



Morgan Lewis

**2022
EARTH DAY
CELEBRATION**

**Major Federal Environmental Cases—
What Lies Ahead**

Duke K. McCall, III | Bryan M. Killian | Debra Carfora
April 20, 2022

Program Overview

- **APRIL 18** | Reaching Net Zero Together: Environmental & Regulatory Considerations in Alternative Energy Development
- **APRIL 19** | Emerging Contaminants—The Road Ahead
- **APRIL 20** | Major Federal Environmental Cases—What Lies Ahead
- **APRIL 21** | Climate Change Regulation—From Emissions Standards to Disclosure Rules and Everything In Between

Recordings and registration for upcoming events available at

<https://www.morganlewis.com/events/earth-day-celebration-series>

Presenters



Duke K. McCall, III
Washington, D.C.
+1.202.373.6607
duke.mccall@morganlewis.com



Bryan M. Killian
Washington, D.C.
+1.202.373.6191
bryan.killian@morganlewis.com



Debra Carfora
Washington, D.C.
+1.202.739.5757
debra.carfora@morganlewis.com

Morgan Lewis

Cases on The Supreme Court Docket

Morgan Lewis

West Virginia v. EPA – Background

- Clean Air Act Section 111, 42 U.S.C. § 7411
 - EPA may identify “categories of stationary sources” that cause or contribute to pollution, then adopt standards of performance for emissions that reflect “the degree of emission limitation achievable through the application of the best system of emission reduction ... [that] has been adequately demonstrated.”

***West Virginia v. EPA* – Background**

Procedural Timeline

- “Clean Power Plan” (2015)
 - Stayed by US Supreme Court (2016)
- “Affordable Clean Energy Rule,” a.k.a. the ACE Rule (2019)
 - Rescinded and replaced the Clean Power Plan
- *West Virginia v. EPA* (January 2021)
 - DC Circuit rejects ACE Rule
- US Supreme Court heard oral arguments (February 2022)
 - Decision likely by the end of June

***West Virginia v. EPA* – The Supreme Court Case**

Two Questions Presented

1. Article III standing
2. The “major questions” doctrine

***Sackett v. EPA* – Background**

- Clean Water Act, 33 U.S.C. § 1362(7)
 - The term “navigable waters” means the waters of the United States, including the territorial seas.

Sackett v. EPA – Background

- *Sackett v. EPA* (2012)
- District Court decision on remand (March 2019)
- Ninth Circuit opinion (August 2021)
 - Applies “significant nexus” test
 - Applies regulations in effect when EPA issued compliance order

***Sackett v. EPA* – The Supreme Court Case**

The Question Presented

- Whether the US Court of Appeals for the Ninth Circuit set forth the proper test for determining whether wetlands are “waters of the United States” under the Clean Water Act, 33 U.S.C. § 1362(7).

Recent Supreme Court Decisions on Remand – The Aftermath

Morgan Lewis

***Louisiana v. American Rivers* – Background**

- Trump EPA Section 401 Certification Rule (June 2020)
- Biden-Harris EPA Notice of Intention to Reconsider and Revise (June 2021)
- District Court Vacatur of Section 401 Certification Rule (October 2021)
- Ninth Circuit Appeal (November 2021)

Louisiana v. American Rivers – The Decision

- Application for stay
- The US Supreme Court's 5-4 decision (April 2022)
 - Irreparable harm likely to occur?
- The “shadow docket”

The *Baltimore* Case – The Decision

- Municipal climate-change tort suits against oil and gas companies (2017)
 - Allegations/Claims
- Procedural History
 - Removal. Remand. Appeal.
 - Multiple questions about jurisdiction
- The US Supreme Court's 7-1 decision (June 2021)

The *Baltimore* Case – The Aftermath

- *Boulder County* (10th Circuit February 8, 2022)
- *City of Baltimore* (4th Circuit April 7, 2022)
- *San Mateo* (9th Circuit April 19, 2022)
- What's next?

Guam v. United States – Background

- 2002, EPA sued Guam under the Clean Water Act alleging that pollutants from the Ordot Landfill were leaching into WOTUS
 - 2004, Resolved via Consent Decree
- 2017 Guam asserts a CERCLA action against the United States
 - Cost-recovery action under section 107(a), 42 U.S.C. § 9607
 - Contribution action under section 113(f), 42 U.S.C. § 9613
- DC Circuit dismisses Guam’s CERCLA action
 - Contribution claim was Guam’s exclusive remedy under CERCLA
 - Contribution claim was time-barred

Guam v. United States – The Supreme Court Case

Question Presented

- Whether a settlement of environmental liabilities must resolve a CERCLA-specific liability to give rise to a contribution action under §113(f)(3)(B).

Guam v. United States – The Supreme Court Case

Question *Not* Presented

- Whether parties possessing a contribution claim under CERCLA § 113(f) are prohibited from proceeding under CERCLA § 107(a)
 - *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 691–93 (7th Cir. 2014);
 - *Hobart v. Waste Mgmt. of Ohio*, 758 F.3d 757, 767 (6th Cir. 2014);
 - *Solutia v. McWane, Inc.*, 672 F.3d 1230, 1237 (11th Cir. 2012);
 - *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 602–4 (8th Cir. 2011);
 - *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 127–28 (2d Cir. 2010).

Implications and Takeaways

- Potential increase in section 107(a) claims
- Be careful and intentional in negotiating settlement or consent decrees

***Atlantic Richfield Co. v. Christian* – Background**

- The case arises out of the Anaconda Superfund site.
- EPA has overseen a historic \$450 million cleanup effort at the site by Atlantic Richfield, the smelter's current owner.
- Dissatisfied with EPA's remedial action, Montana landowners brought suit in state court for "restoration" beyond that deemed necessary by EPA.
- In the trial court, Atlantic Richfield argued that CERCLA preempted the landowners' claim for restoration damages.

***Atlantic Richfield Co. v. Christian* – The Supreme Court Case**

Questions Presented

- Whether CERCLA preempts common-law claims for restoration seeking cleanup remedies beyond EPA's remedy.
- Whether a landowner at a Superfund site is a "potentially responsible party" that must seek EPA's approval under CERCLA § 122(e)(6) before engaging in remedial action.

Atlantic Richfield Co. v. Christian – The Decision

- Defined the scope of federal jurisdiction under CERCLA § 113(b)
 - “Arising Under” CERCLA only if it is based on CERCLA
- Plaintiffs are “potentially responsible parties” subject to Section 122(e)(6)
 - bars a PRP from undertaking any remedial action at a Superfund site without first receiving EPA approval

Implications and Takeaways

- Reduces the certainty of CERCLA settlement agreements
- Questions about restoration plans presented by non-PRPs
- The requirement for EPA approval only applies to Superfund Sites

County of Maui v. Hawaii Wildlife Fund – The Decision

- Environmental groups alleged that County of Maui's injection of treated sewage into underground wells violated the CWA (2012)
- Circuit split (4th and 9th v. 6th)
- Certiorari granted (February 2019)
- EPA Interpretative Statement (April 2019)
- The US Supreme Court's 6-3 decision (April 2020): CWA requires a permit "when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge.*"

County of Maui v. Hawaii Wildlife Fund – The Aftermath

- Trump EPA guidance (January 2021)
- District Court found injection of sewage was “functional equivalent” (July 2021)
- Biden-Harris EPA rescission of guidance (September 2021)
- Application in other contexts?

Cases on the Rise in the Lower Courts

Morgan Lewis

Greenwashing Cases – Background

- Occurs when a business exaggerates its environmentally friendly practices and products to appeal to environmentally conscious consumers.

Greenwashing Cases – Cases on the Rise

- *Hanscom v. Reynolds Consumer Products*, Case No. 4:21-cv-03434 (N.D. Cal)
- *Lee et al. v. Canada Goose Inc.*, Case No. 1:20-cv-09809 (S.D.N.Y)
- *Patricia Dwyer v. Allbirds, Inc.*, Case No. 7:21-cv-05238 (S.D.N.Y)
- *Dezzi Rae Marshall v. Red Lobster Management LLC et al.*, Case No. 2:21-cv-04786 (C.D. Cal)

Greenwashing Cases – Traps to Avoid

- Avoid making unqualified environmental claims
- Avoid suggesting or implying independent certification or endorsement without adequate basis
- Avoid focusing solely on the end-product or service

American Rivers v. American Petroleum Institute

- Appeal of District Court vacatur of Section 401 Certification Rule
- Opening brief filed (April 2022)
- Concurrent regulatory reconsideration of Section 401 Certification Rule
- Implications for issuance of future federal permits

Questions?

Morgan Lewis

Biography



Duke K. McCall, III
Washington, D.C.
+1.202.373.6607
duke.mccall@morganlewis.com

Duke McCall's practice focuses on environmental law and complex litigation. He represents clients in contribution actions, enforcement proceedings, citizen suits, toxic tort litigation, and regulatory matters, including actions brought under the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, and analogous state laws.

Biography



Bryan M. Killian

Washington, D.C.

+1.202.373.6191

bryan.killian@morganlewis.com

Bryan Killian is an appellate lawyer who represents clients facing complex, important, or unresolved questions of constitutional, statutory, and administrative law. He has argued more than 35 cases in the US Courts of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Eleventh, and District of Columbia Circuits. Bryan's practice spans diverse subject areas, including climate change, environmental, tax, arbitration, and American Indian law.

Biography



Debra Carfora

Washington, D.C.

+1.202.739.5757

debra.carfora@morganlewis.com

Debra Carfora represents clients in environmental litigation and provides environmental and regulatory counseling. With experience in complex civil litigation arising under a broad range of environmental statutes, Debbie routinely handles environmental litigation in federal court involving rules issued by the US Environmental Protection Agency and other agencies under pollution control laws; claims for contribution, response costs, and natural resource damages at Superfund sites; and alleged violations of environmental statutes.

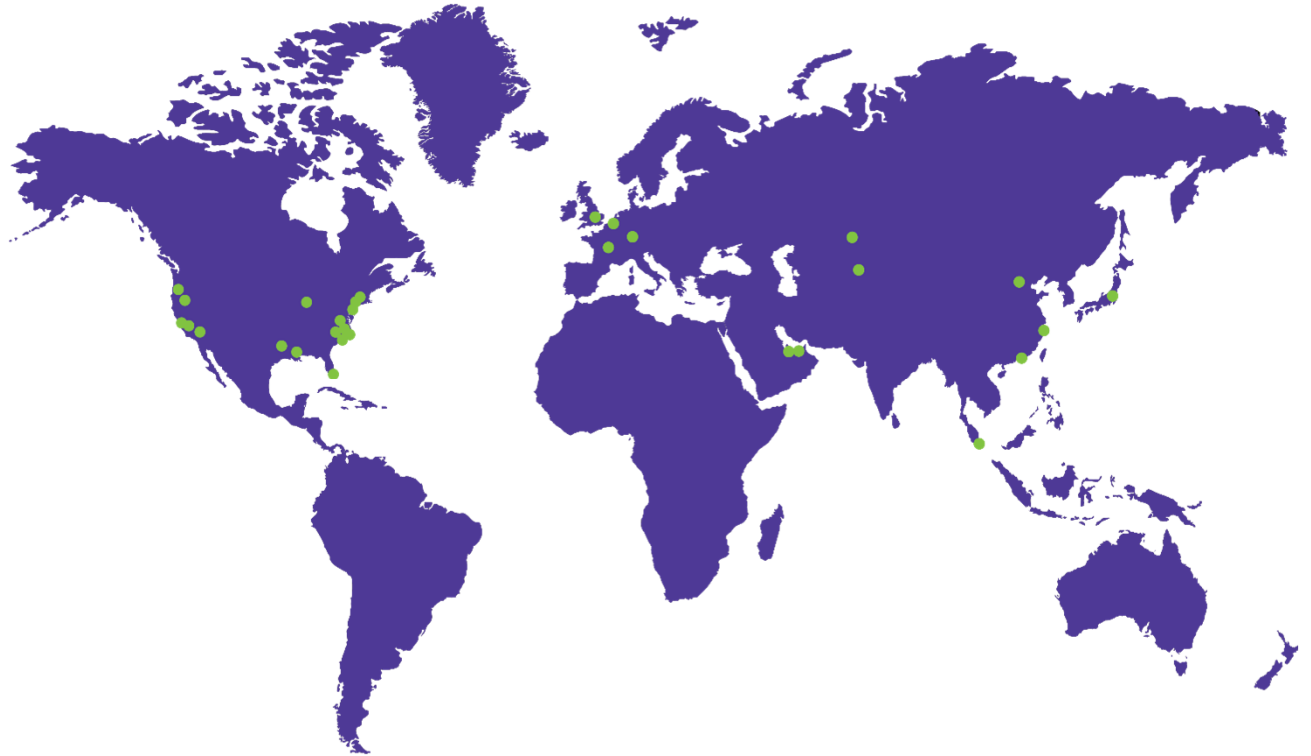
Debbie is a former Trial Attorney and Senior Trial Counsel for the US Department of Justice, Environment and Natural Resources Division, Environmental Defense Section.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Beijing*
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong*
Houston
London
Los Angeles
Miami
New York
Nur-Sultan
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Shanghai*
Silicon Valley
Singapore*
Tokyo
Washington, DC
Wilmington



Morgan Lewis

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

THANK YOU

© 2022 Morgan, Lewis & Bockius LLP
© 2022 Morgan Lewis Stamford LLC
© 2022 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.