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FOR LAWYERS, CONSULTANTS, AND LENDERS WHO COUNSEL BUSINESS, COMMERCIAL, AND REAL ESTATE CLIENTS

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PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements—Air Quality

• AL Solutions, a West Virginia-based metal recycler, has agreed to implement extensive, company-wide safeguards to prevent future accidental releases of hazardous chemicals from its facilities, resolving alleged federal Clean Air Act (CAA) violations stemming from an explosion at the company's New Cumberland, West Virginia facility that killed three people. AL Solutions recycles titanium and zirconium raw materials for use as alloying additives by aluminum producers. In December 2010, three employees who had been handling zirconium powder at the company's former plant in New Cumberland, West Virginia died following an explosion that may have been caused by an accidental release of the chemical. Debris from the explosion, which destroyed the production area of the facility, was scattered into the yards of local residents. In early 2013, the company opened a new, automated facility in Burgettstown, Pennsylvania that includes modern technology to safeguard employees and reduce exposure to hazardous metallic dust. The U.S. Environmental Protection Agency (EPA) estimates that the company will spend approximately $7.8 million to implement extensive measures to ensure compliance with environmental requirements, assess the potential hazards associated with existing and future operations, and take measures to prevent accidental releases and minimize the consequences of releases that may occur. In consultation with EPA, the company has already completed significant portions of the work required by the settlement and a prior administrative order. Among other requirements, AL Solutions must use advanced monitoring technology, including hydrogen monitoring and infrared cameras, to assess hazardous chemical storage areas to prevent fires and explosions. They must also process or dispose of approximately 10,000 drums of titanium and zirconium, or 2.4 million pounds, being stored at facilities in New Cumberland and Weirton, West Virginia by December 2014 to reduce the risk of fire and explosion. The company will also pay a $100,000 civil penalty to resolve the alleged CAA violations documented during EPA inspections of the New Cumberland, West Virginia and Washington, Missouri facilities following the explosion. In a related action, AL Solutions recently agreed to pay the U.S. Department of Labor a total of $97,000 to resolve alleged violations of the Occupational Health and Safety Act (OSHA). The OSHA settlement, which is subject to final approval by an Administrative Law Judge, requires expanded abatement measures that are consistent with the safeguards in EPA's settlement to provide ongoing worker safety protection at the company's four facilities. These measures require adequate fire detection systems, process hazard analyses for production areas, regular safety and health inspections, and restrictions on stockpiling combustible materials. Since the explosion, EPA and OSHA have coordinated their investigations and shared information, which has resulted in settlements designed to protect workers, communities, and the environment.

• Savoia, BMX Imports, BMX Trading—a Dallas-based group of companies—and their owner, Terry Zimmer, must either stop importing vehicles or follow a comprehensive compliance plan to settle CAA violations stemming from the alleged illegal import of over 24,167 highway motorcycles and recreational vehicles into the United States without proper documentation. The four parties are also required to pay a $120,000 civil penalty for allegedly importing the vehicles from several foreign manufacturers into the United States through the Port of Long Beach, California. The vehicles were then sold online and from a retail location in Dallas, Texas. The settlement

requires that the companies either certify that they are no longer engaging in CAA-regulated activities or follow a comprehensive plan over the next five years that would include regular vehicle inspections, emissions testing, and other measures to ensure compliance at various stages of purchasing, importing, and selling vehicles. In addition, the companies are required to export or destroy 115 of their current vehicles that have catalytic converters or carburetors that do not adhere to the certificate of conformity that they submitted to EPA. EPA's investigation showed that approximately 11,000 of the imported vehicles were not covered by an EPA certificate of conformity, which means that EPA is unable to confirm that the emissions from these vehicles meet federal standards. Other violations included approximately 23,000 vehicles sold without the required emissions warranty, and approximately 500 vehicles that did not have proper emission control labels.

•The Cos-Mar Company of Carville, Louisiana has agreed to take a number of steps to better protect the health of the local community, reduce emissions, and come into full compliance with federal clean air laws. The company will develop a flare monitoring plan, repair flaring devices, implement leak detection and repair program (LDAR), and ensure that adequate monitoring and recordkeeping protocols are in place. The company will also pay an $84,050 civil penalty. LDAR is a work practice designed to identify leaking equipment so that emissions can be reduced through repairs. EPA estimates that the LDAR program can potentially reduce product losses, increase worker safety, and decrease community exposure to hazardous releases. The facility is owned by the Cos-Mar Company, headquartered in Houston, and operated by Total Petrochemicals and Refining USA, Inc. The consent agreement addresses a number of violations that occurred on July 2, 2010, March 12, 2009, October 13, 2011, and June 22, 2010. The agreement was signed on December 10, 2013 and the penalty must be paid within thirty days of agreement. The facility has one year from date of agreement to complete the projects and submit a work plan to EPA.

Civil Enforcement Actions and Settlements—Water Quality

•Chesapeake Appalachia, LLC, a subsidiary of Chesapeake Energy, the nation's second largest natural gas producer, will spend an estimated $6.5 million to restore 27 sites damaged by unauthorized discharges of fill material into streams and wetlands and to implement a comprehensive plan to comply with federal and state water protection laws at the company's natural gas extraction sites in West Virginia. The company will also pay a civil penalty of $3.2 million, one of the largest penalties ever levied by the federal government for violations of the federal Clean Water Act (CWA) under the § 404 program. The federal government and the West Virginia Department of Environmental Protection (WVDEP) allege that the company impounded streams and discharged sand, dirt, rocks and other fill material into streams and wetlands without a federal permit in order to construct well pads, impoundments, road crossings and other facilities related to natural gas extraction. The alleged violations being resolved by the settlement occurred at 27 sites located in the West Virginia Counties of Boone, Kanawha, Lewis, Marshall, Mingo, Preston, Upshur and Wetzel, including 16 sites involving hydraulic fracturing operations. The government alleges that the violations impacted over 12,000 linear feet of stream, or approximately 2.2 miles, and more than three acres of wetlands. The settlement requires that the company fully restore the wetlands and streams wherever feasible, monitor the restored sites for up to ten years and implement a comprehensive compliance program to ensure future compliance with the CWA and applicable state law. The company will also perform compensatory mitigation, which will likely involve purchasing credits from a wetland mitigation bank located in a local watershed. EPA discovered some of the violations through information provided by the public and routine inspections. In addition, Chesapeake Appalachia voluntarily disclosed potential violations at 19 of the sites following an internal audit. In 2010 and 2011, EPA issued administrative compliance orders for violations at 11 sites. Since that time, the company has been correcting the violations and restoring those sites in full compliance with EPA's orders. The settlement also resolves alleged violations of state law brought by WVDEP. The State of West Virginia is a co-plaintiff in the settlement and will receive half of the civil penalty. In a related case in December 2012, the company pled guilty to three violations of the CWA related to natural gas extraction activity in Wetzel County, one of the sites subject to this settle-

ment. Chesapeake Appalachia was sentenced to pay a $600,000 penalty to the federal government for discharging crushed stone and gravel into Blake Fork, a local stream, to create a roadway to improve access to a drilling site. The company has already fully restored the damage done to the site. Chesapeake Appalachia engages in the exploration and production of natural gas in the Appalachian Basin. The company has oil and natural gas properties in West Virginia, Pennsylvania, and Ohio.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•Harrell's LLC, a pesticide producer based in Lakeland, Florida, has agreed to pay $1,736,560 in civil penalties for allegedly distributing and selling misbranded pesticides and other violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The penalty is one of the largest ever for an enforcement case under FIFRA. EPA alleged that Harrell's violated FIFRA on numerous occasions between 2010 and 2012, allegedly distributing or selling pesticides over 350 times without labels or with labels that were completely illegible. EPA also alleged that the company distributed or sold pesticides in violation of a prior "stop sale" order issued by EPA, and produced large amounts of pesticides over several years at its Alabama facility before registering with EPA. EPA discovered the violations during field inspections conducted in 2012. The settlement requires Harrell to ensure that its production and distribution centers are operating in compliance with all regulations under FIFRA. The company has corrected all of the violations. Harrell's produces pesticides at facilities in Sylacauga, Alabama and Lakeland, Florida, and operates distribution centers in Danbury, Connecticut; Auburn, Massachusetts; Lombard, Illinois; New Hudson, Michigan; Homestead, Florida; Whitestown, Indiana; and in the cities of Butler and York, Pennsylvania. Harrell's sells most of its products to golf courses and some to the horticulture, nursery, turf and landscape sectors. The company does not sell products to individual consumers or to retail stores. In addition to producing its own pesticides, Harrell's also produces and sells pesticides that are registered with EPA by other companies, acting as a "supplemental" distributor.

•Oregon Metallurgical of Albany, Oregon and TDY Industries of Millersburg, Oregon have agreed to pay a combined total of $825,000 in civil penalties to resolve alleged violations related to improper storage, transportation, and disposal of anhydrous magnesium chloride, a reactive hazardous waste that can pose serious fire and explosion threats. In addition to the penalty, the companies must improve hazardous waste management practices and upgrade recordkeeping on the hazardous wastes generated at each facility to ensure proper management and avoid potential accidents and injuries. The government complaint alleges that both companies improperly stored, transported and disposed of anhydrous magnesium chloride waste over a period of several years, in violation of the federal Resource Conservation and Recovery Act (RCRA). EPA estimates that the companies illegally shipped approximately 160,000,000 pounds of hazardous waste to Oregon landfills that were not equipped or permitted to dispose of untreated reactive wastes. The facilities produce and process titanium and zirconium, which generates large quantities of anhydrous magnesium chloride as a byproduct. Oregon Metallurgical and TDY Industries are wholly owned subsidiaries of Allegheny Technologies Inc., headquartered in Pittsburgh, Pennsylvania.

Indictments, Convictions, and Sentencing

•Z-Group, LLC, a Kansas company registered to do business in Missouri, pleaded guilty in federal court to illegally transporting hazardous waste. Company president Friedrich-Wilhelm Zschietzschmann represented the company in court to plead guilty to illegally transporting hazardous waste. Zschietzschmann was also the president and CEO of Z-International, Inc., which specialized in the labeling industry. Z-International used large quantities of ink and ink-related products in its business, making labels for numerous companies all over the world. Z-Group was established in 2001 by Zschietzschmann to serve as owner of real estate where Z-International operated its business. Z-International was closed by Zschietzschmann in July 2010. Any assets or fixtures remaining on the property after the business closed were sold or otherwise disposed of by a Z-International employee. Between July 2010 and April 2012 the company authorized personnel to hire others to transport hazardous waste to a separate location.

Z-International employees authorized the transportation of 23 containers of varying sizes that contained liquid hazardous waste to Studer Container Service at 520 Madison Avenue in Kansas City, Missouri. Studer did not have a permit to receive hazardous waste. In April 2012, EPA officials conducted a compliance inspection at Studer. During the inspection, EPA inspectors found several containers of what appeared to be hazardous materials. On June 28, 2012, EPA began its sampling and clean-up operation. On December 21, 2012, the EPA National Enforcement Investigations Center provided analytical results for 38 samples collected from the containers dumped at Studer. Five of the samples tested positive for ignitability and two of the samples tested positive for toxicity. The EPA Superfund Program cleaned up the hazardous waste at Studer at a cost of $36,871. Under the terms of the plea agreement, Z-Group must pay a $50,000 fine and $36,871 in restitution, for a total payment of $86,871. The company is also subject to up to five years of probation. A sentencing hearing will be scheduled after the completion of a presentence investigation by the United States Probation Office.

• Two men who participated in a scheme to steal anhydrous ammonia from an eastern Kanawha County, West Virginia mining wastewater treatment site in October 2008 in order to make methamphetamine were sentenced to federal prison. Jason Hudnall, 36, of Malden, West Virginia was sentenced to three and a half years in prison. Hudnall previously pleaded guilty in September 2013 to conspiracy to steal anhydrous ammonia and negligent release of anhydrous ammonia into the air. Hudnall's co-defendant, John Wesley Tucker, 48, of Georges Creek, West Virginia, was sentenced to one year in prison and fined $1000 after pleading guilty in October 2013 to conspiracy to steal anhydrous ammonia to be used to manufacture methamphetamine. During the scheme, Tucker, Hudnall and two other co-conspirators used tools, including a battery-powered saw, to cut a security lock on a 1000-gallon storage tank containing anhydrous ammonia. The co-conspirators also brought portable tanks onto the property to store and transport the stolen anhydrous ammonia. Tucker, Hudnall and their two associates split a theft-prevention valve cover, which caused anhydrous ammonia to leak into the air. As a result of the chemical exposure, the co-conspirators fled the scene and left the anhydrous ammonia storage tank valve open. Approximately 500 gallons of anhydrous ammonia leaked into the air. Emergency service units, including the Belle and Chesapeake Fire Departments, DuPont Chemical Company's Hazardous Material Team, members of the West Virginia State Police, employees from Penn-Virginia Resources, and employees from Republic Mining, responded to the unsuspected leak. The anhydrous ammonia leak also prompted the Kanawha County Office of Emergency Services to issue a shelter-in-place safety procedure as a precaution for nearby eastern Kanawha County residents. Penn-Virginia Resources, owner of the damaged storage tank, lost approximately 2500 pounds of anhydrous ammonia at a cost of $1,725. The company also paid Mallard Environmental approximately $3,325 to clean up the area surrounding the damaged tank. DuPont Emergency Response Group also incurred approximately $1,800 in expenses as a result of the chemical leak. Co-conspirator Mitchell Ray Workman, 34, of Chelyan, Kanawha County, West Virginia, was previously sentenced in April 2013 to 2.5 years in prison for his role in the conspiracy to steal anhydrous ammonia. A fourth co-conspirator, Jason Brown, 34, of Malden, West Virginia pleaded guilty in April 2013 for his role in theft scheme—driving the other three conspirators to the mine site. Brown was sentenced in October 2013 to three years of supervised release with the first six months to be served in community confinement. Brown's supervised release term also called for six months of home confinement involving an electronic monitoring device. Each defendant was ordered to pay restitution in the amount of $6,850 for the damage caused by the leak. The anhydrous ammonia tank has since been removed from the site. (Melissa Foster)

LAWSUITS FILED OR PENDING

FEDERAL DISTRICT COURT IN WASHINGTON ALLOWS CLEAN WATER ACT CASE TO PROCEED BASED ON ALLEGATIONS OF WIDESPREAD DISCHARGES FROM COAL TRAINS

The U.S. District Court for the Eastern District of Washington has denied a motion to dismiss a lawsuit brought by environmental groups against BNSF Railway Co. The lawsuit, *Sierra Club v. BNSF Railway Co.*, Case No. 13-cv-00272 (E.D. Wash.), alleges that trains transporting coal along Washington railways pervasively violate the federal Clean Water Act (CWA) by discharging "coal pollutants" into waterways without a permit. With the court's recent ruling, litigation will continue, as environmental groups seek a judgment that could potentially threaten the viability of coal export terminals proposed for Northwest ports, as well as coal-by-rail transport generally.

Background

In their complaint, the environmental plaintiffs, including Sierra Club, Natural Resources Defense Council, Columbia Riverkeeper, and others, allege that BNSF:

> …discharge[s] coal pollutants into waters of the U.S. in the State of Washington through holes in the bottoms and sides of the rail cars and by spillage or ejection from the open tops of the rail cars and trains. Complaint, ¶ 55 (July 24, 2013).

The lawsuit identifies some 75 separate waterways as being impacted by BNSF's "coal pollutant discharges," where BNSF's "rail lines and rail cars pass by, cross, or are in proximity to such waters," including the Columbia River and various of its tributaries.

Alleging that "each and every train and each and every rail car discharges coal pollutants to waters of the United States when traveling adjacent to, over, and in proximity to waters of the United States," the plaintiffs seek a declaration "that each rail car container constitutes a separate point source," and that "each separate discharge into each waterway constitutes a separate violation." Plaintiffs also seek civil penalties of up the statutory maximum of $37,500 for each separate violation. Under plaintiff's theory, each and every unit coal train travelling from the Powder River Basin to Washington ports could potentially generate hundreds, if not thousands, of individual CWA violations along the journey. The plaintiffs also seek an injunction against the transport of coal in uncovered or perforated rail cars, as well as a cleanup order to remove coal from affected waterways.

The groups have filed a separate, equivalent lawsuit in the U.S. District Court for the Western District of Washington. Case No. 2:13-cv-00967-JCC (Filed June 4, 2013). BNSF has also filed a motion to dismiss that case, while the environmental plaintiffs have filed a Notice of Pendency of Other Action, proposing the consolidation of the two cases. The court has yet to rule on either of those motions.

The Motion to Dismiss

In its motion to dismiss, BNSF raised three separate arguments. First, the company argued that coal materials transported from land into water bodies by precipitation and wind are nonpoint source pollution not subject to CWA permitting requirements. Second, BNSF argued that any discharges from the coal trains due to precipitation are properly characterized as stormwater discharges not subject to CWA permitting requirements. Third, BNSF argued that a CWA venue provision precluded the environmental plaintiffs from bringing claims based on alleged discharges occurring outside the boundary of the Eastern District of Washington.

The Recent Order

In arguing that any coal discharges were nonpoint source pollution outside the scope of the NPDES permitting program, BNSF characterized the environmental plaintiffs' argument as relying on a belief:

> …that the coal materials that purportedly are deposited onto land from trains or rail cars are

later transported to water either by stormwater runoff (described by plaintiffs as 'precipitation events') or by wind (described by plaintiffs as 'windy conditions' or 'crosswinds'). Motion to Dismiss, at 9 (Oct. 7, 2013).

In its opposition brief, the environmental plaintiffs disputed this characterization, emphasizing that "rolling stock" and "containers" are both statutorily defined to be "point sources," and arguing that the complaint:

> …first and foremost alleged that coal pollutants are discharged by BNSF's rail cars directly into waters of the United States. Opposition Brief, at 6-7, 13 (Oct. 28, 2013), citing Complaint at ¶ 54.

The court found the issue to be "whether coal from rail cars that falls onto land, rather than directly into the waters, offends the Clean Water Act," noting that:

> …BNSF takes issue with language recited in the 'Facts" portion of plaintiffs' Complaint (adjacent to, over, and in proximity to waters). Order, at 10 (Jan. 2, 2014).

Ultimately, however, the District Court recognized that the environmental plaintiffs':

> …sole claim alleges 'discharged coal pollutants from the operation of rail cars and trains into, at least, the listed waterways...

Given the procedural posture, the court found it:

> …necessary to allow plaintiffs the opportunity at this early juncture to develop facts that will allow their claim(s) to either stand or fall, based on the statutory definition of a point source discharge. As part of their case, plaintiffs will need to show that BNSF's railway illegally introduced pollutants into navigable waters without a permit.

Second, BNSF argued that any discharges from the coal trains due to precipitation are properly characterized as stormwater discharges not subject to CWA permitting requirements. The environmental plaintiffs disputed this characterization, arguing that precipitation may induce discharges from the rail cars as it "percolates through the coal and flushes pollutants to holes in the bottom and sides of the rail cars from which they are discharged," but that "this is but one factor among many which contributes to the frequency or severity of BNSF's . . . discharges." Opposition Brief, at 17. Without detailed analysis, the court simply found that "[t]he state of the record precludes a finding in favor of BNSF on this issue at the present time." Order, at 11.

Finally, BNSF took issue with the environmental plaintiffs' inclusion of alleged discharges to waterways outside the boundaries of the Eastern District of Washington, arguing that the Clean Water Act contains a specific venue provision, 33 U.S.C. § 1365(c)(1), which limits proper venue to only "the district where the alleged discharges occurred." Id. Accordingly, BNSF argued that all allegations of extra-territorial discharges must be dismissed. The environmental plaintiffs responded by noting the unique nature of mobile point sources, which:

> …travel from one judicial district to another, such that discharges in one district are immediately followed by discharges of the same pollutants, from the same point sources, in another district.

Given an absence of definitive case law and the plaintiffs' suggestion for transfer in the companion case filed in the Western District of Washington, the court determined that the "issue should be decided by the court which may end up hearing the two cases," and that:

> …judicial economy and avoidance of conflicting holdings would be served by such an arrangement." Order, at 11.

Conclusion and Implications

Despite the somewhat limited nature of the District Court's recent decision, this decision importantly allows this potentially groundbreaking case to proceed. A judgment for the environmental plaintiffs in *Sierra Club v. BNSF Railway Co.* could have massive implications for the rail industry as a whole, po-

tentially requiring the complete overhaul of the rail industry's inventory of rail cars used for hauling coal. With coal hauling representing over 40 percent of all U.S. common carrier freight, this would represent an enormous investment for the rail industry, with potential major implications for the cost-effectiveness of coal-by-rail transport throughout the country. (Daniel Timmons)

NEW ORLEANS AUTHORITIES AT ODDS OVER LAWSUIT SEEKING BILLIONS IN DAMAGES FROM INDUSTRY FOR WETLANDS LOSSES

A lawsuit brought in 2013 by one of two authorities for flood protection in New Orleans has been formally denounced by the other such authority, putting into question whether the lawsuit will go forward. The suit, which was brought against 97 oil, gas and pipeline companies, alleges that those companies damaged wetlands through oil and gas exploration, making the coast more vulnerable to flooding during hurricanes such as Hurricane Katrina in 2005.

Background

The Southeast Louisiana Flood Protection Authority-East (East Bank Authority) is one of two levee authorities that service the metropolitan New Orleans area. The other authority is the Southeast Louisiana Flood Protection Authority-West (West Bank Authority). The authorities are responsible for protecting residents, businesses and properties from flooding, including adopting rules and regulations for carrying into effect a comprehensive levee system (which includes levees, floodwalls, drainage structures and floodgates).

The Lawsuit

In July 2013, the East Bank Authority filed suit against 97 oil, gas and pipeline companies on the theory that their exploratory activities over time have damaged wetlands, which in turn has left New Orleans vulnerable to catastrophic flooding. Specifically, the suit alleges that the dredging of canals by the oil and gas companies allowed for destruction of wetlands that protect the New Orleans area from flood damages. The drastic reduction in wetlands puts the area at a higher risk of flooding, which complicates and increases the cost of management of the levee system.

The lawsuit demands that the companies immediately begin filling in canals and restoring wetlands, and to compensate the East Bank Authority for past damages. The primary arguments made in the lawsuit are that: (1) the oil and gas activities were conducted under permits that required restoration of dredged canals through the state's wetlands, which have provided pathways for salt water from the Gulf of Mexico to kill off fresh water marshes; (2) the Rivers and Harbors Act of 1899 prohibits impairing the effectiveness of levees, and increasing storm surge by eliminating wetlands makes impairs the levees; and (3) under a "servitude of drainage" law, an individual cannot take actions on his or her own property that sends water onto someone else's property, and this is what the oil and gas projects have done by increasing storm surge onto the levee system. (*See, Board of Commissioners of the Southeast Louisiana Flood Protection Authority v. Tennessee Gas Pipeline Company, LLC, et al*, Case No. 13-6911, Civil District Court for the Parish of New Orleans; a copy of the lawsuit appears online at: http://tribwgno.files.wordpress.com/2013/07/full-text-oil-gas-coastal-erosion-lawsuit.pdf)

Controversy over the Lawsuit and Threats to Derail It

Soon after the suit was filed, both Louisiana Governor Bobby Jindal and the state's Coastal Protection and Restoration Authority (CPRA) declared their opposition to the suit based on its potential to interfere with the state's own restoration and hurricane protection plans.

In addition, the strategy of seeking oil and gas money could interfere with the state's own strategy of requesting from Congress a greater share of offshore oil revenue. The CPRA acts as the levee authority for coastal levee systems in Louisiana and sponsors U.S. Army Corps of Engineers (Corps) levee projects on behalf of the state, making it ultimately responsible for paying the local share of any federal levee construction costs. Gov. Jindal replaced several members of the East Bank levee authority who had supported the suit.

In November, the West Bank Authority supported a resolution stating that the East Bank Authority had acted alone in filing the suit, without consultation with member districts. According to the West Bank levee authority, cooperation and coordination are required among members in light of the continuing legal battles over the Deepwater Horizon explosion and oil spill, and possible legal action against FEMA and the Army Corps of Engineers over flood elevation maps. The resolution calls for a committee appointed by the association to begin discussions with elected officials and energy companies on:

> …a coherent overall approach that best serves the interests of all stakeholders in the protection and restoration of the Louisiana coastal area.

In January 2014, the CPRA went a step further, granting to its chairman the authority to explore a separate lawsuit nullifying the contract between the East Bank levee authority and its attorneys in the wetlands litigation.

Conclusion and Implications

It is unclear whether the CPRA or West Bank Authority will succeed in halting the East Bank Authority's lawsuit. What does seem clear is that there is not agreement among the state and local levee authorities about how and whether to force the oil and gas industry to help pay for the significant levee improvement work necessary to protect the New Orleans area over the long term. (Andrea Clark)

RECENT FEDERAL DECISIONS

D.C. CIRCUIT COURT VACATES EPA'S CLEAN AIR ACT NONCONFORMING PENALTIES PROPOSED AFTER NEW EMISSION STANDARD COMES INTO EFFECT

Daimler Trucks North American LLC v. U.S. Environmental Protection Agency, ___F.3d___, Case No. 12-1433 (D.C. Cir. Dec. 11, 2013).

In 2012, the U.S. Environmental Protection Agency (EPA) established nonconforming penalties (NCPs) to protect "technological laggards" by allowing them to pay a penalty for engines temporarily unable to meet a new or revised emission standard. Competitors (Daimler) of one technological laggard, Navistar, Inc., sought to vacate the rule on procedural and substantive grounds. The D.C. Circuit Court of Appeals agreed with Daimler, and vacated the rule based on procedural grounds—EPA failed to provide notice to the competitors of revisions to certain criteria related to the NCPs. Also, based on EPA's acknowledgment that Navistar, Inc. would be compliant by 2014, the court held that vacature would cause no harm.

Background

In 2001, EPA promulgated a rule pursuant to the federal Clean Air Act requiring a 95 percent reduction in NOx emissions from heavy-duty engines by 2010. *See,* "Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements," 66 Fed.Reg. 5002, 5002 (Jan. 18, 2001). As compliance required "a new technological solution," EPA afforded manufacturers several years to comply with the new 0.20 grams per brake-horsepower-hour standard. By 2010, Daimler and other manufacturers developed "selective catalytic reduction after treatment technology...and had succeeded in meeting the 0.20...standard." Navistar, Inc. took and alternative path to compliance—developing "advanced exhaust gas recirculation technology (EGR)." When the new NOx standard became fully effective in 2010:

> Navistar, Inc. had not reached the 0.20... standard using EGR, but continued to obtain certificates of conformity for its vehicles by using banked emission credits.

In late 2011 "Navistar, Inc. advised EPA that its supply of emission credits would be inadequate for its model year 2012 heavy-duty engines."

On January 31, 2012, EPA promulgated an interim rule establishing NCPs for manufacturers of heavy-duty diesel engines in model years 2012 and 2013 for the O.20 NOx standard. This EPA interim rule was vacated in *Mack Trucks, Inc. v. U.S. EPA* because EPA lacked good cause under the Administrative Procedures Act to bypass notice-and-comment requirements. *Mack Trucks, Inc. v. U.S. EPA*, 682 F.3d 87 (D.C. Cir. 2012).

On the same day that EPA issued the interim rule, EPA published notice of its proposed rule. *See,* "Nonconformance Penalties for On-Highway Heavy-Duty Diesel Engines," 77 Fed.Reg. 4736 (Jan. 31, 2012). In its proposed rule, EPA stated that the three NCP criteria had been met:

> (1) the 'technology forcing' 0.20...NOx' standard was more difficult to meet than the previous...NOx emission standard; (2) 'substantial work *was* required' to meet the 0.20 ...standard because all heavy heavy-duty diesel engines certified without relying on emission credits were using new after treatment systems to meet the standard; (3) there was 'a significant likelihood' that NCPs would 'be needed by an engine manufacturer that ha[d] not yet met the requirements for technological reasons' and was expected not 'to have sufficient credits to cover its entire model year 2012 production.'

EPA proposed NCPs on the basis of its existing formula, but as modified to allow setting:

> …the upper limit at a level below the previous standard if [EPA] determine[s] that the lower level is achievable by all engines..'

EPA promulgated the 2012 Final Rule that is the subject of Daimler's challenge on September 5, 2012. EPA concluded that the three criteria for NCPs had been met and set NCPs accordingly. EPA also amended its regulations on upper limits and "substantial work" criterion. *Id.* In response to comments, EPA alleged that it had consistently allowed technological laggards to be able to certify engines, and that the:

> …substantial work criterion is to be evaluated based on the total amount of work needed to go from meeting the previous standard to meeting the current standard, regardless of the timing of such changes [internal citations omitted].

Commenters challenged that although:

> …substantial work had been required to meet the NOx standard when it was introduced in 2001, this was no longer true because some manufacturers now had technology capable of meeting the standard.

To avoid confusion regarding future NCPs based on the 2012 Final Rule, EPA changed the verb tense from "substantial work *will be* required to meet the standard…to "substantial work *is* required…"[redefining] "substantial work" to be determined by the total amount of work required to meet the NCP standard for which the rule is offered, as compared to the previous standard, "irrespective of when EPA established the NCP."

Daimler alleged that EPA failed to provide adequate notice and opportunity for comment under the Administrative Procedure Act before amending a regulatory definition of "substantial work" toward compliance to encompass past work, thereby departing from past EPA practice without providing a rational explanation. EPA supported its final rule as a logical outgrowth of the proposed rule because Daimler had actual notice of EPA's interpretation, and the final rule conformed to the interpretation EPA had held for 27 years.

The D.C Circuit's Decision

The court rejected EPA's argument because EPA's prior interpretation was not a notice that it proposed to change the rule, or that Daimler should have anticipated the changes that were made in the 2012 Final Rule. In the proposed rule:

> EPA proposed amendments to its regulation on the determination of upper limits…and the emission standards for which NCPs are available…[EPA] did not propose, and offered no indication that it was contemplating, amendments to the 'substantial work' criterion.

EPA's revisions to the "substantial work" criterion were not for clarification:

> In these circumstances, whether 'substantial work' was required to meet the NOx standard when it was announced in 2001 and whether 'substantial work' was required in 2012, two years after it became fully effective, are different questions.

Regarding EPA's argument that the amendments were consistent with its longstanding interpretation, EPA cited to three documents that included a statement by EPA finding that "substantial work" was required, or was likely required, to meet the NOx standard. "Although EPA is correct that the documents placed [Daimler] on notice that EPA's measurement of 'substantial work' included work completed in the past, they neither stated nor suggested that EPA was contemplating amending the text of the second criterion adopted…" in the initial rule. *Id*.

Conclusion and Implications

The D.C. Circuit Court of Appeals vacated the 2012 Final Rule on procedural notice and comment grounds. However, the court's ruling for *vacature* was made even easier when EPA admitted that all manufacturers would be in compliance by 2014. (Thierry Montoya)

NINTH CIRCUIT UPHOLDS GRANT OF SUMMARY JUDGMENT TO ARMY CORPS UNDER THE CLEAN WATER ACT AND NATIONAL ENVIRONMENTAL POLICY ACT

Jones III v. National Marine Fisheries Service, ___F.3d___, Case No. 11–35954 (9th Cir. Dec. 20, 2013).

In *Jones III v. National Marine Fisheries Service* the Ninth Circuit Court of Appeals has upheld the U.S. District Court of Oregon's grant of a summary judgment to the U.S. Army Corps of Engineers (Corps) following a challenge to that agency's award of a § 404 permit. The decision illustrates the Ninth Circuit's approach on both the selection of project alternatives under the federal Clean Water Act (CWA) and on the depth of treatment required in an environmental assessment under the National Environmental Policy Act (NEPA).

Background and Regulatory Framework

In 2008, Oregon Resources Corporation (ORC) applied for state and federal permits to mine mineral sands from an area near Coos Bay, Oregon. The Clean Water Act governs development and discharge activity into waters of the United States, including Coos Bay. Section 404 of the CWA authorizes the Corps to issue permits for discharge of dredged or fill material into these waters. 33 U.S.C. § 1344(a). Generally, the Corps is prohibited from issuing a § 404 permit if there is "a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem," provided that the alternative does not have other significant environmental consequences. 40 C.F.R. § 230.10(a). These alternatives must be "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose." 40 C.F.R. § 230. 10(a)(2).

In addition to the Clean Water Act, the Corps' issuance of a § 404 permit to ORC must be done in compliance with the National Environmental Policy Act. NEPA requires that agencies prepare an Environmental Impact Statement (EIS) whenever a proposed agency action "significantly affect[s] the quality of the human environment." 42 U.S.C. § 4332(C). The decision to prepare (or not prepare) an EIS is evaluated in an Environmental Assessment (EA). If an EA determines that the agency's proposed actions will not have a significant effect on the human environment, the agency then issues a Finding of No Significant Impact (FONSI). *See* 40 C.F.R. §§ 1501.4(e), 1508.13. An EIS, rather than a FONSI, must be prepared where the effects of the agency's action on the human environment are "highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5).

The Corps, together with the National Marine Fisheries Service (NMFS) provided environmental review of the ORC's permit application, and the Corps then prepared an EA and issued a FONSI in lieu of preparing a full EIS before ultimately issuing the requested permit. A group of citizens groups, including the Bandon Woodlands Community Association, challenged the Corps' decision to issue the ORC § 404 Permit under both the CWA and NEPA. As to the CWA, the plaintiffs argued that the Corps' alternatives analysis was faulty because (1) the "Smaller Project Design" considered by the Corps was actually larger than the proposed project; and (2) that the Corps improperly considered ORC's financing requirements as part of its alternatives analysis. As to NEPA, the plaintiffs argued that the Corps failed to comply with that federal statute because (1) the supporting materials in the EA were not sufficient, and consisted only of "narratives of expert opinions"; and (2) because the Corps' FONSI determination regarding the mining project (including uncertainty surrounding the potential for hexavalent chromium generation at the project site), was arbitrary and capricious.

The District Court granted summary judgment for the Corps, and on review, the Ninth Circuit rejected each of plaintiffs' arguments in turn, and upheld the grant of summary judgment.

The Ninth Circuit's Opinion

On review, the Ninth Circuit considered whether the Corps' decision to issue a § 404 permit under the CWA and NEPA was "arbitrary and capricious" as set out by the federal Administrative Procedures Act. 5 U.S.C. § 706(2)(A). Under the arbitrary and capri-

cious standard, a court will not overturn the agency's decision unless the agency:

> …has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it would not be ascribed to a difference in view or the product of agency expertise. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

Applying this deferential standard, the Ninth Circuit determined that the Corps' permit issuance was defensible under both NEPA and the CWA.

The NEPA Claims

First the Ninth Circuit court rejected the plaintiffs' argument that the EA was insufficient because it merely recited expert opinions, and observed that an agency "may incorporate data underlying an EA by reference." (Slip Op. at 16). The EA cited to publically available data provided by the ORC, including information about the potential for hexavalent chromium generation, and incorporated that data by reference. The court concluded that this information was sufficient under NEPA to allow the public the opportunity to evaluate the decisions made by the agency in the EA. The court further observed that plaintiffs' concerns about the EA's failure to analyze possible future mining at or around the site were based on speculation, not on any firm plan to mine the site beyond that which the Corps had analyzed, and that analysis of those impacts would therefore be speculative and premature. (Slip Op. at 21).

The Clean Water Act Claims

As to the Clean Water Act claims, the court observed that the plaintiffs' contention that the Corps "failed to consider smaller designs" was "simply incorrect," and that the question of the alternatives' practicability was closely tied to the financing options available to ORC. In fact, the court observed, "an agency may consider a project's economic requirements in order to determine whether alternative sites are practicable." (Slip Op. at 23). Observing that "[l]ogically, no one would seek financing to build a refining facility if it were not possible to extract a sufficient quantity of minerals to make the project profitable the overall project purposes," the court determined that the Corps did not err in selecting the particular project alternatives that it did. (Slip Op. at 24).

Conclusion and Implications

The Ninth Circuit's Clean Water Act analysis in *Jones III* makes clear that economic considerations, including the financial viability of the project, may be a factor in selecting project alternatives for review under the CWA, precisely because without such financial viability, the alternatives in question would no longer be "practicable," as required by the act. The decision's analysis is similarly helpful in understanding the depth of analysis an Environmental Assessment must contain in order to be sufficient under NEPA: under *Jones III*, well-supported analysis that incorporates material by reference may be defensible, even if the underlying data is not explicitly included in the EA. A full text of the decision in *Jones III v. NMFS* is available at http://cdn.ca9.uscourts.gov/datastore/opinions/2013/12/20/11-35954.pdf. (R. Anderson Smith, Meredith Nikkel)

ELEVENTH CIRCUIT FINDS TESTIFYING EXPERTS' FILE AND COMMUNICATIONS CANNOT BE SHIELDED FROM PRODUCTION BY ATTORNEY WORK PRODUCT PROTECTION

Republic of Ecuador v. Dr. Robert E. Hinchee, ___F.3d___, Case No. 12-16216 (11th Cir. Dec. 18, 2013).

The Eleventh Circuit affirmed the District Court for the Northern District of Florida's granting the Republic of Ecuador's (the Republic) motion to compel the production of approximately 1,200 documents that Chevron Corporation's testifying expert Dr. Robert E. Hinchee withheld based upon a claim of work-product protection. The documents required to be produced were (1) Dr. Hinchee's personal notes for his own use and (2) email communications between Dr. Hinchee and a group of non-attorneys consisting primarily of other Chevron experts.

Factual and Procedural Background

This discovery dispute is part of a large international controversy related to a group of Ecuadorian plaintiffs class action complaint against a subsidiary of Texaco, Inc., which was merged with Chevron. In 2011, the court, located in Ecuador, issued a judgment awarding the Ecuadorian plaintiffs approximately $18.2 billion in damages against Chevron. The appellate court affirmed this judgment in full, but Ecuador's highest court reduced the judgment to $9.1 billion.

While the litigation was pending in Ecuador, Chevron sought arbitration against the Republic in front of the Permanent Court of Arbitration in The Hague, Netherlands. Chevron claimed that the Republic had violated its obligations under the Ecuador-United States Bilateral Investment Treaty (Treaty). Specifically, Chevron contended that the Republic breached the Treaty by: (1) failing to notify the court that Chevron was fully released from any liability relating to the environmental pollution through a settlement agreement between Chevron and the Republic; (2) refusing to "indemnify, protect and defend" the rights of Chevron in connection with the litigation; (3) "openly campaigning for a decision against Chevron"; and (4) engaging "in a pattern of improper and fundamentally unfair conduct." This Treaty arbitration remains ongoing. Chevron seeks indemnification or damages from the Republic to cover the cost of the monetary award entered against Chevron in the Ecuadorian litigation. To support its position in the Treaty arbitration, Chevron has sought materials and documents in the possession of experts who testified for the plaintiffs in the Ecuadorian litigation, including experts residing in the United States. In turn, the Republic has requested discovery from Chevron's expert witnesses in the Ecuadorian litigation, including Dr. Hinchee in Florida.

The Republic made a request for a subpoena before the District Court for the Northern District of Florida, where Dr. Hinchee resides. The Republic claimed that the discovery was intended to aid in defending the merits of the Ecuadorian judgment in the Treaty Arbitration and it alleged that Dr. Hinchee's documents were relevant for those purposes. Chevron intervened in the case. In response to the subpoena, Dr. Hinchee produced 94,000 pages of documents but withheld an additional 1,200 based upon a claim of attorney work-product protection.

After reviewing 40 of the document in camera, the District Court ordered the production of 39 of the 40 documents it reviewed, as well as all other documents listed on the privilege log which did not consist of draft reports or communications between Chevron's attorneys and Dr. Hinchee, and their related staffs.

The Eleventh Circuit's Decision

The Eleventh Circuit began its review by setting out the issues which it determined were: (1) the scope of discovery that can be obtained from testifying experts under Rule 26 and (2) the impact of the 2010 Amendments to Rule 26 on that discovery.

Rule 26 Scope of Discovery

Rule 26(b)(1) sets forth the general scope of discovery. It instructs that:

> …[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible

> things and the identity and location of persons who know of any discoverable matter.

Rule 26(b)(1) indicates that "[t]he Federal Rules of Civil Procedure strongly favor full discovery whenever possible," as this rule generally entitles a civil litigant:

> …to discovery of any information sought if it appears reasonably calculated to lead to the discovery of admissible evidence.

The court then determined that there is no dispute here that Dr. Hinchee's notes and email communications with non-attorneys, including other experts, are relevant within the meaning of Rule 26(b)(1). The Republic is thus entitled to discover these materials—unless Chevron and Dr. Hinchee can meet their burden of establishing that a privilege or the work-product doctrine exempts these documents from discovery.

Work Product Doctrine

Next the court looked to Rule 26(b)(3)(A), which incorporates the attorney work-product doctrine. Rule 26(b)(3)(A) provides that:

> Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).

It is undisputed that the documents at issue were prepared "in anticipation of litigation or for trial" and that Dr. Hinchee and his colleagues prepared these documents as part of their work for Chevron. It is also undisputed that Dr. Hinchee is a testifying expert for Chevron.

Chevron and Dr. Hinchee contend that Rule 26(b)(3)(A) protects the materials at issue here because Dr. Hinchee is Chevron's "representative" and, therefore, these materials were "prepared by or for a representative." Alternatively, Chevron and Dr. Hinchee argued that these materials are covered by Rule 26(b)(3)(A) because they were "prepared for a party." This lead the court to question whether Rule 26(b)(3)(A) even applies to a testifying expert.

Statutory Interpretation Analysis

The court began by engaging in statutory interpretation of the 1970 language and the Advisory Comments. The court then turned to the 2010 amendment which was added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures" and concluded that Chevron and Dr. Hinchee were pushing an overbroad reading of Rule 26(b)(3)(A) that would undermine the drafters' deliberate choice in Rules 26(b)(4)(B) and (C) to extend work-product protection to only draft expert reports and attorney-expert communications. In crafting Rules 26(b)(4)(B) and (C), the drafters easily could have also extended work-product status to other testifying expert materials, such as an expert's own notes or his communications with non-attorneys, such as other experts. But the rule drafters did not. This omission, if anything, reflects a calculated decision not to extend work-product protection to a testifying expert's notes and communications with non-attorneys.

Conclusion and Implications

The Eleventh Circuit ultimately concluded that the documents had to be produced. To the extent that there was "core opinion work product of attorneys" that could be redacted. However, otherwise the documents were ordered to be produced.

Although the recent amendment to the Federal Discovery Rules limited the production of some documents reflecting expert testimony, the position staked by Chevron and Dr. Hinchee was determined not to be supported. A similar decision was recently issued by the Tenth Circuit in a related case regarding another Chevron expert. Accordingly, there seems to be precedent forming requiring the production of expert notes and non-attorney communications despite a claim of attorney work product protection. (Danielle Sakai)

DISTRICT COURT FINDS A STATUTE INCORPORATED INTO ANOTHER REFLECTS THAT MOMENT IN TIME AND DOES NOT INCLUDE ALL SUBSEQUENT AMENDMENTS TO THE INCORPORATED STATUTE

Conservation Law Foundation v. Public Service Company of New Hampshire, ___F.Supp.2d___, Case No. 11-cv-353-JL (D. N.H. Dec. 17, 2013).

In ruling on defendant Public Service Company of New Hampshire's motion to dismiss plaintiff Conservation Law Foundation's (CLF) citizen suit under federal Clean Air Act (CAA) for failure to state a claim, the U.S. District Court for the District of New Hampshire considered whether when one statute or regulation incorporates another by reference, what version of the referenced provision does it incorporate: the version in effect at the time of enactment, or the version in effect at the time of invocation—amendments and all. The answer turned on whether the reference to the incorporated statute was general or specific.

Factual and Procedural Background

Defendant Public Service Company of New Hampshire (PSNH) operates Merrimack Station, a coal-fired power plant in Bow, New Hampshire Merrimack Station. Since 1968 Merrimack Station generates power by burning coal. In addition to generating power, this process emits pollutants, including nitrogen oxide (NOx), sulfur dioxide (SO2), and carbon dioxide (CO2), into the air. Merrimack Station is the single largest point source of CO2 in New Hampshire.

In 2008, PSNH replaced a steam turbine in one of the units. At the same time, it also replaced, installed, or modified related equipment in another unit in order to increase turbine efficiency, increase output, and reduce maintenance out-ages. In late 2009, PSNH shut down the secondary unit for a period of about four months to make additional alterations to the turbine and its associated equipment.

CLF alleged that PSNH did not obtain any permits prior to making any changes to the Merrimack Station. Nor, CLF alleged, had PSNH obtained the appropriate permits since that time. CLF further alleges that PSNH, violated the CAA by operating Merrimack Station without the necessary permits. Specifically, CLF alleged that PSNH, both prior to and since making changes to the plant in 2008 and 2009, failed to obtain permits required under the state and federal regulations that implement the CAA's "New Source Review" program.

PSNH filed a motion to dismiss for failure to state a claim and argued that the U.S. Environmental Protection Agency's (EPA) implementing regulations for the New Source Review program, as amended in 2002, did not require it to obtain permits in connection with the projects at Merrimack Station. CLF's claims, PSNH asserts, rely upon a version of the implementing regulations for the CAA's "New Source Review" program that existed prior to 2002. In that year, the EPA amended those regulations, and PSNH says that the new, amended regulations obviated the need for the permits in question. CLF denied that claim. The United States filed an *amicus* brief in support CLF's position and an industry group did the same for PSNH.

The District Court's Decision

The Clean Air Act Statutory Framework

The District Court began its analysis by looking at the statutory framework of the CAA. The court stated that Congress enacted the CAA in order to, among other things, "protect and enhance the quality of the Nation's air resources" and encourage "the development and execution of [state] air pollution prevention and control programs." As a part of the regulatory structure created by Congress, the EPA has established National Ambient Air Quality Standards (NAAQS), which reflect the maximum allowable concentration levels for particular air pollutants. States play the primary role in the implementation of the NAAQS. Each state, including New Hampshire, must formulate and administer a "state implementation plan (SIP), which outlines a strategy for implementing, maintaining, and enforcing NAAQS.

Each state's SIP must include a plan for "New Source Review," *i.e.*, for regulating the construction of, and "major modifications" to, air pollution sources

within the state. SIPs and their subsidiary programs, though required to generally adhere to the CAA's requirements, may vary from the EPA's implementing regulations and impose more stringent standards than those regulations, as a result, the EPA's regulations are not uniformly applicable throughout the states.

New Hampshire, through its Department of Environmental Services (DES), developed a SIP. In 2002, the EPA has approved New Hampshire's SIP, which incorporates certain federal regulations by reference.

PSNH contended that the DES, by promulgating a regulation that referred to certain federal implementing regulations of the CAA without including an express date reference, incorporated not only the version of the federal rule in existence at the time of the regulation's adoption, but all future amendments to the federal rule as well. Thus, PSNH claimed that when the EPA subsequently amended the federal rule in late 2002—altering the way emissions were calculated for purposes of NSR permitting requirements, and relaxing those requirements—those amendments were automatically adopted into New Hampshire's SIP. Under the 2002 amendments, PSNH argued, it was not required to obtain permits for the projects as CLF claims. CLF argued that the state's regulation incorporates only the version of the federal rule in existence at the time the regulation was adopted, and therefore excludes the 2002 amendments.

Statutory Interpretation

The court reviewed statutory interpretation under New Hampshire law as well as considered the comments of the environmental regulators involved in the process and found that because the incorporation of the federal regulations was specific, as opposed to a general reference to the CAA, that it was intended to incorporate the law in effect at the time of adoption. In contrast, the court reasoned, a general reference intends to incorporate the law in place at the time of invocation. As such, the court found that the specific reference to subsection of regulations under the CAA was intended to reflect the laws in place at that moment in time and that PSNH was not entitled to rely on the application on later changes to federal law. Thus, PSNH could not rely on the post- 2002 changes to the CAA, which obviated the need for a permit or NSR for the projects undertaken to the Merrimack Station plant.

Conclusion and Implications

Although the decision here only allows CLF to proceed to the merits of the case, because of the reasoning of the court, it is unlikely that PSNH will be able to prevail, as it is undisputed that it did not have the necessary CAA permits. This decision, if upheld and followed, makes it far more difficult for operators like PSNH, as they cannot simply rely upon federal regulations, but will need to undertake statutory construction to determine whether those federal regulations are actually in play in a particular state. The costs and risks associated with that analysis will be great. (Danielle Sakai)

DISTRICT COURT DISMISSES CERCLA §107 COST RECOVERY ACTION AND REJECTS CERCLA RECOVERY AGAINST A CONTRACTUAL INDEMNITOR

Cyprus Amax Minerals Company v. TCI Pacific Communications, Inc.,
___F.Supp.2d___, Case No. 11-CV-0252-JED-PJC (N.D. Ok. Dec. 3, 2013).

Plaintiff Cyprus Amax Minerals Company, Inc. sued CBS Operations, Inc. (CBS) and TCI Pacific Communications, Inc. (TCI) pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) §107 and state law seeking the recovery of its costs. Previously in 2009, the Oklahoma Department of Environmental Quality (ODEQ) filed its complaint against plaintiff alleging that plaintiff was the successor in interest to the corporate parent that operated a zinc smelter that caused contamination, to warrant a CERCLA recovery action. In 2009, plaintiff resolved this action

with ODEQ via a Consent Decree. The court held that plaintiff could not pursue a CERCLA §107 cost recovery action against CBS and TCI as plaintiff did not voluntarily undertake the cleanup work, rather as the result of its Consent Decree with ODEQ, plaintiff was limited to a CERCLA §113 contribution claim. In response to TCI's and CBS's motion to dismiss plaintiff's claims, the court rejected plaintiff's CERCLA claim against CBS based solely on the fact that it was a contractual indemnitor to TCI. CERCLA liability is based on §107(a) categories of liability, none of which plaintiff alleged as applying to CBS. Rather, plaintiff alleged that the indemnity agreement between TCI and CBS should be interpreted to mean that both should be considered CERCLA "operators." The District Court rejected plaintiff's argument that CERCLA §107(a) liability may be transferred from TCI to CBS via a contractual agreement.

Background

This case involved environmental contamination arising from two zinc smelting plants in the City of Collinsville, Oklahoma. Plaintiff was a successor to the corporate parent that operated one of the smelting plants. Plaintiff cooperated with state and federal authorities in remediating the contamination, entering into the 2009 Consent Decree under which plaintiff agreed to undertake cleanup actions in Collinsville. Thereafter, plaintiff filed suit against CBS and TCI alleging CERCLA and state law claims relating to the two smelting plants at issue —BZ Smelter and the Tulsa Fuel and Manufacturing Zinc Smelter (Tulsa).

Plaintiff' complaint alleged that between 1911 and 1925, the Tulsa Smelter was "nominally owned" by Tulsa, a corporation organized under the laws of the State of Kansas in 1906, and later dissolved in 1926. Plaintiff alleged that at all relevant times, Tulsa was "dominated and controlled by, or was operated for the benefit of, and was the alter ego of, the New Jersey Zinc Company (NJ Zinc)." Plaintiff alleged that TCI and CBS were successors to the liabilities of NJ Zinc. Plaintiff asked the court to pierce the corporate veil of Tulsa to determine that NJ Zinc was responsible for the liabilities of [Tulsa] and, as a result, impose those liabilities on TCE and CBS.

The District Court had previously issued substantive rulings on relevant issues. First, the court held that Kansas law would be applied to address whether the corporate veil of Tulsa could be pierced. Second, addressing a discovery order, the court ruled that a complete transfer of CERCLA liability by contract was barred under 42 U.S.C. §9607(e)(1).

The District Court's Decision

The Interplay Between CERCLA Section 107 and Section 113

Section 113(f) claims are limited to circumstances "...when liability for CERCLA claims, rather than some broader category of legal claims, is resolved." *W.R. Grace & Co.-Conn v. Zotos International Inc.*, 559 F.3d 85, 89 (2009). Thus, unless a potentially responsible party (PRP) has settled its CERCLA liability with the federal or a state government, it has no § 113 (f) contribution claim. By contrast, § 107(a) is available to a PRP to recover CERCLA costs that it has incurred voluntarily. *U.S. v. Atlantic Research Corp.* (*Atlantic Reseach)*, 551 U.S. 128 (2007). The rationale for the distinction between §§ 113(f) and 107(a) was nicely stated in *Atlantic Research, infra*:

> Hence, a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue Section 113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under Section 107(a). As a result, though eligible to seek contribution under Section 113(f), the PRP cannot *simultaneously* seek to recover the same expenses under Section 107(a)...For similar reasons, a PRP [cannot] avoid Section 113(f)'s equitable distribution of reimbursement costs among PRPs by instead choosing to impose joint and several liability on another PRP in an action under Section 107(a). *The choice of remedies simply does not exist. Id.*, [emphasis added].

TCI/CBS argued that plaintiff's claims under §107 must be dismissed as to both TCI and CBS because plaintiff was limited to pursuing contribution under §113. Since *Atlantic Research*, TCI/CBS alleged that every circuit court that has considered the interplay between §§107 and 113:

> …has held that a party that has accepted CERCLA liability by way of a consent decree is

limited to seeking the remedy of contribution under §113. *Id.*

Plaintiff alleged that as the Tenth Circuit had yet to decide the issue, its §107 claims should be stayed pending such a decision.

In the five Circuit Courts that have decided this issue:

> …the courts held that a plaintiff could not pursue a cost recovery claim under §107 where its own CERCLA liability had been previously resolved by settlement in either a consent decree or administrative order. The reasoning is twofold…[such] would theoretically allow the plaintiff to recover the full costs it had already incurred in cleanup, thereby skirting its own financial obligations associated with the pollution at issue…[citation omitted]…[and] if a settling plaintiff were permitted to recover under §107, it would essentially render Congress' decision to add CERCLA remedies under §113 meaningless. *Id.*

Although the Tenth Circuit had not yet decided this precise issue, the court held that there would be no reason to believe that it would hold otherwise post *Atlantic Research*. "In light of the single-sided nature of the post *Atlantic Research* circuit case law and the referenced Tenth Circuit decisions [discussing the interplay between §107 and 113]" the court held that plaintiff's §107 claim was barred given plaintiff's prior settlement.

CBS' CERCLA Liability

For a PRP to be liable under either §107 or § 113, they must be either: (i) current owners/operators; (ii) former owners/operators; (iii) generators or arrangers; or (iv) transporters. Plaintiff must prove that a defendant falls within either of these categories, an assertion that plaintiff in this case did not deny when admitting that it had not pled such facts against CBS. Instead, plaintiff alleged that CBS should not be dismissed because it was a necessary party to the litigation as indemnitor of TCI. However, the majority view on this issue holds that §107(e)(1) "bars the contractual transfer/creation of direct liability under CERCLA." *Id.* Section 107(e) states:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator…or from any person who may be liable for a release or threat of release under this section,…to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

This court held that an indemnity provision preserves the rights of parties to distribute contractual risk among themselves, but does not affect any third party asserting a contribution claim. Section 113 contribution claims are solely based on the liability provisions set forth in CERCLA §107(a). As such, CBS could not be deemed an indispensable party under Fed.R.Civ.P. 19. Rule 19 does not provide an independent basis for keeping a party in a particular litigation. While Rule 19 does provide a basis for the joinder of persons needed for a particular litigation, it "does not provide a joinder mechanism for plaintiffs." *Id.*, quoting from *Shaw v. AAA Eng'g & Drafting Inc*. 138 F.App'x 62, 66 (10th Cir.2005).

Conclusion and Implications

Previous cases have addressed the issue of whether an indemnity could avoid CERCLA liability by contractually transferring away the liability; a party cannot do so. This case is unique in seeking CERCLA liability against the indemnitor. Presumably some courts may impose liability on both indemnitee and indemnitor given CERCLA's intended broad sweep. (Thierry Montoya)

FEDERAL CLAIMS COURT HOLDS THAT THE U.S. ARMY CORPS' FAILURE TO ADJUST WETLANDS CREDIT COMPOSITION EXPOSES IT TO CONTRACTUAL LIABILITY AND PRESUMED MONETARY DAMAGES

Davis Wetlands Bank, LLC. v. U.S., ___F.Supp.2d___, Case No. 13-268 C (Fed. Ct. Cl. Dec. 16, 2013).

On April 15, 2013, the Davis Wetlands Bank LLC (Bank) sued the U.S. in the Court of Federal Claims alleging that the U.S. Army Corps of Engineers' (Corps) refusal to adjust credit composition of the wetlands mitigation bank to reflect:

> …the maturation of the restored agricultural fields into forested wetlands, violated 33 C.F.R. § 332.8(o)(3), and breached [the parties] Final Agreement.

The Bank sought alleged monetary damages arising from the Corps' refusal to issue an additional 139.5 credits, in the amount of $1,395,000. The United States argued that the court lacked subject matter jurisdiction to entertain this action as the Final Agreement was not a contract, and did not entertain the prospect of money damages as a remedy. The Claims Court accepted the Bank's arguments that the Final Agreement was an express contract thereby affording the court subject matter jurisdiction under the Tucker Act. As a contract, the court held that the Bank would be presumptively entitled to monetary damages should the Corps' refusal to consider an adjustment to the mitigation credits represent a breach of the Final Agreement. The court held that the reasonableness of the Corps' refusal to adjust the credit allowance was a matter that could not be addressed on a motion to dismiss, but would have to be tried.

Background

On November 4, 1998, the United States and Bank established a wetlands mitigation bank pursuant to an Umbrella Memorandum of Agreement (Umbrella). The Umbrella:

> …establish[ed] general provisions for the design, development, construction, use and monitoring of a compensatory wetland bank…and…a procedure for providing off-site compensation for unavoidable wetland impacts (primarily) in Southeastern Virginia.

On November 24, 1998, a Bank Site-Specific Plan (Plan) was implemented and later revised on March 31, 1999. That Plan required Bank to make hydrological changes. Bank and the United States thereafter signed the Umbrella on September 26, 2001. The court referred to the executed Umbrella and its amendments as the "Final Agreement."

The Final Agreement required Bank to commit to restoring:

> …agricultural and forested areas to wetlands and preserve existing wetlands, as well as provide financial assurance for the Bank's performance….In exchange, [the Corps] agreed to issue the Bank one wetland credit per 1.00 acre of restored cropland, 0.50 acres of restored previously-drained forest; or 7.5 acres of existing wetlands…The Bank could sell credits to third parties as compensation mitigation for unavoidable impacts to wetlands that were permitted, pursuant to Section 404…of the Clean Water Act. [citations omitted].

The Final Agreement also required Bank to provide the Corps with an annual report for seven years. At the end of the first five-year monitoring period "the credit composition [would] be reevaluated and may be adjusted to reflect maturation of the restored or created wetlands."

The Corps suspended performance of the wetlands bank from June 16, 2006 to September 8, 2009, due to a property ownership dispute. However, during that time Bank continued to monitor and report on its restoration activities, and provided a final report to the Corps in 2009.

In 2012, Bank requested that the Corps issue an "additional 139.5 credits to reflect the development of certain agricultural fields into mature forested wetlands." On August 24, 2012, the Corps denied Bank's request. In response, Bank filed its complaint on April 15, 2013.

On July 24, 2013, the United States filed its motion to dismiss for lack of subject-matter jurisdiction that Bank opposed.

The Tucker Act

Under the *Tucker Act*, the Court of Federal Claims has:

> …jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon an express or implied contract with the United States, or for liquidated or unliquidated damage in cases not sounding in tort. 28 *U.S.C.* § 1491(a)(1).

The *Tucker Act* is only a jurisdictional statute "and does not create any substantive right enforceable against the United States for money damages." *U.S. v. Testan*, 424 U.S. 392, 398 (1976). To pursue a right, a plaintiff must plead and prove an:

> …independent contractual relationship….that provides a substantive right to money damages for the court to have jurisdiction. *Id.*, quoting from *Todd v. U.S.*, 386 F.3d 1091, 1094 (Fed. Cir.2004).

Before the Claims Court was the United States' motion to dismiss for lack of subject-matter jurisdiction. Although a court is obligated to assume all of the factual allegations in the complaint to be true and to draw all reasonable inferences in plaintiff's favor, the plaintiff bears the burden of "establishing jurisdiction by a preponderance of the evidence." *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir.1988).

The Court's Decision

The United States made two subject-matter jurisdiction arguments: (i) that the Final Agreement was not a contract; and (ii) the Final Agreement did not contemplate money damages as a remedy.

The Final Agreement as an Enforceable Contract

On the first point, the United States argued that the Final Agreement was not a contract rather:

> …a regulatory instrument…the purpose of which was to establish general provisions for the design [and] development…of a compensatory wetland bank[.] *Id.*, citations omitted.

The United States relied on *Hearts Bluff Game Ranch, Inc. v. U.S.*, 669 F.3d 1326, 1331 (Fed.Cir. 2012) a case in which:

> The mitigation bank program is run exclusively by the Corps, subject to its pervasive control, and no landowner can develop a mitigation bank absent [its] approval.

The United States tried to equate the Final Agreement with a "permit" thereby attempting to portray the Corps' function to that of a regulator or supervisor—and not party to the Final Agreement.

Contrastingly, Bank argued that the Final Agreement was an enforceable contract and any claims arising therefrom were within the court's jurisdiction. The intent of the parties was to protect ecological health and water quality. In response, Bank agreed to design, construct, and maintain a wetlands bank in exchange for mitigation credits that could be sold to third parties. Bank argued that this was the consideration for the agreement that was memorialized in a multi-page agreement and vigorously negotiated by the parties. Whether the agreement represented the Umbrella, the Site-Specific Plan, or the subsequent amendments, Bank alleged that the writings "reflect the mutual obligations, rights, and responsibilities evidencing a contract."

The court agreed with Bank, holding that the Final Agreement met the common law standards governing the requisite elements of a contract:

> …(i) mutuality of intent to contract; (ii) lack of ambiguity in offer and acceptance; (iii) consideration; and (iv) a government representative having actual authority to bind United States in contract….Any agreement can be a contract within the meaning of the Tucker Act, provided that it meets the requirements for a contract with the Government. *Id.*, quoting from *Massie v. United States*, 166 F.3d 1184, 1188 (Fed.Cir. 1999).

The court held that the parties clearly memorialized the terms and conditions that would inure to

the benefit of both parties. The court also noted the substantial investment Bank made in setting-aside large numbers of acres of land, restoration of the land, and promises of long-term maintenance, as further evidence of consideration in addition to the promised issuance of Bank credits:

> Therefore, under the Final Agreement, the … Corps agreed to enter into a contract with private parties to accomplish wetland restoration in exchange for issuing credits that could be sold to third parties as compensation mitigation for unavoidable impacts to wetlands that were permitted pursuant to Section 404 of the Clean Water Act. *Id.*

The court also held that the Final Agreement was not a "regulatory instrument" as the Final Agreement manifested the government's intent to contract with a private party. The United States' argument that:

> …no landowner can develop a mitigation bank absent …Corps approval, did not preclude the …Corps from contracting with a private party. *Id.*, quoting from *Hearts Bluff Game Ranch*, *supra.*

Damages

In a contract case, the money damage requirement for Tucker Act jurisdiction is met by the presumption that money damages are available for breach of contract. The court held that Bank met its subject-matter jurisdiction pleading burden by having pled a contractual claim.

Conclusion and Implications

The court could not decide the factual issue of whether the Corps' refusal to consider an adjustment to the credits was fair and reasonably considered. Facts concerning the Corps potential breach and subsequent damages would have to be addressed as part of the case-in-chief.

Wetland and stream offsets in the United States are created via: restoration, enhancement, creation, and preservation—indirect offsets (payments to fund research for instance) are not allowed. Offsets must be located within the same watershed as the impacts. (Thierry Montoya)

DISTRICT COURT DISMISSES AS PREMATURE PLAINTIFFS' CHALLENGE TO POTENTIAL CHESAPEAKE BAY CLEAN WATER ACT TMDL WATER POLLUTION TRADING PROGRAM

Food and Water Watch and Friends of the Earth v. U.S. Environmental Protection Agency, et al., ___F.Supp.2d___, Case No. 12-1639 (D. D.C. Dec. 13, 2013).

This action is one of many that will probably arise out of the creation and implementation of the 2010 Chesapeake Bay Total Maximum Daily Loads (Bay TMDL) for nitrogen, phosphorus, and sediments pursuant to the federal Clean Water Act (CWA). (A TMDL is the amount of a pollutant that can be discharged to a waterway on a given day.) In this case, two environmental groups and their members alleged that the U.S. Environmental Protection Agency (EPA) has authorized—in effect, ordered—the seven Chesapeake Bay jurisdictions (the States of Delaware, Maryland, Virginia, Pennsylvania, New York, West Virginia, and the District of Columbia) to establish water-pollution trading programs to achieve the Bay TMDL goals. The plaintiffs alleged that pollution-credit trading would result in harmful pollution "hotspots" throughout the bay. When one source increases its discharges into the bay because it has purchased pollution credits from another source that has decreased its discharges, plaintiffs allege that high levels of pollution will exacerbate existing water-quality impairments. The U.S. District Court for the District of Columbia, however, rejected the complaint on multiple grounds. With respect to standing, the court held that plaintiffs had not demonstrated any injury; had not demonstrated that the alleged harms were traceable to agency action; and had not described an injury that could be redressed by court

action. The District Court also ruled that plaintiffs' claims were not ripe, and that plaintiffs had failed to challenge a final agency action.

Background

The Chesapeake Bay is the largest estuary in the United States and one of the largest and most biologically productive estuaries in the world. The waters of six states and the District of Columbia contribute to the bay's watershed, which covers 64,000 square miles in the Mid-Atlantic States. The efforts of federal and state regulators over many decades have failed to relieve the bay of widespread pollution resulting from the industrial, agricultural, and transportation-related activities that generate pollution emissions in the watershed.

The history of pollution in the Chesapeake Bay and the efforts to restore its water quality are described in great detail in another recent U.S. District Court decision, *American Farm Bureau Federation, et al. v. U.S. Environmental Protection Agency, et al.*, ____ F.Supp.2d ____, Case No. 1:11-CV-0067 (M.D. Pa. Sept. 13, 2013). Efforts to address the bay's water quality have been ongoing for more than 30 years, and have included numerous multi-state efforts to improve and protect the estuary. Congress also amended the Clean Water Act in 1987 to establish the Chesapeake Bay Program to coordinate state and federal improvement programs. Progress toward water quality restoration was limited, and in 2007 the seven bay jurisdictions and the EPA agreed that the federal agency would establish a TMDL for nitrogen, phosphorus and sediments no later than May 1, 2011. The target date for the implementation of all pollution control measures under the TMDL would be 2025. Subsequently, on December 29, 2010, the EPA issued the Final Bay TMDL for nitrogen, phosphorus and sediment. The bay jurisdictions, through a phased series of Watershed Implementation Plans (WIP) developed through 2017, will have to implement pollution-control requirements and other measures that will achieve their allocated shares of target loads by 2025. *See generally* the slip opinion of *American Farm Bureau* at 4-27.

Throughout the Bay TMDL, the EPA "outlines . . . expectations for how States will keep pollution levels down despite future population growth." *Food and Water* at 7. The agency "expects" that new or increased loadings of nitrogen, phosphorus, and sediment will be offset by loading reductions and credits generation by other sources. Notably, while "encouraging" and "expecting" the bay jurisdictions to develop and implement offset and trading programs, the Bay TMDL does not order the development of such plans. Plaintiffs, however, viewed such language as a mandated regulatory requirement. Plaintiffs characterized the Bay TMDL as an "authorization" of offsets and water-pollution trading that would increase rather than decrease Chesapeake Bay pollution. The District Court, however, ruled that no final agency order had been issued; that encouragement and discussion of trading plans did not amount to the imposition of a regulatory requirement; and that the Bay TMDL does not constitute an actual and imminent threat to water quality.

The District Court's Decision

The defendants and the defendant-intervenors moved to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) and for failure to state claim under Fed.R.Civ.P. 12(b)(6). Defendants asserted that the plaintiffs' lack of standing eliminated the basis for the court's jurisdiction. Defendants also moved to dismiss on the grounds that plaintiffs were not challenging any final agency action. The court granted the motion on both grounds.

Standing

The court found wanting every aspect of the plaintiffs' standing. With respect to injury, the court held that the plaintiffs had not alleged "an actual or imminent one." *Food and Water* at 14. Plaintiffs' affidavits asserting that a pollution-trading program would cause the development of pollution hotspots in the bay were "highly speculative." The court agreed with the defendants that no trading or offsets could be allowed if they violated discharge limits or otherwise violated the Clean Water Act. Nothing about plaintiffs' hotspot allegations, however, demonstrated the likelihood of actual and impending harm.

"Traceability," a demonstration that plaintiffs' injury "can be traced to the challenged action of the defendant," *see, Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 29 (1976), was also inadequately presented in the plaintiffs' allegations. The court rejected the view that the EPA has required offset

programs and pollution trading. It also disagreed that the expectations voiced in the Bay TMDL amounted to coercion or "strong-arming" of the states. *Food and Water* at 18. The court held that the Bay TMDL "does not authorize offset or trading programs." Additionally, the EPA's involvement in the development of the Bay TMDL and the supervision of state WIPs was not tantamount to an authorization of state action. It was merely a reflection of the simultaneous federal and state involvement contemplated in the structure of the CWA.

Ripeness Doctrine

Repeating most of the arguments made in its standing ruling, the court also held that the plaintiffs' claims were not ripe for adjudication.

> Because there are multiple stages to the implementation of the Bay TMDL, . . . and the implementation occurs primarily through the actions of state actors, who are not parties to this action, judicial intervention at this time would be inappropriate, as further factual development would better help a court adjudicate these issues.

Final Agency Action Rule

Finally, the court found no final agency action had occurred. Noting that the same arguments undermining standing also illuminated the finality requirement, the court held that the:

> …EPA's language in the Bay TMDL regarding offsets and trading does not legally require any conduct, but rather serves as an 'informational tool.'

Assertions of an agency's expectations, hope, and assumptions did not amount to a regulatory requirement. The court found that the plaintiffs had jumped the gun because it will be the final actions of state agencies that implement the TMDL established by the EPA. Simply put, the final agency actions to be challenged have not yet occurred:

> The plaintiffs' rights will not be affected until further implementation by the States begins to take shape. Thus, the EPA's setting forth its 'expectations' is the starting point, and the States end up with the final decision as to whether to implement trading or offset programs.

Conclusion and Implications

This case does not offer any startling insights into the basic constructs of administrative law and standing. It is, however, a harbinger of future battles to be fought over the Bay TMDL. The Chesapeake Bay watershed is enormous, and the implementation of the Bay TMDL will involve the development and promulgation of numerous regulations and programs by seven jurisdictions. Some or all of the bay jurisdictions will probably adopt offset programs and pollution-trading regimes, and some will be challenged in court. Ultimately, thousands of regulatory decisions—many of them final decisions subject to judicial review—will be made as a result of the Bay TMDL. (Robert E. McDonnell, Duke McCall III)

RECENT STATE DECISIONS

NEW YORK APPELLATE COURT CHALLENGE TO REGIONAL GREENHOUSE GAS INITIATIVE PROGRAM FAILS AMIDST PROCEDURAL SHORTCOMINGS

Thrun v. Cuomo, Case No. 516556 (N.Y.App.Div. Dec. 5, 2013).

The New York Supreme Court Appellate Division, Third Department dismissed a legal challenge to the state's enforcement of the Regional Greenhouse Gas Initiative (RGGI), a carbon dioxide cap-and-trade program targeting emissions from power plants in seven northeastern states. On appeal was the dismissal of the challenger's claims on standing and laches grounds. The Appellate Division held the claims were time-barred and moot and therefore affirmed the dismissal, albeit on different grounds.

Factual and Procedural Background

In 2005, the governors of seven northeastern states including Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island and Vermont signed a Memorandum of Understanding (MOU) creating the RGGI program. In 2008, the New York State Department of Environmental Conservation (DEC) and the New York State Energy Research and Development Authority (NYSERDA) adopted regulations implementing RGGI. The DEC regulations required power plants generating 25 megawatts or more of electricity to obtain a permit from DEC which then obligated the regulated entities to purchase and hold sufficient carbon dioxide allowances to cover emissions for the past three-year control period. The NYSERDA regulations authorized it to coordinate and implement the state's participation in the quarterly, multi-state auctions through which the carbon dioxide allowances allocated for sale by the DEC are sold to regulated entities. The auction proceeds are to be used to promote programs for energy efficiency, renewable or non-carbon emitting technologies and innovative carbon emissions abatement technologies and for reasonable administrative costs associated with the program.

In 2011, a group of New York electricity ratepayers filed a lawsuit seeking declaratory and injunctive relief against the enforcement of the RGGI program throughout the state. The plaintiffs asserted the MOU was executed and regulations promulgated without legislative authorization and in violation of the New York Constitution and separation of powers doctrine. The plaintiffs further asserted that the RGGI program imposes an unlawful tax upon ratepayers not authorized by the New York Legislature, the program was arbitrary and capricious as implemented, and the MOU constituted an interstate compact in violation of the U.S. Constitution. On June 12, 2013, the New York Supreme Court, Albany County dismissed the lawsuit on the basis that the plaintiffs lacked standing to sue because their injury was not distinct from the general public and on the basis of laches due to the "unreasonable delay" between the 2005 MOU and 2008 regulations and when the lawsuit was filed in 2011. Plaintiffs appealed.

The Appellate Division's Decision

The Statute of Limitations

The Appellate Division affirmed the dismissal on different grounds. At the outset, the court sidestepped the standing argument by assuming without deciding that plaintiffs had standing to bring the action. Instead, the court focused on the applicable statute of limitations and found that since the RGGI regulations were "quasi-legislative" in nature they were subject to a four-month statute of limitations rather than the six-year limitations period normally associated with declaratory judgment actions. Since plaintiffs' challenge came two-and-one-half years after the regulation's effective date, the Court deemed those claims time-barred.

Mootness Doctrine

The court further held that the plaintiffs' challenge to the Governor's authority to enter into the MOU

was moot because it was not the signing of the MOU but rather the enactment of regulations themselves that formed the legal basis for the State's participation in the RGGI. Since a decision on the Governor's authority would not effect the validity of the regulations or the rights of the parties the claim was moot.

> While the plaintiffs' challenge Governor Pataki's authority to enter into the MOU are not subject to the four-month statute of limitations [citations omitted]…such claims must be dismissed as moot. By signing the MOU Pataki did not obligate New York to participate in the RGGI program, but merely agreed to *propose* a carbon dioxide omission cap-and-trade program in New York. It is the regulations implementing RGGI in New York—not the MOU—that form the legal basis for state's participation in the RGGI program [citations omitted]…As the MOU did not actually effectuate the RGGI program or the state's participation…invalidating the MOU will not have the effect of repealing the regulations….A declaration as to the validity or invalidity of the MOU would therefore have no effect on the rights of the parties….

Conclusion and Implications

Since the court never reached plaintiffs' substantive challenge to the RGGI, *Thrun v. Cuomo* provides little insight into whether carbon dioxide cap-and-trade laws like this one will survive legal scrutiny. Those looking to challenge similar programs may use this case as a cautionary tale of what not to do and as a road map for where to focus their efforts—the regulations themselves and how they are implemented. Nevertheless, this decision will likely—at least with regards to RGGI—chill future challenges because of the statute of limitations and standing hurdles a challenger would have to overcome. A copy of the court's December 5, 2013 Memorandum of Decision appears online at: http://decisions.courts.state.ny.us/ad3/Decisions/2013/516556.pdf (Jesus Chavez, Duke McCall III)

PENNSYLVANIA SUPREME COURT STRIKES DOWN AS UNCONSTITUTIONAL, STATE LAW WHICH SOUGHT TO ELIMINATE MUNICIPAL ZONING AUTHORITY OVER THE 'FRACKING' OF OIL AND GAS

Robinson Township v. Commonwealth of Pennsylvania, Case Nos. 63 & 64 MAP 2012 (Pa. Dec. 19 2013).

On December 19, 2013, the Supreme Court of Pennsylvania issued a ruling that effectively struck down a recent law that prevented local governments from passing zoning ordinances prohibiting the controversial practice of hydraulic fracturing (fracking). Because the act sought to eliminate all zoning authority from municipalities over oil and gas extraction, the Supreme Court concluded that the law violated the state's constitution.

Factual and Procedural Background

In 2012, the Governor of Pennsylvania signed Act 13 of 2012, a statute amending the Pennsylvania Oil and Gas Act, into law. Act 13 repealed parts of the existing Pennsylvania Oil and Gas Act and bars municipalities from passing zoning ordinances restricting natural gas drilling. Specifically, Act 13 prohibits local regulation of oil and gas operations, including via environmental legislation, and requires statewide uniformity among local zoning ordinances with respect to the development of oil and gas resources.

After the enactment of Act 13, multiple Pennsylvania municipalities and environmental organizations brought suit against the state in Pennsylvania's Commonwealth Court, the trial court for actions brought against the State of Pennsylvania. The municipalities asserted that Act 13 may not remove protections created by existing zoning only to replace them with a zoning scheme that is inconsistent with constitutional mandates generally imposed on any legislative zoning effort. Thus, the municipalities asserted that Act 13's exercise of police power to restrict zoning authority was unconstitutional. Ultimately the Commonwealth Court struck down portions of Act 13 and

ruled that Act 13 violated the constitutional property rights of landowners by the elimination of municipal zoning authority. Several parties appealed the decision to the Pennsylvania Supreme Court.

The Pennsylvania Supreme Court's Decision

By a 4-2 decision, the Pennsylvania Supreme Court ruled that Act 13 must be balanced against the public's right to clean air and pure water, as provided in § 27 of the Pennsylvania Constitution (the Environmental Rights Amendment), and was therefore unconstitutional. In contrast to the decision of the lower court, which was based on property rights of landowners, the state Supreme Court decision was based on the Environmental Rights Amendment. The Court explained that it had not previously had an opportunity to address the Environmental Rights Amendment and how it restrains the exercise of governmental regulatory power, and therefore this case presented an issue of first impression.

The Environmental Rights Amendment

The Environmental Rights Amendment provides citizens of Pennsylvania with the right to "clean air and pure water" and to the "preservation of natural, scenic, historic and esthetic values of the environment." The Environmental Rights Amendment also provides that the state and local governments must act as trustees to protect these rights for the state's citizens.

First, the Court found that zoning and land use planning are the state's and municipalities' primary tools to protect rights under the Environmental Rights Amendment. Second, the Court determined that Act 13 departed from existing zoning law and required the state to abandon its role as trustee of Pennsylvania's natural resources. Specifically, § 3303 of Act 13, which preempted local regulations of the oil and gas industry, was unconstitutional:

> …because the General Assembly has no authority to remove a political subdivision's implicitly necessary authority to carry into effect its constitutional duties.

Further, § 3304 of the act, which provides that local ordinances must "allow for the reasonable development of oil and gas resources" and imposed uniform rules of regulation, was unconstitutional because it is inconsistent with state and local governments' duty to act as a trustee under Environmental Rights Amendment. Finally, the Court found that § 3215(b)(4) of Act 13, which requires the state to waive setback distances to streams and other water bodies, violates the Environmental Rights Amendment because the legislation:

> …does not provide any ascertainable standards by which public natural resources are to be protected if an oil and gas operator seeks a waiver.

Therefore, the Court ruled that Act 13 was incompatible with the state and local governments' duty as trustee under the Environmental Rights Amendment and, therefore, unconstitutional.

Conclusion and Implications

This decision appears to protect the zoning and land use authority of local governments, who may continue to regulate oil and gas operations. As a result of this decision, the oil and gas industry may face a new regulatory environment as local governments are empowered to regulate the industry. This decision may also have implications for the future enforcement of the Environmental Rights Amendment, which may be applied by environmental organizations to prevent future attempts by the state to preempt local environmental regulations of the oil and natural gas industry. To the extent that the state wishes to amend and readopt Act 13, lawmakers will be required to rewrite the law with the state's trustee obligations under the Environmental Rights Amendment in mind. (Danielle Sakai, Lucas Quass)

PENNSYLVANIA APPELLATE COURT ESTABLISHES THRESHOLD FOR ADMITTING EXPERT TESTIMONY IN ENVIRONMENTAL WRONGFUL DEATH CASE

Snizavich v. Rohm and Haas Company, Case No.1383 EDA 2012 (Pa. Super Ct. Dec. 6, 2013).

A Superior Court of Pennsylvania, one of two state intermediate appellate courts, upheld a trial court's decision to preclude proffered expert testimony and affirmed the subsequent grant of summary judgment to defendant, Rohm and Haas Company. Under Pennsylvania's *Frye* standard for admissibility, the trial court found that the expert's testimony did not rely upon, point to, or cite to any scientific authority to support the causal relationship asserted and necessary to sustain the plaintiff's causes of action under Pennsylvania's Wrongful Death and Survival Acts. As a result, the trial court found that the expert's conclusion was simply a personal belief not predicated on any "scientific, technical, or other specialized knowledge beyond that possessed by a layperson." Thus, the expert's conclusion would not assist the trier of fact, making it inadmissible under the basic requirements of Pennsylvania's Rules of Evidence. On appeal, the Superior Court affirmed.

Background

Joseph Snizavich worked as a pipefitter-contractor at Rohm and Haas Company's "Spring House" facility in Pennsylvania working on air conditioning, refrigeration, and assembly/disassembly of the facility's environmental chambers. Mr. Snizavich was later diagnosed with brain cancer, and he died from his illness. His wife, Anne Snizavich, filed suit against Rohm and Hass, individually and on behalf of her late husband's estate, asserting causes of action under Pennsylvania's Wrongful Death and Survival Acts. Ms. Snizavich alleged that her husband's cancer was caused by his exposure to chemicals while working at Spring House.

Rohm and Haas filed a motion for summary judgment claiming that Ms. Snizavich had failed to show causation to support her claims. In response, Ms. Snizavich submitted the expert report of Thomas H. Milby, M.D, in which he concluded that Mr. Snizavich's brain cancer had been caused by exposure to an unknown chemical or chemicals found at Spring House. To reach this conclusion, Dr. Milby reviewed nine documents and relied on his years of expertise in epidemiology, toxicology, and occupational medicine. Eight of the nine documents reviewed by Dr. Milby pertained to Mr. Snizavich's medical and work history and his working conditions at Spring House. The remaining document was a report from the University of Minnesota (Minnesota Report). The Minnesota Report found a statistically higher occurrence of brain cancer amongst individuals who worked at Spring House. But, both the cause of cancer and any relationship between the chemicals found at Spring House and the increased incidence of brain cancer was found to be inconclusive.

After Rohm and Haas' motion for summary judgment was denied, Rohm and Hass filed a *Frye* motion to preclude Dr. Milby's testimony. The trial court granted the motion finding that Dr. Milby's expert testimony did not comply with the standard for admissibility of under Pa.R.E. 702. The trial court scrutinized Dr. Milby's reliance on the Minnesota Report in reaching his conclusion. The Minnesota report was inconclusive with regard to causation, but Dr. Milby concluded that exposure to Spring House chemicals was the cause of Mr. Snizavich's cancer. Dr. Milby, however, provided no support or scientific methodology of his own, nor did he critique the Minnesota Report's scientific methodology, to explain this difference of opinion. The trial court found that there was *nothing* in Dr. Milby's report to support his conclusion, and the court described it as "nothing more than a logical *post hoc ergo propter hoc* fallacy." As a result, the court found that Dr. Milby's testimony would not assist the trier of fact: Dr. Milby's report "seems to be little more than an unscientific lay opinion given by someone who happens to be a medical doctor." As a result, the court held that the doctor's conclusion did not require "scientific, technical, or other specialized knowledge beyond that possessed by a layperson" and thus did not meet the basic requirements of Pa.R.E.702.

After the *Frye* motion was granted and Mr. Milby's testimony precluded, the trial court granted summary

judgment for Rohm and Haas because Dr. Milby was the only expert on the issue of causation. Ms. Snizavich appealed.

The Appellate Court's Decision

On appeal, the Superior Court focused on the minimal threshold necessary to demonstrate that "proffered [expert] testimony reflects the application of the expert's expertise, as opposed to simply being a lay opinion offered by an expert," and whether here that threshold had been crossed. Ultimately, the court concluded that the threshold for admitting expert testimony is such that "proffered expert testimony must point to, rely on or cite some scientific authority," whether it be facts, empirical studies, or the expert's own research, and that the expert apply that authority to support his/her conclusions. According to the court, Dr. Milby's proffered testimony included no such scientific authority: no facts, testimony, or empirical data to support his conclusion, and as a result the trial court was correct in its decision to preclude his testimony and grant summary adjudication to Rohm and Haas.

Analysis under Prior State Decisions

In reaching its holding, the court looked to its earlier decisions bearing on the issue. In *Checchio*, a 1998 case, the court affirmed a grant of summary adjudication following the exclusion of proffered expert testimony on causation. In upholding the trial court's decision, the court was swayed by the experts own admissions that that their conclusions were based entirely on their own observations and experiences in the field without reference to, or reliance on, documented scientific authority. Thus, the causal connection asserted in the case was not supported and could be proved to be no more than the experts' "mere personal belief[s]."

Conversely, in *Harris*¸ a 2011 case, the court reversed a trial court grant of summary judgment following the exclusion of expert testimony on causation. In *Harris*, the expert reviewed medical records, discharge summaries and test results and relied on his expertise and experience in the field to support a causal connection between beryllium exposure and shortness of breath, which had been previously recognized by the U.S. Department of Labor's Occupational Safety and Health Administration. Thus, the difference between *Checchio* and *Harris*, according to the court, is that in *Harris* the expert referenced outside data to support a *recognized* causal relationship. But in *Checchio*, the asserted causal relationship was not supported *at all* by any documented scientific authority.

This case, the court reasoned, was more like *Checchio* than *Harris*. Although Dr. Milby reviewed and relied upon relevant documentation to reach his conclusion, none offered any scientific authority that supported the causal relationship asserted between exposure to chemicals at Spring House and brain cancer, and this causal relationship had not been previously recognized. In fact, the Minnesota Report, reviewed by Dr. Milby for his expert report, reported that any causal relationship between Spring House chemicals and cancer was inconclusive. To be clear, the court acknowledged that expert testimony as to a causal relationship may be admissible even if based solely on the expert's review of medical records and experience and expertise in the applicable medical field, but *only if* the expert can point to some scientific authority that supports the causal connection. Dr. Milby provided no such scientific authority. Thus, the court held that Dr. Milby's expert report failed to meet the basic requirements for admissible expert testimony and it was properly precluded.

Conclusion and Implications

The appellate court clarified the application of the *Frye* in Pennsylvania requires that expert testimony rely upon, point to, or cite scientific support for opinions offered. Expert testimony lacking in scientific support may be precluded even if the expert possesses the requisite experience and expertise in the relevant field. The court's analysis signals a shift in the application of the *Frye* standard in Pennsylvania to more closely scrutinize expert testimony to ensure that opinions offered have a sound scientific basis. It remains to be seen whether courts in other jurisdictions will follow suit. (Misti Groves, Duke K. McCall, III)

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