations’ for the facility prior to its construction.” *Id.* at 447 (citing 42 U.S.C. § 7475(a)(1)). “Under the CAA’s cooperative approach, states issue the preconstruction permits in accordance with their SIPS [state implementation plans] and federal minimum standards.” *Id.* In addition, “[i]n 1990, Congress added another permit requirement to the CAA’s regulatory scheme, the Title V permit,” which permits “purport to incorporate into a single document all of the CAA requirements governing a facility.” *Id.* In Arkansas, “[t]he ADEQ issues these permits together in a combined permit to qualifying entities.” *Id.*

With regard to plaintiffs’ attempt to file a citizen suit for alleged violations of emission limitations under section 7604(a)(1) of the CAA, the court found that this provision only permits such a suit where the alleged violations (1) are ongoing or (2) were repeated, if historical violations. *Id.* at 449. Thus, the court agreed that the district court lacked jurisdiction under this provision because, “[t]aking the facts as alleged, even though Nucor’s allegations that Big River violated the Arkansas SIP present a challenge to an ‘emission standard or limitation’ . . . Nucor has not alleged the repeated or ongoing violations necessary to support a citizen suit under § 7604(a)(1).” *Id.* at 450.

Similarly, the court found that the district court had not erred by finding that it lacked jurisdiction under section 7604(a)(3) of the CAA, which authorizes a citizen suit against any person constructing a new emitting facility without the requisite permits. *Id.* at 450–51. Here, the alleged violator clearly had received the required permits from the state regulatory authority, but plaintiffs contended that the permit was “defective” because the competitor allegedly failed to meet the permitting requirements. *Id.* at 451. The court rejected this argument, stating that “[t]he district

court rightly noted that such an argument would mean that § 7604(a)(3) authorizes a citizen suit against anyone who proposes to construct or constructs a major emitting facility, even if that person already has obtained a permit issued by the appropriate regulatory authority . . . as long as the plaintiff alleges that the person failed to meet the requirements of § 7475(a). Such an argument amounts to a collateral attack on a permit, rather than the protection against unpermitted construction that § 7604(a)(3) purports to provide.” *Id.*

Finally, with regard to plaintiffs’ challenge to the Title V operating permit, the court noted that the CAA and related regulations provide a mechanism for interested parties to challenge permits with EPA. Plaintiffs’ “remedy thus lies in petitioning the EPA” and “judicial review via the enforcement proceedings Nucor has brought in the district court are inappropriate.” *Id.* at 453.

STATE AND MARITIME LAW PERSONAL INJURY CLAIMS AGAINST “RESPONSIBLE PARTY” NOT PREEMPTED UNDER CLEAN WATER ACT

Lisa Cipriano

***Winkler v. BP Exploration & Production, Inc.*, No. 16-2715, 2016 WL 4679946 (E.D. La. Sept. 7, 2016).** In a case stemming from the 2010 Deepwater Horizon oil spill, a district court held that plaintiffs’ personal injury claims against defendant BP Exploration & Production Inc. (BP), which had been designated as a “responsible party” under the Oil Pollution Control Act, were not preempted by the Clean Water Act (CWA). *Winkler v. BP Exploration & Production, Inc.*, No. 16-2715, 2016 WL 4679946, at *1 (E.D. La. Sept. 7, 2016). In the aftermath of the spill, the federal on-scene coordinator (FOSC) was in charge of the response, “including the direction of all Federal, State, and private actors.” *Id.* Therefore, while BP was required to participate in the response, it acted at the direction of the FOSC. Among other response actions taken, “containment boom” was placed “in coastal waters to capture oil that the

wind and tides carried landward” and “[t]housands of Danforth anchors held this boom in place.” *Id.* However, 1700 of those anchors subsequently could not be located or retrieved and, therefore, remained on the water bottoms. *Id.* In 2011, the Coast Guard commissioned studies to determine whether workers should retrieve these “orphaned” anchors, and those studies recommended leaving the anchors in place. *Id.* “On July 1, 2011, the FOSC concurred in this recommendation.” *Id.*

Several years later, plaintiffs suffered injuries while harvesting oysters when their oyster rake caught on two unmarked “orphan” anchors left by BP. *Id.* at *2. Plaintiffs filed suit in state court under both state and general maritime law, alleging personal injuries as well as damage to the vessel involved in the incident. Specifically, plaintiffs alleged that the anchors were “underwater obstructions” and that BP was liable for “failing to remove or mark them.” *Id.* BP removed the case to federal court and argued on its motion to dismiss that plaintiffs’ tort claims were preempted by the CWA “because the CWA and its regulations placed exclusive control over the oil spill response in the hands of the FOSC, who directed the placement of the boom and anchors as part of the response and further directed that the orphaned anchors should not be removed.” *Id.*

The court rejected defendant’s preemption argument, finding that the CWA “reflect[s] that Congress intended that responsible parties like BP would be liable for damages that result from actions directed by the FOSC in response to an oil spill.” *Id.* at *3. The court noted that “[i]n an effort to encourage immediate and effective responses, the CWA immunizes spill responders against removal costs and damages that result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the [National Contingency Plan] or as otherwise directed by the [FOSC] relating to a discharge or a substantial threat of a discharge of oil. *Id.* (citing 33 U.S.C. § 1321(c)(4)(A)) (internal quotations omitted, brackets in original). “However, Congress explicitly declined to extend this immunity to a

responsible party. . . .” *Id.* (citing 33 U.S.C. § 1321(c)(4)(B)(i)). In addition, “the CWA places liability on the responsible party for any removal costs or damages that are immunized under § 1321(c)(4)(A).” *Id.* (citing 33 U.S.C. § 1321(c)(4)(C)).

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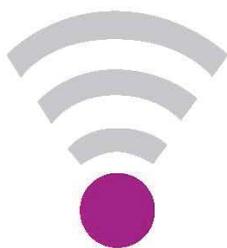


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CASE LAW HIGHLIGHTS: SOUTHEAST

U.S. SUPREME COURT HOLDS THAT APPROVED JURISDICTIONAL DECISION IS FINAL AGENCY ACTION

Matthew Thurlow and Laura Glickman

United States Army Corps of Engineers v. Hawkes Co., Inc., 136 S. Ct. 1807 (2016). On May 31, 2016, the U.S. Supreme Court held that an approved jurisdictional decision by the U.S. Army Corps of Engineers (Corps) as to whether private property contains “waters of the United States” under the Clean Water Act constituted “final agency action,” permitting judicial review of the Corps’ decision. *United States v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016). In an 8-0 decision authored by Chief Justice Roberts, the Supreme Court held that an approved jurisdictional decision by the Corps satisfied the two-part test required for a “final agency action” under the Administrative Procedure Act (APA). Specifically, the Court held that a jurisdictional decision by the Corps under section 404 of the Clean Water Act is a final agency action because it represents a final decision by the Corps, and rights or obligations and legal consequences for landowners flow from the decision.

The Clean Water Act prohibits the discharge of pollutants into navigable waters of the United States. *See id.* at 1811 (citing 33 U.S.C. § 1311(a)). In 2015, the Corps adopted a new rule that modified the definition of “waters of the United States.” The new rule was stayed pending a challenge in the Sixth Circuit. *Id.* at 1811–12. The current definition applies to areas that are “occasionally or regularly saturated with water” and that the “use, degradation, or destruction of which could affect interstate or foreign commerce.” *Id.* at 1811 (citing 33 C.F.R. § 328.3(a)(3) (2012)). The Corps determines whether properties contain “waters of the United States” by issuing jurisdictional decisions on a case-by-case basis. *Id.* at 1812. Jurisdictional decisions can be issued as preliminary or approved decisions. Preliminary decisions are advisory, while approved decisions

are binding for five years on the Corps and EPA, can be administratively appealed, and are defined by Corps' regulations as "Corps final agency action." *Id.*

Respondents brought an APA challenge following the Corps' decision to designate areas as wetlands near their peat mines in Marshall County, Minnesota. *Id.* at 1812–13. Respondents sought to develop a 530-acre tract for mining peat that could be used on golf greens. *Id.* at 1813. In December 2010, they applied to the Corps for a section 404 permit under the Clean Water Act that would allow them to discharge fill material on their property. *Id.* In February 2012, the Corps issued an approved jurisdictional decision stating that the peat-mining property contained "waters of the United States" because the wetlands on the property had a "significant nexus" with the Red River of the North, located approximately 120 miles away. *Id.* Respondents appealed the initial decision of the Corps' Mississippi Valley Division Commander; the Corps upheld its original decision and issued a revised jurisdictional decision. *Id.* Respondents then brought a challenge under the APA in federal district court. This challenge was dismissed for lack of subject matter jurisdiction because the court determined the jurisdictional decision did not constitute final agency action under the APA. The Eighth Circuit reversed the district court, and the Supreme Court granted certiorari. *Id.*

In appealing the decision of the Eighth Circuit, the Corps argued that the issuance of an approved jurisdictional decision for the peat mine property in Marshall County was not a "final agency action" under the APA. *Id.* at 1813. Applying its holding from *Bennett*, the Supreme Court held that an approved jurisdictional decision is a final agency action because the action marks the "consummation of the agency's decision-making process" and is not "merely tentative or interlocutory in nature," and the action is one "by which rights or obligations have been determined, or from which legal consequences flow." *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). The Corps did not dispute that the first

condition of *Bennett* had been met, but argued that the approved jurisdictional decision was not final, despite its own guidance characterizing such actions as "final." *Id.* at 1814. The Court disagreed. Although the Corps might revise an approved jurisdictional decision, the Court held that "for all practical purposes" such a decision was a definitive ruling by the Corps that "respondents' property contains jurisdictional waters." *Id.* Because the decision is "definitive," the Court determined that benefits, including a safe harbor from Clean Water Act enforcement proceedings, would not be available following issuance of an approved jurisdictional decision. *Id.*

Finally, the Court held that parties had no reasonable alternatives to challenging an approved jurisdictional decision. A party could either discharge fill without a permit and risk an EPA enforcement action, or apply for a permit and seek judicial review of the permit. *Id.* at 1815. The Court held that parties could not be forced to face the risks of "serious criminal and civil penalties" from EPA by discharging material without a permit. *Id.* Nor could parties be forced to undertake the "arduous, expensive, and long" permitting process in order to challenge the Corps' decision in court. *Id.* at 1815–16. The Court concluded that the "issuance of a permit" does not alter "finality of an approved JD, or affect its suitability for judicial review." *Id.* at 1816. Accordingly, the Court affirmed the judgment of the Eighth Circuit.

D.C. CIRCUIT REVERSES FERC DECISION ON CRUDE OIL VALUATION

Matthew Thurlow and Laura Glickman

***Petro Star Inc. v. Federal Energy Regulatory Commission*, No. 15-1009, 2016 U.S. App. LEXIS 15973 (D.C. Cir. Aug. 30, 2016).** On August 30, 2016, the Court of Appeals for the District of Columbia Circuit granted a petition for review challenging the Federal Energy Regulatory Commission's (FERC) decision not to change its methodology for calculating the value of crude oil placed on the Trans Alaska Pipeline System.

Petro Star Inc. v. Federal Energy Regulatory Commission, No. 15-1009, 2016 U.S. App. LEXIS 15973 (D.C. Cir. Aug. 30, 2016). Petitioner Petro Star challenged an administrative law judge’s decision to uphold the methodology used by FERC’s Quality Bank to value the different crude oil components on the pipeline. *Id.* at *1. The court held that FERC failed to meaningfully respond to new evidence presented by Petro Star that challenged the Quality Bank’s valuation methodology, and remanded the case to FERC to reconsider its valuation methodology. *Id.* at *35

Oil companies on Alaska’s North Slope deposit crude oil onto the Trans Alaskan Pipeline System that they later extract in Valdez, Alaska. Oil placed into and later removed from the pipeline is of varying quality and value. In order to ensure that parties depositing and extracting oil from the pipeline do not suffer unfair losses or gain windfalls, FERC created the Quality Bank for assigning values to each company’s oil based on the components of the oil, also known as “cuts.” *Id.* at *2–3. The Quality Bank charges companies that deposit low-quality petroleum and then uses those funds to compensate companies that deposit higher-quality petroleum on the pipeline. *Id.* at *4. The Quality Bank also takes into account the activities of refineries along the pipeline route that extract petroleum from the pipeline and return unused, and typically lower quality, petroleum cuts to the pipeline. For over 20 years, FERC has made its adjustments by calculating the value of the different cuts of petroleum. These cuts include six “marketable” cuts, for which there is an actual market value that the Quality Bank can use, and three other cuts that cannot be sold without additional processing following distillation. For the petroleum cuts that do not have an actual market value, the Quality Bank determines a hypothetical market price based on the market price for the finished products that can be developed from these lower quality cuts. In estimating the value of the lower quality cuts, the Quality Bank also takes into account the processing costs required to produce the finished products. *Id.* at *7–8. In this case, Flint Hills and Petro Star challenged the Quality Bank’s

use of a 20 percent capital recovery factor applied for construction of a hypothetical refinery capable of processing one of the lower quality cuts (Resid) into a marketable product (coke). *Id.* at *8–9.

In August 2013, Flint Hills brought a complaint to FERC challenging the Quality Bank’s petroleum valuation method under the Interstate Commerce Act, 49 U.S.C. § 15 (1988). Petro Star intervened, and both companies argued for removal of the 20 percent capital recovery allowance from the Quality Bank’s valuation formula for Resid. *Id.* at *10. Other major oil companies also intervened and opposed changing the valuation formula. *Id.* at *11. The issue was heard by an administrative law judge, who held that Flint Hills and Petro Star had failed to propose a “just and reasonable” alternative to the Quality Bank valuation method for Resid and failed to demonstrate that including a capital investment allowance in the valuation of Resid was “unjust and unreasonable.” *Id.*

The D.C. Circuit determined that FERC’s decision to leave its petroleum valuation methodology unchanged was “arbitrary and capricious” because FERC failed to evaluate new evidence provided by Petro Star regarding spot-market prices and capital investment returns that was inconsistent with FERC’s petroleum valuation method. *Id.* at *13–14. Among other anomalies identified by Petro Star, the market value of a barrel of crude oil exceeded the value calculated by the Quality Bank from the period 2009 to 2012, indicating that Resid was systematically undervalued by the Quality Bank. *Id.* at *16–17. The D.C. Circuit faulted the administrative law judge and FERC for failing to respond to this point. *Id.* at *21. Petro Star also presented evidence that market changes, including no further investment in new coking capacity, the sale of coking facilities at depressed prices, and underutilization of coking facilities, altered market expectations that capital investment costs for coking will be recovered. The D.C. Circuit agreed that FERC failed to adequately address this new evidence in its decision. *Id.* at *23–27. The D.C. Circuit also held that Petro Star’s failure to propose a viable alternative valuation methodology

did not obviate FERC's obligation to reevaluate the Quality Bank's existing valuation model. *Id.* at *33–34. Because Petro Star “raised a facially legitimate objection to the inclusion of the capital recovery factor in the Quality Bank's processing cost adjustment for Resid,” the court remanded the case to FERC, and instructed FERC that it “must either answer Petro Star's objection or change its [valuation] formula.” *Id.* at *15, 35.

Finally, the court held that the state of Alaska did not have standing to raise an additional claim challenging the Quality Bank's valuation methodology because it had not suffered “any concrete harm.” *Id.* at *35.

ELEVENTH CIRCUIT AFFIRMS CORPS' NATIONWIDE PERMIT FOR DISCHARGE OF MINING WASTE

Matthew Thurlow and Laura Glickman

***Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 2016 U.S. App. LEXIS 14877 (11th Cir. Aug. 12, 2016).** On August 12, 2016, in an unpublished opinion, the Court of Appeals for the Eleventh Circuit affirmed a district court decision upholding the Army Corps of Engineers' (Corps) Nationwide Permit 21, which regulates the discharge of dredged or fill materials into navigable waters of the United States by surface coal mining operations. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 2016 U.S. App. LEXIS 14877 (11th Cir. Aug. 12, 2016). The court rejected arguments brought by a citizens group that the Corps violated the Clean Water Act, Administrative Procedure Act (APA), and National Environmental Policy Act (NEPA) in issuing the permit.

The Clean Water Act prohibits the discharge of pollutants into navigable waters of the United States. 33 U.S.C. § 1311(a). Section 404 of the Act authorizes the Corps to regulate discharges of dredged or fill materials into waters of the United States through the issuance of discharge permits. *Black Warrior Riverkeeper*, 2016 U.S.

App. LEXIS at *5. In addition to issuing individual discharge permits, the Corps is also authorized to issue “general permits” on a state, regional, or nationwide basis. *Id.* at *5–6. Before a general permit can be issued, the Corps must follow an extensive administrative process and allow public notice and comment. The activities authorized under a general permit must also satisfy three conditions: (1) they must be “similar in nature”; (2) result in only “minimal adverse effects when performed separately”; and (3) “have only minimal cumulative adverse effect on the environment.” *Id.* at *6–7. In addition to these requirements, the Corps must evaluate the environmental effects of the general permit under NEPA. While NEPA does not mandate any particular outcome, it requires federal agencies to prepare an Environmental Impact Statement (EIS) for any major federal action that significantly affects the quality of the environment. 42 U.S.C. § 4332(2)(C). Under NEPA, the Corps is required to prepare an Environmental Assessment evaluating whether the effects of the federal action (in this case Nationwide Permit 21) would be significant. If the effects are not significant, the agency can issue a Finding of No Significant Impact (FONSI). If the effects are significant, the agency must prepare an EIS. *Black Warrior Riverkeeper*, 2016 U.S. App. LEXIS at *7–8.

Nationwide Permit 21 authorizes “discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations.” *Id.* During surface mining operations, excess mining debris, often referred to as “overburden,” is often deposited in nearby streams and other water bodies. Mining also results in discharges to navigable waters during the construction of roads, processing plants, and other mining facilities. Finally, mining results in the discharge of runoff, including sediment, salts, and metals that can impact waters for extremely long periods of time. *Id.* at *8–9. The Corps has struggled with these impacts on water bodies for decades with somewhat mixed success. In 2010, the Corps suspended Nationwide Permit 21 for six states because of concerns regarding environmental

impacts. *Id.* at *10. In 2012, the Corps issued a revised version of Nationwide Permit 21 that included two new provisions. First, the revised permit included a grandfathering provision that allowed reauthorization of operations previously permitted under the 2007 Nationwide Permit 21, subject to verification that those activities would cause only minimal individual and cumulative adverse effects, and additional activity-specific conditions that a district engineer deemed appropriate. Second, for new operations, the revised Nationwide Permit 21 added restrictions on stream-filling activity, including restrictions on the amount of fill that could be discharged and a bar on the construction of “valley fills,”—i.e., those that filled or buried entire streams. *Id.* at *11–12. The new restrictions did not apply to the grandfathered operations. *Id.* at *12. When the Corps issued the revised Nationwide Permit 21, it also issued a decision document that included Clean Water Act and NEPA analysis. The decision document estimated that Nationwide Permit 21 would be used approximately 61 times a year nationwide, would impact only 26 acres of waters of the United States, and would require approximately 62 acres of compensatory mitigation to offset those impacts. *Id.* at *16. In the decision document, the Corps concluded that Nationwide Permit 21 would not significantly impact the quality of the environment and issued a FONSI. *Id.*

Black Warrior Riverkeeper, an environmental citizens group in west-central Alabama, challenged the Corps’ issuance of Nationwide Permit 21, and sought to block reauthorization of approximately 41 mining operations under the Permit. *Id.* at *18. Black Warrior Riverkeeper brought claims under the Clean Water Act, APA, and NEPA, and also sought a preliminary injunction suspending all reauthorizations in the Black Warrior River watershed. *Id.* at *18–19. The district court denied the Black Warrior Riverkeeper’s motion for preliminary injunction, and dismissed the case under the doctrine of laches because of the Black Warrior Riverkeepers’ delay in filing suit. *Id.* at *20–21. On appeal, the Eleventh Circuit reversed and remanded the case back to the district court. *Id.* at *21.

Following the Corps’ admission that an error had been made in calculating the number of acres of waters of the United States impacted by Nationwide Permit 21, the district court requested an updated analysis from the Corps. *Id.* at *23. The Corps determined that over 500 acres of water (not merely 26 acres as originally reported) would be impacted by Nationwide Permit 21. *Id.* at *24. However, the Corps’ overall findings regarding the environmental impacts of Nationwide Permit 21 remained unchanged, and the Corps issued a new FONSI under NEPA. *Id.* at *25. The parties submitted new summary judgment motions, and the district court granted the Corps’ motion, and denied the Black Warrior Riverkeepers’ motion.

The Eleventh Circuit accorded substantial deference to the Corps in evaluating the Black Warrior Riverkeepers’ challenge to Nationwide Permit 21. *Id.* at *28. In determining whether reissuance of the permit might cause significant environmental impacts, the court emphasized that even for the grandfathered facilities that sought reauthorization, a district engineer would evaluate whether the reauthorized activities might result in greater loss of waters than under the 2007 permit, whether the activity would result in adverse effects, and whether additional activity-specific conditions or even a separate permit might be required. *Id.* at *30–31 (“On its face, Rule 21(a) expressly requires a district engineer to determine that a grandfathered-in permit will have minimal effects before authorizing it.”). Likewise, based on the Corps’ Revised Decision Document, the court concluded that the Corps had taken a “hard look” at the environmental impacts of the reauthorizations, as required by NEPA. *Id.* at *36. Finally, the court rejected the Black Warrior Riverkeepers’ argument that the Corps did not provide a sufficient rationale for distinguishing between grandfathered mining discharge activities and new activities. *Id.* at *39–40. Although the court agreed that the Corps had taken into account “economic hardship to the regulated companies,” in issuing the grandfathering provision in Nationwide Permit 21, it did not agree that applying that consideration was arbitrary and capricious: “Nothing in the CWA [Clean

Water Act] or NEPA precluded the Corps from relying on economic considerations in choosing between alternatives that have minimal aquatic impacts in order to ensure that mining companies were not unfairly burdened by the new permit requirements.” *Id.* at *41. The court also concluded that the grandfathered-in projects presented less risk of harm because the projects had been operating for years such that the Corps knew the potential for adverse environmental risks, as compared to the new projects, where the Corps had only projected environmental impacts. *Id.* at *42. Accordingly, the court affirmed the district court’s judgment upholding Nationwide Permit 21. *Id.* at *43.

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CASE LAW HIGHLIGHTS: NORTHEAST

APPEAL SEEKS TO RAISE BAR ON ENVIRONMENTAL CLASS ACTION SETTLEMENTS

Steven German

Mattie Halley, et al. v. Honeywell International, Inc., et al., Case No. 16-2712 (3d Cir. 2016). A class objector has appealed the District of New Jersey’s final judgment approving class action settlement in *Halley, et al. v. Honeywell International, Inc. and PPG Industries, Inc.* Plaintiffs sought money damages for their alleged diminution of property value caused by defendants’ disposal and failure to properly remediate hexavalent chromium waste in residential areas of Jersey City, New Jersey. Plaintiffs and a single defendant—Honeywell—reached settlement in October 2014. The district court issued its Order and Final Judgment Approving Class Action Settlement on May 10, 2016. Objector appealed, raising three issues of interest for the environmental practitioner.

First, must the settling parties present scientific proof of the presence or absence of contamination on settlement class properties? Appellant argued such information is required for the court to determine if the settlement is fair, reasonable, and adequate under *Girsh v. Jepsen*, 521 F.2d 153 (3d Cir. 1975). Without such information, she argued, the court cannot properly evaluate the settlement or approve the release of claims for presently “unknown” property damage or remediation that might be required in the future. Notably, plaintiffs cited studies, reports, and data that—they believe—demonstrate the ubiquitous presence of chromium contamination across the class properties. Honeywell cited evidence that—it believes—demonstrates the absence of such contamination. But neither party provided the sort of residential testing sought by appellant. Together with the settling parties, the district court viewed the conflicting submissions to support settlement because they demonstrated the risks of proceeding through class certification, trial, and appeals—

critical considerations under *Girsh*. Appellant cited no precedent requiring such detailed environmental data under *Girsh*.

Second, must the district court be provided a dollar estimate of the best possible recovery in order to evaluate the range of reasonableness of the settlement? Appellant argues that the district court erred in approving the settlement without such an estimate. Plaintiffs argued to the district court that such estimates are not only unnecessary under *Girsh*, but they have often been deemed “speculative” and “nearly impossible to predict.” See, e.g., *In re Processed Egg Products Antitrust Litig.*, 302 F.R.D. 339, 360 (E.D. Pa. 2014); *In re Imprelis Herbicide Mktg., Sales Practices & Products Liab. Litig.*, 296 F.R.D. 351, 369 (E.D. Pa. 2013). Rather, plaintiffs argued, *Girsh* requires a weighing of the real and substantial benefits of the settlement against the attendant risks of litigation, including the potential for little or no recovery at all. Plaintiffs further argued that having to generate a merits-phase expert damages report during the class certification stage of a bifurcated class action would be premature and undermine the economies of settlement by forcing parties to dedicate significant time and money for the sole purpose of obtaining settlement approval. It would, moreover, be prejudicial to force plaintiffs to disclose their expert analysis while the case against a non-settling party is proceeding.

Third, how should class counsel be reimbursed for their disbursements when settling with fewer than all defendants? Appellant argues that class counsel should have been denied reimbursement of expenses pursuing PPG from the Honeywell settlement fund. Plaintiffs argued that the case involved allegations of joint and several liability, including civil conspiracy. As such, up until settlement, the case was litigated in such a way that all costs were necessarily advanced to prosecute claims against Honeywell and PPG jointly. Once settlement was achieved, the majority of case expenses were incurred in pursuing PPG alone and could then be isolated for reimbursement from PPG at a later date.

**DISTRICT OF MASSACHUSETTS RULES EPA
PRESS RELEASE INSUFFICIENT TO TRIGGER
STATUTE OF LIMITATIONS; *AMERICAN PIPE*
TOLLING PRESERVES CLASS CLAIMS**

Steven German

Town of Princeton v. Monsanto Company, et al., No. 15-cv-40096, 2016 WL 4250250 (D. Mass. Aug. 10, 2016). In April 2011, polychlorinated biphenyls (PCBs) above EPA standards were found in the Prince School in the town of Princeton, Massachusetts. PCBs are synthetic odorless chemicals that present serious health risks. PCBs were widely used in the construction of schools through the 1970s. Princeton incurred significant costs and damages as a result of the PCB contamination. In 2015, Princeton sued Monsanto Company, Solutia Inc., and Pharmacia (defendants), the largest manufacturers of PCBs in the United States from 1935 to 1978. *Town of Princeton v. Monsanto Company*, 2016 WL 4250250, at *2 (D. Mass. Aug. 10, 2016). On September 4, 2012, the town of Lexington—another Massachusetts town—filed a putative class action against the same defendants over PCB contamination in its school and other Massachusetts schools. Princeton was a member of the proposed class. The court denied class certification. *Id.* at *3.

Defendants moved to dismiss the Princeton case based on the expiration of the statute of limitations. Defendants argued that Princeton’s claims accrued on September 25, 2009, when EPA issued a press release entitled “EPA Announces Guidance to Communities on PCBs in Caulk of Buildings Constructed or Renovated between 1950 and 1978 EPA to gather latest science on PCBs in caulk.” *Id.* at *4. The press release suggested numerous “steps that building owners and school administrators should take to reduce exposure to PCBs that may be found in caulk in many buildings constructed or renovated between 1950 and 1978.” It described PCBs as “man-made chemicals that persist in the environment and were widely used in construction materials and electrical products prior to 1978.”

It also summarized the potential health impacts of PCBs and noted several unresolved scientific issues necessary to assess the magnitude of the problem and identify the best long-term solutions. The press release stated that the potential presence of PCBs is a serious issue, but it “should not be a cause for alarm.” *Id.*

Princeton argued that the accrual of its claims coincided with its injury, which occurred in April 2011, when Princeton first received the positive test results.

The district court found that defendants failed to demonstrate that, as a matter of law, the EPA press release provided Princeton sufficient notice of harm. The court found that a single, generic press release addressed to all “building owners and school administrators,” was insufficiently specific to alert Princeton, in particular, of its injury and the likely cause. *Id.* at *5. In reaching this conclusion, the court focused on the unique nature of environmental claims where an injury might be invisible, imperceptible, and unknowable without environmental or medical testing results. Tort claims, the court explained, typically accrue, and thus the statute of limitations starts to run, at the time the plaintiff is injured. However, in cases involving inherently unknowable dangers, the discovery rule provides that causes of action do not accrue until the plaintiff learns, or reasonably should have learned, that she has been harmed by the defendant’s conduct. The plaintiff must have “knowledge or sufficient notice that she was harmed and . . . knowledge or sufficient notice of what the cause of harm was.” *Id.* at *4 (citing *Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215, 228, 914 N.E.2d 891 (2009)).

The court next addressed the issue whether Princeton’s negligence claim was tolled by the town of Lexington’s class action. Under *Am. Pipe & Constr. Co. v. Utah*, “the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.” *Id.* at *8

(citing 414 U.S. 538, 554 (1974)). The claims of individual class members remain tolled up until class certification is denied. *Id.* (citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983)). Defendants argued that Princeton’s negligence claim was not tolled because the town of Lexington did not assert a negligence claim. Tolling applies, argued defendants, only to claims that are identical to the claims raised in the original class action.

The court disagreed. Quoting *Lindner Dividend Fund, Inc. v. Ernst & Young*, 880 F. Supp. 49, 54 (D. Mass. 1995), the court explained that “a subsequent individual suit need not necessarily be identical in every respect to an earlier class action for the limitations period to be tolled.” *Id.* at *9. “The touchstone is whether ‘the class action suit . . . g[a]ve defendant ample notice of plaintiff’s individual claim.’” *Id.* Here, said the court, Princeton’s negligence claim shared the same factual allegations as the claims asserted by the town of Lexington. Both cases alleged that defendants marketed, sold, and promoted PCBs without warning of the risks. Likewise, both alleged that PCBs caused property damage requiring investigation, cleanup, remediation, and monitoring. Moreover, Princeton’s negligence claim involved the same evidence that defendants would need to rely upon in both cases and which they were already on notice to preserve from the prior action. Since the town of Lexington case provided defendants notice of the potential claims they might have to defend, the factual bases for those claims, and the potential witnesses who might be called, they were sufficiently similar for the limitations period to be tolled. *Id.*

**PENNSYLVANIA’S ACT 13 OIL AND GAS
LAW RULED UNCONSTITUTIONAL BY
PENNSYLVANIA SUPREME COURT**
Steven German

Robinson Township et al. v. Commonwealth of Pennsylvania et al., No. 104 MAP 2014, 2016 WL 5597310 (Pa. Sept. 28, 2016). On September 28, 2016, the Pennsylvania Supreme Court struck

down certain provisions of Act 13, finding them to be unconstitutional.

By way of background, in February 2012 the Pennsylvania General Assembly passed Act 13—a sweeping law regulating the oil and gas industry. Act 13 repealed Pennsylvania’s Oil and Gas Act of 1984 and replaced it with a new framework, ostensibly to remove any local barriers to the expansion of drilling and fracking across the state. Advocates of the new law touted it as a pro-business, clean-energy bill creating jobs, revenue, and improving environmental laws surrounding drilling. Opponents viewed it as anti-environmental—giving the shale industry the right to drill anywhere, seize private property, and deny health care professionals important information about fracking’s potential health effects in cases of exposure to its chemicals.

The court struck down three key provisions.

First, the court ruled that the Act’s provision restricting medical professionals’ access to information about the identity and amount of chemicals used in the fracking process that could harm their patients—characterized as the “physician gag rule”—was unconstitutional because it conferred special treatment to the oil and gas industry afforded to no other industry: “[W]e discern no manifest peculiarity of the oil and gas industry which warrants granting it the special treatment conferred by [the Act] and so we hold that these statutory provisions violate Article III, Section 32’s prohibition against the enactment of special laws.” *Robinson Twp. v. Commonwealth*, 2016 WL 5597310, at *28 (Pa. Sept. 28, 2016).

Second, the court held that Act 13’s provisions limiting notification of fracking-related spills or chemical releases to public water suppliers—but not to private well owners—was unconstitutional: “In short, [the Act’s] exclusion of mandatory notice by the DEP to these well owners does not further the legislative goal of ensuring they may exercise their right to have the integrity of their water supply secured in the event it is threatened

by pollution from a spill; to the contrary, this exclusion serves to undermine that goal. For these reasons, we conclude that [the Act’s] requirement that only public water facilities must be informed in the event of a spill is unsupportable under Article III, Section 32 of our Constitution.” *Id.* at *34. Under the ruling, the Department of Environmental Protection must within 180 days begin notifying private well owners of drilling spills and leaks affecting their water.

Third, the court struck down Act 13’s provision allowing companies involved in transporting, selling, or storing natural gas to seize privately owned subsurface property through eminent domain. The court called the provision “repugnant” to the U.S. Constitution’s Fifth Amendment and Article 1, Section 10, of the Pennsylvania Constitution: “The plain language of [the Act] permits ‘a corporation empowered to transport, sell or store natural gas or manufactured gas in this Commonwealth’ to use the subsurface real property of another landowner in order to store natural or manufactured gas. . . . This type of forced use of another landowner’s property unquestionably deprives that landowner of the use and enjoyment of the subterranean portion of his property, given that natural gas is now physically occupying it; hence, it constitutes a *de facto* taking by the corporation.” *Id.* at *37 (internal citations omitted).

The plaintiffs included numerous Pennsylvania townships and the Delaware Riverkeeper Network. The defendants included the Pennsylvania Public Utility Commission, the Commonwealth of Pennsylvania, and the Pennsylvania Department of Environmental Protection.

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FLINT'S DIFFICULT PATH TO FEDERAL AID

Ameri R. Klafeta

The city of Flint, Michigan, faces significant costs to replace its aging drinking water infrastructure—infrastructure that has contributed to a public health emergency concerning high levels of lead in drinking water. These costs are expected to far outpace the \$27 million that the state of Michigan has committed to Flint. Obtaining federal aid, however, has proven to be a difficult undertaking. Indeed, recently, it brought the government to the brink of a shutdown. As it presently stands, Congress has agreed to reconvene after the November 2016 election to resolve conflicting bills that offer aid to Flint.

The debate surrounding funding for Flint turns on the federal Water Resources Development Act (WRDA). This biannual legislation authorizes and implements policy changes regarding the U.S. Army Corps of Engineers' water initiatives. On September 15, 2016, the U.S. Senate passed its version of the WRDA of 2016. *See* Water Resources Development Act, S. 2848, 114th Cong. (2016). Approved by a 95-3 vote, this bill would provide funding to help fix Flint's drinking water infrastructure, among other things. The Senate bill provided \$220 million in funding for Flint, most of which was aimed at repair and replacement through the Safe Drinking Water Act's State Revolving Fund and the Water Infrastructure Finance and Innovation Act of 2014. The bill also provides funding for a lead exposure registry, an advisory committee to study issues related to lead exposure and poisoning, and a childhood lead poisoning prevention program. The Senate bill offsets its expenditures by rescinding a subsidy program for advanced technology vehicle manufacturers.

The House of Representatives' version of the WRDA of 2016 initially did not contain funding for Flint. *See* Water Resources Development Act, H.R. 5303, 114th Cong. (as reported by House Committee on Transportation and Infrastructure, Sept. 22, 2016). At the same time that House Bill

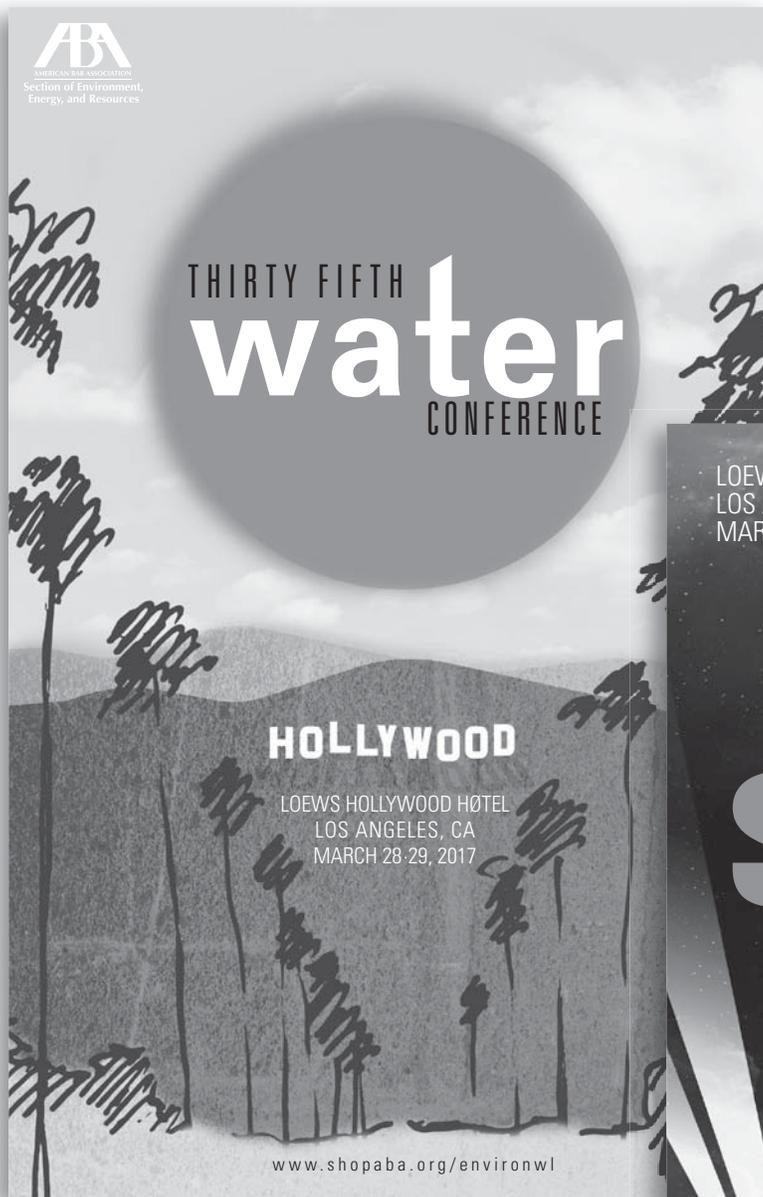
5303 was being considered, Congress also was trying to enact a separate short-term spending bill to keep the government operating past October 1, 2016, when its funding would run out. That separate bill did not address Flint, but did include \$500 million in aid for flood-stricken areas in Louisiana and Maryland and \$1.1 billion for the fight against the Zika virus. *See* H.R. 5325, 114th Cong. (2016). Faced with an absence of funding for Flint in House Bill 5303, many members of Congress refused to agree to this separate budget legislation. As Michigan senator Debbie Stabinow, one of bill's opponents, explained, "It is wrong to ask families in Flint to wait at the back of the line again."

Finally, on September 28, 2016, Congress passed a stopgap measure to fund the government through December 9. *See* H.R. 5325. That same day, the House voted on a revised House Bill 5303 to pass legislation authorizing \$170 million on infrastructure improvements for Flint. *See* H.R. 5303. This compromise and its timing allow members of Congress to return home for the upcoming election. After the November 8, 2016, election, discussions are set to continue on federal aid to Flint. Congressional leadership has agreed to reconcile the House and the Senate legislation, including determining the amount of aid to Flint.

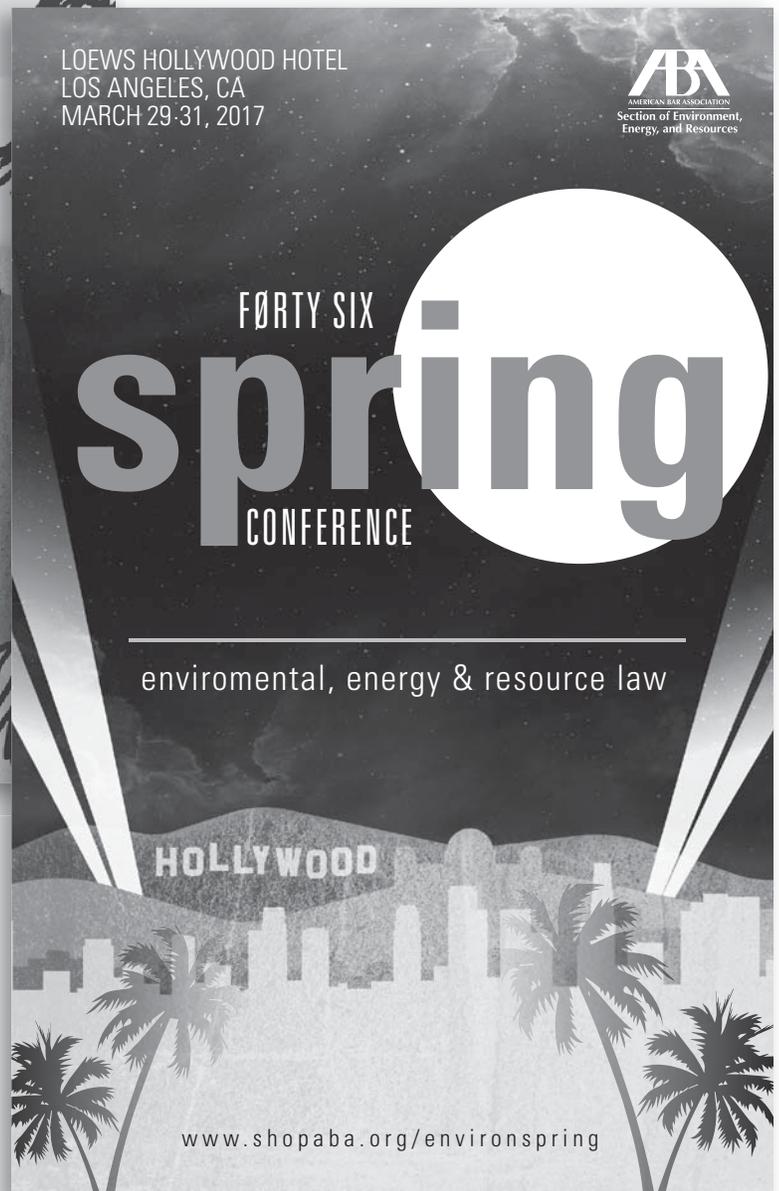
However, some other legislators are skeptical about Congress's ability to agree on the Flint legislation during the post-election, lame duck session. The Obama administration has expressed support for funding aid to Flint and urged Congress to take immediate action to provide funding upon its return in November.

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