ENVIRONMENTAL LITIGATION
AMERICAN BAR ASSOCIATION SECTION OF LITIGATION

Winter 2015, Vol. 26 No. 2

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Environmental Whistleblowers' Rights

By Allan Kanner – February 18, 2015

The law protects those who blow the whistle on potential or actual threats to the environment. Whistleblowers have a right to report environmental violations and to be free from retaliation for doing so. They may also be able to obtain money damages and other relief from those who violate environmental laws or retaliate against whistleblowers.

What Laws Protect Environmental Whistleblowers?
Seven major federal environmental laws have special provisions protecting corporate whistleblowers:

- the Clean Air Act (CAA), 42 U.S.C. § 7622
- the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622
- the Federal Water Pollution Control Act (FWPCA) (a.k.a. Clean Water Act), 33 U.S.C. § 1367
- the Energy Reorganization Act (ERA) (also encompassing the Atomic Energy Act), 42 U.S.C. § 5851
- the Resource Conservation and Recovery Act (RCRA) (also encompassing the Solid Waste Disposal Act (SWDA)), *id.* § 6901
- the Safe Drinking Water Act (SDWA), *id.* § 300j-9(i)
- the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (a.k.a. Superfund), *id.* § 9610

In addition, the False Claims Act offers environmental whistleblowers both a financial incentive to report wrongdoing in connection with federal contracts or other benefits and protection from retaliation for investigating and filing suit under the False Claims Act. 31 U.S.C. §§ 3729–3730.

A variety of federal laws protect the rights of whistleblowers in other fields that come into contact with the environmental sector. *See, e.g.*, 46 U.S.C. § 2114 (maritime whistleblower protection); 49 U.S.C. § 31105 (transportation safety); *id.* § 60129 (Pipeline Safety Improvement Act). Many states have also enacted laws to protect whistleblowers. In addition, environmental whistleblowers may be protected under other provisions of law, such as 42 U.S.C. § 1983, from retaliation for environmental whistleblowing if the conduct is protected by the First Amendment. *See, e.g.*, *Charvat v. E. Ohio Reg'l Wastewater Auth.*, 246 F.3d 607 (6th Cir. 2001). However, liability under section 1983 may be more difficult to establish than under whistleblower laws.

Environmental Whistleblower Statutes

> **Who is protected by federal environmental whistleblower laws?** Any employee (or, in certain circumstances, an employee's representative) who believes he or she has been discriminated against in retaliation for "blowing the whistle" on a safety problem or environmental violation, or for engaging in other activity protected under the whistleblower law, may file a complaint. Under certain provisions (the CAA, TSCA, SDWA, and ERA), an employee may have "any person" file a complaint on his or her behalf.

Almost any private sector or state, municipal, or federal employee can be protected.*See Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1156–58 (10th Cir. 2005) (whistleblower action against political subdivision); *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474 (3d Cir. 1993) (same). In addition, under certain environmental laws (CERCLA, SWDA, and FWPCA), "authorized representatives of employees," which might include union officials, unions, or attorneys authorized to represent employees, may be protected as well. *See Anderson*, 422 F.3d at 1175–82.

The ERA, SDWA, CAA, and TSCA prohibit discrimination based on the protected activity of an employee "or any person acting pursuant to a request of the employee," but the discrimination must be directed toward the employee, and under those laws it is the employee who may file a complaint.

What activity is protected? Employees participate in protected activity when they (1) report internally a violation of the environmental statutes, *see, e.g.*, ERA, 42 U.S.C. § 5851(a)(1)(A)&(B); *Passaic*, 992 F.2d at 478–79; (2) commence or are about to commence a proceeding for violation of federal environmental laws; (3) testify or are about to testify in any such proceeding; or (4) assist or participate in proceedings that may implicate violations of environmental regulations.

Are any employees excluded from federal whistleblower protections? Yes. The federal environmental whistleblower laws do not protect any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of federal environmental law.

What is illegal discrimination? The federal environmental statutes prohibit a wide range of retaliatory actions, including reprimands, termination, threats of discharge or layoff, demotion, salary reduction, denial of promotion, denial of benefits, refusal to hire or rehire, blacklisting, harassment, and any act that would dissuade a reasonable person from engaging in further protected activity.

What must a plaintiff prove to prevail? To prevail under any of the environmental statutes for unlawful discrimination, an employee must establish a prima facie case by showing the following:

1. The employee engaged in protected activity;
2. The employer knew of the protected activity;
3. The employee was subjected to adverse action by the employer; and
4. The employee has sufficient evidence to raise at least an inference that the protected activity was the likely reason for the employer's adverse action.

(Sometimes courts phrase it differently or break the prima facie case into five rather than four elements, but the basic rule is the same. *Compare, e.g.*, *Anderson*, 422 F.3d at 1178 (five-factor test), *with, e.g.*, *Passaic*, 992 F.2d at 480–81 (test parsed as four factors).

What is the employer's burden of production? If an employee successfully establishes a prima facie case that the protected activity was the likely reason for the employer's adverse action, an employer may rebut the employee's prima facie case by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory, and non-pretextual reason for its action.

Where evidence of a "dual motive" exists, i.e., where reasons other than retaliation may also account for the employee's termination, the employer has the burden to prove that it would have terminated the employee even if the employee had not engaged in the protected conduct. *See, e.g.*, *Passaic*, 992 F.2d at 480–81

(CWA);*Consol. Edison Co. v. Donovan*, 673 F.2d 61, 62–63 (2d Cir. 1982) (ERA). The burden of proof is sometimes said to be a preponderance of the evidence, *seePassaic*, 992 F.2d at 481 (applying the CWA and general principles from non-environmental cases), and is sometimes clear and convincing evidence, for instance under the ERA, *see* 42 U.S.C. § 5851(b)(3)(B) & (D).

What can a prevailing plaintiff recover? A prevailing employee will be made whole, i.e., will be returned to the same position in which he or she would have been absent the retaliation. Depending on the federal environmental law at issue, a prevailing employee may be entitled to reinstatement, back pay with interest for lost wages, front pay, compensatory damages (for emotional distress and loss of professional reputation), restoration of seniority, sick leave, and other "privileges of employment," and litigation costs, which may include attorney fees, expert-witness fees, and costs. In addition, some of the environmental whistleblower-retaliation statutes authorize exemplary or punitive damages "where appropriate" (under the TSCA and the SDWA) and other "affirmative relief" (such as requiring a letter of apology and formal posting of the decision).

Where should a complaint be filed? The federal environmental whistleblower laws are administered by the U.S. Department of Labor (DOL). Complaints must be filed in writing within 30 days of the date on which the discriminatory action was made and communicated to the employee (except for ERA complaints, which have a longer filing period), and should be mailed to:

> U.S. Department of Labor
> Office of the Assistant Secretary
> Occupational Safety and Health Administration – Room S2315
> 200 Constitution Avenue
> Washington, DC 20210
> 202-693-2000

The Secretary of Labor promulgated regulations imposing additional requirements and procedures for handling whistleblower complaints by employees under all seven of the federal environmental statutes named above. *See* 29 C.F.R. §§ 24.100–24.115.

How soon must a complaint be filed? A complaint under six of the environmental statutes just discussed must be filed with the DOL in writing within 30 days of the time an employee learns that he or she will be, or has been, subjected to discrimination, harassment, or retaliation. For whistleblower actions under the ERA, complaints must be filed within 180 days.

As noted at the outset, many states have also enacted laws to protect whistleblowers. Many of these laws have a longer statute of limitations and other benefits unavailable under federal law.

False Claims Act—Protection for *Qui Tam* Whistleblowers

What conduct is covered by the False Claims Act? In addition to the environmental statutes just discussed, the False Claims Act (FCA), 31 U.S.C. §§ 3729–3730, also offers protection to environmental whistleblowers. The FCA is an important litigation tool to combat fraud committed against the federal government; its broad reach includes liability for misrepresenting compliance with the obligations of a government contract and "reverse" false claims to avoid the payment of fines or other financial obligations to

the government. *Id.* § 3729(a)(2) & (a)(7); *see id.* § 3279(c) (defining "claim"); *see also, e.g.*, Michael Holt & Gregory Klass, "Implied Certification under the False Claims Act," 41 *Pub. Cont. L.J.* 1, 7 (2011) (discussing ways in which claims may be false or fraudulent); *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 385 (1st Cir. 2011) (same). The FCA imposes civil penalties and treble damages on any person who violates the act, among other remedies.

Who may bring an FCA suit? The citizen suit (*qui tam*) provisions of the FCA empower private individuals to bring an action on behalf of the federal government against those who violate the act. 31 U.S.C. § 3730(b)(1). If the plaintiff ("relator") succeeds, he or she is entitled to a portion of the proceeds of the suit. *See id.*§ 3730(d). The purpose of this provision is to encourage private individuals who are aware of fraud being perpetrated against the government to disclose that information.

What must an environmental whistleblower prove to prevail on an FCA claim?To state a claim under the FCA, a plaintiff must allege (1) a false statement or fraudulent course of conduct; (2) made or carried out knowingly, *see id.* § 3729(b)(1)(A)(i)–(iii) & B; (3) that was material, *id.* § 3729(b)(4); and (4) that is presented to the federal government, *e.g.*, *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 (5th Cir. 2010). In addition, only the attorney general or an "original source" of the information may bring suit under the FCA. 31 U.S.C. § 3730(e)(4); *see Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467 (2007),*possible abrogation on other grounds by amendment to* 31 U.S.C. § 3730(e)(4)*raised by Ping Chen ex rel. U.S. v. EMSL Analytical, Inc.*, 966 F. Supp. 2d 282, 293 (S.D.N.Y. 2013). "Original source" means an individual who either, before the information is publicly disclosed, voluntarily disclosed the information to the government or has independent knowledge that "materially adds" to the allegations. 31 U.S.C. § 3730(e)(4)(B).

The FCA offers remedies to environmental whistleblowers in cases in which a company's operations involve contracts with or other benefits from the federal government. *See, e.g.*, *Simoneaux v. E.I. du Pont de Nemours & Co.*, No. Civ. 12-219-SDD-SCR, 2014 WL 4352185, at *1 (M.D. La. Sept. 2, 2014); *Abbott v. BP Exploration & Prod. Inc.*, 781 F. Supp. 2d 453, 461–62 (S.D. Tex. 2011); *see also, e.g.*, *Rockwell*, 549 U.S. 457. For example, if a company is operating under an oil or gas lease and discharges oil or other hazardous substances into the environment and fails to report it as required, or makes a material misrepresentation in a federal oil- or gas-drilling permit application, that company may be liable under the FCA. *See Abbott*, 781 F. Supp. 2d at 462; Jennifer Machlin & Tomme Young, *Managing Environmental Risk: Real Estate and Business Transactions* § 20:29 (2014) (failure to report a discharge or emission).

How does the FCA protect whistleblowers? The FCA contains an anti-retaliation provision, which protects an employee from being "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer" because the employee investigated, reported, or sought to stop an employer from engaging in practices that defraud the federal government. 31 U.S.C. § 3730(h)(1).

What must a plaintiff prove in an FCA retaliation suit? To prove that an employer retaliated against an employee in violation of the FCA, an employee must demonstrate that (1) he or she engaged in protected activity, i.e., opposed the employer's attempt to get a false or fraudulent claim paid or approved by the federal government or conducted an investigation that reasonably could lead to a viable FCA action; (2) the employer had knowledge of the protected activity; (3) the employee suffered an adverse action that was motivated, at least in part, by the employee's engaging in protected activity. The FCA protects "[a]ny employee, contractor, or agent[,]" not just employees, but only "employers" may be held liable for

retaliation. *Id.* § 3730(h); *see, e.g.*, *United States ex rel. Golden v. Ark. Game & Fish Comm'n*, 333 F.3d 867, 870–71 (8th Cir. 2003) (only employers may be held liable); *United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 322 F.3d 738, 740 (D.C. Cir. 2003) (same).

What remedies are available in retaliation suits? Remedies for retaliation against whistleblowing employees include reinstatement and restoration of seniority status, double back pay with interest, compensatory damages, and costs and attorney fees. 33 U.S.C. § 3730(h)(2). A civil action seeking damages for retaliation under the FCA must be brought within three years after the retaliation occurred. *Id.*§ 3730(h)(3).

What limitations does the FCA impose? The FCA does not apply to some matters, such as claims made under the Internal Revenue Code, certain claims brought by members of the armed forces, certain suits brought against federal officials if the government already possessed the information at issue, and information sourced from civil proceedings in which the government was already a party. *Id.* §§ 3729(d), 3730(e).

Most courts hold that federal employees may serve as FCA relators. *See, e.g.*, *Little v. Shell Exploration & Prod. Co.*, 690 F.3d 282, 286–92 (5th Cir. 2012) (collecting cases); *United States ex rel. Holmes v. Consumer Ins. Grp.*, 318 F.3d 1199, 1208 (10th Cir. 2003) (en banc); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991). Other laws protect the rights of federal-employee whistleblowers as well. *See, e.g.*, 5 U.S.C. § 2302. However, FCA *qui tam* and retaliation claims may not be brought by federal employees against the U.S. government nor by state employees against the state or state entities due, among other considerations, to sovereign immunity. *See, e.g.*, *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 142–43 (4th Cir. 2014);*United States v. Tex. Tech Univ.*, 171 F.3d 279 (5th Cir. 1999). By contrast, with respect to state officials, the better view is that they are not entitled to good-faith ("qualified") immunity from retaliation suits brought against them in their individual capacities under the FCA. *See Samuel v. Holmes*, 138 F.3d 173, 178 (5th Cir. 1998); *but see, e.g.*, *Kaminski v. Teledyne Indus., Inc.*, 121 F.3d 708 (6th Cir. 1997) (unpublished table disposition) (suggesting in passing that government officials could raise qualified-immunity defenses).

Conclusion

Overall, protections in federal law for environmental whistleblowers are robust. If an employee is concerned about potential or actual threats to the environment, he or she has a variety of options to consider, each with its own set of protections.

Keywords: environmental litigation, whistleblower, False Claims Act, Clean Air Act, Toxic Substances Control Act

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Fracking Debate: The Importance of Pre-Drill Water-Quality Testing

By Teodoro Bosquez IV, Daniel Carmeli, Jeremy Esterkin, Mae Kieng Hau, Kenneth Komoroski, Camarin Madigan, and Matthew Sepp – February 18, 2015

Pre-drill water-quality testing has emerged as a critical topic related to the use of hydraulic fracturing (fracking) in oil and gas operations in the United States. The oil and natural gas industry appropriately points out that there are no documented cases of groundwater contamination anywhere in the United States from hydraulic fracturing since the practice began several decades ago. Environmentalists allege concerns with the practice, nonetheless, in response to the increase of development of unconventional shale resources in the United States and elsewhere.

Pre-drill testing involves the collection of water (typically shallow groundwater, but sometimes from springs or surface water) data near an oil and natural gas well pad prior to commencing drilling activities. This practice enables oil and gas operators to establish baseline water-quality conditions prior to drilling, well completion, and production activities. Further, pre-drill surveys can be used to document other important information such as the condition of on-site water sources, including water-well integrity or construction.

Despite the fierce public debate on the merits of hydraulic fracturing, the availability of water-quality baseline data is invaluable for oil and gas operators, the public, and regulatory officials. The data can play a crucial role in responding to environmental challenges by the public or claims that an operator affected water supplies brought by regulatory agencies.

The data can also prevent potential litigation altogether and otherwise help establish good community and public relations by providing important facts and information. In fact, one of the most common benefits of pre-drill testing is to inform the landowner, often for the first time, as to the quality of the private water supply. The data can often identify issues unrelated to drilling, such as septic system leaks or natural contaminants that may have been present in untested water supplies for years.

That said, pre-drill testing regulations vary considerably from state to state. Some states have elaborate notification and sampling requirements, distance specifications, testing methods, and legal ramifications for noncompliance or inaction. Others have no regulations, forcing operators to independently weigh the merits of undertaking pre-drill testing or determine the appropriate procedures.

No matter the nature of regulation, pre-drill testing can mean the difference between a successful operation and one resulting in expensive, onerous litigation that could have been avoided. Pre-drill testing is not just an administrative checkbox; rather, it potentially can provide an operator with a shield from liability or leave it vulnerable and exposed.

Overview of Pre-Drill Testing Regulations: Duties

In general, for states that have them, pre-drill testing regulations share two common components: duties and legal

consequences. The specific details inevitably will vary from state to state, but the same salient considerations are common to all.

Pre-drill testing requirement. Operators may be required to perform pre-drill testing unconditionally, only upon a landowner's request, or not at all.

Covered water supplies. Only water supplies within a certain radius of the well site (generally 1,500–2,500 feet) are implicated. Water supplies commonly include both groundwater wells and surface springs. Some states apply such testing requirements to all water supplies while others limit regulation to water supplies serving particular uses, such as drinking and irrigation.

Methods and scope. Operators must implement state-approved analytical methods. The scope of testing presents a significant concern and potential cost; some states list a limited number of commonly tested parameters while others require advanced testing such as isotopic analysis. Either way, testing only for chlorides (a.k.a. salt) should be sufficient because the presence of chlorides alone can establish whether drilling and well-completion activities have affected water supplies. Chloride has been scientifically determined to be the ultimate "tracer" for fossil-fuel formations that resulted from receding oceans. That said, operators must be cognizant of the state-specific requirements to avoid undermining or invalidating their data. Additionally, operators may need to test anywhere from a single water supply to *all* water supplies within the statutory radius. The number of samples required per water supply also varies.

Landowner notification. Operators generally must notify local landowners of planned drilling activities. In some states, the regulations require operators to inform landowners of their pre-drill testing rights while others merely direct operators to forward well-site-related materials such as permit applications. That said, in the absence of a specific requirement to notify and share pre-drill testing data, operators are advised to consider the value of engaging and maintaining an open dialogue with nearby landowners.

Right of refusal/entry. Landowners generally are entitled to refuse testing in states that do not require pre-drill sampling. Doing so, however, waives any presumptive liability that may be otherwise available under the law. Additionally, in states that require testing, operators may seek a court order granting them entry.

Post-drill testing requirement. In some states, the regulations require operators to perform post-drill testing, generally at all locations that underwent pre-drill testing. In other states, operators need not perform post-drill testing unless directed to by the government. Again, in states where post-drill testing is not required, operators should still consider the value of comparative post-drill data for legal and nonlegal purposes, such as community relations and public education.

Overview of Pre-Drill Testing Regulations: Legal Consequences

Presumption of pollution. In some states, operators are presumed to have caused any pollution identified in water supplies within a certain time frame (generally between 6 and 30 months) after and distance (generally between 1,500 and 2,500 feet) from drilling activities. Likewise, post-drill testing requirements achieve a similar result, effectively shifting the burden onto operators to produce evidence demonstrating that they have not caused any pollution.

Rebutting the presumption. Where applicable, operators may rebut the presumption by proving that pollution preexisted drilling activities, was caused by something else, occurred outside the statutory time frame, was alleged for a water supply outside the statutory radius, or was alleged by a landowner who had refused pre-drilling testing.

Emergency or temporary water replacement. Most states require operators to provide emergency or temporary water-supply replacements to landowners within the statutory distance whose water supplies were found by agency investigation, or even just alleged by the landowner, to be polluted within the statutory time frame.

Quality of permanent water replacement. Where a final order finds that a water supply was polluted, the operator held responsible must permanently replace or restore the water supply (or reimburse the landowner for the cost thereof). The replaced water supplies may need to be of a quality and quantity adequate for the landowner's use, comparable to pre-drilling water, or in compliance with drinking water standards.

Comparison of State Regulatory Models

The variability in pre-drill testing regulations can be understood by grouping and comparing states' hydraulic-fracturing regulations and presence.

Category 1: Texas, Oklahoma, Louisiana. Generally, states with well-established oil and gas industries do not require pre-drill sampling. These states, including Texas, Oklahoma, and Louisiana, have regulated fracking operations for decades. These state rules have addressed pollution concerns since well before the past few years, during which time pre-drill sampling requirements became popular. From their perspective, there is no need to add to or abandon trusted approaches that have stood the test of time.

Category 2: Pennsylvania/West Virginia vs. Colorado/Wyoming. The significant growth of oil and natural gas development, including larger water-volume fracking practices, in a number of states required them to reevaluate and revise existing regulations. The regulatory responses to the shale revolution have varied as states have developed regulations that reflect a balancing act between industry and economic interests on the one side and public safety and perceptions on the other.

The Pennsylvania/West Virginia Model—Presumptive Liability: Both Pennsylvania and West Virginia require operators to first notify local landowners of the right and advantage of pre-drill testing and then perform the testing if requested. Under Pennsylvania law, operators are presumed responsible for polluted water supplies within 2,500 feet of a well site and occurring within 12 months of completion, drilling, stimulation, or alteration. West Virginia's regulations impose the same presumption, but with distance and timing thresholds of 1,500 feet and 6 months, respectively. Both presumptions may be rebutted with evidence of preexisting or alternative causes, that the distance or timing thresholds were not met, or that the landowner refused to allow the operator to take a pre-drill sample.

The Colorado/Wyoming Model—Post-drill Testing: The Colorado and Wyoming regulations are similar to one another. Unlike Pennsylvania and West Virginia, these states do not provide for any presumption of pollution. Instead, they require operators to perform pre-drill testing and two rounds of post-drill testing at four locations within a half-mile of the well.

Both models represent sensible moderate approaches that mitigate the inherent challenges of proving causation while limiting prejudice to operators.

Category 3: California/Ohio vs. North Carolina/Illinois. Although the recent energy boom has spread to most states with significant oil and gas reserves, some states remain largely untapped with the potential for expanded development.

California/Ohio Model: California's recent fracking legislation and proposed regulations require operators to provide notice of sampling rights to landowners within 1,500 feet of the vertical wellbore. The landowners can then request pre- and post-drilling sampling. Under Ohio's limited pre-drill testing regulations, operators must perform pre-drill testing of water supplies within 300 feet of the well site in urbanized areas and submit any other samples of water supplies within 1,500 feet that they choose to take. Neither California nor Ohio imposes any type of presumption of pollution.

North Carolina/Illinois Model: North Carolina and Illinois have thrown the kitchen sink at operators. Both require pre-drill and post-drill sampling (five rounds in North Carolina and three rounds in Illinois) of *all* water supplies (three samples per location in Illinois) within the statutory radius (half-mile in North Carolina and 1,500 feet in Illinois). Both states also tack on a rebuttable presumption of contamination.

California and Ohio require sampling only under limited circumstances and impose no presumption of fault on operators. By contrast, North Carolina and Illinois have been far more aggressive. With undeveloped or even nonexisting hydraulic fracturing operations, these states are regulating in a relative vacuum. Imposing a presumption on top of several rounds of area-wide pre- and post-drilling sampling is an aggressive policy made possible, in part, by the absence of a strong industry presence in the states. Drilling in those states may be slow to take shape, as operators may be hesitant to enter such unfavorable regulatory environments.

Practical Considerations

The significant growth of fracking in the United States has resulted in a spirited debate both in the public sphere as well as in courtrooms and administrative settings. In all these arenas, reliable data are invaluable to prove or disprove that oil and natural gas operations have impacted the environment.

Baseline water-quality data can play a significant role in defending groundwater-contamination cases. Notably, in states that require pre-drill testing and impose liability presumptions in the absence of baseline data, failure to test can be a fatal blow. Even where pre-drill testing is not required, it dramatically reduces the need to support a defense with highly technical arguments that could easily complicate the issues, confuse the fact finder, and increase costs.

More importantly, baseline data can help prevent government investigations or enforcement actions altogether. State environmental agencies are statutorily mandated to investigate and assess allegations of environmental impacts. It is far more difficult to alleviate regulators' groundwater-contamination concerns solely with post-drilling data. After all, how can an operator establish that that water quality has not been impacted by its operations if it cannot show what the water was like beforehand?

In the absence of pre-drill data, operators may need to review regional groundwater studies and topographic/geologic maps to identify potentially applicable background water quality data. The data may be available in databases or other resources maintained by the U.S. Geological Survey, state geological surveys, or the U.S. Department of Energy. Data from these resources, however, may not be site-specific or contemporaneous with the oil and gas operations contested in the dispute, and may therefore provide limited practical value to operators.

Pre- and post-drilling testing can also prevent citizen suits and promote public relations. By collecting and sharing the data, operators can alleviate landowner concerns that fracking operations may have contaminated their water supplies. The data can also serve to clear up misunderstandings or misconceptions that are commonly premised on speculation. Further, operators can enhance their reputation as responsible and transparent by showcasing their willingness to share such information. For those regions serving as the front lines in the battle over fracking, it is difficult to overstate the value of establishing a good rapport with the public.

Landowners also benefit from sampling by obtaining a better understanding of the quality of their water supplies. Clean results can provide comfort that water used to drink, cook, and clean is safe. Alternatively, samples showing contamination can clear the way through an otherwise intimidating legal process. Certainly, without the baseline water-quality data, landowners and their counsel may face significant challenges proving claims that water supplies were impacted by oil and gas operations.

In light of ongoing litigation and public debate over the alleged impacts of fracking to groundwater sources, understanding the legal requirements and significance of pre-drill testing is critical.

Keywords: environmental litigation, fracking, hydraulic fracturing, monitoring, testing, sampling, pre-drilling, regulations

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Mass Tort Claims Administration and Handling: Lessons from *Deepwater Horizon*

By Peter Knight and Alex Judd – February 18, 2015

In mass-casualty and toxic-tort litigation, an effective means of providing efficient compensation to victims can benefit all stakeholders. Claimants receive prompt payment for lost property or business expenses, courts are spared from individual litigants crowding their dockets, and responsible parties (RPs) can begin to cap their exposure and liability risk. A fast and fair claims process can provide an alternative to costly, protracted, and uncertain tort litigation. The 2010 *Deepwater Horizon* spill in the Gulf of Mexico was a good candidate for such a process. Thousands of businesses and individuals along the gulf were seriously affected by the spill, and both British Petroleum (BP) and the Plaintiffs' Steering Committee (PSC) moved quickly to get a claims process in place.

To date, the *Deepwater Horizon* spill claims process has resulted in thousands of payments by BP, the RP for the spill under the Oil Pollution Act (OPA), totaling billions of dollars; however, despite voluntarily initiating a claims process and negotiating its terms, BP now vigorously disputes the program's implementation. The claims-handling process, including who qualifies to receive payment and the standard for recovery, has been the subject of substantial litigation—the very disputes the process was intended to avoid. The courts that have considered BP's requests for intervention have not provided any relief to the RP, based in large part on the fact that the claims process was one of BP's own making. Over BP's repeated objections, *Deepwater Horizon* claims continue to be processed. Although the scale of the *Deepwater Horizon* claims process provides an extreme case, it offers important considerations for parties managing claims following an oil spill or other mass casualty.

Shortly after the April 2010 *Deepwater Horizon* oil spill and prior to the initiation of claims-based litigation, BP established the Gulf Coast Claims Facility (GCCF). BP selected Kenneth Feinberg, the architect and administrator of the September 11 fund, among other large, high-profile mass-tort settlements, to design, implement, and administer the GCCF. The process went into immediate effect, and for 16 months, Feinberg processed over one million claims and authorized payments totaling about $6.2 billion to over 220,000 individual and business claimants. Despite the thousands of claims Feinberg processed, costing BP billions of dollars, the PSC, believing Feinberg's administration was biased in favor of the RP, successfully challenged his neutrality, and on March 2, 2011, Judge Carl Barbier determined that the GCCF and Feinberg "are not completely 'neutral' or independent from BP. For example, Mr. Feinberg was appointed by BP, without input from opposing claimants or the [PSC], and without an order from the Court."

Toward the end of Feinberg's tenure, in February 2011, settlement negotiations between BP and the PSC began in earnest for the proposed economic and property damages settlement. Unlike the GCCF, the settlement was placed under the court's direct supervision and ongoing jurisdiction. This was a fundamental structural and functional difference. On December 21, 2012, Judge Barbier issued an order that certified the economic and property settlement class and, at both parties' urging, granted approval of the economic and property damages settlement agreement, which had been negotiated by BP and the PSC. Consideration between the parties was stated simply: In exchange for the remedies provided to the claimants, BP would obtain a broad classwide release as well as a signed individual release from each claimant that accepts a payment. In this way, BP would begin to resolve its staggering potential liability for certain property and economic damages resulting from the spill. However, the order noted that

"[a]n unusual feature of the Settlement Agreement [ ] is that class members [were] able to submit claims and receive payments prior to the Court's grant of final approval, provided that they sign[ed] an individual release." In addition, whereas the seafood compensation program was capped at $2.3 billion, there was no cap on the amounts that could be paid under the settlement agreement.

The claims process soon moved from the informal precertification process administered by Feinberg to the district court's supervision under a new claims administrator. On March 8, 2012, at the parties' request, the court entered an order creating a process to facilitate the transition from the GCCF to the court-supervised settlement program envisioned by the settlement. As part of the settlement agreement, the PSC negotiated Feinberg's removal as claims administrator. The court-supervised settlement program commenced on June 4, 2012, headed by claims administrator Patrick Juneau, who previously served as the mediator in over 2,000 cases and as a special master or claims administrator in various federal and state court cases. Prior to his appointment, Juneau was vetted and approved by both BP and the PSC. Under his administration, as of December 2014, BP has made more than 73,000 claim payments to over 54,000 unique claimants totaling over $4.3 billion, in addition to payments made under Feinberg's administration. With no cap on the settlement fund and limited rights of appeal, BP is required to pay all claims that Juneau deems eligible.

The settlement agreement outlines the basic process for making claims. Economic and property settlement class members must submit claims forms to participate in the settlement program. For business economic loss claims, claimants must include information about the compensation period and a benchmark period ranging from 2007 to 2009 as well as certain monthly and annual profit-and-loss statements. Additional documentation may be required depending on the type of business and certain causation provisions, as discussed below. If an Economic and Property Settlement Class member submits a claim and qualifies for a settlement program, prior to receiving any payment, that class member must execute an individual release, which provides a "final, complete, and exclusive agreement and understanding" between that class member and BP. However, despite negotiating and implementing a clear and consistent policy, BP has raised a number of objections.

Juneau's interpretation of the settlement agreement and his administration of the claims process have been the source of much litigation and debate, and despite BP's initial approval of Juneau and the terms of the agreement, the RP is now contesting critical aspects of the claims process, most significantly its treatment of causation. The settlement administrator's interpretation of the causation element is best exemplified by a policy statement issued on October 10, 2012, and approved by the district court on April 9, 2013. The policy statement was developed to answer questions relating to causation that arose after the settlement agreement was agreed to. Again, BP provided input on and agreed to the statement, which is embodied in Exhibit 4B of the settlement agreement. The section titled "Causation Requirements for Business Economic Loss Claims" describes four geographic zones, several types of businesses, formulae for presenting economic losses, and various presumptions regarding causation that apply to specific combinations of those criteria. The policy statement also describes Juneau's very limited role in determining issues of causation: "The Settlement Agreement does not contemplate that the Claims Administrator will undertake additional analysis of causation issues beyond those criteria that are specifically set out in the Settlement Agreement." While this formulaic approach was meant to limit disputes, it has proven contentious.

BP appealed directly to the Fifth Circuit and also sought an injunction to prevent additional claims from being processed. BP claimed that it never intended to do away with the causation requirement, citing a series of examples

involving claimants whose damages were extremely attenuated, if even tangentially related to the *Deepwater Horizon* spill. On March 3, 2014, the Fifth Circuit ruled 2–1 in *In re Deepwater Horizon*, 744 F. 3d 370 (5th Cir. 2014), to uphold Judge Barbier's judgment that the settlement BP agreed to in 2012 did not require businesses to present direct evidence of causation tying their losses to the oil spill. BP filed a petition for an en bancrehearing before a full panel of the Fifth Circuit, arguing that such an interpretation "effectively permit[s] the expansion of class membership during the claims-processing stage, resulting in awards to claimants whose injuries lack any causal nexus to the defendant's conduct."

On May 19, 2014, by an 8–5 vote, the Fifth Circuit denied BP's request for an en bancrehearing to review Judge Barbier's decision that the settlement BP agreed to in 2012 did not require businesses to present direct evidence of causation tying their losses to the oil spill. In its denial, the court specifically addressed Exhibit 4B, which discusses the causation factor. According to the Fifth Circuit, the policy statement was developed to address the situation where a claimant meets every evidentiary standard in Exhibit 4B but lacks an actual causal nexus to the oil spill. The Fifth Circuit concluded that the causation element still exists but is "under the specific criteria and formulae that BP and Class Counsel agreed would be utilized for that purpose." In other words, causation is established by certain factors set out in Exhibit 4B that the parties agreed were a sufficient, albeit indirect, way to satisfy the goal of connecting a claim to the *Deepwater Horizon* spill. But once causation is established through the formula, the policy statement provides that "the Claims Administrator will not be concerned with the possibility that a particular claimed injury might have been caused in whole or part by other events."

The Fifth Circuit articulated a basis for BP to adopt the policy statement in the first place. "The parties did not reject the need to establish a [causal] connection. Instead, they agreed to a means for doing so that sufficiently satisfied each party's litigation interests." In other words, the court read into BP's accedence to the lower causation standard a priority on capping its exposure and avoiding protracted litigation or disputes over individual claims.

In a May 21, 2014, press release, BP said that the Fifth Circuit ruling was "erroneous" and that it would seek review by the Supreme Court. In its press release, BP claimed that "[n]o company would agree to pay for losses that it did not cause, and BP certainly did not when it entered into this settlement." In addition, BP ran full-page advertisements in major newspapers. The ads contained the tag line "Would you pay these claims" and detailed such claims awards as $173,000 to an adult escort service and $8 million to a celebrity chef. On June 27, 2014, BP took additional legal action and filed a motion in the district court for restitution, plus interest, for those claimants who have been overpaid, totaling 793 claims. BP provided four specific examples of erroneous payments, with estimated overpayments ranging from $2 million to $14 million. On September 24, 2014, Judge Barbier denied BP's motion for restitution, which BP appealed to the Fifth Circuit on October 7, 2014. As of the date of this publication, the Fifth Circuit has not yet issued a decision on BP's appeal.

On August 1, 2014, BP filed a formal petition to the Supreme Court appealing the Fifth Circuit's May 19, 2014, ruling on the causation element. In its petition, BP argued that four other appellate courts—the Second, Seventh, Eighth, and D.C. Circuits—require a direct link between damages and payment, and only one other appellate court, the Third Circuit, has, like the Fifth Circuit, allowed claims to proceed in the absence of direct causation. On December 8, the U.S. Supreme Court, without comment, denied BP's petition. The Court's decision means that *Deepwater Horizon* claims will continue to be processed. Furthermore, Juneau's interpretation of the Settlement Agreement and his handling of the claims process have, in effect, been validated.

BP is fighting the claims-handling process on other fronts as well. The company recently filed a motion seeking the removal of Juneau as claims administrator of the court-supervised settlement program, alleging a previously undisclosed conflict of interest. According to BP, "[r]ecently disclosed evidence reveals that as counsel for the State of Louisiana, Mr. Juneau advocated vigorously on behalf of individual and business claimants seeking compensation from BP for alleged spill-related injuries." A September 2, 2014, memorandum issued by BP in support of its motion to remove the claims administrator alleged that "Mr. Juneau also did not implement at the outset the necessary systems to prevent and detect the payment of fraudulent and potentially fraudulent claims." On November 10, 2014, Judge Barbier denied BP's motion. BP subsequently appealed Judge Barbier's decision to the Fifth Circuit. Oral arguments have been calendared for February 3, 2015.

A process intended to control costs and limit exposure has resulted in an unintended surplus of both. Despite the issues that have arisen in the *Deepwater Horizon* case, claims handing will continue to be an integral part of resolving mass casualties. These incidents, and particularly oil spills, can result in hundreds, if not thousands, of individual claims from unique claimants. Having a tool to address potential litigants' claims early in the case can benefit both plaintiffs and defendants alike. The claims process in the *Deepwater Horizon*spill, however, provides an important caution. Such agreements, though most often voluntary, are binding. Their terms should be negotiated and understood as would any final settlement agreement. The key issue in most administrative settlements is the one that BP is now disputing: What evidence of causation will be required to submit a claim and receive payment? In establishing the requisite claims protocols, RPs and other defendants will need to balance the competing interests of efficiency in having a simple, direct process, and accuracy in ensuring that only deserving claimants are compensated. This is especially so where, as here, there is no cap on the settlement fund.

Keywords: environmental litigation, claims administration, claims handling, mass tort, Deepwater Horizon, oil spill, BP

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District Court Holds Utah Prairie Dog Protection Unconstitutional

By Damien M. Schiff and Paul J. Beard – February 18, 2015

Late last year, the U.S. District Court for the District of Utah rendered a groundbreaking decision in *People for the Ethical Treatment of Property Owners (PETPO) v. United States Fish & Wildlife Service*, 2014 WL 5743294 (D. Utah Nov. 4, 2014). The court held that federal regulation of the Utah prairie dog—a threatened species found solely in southwestern Utah—under the Endangered Species Act (ESA) exceeded the federal government's authority under the Commerce and Necessary and Proper Clauses of the U.S. Constitution. The decision was the first from any court to invalidate federal regulation of a purely intrastate species on federalism grounds. The service, as well as the environmental intervenor Friends of Animals (FOA), has appealed the decision to the Tenth Circuit Court of Appeals. Given the stakes, the *PETPO* case stands a good chance of landing in the U.S. Supreme Court.

Legal Background

The ESA gives the Fish & Wildlife Service the power to list and protect endangered and threatened terrestrial and freshwater species (the National Marine Fisheries Service does the same for saltwater denizens). The act defines an endangered species as one in danger of extinction throughout all or a significant portion of its range, and defines a threatened species as one that is likely to become endangered in the foreseeable future throughout all or a significant portion of its range. Whether a species is listed as endangered or threatened determines the kind of federal protection it receives.

Section 9 of the ESA makes it unlawful for anyone to "take" an *endangered* species without authorization. "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct." The "take" prohibition does not apply to*threatened* species (such as the Utah prairie dog). But, under the ESA, the services may by rule extend section 9's "take" prohibition to a threatened species, if necessary and advisable to do so for the conservation of that species.

These and other provisions of the ESA are premised on Congress's power under Article I, section 8, of the Constitution to "regulate Commerce . . . among the several States." Over the years, the U.S. Supreme Court has recognized that Congress's Commerce Clause power authorizes only three categories of federal regulation: (1) the regulation of the channels of interstate commerce, (2) the regulation of the instrumentalities of interstate commerce, and (3) the regulation of activities that substantially affect or substantially relate to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995); *United States v. Morrison*, 529 U.S. 598, 608–9 (2000). Further, the Court has held that the Necessary and Proper Clause can extend the Commerce Clause power to noncommercial activities, the regulation of which is essential to vindicate a larger regulation of economic activity. *Gonzales v. Raich*, 545 U.S. 1, 24–28 (2005). Yet, despite the commercial nexus that the Supreme Court's recent case law has required, and until *PETPO* was decided, courts routinely upheld ESA regulation of wholly intrastate, noncommercial species.

Factual Background

The Utah prairie dog is a species of rodent and one of five species of prairie dog native to North America. As its name

suggests, the Utah prairie dog exists only within the state of Utah. Its current range is southwestern Utah, and a majority of its habitat is owned by nonfederal entities.

In 1974, the Utah prairie dog was listed in the ESA as an endangered species. But in 1984, the service down-listed the species to threatened. At the same time, the service issued a special rule extending the ESA's section 9 prohibition to the prairie dog. The current rule generally prohibits the take of prairie dog, with very limited exceptions. The rule authorizes the take of prairie dog only on agricultural lands, private property within a half-mile of conservation lands, and areas where the prairie dog creates serious human-safety hazards or disturbs the sanctity of significant human cultural or human burial sites. Even within those narrow geographic exceptions, a take is authorized only after a permit or written approval—with costly and onerous conditions—has been obtained from the service.

PETPO is a public-interest organization whose members are injured by the service's regulation of the prairie dog. One member is the Cedar City Corp., which is the municipal government for Cedar City, Utah. The city owns and operates a golf course, airport, and recreational areas for its residents, all of which have suffered damage by the burrows and holes created by the prairie dog. Other PETPO members have been negatively affected by the prairie dog's activities at the local cemetery where loved ones are buried. The prairie dog has dug up earth around graves and created other noise and disturbances at a site that should be quiet and peaceful. Still other affected PETPO members include farmers whose equipment has been damaged by the prairie dog and landowners unable to sell or pull permits to develop their properties because of the species' invasion of their lands.

On behalf of its members, PETPO (represented by attorneys with the Pacific Legal Foundation) sued to challenge the federal regulation of the Utah prairie dog as unconstitutional under the Commerce and Necessary and Proper Clauses. PETPO sought declaratory and injunctive relief to prevent the service's enforcement of the prairie-dog-take regulation on nonfederal land.

The Parties' Arguments

PETPO's Commerce Clause argument focused on the third *Lopez* category—economic activities that substantially affect interstate commerce. PETPO argued that the take of prairie dogs on nonfederal land cannot substantially affect interstate commerce because such activities are categorically noneconomic. Additionally, PETPO argued that the Necessary and Proper Clause cannot pick up where the Commerce Clause leaves off: The Endangered Species Act is not a larger regulation of economic activity, and the regulation of prairie dog takes is not essential to any economic regulatory aspects that the act may have.

In defense, the service and FOA advanced a variety of reasons for why prairie-dog regulation can be sustained under *Lopez*'s third category. First, many of the activities that the take regulation causes PETPO's members to forgo are themselves economic, e.g., land development and farming. Second, prairie dogs are part of an ecosystem that has a substantial effect on interstate commerce. And third, the prairie dog has been the subject of scientific studies and published books. With respect to the Necessary and Proper Clause, the service and FOA contended that regulating the take of prairie dogs is permissible because regulation of even noneconomic, intrastate species is still necessary to vindicate the act's purpose of protecting all listed species. Finally, the service and FOA contended that

PETPO lacked standing, reasoning that eliminating the take prohibition would not redress the injuries of PETPO's members because other laws would still preclude whatever development they otherwise would pursue.

The Decision

In a precedent-setting decision, the court ruled that the service does not have the constitutional authority to regulate the take of prairie dogs on nonfederal property. (Note that PETPO did not challenge the regulation of prairie-dog take on federal property, where about a quarter of the prairie-dog population resides). The court began its analysis by finding that PETPO has standing. The court explained that, although PETPO's members may have other obstacles to developing their land, the take prohibition remains one of those obstacles. Eliminating that obstacle would materially advance the members' development plans. Such advancement, although only partial, is enough to satisfy the standing test.

With respect to the merits, the court followed the parties' lead to analyze the Commerce Clause question under the third *Lopez* category of "substantially affect." The court noted that*Morrison* provides several factors to be considered in that analysis—the economic nature of the regulated activity, the presence of a statutory jurisdictional element, the presence of congressional findings of economic effect, and the nature of the link between the regulated activity and interstate commerce.

According to the court, none of these factors supports federal regulation of prairie-dog takes. First, the take prohibition encompasses all manner of activities, whether or not they have economic aspects or economic motivation. Second, neither the ESA, generally, nor the prairie-dog-take regulation, specifically, contains a jurisdictional element. Third, Congress has made no finding with respect to the economic impact of prairie-dog takes. Fourth, such takes have at best an attenuated connection to interstate commerce. That the regulation precludes economic activity and thereby produces economic impacts is irrelevant; what matters is whether the regulated activity *itself* affects interstate commerce. The fact that the prairie dogs are part of an ecosystem that in turn may substantially affect interstate commerce cannot justify federal regulation because it would remove any limitation on federal power. After all, every species (including humans) is part of a worldwide ecosystem in which all commerce occurs. Similarly, that some tourists are interested in viewing prairie dogs, or that the prairie dogs have been the subject of studies and books, establishes nothing more than an attenuated connection to interstate commerce.

The court also rejected the argument that the regulation of prairie-dog takes on nonfederal land is permissible under the Necessary and Proper Clause. The court acknowledged*Raich*'s holding that noneconomic, intrastate activity may be constitutionally regulated if the regulation of such activity is essential to vindicate an interstate market regulatory scheme. But *Raich* is inapposite, reasoned the court, because the regulation of prairie-dog takes does not have any meaningful connection with the ESA's regulation of other listed species—such as the bald eagle—the take of which clearly does have a substantial effect on interstate commerce. Finally, the court rejected the argument that prairie-dog takes may be regulated because, when the effects of those takes are added to the effects of the takes of all listed, intrastate, noncommercial species, those aggregated impacts substantially affect interstate commerce. As with the other ecosystem arguments, the court concluded that this one, because it lacked a logical stopping point, would remove any limitation on the federal government's Commerce Clause power.

Conclusion

Until *PETPO*, the lower federal courts had been unanimous in upholding (on varying and sometimes conflicting rationales) the constitutionality of federal regulation of endangered species. Not surprisingly, the service and FOA have appealed the district court's precedent-setting decision to the Tenth Circuit Court of Appeals. However that appeal is decided, it is likely that the Supreme Court will be asked to review the case.

Keywords: environmental litigation, PETPO, Friends of Animals, Property Rights, endangered species

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NEWS & DEVELOPMENTS

February 5, 2015

NJ Supreme Court: No Time Limits to Spill Act Contribution Claims

Defendants can no longer assert a statute-of-limitations defense to claims of contribution under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, *et seq*. Following the recent unanimous decision by the New Jersey Supreme Court in *Morristown Associates v. Grant Oil Co.*, a responsible party cleaning up a contaminated site can pursue claims against other potentially responsible parties without worrying that their claims may be time-barred. Simply put, there is no statute of limitations applicable to claims for contribution brought under the Spill Act.

Facts and Procedural History

In 1979, plaintiff Morristown Associates purchased a strip mall in Morristown, New Jersey, where one of the tenants, a dry-cleaning business, had installed an underground storage tank (UST). The dry-cleaning business was later sold and resold several times to different individuals. In 2003, when oil contamination was subsequently discovered in the soil surrounding the strip mall, it was determined that the contamination was linked to the dry cleaner's leaking UST.

Morristown Associates took steps to remediate the property, and in 2006, filed Spill Act claims against one of the fuel companies that had serviced the UST, seeking contribution for costs related to the cleanup. Over the next three years, Morristown Associates filed three amended complaints, adding the owners and prior owners of the dry-cleaning business and several other fuel companies as additional defendants.

The defendants moved for summary judgment on the ground that the plaintiff's contribution claims were time-barred by the general six-year statute of limitations for property-damage claims (N.J.S.A. 2A:14-1), arguing that the plaintiff should have been aware of the leaking UST by at least 1999, when another UST in the strip mall was investigated and found to be leaking. The trial court agreed and the Appellate Division affirmed, finding that because the Spill Act does not address a statute of limitations, plaintiffs in Spill Act cases must comply with the six-year statute of limitations applicable to general property-damage claims.

The New Jersey Supreme Court's Analysis

The Supreme Court began by looking at the history and purpose of the Spill Act, noting that the act was expressly amended to allow the party performing the cleanup to bring contribution claims against other potentially responsible parties to recoup the costs of the cleanup and removal.

Although the Spill Act is notably silent as to whether there is a statute of limitations for such contribution claims, the act does list several specific defenses for contribution defendants. In turn, the court focused on, among other things, the act's provision specifying that a defendant shall have "only" those defenses to liability available to it under N.J.S.A. 58:10-23.11g(d), i.e., "an act or omission caused solely by war, sabotage, or God, or a combination thereof." Recognizing that the Spill Act enumerates the only defenses available to contribution defendants, and that a statute of limitations defense is not included in the list, the Supreme Court found that the legislature could not have intended to permit the imposition of contribution liability on culpable dischargers to be frustrated by the imposition of a general and prior enacted, but unreferenced, statute of limitations. The court differentiated the statute-of-limitations defense

from other unlisted defenses that should presumably be maintained, such as challenges to venue, service of process, and subject-matter jurisdiction, as those defenses are established by court rules under the jurisdiction of the supreme court, and are not subject to overriding legislation. Statutes of limitations, by contrast, are the product of the legislature.

The supreme court concluded that the plain text and a common-sense reading of the act supports this view, and that the construction adopted by the court "supports the longstanding view, expressed by the legislature and adhered to by the courts, that the Spill Act is remedial by design to cast a wide net over those responsible for hazardous substances and their discharge on the land and water of this state."

Conclusion

The supreme court's ruling is welcome news to responsible parties performing cleanup work, as they no longer have to fear losing the opportunity to sue other potentially responsible parties for contribution due to time constraints. The ruling is consistent with the Spill Act, which is designed to facilitate the cleanup of contaminated sites and hold dischargers responsible for such cleanups. It undoubtedly allows more contributing defendants to be brought into the cleanup process, as the court's decision once and for all closes the door on the statute-of-limitations defense (unless, of course, the legislature amends the act).

— Kevin J. Bruno and Kevin R. Doherty, Blank Rome LLP, New York, NY

December 29, 2014

EPA Expands the Definition of Solid Waste

The U.S. Environmental Protection Agency (EPA) is cracking down on alleged sham recycling with the issuance of a final "Definition of Solid Waste" Rule. The rule aims to reestablish hazardous-waste restrictions eased by the Bush administration in 2008. Rulemaking on the Definition of Solid Waste, Pre-Publication version (Dec. 9, 2014) (to be codified at 40 CFR Parts 260 and 261). The 2008 rule exempted hazardous secondary materials that would be reclaimed from the definition of solid waste. Doing so, according to the EPA, effectively de-regulated 1.5 million tons of materials, such as arsenic, benzene, trichloroethylene, lead, and mercury. Environmental groups and the EPA claim that the deregulation resulted in third-party recyclers over-accumulating materials, increasing the risk of accidents and environmental releases. Consequently, the rule redefines certain materials as hazardous waste and implements stricter controls on facilities and processes.

The new rule has the potential to affect numerous industries because it changes what may be recycled, and how, without being subject to hazardous-waste requirements. The EPA has grouped the regulatory changes into six major categories, outlined below.

1. Exclusion for hazardous secondary materials that are legitimately reclaimed under the control of the generator. The rule retains the exclusion from solid waste for companies who recycle the waste they generate.

2. Verified recycler exclusion. The rule will also replace the transfer-based exclusion with an exclusion for verified recyclers reclaiming hazardous materials. A more restrictive framework for generators will result, as the responsibility shifts to the generator to ensure that it is sending hazardous secondary materials only to a recycler or intermediate facility that has obtained the proper Resource Conservation and Recovery Act (RCRA) permit or solid-waste variance. The solid-waste variance procedure replaces a “reasonable efforts” environmental-audit process in the 2008 rule and requires EPA or state involvement before recycling operations begin.

3. Remanufacturing exclusion. The rule excludes from the definition of hazardous waste certain higher-value hazardous spent solvents that are remanufactured into commercial-grade products. This new exclusion, according to the EPA, will encourage sustainable materials management and reduce the environmental effects of raw-materials use. Facilities may submit a rulemaking petition to request the addition of other higher-value hazardous secondary materials to the remanufacturing exclusion.

4. Prohibition of sham recycling and revisions to the definition of legitimacy. The rule tightens the standards required to show "legitimate recycling," now mandating the following:

a. the hazardous secondary material must provide a useful contribution to the recycling process or product;
b. the recycling process must produce a valuable product or intermediate;
c. the hazardous secondary material must be managed as a valuable commodity; and
d. the recycled product must be comparable to a legitimate product or intermediate.

The rule confirmed the exclusion from solid waste for commodity-grade recycled products, such as scrap metal, and in-process recycling.

5. Revisions to solid-waste variances and non-waste determinations. Companies may seek a variance to conduct recycling or reclamation, or they may apply for a non-waste determination on a particular waste stream or product.

6. Deferral on revisions to pre-2008 recycling exclusions. The new rule declines to supersede pre-2008 recycling exclusions and exemptions. Thus, any existing facilities operating under a pre-2008 solid-waste-exclusion determination are not subject to a re-determination unless the state chooses to revisit the regulatory determination. However, all facilities will have to comply with the recordkeeping requirements for speculative accumulation and legitimate recycling.

Although the rule will become effective six months after publication, most states (those that are authorized to enforce the RCRA) must individually adopt the rule before it becomes effective in those states. Such states will have until July 1, 2016, to adopt the new federal rules, though a one-year extension may be available if a statutory amendment is needed. Compliance will likely require a significant investment in proactive planning and new protocols.

— *Erin Guffey, Schiff Hardin LLP, Chicago, IL*

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