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EASTERN WATER LAW™

& POLICY REPORTER

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EASTERN WATER NEWS

MAJOR MODIFICATIONS TO TOXIC SUBSTANCES CONTROL ACT LIE AHEAD

On June 22, 2016, President Obama signed the "Frank R. Lautenberg Chemical Safety for the 21st Century Act" (Act) into law, making wide-ranging changes to the Toxic Substances Control Act (TSCA). The changes to TSCA will have far-reaching impacts on various industries and manufacturers and provides the U.S. Environmental Protection Agency (EPA) with wider authority to regulate chemicals. The modifications to the TSCA are designed to streamline the testing, evaluating, and regulating of chemicals by the EPA. In signing the Act, President Obama noted that:

> …for the first time in 20 years, we are updating a national environmental statute [and that] for the first time in our history, we'll actually be able to regulate chemicals effectively.

While not all chemicals impact climate change, the major revisions to the law are notable because they indicate increased regulation of industry and renewed focus on environmental regulation.

A List of Major Revisions to TSCA

Modifications to the TSCA include the following:

1. Update to TSCA Chemical Inventory
The law requires identification of chemicals that are now, or were recently, in use so that the EPA can concentrate on active chemicals, as opposed to chemicals on the currently inventory list which are no longer utilized or sparingly utilized. Manufacturers and processors must report chemicals they have manufactured and/or processed in the last ten years.

2. Identification of Risk Levels for All Existing Chemicals
The new law requires EPA to develop a screening process for existing chemicals to evaluate any risks. The EPA must identify high priority substances for testing, and evaluate them based on the health and environmental risks they pose, regardless of cost. The new TSCA mandates that any use restrictions be based on the environmental, health, and safety effects of a chemical. If a chemical is deemed unsafe, the EPA now has the power to place use restrictions on that chemical or place an outright ban on its use.

3. Use of Any New Chemicals Must Be Analyzed for Safety
New chemicals cannot be used until the EPA makes a determination concerning their safety.

4. Streamlined Testing Authority
As a result of the new law, the EPA is provided with expanded testing authority and permits the EPA to test chemicals of concern without the need to go through a time intensive rulemaking process. The new law permits testing of new chemicals without rulemaking.

5. Increased Fees on Manufacturers and Processors
The new law allows EPA to levy higher fees on manufacturers and processors who produce chemicals that require notification and risk evaluation.

6. Change in Confidential Business Information
The new law requires that manufacturers and processors provide justification for treating information that is submitted to the EPA as confidential business information, including data and testing information.

Timing of Chemical Evaluation

The EPA is now subject to various deadlines under the new law. The EPA has one year to establish a rule implementing a risk evaluation process for existing listed chemicals. Within six months, the EPA must identify ten high-priority chemicals for risk evaluation. Within three and a half years, twenty high-priority chemicals and twenty low-priority chemicals must be identified. Upon any finding that a chemical poses an unreasonable risk, EPA has one year to provide a rule which manages the chemical and its risks.

Stakeholders Have Already Begin Lobbying for Which Chemicals Should First Be Evaluated

The Environmental Working Group (EWG) recently identified 20 chemicals it considers should undergo high priority chemical evaluation. The first ten chemicals on the EWG priority list are asbestos, bisphenol-A (BPA), chlorinated flame retardants , brominated flame retardants, 1-bromopropane, P-dichlorobenzene, phthalates, perchloroethylene, tetrabromobisphenol A, and bis(2-ethylhexyl) adipate. The second group of ten chemicals includes lead, formaldehyde, vinyl chloride, bromoform, chromium-6, styrene, arsenic, ethylbenzene, cadmium, and 1,4-dioxane. Many other environmental and industry groups have and are likely to weigh in shortly.

Conclusion and Implications

Implementation of the new TSCA is in its infancy. EPA is currently developing an Implementation Plan to guide the agency's efforts on successfully meeting the deadlines in the new law, including identifying the initial ten chemical risk assessments, establishing a process and criteria for identifying high priority chemicals for risk evaluation, and issuing a procedural rule that establishes EPA's process for evaluating risks from high-priority chemicals. Many of the particulars of how the TSCA will be implemented are actively being developed today. It is recommended that stakeholders which will be impacted by the TSCA immerse themselves into the implementation process. (Jonathan Shardlow)

FLINT MICHIGAN DRINKING WATER CRISIS CONTINUES TO SPAWN LEGAL ACTIVITY

The scandal over lead contamination of Flint Michigan's drinking water supply continues to spawn legal activity as new court actions have been filed in the last couple of months. More parties have been drawn into the fray as targets for criminal and civil liability. The Michigan Attorney General filed new criminal complaints against additional defendants. That office also filed a civil case against consulting firms that advised Flint. Also, a U.S. District Court judge overruled motions to dismiss a class action complaint brought by individuals affected and a public interest organization. This article will provide some detail on these developments.

Background

The Flint water crisis reportedly started in April 2014 when the City of Flint, Michigan changed its water source from treated water from the City of Detroit to the Flint River. The corrosiveness of the river water caused lead in aged water pipes to elevate the heavy metal levels so that up to 12,000 children were exposed to drinking water with excessive lead levels, with medical experts reporting that children—unborn and up to age five—bearing the greatest risk of significant health problems. Testing in Flint was reportedly done improperly by either the tests themselves or the handling of testing results. While the fallout and rebuilding in Flint occurs, water agencies around the country are either reviewing protocols or being evaluated publicly.

The Update

The State Attorney General's Multi-Count Civil Complaint

In late June 2016, Bill Schuette, Michigan's Attorney General, filed a multi-count civil complaint against four companies operating under the name Veolia. These include the French transnational firm Veolia Environnement, S.A., Veolia Water North America Operating Services, LLC, Veolia North America, LLC, and Veolia North America, Inc. Other defendants include defendant Lockwood, Andrews & Newnam, Inc., and a Leo A. Daly Company, referred to here as LAN. The defendants are alleged to be engineering professionals that held themselves out as knowledgeable about issues of the sort that Flint has with its water supply.

The Attorney General's complaint was filed in the state Circuit Court for Genesee County Michigan. It alleges defendants are guilty of acts and omissions constituting professional negligence and fraud, and of causing or contributing to a public

nuisance. The Complaint indicates that as professionals the defendants owed a duty to the public that they breached in poorly advising the City of Flint on water treatment, saying:

> …the [d]efendant corporations have caused past, ongoing, and future harm to public health, destruction of public property, and cost to public resources.

The Complaint says that LAN began advising Flint in 2011 on the feasibility of drawing drinking water from the Flint River, and it avers LAN indicated it was feasible but would require some $69 Million of adjustments and upgrades to Flint's aging water treatment facilities. It further alleges that LAN helped manage an effort to enable Flint to upgrade its treatment plant and accept and use the Flint River water. After initial problems of discolored water and other "aesthetics" were encountered, Veolia was engaged by the city in early 2015. It also analyzed and advised Flint. The Complaint further alleges that these consulting entities failed to timely grasp and identify the serious problem with excess lead in the water supply due to corrosion. It further states that Veolia provided bad advice on treatment of the water that actually exacerbated the lead problem.

Defendants Respond

Veolia and LAN have denied liability and have vigorously asserted that the Complaint is irresponsible and incorrect. It has been reported that Veolia claims: "The lawsuit filed by the Michigan Attorney General yesterday is outrageous." Veolia said:

> The allegations against Veolia are false, inaccurate, and unwarranted. Sadly for the citizens of Flint and throughout Michigan, the lawsuit represents the latest attempt to deflect responsibility by government officials and representatives who caused and are responsible for this situation. LAN defendants also assert they are similarly not to blame.

Attorney General Also Files Criminal Charges

Attorney General Schuette has also filed additional criminal charges, following on initial charges in April 2016. The April allegations were against two Flint officials and a state official. (Recently, a criminal court judge denied two of those defendants' motions for a bill of particulars). In late July, a statement of criminal charges was filed against six additional state officials, three working at the Michigan Department of Environmental Quality and three at the Department of Health and Human Services, state offices that dealt with the Flint situation as the crisis developed. The allegations include official misconduct and willful neglect of duty type criminal acts or omissions.

The U.S. District Court Update

Meanwhile, in U.S. District Court, Judge David M. Lawson has sustained a class action complaint filed in *Concerned Pastors for Social Action, et al. v. Khouri,* ___F.Supp.3d___, 2016 WL 3626819, (E.D. Mich. 7/7/2016). Defendant Khouri is State Treasurer. Michigan law puts him in financial oversight of cities in receivership. Other targets of the lawsuit are members of the Flint Receivership Transition Advisory Board (RTAB) (State Defendants), and the City of Flint and its city administrator (the Flint defendants). The Complaint was filed in January, soon after EPA issued an Order to remedy the Flint water contamination. The plaintiffs are alleging violations of certain federal regulations enacted under the Safe Drinking Water Act. They bring four separate claims: 1) Violations of the SDWA's requirement to operate and maintain optimal corrosion control treatment, 2) violations of the SDWA's requirements for monitoring tap water for lead, 3) violations of the SDWA's reporting requirements, and 4) violations of the SDWA's notification requirements that would have alerted the public to the problem in their water.

In his opinion Judge Lawson explains that he does not see the complaint as precluded by the Environmental Protection Agency's (EPA) assertion of SDWA jurisdiction or its January Order. He points out that the Safe Drinking Water Act allows citizen suits, provided that there is 60 day prior notice of violation and intent to bring such a case, and provided the Administrator of the EPA is not then seeking in court relief of the same alleged violations the notice contains. Administrative activity by the EPA does not suffice to preclude the citizen suit option.

Conclusion and Implications

The Flint water crisis is an epochal event in the history of modern American water supply and treatment law. The potential of the public water supply in a city to threaten and harm a sizeable population has been placed center stage in the theater of public concerns, and the events regarding Flint have unquestionably chastened and cautioned engineers and public employees nationwide that any failure on their part to assure public safety may endanger their personal and professional futures.
(Harvey M. Sheldon)

NEWS FROM THE WEST

This month's News from the West covers a report from the U.S. Department of Energy, which looks at the future of hydroelectric power generation in the West. We also cover a decision out the Utah Court of Appeals approving a water right change application to supply and service a nuclear power generating plant. Finally, the Special Master, appointed by the U.S. Supreme Court, pursuant to its original jurisdiction over disputes between states, issued a report to the High Court, to deny New Mexico's motion to dismiss the complaints by Texas, et al.. The suit alleges groundwater pumping in the New Mexico deprives other states and the U.S. of entitled water pursuant to the Pecos River Compact.

U.S. Department of Energy Presents 'Hydropower Vision' Plan for the Future of Hydropower

The U.S. Department of Energy (DOE) recently released a report detailing a vision for increasing the nation's hydropower capacity by 50 percent by 2050. While a variety of technical, environmental, and market challenges must be overcome, there remain significant opportunities for hydropower development, particularly through upgrades to existing hydropower facilities, adding power generation capacity to existing dams and canals, and development of new pumped storage capacity. In the Pacific Northwest, the nation's hydropower leader, there appears to be limited capacity for development of new stream reaches in large part due to environmental constraints associated with fish habitat protections. However, there are still significant regional opportunities to optimize the use of existing infrastructure to increase hydropower capacity, with benefits ranging from increased grid reliability, improved ability to incorporate intermittent renewable power sources like wind energy, and reduced carbon emissions.

In July 2016, the DOE's Office of Wind and Water Power Technologies released its "Hydropower Vision: A New Chapter for America's 1st Renewable Electricity Source." *See*, http://energy.gov/eere/water/articles/hydropower-vision-new-chapter-america-s-1st-renewable-electricity-source

This report represents the culmination of the agency's first comprehensive analysis to evaluate the future of hydropower in the United States, focusing on continued technical evolution, increased energy market value, and environmental sustainability. Undertaken through a broad-based collaboration with a wide variety of stakeholders, the *Hydropower Vision* initiative had four principal objectives: 1) Characterize the current state of hydropower in the United States, including trends, opportunities, and challenges; 2). Identify ways for hydropower to maintain and expand its contributions to the electricity and water management needs of the nation from the present through 2030 and 2050; 3) Examine critical environmental and social factors to assess how existing hydropower operations and potential new projects can minimize adverse effects, reduce carbon emissions from electricity generation, and contribute to stewardship of waterways and watersheds; and 4) Develop a roadmap identifying stakeholder actions that could support responsible ongoing operations and potential expansion of hydropower facilities.

The Hydropower Vision analysis concludes that U.S. hydropower could grow from 101 gigawatts (GW) of capacity to nearly 150 GW by 2050, as modeled based on certain assumptions regarding technological improvements, environmental constraints, and market factors. Under this scenario, this growth would result from a combination of 13 GW of new hydropower generation capacity (upgrades to existing

plants, adding power at existing dams and canals, and limited development of new stream-reaches), and 36 GW of new pumped storage capacity. While ambitious in scope, such growth is anticipated to have considerable benefits, such as a savings of $209 billion from avoided greenhouse gas (GHG) emissions, increased grid reliability, and air quality improvements.

Utah Court of Appeals Upholds Approval of Change Applications For Proposed Nuclear Power Plant on the Green River

HEAL Utah v. Kane County Water Conservancy District, et al., 2016 UT App 153 (Ut.App. July 21, 2016).

The Utah Court of Appeals in *HEAL Utah v. Kane County Water Conservancy District, et al.*, reaffirmed that an applicant for a water right change of use must only meet the "reason to believe" standard of proof, and that in doubtful cases, the policy of Utah water law is to favor approval of applications, as approval:

> …merely clothes the applicant with authority to proceed and perfect, if he can, his proposed appropriation by the actual diversion and application of the water claimed to a beneficial use. It does not rise to the level of an appropriation or an adjudication of a water right.

The two water districts, *Kane County Water Conservancy District, San Juan County Water Conservancy District* (collectively: Water Districts) are located in the southeast corner of Utah. Both had filed to appropriate a portion of Utah's Colorado River allocation for use in a coal fired power plant project. That project died with the establishment of the Grand Staircase Escalante National Monument, and the Water Districts had no other use for water. Blue Castle Holdings had proposed to build a nuclear power generation plant on the main stem of the Green River. The proposed power plant would fully deplete the water to create steam to drive the turbines and for cooling of the power plant. At the time of filing the change applications, Blue Castle had already spent approximately $17 million on the project. The project will not proceed in the regulatory process without having a water right, so obtaining the Utah State Engineer's approval is an essential next step. Still ahead are compliance with the Nuclear Regulatory Commission (NRC) process, compliance with the federal National Environmental Pollicy Act (NEPA) and various other state and federal permits.

The State Engineer conceded that if all approved but undeveloped water rights on the Colorado River were fully used, Utah would have over-appropriated its supply. However, as of today there are approximately 574,600 acre-feet of approved but yet undeveloped water in the Upper Colorado River in Utah, and many of these uses may never be developed. Therefore, the amount of water in actual beneficial use is significantly less that what is held under approved applications. The State Engineer therefore concluded that there was unappropriated water in the Green River that could be used without impairing other vested water rights. Based on that conclusion and others, the State Engineer approved the Kane County change application for 29,600 acre-feet, and the San Juan County application for 24,000 acre-feet.

The state District Court, in a *de novo* review proceeding, employed the reason-to-believe standard of proof, holding that the applicants had met their burden of proof and approved the change applications.

The Utah Court of Appeals found that the proposed diversions and depletion would change the depth of the river by less than 1.5 inches 99 percent of the time, and less than 1 inch 95 percent of the time. Accordingly, the court held that the proposed change would not adversely impact the stream environment, nor would it adversely affect the Recovery Implementation Program for the 4 Colorado River endangered fish.

The proposed power plant must still go through an arduous public process including NRC review, NEPA review and other permitting before it may proceed. Because of this public process, the court held the public interest would be well protected. In short, the protestants failed to marshal the evidence needed to overcome even the limited reason-to-believe standard on any of the contested issues.

Special Master in *Texas v. New Mexico* Issues Report Recommending that the U.S. Supreme Court Deny New Mexico's Motion to Dismiss Texas' Complaint

The Special Master in *Texas v. New Mexico and Colorado*, U.S. Sup. Ct. No. 22O141 Orig, Gregory Grimsal, issued a report recommending that the U.S. Supreme Court deny New Mexico's Motion to

Dismiss. New Mexico filed its Motion to Dismiss on April 30, 2014 arguing, *inter alia*, that the complaints of Texas and the United States fail to state a claim under Fed. R. Civ. P. 12(b)(6), the plaintiffs failed to base their claims on the express terms of the Rio Grande Compact and that New Mexico is in compliance with its delivery obligations under the Pecos River Compact (Compact).

In dividing the waters of the Rio Grande between Colorado, New Mexico and Texas, the Compact maximizes the beneficial use of the water among all states without impairment of any beneficial uses under the conditions that prevailed in 1929. (Water is also delivered from Elephant Butte Reservoir to Mexico pursuant to an international accord). While Colorado and New Mexico can increase their storage, Texas is assured that no matter what actions are taken above Elephant Butte Reservoir, if available, 790,000 acre-feet will be released to the lands below Elephant Butte Reservoir. However, based on Reservoir levels, during drought conditions Colorado and New Mexico may be required to release water from storage and may be precluded from increasing the amount of water in storage. The application of these Compact requirements during a drought depends, *inter alia*, on the accrued debit/credit status of each state. Unlike some compacts, the Rio Grande Compact acknowledges the variability of the hydrograph and allows accruals of credits and debits.

Historically, the Compact has resulted in 57 percent of the water supply below Elephant Butte Reservoir being delivered to New Mexico and 43 percent delivered to Texas, based upon the proportionate amounts of irrigated land in each state. Texas contends that water to be delivered to it under the Compact is consumed by groundwater pumping below New Mexico's Elephant Butte Reservoir. According to Texas, these hydraulically connected wells take water before it arrives at the New Mexico—Texas state line, in effect resulting in re-diversions of Texas' water after it has been released to Texas. Therefore, on January 8, 2013, the State of Texas filed a Motion with the U.S. Supreme Court seeking leave to file its Complaint against New Mexico contending that excessive groundwater pumping between Elephant Butte Reservoir and the New Mexico—Texas border is depriving Texas of water it is legally entitled to. The Motion seeks to invoke the Supreme Court's original jurisdiction to both determine and enforce Texas' rights against New Mexico to deliveries of Rio Grande water in accordance with the Rio Grande Compact, 53 Stat. 785 (1939). The Special Master's addressed this issue.

The Special Master made several significant rulings. The most important ruling is that the case will go forward against New Mexico because there is nothing in the Rio Grande Compact or its history that would suggest that New Mexico can deliver water into Elephant Butte Reservoir, as required under the Rio Grande Compact, and then immediately after it is released, make it available to groundwater users who can pump their wells and deplete it before it reaches Texas. The groundwater users that Texas is complaining about are the thousands of well owners within Elephant Butte Irrigation District and the City of Las Cruces in southern New Mexico. As the Special Master noted:

> …[i]ndeed, … New Mexico has identified in its pleadings and at oral argument no provision in the 1938 Compact that would allow it to recapture water it has delivered to the Rio Grande Project upon Release from the Elephant Butte Reservoir. Report at 174 (citations omitted) (emphasis in original).

The Special Master made it clear that the state laws relating to declaration of a basin, or other state processes, cannot justify allowing groundwater users to take the water committed to Texas under the Compact. He refused to allow the Elephant Butte Irrigation District (EBID) to even participate in the process, as well as the irrigation district in Texas, El Paso County Water Improvement District No. 1. In the Special Master's view, this is not a local problem to be solved by State administrative processes and local State judges. Rather, this is a State of New Mexico problem that the State of New Mexico needs to remedy.
(Daniel Timmons, Steve Clyde, Christina Bruff, Robert Schuster)

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—Water Quality

•On June 21, 2016, EPA announced an agreement with the U.S. Army to close four illegal large capacity cesspools on Oahu and eight on the Big Island. The Army will pay a $100,000 fine, the first time EPA has imposed a civil penalty against a federal government facility for operating banned cesspools. EPA found that the Army continued to use the cesspools despite a 2005 ban under the federal Safe Drinking Water Act's Underground Injection Control program. The Army had failed to close three large capacity cesspools at Wheeler Army Airfield and one at Schofield Barracks on Oahu, as well as eight on the Big Island at the Pohakuloa Training area and the Kilauea Military Camp.

•On June 23, 2016, the EPA and the Department of Justice (DOJ) entered into a consent decree with D. G. Yuengling and Son Inc., to settle federal Clean Water Act (CWA) violations involving its two large-scale breweries near Pottsville, Pennsylvania. Under the consent decree, the company has agreed to spend approximately $7 million to improve environmental measures at its brewery operations after it allegedly discharged pollutants into the Greater Pottsville Area Sewer Authority municipal wastewater treatment plant. Yuengling will also pay a $2.8 million penalty. In addition, the consent decree includes a requirement to implement an environmental management system (EMS) focused on achieving CWA compliance at the facilities. Yuengling must hire a third party consultant to develop the EMS and a third party auditor to ensure proper implementation at the facility operations. The company allegedly violated Clean Water Act requirements for companies that discharge industrial waste to municipal publically-owned wastewater treatment facilities numerous times between 2008 and 2015. Companies must obtain and comply with permit limits on discharges of industrial waste that goes to public treatment facilities, which in many cases require "pretreatment" of waste before it is discharged. The case was referred to EPA by the Greater Pottsville Area Sewer Authority (GPASA).

•On July 14, 2016, EPA announced a settlement with petroleum exploration and development companies, BP Exploration Alaska and Hilcorp Alaska, for Clean Water Act violations following oil spills on Alaska's North Slope. BP Exploration Alaska agreed to settle related violations with the Alaska Department of Environmental Conservation in a parallel agreement. Under the settlement framework, Hilcorp Alaska will pay $100,000 in federal penalties to resolve their alleged violations, while BP will pay $100,000 in state penalties and $30,000 in federal penalties to the Oil Spill Prevention Liability Trust Fund. In April 2014, BP Exploration Alaska released approximately 700 gallons of natural gas, crude oil, and produced water onto 33 acres of arctic tundra and gravel pad. The spill was caused by a freezing rupture in the dead leg section of BP's H Pad Well 8 three-phase flowline. In February 2015, Hilcorp Alaska spilled nearly 10,000 gallons of crude oil and produced water onto 40,000 square feet of arctic tundra and gravel pad. The spill resulted from a leak in the bottom of a pipeline from Hilcorp's Milne Point Tract 14 production line.

•On July 18, 2016, EPA announced an administrative settlement with Goodrum Farm CR314, LLC, in Butler County, Missouri, to resolve violations of Section 404 of the Clean Water Act (CWA). As part of the settlement, the company has agreed to pay a civil penalty of $15,000. During a July 16, 2014,

inspection, U.S. Army Corps of Engineers (Corps) inspectors found the company had placed dredged and fill material into forested wetlands, in an effort to convert the wetlands to agricultural cropland. This resulted in the unauthorized impact of approximately 9.46 acres of wetlands adjacent to a designated "water of the United States." Under a previously issued administrative compliance order to address the CWA violations, Goodrum Farm CR314, LLC, mitigated the impacted wetland acres by placing approximately 35 acres of the property into a conservation easement, preventing further development, including future farming.

•On July 20, 2016, EPA and DOJ announced a settlement with Enbridge Energy Limited Partnership and several related Enbridge companies to resolve claims stemming from its 2010 oil spills in Marshall, Michigan and Romeoville, Illinois. Pursuant to the settlement, Enbridge agreed to spend at least $110 million on a series of measures to prevent spills and improve operations across nearly 2,000 miles of its pipeline system in the Great Lakes region. Enbridge will also pay civil penalties totaling $62 million for Clean Water Act violations—$61 million for discharging at least 20,082 barrels of oil in Marshall and $1 million for discharging at least 6,427 barrels of oil in Romeoville. In addition, the proposed settlement will resolve Enbridge's liability under the Oil Pollution Act, based on Enbridge's commitment to pay over $5.4 million in unreimbursed costs incurred by the government in connection with cleanup of the Marshall spill, as well as all future removal costs incurred by the government in connection with that spill. The settlement includes an extensive set of specific requirements to prevent spills and enhance leak detection capabilities throughout Enbridge's Lakehead pipeline system - a network of 14 pipelines spanning nearly 2,000 miles across seven states. Enbridge must also take major actions to improve its spill preparedness and emergency response programs. Under the settlement, Enbridge is also required to replace close to 300 miles of one of its pipelines, after obtaining all necessary approvals. Enbridge has already reimbursed the government for $57.8 million in cleanup costs from the Marshall spill and $650,000 for cleanup costs from the Romeoville spill, and Enbridge reportedly incurred costs in excess of $1 billion for required cleanup activities relating to the Marshall and Romeoville spills

•On July 28, 2016, the EPA, the DOJ, and the Nevada Department of Environmental Protection (NDEP) have reached an agreement with the Nevada Department of Transportation (NDOT) to resolve alleged violations of NDOT's stormwater permit. The agreement requires NDOT to establish a stormwater management program to control pollutants entering waters, spend $200,000 on an environmental project that will provide real-time water quality data to the public and pay $60,000 each to EPA and NDEP. The settlement also requires NDOT to develop a public outreach program, digitized statewide maps indicating where NDOT discharges stormwater and a plan detailing steps NDOT is taking to reduce the discharge of pollutants from its operations.

•On August 4, 2016, EPA and the state of Pennsylvania, announced a settlement with Consol Energy Inc., CNX Coal Resources and Consol Pennsylvania Coal Co., LLC (Consol) requiring the companies to implement extensive water management and monitoring activities to prevent contaminated discharges of mining wastewater from the Bailey Mine Complex (Complex) in Greene and Washington Counties, Pennsylvania, to the Ohio River and its tributaries. In a consent decree filed in federal court in Pittsburgh, Consol also agreed to continue to prevent certain discharges from the Complex, conduct regular long-term-monitoring to ensure sufficient storage capacity to prevent future discharges, develop contingency plans should future discharges become likely, and implement an environmental management system to ensure compliance with the Clean Water Act and other applicable environmental laws. In addition, Consol, the largest producer of coal from underground mines in the United States, will pay a $3 million civil penalty for Clean Water Act violations. The U.S. government's complaint, filed concurrently with the settlement, alleges chronic exceedances of osmotic pressure (OP) and other limits in Consol's Clean Water Act discharge permits. The discharges primarily enter into tributaries of the Ohio River. OP is the standard used in Pennsylvania to protect aquatic life from excess amounts of total dissolved solids (TDS).

•On August 5, 2016, EPA issued the City of Derby, Connecticut an administrative order requiring the city to make improvements to its sewage system. Since June 2, 2011, on at least four occasions, the city discharged untreated sewage from its sewer system to the Naugatuck River or to the Housatonic River. The order requires that, in order to prevent future overflows, known as sanitary sewer overflows or SSOs, the city will re-evaluate and revise its operation and maintenance practices.

•On August 11, 2016, EPA issued an adminsitrative order to the Village of Tarrytown, New York directing it to comply with the Safe Drinking Water Act's Lead and Copper Rule. A recent investigation by the EPA revealed that Tarrytown had violated numerous provisions of the rule, including failing to properly evaluate the village's water distribution system before establishing tap sampling locations and failing to meet requirements for properly identifying tap monitoring locations. The EPA order requires the Village of Tarrytown to deliver consumer notices and conduct public education activities for individuals and organizations using the village's water supply. In April 2016, the EPA conducted an audit at Tarrytown Water Supply's offices to review Lead and Copper Rule data and also conducted a site visit of treatment facilities used by the village. Tarrytown was inspected because recent sampling results by the village showed action level exceedances for lead in drinking water. Out of 31 samples, four exceeded the EPA's action level for lead.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•On June 21, 2016, EPA an agreement with the U.S. Navy and Guam Industrial Services (known as Guam Shipyard) for hazardous waste storage violations under the federal Resource Conservation and Recovery Act (RCRA), at Apra Harbor, Guam. As part of the settlement, Guam Shipyard will remove an abandoned vessel grounded in the harbor. EPA's inspections at the Guam Shipyard facility in 2012, 2013 and 2014 documented illegal storage and improperly contained hazardous wastes. Guam Shipyard, which operated the facility where the violations occurred, will pay a penalty of $44,893 and the Navy will pay $80,680 to settle its violations. In addition, Guam Shipyard has agreed to spend an estimated $250,000 to $330,000 to remove the abandoned vessel the Guahan-I located on the shoreline of the Outer Piti Channel in Apra Harbor. The Guahan-I is a 115-foot by 322-foot steel landing craft that likely went aground during Typhoon Pongsona in 2002. Guam Shipyard operates a ship repair facility at Apra Harbor and will use its own personnel and equipment, including its own floating crane, to cut, lift, and dispose of the vessel as scrap.

•On July 12, 2016, EPA announced a settlement with Whittaker Corp., Textron Inc., U.S Army, and U.S Department of Energy addresses the cleanup of contaminated groundwater at the Nuclear Metals, Inc. Superfund Site in Concord, Massachusetts. Under the settlement, Whittaker and Textron will perform a non-time critical removal action for groundwater cleanup at the Concord site, which will be financed in large part by the federal government responsible parties. The cleanup, including EPA oversight costs, is estimated at $5.7 million. The Nuclear Metals, Inc. site, also known as the Starmet Corp. site, includes a 46+-acre parcel located at 2229 Main Street in Concord, Mass. and surrounding areas where groundwater contamination has migrated. Several prior owners/operators used the site for research and specialized metals manufacturing, and were licensed to possess low-level radioactive substances. From 1958 to 1985, wastes contaminated with depleted uranium, copper, and nitric acid were disposed into an unlined holding basin at the site. Volatile organic compounds (VOCs), which likely contained 1,4-dioxane as a stabilizer, were used as solvents and degreasers for cleaning of machines and machined parts/products, and discharged through floor drains to an on-site cooling water pond resulting in contamination of an on-site supply well. Sampling during the late stages of the Site Investigation determined that a 1,4-dioxane plume at the site was migrating. Cleanup of the groundwater is part of EPA's overall remedy for the site. The Site Remedy was selected in EPA's Sept. 2015 "Record of Decision." EPA elected to address VOCs and 1,4-dioxane in groundwater in a separate, early action to contain the plume and prevent further migration. Specifically, this early action will prevent migration to a "down-gradient" well field for the town of Acton's public water supply. The groundwater action includes the design and construction of a groundwater treatment system and initial operation of the system.

•On July 18, 2016, EPA announced that PuriCore Inc. of Malvern, Pennsylvania paid a $550,000 penalty for the unauthorized distribution of two pesticide products that were used in supermarkets nationwide. The products included ProduceFresh, an unregistered pesticide used as part of a crisping process in the produce section of stores, and FloraFresh that was used in floral departments. Along with the penalty, EPA issued a stop-sale order to PuriCore Inc. prohibiting the sale of ProduceFresh. The order and penalty were issued under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

•Under a settlement announced on July 20, 2016, Galvco Maryland LLC, a steel galvanizer, has agreed to pay a $60,000 penalty to settle alleged violations of RCRA at its manufacturing facility in Baltimore, Maryland. Alleged violations involved spent hydrochloric acid and included failure to conduct daily inspections of the tank, failure to have a leak detection system or secondary containment surrounding the tank to prevent a spill from reaching the environment should the tank fail, and failure to have the tank evaluated by a professional engineer before using it for hazardous waste storage. The violations did not involve any spill or release of hazardous waste into the environment.

•On July 29, 2016, the EPA, and the DOJ announced that Honeywell International Inc. and Georgia Power Company have agreed to clean up the 760-acre saltwater marsh at the LCP Chemicals Superfund Site in Brunswick, Georgia. The settlement requires the companies to spend an estimated $28.6 million to remove and isolate contaminated sediments in the marsh and to monitor the long-term effectiveness of the work. Between 1919 and 1994, the LCP Chemicals site hosted a petroleum refinery, an electric power generation facility and various manufacturing operations, including a mercury cell chlor-alkali plant. These industrial activities led to widespread contamination of the site's soil, groundwater, surface water and sediment with mercury, polychlorinated biphenyls (PCBs) and other hazardous substances. The site was placed on the federal Superfund list in 1996. The cleanup work required by the settlement includes dredging and installing protective caps on portions of four tidal creeks, placing a layer of clean sediment on eleven acres of marsh and restoring areas disturbed by construction. The work is expected to reduce concentrations of mercury, PCBs, lead and polycyclic aromatic hydrocarbons in the marsh's sediments.

•On August 3, 3016, EPA anounced a settlement with the Connecticut Light and Power Company has agreed to pay $47,000 to settle claims by EPA that it violated federal regulations in its management of a transformer that spilled 50 gallons of oil containing PCBs at a location in Waterbury. EPA alleged that violations of the federal Toxics Substances Control Act (TSCA) occurred at a transformer at 130 Freight St., home to a client of the power company. The transformer was owned by the power company, which is doing business as Eversource Energy. Eversource was responsible for the storage and removal of the transformer. Eversource has since removed and shipped for disposal the PCB-contaminated transformer and contaminated soil and concrete. About 70 cubic yards of material was removed as a result of the cleanup, according to Eversource officials.

•On August 3, 2016, EPA announced a settlement with Vita Craft Corporation of Shawnee, Kansas, under which the company will install equipment to completely eliminate emissions of the hazardous air pollutant perchloroethylene (PCE) from its facility. An EPA inspection in September 2015 that revealed the facility's PCE emissions were in excess of the regulatory threshold, Vita Craft approached EPA with a proposal to address the findings by eliminating PCE emissions entirely. Although it is allowed to use and emit PCE up to an annual limit, Vita Craft, a manufacturer of high-end metal cookware, elected to modify its manufacturing process by installing an aqueous degreaser, which will result in zero PCE emissions to the surrounding community. EPA estimates this equipment will eliminate more than eight tons of PCE emissions annually.

•On August 3, 2016, EPA announced a settlement with Crosby & Overton, Inc., for improper handling of hazardous waste at its southern California facility. Crosby & Overton will pay a $78,570 penalty. EPA inspected Crosby & Overton's hazardous waste treatment facility in Long Beach in August 2014. EPA found that the company failed to safely store broken batteries, which contain corrosive hazardous waste.

In addition, Crosby & Overton did not properly use and maintain equipment—such as a diaphragm pump for pumping paint waste—and failed to conduct the required inspections and monitoring to manage hazardous materials and related air emissions.

•On August 9, 2016, EPA and DOJ and the State of New Mexico announced a settlement with Chevron Mining Inc. (CMI) requiring $143 million in cleanup work at the Chevron Questa Mine Superfund site near Questa, New Mexico. As part of the settlement, the company will perform a pilot project to cover about 275 acres of the tailing facility where mine waste or "tailings" are stored, operate a water treatment plant and install groundwater extraction systems. CMI will also pay over $5.2 million to reimburse EPA's past costs for overseeing cleanup work at the site.

•On August 12, 2016, he U.S. District Court for the Southern District of West Virginia approved a settlement that requires Bayer CropScience LP to pay $5.6 million for a penalty and safety improvements to resolve violations of federal chemical accident prevention laws. The violations occurred at Bayer's facility in Institute, West Virginia, where a 2008 explosion killed two people. Under the settlement, Bayer CropScience will spend $4.23 million to improve emergency preparedness and response in the Institute, W.Va. area, pay a $975,000 penalty, and spend approximately $452,000 to implement a series of measures to improve safety at their chemical storage facilities across the United States.

•On August 15, 2016, EPA announced a settlement with Citrus and Allied Essences, Ltd. a producer of essential oils used for flavoring and fragrances. Under the settlement, the company will pay a $59,472 penalty to settle alleged violations of hazardous waste regulations at its manufacturing facility in Belcamp, Maryland. As part of the settlement, Citrus and Allied also agreed to spend an additional $44,000 to complete a supplemental environmental project that involves developing a management program that will enhance the company's safety and environmental compliance. EPA cited Citrus and Allied for violating RCRA. The alleged RCRA violations involved the generation and management of spent terpenes, which are organic compounds generated at the facility from the distillation of essential oils from fruits, flowers, and other plants. The spent terpenes are considered hazardous waste because they are ignitable. The alleged violations included failure to make hazardous waste determinations; failure to properly manage hazardous waste in containers and in a hazardous waste storage tank; failure to update the facility contingency plan; and failure to document hazardous waste training for employees.

Indictments Convictions and Sentencing

•On July 15, 2016, a federal grand jury in Charleston, South Carolina, returned an indictment charging Aegean Shipping Management S.A. and Aegeansun Gamma Inc. with obstruction of an agency proceeding, conspiracy and failing to keep accurate pollution control records. Three engineering officers were charged with related offenses. The charges stem from the 2015 falsification of records and obstruction designed to cover up overboard discharges of oily mixtures and machinery space bilge water from the Liberian-flagged chemical tanker, T/V Green Sky. The vessel's management company, Aegean Shipping Management of Liberia and the vessel's owner, Aegeansun Gamma of the Republic of the Marshall Islands, are charged with failing to maintain an accurate oil record book as required by the Act to Prevent Pollution from Ships (APPS), a U.S. law which implements the International Convention for the Prevention of Pollution from Ships, commonly known as "MARPOL." The companies were also charged with falsification of records, obstruction and conspiracy. The individuals, Panagiotis Koutoukakis and Herbert Julian, both former Chief Engineers of the T/V Green Sky and Nikolaos Bounovas, the former Second Engineer onboard the vessel, were charged with aiding and abetting the failure to maintain an accurate oil record book, falsification of federal records and conspiracy. Julian is facing an additional obstruction charge.
(Andre Monette)

LAWSUITS FILED OR PENDING

U.S. DISTRICT COURT TO ADDRESS RECOVERY OF CERCLA CLEANUP COSTS FOR SOIL AND GROUNDWATER CONTAMINATION ON REMAND FROM THE NINTH CIRCUIT

Plaintiff AmeriPride Services, Inc. (AmeriPride) pursued a federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) action more than 16 years ago to recover investigation and remediation costs of about $7.75 million it incurred resulting from perchloroethelyne (PCE) contamination caused by previous owners—Valley Industrial Services, Inc. (VIS), an industrial dry cleaning and laundry business using PCE as a solvent. VIS would eventually merge into Texas Eastern Overseas, Inc. (TEO). After trial, appeal, and settlement with other parties TEO remains as the sole defendant. The U.S. District Court apportioned liability between AmeriPride and TEO at 50/50, concluding "given the facts as the court has found them… the fairest apportionment is to divide responsibility equally." The court then ordering TEO to pay $9.9 million, also issuing a declaratory judgment that TEO would be responsible for one-half of all future cleanup costs. TEO appealed the decision in April of 2015. The Ninth Circuit Court of Appeals vacated judgment and remanded back to the District Court to explain its allocation. Now pending before the District Court on remand, are both TEO and AmeriPride's cross motions for summary judgment. TEO's motion sought a ruling holding other parties Petrolane, Chromalloy, and Huhtamaki liable for the cleanup costs incurred by AmeriPride. AmeriPride's settlements with Huhtamaki and Cal-Am reimbursed them for necessary response costs. AmeriPride's motion sought an opposite ruling on the same issues. [*AmeriPride Services, Inc. v. Valley Industrial Services, Inc.*, ___F.Supp.3d___, Case No. 2:00-cv-113-Mce-EFB (E.D. Cal.).]

Background

AmeriPride now owns the contaminated site, which was initially owned and operated by VIS—during which time VIS contaminated the soil and ground water with PCE. While VIS operated the facility, it was a wholly-owned subsidiary of Petrolane. VIS eventually merged into Defendant TEO, which expressly assumed VIS's liabilities. In 1983, Petrolane sold the facility which would then change ownership several times until AmeriPride became the owner.

During AmeriPride's ownership there were additional releases of contaminated water into the soil and groundwater. The contamination migrated to neighboring property owned by Huhtamaki Foodservices, Inc. (Huhtamaki) and contaminated wells owned by California-American Water Company (Cal-Am). It was in 1997 when AmeriPride found evidence of the contamination and reported the discovery to regulatory authorities. In 2002, the California Regional Water Quality Control Board (RWQCB) took regulatory control over the investigation at the facility; AmeriPride has since performed investigation and remediation of the PCE under the RWQCB's direction. The cleanup is ongoing.

In January 2000, AmeriPride filed its CERCLA and state law claims against against VIS, TEO, Petrolane, Chromalloy, and other parties—through which AmeriPride sought to recover its remediation costs responding to the PCE contamination. TEO asserted a counterclaim against AmeriPride.

On July 9, 2002, Cal-Am filed a separate claim against AmeriPride and TEO seeking recovery of response costs, damages, and other relief in connection with the contamination of its wells. AmeriPride paid Cal-Am $2 million to settle those claims. On July 29, 2004, Huhtamaki sued Ameripride; AmeriPride then paid $8.25 million to settle. In 2006, AmeriPride entered into settlement agreements with Chromalloy and Petrolane which AmeriPride received $500,000 and $2.75 million. Settlement attempts between TEO and AmeriPride were unsuccessful—resulting in AmeriPride's cost recovery claims against TEO.

The Initial Ruling

In May 2011, the District Court granted, in part, AmeriPride's motion for summary judgment determining as a matter of law that: 1) TEO is a potentially responsible party liable for AmeriPride's

response cost under CERCLA; 2) AmeriPride paid for investigation and remediation costs of $7,750,921 through August 2010, and regulatory oversight costs of $474,730 through September 2010; and 3) AmeriPride's investigation and remediation costs are necessary and consistent with National Contingency Plan, 40 C.F.R, pt. 300 (NCP). The court also denied several of AmeriPride's summary judgment claims, specifically denying: 1) AmeriPride's summary judgment to the extent it pertains to allocation of liability on AmeriPride's CERCLA claims; and 2) AmeriPride's summary judgment of TEO's counterclaim.

The case proceeded to trial with the main issue being the equitable allocation of responsibility of CERCLA claims. The court entered an order finding: the amount subject to equitable allocation totaled $15,508,912.36. The court calculated the amount by combining AmeriPride's investigation, remediation costs, then adding the $10.25 million, representing AmeriPride's settlement to Huhtamaki and Cal-Am. The court then deducted $3.25 million based on AmeriPride's settlement with Chromalloy and Petrolane. In so doing, the court applied the Uniform Contribution Among Tortfeasor's Act's (UCATA) *pro tanto* approach to equitably account for these settlements. Next, the court apportioned the liability 50/50 between TEO and AmeriPride holding TEO responsible for paying one-half of all future cleanup costs. The court also ordered TEO to pay prejudgment interest to AmeriPride "in amounts calculated in accordance with 42 U.S.C. §9607."

On April 20, 2012, the court issued its order determining issues raised at the trial, including the award of interest, and adopting all undisputed facts of the pretrial order. The court entered judgment ordering TEO to pay $9, 974,421.95, and issuing a declaratory judgment holding TEO responsible for one-half of all future cleanup costs.

At the Ninth Circuit

TEO appealed the decision on April 2, 2015. The Ninth Circuit Court of Appeals vacated judgment and remanded with instructions to: 1) explain which equitable factors the court considered in allocating the $3.25 million in settlement payments from Chromalloy, and Petrolane to AmeriPride, or select those factors and allocate the settlement payments in accordance with those factors in the first instance; 2) determine the extent to which AmeriPride reimbursed Huhtamaki and Cal-Am for necessary response costs incurred consistent with NCP; and 3) apply the interest provisions in CERCLA § 107 (a) to determine when interest began to accrue on the costs paid by AmeriPride.

One of the central issues left to resolve concerned the liability of the parties that settled with AmeriPride (Chromalloy, Petrolane, Cal-Am, Huhtamaki (Settlors)—an important point as TEO's liability to AmeriPride would be reduced by the amount Settlors' liability for contamination at the site. Regarding Chromalloy and Petrolane, AmeriPride argued on remand that the court could not find that they did anything to cause contamination at the site—despite AmeriPride suing them under CERCLA, and extracting significant settlements from them.

As to Chromalloy, the court granted TEO's motion on the issue of Chromalloy's liability. The contaminants at issue were present at Chromalloy's facility—and there was no genuine issue of material fact that Chromalloy used TCA and PCE at its facility.

Regarding Petrolane, Petrolane owned VIS, one of its subsidiaries that, during the relevant timeframe, owned the site. Evidence suggested that Petrolane actually operated the site alongside VIS—making it directly liable under *United States v Bestfoods*, 524 U.S. 51 (1998). Petrolane was liable under successor liability theory as well as there was no genuine issue of material fact that the sale of VIS' assets to Petrolane was a de facto merger.

The court granted AmeriPride's motion as to Huhtamaki's and Cal-Am's liability based on the lack of evidence in the record that Huhtamaki's release of hazardous substances at its facility caused AmeriPride to incur response costs.

On Remand at the District Court

On remand, the Court of Appeals directed the District Court to determine how much of the settlements "reimbursed Huhtamaki and Cal-Am solely for necessary response costs incurred consistent with the NCP." The Ninth Circuit went on the state:

> This is qualitatively different from a determination of how much Huhtamaki and Cal-Am spent on NCP-compliant response costs. Put simply, the court cannot begin to make a determination of how much Cal-Am and Huhtamaki spent on NCP-complaint response costs without

> first determining that some portion of the settlement money paid was intended to reimburse them for such costs under CERCLA. Since the settlement agreements themselves are the only admissible evidence of AmeriPride's intent to reimburse per the parties' stipulation, and because they say nothing about any such intent, TEO's motion is [granted].

Conclusion and Implications

On July 29 the parties entered into a series of stipulations, which were adopted by the District Court in anticipation of trial. *See,* https://scholar.google.com/scholar_case?case=12031640557873020920&hl=en&as_sdt=6&as_vis=1&oi=scholar

This case highlights the CERCLA complication of whose settlements are to be credited. In the majority of tort cases, court rely on the *pro tanto* approach thereby giving the remaining defendants a "dollar-for-dollar" credit for settlement amounts received by the plaintiff. This is not the trend in CERCLA cases in which the *pro rata* approach is more prevalent, under which the remaining defendants are credited for settling defendants' proportional share of the liability.

In this case, the Ninth Circuit held that the District Court has the discretion to select the appropriate settlement credit.

(Thierry Montoya, Pablo Rodriguez)

JUDICIAL DEVELOPMENTS

FIRST CIRCUIT UPHOLDS DISTRICT COURT'S HOLDING THAT PROPERTY OWNER FAILED TO SHOW A CLEAN WATER ACT STORMWATER VIOLATION

Louis Paolino, et al. v. JF Realty, et al., ___F.3d___, Case No. 15-1498 (1st Cir. July 18, 2016).

Louis Paolino and wife Marie Issa (Paulino) sued under the federal Clean Water Act's (CWA) citizen suit provisions filing injunctive relief and damage claims against the owner of the neighboring property and the business operating on it (collectively: JF Realty). The action alleged that JF Realty discharged contaminated stormwater runoff without CWA permit, contaminating their property in the process. The U.S. District Court characterized the claims as "…an inventive series of unjustifiable efforts to indict their neighbor's environmental practices." The First Circuit Court of Appeals affirmed the lower court's granting of summary judgment in favor of JF Realty and its award of attorneys' fees to the same.

Background

Joseph I. Ferreira bought thirty-nine acres at a site in Cumberland, Rhode Island. The property is now owned by JF Realty, and home to an automobile recycling business—LKQ Route 16 Used Auto Parts, Inc., d/b/a Advanced Auto Recycling (LKQ). Paolino bought neighboring two half-acre parcels in December 1985.

In the early 2000s, Paolino sold the parcels for development; the buyer sued Paolino for failing to disclose the land was contaminated. Paolino has been directed to remediate his property but has yet to do so.

In 2005, the Rhode Island Department of Environmental Management (RIDEM) issued a Notice of Intent to Enforce (NIE) to then-operator—Advanced Auto Recycling (Advanced Auto), requiring it to: 1) install controls to prevent stormwater runoff on the property; and, 2) apply for a Rhode Island Pollution Discharge Elimination System (RIPDES) permit for the property. Ferreira's business manager, Robert Yabroudy, submitted an application to RIDEM for the permits required by the NIE. This application named the operator as—Advanced Auto and owner Joseph I. Ferreira Trust (Ferriera Trust), although at this point in time it appears as though JF Realty were the owners and LKQ was the operator. RIDEM did eventually issue the RIPDEM permit to Joseph I. Ferriera Trust.

During this time Paolino communicated to Yarbroudy that he wanted Ferriera to buy what remained of his property for $250,000; Ferreira refused. In response, Paolino-Issa filed their first lawsuit against JF Realty for contamination of the Paolino-Issa property as well as issuing complaints with RIDEM, the U.S. Environmental Protection Agency (EPA), the U.S. Attorney's Office, the police department, the Department of Business Relations, and with U.S. Senator Sheldon Whitehouse. Paolino-Issa also embarked on a media campaign.

At the Rhode Island Department of Environmental Management

RIPDEM investigated Paolino-Issa's complaint and found all but one allegation to be without merit. In 2008 Paulino-Issa were notified that the discharge point of stormwater had been relocated and was not discharging stormwater onto their property. On March 2, 2010, RIDEM issued a NOV showing that a November 20, 2009 investigation confirmed that the discharge from the JF Realty property was reaching Curran Brook—in violation of the Rhode Island Water Pollution Act and RIDEM Water Quality Regulations. A $2,500 administration penalty was imposed. November 19, 2012, RIDEM issued a letter confirming receipt of a check from JF Realty thereby releasing the NOV. Later April 2014 inspections found no additional violations.

The District Court Claims

Paolino-Issa filed its current claims against JF Realty on January 20, 2012, alleging that contaminated stormwater runoff from the property was being discharged into U.S. waters, contaminating Paolino-Issa's property, and that the JF Realty lacked RIPDES

permit. The case was initially dismissed on July 26, 2012, due to defective pre-suit notice, however, the First Circuit reversed and remanded the case to the District Court—excepting the claims against Ferreira's business manager, Robert Yarbroudy. (*Paolino v. JF Realty, LLC*, 710 F.3d 31, 36, 40-42 (1st Cir. 2013).)

The deadline for Paolino-Issa's submittal of expert disclosures was February 2014. Although Paolino-Issa did provide disclosures for two expert witnesses - Alvin Snyder and Dr. Robert Roseen, the latter's report was thirty-two – with some pages stamped as "draft." On June 13, 2014, Paolino-Issa sought to supplement Dr. Roseen's report. In response, the District Court held that the request was:

> …more than three months after Plaintiff's expert disclosures were due, two weeks after discovery had closed, and after [JF Realty] had filed a motion for summary judgment, based, in part, on the information disclosed on Dr. Roseen's export report.
>
> The second report was 70 pages.

The case proceeded to trial over seven days in August and September 2014, at which the District Court allowed Dr. Roseen to testify only on the content provided in his initial report. The District Court issued a memorandum of the decision on November 19, 2014, concluding Paolino-Issa failed to meet their burden of proof.

On December 3, 2014, JF Realty filed a motion for attorney's fees claiming: 1) Paolino-Issa went to trial without credible evidence; 2) Paolino-Issa conceded that RIDEM had investigated the property and found his complaint lacked merit; and 3) neither RIDEM nor EPA chose to intervene. Paolino-Issa filed an objection alleging that the administrative agency action was not definitive, and JF Realty was seeking fee's related to prior suits. On March 26, 2015, the District Court ordered Paolino-Issa to pay $111,784.50 in attorney's fees - the total amount of fees charged by JF Realty's from June 30, 2014, to October 29, 2014.

The First Circuit's Decision

On appeal, Paolino-Issa alleged that the lower court erred in excluding evidence from Dr. Roseen's expert testimony. When reviewing the exclusion of evidence the court relied on *Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72, 78 (1st Cir. 2009) thereby considering:

> (1) the history of the litigation; (2) the sanctioned party's need for the precluded evidence; (3) the sanctioned party's justification … for its late disclosure; (4) the opponent-party's ability to overcome the late disclosure's effects …; and (5) the late disclosure's impact on the District Court's docket.

The Court of Appeals held that the District Court court's decision to exclude the supplement to Dr. Roseen's report passed the five-factor *Esposito* test.

In terms of the history of litigation, Paolino-Issa repeatedly missed deadlines for discovery and motions. While they also contend the information was crucial to their case they were able to present numerous other forms of evidence as well as nine other witnesses. Dr, Roseen was also allowed to testify—only on the material, which was submitted before the deadline. Paolino-Issa claim their tardiness was due to JF Realty's refusal to allow them on their property yet concede they did not file a motion to obtain an order to inspect the property as opposed to a request for entry until February 10, 2014; experts' reports were to be disclosed February 28.

As to the fourth *Esposito* factor, the court noted Paolino-Issa's motion to:

> …serve a revised report [came] months after the deadline for expert disclosures had passed and only after the Defendants… had filed their motion for summary judgment.

JF Realty had already relied on the original report from Dr. Roseen in drafting its motion for summary judgment. To grant the supplement would have greatly affected JF Realty who relied upon that initial disclosure. Thus the Court of Appeals found no abuse of discretion in the District Court's decision to exclude the revised report.

Conclusion and Implications

As the District Court carefully considered and detailed its analysis, the Court of Appeals found no grounds of an abuse of discretion or of a clear error of judgment. The Court of Appeals' decision is accessible online at: http://media.ca1.uscourts.gov/pdf.opinions/15-1498P-01A.pdf
(Thierry Montoya, Pablo Rodriguez)

FIFTH CIRCUIT UPHOLDS FWS CRITICAL HABITAT DESIGNATION UNDER THE ESA ON LAND THAT IS UNOCCUPIED BY LISTED SPECIES

Markle Interests L.L.C. v. U.S. Fish and Wildlife Service, ___F.3d___, Case No. 14-31008 (5th Cir. June 30, 2016).

The Fifth Circuit Court of Appeals has upheld a designation of Critical Habitat under the federal Endangered Species Act (ESA) even where the land at issue is currently unoccupied by the listed species, and although it contains one physical feature necessary for conservation of the species: i) it currently lacks other, necessary features, ii) the landowners have stated they will not allow any alterations to create the other necessary features, and iii) the federal government lacks the power to compel alteration of the land to make it habitable. The court held that despite the lack of any reasonable likelihood that the land will become habitable in the foreseeable future, the U.S. Fish and Wildlife Service (FWS) did not exceed its statutory authority in finding the unoccupied lands "essential" to conservation of the species.

Background

When the dusky gopher frog was listed as endangered under the ESA in 2001, only about 100 adult frogs were known to exist in the open-canopied pine forests of Mississippi. The frogs spend most of their lives underground in the forests, but rely on isolated ephemeral ponds to breed. In 2012, the FWS designated Critical Habitat for the frog, including 1,544 acres in St. Tammany Parish, Louisiana. The Louisiana lands are subject to a long-term timber lease and the landowners and lessees (collectively: landowners) intend to use the land for residential and commercial development and timber operations. They challenged the designation of their lands as critical, although currently unoccupied, habitat "essential" to the preservation of the frog, as the land does not currently support conservation of the frog and it is not reasonably likely that it will support conservation of the frog in the foreseeable future. The landowners alleged the FWS exceeded its statutory authority under the ESA and that its findings in support of the designation were not supportable under the Administrative Procedure Act. The District Court upheld the designation.

The Fifth Circuit's Decision

The ESA provides for designation of both occupied and unoccupied Critical Habitat "essential" to conservation of listed species. 16 U.S.C. § 1532(5)(A)(i)-(ii). A designation of unoccupied habitat, such as the Louisiana land at issue, was only merited, under the regulations in effect in 2012, once the FWS made a finding that:

> …a designation limited to [the species'] present range would be inadequate to ensure the conservation of the species. 50 C.F.R. § 424.12(e) (2012).

The FWS originally proposed designating only occupied land in Mississippi, but on the basis of peer-review and expert comments received found the frog could not recover without establishing additional breeding populations, and that unoccupied habitat outside of Mississippi must be designated to protect against the risk of "local events, such as drought and other environmental disasters." The landowners did not challenge this "inadequacy" finding.

The ESA, Critical Habitat and 'Essential' Land

But the ESA does not define "essential," and the landowners challenged the FWS' finding that their unoccupied Louisiana land was "essential" for conservation of the frog. The existence of ephemeral ponds on the lands, their quality and proximity to each other allowing frogs to move between them, is not at issue. The landowners also did not challenge the scientific support for the FWS' findings with respect to the quality of the upland habitat and connecting corridors. All agree that the current state of the uplands would not support the frogs, as they are currently covered with 90 percent closed-canopy forest that would require significant alteration to become habitable and the landowners strenuously affirm they have no plan or proposal to render the land habitable by the frog. Rather, the landowners alleged the FWS' finding that their lands were "essential" to conserva-

tion of the species "exceeded its statutory authority" because unoccupied lands not currently supporting the conservation of a listed species that are not reasonably likely to support such conservation in the foreseeable future "cannot rationally be called 'essential for conservation of the species.'"

Supporting Re-Occupation of the Land—Temporal Nature of the ESA

The critical lynchpin in the landowners' argument was that the FWS has no ability to require them to alter the uplands in any way that would support re-occupation by the frogs, and therefore "the FWS has no reasonable basis to believe that" the lands will become habitable "at any point in the foreseeable future."

The Fifth Circuit rejected this argument, holding that the ESA does not include a temporal component requiring the FWS to "know when a protected species will be conserved as a result of the designation" and the ESA does not "set[] a deadline for achieving this ultimate conservation role." The court contrasted the ESAs recovery plan provisions, which:

> …do require the FWS to estimate when a species will be conserved. … Congress' inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designations, further underscores the weakness of the landowners' argument.

The court noted the landowners':

> …logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring they will not—now or ever—permit reintroduction of the species to their land. The landowners' focus on private-party cooperation as part of the definition of 'essential' finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.

The Dissent

In a dissenting opinion, Justice Owen rejected the majority's reasoning, arguing that the existence of one habitat feature—ephemeral ponds—was insufficient to support a finding land is "essential" to conservation of the species:

> The existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics.

Conclusion and Implications

The FWS' discretion to designate Critical Habitat under this decision is potentially bounded only by the existence of at least one rare physical characteristic necessary to conservation of a listed species. While a finding such a physical characteristic exists must be supported by scientific consensus, it cannot be undermined by an affirmative showing that there is no reasonable probability that the land will ever be altered to become habitable. This decision bolsters the authority of the FWS to designate private land as Critical Habitat. The court's refusal to grant any weight to private landowners' preemptive rejection of participation in conservation efforts could, in theory, reduce the incentive to resist such efforts, but that seems unlikely given the negative effect of designation on the market value of land. The Fifth Circuit's decision is accessible online at: https://scholar.google.com/scholar_case?case=11464981352751772 37&q=Markle+Interests+L.L.C.+v.+U.S.+Fish+and+Wildlife+Service&hl=en&as_sdt=2006&as_vis=1
(Deborah Quick)

D.C. CIRCUIT UPHOLDS EPA'S 'BACKSTOP' AUTHORITY TO REVOKE CORPS' CLEAN WATER ACT PERMIT DUE TO 'UNACCEPTABLE ADVERSE EFFECTS' ON WILDLIFE

Mingo Logan Coal Company v. U.S. Environmental Protection Agency, ___F.3d___, Case No. 14-5305 (D.C. Cir. July 19, 2016).

In a second look at withdrawal of fill disposal sites by the U.S. Environmental Protection Agency (EPA) from a federal Clean Water Act (CWA) § 404 permit issued several years before by the U.S. Army Corps of Engineers (Corps), the D.C. Circuit Court of Appeals bolstered its prior holding that EPA's "backstop" 404 permitting authority allows post-issuance permit revocation, holding this time around that the agency's revocation was not arbitrary or capricious under the Administrative Procedure Act (APA). This case also involves a dramatic application of the waiver doctrine: the permit holder's allegation the permit withdrawal would cost it "millions of dollars" in reliance costs, without any more detail, was held insufficient to trigger any duty by the EPA to engage in any cost-benefit analysis.

Background

In 2007, Mingo Logan obtained a CWA 404 permit from the Corps allowing it to deposit spoil from surface coal mining in West Virginia. The 404 permit designated three disposal sites in valleys surrounding mountains proposed to be mined. Although the EPA "expressed its concern that 'even with best practices, mountaintop mining yields significant and unavoidable impacts'" not adequately described in the Corps' Environmental Impact Statement, the EPA ultimately did not block issuance of the 404 permit under its "backstop" authority to deny, restrict or withdraw specification of sites for the disposal of dredge or fill materials under a 404 permit on finding such disposal will have an:

> …unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas …, wildlife, or recreation areas. 33 U.S.C. § 1344(c).

The mine began operations, depositing spoil in only one of the three designated sites. In 2009, the EPA requested the Corps suspend, revoke or modify the 404 permit on the basis of new information and circumstances, including "actual data" from the mine's operations supporting a conclusion of "significant risk" that selenium levels leaching from deposited spoils would regularly exceed levels that would produce harmful effects on macroinvertebrates and fish. The Corps rejected EPA's request; EPA, following a notice and comment period, then acted under its own authority to withdraw from the permit the two, as-yet-unused, disposal sites, which together constituted approximately 88 percent of the permit's fill area.

Mingo Logan challenged the EPA's action, asserting i) the CWA did not grant the EPA authority to withdraw permit coverage for specified spoils disposal sites post-issuance, and ii) the withdrawal was arbitrary, capricious or otherwise contrary to law in violation of the APA. In 2013, the D.C. Circuit upheld the EPA's authority to withdraw permit coverage post-issuance, remanding for consideration of the APA claims.

The D.C. Circuit's Decision

Mingo Logan argued the EPA impermissibly failed to consider its sunk, or reliance, costs in beginning operation of the mine and history of permit compliance as balanced against the avoidance of the anticipated adverse environmental effects. The Circuit Court held Mingo Logan had waived this argument by failing to put before the EPA sufficiently detailed claims of its costs and by failing to pursue this argument in the District Court. In its submissions in the EPA's notice and comment proceedings, Mingo Logan stated it had expended "millions of dollars" in beginning operation of the mine. The court found this bare assertion, with no more detail provided, was insufficient to trigger any duty by the EPA to carry out a comparative analysis of Mingo Logan's reliance costs against the projected value of the anticipated environmental harms:

> [O]n Mingo Logan's submission the EPA would have to ask: Did Mingo Logan rely on the permit to the tune of two 'millions of dollars' or two hundred 'millions of dollars?' What portion of the 'millions' would in fact be lost by withdrawing two disposal sites inasmuch as Mingo Logan can continue to discharge spoil at the [remaining] site, *and* neither [withdrawn] site had become operational yet? The EPA's obligation is to engage in reasoned decisionmaking but Mingo Logan has an obligation to explain why it believes its reliance costs must be considered and to supply sufficient information about its costs to allow the EPA to consider them. "[M]illions of dollars' is not enough.

The court declined to opine on whether such a cost-benefit analysis would be required, holding here only that Mingo Logan had waived this argument. It therefore did not engage with the dissent's position that the EPA must include in a required cost-benefit analysis not only the permittee's direct reliance costs but also costs flowing from lost jobs and other indirect economic benefits that would be lost as a result of permit revocation or withdrawal.

Adverse Impacts Argument

Mingo Logan also argued that the withdrawal violated the APA as the EPA could not support its conclusion of adverse environmental effects due to water quality degradation where West Virginia had certified the mine as meeting water quality standards under its EPA-certified 402 state permitting program. Here too the Circuit Court upheld the agency's decision. First, it rejected Mingo Logan's interpretation of the CWA as disallowing an EPA finding of adverse impact based on effects outside the fill footprint, *i.e.*, downstream of the designated disposal site. The court noted that adverse impacts on, for example, municipal water supplies are necessarily downstream of designated fill sites, and therefore Congress clearly granted EPA authority to find adverse effects beyond the fill footprint. Next, the court found that EPA sufficiently supported its findings that impacts on water quality—including due to selenium leaching at higher levels than anticipated at the time of initial permit issuance—would adversely affect downstream wildlife resources.

Sufficient Factual Findings to Support 'Back-stop' Authority

Lastly, Mingo Logan argued that EPA's "*volte face*" constituted a change in policy triggering a heightened evidentiary standard to support its regulatory decision under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), which held that when a "new policy rests upon factual findings that contradict those which underlay [an agency's] prior policy" the agency "must" provide "a more detailed justification" for the new policy. The court declined to decide whether the *Fox* standard is necessarily triggered whenever the EPA invokes its post-issuance authority to withdraw or revoke a 404 permit, finding only that in this instance the EPA's detailed factual findings would meet the heightened *Fox* standard assuming, for the sake of argument, that it applied.

Conclusion and Implications

Soundly affirming a broad scope of application for EPA's post-issuance "back-stop" authority to allow withdrawal or revocation on the basis of downstream adverse effects, this decision dramatically underlines the importance of preserving litigation theories by laying a solid foundation in agency proceedings. Even when those proceedings may appear to be driven by technical, rather than legal, considerations, it is critical to consider the long-term litigation options—including at the appellate level—even at the notice and comment period stage of permitting. The D.C. Circuit's decision is accessible online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/3D375003952F4CDE85257FF500506715/$file/14-5305-1625459.pdf

(Deborah Quick)

NINTH CIRCUIT DISMISSES CERCLA CASE AGAINST CANADIAN MINING COMPANY FOR CROSS-BORDER AERIAL EMISSIONS CAUSING POLLUTION TO WATER AND SOIL

Pakootas v. Teck Cominco Metals, Ltd., ___F.3d___, Case No. 15-35228 (9th Cir. July 27, 2016).

The U.S. Court of Appeals for the Ninth Circuit recently dismissed a lawsuit seeking to hold a Canadian mining company liable for soil and water contamination allegedly caused by aerial emissions of hazardous compounds through a smokestack at its mining facility. Bound by several recent Ninth Circuit decisions addressing similar issues, the court held that the owner-operator of the facility did not arrange for the "disposal" of those substances within the meaning of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) because such liability does not extend to activities involving "the gradual spread of contaminants without human intervention." As a result, the court dismissed the claim.

Background

The history of legal disputes over damage allegedly caused in the State of Washington by emissions of toxic chemicals from Teck Cominco Metals, Ltd.'s (Teck) mining facility, which is located ten miles north of the border between the United States and Canada in Trail, British Columbia, stretches back more than 100 years. This particular dispute initially focused upon the disposal of slag into the Columbia River. While litigation was proceeding, the Confederated Tribes of the Colville Reservation and the State of Washington (collectively: plaintiffs) sought leave to file an amended complaint to add a new claim under CERCLA, alleging that, in addition to dumping hazardous substances into the river, the company also emitted hazardous substances into the air through smokestacks at the facility causing damages.

More specifically, plaintiffs alleged that "[f]rom approximately 1906 to the present time," Teck emitted hazardous substances, including lead, arsenic, cadmium, and mercury compounds, into the atmosphere through the smokestacks at its industrial smelter. These emissions then traveled through the air into the United States and were deposited into an area in Washington known as the Upper Columbia River Site (UCR Site). Over time, plaintiffs alleged these deposits caused the land and water to become contaminated.

After the U.S. District Court granted plaintiffs' request to add the CERCLA claim, Teck moved to strike or dismiss those claims. In its motion, Teck argued that CERCLA imposes no liability when hazardous substances are directly emitted into the air, and then are later deposited "into or on any land or water." The District Court disagreed, allowing the plaintiffs to continue to pursue this theory of liability.

Shortly after the District Court's determination, the Ninth Circuit issued its decision in *Center for Community Action & Environmental Justice v. BNSF Railway Co.*, 764 F.3d 1019, 1023-24 (9th Cir. 2014). In that case, the court held that emitting diesel particulate matter into the air and allowing it to be "transported by wind and air currents onto the land and water" did not constitute "disposal" of waste within the meaning of the federal Resource Conservation and Recovery Act (RCRA). While this was not a decision under CERCLA, Teck filed a motion for reconsideration arguing that this served as persuasive authority to support its motion to dismiss. This request was denied by the District Court. On interlocutory appeal, the Ninth Circuit addressed the issue.

The Ninth Circuit's Decision

In examining whether the plaintiffs had raised actionable claims under CERCLA, the court focused its analysis upon the text and statutory framework of CERCLA. To fulfill its goal of ensuring prompt and effective cleanup of waste disposal sites, "CERCLA sets forth a comprehensive scheme" to "assure that parties responsible for hazardous substances bear the cost of remedying the conditions they created." Unfortunately, the statute does not set forth a clear definition of "disposal," the key word at issue in this case. Instead, the statute "cross-references RCRA's [definition]," under which disposal means:

> …the discharge, deposit, injection, dumping…

> 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.

Aerial Emissions as a 'Deposit' of Hazardous Substances to Land and Water

Here, plaintiffs argued Teck's emissions resulted in the "deposit" of hazardous substances in the land and water at the UCR Site. While the court noted the reasonableness of this interpretation, it stated that it must interpret the text of the statute by also looking to relevant case law. In two prior cases, *Carson Harbor Village, Ltd v. Unocal Corporation*, 270 F.3d 863, 870 (9th Cir. 2001) and *Center for Community Action*, the court did just that by examining the meaning of the terms "deposit" and "disposal."

In *Carson Harbor*, the court held that the term "deposit" "is akin to 'putting down,' or placement" by someone and that:

> …[n]othing in the context of the statute or the term 'disposal' suggest[ed] that Congress meant to include chemical or geologic processes or passive migration...*i.e.*, the gradual spread of contaminants without human intervention.

Here, because Teck's emissions traveled across the Canadian border passively without human intervention, this suggested that Teck did not arrange for the "disposal" of hazardous substances within the meaning of CERCLA.

Moreover, in *Center for Community Action*, which involved essentially the same facts as this case but in the context of RCRA, the court interpreted § 6903(3) as requiring any solid or hazardous waste to "*first* [be] placed 'into or on any land or water' and . . . *thereafter* be 'emitted into the air.'" This language, the court reasoned, suggested that Congress did not imagine an "emission" of hazardous substances to fall within the definition.

These two cases, the court noted, provided significant authority to support Teck's position. Because the plaintiffs did not offer any persuasive argument to distinguish either case or to interpret "deposit" differently, the court dismissed the claim. As a result, the court dismissed plaintiffs' claim.

Conclusion and Implications

While the court recognized that plaintiffs had presented an "arguably plausible" interpretation of "deposit" and "disposal," the court found *Carson Harbor* and *Center for Community Action* to compel a different determination. This case could prove to be quite significant to those that are seeking to remedy contamination under an aerial deposition theory. At the same time, the Ninth Circuit's limited focus upon the terms "deposit" and "disposal," this case could potentially serve as roadmap for litigants to pursue an alternative theory under one of the different verbs within the definition of "disposal." As a result, further litigation is likely necessary to clarify the parameters of this decision, as well as the scope of CERCLA. The court's decision is accessible online at: http://assets.law360news.com/0822000/822080/pakootas.pdf
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