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

CONTENTS

ENVIRONMENTAL NEWS

EPA and NOAA Reject Oregon's Coastal Nonpoint Pollution Program Due to Inadequate Protection of Water Quality from Forestry Impacts. 87

California Department of Conservation Releases Draft Environmental Impact Report for Fracking. 90

PENALTIES AND SANCTIONS

Recent Investigations, Settlements, Penalties and Sanctions 92

RECENT FEDERAL DECISIONS

Circuit Court of Appeals:
Eleventh Circuit Denies Appellant a Research Tax Credit for Work Performed in Landfill Contracts as Appellant's Work Was Funded 96
Geosyntec Consultants, Inc. v. U.S., ___F.3d___, Case No. 14-11107 (11th Cir. Jan. 29, 2015).

Sixth Circuit Finds Statute of Limitations Period for CERCLA Contribution Claims Begins on the Effective Date of an Administrative Settlement . . . 99
LWD PRP Group v. Alcan Corp., et al., ___F.3d___, Case No. 14-5730 (6th Cir. Jan. 14, 2015).

Sixth Circuit Finds Coal Mine Complying With Clean Water Act General Permit Is Shielded from Liability for Pollutant Discharges Not Explicitly Addressed in the Permit 101
Sierra Club v. ICG Hazard, LLC, ___F.3d___, Case No. 13-5086 (6th Cir. Jan. 27, 2015).

Continued on next page

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Fifth Circuit Holds Lack of Intent to Dispose Is Dispositive in Rejection of CERCLA 'Arranger' Liability in Soil and Groundwater Contamination Case 103
Vine Street LLC v. Borg Warner Corp., ___F.3d___, Case No. 07-40440 (5th Cir. Jan. 16, 2015).

Seventh Circuit Upholds Decision to Apply Michigan's Interpretation of Insurance Policy Standard Pollution Exclusion Clauses 105
Visteon Corporation v. National Union Fire Insurance Company of Pittsburgh, P.A., ___F.3d___, Case No. 1:11-cv-002000-RLY-TAB (7th Cir. Jan. 23, 2015).

District Court:
District Court Finds Environmental Groups Lacked Standing to Challenge Federal Loan Guarantee Supporting Coal Exports 107
Chesapeake Climate Action Network, et al., v. Export-Import Bank of the United States, et al., ___F. Supp.3d___, Case No. 1:13-cv-01820 (D. D.C. Jan. 22, 2015).

District Court Denies Summary Judgment Based on Successor's Potential Knowledge of CERCLA Liabilities 109
Housing Authority of the City of Los Angeles v. PCC Technical Industries, ___F.Supp.3d___, Case No. CV 11-01626 FMO (C.D. Cal. Dec. 15, 2014).

District Court Finds Potential CERCLA Liability for Discharge of Aerial Emissions in Canada Resulting in Pollutants Contaminating U.S. Water Bodies 111
Pakootas v. Teck Cominco Metals, Ltd., ___F. Supp.3d___, Case No. CV-04-256-LRS (E.D. Wash. Dec. 31, 2014).

RECENT STATE DECISIONS

New Jersey Supreme Court Finds No Statute of Limitations for Contribution Claims under the New Jersey Spill Act 114
Morristown Associates v. Grant Oil Company, Case Nos. A-38-13 (073248) (N.J. Jan. 26, 2015).

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ENVIRONMENTAL NEWS

EPA AND NOAA REJECT OREGON'S COASTAL NONPOINT POLLUTION PROGRAM DUE TO INADEQUATE PROTECTION OF WATER QUALITY FROM FORESTRY IMPACTS

The National Oceanic and Atmospheric Administration (NOAA) and the U.S. Environmental Protection Agency (EPA) have rejected the State of Oregon's program for controlling coastal nonpoint pollution based on findings that Oregon's program does not adequately protect water quality from forestry impacts, including logging in and around riparian areas, runoff from older, "legacy" forest roads, landslide risks, and aerial herbicide and pesticide application. As a result, NOAA and EPA may begin withholding grant funds to the state for non-point source pollution control assistance, and the state will likely need to reevaluate its forestry regulations regarding certain riparian buffer protections, management of legacy forest roads, and aerial spraying near small non-fish-bearing streams.

Background

In 1990, Congress passed the Coastal Zone Act Reauthorization Amendments (CZARA) to address nonpoint source pollution in coastal waters. Coastal states that participate in the National Coastal Zone Management Program (Coastal Nonpoint Program) are required to develop a Coastal Nonpoint Pollution Control Program that describes how they will prevent and control polluted runoff in coastal waters. State programs must be approved by NOAA and EPA based on whether the nonpoint source pollution controls, known as management measures, conform to those described in federal guidance documents.

In 1998, the federal agencies approved Oregon's Coastal Nonpoint Program subject to certain conditions. While Oregon has worked with the federal agencies to address the conditions, Oregon's efforts have not yet satisfied the federal regulators. In December 2013, NOAA and the EPA issued a notice letter indicating that the agencies intended to find that Oregon had not fully met the approval conditions related to new development, onsite sewage disposal systems (OSDS), and additional forestry management measures.

In response to the 2013 notice, Oregon provided the federal agencies with additional information regarding management measures to address non-point source runoff from new development and nutrient loading from OSDS operations. In their January 30, 2015 "NOAA/EPA Finding that Oregon has not Submitted a Fully Approvable Coastal Nonpoint Program" (the Findings), the federal agencies found that the information provided by the state was sufficient to show compliance with the 1998 conditions related to new development and OSDS. The state, however, was unable to persuade the federal agencies that its forestry management program was sufficient to protect water quality, particularly with respect to water-quality impacts on small, non-fish bearing streams tributary to larger, fish-bearing streams.

The NOAA/EPA Findings

The crux of the issue is that Oregon has not adopted and implemented sufficient management measures applicable to forest lands and forestry activities necessary to achieve and maintain water quality standards and to protect designated uses. The agencies' Findings focus particularly on riparian buffers, legacy forest roads, landslide risk, and aerial spraying.

Riparian Areas

Oregon relies on both regulatory and voluntary measures to provide riparian protections for medium-sized and small fish-bearing streams and non-fish bearing streams. Generally, under the state's Forest Protection Act (FPA) rules, no tree harvesting is allowed on private forestlands within 20 feet of fish-bearing streams, or medium-sized and large non-fish-bearing streams. There are also requirements for maintenance of downed wood and vegetation targets for riparian management areas along fish-bearing streams. The Findings noted, however, that Oregon has no vegetation retention requirement for small, non-fish-bearing streams in the Coast Range and Western Cascades and strongly encouraged the state to adopt such measures.

The Findings reviewed several scientific reports indicating that:

> …riparian protection around small and medium-sized fish-bearing streams and non-fish-bearing streams in Oregon is not sufficient to achieve and maintain water quality and protect designated uses.

For example, a prior Oregon Department of Forestry (ODF) study indicated that sites managed under existing FPA rules had a 40 percent chance of exceeding Protection of Cold Water criterion under the Oregon water quality standard for temperature, considered critical for salmon protection. The Findings also noted previous studies had found substantial adverse effects from reduced available shade with no-cut riparian buffers ranging from 20 to 30 meters, whereas no-cut buffers of 46 meters and greater were found to protect stream temperature and other water quality parameters. With no-cut buffers of 20 meters of less, like those adopted in Oregon, logging activities were shown to create pronounced reductions in shade and increases in stream temperature.

While the Findings noted that ODF is undergoing rulemaking to provide greater buffer protection for medium-sized and small fish-bearing streams on private forest lands, ODF has not proposed increased protection for riparian areas around small-non-fish-bearing streams. The Findings indicate that because of the importance of small, non-fish-bearing headwater streams to downstream water quality, "non-fish-bearing streams should be treated no differently than fish-bearing streams when determining the appropriate buffer width required to protect designated uses," and direct Oregon to:

> …revise and implement additional management measures for riparian areas adjacent to small non-fish-bearing streams necessary to achieve and maintain water quality standards and protect designated uses.

The agencies note that such measures may be voluntary, but:

> …voluntary measures must be monitored for effectiveness and backed up by enforcement authorities should voluntary measures not be implemented or effective.

The Impact of 'Legacy' Forest Roads

In the 1998 conditional approval, the agencies also noted concerns with Oregon's FPA rules governing road density and maintenance, particularly with respect to so-called "legacy roads," constructed and used prior to adoption of the FPA in 1971 and not used or maintained since then. Since legacy roads were not required to be treated and stabilized before closure, these roads have in some locations:

> …resulted in significantly altered surface drainage, diversion of water from natural channels, and serious erosion or landslides, conditions that threaten to impair coastal waters.

This was particularly concerning to the agencies because legacy roads make up the majority of forest road mileage in the state.

While Oregon has adopted general road maintenance measures to improve water quality, limiting road-building in critical areas, addressing wet weather hauling, and reducing sediment delivery through improved drainage systems, these rule changes and new policies do not address legacy roads. While Oregon has a voluntary program to address legacy roads, the agencies noted that Oregon does not have a monitoring or tracking program to report on the effectiveness and reach of the voluntary programs. While the Findings indicate that the voluntary programs *could* satisfy the forestry roads element of the management measure, the agencies needed additional information, including a mechanism for tracking and monitoring implementation of such voluntary measures and a commitment from the state to use its backup authority to ensure implementation of measures that actually reduce impacts from legacy roads.

To obtain approval of its Coastal Nonpoint Program, Oregon will likely need to provide additional regulatory mechanisms or a more effective means of tracking implementation of existing voluntary efforts to address water quality impacts from older, legacy forest roads.

Protection of Landslide-Prone Areas

The federal agencies also found Oregon's regulatory and voluntary efforts to reduce landslide risk to insufficient to protect water quality. In light of the significant impact of landslides on downstream water quality and scientific evidence that clearcut-

ting on steep slopes significantly increases the risk of landslides for decades, the agencies determined that additional measures to address landslide risk were needed to achieve water quality standards and protect designated uses. The agencies suggested that the state pursue some of the following actions:

(1) Adopt harvest and road construction restrictions that apply to all high-risk landslide areas with moderate-to-high potential for negative water quality impacts;

(2) Develop a scientifically-sound process for identifying high-risk areas;

(3) Develop more robust voluntary programs to incentivize best management practices for forestry activities that limit landslide risk;

(4) Institute a monitoring program to track compliance with both regulatory and voluntary programs.

Stream Buffers for Aerial Herbicide Application

While Oregon does have aerial spray buffers for most pesticide applications, it does not have a mandatory spray buffer for aerial application of herbicides along non-fish-bearing streams, the type of streams commonly found in headwater areas. The agencies found that additional efforts to control aerial herbicide application near streams was needed, particularly given the common application of herbicides such as glyphosate, 2-4-D, atrazine, and others to control the growth of weeds on recently harvested and replanted parcels. The Findings note that in 2008, over 800,000 pounds of pesticides, mostly herbicides, were used for forestry purposes in Oregon.

The federal agencies expressed particular concern that Oregon has no spray buffer for aerial spraying on small non-fish-bearing streams. Since these streams also have no mandatory harvest buffer, applicators can spray directly up to and over such small, non-fish-bearing streams. Since non-fish-bearing streams comprise about 70 percent of total stream length and feed fish-bearing streams, the agencies found that the wide use of herbicides by the forestry industry in coastal Oregon and the lack of any spray or riparian buffers to protect non-fish bearing streams threaten designated uses in Oregon's coastal waters.

The federal agencies suggested several measures to protect small, non-fish-bearing streams from aerial herbicide application:

(1) Adoption of rules requiring spay buffers for small, non-fish bearing streams;

(2) Adoption of riparian buffer protections for timber harvest along non-fish bearing streams;

(3) Expanded guidelines for voluntary buffers on non-fish bearing streams;

(4) Tracking and evaluation of the effectiveness of existing and new voluntary measures;

(5) Provision of detailed maps of non-fish-bearing streams to increase the awareness of the areas that need protection among the aerial applicator community.

To obtain federal approval of its Coastal Nonpoint Program, Oregon will need to revisit its approach to regulating aerial herbicide application near waterways. In particular, the state will likely need to consider adopting mandatory buffers for aerial spraying along small non-fish-bearing streams in order to protect downstream water quality.

Conclusion and Implications

Oregon has become the first state to have its Coastal Nonpoint Program rejected by NOAA and EPA. While the Findings may ultimately result in the state adopting additional regulatory means for addressing the shortcomings identified by the federal agencies with respect to riparian buffers, legacy forest roads, landslide risk, and aerial herbicide application, the immediate impact to the state is financial in nature. As soon as July 2015, the federal agencies may begin cutting federal grant funds available to the state under § 306 of the federal Coastal Zone Management Act, and § 319 of the federal Clean Water Act. With reports indicating that the state could lose as much as $1.3 million in grant funding during the first year, Oregon has great incentive to make changes to its forestry regulations and guidelines necessary to obtain federal approval of its Coastal Nonpoint Program. (Daniel Timmons)

CALIFORNIA DEPARTMENT OF CONSERVATION RELEASES DRAFT ENVIRONMENTAL IMPACT REPORT FOR FRACKING

On January 14, 2015 the California Department of Conservation, through its Division of Oil, Gas and Geothermal Resources (DOGGR), published a Draft Environmental Impact Report (EIR) titled "Analysis of Oil and Gas Well Stimulation Treatments in California." The Draft EIR analyzes the impacts of well stimulation treatments, including hydraulic fracturing (commonly known as "fracking"), performed in a manner consistent with the DOGGR's proposed permanent regulations.

The public review period for this Draft EIR began on January 14, 2015 and will end on March 16, 2015. DOGGR is directed by Senate Bill 4 to certify the EIR on or before July 1, 2015.

Background

On September 20, 2013, California Governor Jerry Brown signed into law Senate Bill 4, to provide regulation and oversight to the practice of well stimulation treatment in the energy industry. Well stimulation treatment is a technique in which water is mixed with sand and chemicals, and the mixture is injected at high pressure into a wellbore to create small fractures from which hard-to-reach oil and gas deposits can be extracted.

Senate Bill 4 imposes requirements on oil and gas well operators and suppliers, including the application for permits, public disclosure of chemicals used, public notices, and new civil penalties for violations. The bill also requires groundwater and air quality monitoring. The new regulatory and oversight mechanisms involve multiple state and district agencies. These include the Department of Toxic Control Substances (DTSC), State Air Resources Board, State Water Resources Control Board, Division of Oil, Gas, and Geothermal Resources, and the Natural Resources Agency.

Overview of the Draft EIR

The EIR evaluates well stimulation treatments of existing and future oil and gas wells in the State at a programmatic level. Therefore, the degree of specificity under the EIR's programmatic analysis is inherently less detailed than a site specific analysis since the exact activities associated with future well stimulation treatments of either existing or newly drilled wells at any particular location cannot be predicted without speculation.

For the purposes of this EIR the "project" is defined as all activities associated with a stimulation treatment that could occur either at an existing oil and gas well, or at an oil and gas well that is drilled in the future expressly for the purposes of a stimulation treatment.

At a programmatic level of analysis, the EIR concludes that project could have the potential to cause significant and unavoidable impacts to aesthetics, air quality, biological resources, cultural resources, geology, soils and mineral resources, greenhouse gas emissions, land use and planning, risk of upset/public and worker safety, and transportation and traffic. Notably, the project assumes that well stimulation treatment permits will satisfy specific standards for resource protection, including standards for water recycling, habitat protection, surface water protection and groundwater protection. The project also assumes implementation of the mitigation measures recommended in the EIR, as applicable at a site-specific level of analysis, to avoid or minimize potential impacts to certain categories of environmental resources.

Significantly, the EIR acknowledges that new regulations and additional mitigation measures are possible:

> In the future, decisionmakers will need to consider if the proposed permanent regulations, the mitigation measures and standards for resource protection recommended in this EIR, and other State regulatory actions prescribed by [Senate Bill] 4 are sufficient to reduce potential environmental effects to an acceptable level. Further legislative or rulemaking actions may be warranted in the future if it is determined that additional measures should be taken to minimize environmental effects that have not been predicted, or have been underestimated in their severity, in this EIR.

Although this EIR functions as a Program EIR in all respects, some of its programmatic level analysis is more detailed than the rest. In particular, the

document evaluates three particular oil and gas fields (the Wilmington, Inglewood, and Sespe Oil and Gas Fields) at a greater level of detail.

Objectives of the EIR include the following:

(1) To provide DOGGR and other applicable regulatory agencies with information which may be necessary to efficiently and effectively evaluate future permit applications for proposed oil and gas well stimulation practices, during or following well completion, in order to ensure a consistent approach to California Environmental Quality Act compliance.

(2) To identify and develop impact avoidance and mitigation strategies to address any significant environmental effects directly, indirectly or cumulatively resulting from well stimulation practices that are not already sufficiently addressed by the proposed regulations addressing well stimulation treatments to be adopted by DOGGR.

(3) To facilitate on-going coordination between DOGGR and other federal, State, regional and local agencies having regulatory authority over well stimulation practices.

Conclusion and Implications

The Environmental Impact Report seeks to provide an objective public information analysis of environmental impacts associated with well stimulation treatments and hydraulic fracturing, which have recently been the topic of widespread debate. Although well stimulation treatments and hydraulic fracturing have been used as a production stimulation method in California for more than 30 years, with the increase in the development of horizontal shale gas wells in various regions of the United States, hydraulic fracturing has become the focus of significant attention. Interested parties should make an effort to submit public comments or attend one of six scheduled public comment meetings which will be held throughout the state. This opportunity is likely to be the last occasion to shape California's final hydraulic fracturing regulations, which are scheduled to take effect on July 1, 2015.

The Draft EIR can be accessed at: http://www.conservation.ca.gov/dog/SB4DEIR/Pages/SB4_DEIR_Home.aspx (Jonathan Shardlow)

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

•The City of Fort Dodge, Iowa, has agreed to implement safer work practices at its John T. Pray Water Treatment Plant in an effort to resolve alleged violations of the Chemical Accident Prevention regulations under the federal Clean Air Act (CAA). According to an administrative compliance order on consent filed by the U.S. Environmental Protection Agency (EPA) Region 7, EPA conducted an inspection of chlorine handling at the water treatment facility in August 2013, which revealed that the facility failed to: develop and implement a Risk Management Program, certify annually that operating procedures are current and accurate, and develop and implement safe work practices, among other violations. As a result of the Consent Order, the plant must develop and implement a Risk Management Program by July 31, 2015 and submit a plan to EPA. Facilities holding more than 2,500 pounds of chlorine gas in a process are required to comply with EPA's Risk Management Program regulations. The plant routinely stores and uses three to four times that amount of chlorine gas. In addition to preventing accidental releases of extremely hazardous substances, the plant's plan is available to help local fire, police, and emergency response personnel prepare for and respond to chemical emergencies at the facility.

Civil Enforcement Actions and Settlements—Water Quality

•Newfield Production Company (Newfield), based in Denver, Colorado, has agreed to resolve alleged federal Clean Water Act (CWA) violations and complete wetlands restoration and creation projects at production sites in Uintah and Duchesne counties in Utah's Uinta Basin. The company will also pay a penalty of $175,000. The settlement resolves CWA violations reported by Newfield through a 2012 self-audit at 45 of the company's production sites in Utah, including four sites previously owned and operated by Harvest Holdings, Inc. Newfield's audit report found that 19 of 45 sites inspected, including the four acquired from Harvest Holdings, were potentially in violation of § 404 of the CWA, which prohibits the filling or dredging of wetlands, rivers, streams, and other waters of the United States without a permit from the U.S. Army Corps of Engineers (Corps). Activities at these sites included the construction of well pads, access roads, and pipelines that resulted in the discharge of dredged or fill materials into wetlands and drainages. Newfield's self-audit identified impacts affecting more than 17 acres of wetlands and streams at nineteen sites located in drainages connected to the Duchesne River, which flows to the Green River. Under the terms of the settlement agreement, Newfield will restore approximately thirteen acres of impacted wetlands and streams and will perform mitigation for the remaining impacts by creating more than ten acres of new wetlands. The mitigation includes Newfield's voluntary action to restore and create new wetland areas to remedy impacts at sites previously owned by Harvest Holdings. The site-specific details of wetlands impacts and planned restoration activities are described in a restoration plan developed by Newfield in August 2014.

•As part of federal efforts to protect and restore Puget Sound, EPA has settled with Supervalu Holdings, Inc., a Minneapolis, Minnesota-based national wholesale grocery distributor, for federal stormwater pollution violations. The violations stem from EPA inspections at three Supervalu facilities in the State of Washington (two in Tacoma, one in Auburn) in 2013 where EPA documented several CWA viola-

tions at each facility. Supervalu has also agreed to pay a $120,000 penalty. The violations documented during the inspections include i) failure to implement adequate stormwater control measures; ii) failure to conduct visual or benchmark monitoring of stormwater discharges; iii) failure to conduct or document required stormwater inspections; and iv) inadequate Stormwater Pollution Prevention Plan (SWPPP). EPA's stormwater enforcement program helps ensure compliance at permitted and unpermitted industrial stormwater sources across western Washington, reducing Puget Sound pollutants. In this case, the facilities discharged stormwater to tributaries to either the Green River (Auburn) or the Thea Foss Waterway (Tacoma), which are directly connected to Puget Sound.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•EPA's settlement with Anadarko and Kerr-McGee is final and will allow funds to be disbursed for cleanups across the country. The settlement secures payments of $5.15 billion to resolve claims that the defendants fraudulently transferred assets in part to evade their liability for contamination at toxic sites around the country. Of this total, approximately $4.4 billion will be used to clean the environment. This is the largest sum ever awarded in this type of a bankruptcy-related environmental settlement with the federal government. An estimated $1.1 billion will be paid to a trust responsible for cleaning up a former chemical manufacturing site in Nevada that led to perchlorate contamination in Lake Mead. The site is located within the Black Mountain Industrial complex near Henderson, Nevada. Fifty to one hundred pounds of perchlorate are still seeping into Lake Mead every day, and the funds will allow that state's Department of Environmental Protection to clean up the remaining underground sources of contamination. The Henderson site is the largest perchlorate groundwater plume in the United States. By way of the Las Vegas Wash, the plume has contaminated Lake Mead, which feeds into the Colorado River, a major source of drinking water in the Southwest. More than $985 million is expected to be paid to EPA to fund the cleanup of approximately 50 abandoned uranium mines in and around the Navajo Nation, where radioactive waste remains from cold-war era Kerr-McGee mining operations. Additionally, the Navajo Nation is expected to receive more than $43 million to address radioactive waste left at the former Kerr-McGee uranium mill in Shiprock, New Mexico. EPA is currently meeting with the Navajo Nation and the State of New Mexico to plan work to occur there later in 2015. Kerr-McGee mined over 7 million tons of ore on or near the Navajo Nation from the late 1940s through the 1960s in the Lukachukai area, and from the 1950s to the 1980s in the Eastern and Ambrosia Lake areas. The Kerr-McGee Corp. was founded in 1929 as a company involved with oil and gas exploration and production, and uranium mining. The company left abandoned uranium mine sites, including contaminated waste rock piles, in the Lukachukai Mountains of Arizona, the Eastern Agency of the Navajo Nation in New Mexico, and in the Ambrosia Lake/Grants Mining District of New Mexico. In addition to the cleanups in Nevada and on the Navajo Nation, funds are also starting to flow to cleanups across the country, including sites in Jacksonville, Florida; West Chicago, Illinois; Columbus, Mississippi; and Navassa, North Carolina.

•EPA and the U.S. Department of Energy (DOE) have resolved alleged violations of hazardous waste requirements at the Hanford Site near Richland, Washington. By ensuring that hazardous waste management is conducted in accordance with all applicable requirements, EPA helps protect cleanup workers, first responders and the public from unnecessary exposure to hazardous chemicals. This action also protects the environment by ensuring proper cleanup and closure of hazardous waste storage sites. The Consent Agreement and Final Order addresses two independent federal Resource Conservation and Recovery Act (RCRA) violations that occurred in 2013. In the first case, EPA alleged that DOE moved 136 fifty-five gallon drums of hazardous waste from a permitted area to an unpermitted area, without seeking or obtaining the required permit authorization. In the second case, in October 2013, DOE submitted a closure plan for eight storage units that lacked all the required information as required under an earlier settlement. The plan did not detail how and when any remaining waste and contamination would be removed and disposed of as the project was completed. DOE is now working with the Washington Department of Ecology to amend the plan to include the needed closure information. As part of this agree-

ment, DOE will pay a $44,722 penalty.

•EPA announced a settlement valued at more than $920,000 with the Imperial Irrigation District (IID) for its improper disposal of polychlorinated biphenyls (PCBs) at a former electricity substation. Under the terms of the settlement, IID must spend $543,000 to replace equipment currently containing PCBs and perform an audit of nine inactive substations. IID, the sixth largest utility in California, providing electric power to more than 145,000 customers in the Imperial Valley and parts of Riverside County, will also pay a $379,000 civil penalty. As part of the settlement, IID must hire an independent auditor to conduct audits of nine inactive electricity substations located in Brawley, Calexico, Indio, Mecca, and El Centro. The audit will examine all PCB-containing equipment and conduct soil sampling at the properties. Any soil contamination in violation of the Toxic Substances Control Act (TSCA) discovered during the audit will be cleaned up and any remaining PCB-containing equipment will be removed. The deadline for completion of the audits is 17 months after EPA's approval of the auditor. IID is also required to replace 16 regulators, three transformers and three circuit breakers with non-PCB containing equipment at active facilities located throughout its service area. This project must be completed within a year. The settlement resolves violations of the TSCA at the Rio Vista Electricity Substation, which IID operated from 1957 until 2002. The substation was adjacent to the Phil D. Swing Elementary School, the largest elementary school in the city. In February 2002, IID closed the facility and removed all PCB electrical equipment. In 2011, an environmental assessment of the facility by the company discovered that old electrical equipment had leaked PCBs into the soil and testing found PCB concentrations as high as 363 ppm, greater than the federal limit of 50 ppm and a violation of TSCA. As a result, IID, under EPA's supervision, removed and properly disposed of 10,000 pounds of PCB-contaminated dirt.

Indictments, Convictions, and Sentencing

•Nancy Marie Stein, 62, of Anderson, South Carolina, was sentenced to a total of 73 months in prison for six counts of bank fraud and 60 months for storing hazardous wastes without a permit. The sentences were ordered to run concurrently for a total sentence of 73 months. Stein was also ordered to pay restitution in the amount of $17,692,974. Stein's Company, American Screw and Rivet Corporation (ASR), was placed on probation for five years and ordered also to pay restitution for its involvement. Both Stein and ASR entered guilty pleas on December 16, 2013. The case had originally been set for sentencing on July 15, 2014, but was continued due to issues raised by Stein. During the guilty plea hearing in December of 2013, the factual presentation revealed that had the cases had gone to trial, the government would have presented evidence indicating that from at least 2004 and continuing until 2011, while operating ASR, Stein developed a scheme to defraud a number of financial institutions. As part of the ruse, Stein created a number of fictitious manufacturing companies, organizations, and business associations with apparent legitimate addresses, bank accounts, and telephone numbers in various locations throughout the Southeast and the Midwest including Alabama, Georgia, Indiana, Ohio, and Pennsylvania. The addresses were mail drops, Stein controlled the accounts, and the telephone numbers were answering services. One of the fictitious entities was an accounting firm that issued audits and financial statements attesting to the fiscal soundness of ASR. Stein would then apply to various financial institutions for loans for ASR. Often she would present to the institutions false invoices indicating that ASR had purchased types of specialized machinery from the fictitious vendors that could be used as collateral for loans. Stein would then have the financial institutions forward the loan proceeds to the non-existent vendors' accounts. The deception also involved removing legitimate identity plates on existing machinery at the ASR location and replacing them with false plates reflecting serial numbers of the fictitious machines. After a number of years of running the scheme, Stein's and ASR's debts continued to grow, and, ultimately, ASR's creditors forced the company into involuntary bankruptcy in 2011. Thereafter, the United States Secret Service was asked to investigate. At least 26 victim financial institutions were identified with cumulative losses in excess of $16 million. In a statement to the Secret Service, Stein admitted what she had done and took full responsibility for the fraud. With respect to the environmental crime violation, the Government was prepared to show that some years prior to the involuntary bankruptcy, Stein and ASR had been

informed that they needed a permit from the South Carolina Department of Health and Environmental Control (DHEC) or from EPA to store the large quantities of hazardous wastes generated by ASR's manufacturing process. No permit to store hazardous waste was ever sought by Stein or ASR or issued by EPA or DHEC. In June, 2011, as a result of a DHEC search of ASR's property, a large quantity of hazardous waste was discovered on site. Thereafter, EPA removed and disposed of more than 24,000 gallons of waste from the site at a cost of approximately $1,720,000.

•U.S. District Judge Ronnie Greer sentenced five people to prison terms in federal court in Greeneville, Tennessee, for conspiring to commit CAA offenses in connection with the illegal removal and disposal of asbestos-containing materials at the former Liberty Fibers Plant in Hamblen County, Tennessee. A&E Salvage had purchased the plant out of bankruptcy in order to salvage metals that remained in the plant after it ceased operations. Mark Sawyer, 55, of Morristown, Tennessee, a former manager of A&E Salvage, was sentenced to the statutory maximum of five years in prison, to be followed by two years of supervised release. A&E Salvage manager Newell Lynn Smith, 59, of Miami, Florida, was sentenced to 37 months and two years of supervised release. A&E Salvage Manager Eric Gruenberg, 50, of Lebanon, Tennessee, received a 28-month sentence. Armida, 56, and Milto DiSanti, 54, of Miami, Florida, each received sentences of six months in prison, to be followed by six months of home confinement. The judge ordered all the defendants to pay restitution of more than $10.3 million, which will be returned to EPA for past cleanup of contamination at the plant site. The sentencing took place over three days and included expert testimony that the exposures of the A&E Salvage workers to asbestos resulted in a substantial likelihood that the workers would suffer death or serious bodily injury as a result of their exposure constituted a risk of death or serious bodily injury. According to court documents, all the defendants pleaded guilty to one criminal felony count for conspiring to violate the CAA's "work practice standards" salient to the proper stripping, bagging, removal, and disposal of asbestos. According to the charges, the conspirators engaged in a multi-year scheme in which substantial amounts of regulated asbestos containing materials were removed the former Liberty Fibers plant without removing all asbestos prior to demolition and stripping, bagging, removing, and disposing of such asbestos in illegal manners and without providing workers the necessary protective equipment. (Melissa Foster)

RECENT FEDERAL DECISIONS

ELEVENTH CIRCUIT DENIES GEOSYNTEC A RESEARCH TAX CREDIT FOR WORK PERFORMED IN LANDFILL CONTRACTS AS GEOSYNTEC'S WORK WAS FUNDED

Geosyntec Consultants, Inc. v. U.S., ___F.3d___, Case No. 14-11107 (11th Cir. Jan. 29, 2015).

Geosyntec Consultants (Geosyntec) appealed a U.S. District Court summary judgment ruling in favor of the United States denying Geosyntec's research tax credits pursuant to 26 U.S.C. § 41, for research expenses incurred on certain client projects during tax years 2002-2005. Between 2002 and 2005, Geosyntec entered into hundreds of consulting and engineering contracts with various clients. At issue were three contracts of a fixed-price nature, and three that were cost-plus contracts, under which Geosyntec paid for its labor and expenses, plus a mark-up, subject to an agreed-upon maximum price. Geosyntec filed for research tax credit prior to 2002, which were denied by the Internal Revenue Service (IRS). In 2012, Geosyntec filed suit in the District Court seeking a federal income tax credit for research tax credits. The parties briefed the case on cross-motions for summary judgment denying Geosyntec its tax credits as to the three cost-plus contracts, but granting its research tax credits as to the fixed-price contracts. Geosyntec and the United States settled Geosyntec's research tax credits as to the fixed-provide contracts to avoid further litigation to determine whether Geosyntec was, in fact, eligible for the credits. Geosyntec appealed the District Court's ruling as to the capped contracts. On appeal, the Court reviewed the issue *de novo* and affirmed the District Court's ruling. To claim funds expended on qualified research as "credit-eligible" research under § 41, the research must be performed on behalf of the client and the client must "bear the expense [of the research] even if the research is not successful." Focusing on Geosyntec's Cherry Island and WM contracts the court held that Geosyntec was entitled to payment under both contracts regardless of success:

> Because payment to [Geosyntec] was not contingent on the success of its research, [Geosyntec] did not bear the financial risk of its own failure, and the two capped contracts were funded by [Geosyntec's] clients.

The Eleventh Circuit's Decision

To determine the extent to which research is funded, the Court of Appeals looked to Treasury Regulation § 1.41–4A(d), which provides, in relevant part:

> Research does not constitute qualified research to the extent it is funded by any grant, contract, or otherwise by another person (including any governmental entity). All agreements (not only research contracts) entered into between the taxpayer performing the research and other persons shall be considered in determining the extent to which the research is funded. Amounts payable under any agreement that are contingent on the success of the research and thus considered to be paid for the product or result of the research (see § 1.41–2(e)(2)) are not treated as funding. (quoting from 26 C.F.R. § 1.41–4A(d).)

Treasury Regulation § 1.41–2(e), in turn, governs the client's ability to claim funds expended on qualified research as credit-eligible research expenses under § 41. To be an expense paid or incurred by the client, the research must be performed on behalf of the client and the client must "bear the expense [of the research] even if the research is not successful." (*Id.* § 1 .41–2(e)(2)(iii).) The court found the reason clear "If an expense is paid or incurred pursuant to an agreement under which payment is contingent on the success of the research, then the expense is considered paid for the product or result rather than the performance of the research," and the tax credit is meant to incentivize research not production. (*Id.*;

see H.R.Rep. No. 100–1104, vol. 2, at 78.) Therefore, the client cannot claim the payment as a credit-eligible contract research expense.

Based on § 41 and the related implementing regulations, the issue concerned whether [Geosyntec's] right to payment under its separate contracts with DSWA and WM was "contingent on the success of the research" contemplated by those contracts.

A Closer Look at Geosyntec's Contracts

Geosyntec contract with DSWA to design a method for expanding the Cherry Island Landfill in Wilmington, Delaware. The DSWA contract was composed of an engineering services agreement and exhibits setting forth a detailed scope of work. Geosyntec's work was segregated into seven tasks with related sub-tasks. DSWA agreed to pay Geosyntec "on a cost reimbursement basis…in an amount not to exceed $9,991,578." However, additional compensation was available to Geosyntec under stated circumstances.

Under the WM contract, Geosyntec agreed to provide engineering consulting services on future projects that were described in a project-specific addenda. Each addendum included a statement of work. Geosyntec was hired under one addendum to remediate contaminated groundwater beneath a warehouse site previously used to manufacture and store weapons and radioactive material. The addendum capped the work at a certain price, however, Geosyntec could seeks additional payment for changed work and, if granted, that would adjust the contract price.

The court found that:

> Applying the above-stated legal principles to the two contracts at issue, the matter to be determined is whether payment to Geosyntec under the Cherry Island Contract or under the WM Contract, or both, was contingent on [Geosyntec's] performance." (citing to *Fairchild Indus., Inc. v. United States*, 71 F.3d 868 (Fed. Cir.1995).)

The court went on to state that:

> If [Geosyntec] was entitled to payment under both or either contract regardless of the success of its research, it is not eligible to claim the research tax credit; conversely, if payment to [Geosyntec] under both or either contract was contingent on [Geosyntec's] successful research or development of a product or process, [Geosyntec] is eligible to claim the research tax credit.

Analysis under the *Fairchild Industries* Decision

The parties agreed that *Fairchild Indus., Inc.* was the operative case on funded research, an inquiry that "turns on who bears the research costs upon failure." (*Fairchild Indus., Inc.*, 71 F.3d 873.)

Fairchild Indus., Inc. involved a government contract under which an aerospace manufacturer agreed to develop a new aircraft, the T-46A, for the Air Force. The contract contained specifications governing the T-46A's design, construction, and performance. The Air Force was obligated to pay only if the taxpayer produced results meeting detailed specifications. If the Air Force deemed the taxpayer's work unsatisfactory, it could: (1) reject the work, (2) require the taxpayer to correct the work at its own expense, or (3) accept the work at a reduced price. (*Id.* at 871.) The contract called for bimonthly refundable "progress payments," but the taxpayer had no right to retain them unless the line items to which they applied were accepted. Once the Air Force accepted a line item, progress payments previously applied to that item were "liquidated." The Air Force ultimately paid $120.6 million under the contract.

At the trial level, the Court of Federal Claims concluded that the research was funded because the taxpayer "expected that it would be paid and was paid for the research." The Federal Circuit rejected this approach, stating:

> The inquiry turns on who bears the research costs upon failure, not on whether the researcher is likely to succeed in performing the project….When payment is contingent on performance, such as the successful research and development of a new product or process, the researcher bears the risk of failure.... Applying this standard, the Federal Circuit held that because the Air Force was liable for payment only when the work, line item by item, succeeded and was accepted, the T-46A contract explicitly

> placed solely on [the taxpayer] the risk of failure of every line item of [full scale development]. Accordingly, the taxpayer's research was not funded for research credit purposes even though the Air Force had paid the taxpayer $120.6 million for developing the T-46A aircraft.

Geosyntec's Contract Work was 'Funded'

Applying *Fairchild Indus., Inc.* to this case, the Court of Appeals here rejected Geosyntec's claims that it faced significant financial risk under the capped contracts:

> …because it would only be paid for expenses incurred, eliminating an opportunity to make a profit on the research should it come in under budget, and it bore the risk that its expenses would exceed the ceiling price for each contract.

The court held that Geosyntec's contract work was "funded" as defined under § 41 and the Treasury Regulation.

First, Geosyntec contracts did not expose it to anything more than general economic risk:

> Cost-of-performance is not the financial risk with which we are concerned because 'the only issue is whether payment was contingent on the success of the research'—that is, the financial risk of failure. (citing to *Fairchild Indus., Inc.* at 872.)

Geosyntec's contracts were not structured in that manner, and, also, provided for additional compensation under certain circumstances.

Second, neither contract made payment to Geosyntec contingent on the success of Geosyntec's research. Here, both contracts required DSWA and WM to pay Geosyntec for its research and work produce even if it did not produce the desired outcome.

Conclusion and Implications

In light of the nature of appellant's contracts, and pursuant to the IRS code and analysis under the *Fairchild* decision the Eleventh Circuit Court of Appeals rejected the claim for tax credits.

Geosyntec's cost-of-performance was not specifically research-related and was a general economic risk, putting it outside of the *Fairchild Indus., Inc.* rationale. (Thierry Montoya)

SIXTH CIRCUIT FINDS STATUTE OF LIMITATIONS PERIOD FOR CERCLA CONTRIBUTION CLAIMS BEGINS ON THE EFFECTIVE DATE OF AN ADMINISTRATIVE SETTLEMENT

LWD PRP Group v. Alcan Corp., et al., ___F.3d___, Case No. 14-5730 (6th Cir. Jan. 14, 2015).

On January 14, 2015, the U.S. Court of Appeals for the Sixth Circuit held that the three-year statute of limitations period for contribution claims after an administrative settlement to perform waste removal activities begins running on the effective date of the settlement. Accordingly, the Sixth Circuit also held that the statute of limitations for such contribution claims does not begin running when the removal activities are completed.

Background

From the 1970s to 2004, a hazardous waste incinerator operated at the LWD, Inc. Superfund site in Kentucky. After the last-known operator abandoned the site, the U.S. Environmental Protection Agency (EPA) conducted initial waste removal activities. On March 1, 2007, the EPA entered into an "Administrative Settlement Agreement and Order on Consent for Removal Action" (Settlement Agreement) with 58 potential responsible parties (PRPs). These PRPs agreed to conduct removal activities and to compensate the EPA for future response costs at the site. On September 29, 2009, the EPA issued a notice of completion of the removal activities detailed in the Settlement Agreement.

On August 31, 2012, LWD PRP Group (LWD), an association composed of some of the 58 PRPs, filed suit in district court under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). LWD sought cost recovery under CERCLA § 107 and contribution under CERCLA § 113(f). Under CERCLA § 113(g)(2)(A), a party seeking recovery costs of a removal action under CERCLA § 107 is subject to a three year statute of limitations running from the completion of the removal action. Under CERCLA § 113(g)(3) (Contribution Limitations Provision), a party seeking contribution after an administrative settlement with the EPA that resolves liability is subject to a three year statute of limitations running from the settlement's effective date.

LWD argued that the statute of limitations for its contribution claim started on September 29, 2009, the completion date of removal activities. Appellants, however, filed a motion to dismiss LWD's contribution claim, arguing that LWD's lawsuit was time-barred because the three-year statute of limitations started on March 1, 2007. The district court agreed with LWD and denied appellant's motion to dismiss.

The Sixth Circuit's Decision

The Sixth Circuit's decision in *Hobart Corp. v. Waste Management of Ohio, Inc.*, 758 F.3d 757 (6th Cir. 2014), guided the Sixth Circuit's analysis in the instant case. In *Hobart*, the Sixth Circuit held that a PRP that has entered into an administrative settlement with the government can only bring a CERCLA § 113(f) action for contribution, not a CERCLA § 107 cost-recovery action. The *Hobart* court also held that an EPA settlement was an administrative settlement that resolved liability to the United States under CERCLA § 113(f). Therefore, pursuant to the Contribution Limitations Provision, any contribution claim seeking costs incurred under an EPA settlement was subject to a three year statute of limitations running from the settlement's effective date.

Applying the *Hobart* Decision

The Sixth Circuit held that the four factors that justified its holding in *Hobart* were also present in the instant case. First, the language in the *Hobart* settlement explicitly stated the parties' intent that the agreement be an administrative settlement. Second, the *Hobart* settlement provided that its settling parties were entitled, as of the effective date, to protection from contribution claims or claims under CERCLA §§ 113(f)(2) and 122(h)(4). For this settlement provision to have any effect, the *Hobart* court held that the settlement must be an administrative agreement under CERCLA § 113(f). Third, the parties in *Hobart* titled the settlement an "*Administrative*

Settlement Agreement and Order on Consent," which precisely matched the statutory language in CERCLA § 113(f)(3)(B). Fourth, the *Hobart* settlement contained a promise that the EPA would not take action against the *Hobart* appellants pursuant to CERCLA §§ 106 and 107(a) for future response costs. Based on these factors, the *Hobart* court held that the settlement qualified as an administrative settlement that could support a contribution claim. According to the Sixth Circuit, nothing distinguished the instant case from *Hobart*, which meant that *Hobart* was controlling and the Settlement Agreement here could also support a contribution claim.

Additional Arguments

The Sixth Circuit rejected LWD's other arguments. First, LWD argued that the Contribution Limitations Provision should not apply to contribution claims "for costs incurred under types of administrative agreements it does not expressly mention." The Sixth Circuit rejected LWD's argument by applying *Hobart*, which held that administrative settlements other than those expressly mentioned in the Contribution Limitations Provision could give rise to contribution claims. As long as the claims were for contribution towards costs incurred under an administrative settlement resolving liability to the United States, the three-year statute of limitations for such claims started running on the effective date of the settlement.

Second, LWD argued that the statute of limitations for its contribution claim started on the completion date of removal activities pursuant to CERCLA § 113(g)(2)(A). The Sixth Circuit rejected this argument by again applying *Hobart*, which held that even if a settlement requires PRPs to perform removal activities, a lawsuit to recover the costs of removal is a contribution claim under CERCLA § 113(f). Therefore, the statute of limitations in the Contribution Limitations Provision applied here.

Finally, LWD argued that the parties intended the statute of limitations to run from the completion of the removal action. LWD pointed to the fact that several Appellants signed tolling agreements more than three years after the effective date of the Settlement Agreement. The Sixth Circuit held that this argument failed for several reasons. First, the tolling agreements did not mean that Appellants believed the statute of limitations had not yet run. Instead, the tolling agreements merely sought to facilitate settlement negotiations by excluding a defined tolling period from counting towards the statute of limitations or other time-based defenses. Second, the statute of limitations period was statutory, not contractual. Thus, the settling parties did not have the power to extend the time within which LWD could bring claims against third parties.

The Sixth Circuit ultimately held that the three-year statute of limitations period for contribution claims after an administrative settlement runs from the effective date of the settlement. Therefore, the Contribution Limitations Provision barred LWD's contribution claim against Appellants.

Conclusion and Implications

While the Sixth Circuit's decision establishes a bright line rule by applying the Contribution Limitations Provision to all CERCLA contribution claims after an administrative settlement, it also raises issues regarding the interplay between cost recovery and contribution claims. Given the complexities of remediation, which often involve numerous PRPs, the Sixth Circuit's holding could create practical challenges in cases where parties enter into administrative settlements well before they discover the nature and extent of the contamination. In such cases, despite the uncertain costs of cleanup, PRPs may feel pressured to initiate contribution claims early on in the remediation process in an effort to comply with the statute of limitations. (Danielle Sakai)

SIXTH CIRCUIT FINDS COAL MINE COMPLYING WITH CLEAN WATER ACT GENERAL PERMIT IS SHIELDED FROM LIABILITY FOR POLLUTANT DISCHARGES NOT EXPLICITLY ADDRESSED IN THE PERMIT

Sierra Club v. ICG Hazard, LLC, ___F.3d___, Case No. 13-5086 (6th Cir. Jan. 27, 2015).

The U.S. Court of Appeals for the Sixth Circuit recently held that a Kentucky coal mine operating pursuant to a General Permit under the federal Clean Water Act (CWA) was shielded from liability for discharges of pollutants not explicitly addressed in the permit.

Factual and Procedural Background

The CWA is a "comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The CWA seeks to achieve these goals through two primary mechanisms. First, it limits the discharge of pollutants through a "default scheme of strict liability." Section 301 of the CWA provides, "the discharge of any pollutant by any person shall be unlawful." The main exception to this prohibition is the National Pollutant Discharge Elimination System (NPDES), which provides for the issuance of permits allowing the discharge of pollutants within prescribed limitations. Second, § 303 of the CWA:

> …requires each State, subject to federal approval, to institute comprehensive water quality standards, establishing water quality goals for intrastate waters.

Under the NPDES, the:

> …permitting authority may issue a fixed-term permit allowing a point-source discharger to discharge specific pollutants—set out in the permit—subject to limitations on 'the quantities, rates, and concentrations' of the specific pollutants being discharged.

A state is allowed to establish its own permitting authority that, once authorized by EPA, is then responsible for issuing discharge permits within the state. Here, Kentucky had such authority to issue permits within the Commonwealth, and did so through the Kentucky Department of Water (KDOW).

A permitting authority may issue either an individual or General Permit under the CWA. An individual permit applies to one specific discharger, while a General Permit usually covers an entire category of dischargers within a geographical boundary.

The Permit Shield Defense

Importantly, the CWA contains a "permit shield," which insulates permit holders from liability for certain discharges of pollutants so long as the permittee does not exceed the discharge limits that the permit provides. Section 1342(k) of the CWA codifies this provision by stating: "compliance with a permit issued pursuant to this section shall be deemed compliance" with the statutory scheme.

The General Permit

In this case, ICG Hazard operated a surface coal mine in Kentucky. The mine was operated pursuant to a five-year coal General Permit issued by KDOW under the CWA. The permit allowed ICG to discharge certain listed pollutants into the state's water, subject to the conditions set out in the permit. While the conditions included effluent limitations for several specific pollutants, it did not address selenium. As it turns out, KDOW was aware of the potential for selenium discharges from mines in this geographical area. To address this potentially dangerous element, KDOW included a provision recognizing the possible discharge of selenium in the General Permit. KDOW also established "one-time" monitoring whereby a single sample would be taken during the five-year life of the permit to determine whether selenium levels were within acceptable levels.

In 2009, ICG applied to KDOW to modify its coverage under the General Permit so that it could expand the reach of its surface coal mining. The renewal process required ICG to submit water samples from an existing discharge point. These samples showed that the selenium in the surrounding water

exceeded the acute limit in Kentucky's water quality standards.

In 2010, Sierra Club filed a citizen-suit under the CWA and the Surface Mining Control and Reclamation Act (Surface Mining Act). Sierra Club argued that the discharge of selenium exceeded the scope of the General Permit and was therefore unlawful. The district court disagreed, finding that the permit shield applied to the discharge, and awarded summary judgment in ICG's favor. Sierra Club appealed, arguing that the district court erred in finding that the permit shield applied.

The Sixth Circuit's Decision

First, the court considered whether pollutants could only be discharged under the CWA if they were explicitly listed in the General Permit. In support of this argument, Sierra Club referenced an EPA policy statement, which stated:

> General Permits authorize the discharge of pollutants within the *specified scope* of a particular General Permit.

According to Sierra Club, the "specified scope" language made clear that any pollutants not specified in the permit could not be discharged.

In analyzing this issue, the court noted that the language of the CWA's:

> …permit shield is ambiguous because, while it states the exception to the other provisions of the CWA . . . it does not make the scope of that exception clear.

In such instances, courts will "defer to the agency's interpretation [of the statute], provided . . . it is reasonable."

Here, the court found that EPA "allowing some pollutants to be discharged even though not specifically listed in the General Permit" was "'sufficiently rational . . . to preclude a court from substituting its judgment" for that of the regulating agency. In a prior adjudication, the EPA had explained the "practical impossibility of identifying and limiting every potential compound or chemical in a given discharge." Thus, the court deferred to EPA's expertise, holding that the "specified scope" language does not limit the permissible discharges to pollutants listed in the permit.

Scope of the General Permit

Next, the court considered the appropriate scope of the permit shield that applies to a General Permit. In a previous case, the Fourth Circuit considered the scope of the permit shield in the context of an individual permit. In that case, the court deferred to the EPA's reasonable interpretation of the shield, finding that a permit holder will be exempt from liability for the discharge of pollutants not expressly mentioned in the permit, provided the discharges met two prongs. First, the permit holder must comply with the CWA's reporting and disclosure requirements. Second, the discharges must be within the permitting authority's "reasonable contemplation" during the permit application process." The Sixth Circuit adopted this analysis for General Permits as well.

Here, the court found both prongs were satisfied. The first prong was satisfied because ICG had disclosed the selenium discharge when it requested modification of its permit. In addition, the court found that the second prong was satisfied because KDOW knew at the time it issued the General Permit that the mines in the area could produce selenium. As discussed above, a provision of the permit had recognized the possibility that the mines in the area could discharge selenium. As a result, the court found that the second prong was satisfied, and that the permit shield therefore covered ICG's discharge of selenium.

Conclusion and Implications

This decision confirms that the permit defense under the Clean Water Act is not limited only to discharges of pollutants explicitly addressed in the permit. Rather, the Sixth Circuit broadly interpreted the permit shield to also extend to those pollutants that were within the agency's "reasonable contemplation" when granting the permit. While the Sixth Circuit has been the only court to address this issue, it will likely continue to be an issue that is subject to further litigation. (Danielle Sakai, Matthew Collins)

FIFTH CIRCUIT HOLDS LACK OF INTENT TO DISPOSE IS DISPOSITIVE IN REJECTION OF CERCLA 'ARRANGER' LIABILITY IN SOIL AND GROUNDWATER CONTAMINATION CASE

Vine Street LLC v. Borg Warner Corp., ___F.3d___, Case No. 07-40440 (5th Cir. Jan. 16, 2015).

After purchasing a property that formerly served as the site of a dry cleaning facility, Vine Street, LLC (Vine Street) discovered that the soil and groundwater were contaminated with perchloroethylene (PERC). Vine Street filed suit in federal court asserting claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Texas Solid Waste Disposal Act (TSWDA), against parties with historical relationships with the site. Despite finding that Norge, a former equipment and services provider, did not intend to allow any discharge, the District Court held it responsible for 75 percent of the past, present, and future, cleanup costs, and Vine Street was responsible for only 25 percent. On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed. The Fifth Circuit relied upon a recent *Burlington Northern* ruling by the Supreme Court of the United States and held that, because Norge did not intend to dispose of the PERC, it was not liable as an "arranger" under CERCLA.

Background

From 1961 to 1975, in collaboration with another commercial entity, Norge operated a dry cleaning facility called Norge Laundry & Cleaning Village that offered customers self-service dry cleaning in Tyler, Texas. Norge supplied six to eight dry cleaning machines for use at the facility, provided an initial supply of PERC (used to clean the clothes), designed, installed, and tested the dry cleaning system including its drainage system, and supplied other related support services. Norge had installed water separators in the dry cleaning machines, which were designed to release wastewater into the sewer and recycle the PERC for future use. Unfortunately, the water separators were only 95 percent effective, thereby causing some PERC to escape into the sewer. PERC reached the soil and groundwater underlying the facility, which Vine Street subsequently purchased. Vine Street subsequently remediated the site through the Voluntary Cleanup Program administered by the Texas Commission on Environmental Quality and filed its CERCLA/TSWDA suit in an attempt to recoup its costs from Norge.

To establish CERCLA liability, the plaintiff must show:

> (1) that the site in question is a "facility" as defined in § 9601(9);
>
> (2) that the defendant is a responsible person under § 9607(a);
>
> (3) that a release or a threatened release of a hazardous substance has occurred; and
>
> (4) that the release or threatened release has caused the plaintiff to incur response costs. *Amaco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989).

Under the second prong, one class of "responsible parties" is referred to as "arrangers," which extends to:

> ..any person who by contract, agreement, or otherwise arranged for disposal or treatment or otherwise arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances. 42 U.S.C. § 9607(a)(3).

At issue in this case was whether Norge "arranged for disposal …. of hazardous substances," thereby making it liable under CERCLA as an "arranger." The U.S. District Court held in the affirmative and Norge appealed.

The Fifth Circuit's Decision

Analysis under the *Burlington Northern* Decision

As the appeal was pending before the Fifth Circuit, the Supreme Court issued its opinion in *Burlington Northern & Santa Fe Railway Co. v. United States*, a case with facts similar to those in *Vine Street* proceeding. 556 U.S. 599 (2009). In that case, Shell Oil Company (Shell) sold chemicals to an agricultural chemical distributor. A common carrier would transport the chemicals to distributor's site, at which point the distributor would transfer it to storage tanks and move the tanks around its facility. Shell became aware that leaks were occurring during this transfer process but, despite its efforts, could not eliminate the releases. In assessing whether Shell was an "arranger" under CERCLA, the Supreme Court opined that:

> …an entity may qualify as an arranger under § 9607(a)(3) when it takes *intentional* steps to dispose of a hazardous substance. *Id.* at 611 (emphasis added).

The Supreme Court held that the spills were ancillary to a legitimate sale and Shell's knowledge of the releases did not equate to planning for them. Therefore, Shell was not liable as an arranger under CERCLA.

In *Vine Street*, the Fifth Circuit opined that the *Burlington Northern* ruling changed the applicable law by requiring that a party actually intend to dispose the waste rather than just possess a sufficient nexus to its disposal. Under this new standard, the Fifth Circuit determined that Norge *was not* an arranger. The Fifth Circuit did not have to stray far in order to reach its conclusion. It pointed to the District Court's clear findings that Norge had not intended the discharges: "[w]hile pollution happened many years ago, neither party intended to allow the discharge of PERC into the ground"; a witness "recalled no spills or intentional disposals of PERC"; there was no evidence of a manufacturing defect or improper maintenance. Further, the Fifth Circuit noted that, under *Burlington Northern*, Norge's knowledge of the PERC releases did not translate into intention. On the contrary, the District Court had found that the PERC was handled with great care and that Norge's machines were intended to recycle, not dispose of the PERC as this material was expensive. In addition, as was in the case of the legitimate sales in *Burlington Northern*, Norge's transaction was intended to promote successful dry cleaning operations, not the disposal of waste.

The parallels to the binding decision in *Burlington Northern* made it easy to dismiss distinguishable cases from other circuits. The court held that the First Circuit's decision in *United States v. General Electric Co.* was not applicable to Norge's transaction. 670 3d. 377 (1st. Cir. 2012). In *General Electric Co.*, a scrap Pyranol manufacturer continued shipments after the purchaser had stopped submitting new orders or even making payments. The continued shipments by the manufacturer without orders or payments evidenced the intent by the manufacturer to dispose of the materials, thereby implicating "arranger" liability.

Analysis under the *Team Enterprises* Decision

In addition, Vine Street pointed to the Ninth Circuit's ruling in *Team Enterprises, LLC v. Western Investment Real Estate Trust* to support its claims against Norge. 647 F.3d 901 (9th Cir. 2012). In *Team Enterprises*, the Ninth Circuit held that a dry cleaning equipment manufacturer, which had not hooked up the equipment to the sewer, was not an arranger under CERCLA. In its arguments to the Fifth Circuit, Vine Street asserted that the manufacturer's failure to connect the equipment to the sewer was the dispositive fact in the *Team Enterprises*. As such, Vine Street claimed that the fact that Norge *did* connect the equipment to the sewer established Norge as an arranger under the Ninth Circuit's analysis in *Team Enterprises*. The Fifth Circuit disagreed, not convinced that the Ninth Circuit's "dicta" had any meaningful impact on that Ninth Circuit's analysis.

In the end, Vine Street failed to set forth arguments compelling enough to nudge the Fifth Circuit's analysis outside the orbital grip of the *Burlington Northern* decision.

Conclusion and Implications

CERCLA is arguably the furthest reaching federal environmental statute. Companies can incur liability decades after they had any involvement with a site. In fact, many liable entities cease to exist well before any complaint is ever filed. Further, CERCLA casts

a very wide net as to what type of actors may bear the liability. Potentially responsible parties include current owners, current operators, all past owners, all past operators, any arrangers, and any transporters.

The Fifth Circuit's decision in *Vine Street* is significant as the ruling, in accordance with the *Burlington Northern* ruling, requires an intentional action to dispose of a hazardous substance to establish arranger liability under CERCLA. Under this developing case law, parties that supply equipment or services related to the handling of hazardous materials may not be liable under CERCLA for the inadvertent release of such materials as long as their actions are not intended to lead to disposal. (Kenneth S. Komoroski, Ted Bosquez, Daniel Carmeli, Duke McCall III)

SEVENTH CIRCUIT UPHOLDS DECISION TO APPLY MICHIGAN'S INTERPRETATION OF INSURANCE POLICY STANDARD POLLUTION EXCLUSION CLAUSES

Visteon Corporation v. National Union Fire Insurance Company of Pittsburgh, P.A., ___F.3d___, Case No. 1:11-cv-002000-RLY-TAB (7th Cir. Jan. 23, 2015).

Visteon manufactures automobile parts with manufacturing plants located around the world. Its headquarters are in Michigan and the plant, which leaked Trichloroethylene (TCE) into the soil and groundwater is located in Indiana. Visteon spent millions settling landowner suits and cleaning up the TCE pollution at its Indiana plant for which it tendered to its carrier—National Union Fire Insurance Company (National Union). When National Union refused to defend or reimburse Visteon for its cleanup costs, Visteon filed suit in Indiana state court; National Union removed to federal court. The issue concerned which state's law—Indiana or Michigan—should govern the enforcement of a standard pollution—exclusion clause in National Union's policy. Indiana Law requires a carrier to specifically state what falls within its pollution exclusion, *i.e.* TCE must be specified in the policy. Michigan law, however, enforces the type of general pollution exclusion clauses at issue. The U.S. District Court ruled that Michigan law governed.

Background

In 2001, during the coverage period, Visteon used TCE to clean machinery at its Connerville, Indiana plant. When a TCE leak to soil and groundwater was discovered, neighboring landowners sued Visteon for damages arising from the leakage. Visteon spent millions settling the suits and cleaning up the site. National Union had refused to either defend or indemnify Visteon. Visteon filed suit and the case was ultimately removed to federal court.

The parties agreed that the District Court was required to apply choice of law rules of the state in which the suit was brought—Indiana:

> The object in picking the state whose law is to govern is to identify the state that has the closest relation to the transaction, activity, or event that gave rise to the litigation. In the case of the suits against Visteon—suits alleging nuisance, negligence, and related torts arising from the leakage of TCE—the closest relation was to Indiana.

This suit varied from the tort-based suits filed against Visteon—this suit arose from an insurance contract between Visteon and National Union that was not limited to Visteon's Indiana plant. Rather, National Union's policy covered all of Visteon's plants, worldwide. In a case of alleged breach of contract insuring against liability for environmental contamination that occurred at various sites, the Indiana Supreme Court ruled that it would follow the:

> …uniform-contract-interpretation approach, … [applying] the law of a single state to the whole contract even though [the contract] covers multiple risks in multiple states …[with the chosen] state having more insured sites than any other. (*National Union Fire Ins. Co. of Pittsburg, PA v. Standard Fusee Corp.*, 940 N.E.2d 810, 813, 815-16 (Ind. 2010).

The Seventh Circuit's Decision

The court found this decision compelling. Visteon manufactures and sells automotive parts all over the world, and operation at Visteon's plants could give rise to liability for which an insurable interest could result. Visteon's desire to have Indiana law govern its rights under the policy would result in Indiana law governing all future environmental liabilities—under the uniform contract interpretation approach—regardless of where they occurred. This would make it:

> … immensely difficult, and maybe impossible as a practical matter, for National Union to calculate a single premium for risks made so diverse by the worldwide scope of Visteon's operations.

This could result in National Union charging Visteon varying premiums to address state-specific risks because:

> …some country in which Visteon has a plant refuses, like Indiana, to enforce the kind of pollution—exclusion clause found in National Union's policy.

The court rejected Visteon's argument that National Union could have charged a higher premium to cover the additional risk posed by the Indiana plant, since it was reasonably foreseeable that Indiana would not enforce standard pollution exclusion clauses that do not specifically identify particular contaminates to be excluded. "The result would be multiple, different premiums to the same insured for the same insurance."

There were many compelling reasons for National Union charging a uniform premium to an insured, and compelling reasons for a single jurisdiction's law governing disputes. Given the two choices offered the District Court, Indiana and Michigan:

> …the court was right to choose Michigan. Fourteen of Visteon's manufacturing plants were located there (and no greater number in any other jurisdiction in which Visteon does business), and only three of its plants were in Indiana. Michigan is also the jurisdiction in which Visteon's headquarters is located and in which the personnel who administers its insurance contracts and negotiated the contract with National Union are stationed.

Traditional rules of choice of law aside, the District Court's decision is supportable under a multifactor test. In *Standard Fusee, supra*, the court considered the state where the risk insured against had materialized and the state where the insurance contract had been made. Here, although the case occurred in Indiana, such a risk could not have been foreseen. Moreover, the Indiana victims compensated for damages arising from Visteon's TCE leak were paid by Visteon, "and it is unclear what benefit the state would have derived from reimbursement of Visteon's costs by National Union."

This point afforded Visteon an argument as its settlement with one of the landowners was conditioned on whether Visteon would recover its damages from National Union—if so, the landowner's compensation under the settlement would increase:

> But if [the landowner's] speculative interest were deemed an interest of Indiana, then Visteon could select the state whose law would govern any dispute with its insurer simply by making a speculative contract with a citizen of its preferred stat—promising to pay that citizen some amount of money in the event that Visteon incurred a liability in that state. Such an approach would make it impossible to determine which jurisdiction's law applies before the risk materializes.

As for the factor of where the contract was made, no state can be designated as *the* state where an insurance contract was made. Here, negotiations, signing, and receipt of premiums occurred in Indiana, Michigan, and New York.

Conclusion and Implications

National Union avoided coverage of Visteon's pollution claims. Although the risk materialized in Indiana, that was not foreseeable. Moreover, it was unclear what benefit Indiana would have derived from the reimbursement of Visteon's costs by National Union. (Thierry Montoya)

DISTRICT COURT FINDS ENVIRONMENTAL GROUPS LACKED STANDING TO CHALLENGE FEDERAL LOAN GUARANTEE SUPPORTING COAL EXPORTS

Chesapeake Climate Action Network, et al., v. Export-Import Bank of the United States, et al., ___F.Supp.3d___, Case No. 1:13-cv-01820 (D. D.C. Jan. 22, 2015).

Six environmental groups challenged approval of a $90 million loan guarantee by the Export-Import Bank of the United States (Bank) in support of a three year, $100 million loan from PNC Bank (PNC) to Xcoal Energy & Resources, LLC (Xcoal), alleging the Bank failed to comply with the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA), by not considering environmental impacts from exports of $1 billion in U.S. coal allegedly allowed by the loan guarantee. Plaintiffs sought an injunction ordering rescission of the guarantee and requiring compliance with NEPA prior to approval of any further financing. On cross-motions for summary judgment, the court found plaintiffs lacked standing and granted summary judgment in favor of defendants.

Background

Xcoal annually exports millions of tons of metallurgical coal from mines in Pennsylvania and West Virginia, transporting it by rail to ports in Maryland and Virginia for shipment overseas, typically to China, South Korea or Japan. Xcoal finances its export business through lines of credit, historically from several European banks as well as PNC in the United States. In 2011, Xcoal sought to replace its existing $25 million line of credit from PNC with a $100 million loan from PNC, guaranteed by the Bank. Xcoal was concerned that its $530 million in uncommitted lines of credit from nine European banks was at risk due to the European sovereign debt crisis.

The Bank was established in 1954 as an independent federal agency with the purpose of facilitating:

> …exports of goods and services … and in so doing to contribute to the employment of United States workers,…[by]…providing 'loans, guarantees, insurance and credits' to support U.S. exports. 12 U.S.C. § 635(a)(1).

PNC did not approve loans against accounts receivable due from overseas buyers without a guarantee from the Bank. Therefore, Xcoal and PNC jointly applied to the Bank for a loan guarantee to support the new $100 million loan to Xcoal.

Bank staff, in recommending approval of the application, wrote it was justified as:

> Xcoal did 'not have the ability to internally generate the necessary working capital,' that '[d]omestic financial institutions are not willing to provide enough financing to Xcoal without the Ex-Im Bank guarantee,' and that with the Bank's support, the company 'will be able to ensure liquidity and access to capital financing.'

In considering the application, the Bank did not carry out any environmental analysis; rather, the Bank relied on a previously adopted categorical exemption from NEPA for Bank "financing in the form of insurance or guarantees."

On May 14, 2012, the Bank approved a $100 million transaction-specific revolving working capital guarantee loan from PNC to Xcoal with a 36-month term, backed by a $90 million Bank loan guarantee. The Bank's procedures for its working capital guarantee program require the Bank's approval for all transactions under the approved loan and guarantee; Xcoal has sought and received the Bank's approval for more than a dozen transactions since the approval.

Plaintiffs filed suit on July 13, 2013, challenging the approval under the APA for failure to comply with NEPA. The parties filed cross-motions for summary judgment, the plaintiffs challenging the applicability of the categorical exclusion from NEPA, and the defendants arguing the plaintiffs lacked standing.

The District Court's Decision

Associational Standing

With regard to the associational standing asserted by four of the plaintiffs, the court held that these plaintiffs failed to establish their injuries (undisputed

by defendants) could be redressed by the court, the third requirement for Article III standing. Plaintiffs needed to satisfy redressability with respect to the regulated independent third party—PNC—that was the recipient of government funding, specifically by showing that Xcoals exporting activity would be altered or affected by the Bank's approval, subject to additional conditions, or disapproval of the guarantee. The court found that plaintiffs had failed to submit any evidence to rebut defendant's evidence that the loan guarantee represents only 18.7 percent of Xcoal's credit, and that Xcoal's credit utilization rate is 30 percent. In addition, plaintiffs did not dispute that the European debt crisis has eased or demonstrate that Xcoal's financing was at risk at the time plaintiffs filed suit. Thus, even if the court assumed causation (the second Article III standing requirement) was satisfied, the availability of alternative financing and Xcoal's "stated commitment to exporting the same volume of coal regardless of whether the loan guarantee" was rescinded would not support finding redressability.

Organizational Standing

The remaining two plaintiffs asserted organizational standing, arguing they suffered injuries to their organizational missions, activities and resources sufficient to confer standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The D.C. Circuit imposed two further requirements for organizational standing: the government's conduct must directly conflict with the organization's mission; and, the organization must show expenditure of resources:

> …to counteract the injury to its ability to achieve its mission and not simply as a product of unnecessary alarmism constituting a self-inflicted injury. *Nat'l Treasury Emps. Union v. United Sates*, 101 F.3d 1423, 1430 (D.C. Cir. 1996).

The first plaintiff alleged the Bank's approval of the loan guarantee conflicted with its mission to "protect the living environment of the Pacific Rim" and require financial institutions to improve environmental policies, and that the approval would require the organization to expend additional resources to promote environmentally responsible financing. The court found the plaintiff failed to show the particular loan guarantee at issue had "even the potential to affect the environment of the Pacific Rim." Further, the court found no link was established between an increase in resources devoted to advocacy and the Bank's approval of the loan guarantee. The plaintiff had advocated for changes in the Bank's policies since 1997, and it failed to identify any specific prior or future allocation of additional resources linked to this particular Bank approval.

The second plaintiff alleged approval of the loan guarantee undermined its policy work to promote sustainable energy and interfered with its public education efforts by causing it to expend additional resources to educate the public about coal financing. The court found the plaintiff failed to provide specific facts, sufficient to survive a motion for summary judgment, showing any concrete harm to its programmatic activities by the Bank's approval. Further, even if the court assumed the approval did perceptibly impair the organization's efforts, the court noted that D.C. Circuit precedent cast:

> …significant doubt on the viability of a claim of organizational injury premised solely on injury to an organization's advocacy efforts.

As with the co-plaintiff asserting organizational standing, there were not sufficient facts to support a finding that the organization's expenditures monitoring the Bank's activities and educating the public were a consequence of the Bank's decision and not an ordinary program cost or self-inflicted harm. Specifically, the organization's declaration in support of standing failed to allege its additional expenditures as a result of the Bank's approval were necessary to achieve the organization's purpose, failed to identify the timing of these additional expenditures in relationship to the approval, and failed to distinguish those expenditures from ordinary program costs.

Conclusion and Implications

The resolution of this case on standing leaves unresolved the viability of the Bank's categorical exemption for financing activities supporting the export of coal. However, the difficulty plaintiffs faced in establishing associational standing indicate the challenges environmental groups may face in demonstrating that the Bank's financing activities constitute a major federal action *significantly affecting the quality*

of the quality of the human environment. The plaintiffs asserting organizational standing were, in turn, unable to overcome the D.C. Circuit's hostility to standing on the basis of injury to lobbying and general public policy advocacy activities. (Deborah E. Quick, Duke McCall III)

DISTRICT COURT DENIES SUMMARY JUDGMENT BASED ON SUCCESSOR'S POTENTIAL KNOWLEDGE OF CERCLA LIABILITIES

Housing Authority of the City of Los Angeles v. PCC Technical Industries, Inc., ___F.Supp.3d___, Case No. CV 11-01626 FMO (C.D. Cal. Dec. 15, 2014).

On December 15, 2014, a U.S. District Court Judge denied a motion for summary judgment by GK Technologies, Inc. (GK) in a suit for environmental cleanup costs of a former steel mill site. The court acknowledged that GK had no direct or indirect liability under the federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA). However, questions remained as to successor liability stemming from GK's acquisition and eventual dissolution of Southwest Steel Rolling Mills, Inc. (Southwest). Citing evidence that GK may have been aware of Southwest's liability for environmental contamination, the court ruled that it may be liable as a successor based on its express assumption of Southwest's liabilities.

Background

The lawsuit by the Housing Authority of the City of Los Angeles (HACLA) stemmed from the environmental contamination of a 21.1-acre property in Los Angeles (Site). The Site was developed in 1938 for steel processing and, for an approximately seventy year period from 1938 to 2008, was used for various industrial operations and subject to multiple owners. In 1969, Automation Industries, Inc. incorporated Southwest as a wholly-owned subsidiary to operate a steel mill on the Site. The Site was transferred to Cascade Steel Rolling Mills, Inc. in 1976 for roughly 9 months, at which point it was deeded back to Southwest.

In April 1978, GK Technologies, Inc. (GK) became the great-grandparent of Southwest via acquisition and merger. One year later, Southwest transferred the Site to Shama, a general partnership (Shama), and thereafter became GK's inactive corporate subsidiary. Southwest dissolved in 1993 and filed a Certificate of Dissolution in which a majority of its directors declared under penalty of perjury that:

> adequate provision for the payment of unpaid debts and liabilities has been made in that GK Technologies…has assumed payment of all known debts and liabilities of Southwest Steel Rolling Mills, Inc.

HACLA purchased the Site in 2008 to redevelop as mixed use public housing. In 2011, it filed suit against ten former owners of the Site, including GK as the agent, successor, or assignee of Southwest. HACLA alleged, among other things, that each former owner contributed to the release of hazardous substances in violation of CERCLA. It pursued GK under the theory of successor liability, contending that GK expressly assumed any liability that Southwest may have for contamination at the Site.

The District Court's Decision

The court explained as an initial matter that GK, as the party moving for summary judgment, has the burden of showing that there is no genuine dispute as to any material fact. The court also noted that while CERCLA is silent on the matter of successor liability, the Ninth Circuit ruled that the statute authorizes it. GK would be liable for Southwest's alleged contamination of the Site if it expressly or impliedly agree to assume the liability.

GK presented several arguments against successor liability for Southwest's alleged contamination of the Site. It argued that summary judgment was proper because the Certificate of Dissolution proved it only assumed Southwest's "known" liabilities. This, according to GK, did not include CERCLA liability. The court found this argument unpersuasive and recited several factors that potentially proved GK's knowledge of the Site's environmental contamination when it assumed Southwest's liabilities.

First, the court noted that the Site was strewn with contaminants such as debris, slag, and scrap metal shavings in 1979. GK acquired Southwest just one year before, in 1978. Next, the court remarked that GK and Southwest both employed the same high-level officer. Eugene Swartz was Southwest's Vice President and Chairman of the Board of Directors from 1969 to 1979. In this capacity, he had oversight authority of the Site's operation as a hot steel rolling mill. Swartz went on to serve as GK's Vice President from 1978 to 1982, and as a GK Director from 1982 to 1992. Based on his dual employment, the court made the reasonable inference that Swartz was aware of possible environmental contamination related to Southwest's activities on the Site, and that he shared this knowledge with GK. Finally, the court pointed to evidence that in 1992, before GK assumed all of Southwest's known liabilities, GK's corporate parent, General Cable Company (General Cable), contemplated environmental liability in a major corporate restructuring plan. The court surmised that this provision may have resulted from environmental contamination claims from General Cable's companies. Taken together, the court determined the facts could prove that GK was aware of a potential CERCLA claim at the time it assumed Southwest's liabilities.

GK's second contention was that CERCLA liability did not arise until after HACLA purchased the Site in 2008. It argued, therefore, that the liabilities could not have been "known" in 1993, when GK assumed Southwest's liabilities. The court found this interpretation overly constrictive. It reiterated that the relevant knowledge was that of facts necessary for CERCLA liability, not the knowledge of CERCLA liability itself. If GK had such knowledge, then HACLA's claims would exist at the time GK assumed Southwest's known liabilities.

Finally, GK argued that even if were liable, its liability would be limited to the assets it received from Southwest in the dissolution. GK cited several provisions of the California Corporations Code, which the court found inapplicable. The statutes dealt with collecting assets of a dissolved corporation that were improperly distributed to shareholders where, as here, HACLA was pursuing GK on a theory that it expressly assumed Southwest's liabilities, not as Southwest's former shareholder.

Conclusion and Implications

The District Court's decision clarifies the "knowledge" requirement for successor liability under CERCLA. GK's potential knowledge of Southwest's CERCLA liability was central to the court's inquiry. Though it did not contribute to the Site contamination or reference environmental contamination in its assumption of Southwest's liabilities, GK's potential knowledge was sufficient to defeat summary judgment and potentially impose successor liability. Because of the interests at stake, the District Court's decision could serve as an incentive for other parties to expressly disclaim environmental liabilities in asset purchase and sale agreements. (Mae K. Hau, Duke McCall III))

DISTRICT COURT FINDS POTENTIAL CERCLA LIABILITY FOR DISCHARGE OF AERIAL EMISSIONS IN CANADA RESULTING IN POLLUTANTS CONTAMINATING U.S. WATER BODIES

Pakootas v. Teck Cominco Metals, Ltd.,
___F.Supp.3d___, Case No. CV-04-256-LRS (E.D. Wash. Dec. 31, 2014).

The U.S. District Court for the Eastern District of Washington, on the last day of 2014, issued an order finding that a mining company could be found liable under the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* (CERCLA) for aerial emissions from its smelter in Canada—when those emissions resulted in pollutants landing in water bodies in the United States. The District Court concluded that a "disposal" had occurred under CERCLA, not when the emissions were first released, but later when hazardous substances in the emissions were deposited "into or on any land or water" of a facility.

The District Court based its decision on the definition of "disposal," but reached a different conclusion from the Ninth Circuit Court of Appeals, which had interpreted the same definition a few months earlier in a case under the Solid Waste Disposal Act (Resource Conservation and Recovery Act), 42 U.S.C. § 6901 *et seq.* (RCRA). The Ninth Circuit concluded that, to constitute a disposal, hazardous substances must *first* be placed into or on any land or water and then enter the environment, be emitted into the air, or discharged into water. An emission into the air, which then traveled to land or water could not be considered a "disposal."

Background

In *Pakootas v. Teck Cominco Metals, Ltd.*, plaintiffs sued a mining company, claiming that aerial emissions containing hazardous substances from the stacks of defendant's smelter located in Trail, British Columbia, traveled through the air and resulted in a disposal across the border into the Upper Columbia River and Lake Roosevelt, both located in the United States, in violation of CERCLA. Plaintiffs sought natural resource damages and response costs, but could not bring an action under CERCLA for direct releases from the Canadian smelter, as that would require extraterritorial application of CERCLA. Instead, plaintiffs sought to hold the mining company liable under CERCLA as one who "arranges" for the disposal of hazardous substances via aerial emissions that crossed the border and were deposited into U.S. waters.

CERCLA § 107(a)(3) makes liable:

> …any person who by contract, agreement, or otherwise arranged for disposal or treatment…of hazardous substances owned or possessed by such person…at any facility…owned or operated by another entity and containing such hazardous substances….from which there is a release or threatened release of hazardous substances. 42 U.S.C. § 9607(a).

A "disposal" under CERCLA has the same meaning as that term is used under RCRA. 42 U.S.C. § 9601(29). RCRA, in turn, defines "disposal" as:

> …the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters. 42 U.S.C. § 6903(3).

To be actionable under CERCLA, such "disposal" must be "at any facility," broadly defined to include:

> …any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise comes to be located. 42 U.S.C. § 9601(9)(B).

The Earlier District Court Decision

In 2014, the U.S. District Court Eastern District of Washington issued an order denying the defendant's motion to strike or dismiss, concluding that an actionable disposal under CERCLA occurred when hazardous substances from the aerial emissions were

deposited onto the water bodies. The District Court concluded that so long as the hazardous substances were disposed of into or on any land or water of a facility, even if carried there by air, the defendant could be found liable as an "arranger" under CERCLA. The court identified two separate discharges, the discharge of hazardous substances into the air from the smelter in Canada, and the discharge of hazardous substances from the air into the Columbia River. The court reasoned that emissions to the air in Canada do not constitute a CERCLA disposal, because there was no disposal to a facility in the United States. However, once the emissions crossed the border and hazardous substances were deposited into or on land or water at a U.S. facility, a "disposal" under CERCLA had occurred.

In reaching its conclusion, the District Court distinguished the Ninth Circuit's decision in *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001), in which the court held that "disposal" under CERCLA did not include passive migration of contaminants through soil. *Id.* at 887. Although the Ninth Circuit rejected a bright line distinction between active and passive conduct in determining whether a disposal had occurred, it concluded that the terms used to describe a disposal—"discharge, deposit, injection, dumping, spilling, leaking, or placing"—did not describe the sort of conduct at issue in the case. Indeed, the broader definition of a "release" under CERCLA includes the some of the same terms as used in defining a disposal, but a release also includes more passive terms such as leaching and escaping, terms not included in the definition of a disposal.

The Ninth Circuit's 2014 Decision in *Center for Community Action*

Just a few weeks after the District Court's ruling in *Pakootas*, on August 20, 2014, the Ninth Circuit issued a decision in *Center for Community Action and Environmental Justice v. BNSF Railway Co.*, 764 F.3d 1019 (9th Cir. 2014) (*CCAEJ*), concluding that a disposal under RCRA:

> …occurs where the solid waste is *first* placed 'into or on any land or water' and is *thereafter* 'emitted into the air.' *Id.* at 1024.

The Ninth Circuit went on to hold that "'[E]mitting' solid waste into the air does not constitute 'disposal' under RCRA."

In *CCAEJ*, plaintiffs sued two railroads under RCRA's citizen suit provisions, 42 U.S.C. § 6972(a)(1), claiming that the railroads allowed diesel exhaust containing diesel particulate matter, a toxic air contaminant, to be discharged from rail yards into the air, from which it fell onto nearby ground and water, was re-entrained into the air, and inhaled by people. The citizen suit provisions authorize any person to sue:

> …any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6972(a)(1)(B).

The court analyzed whether the emission of diesel particulate matter could constitute "disposal" of solid waste under RCRA, and after analyzing both the plain meaning and history of the statute, concluded that it could not. Under RCRA's definition, disposal is limited to a particular conduct—the placing of hazardous waste "into or on any land or water," with a particular result—uch that the hazardous waste or a constituent thereof may enter the environment, be emitted into the air, or be discharged into water. Here, the railroads first emitted waste into the air, and only thereafter did it travel onto land and water. Thus, the court concluded that RCRA did not provide a private right of action with respect to defendants' emissions.

The District Court's Recent Decision

Following the Ninth Circuit's decision in *CCAEJ*, defendant Teck Cominco Metals brought a motion for reconsideration of the *Pakootas* court's decision, arguing that the Ninth Circuit's holding on the meaning of "disposal" required a ruling in Teck's favor. The District Court disagreed, distinguishing *CCAEJ* based on the Ninth Circuit's interpretation of the definition of "disposal" in the context of RCRA, as opposed to how it should be interpreted under CERCLA, under which a disposal must be at a facility to be actionable. The District Court appeared to reject the Ninth Circuit's holding that a "disposal" must first be placed into land or water and then enter the environment, instead finding that:

> …[t]his disposal occurred in the 'first instance' into or on land or water of the [Upper Columbia River] and therefore, does not run afoul of RCRA's definition of 'disposal' as interpreted by the Ninth Circuit in *CCAEJ*.

Conclusion and Implications

The District Court in *Pakootas* acknowledged that:

> …[i]n over 30 years of CERCLA jurisprudence, no court has impliedly or expressly addressed the issue of whether aerial emissions leading to disposal of hazardous substances 'into or on any land or water' are actionable under CERCLA.

Recognizing "substantial ground for a difference of opinion" on the "controlling issue of law" following *CCAEJ*, the District Court certified its order for an immediate interlocutory appeal to the Ninth Circuit under 28 U.S.C. § 1292(b). Given the potentially broad impact of the District Court's order, an interlocutory appeal will almost certainly follow, and any decision by the Ninth Circuit will be closely watched. (Kathryn Horning)

RECENT STATE DECISIONS

NEW JERSEY SUPREME COURT FINDS NO STATUTE OF LIMITATIONS FOR CONTRIBUTION CLAIMS UNDER THE NEW JERSEY SPILL ACT

Morristown Associates v. Grant Oil Company, Case Nos. A-38-13 (073248) (N.J. Jan. 26, 2015).

The New Jersey Supreme Court has issued an important and highly anticipated decision on a party's potential defenses against private contribution claims under state law for site contamination. The New Jersey Supreme Court confronted head-on whether a general six-year statute of limitations applies to private claims for contribution for remediation costs brought under the New Jersey Spill Compensation and Control Act (Spill Act). In overturning the lower courts' decisions, New Jersey's highest court unanimously answered this inquiry in the negative and, in doing so, re-established a "decades-long understanding" that "no limitations period restricts contribution claims against responsible parties."

Background

In 1979, plaintiff Morristown Associates purchased a shopping center in Morristown, New Jersey. Plaza Cleaners was among the tenants. At some point prior to 1978, the owner of Plaza Cleaners installed a steam boiler and an Underground Storage Tank (UST) to house fuel for the boiler. The owner sold his cleaning business to Edward and Amy Hsi, who owned the business until 1998, when it was sold to Byung Lee.

In 1999, a UST for a nearby grocery store within the shopping center (not associated with Plaza Cleaners) was discovered to have a leak, and was removed. In 2003, fuel oil contamination was discovered near the Plaza Cleaners UST. The subsequent investigation revealed that, although the UST itself was intact, the fill and vent pipes had deteriorated years prior, as early as 1988. Plaintiff's expert concluded that, since that time, each time the UST was filled, oil would leak from the deteriorated pipes, allowing fuel oil to seep in the surrounding ground.

Plaintiff took steps to remediate the contamination, and, in 2006, filed a complaint seeking contribution against one of fuel suppliers under the Spill Act. Plaintiff subsequently amended its complaint to include contribution claims against the Hsis and other heating oil suppliers; Lee and Plaza Cleaners were later joined as third-party defendants.

The Proceedings Below

In response to motions for summary judgment on statute of limitations, the trial court held that the general six-year statute of limitations for injury to real property applied to private claims for contribution under the Spill Act. After conducting a hearing, the trial court further determined that tolling the statute of limitations would be inappropriate, finding that plaintiff should have discovered its claims when the other leaking UST on the property was uncovered in 1999, and it was therefore unable to seek shelter behind the discovery rule enunciated in the *Lopez v. Swyer*, 62 N.J. 267 (1973). Accordingly, the trial court held the plaintiff's claims for damages arose more than six years prior and were time-barred.

On appeal, plaintiff argued that the trial court had erred by applying the general six-year statute of limitations to its Spill Act contribution claims. The Appellate Division rejected plaintiff's contention, finding no error in the trial court's application of the six-year limitations period. In a published decision, the explained that when, as was the case with the New Jersey Spill Act, a particular statute does not provide a specific limitations period, application of a general statutes of limitations is appropriate.

In reaching this conclusion, the court found that neither the 1994 New Jersey Appellate Division case, *Pitney Bowes, Inc. v. Baker Industries Inc.*, 277 N.J. Super. 484 (App.Div. 1994), which held that the ten-year statute of repose did not apply to bar a contribution action under the Spill Act, nor a 1999 unpublished decision that applied the *Pitney Bowes* rationale in concluding the inapplicability of a statute of limitations defense to Spill Act contribution claims, was controlling, and distinguished *Pitney Bowes*, differentiating the statute of repose from the statute of limitations before the court. The Appellate Division also pointed to federal courts' application of the six-year statute of limitations period to Spill Act contribution claims. The Appellate Division affirmed the trial court's holding and its application

of the general six-year statute of limitations. Plaintiff filed for certification, which the New Jersey Supreme Court granted.

The New Jersey Supreme Court's Decision

The New Jersey Supreme Court addressed the narrow issue of whether the Appellate Division's application of New Jersey's general six-year statute of limitations was appropriately applied to private contribution claims under the Spill Act. Although the Court agreed that, *if* a statute of limitations provision were applicable to Spill Act claims, it would be the general six-year limitations period, it declined to adopt the Appellate Division's ultimate conclusion. Rather, the Court explained that the question remained of "what import to give to the Legislature's silence" of whether a statute of limitations was intended to apply at all.

No Statute of Limitations Applies

Relying on principles of strict statutory construction and the plain text of the Spill Act, the Court identified its role as to discern the legislative purpose and intent of the Spill Act. The Court began its analysis by noting that the current language of the Spill Act itself expressly restricts the possible defenses available to contribution defendants to those of "an act or omission caused solely by war, sabotage, or God, or a combination thereof." The Court then concluded that, given this provision, it would be incorrect to conclude that the Spill Act was silent concerning the applicability of a limitations defense—that a statute of limitations defense was expressly *not* included. By comparison, the New Jersey Legislature *had* expressly included a statute of limitations in other provisions of the Spill Act. Thus, the Court found that the plain language of the statute and legislative intent provide support for a conclusion that no statute of limitations applies to contribution claims.

A 'Longstanding' View and *Amici* Briefs

The Court found further support for its interpretation through the "longstanding" view that the Spill Act is remedial legislation "designed to cast a wide net over those responsible for hazardous substances and their discharge on the land and waters of this state." This view was also promoted by 12 *amici curiae*, including the New Jersey Department of Environmental Protection, who all argued for reversal of the lower courts' decisions on statutory intent and policy grounds. Taking these considerations into account, the Court reasoned that the legislature could not have intended to allow the imposition of contribution liability on culpable dischargers to be frustrated by an unreferenced statute of limitations.

Legislative History Also Signals the Need to 'Remove Defenses to Strict Liability'

While the Court found the language of the Spill Act to be unambiguous, it nonetheless observed that the legislative history of the Spill Act also supported its construction, noting that the Spill Act had been amended to remove certain language which provided that specific persons "shall have available to him any defense authorized by common or statutory law."

Conclusion and Implications

The Court's ruling removes the prior uncertainties surrounding the possibility of a statute of limitations bar for private contribution claimants, and also eliminates the added layer of the discovery rule endorsed by the Appellate Division's ruling. The clear elimination of a statute of limitations will permit contribution plaintiffs more time to conduct investigations concerning other potentially responsible parties rather than rushing to file suit. On the other hand, potential contribution claimants may find it more difficult to prove liability for parties due to the passage of time (as evidence may be lost or destroyed over the years), and certain parties may simply no longer exist.

In addition, the Court's decision potentially creates a tension between cases brought under the federal Superfund statute (CERCLA) and cases brought under the largely similar Spill Act, insofar as CERCLA does have an express statute of limitations for contribution actions, whereas the Spill Act now clearly does not. Interestingly, this issue was not expressly addressed by the Court, notwithstanding the part it played in the Appellate Division's reasoning. Notably, however, the Court did invite the New Jersey Legislature to "fix any interpretive misunderstanding." It remains to be seen whether the legislature will let the statute lie, or will take steps to insert an express statute of limitations. For the present, however, it is clear that potentially responsible parties can no longer avoid contribution claims under the New Jersey Spill Act based on the passage of time.

(Stephanie Feingold, Drew Jordan, Duke McCall III)

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