

Environmental Litigation and Toxic Torts Committee Newsletter

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MESSAGE FROM THE CHAIR

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This first issue of the Environmental Litigation and Toxic Torts (ELTT) Committee's newsletter for the 2011–12 ABA term focuses on three major and emerging issues in the field of environmental litigation—hydraulic fracturing or “fracking,” climate change, and stormwater discharges. The articles covering these topics provide analysis of recent developments, as well as insights into where future environmental litigation in these areas may be headed.

The first article, by Brent Allen and Lesley Lawrence-Hammer of Greenberg Traurig LLP explores the hot-button topic of fracking, including an overview of the basics of fracking, current legal issues relating to it, and the potential for the number and scope of mass tort cases to expand as fracking operations expand.

Any time environmental cases are decided by the U.S. Supreme Court, our committee takes notice. The second article, written by Andrew J. Marks, an environmental lawyer in the Chicago area, provides an overview and analysis of the Supreme Court's most significant decision to date in the world of climate-nuisance litigation: *AEP v. Connecticut*. The article, however, goes beyond *AEP* and its implications by analyzing the wave of climate-related litigation that has followed fast on its heels—a series of cases filed under the public trust doctrine.

The third article, penned by ELTT's Newsletter Vice Chair Alex Basilevsky of Obermayer, Rebmann, Maxwell & Hippel, LLP, dives into an emerging trend of citizen suits that have been filed based on alleged violations of stormwater discharge permits. The article is a must-read for anyone who owns, operates, or represents a facility with a stormwater discharge permit.

Finally, Committee Vice Chair Patrick Jacobi and I, both of Beveridge & Diamond, PC., provide an update of some of the major environmental and toxic tort case law developments of 2011 beyond those covered in this issue's principal articles.

I trust you will find this issue's articles on these major environmental events and litigation developments both interesting and informative. Please contact me (dkrainin@bdlaw.com) or Newsletter editor Alex Basilevsky (alex.basilevsky@obermayer.com) with feedback on this issue or suggestions for additional newsletter themes or articles. Likewise, please contact me if you wish to become more involved in or have suggestions for ELTT Committee newsletters, programs, or activities. We hope to hear from you or see you at one of the upcoming Section conferences, such as the 30th Annual Water Law Conference (to be held in San Diego on February 22–24, 2012) or the 41st Annual Conference on Environmental Law (to be held in Salt Lake City on March 22–24, 2012). Happy reading!

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Alex Basilevsky, Editor**

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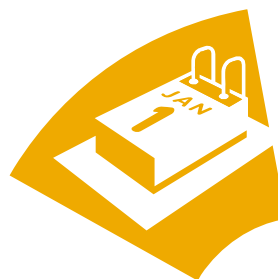
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December 13, 2011
California Dreaming, Reality, or Nightmare?
California’s New Paradigm in Products and
Chemicals Regulation Could be Coming to a Store
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New Orleans

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30th Annual Water Law Conference
San Diego

March 22-24, 2012
41st Annual Conference on Environmental Law
Salt Lake City

April 19-20, 2012
2012 ABA Petroleum Marketing Attorneys’ Meeting
Washington, DC

June 1, 2012
2012 National Spring Conference on the
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HYDRAULIC FRACKING AND MARCELLUS SHALE: DRILLING FOR MASS TORTS?

Brent Allen and Lesley Lawrence-Hammer

The exploration and production of oil and natural gas have always been subject to extensive litigation. However, as new technologies develop and expand, so does the potential for lawsuits. One such new technology is hydraulic fracturing (more commonly known as “fracking”). In recent years, fracking has taken on an expanded role in the Marcellus Shale region in the northeastern United States. While many legal issues accompany hydraulic fracking—including industrial accidents and personal injuries, royalty and land use issues, and regulatory and legislative activities—this article focuses on the potential for new mass torts cases.

Understanding Fracking and the Marcellus Shale

The Marcellus Shale is a huge rock formation in the northeastern United States, lying under large parts of Pennsylvania, New York, Ohio, West Virginia, and Maryland. It exists as a thick layer of shale sandwiched between other rock formations. Marcellus Shale contains great quantities of natural gas trapped in small pockets throughout its shale layer¹ Although the amount of gas contained within the shale is enormous, the difficulty has been in finding an economical way to recover it.

1. Fracking Basics

Hydraulic fracturing (or “hydrofracking”) involves using water and other fluids under high pressure to *fracture* deep rock formations, ultimately releasing small pockets of trapped natural gas and allowing it to flow back up to the surface. Hydrofracking has many uses and has been employed for decades to stimulate oil and gas wells. In recent years, petroleum engineers have combined hydrofracking with horizontal drilling techniques to increase greatly their ability to retrieve hydrocarbons from previously inaccessible underground deposits. The use of this method has spread rapidly. Some estimate that 90 percent of all natural gas wells in the United States now use hydrofracking to improve production rates.

A brief overview of the method is instructive in understanding its popularity and its potential to spawn litigation. First, once engineers identify a promising location, workers clear a zone of approximately five acres and erect a large drilling rig. Fracking sites also may include a variety of other industrial equipment, such as slurry blenders, high-pressure pumps, large tanks or pits to contain fracking fluid, chemical additive units, and monitoring units.

Powerful motors initially drill down vertically creating a well hundreds of feet deep to reach the shale layer below where natural gas is trapped. When the well bore reaches the shale layer, it continues drilling horizontally. The horizontal well bore can extend up to two miles in any direction from the original well site. A single well site can use several horizontal well bores branching off of just one vertical shaft.

As the well bore extends downward and outward, workers seal it with casing and cement. This process not only protects the well bore and improves effectiveness, but it also shields any groundwater that may be present from contamination by fluids and gas as they move throughout the well. After the well bore is complete, workers send a “perf gun” into the pipe that uses small explosives to perforate the well casing and nearby rock. This allows the fracking process to begin. Powerful pumps then push millions of gallons of fracking fluid into the well and newly created cracks at high pressure (up to 15,000 psi).

Fracking fluid is a complex mixture. Drillers consider the contents of their fracking fluid to be proprietary. Significantly, the Safe Drinking Water Act (SDWA) was amended in 2005 to exclude hydraulic fracturing from the Underground Injection Control (UIC) program, so drillers are not required to disclose the proprietary components of their fracking fluids.² Nevertheless, various partial lists of common fracking fluid constituents have been made public. Although fracking fluid is roughly 99 percent water, it also contains several chemicals, such as friction reducers, surfactants, gelling agents, acids, corrosion inhibitors, antibacterial agents, and clay stabilizers. Many of these chemicals are potentially hazardous. In addition, sand

and other “proppants” are added to the fracking fluids to prop open cracks in the rock.

When fracking fluid is pumped into a well bore, the immense pressure breaks up the shale and extends the cracks initially created by the perf gun. Indeed, the pressure is so great that some claim fracking can create miniature earthquakes.³ As the shale breaks apart, the pockets of trapped natural gas are released. When workers stop pumping fracking fluid into the well, the loss of pressure allows the fracking fluid and now-released natural gas to seep out of the shale. The fracking fluid and the released natural gas begin flowing back up the well to the surface.

As it reaches the surface, the natural gas is recovered. Workers also must recover the returning fracking fluid, which will have picked up many new components during its journey underground, such as salts, heavy metals, and naturally occurring radioactive materials like radium and uranium. Since a single well may require four to five million gallons of fracking fluid, disposal of the recovered fluid is no small task. When it emerges from the well bore, the spent fluid generally is pumped into on-site pits or storage tanks. In some parts of the country, disposal is permitted by injection into specially drilled deep wells. In the Marcellus Shale region, however, the recovered fluid usually must undergo wastewater treatment.

2. Enormous Energy Potential and Possible Environmental Risk

Considering the size of Marcellus Shale and the natural gas reserves it holds, it is no surprise that fracking operations pervade states containing the formation. Estimates vary as to how much of the Marcellus Shale’s natural gas is now recoverable, but most agree the quantity is enormous, ranging from 262 to 1300 TCF (trillion cubic feet) of recoverable natural gas. To put this volume in context, the total annual natural gas consumption in the United States is approximately 25 TCF. If these estimates prove accurate, the Marcellus Shale formation conceivably could satisfy the United States’s total natural gas requirements for the next ten to 50 years. At the very least, many expect the Marcellus Shale to supply the Northeast’s natural gas needs for many years to come.

As detailed above, the fracking process is a complex one involving sensitive technologies and potentially hazardous chemicals. The combination of these elements presents certain environmental risks and concerns. One concern is the potential release of methane and other natural gasses into drinking water. This possibility was dramatized in the recent documentary *Gasland*, which includes a scene where a homeowner ignites his kitchen sink water, something allegedly possible because of the elevated levels of gas in his water well.⁴ In other instances, water wells and even houses have exploded from methane contamination of aquifers resulting from faulty gas-well casings. In addition, while methane is not currently regulated in drinking water, possible health effects have not been fully investigated.⁵

Researchers from Duke University recently reported on their study of methane levels in several private groundwater wells in Pennsylvania and New York.⁶ The Duke researchers noted that across the region, methane detections are common, appearing in approximately 85 percent of all private drinking water wells. However, when the researchers compared the methane levels in different wells, they found that methane concentrations in wells close to active drilling sites are *17 times higher* than in wells farther removed from drilling sites. Moreover, the researchers studied the chemical signatures of methane and other hydrocarbons in different wells and found that the hydrocarbons in wells near active drilling sites more closely resemble the type of deep-shale gasses extracted by hydraulic fracking.

The Duke researchers hypothesize different mechanisms that could allow methane and other deep hydrocarbon gasses to reach shallow drinking water wells. They consider it unlikely that very deep fracking, thousands of feet below the surface, could have created direct pathways through many layers of rock to the shallow groundwater aquifer. Instead, they theorize that leaky casings along the well bore could provide a path for deep methane to reach shallow wells near the drilling sites. Alternatively, they suggest that the process of deep hydraulic fracturing could create new fractures (or enlarge existing ones) in shallower formations closer to the drinking water wells.

The researchers also note that parts of Pennsylvania and New York contain many old, uncased, and abandoned wells from the past 150 years of exploration. In some cases, these abandoned wells could provide easy pathways for contamination of drinking water aquifers.

There are other environmental concerns associated with hydraulic fracking sites. Some fear that salts and other radioactive materials dredged up by the deep fracking fluid could contaminate shallower drinking water wells. Even if fracking fluid cannot migrate from the deep shale formation directly to the shallower water aquifers, contamination by fracking fluid remains possible through mechanisms such as faulty well casing and negligent handling of wastewater. Others worry about the potential for fracking fluid spills on the surface by trucks or other facilities before the fracking process even begins, underground well blowouts that release chemicals or natural gas into groundwater, leaking or overflowing fracking fluid holding pits or tanks, and release of not-fully-treated wastewater into surface water bodies. An additional risk sometimes cited is the high rate of methane losses to air. A recent study from a Cornell research team estimates that 3–7 percent of the methane from shale gas extraction is lost to the atmosphere.⁷ Finally, in addition to direct environmental impacts, there also may be loss-of-enjoyment issues arising from the heavy industrial activities taking place in traditionally rural areas.

Current Legal Issues Related to Fracking

All of the environmental risks and concerns associated with fracking create significant potential for lawsuits and related legal obstacles. As outlined below, some of this potential is already being realized. Indeed, new cases are being filed so rapidly that by the time this article is published, several significant new lawsuits likely will have been filed.

1. Private Lawsuits

Private lawsuits challenging fracking have been brought throughout the country. Typically, these lawsuits involve one drilling site and a limited set of impacted plaintiffs who own or reside on land nearby. For example, one law firm, well-known for mass tort litigation focusing

on groundwater contamination and the gasoline additive MTBE, recently filed lawsuits in several states on behalf of plaintiffs who claim that fracking has contaminated their drinking water supplies and caused other contamination. *See, e.g., Baker v. Anschutz Exploration Corp.*, No. 6:2011cv06119 (W.D.N.Y. Feb. 2011) (involving nine plaintiffs from Horseheads, New York, alleging “potable water supplies have been contaminated with combustible gases, toxic sediments, and hazardous chemicals” as a result of “improper or insufficient” drilling, operation, cement casing, and capping of defendants’ gas wells in the Trenton Black River formation); *Strudley v. Antero Resources Corp.*, No. 2011 CV 2218 (Denver County Dist. Ct. Mar. 2011) (complaining of fracking activities in Colorado’s Western Slope).

One relatively developed Marcellus Shale fracking lawsuit is *Fiorentino v. Cabot Oil & Gas Corp.*, No. 09-cv-2284, a Middle District of Pennsylvania case filed in November 2009 on behalf of plaintiffs in Dimock and Montrose, Pennsylvania. Notably in November 2010, the case survived the defendants’ motion to dismiss. Although the court did agree to dismiss the plaintiffs’ claim for gross negligence, it allowed other claims to proceed, including ones for medical monitoring and strict liability. *See Memorandum & Order, Fiorentino v. Cabot Oil & Gas Corp.*, 09-cv-2284 (M.D. Pa. Nov. 15, 2010). The court’s reasoning in *Fiorentino* subsequently was applied in another Pennsylvania fracking case brought by residents of Susquehanna County where the plaintiffs’ strict liability claim was again allowed to proceed. *See Memorandum, Berish v. Southwestern Energy Production Co.*, No. 3:10-cv-1981 (M.D. Pa. Feb. 3, 2011). Besides *Fiorentino* and *Berish*, several other lawsuits related to fracking in the Marcellus Shale have been brought by small groups of plaintiffs in Pennsylvania courts. *See, e.g., Bidlack v. Chesapeake Appalachia, LLC*, No. 3:11-cv-129 (M.D. Pa.) (action removed to federal court on Jan. 19, 2011; originally filed in state court on Dec. 10, 2010); *Otis v. Chesapeake Appalachia, LLC*, No. 3:11-cv-115 (M.D. Pa.) (action removed to federal court on Jan. 18, 2011; originally filed in state court on Dec. 17, 2010).

In a departure from the trend of lawsuits that target fracking operations on only a limited scale, three class action lawsuits were filed in the Eastern District of Arkansas in May 2011 complaining of fracking in the Fayetteville Shale formation. *Tucker v. Southwestern Energy Co.*, No. 1:11 cv 44 DPM, was brought on behalf of “[a]ll citizens and/or residents and/or property owners of the State of Arkansas who live and/or own property within a three-mile radius of [any bore holes, wellheads, or other gas extraction operations] where the Defendants are in the process of natural gas production, including but not limited to natural gas exploration, extraction, collection, treatment, transmission, and any other on-site processes including hydraulic fracturing.” The complaint alleges that the plaintiffs’ water wells were contaminated with fracking fluid after the defendants began extracting gas nearby. More generally, the plaintiffs also claim contamination of soil, air, and groundwater in the vicinity of the fracking operations. The complaint contains causes of action for strict liability, nuisance, trespass, and negligence. The plaintiffs seek \$1 million in compensatory damages and \$5 million in punitive damages, as well as medical monitoring. The second Arkansas class action, *Berry v. Southwestern Energy Co.*, No. 1-11-CV-0045 BRW (E.D. Ark. 2011), targets the same defendants, defines the same class, seeks the same damages, and makes essentially the same allegations as *Tucker*.

The third class action lawsuit, *Ginardi v. Frontier Gas Services LLC*, No. 4-11-CV-0420 BRW (E.D. Ark. 2011) attacks fracking from a slightly different angle, focusing on compressor units situated along pipelines used to transport the gas collected via fracking. The plaintiffs allege the compression devices “produce injurious levels of noise” and “emit large amounts of methane and hydrogen sulfide as well as other flammable and noxious gases.” Accordingly, the complaint defines the class as “[a]ll citizens and/or residents and/or property owners of the State of Arkansas who live and/or own property within a one-mile radius of [any natural gas compressor and or transmission station] operated by the Defendants.” Despite its different “hook” into fracking, *Ginardi* contains the same causes of action and seeks the same damages as *Tucker* and *Berry*.⁸

2. Governmental Lawsuits and Fines

Private plaintiffs are not the only ones targeting fracking with lawsuits; several state governments have also put fracking in their crosshairs. For example, New York’s Attorney General Eric Schneiderman filed a lawsuit in the Eastern District of New York on May 31, 2011, seeking to require several federal agencies to prepare and make available for public comment a draft environmental impact statement before adopting proposed Delaware River Basin Commission (DRBC) regulations that would allow fracking within the Delaware River Basin. *See N.Y. v. U.S. Army Corps of Eng’rs*, No. CV-11-2599 (E.D.N.Y. 2011).⁹

Like the New York Attorney General, Maryland’s Attorney General Douglas F. Gansler has also decided to take on fracking via lawsuit. On May 2, 2011, the attorney general announced that he had sent a letter to Chesapeake Energy Corporation and its affiliates notifying them of his intent to sue for Resource Conservation and Recovery Act and Clean Water Act violations.¹⁰ The attorney general’s actions were prompted by an April release of fracking fluids from a Chesapeake Energy well in the Marcellus Shale in Leroy, Pennsylvania, into Towanda Creek, a tributary of the Susquehanna River which flows into Maryland and supplies the Chesapeake Bay with freshwater. After the end of the required 90-day notice period, Maryland plans to file a citizen suit seeking injunctive relief and civil penalties.

Other state governments have responded to fracking using different weapons in their legal arsenals besides lawsuits. For instance, on May 17, 2011, the Pennsylvania Department of Environmental Protection announced that it had fined Chesapeake Energy more than \$1 million for violations related to its natural gas drilling activities in the Marcellus Shale.¹¹ The Department of Environmental Protection (DEP) said that throughout 2010, it received complaints from Bradford County residents regarding contamination in their drinking wells near Chesapeake’s drilling operations. DEP claimed that improper well casing and cementing in shallow zones had allowed natural gas from non-shale, shallow gas formations to migrate into the groundwater. Additionally, at a separate Chesapeake site in Avella, Pennsylvania, three

condensate separator tanks caught fire in February 2011 and injured several workers. DEP claimed that the fires were caused by improper handling and management of the condensate. DEP described the fine as “the largest single penalty DEP has ever assessed against an oil and gas operator”

Some government agencies, like EPA’s Criminal Investigations Division, are even coordinating with the Department of Justice and local prosecutors to evaluate criminal law enforcement issues associated with Marcellus Shale fracking. A “Marcellus Shale Law Enforcement Training Conference” was held in May 2011 and was attended by more than 200 federal, state, and local law enforcement officers, prosecutors, and environmental officials from Pennsylvania, New York, West Virginia, and Ohio.¹²

What the Future Holds

Despite the threat of lawsuits, the enormous economic benefits of the Marcellus Shale’s natural gas continue to attract investment and drilling operations. Indeed, the pace of production is expected to increase dramatically over the next 20 years. As drilling, gathering, and processing operations expand, more lawsuits undoubtedly will follow, despite the best efforts of energy companies to protect the environment. With the expansion of operations, however, energy companies should prepare for the corresponding expansion of legal claims and a shift in tactics from plaintiffs’ counsel.

Although prior and pending lawsuits have focused on relatively straightforward causes of action related to various forms of contamination, plaintiffs’ counsel may grow more creative in their claims. For example, given the unpredictable way in which contaminants can migrate through different geology, claims of contamination at sites farther and farther away from drilling operations may emerge.

Additionally, plaintiffs may decide to focus on improper management or disposal of fracking wastewater. Recall that the fracking process can generate millions of gallons of wastewater per well. That wastewater contains many hazardous chemicals, salts, and

radioactive materials, and disposal is becoming increasingly controversial. Leaks from storage and transport units are inevitable, and with the increase in drilling, will mount in numbers. Moreover, water treatment facilities may bring claims if they are impacted in some way by treating the fracking wastewater.

In addition to expanding their roster of legal claims, plaintiffs’ counsel may employ new procedural mechanisms to leverage their impact. As mentioned previously, prior and pending lawsuits associated with natural gas extraction typically focus on individual sites, usually where a particular driller suffered a mishap, or a small group of adjacent homeowners are claiming injury. It seems inevitable that creative counsel will shift to seeking aggregated recoveries from deep-pocket defendants with interests in many sites over a broad region to maximize their recovery. In many respects, the Marcellus Shale situation has all the hallmarks of a mass tort case waiting to happen.

One way for plaintiffs’ counsel to create a mass tort case is to file statewide class actions on behalf of all private citizens affected by drilling operations. Indeed, as discussed above, three such class actions have already been filed in Arkansas. Of course, these plaintiffs will need to clear class action hurdles such as commonality and typicality, which should be substantial because of disparity among sites, the different ways in which injury can occur, and the varying damages suffered by each plaintiff. However, to do so, plaintiffs will likely point to the common processes for extracting natural gas and the common geology of the area.

Another possible avenue that plaintiffs’ mass tort counsel may take is to join forces with the states and prosecute claims on their behalf. Many states use contingency-fee arrangements with private lawyers to pursue complex environmental claims. When private mass torts lawyers represent a state’s trustee interest in the environment, the result is often an aggregation of many claims in ways that avoid traditional limits in other contexts.

In addition to combining several sites into one case, creative counsel can name several unaffiliated

defendants in a single lawsuit as a method of maximizing recovery. For example, plaintiffs might name not only the driller as a defendant but also any subsidiary contractors that might handle various aspects of a fracking site, such as wastewater transport. For many plaintiffs' counsel, the ultimate deep pocket may be the large energy companies that hold natural gas leases or other rights over large regions. These companies often have the most resources and the most interest in resolving lawsuits so that exploration and production can continue. Plaintiffs' counsel may argue that these leaseholders maintain responsibility for all operations of affiliates and contractors working the land. Other less-obvious targets for litigation include chemical manufacturers who market specialized additives for fracking fluid. At most drilling sites, much of the fracking fluid is left underground. If evidence suggests the chemical additives may pose some risk, new legal claims certainly would follow.

While some of these approaches may sound extreme, many of them have been used in other well-known mass tort litigations. *See, e.g., In re MTBE Products Liability Litigation*, MDL No. 1358, No. 1:00-cv-01898-SAS -DCF (S.D.N.Y.) (involving aggregation of claims against many unaffiliated "deep-pocketed" refiner and manufacturer defendants under product liability and common-law tort theories, and contingency arrangements between governmental plaintiffs and outside counsel).

Many well-known mass tort plaintiffs' counsel are already investing in Marcellus Shale and hydraulic fracturing lawsuits. For example, one firm's Web site recently proclaimed, "Fracking puts drinking water in peril!" and alleges that "[t]housands of homeowners' properties and water supplies in Pennsylvania and other states have become contaminated as a direct result of oil and gas exploration activities." Accordingly, the firm invites viewers who "believe [their] drinking water and property have been impacted by oil and gas exploration activities" to contact the firm.¹³

Similarly, another firm with an active mass torts practice recently stated that it was "investigating a controversial type of natural gas drilling called 'fracking' in Pennsylvania and other parts of the

country" and invited viewers to determine "if this process has tainted your water supply" As evidence of its "success" in this field, the firm cited the landmark settlement" it secured "against some of the country's biggest oil companies for contaminating public drinking water supplies with ... MTBE."¹⁴

Both firms reportedly held public meetings around the country, including in Marcellus Shale areas, warning attendees of the dangers of fracking and presenting the option of lawsuits as a remedy.¹⁵ Undoubtedly, energy companies will soon see the fruits of their labor

Conclusion

Many energy industry participants involved in Marcellus Shale fracking are steeped in practical know-how and scientific research that gives them confidence that water contamination from fracking operations is a rare aberration. While this may be true, there is a widespread (and perhaps unfair) perception in the Marcellus Shale region that hydraulic fracking often leads to water contamination. The Marcellus Shale region is a largely rural one, relatively unaccustomed to the sprawling industrial impact of natural gas drilling that many in other parts of the country take for granted. Plaintiffs' counsel are actively seeking to represent clients in the region.

This volatile combination of factors strongly suggests a future increase in mass tort cases. Energy companies operating in the Marcellus Shale region would be well advised to plan now for future claims.

Brent Allen and Lesley Lawrence-Hammer both focus on complex environmental litigation and mass torts as part of Greenberg Traurig LLP's litigation group in Washington, D.C.

Endnotes

¹ Although this article focuses on the Marcellus Shale, several other significant shale formations exist around the country, which also produce natural gas. Texas, Colorado, and Wyoming are particularly rich in shale formations with recoverable natural gas reserves

² In 2009, members of Congress introduced the Fracturing Responsibility and Awareness of Chemicals

Act (FRAC Act) (H.R. 2766, 111th Cong. (2009); S. 1215, 111th Cong. (2009)). The FRAC Act would have required drillers to disclose the proprietary contents of their fracking fluid. However, the proposed legislation ultimately was not passed.

³ See David Jolly, *U.K. Company Suspends Controversial Drilling Procedure*, N.Y. TIMES, June 1, 2011, available at <http://www.nytimes.com/2011/06/02/business/global/02fracking.html>.

⁴ A snippet of this scene is viewable about 30 seconds into the *Gasland* movie trailer at <http://www.gaslandthemovie.com/trailer/> (last visited Oct. 24, 2011).

⁵ See Robert B. Jackson et al., RESEARCH AND POLICY RECOMMENDATIONS FOR HYDRAULIC FRACTURING AND SHALE-GAS EXTRACTION (Center on Global Change, Duke Univ. 2011) (recommending independent medical review of health effects of methane in drinking water and possible toxicity tests and epidemiological research).

⁶ See Stephen G. Osborn et al., *Methane Contamination of Drinking Water Accompanying Gas-Well Drilling and Hydraulic Fracturing*, 108 PROC. NAT'L ACAD. SCI. 1872 (2011).

⁷ See Robert W. Howarth et al., *Methane and the Greenhouse-Gas Footprint of Natural Gas from Shale Formations*, 106 CLIMATIC CHANGE LETTERS 679 (2011).

⁸ Private fracking lawsuits have not been limited to the United States. In *Ernst v. EnCana Corp.*, No. 0702-00120, a Canadian case filed in April 2011, a property owner claims that EnCana's negligent drilling for coal bed methane released methane and other chemicals into the groundwater, contaminating the plaintiff's water well. Notably, the plaintiff included as defendants the Alberta government and the Alberta Energy and Utilities Board, claiming both had knowledge of EnCana's alleged negligence but failed to follow their own investigation and enforcement processes in response to reports of water contamination as part of a "governmental cover-up of environmental contamination caused by the oil and gas industry." The plaintiff is seeking \$33.1 million in damages.

⁹ See also Press Release, N.Y. Office of the Attorney General, A.G. Schneiderman to Sue Federal Government Today for Failure to Study "Fracking" (May 31, 2011), available at http://www.ag.ny.gov/media_center/2011/may/may31a_11.html.

¹⁰ See Press Release, Md. Attorney General, Attorney General Gansler Notifies Chesapeake Energy of the State's Intent to Sue for Endangering the Health of Citizens and the Environment (May 2, 2011), available at <http://www.oag.state.md.us/Press/2011/050211.html>.

¹¹ See Press Release, Pa. Dep't of Env'tl. Prot., DEP Fine Chesapeake Energy More than \$1 Million (May 17, 2011), available at http://www.portal.state.pa.us/portal/server.pt/community/search_articles/14292.

¹² See Press Release, U.S. Attorney's Office, M.D. Pa., Federal and State Officials Hold Training Conference on Criminal Enforcement of Oil and Natural Gas Extraction in the Marcellus Shale (May 25, 2011), available at http://www.justice.gov/usao/pam/news/2011/MarcellusShale_5_25_2011.htm.

¹³ See Napoli Bern Ripka LLP, Oil and Gas Exploration, <http://www.nbrlawfirm.com/Environmental-Litigation/Oil-and-Gas-Exploration/> (last visited June 19, 2011).

¹⁴ See Weitz & Luxenberg, P.C., Gas Drilling, http://www.weitzlux.com/fracking_1937721.html (last visited June 19, 2011).

¹⁵ See John Colson, *Attorneys Spoke to County Residents About Perceived Negative Impacts of Gas Drilling Activity in the Area*, POST INDEP., Feb. 24, 2011; Casey Junkins, *Lawyers from New York May Sue Gas Drillers*, INTELLIGENCER/WHEELING NEWS-REG., Feb. 3, 2011; Chris Dickerson, *N.Y. Firm Has Public Meeting About Drilling*, W. VA. REC., Feb. 3, 2011.

CLIMATE CHANGE LAWSUITS UNDER THE PUBLIC TRUST DOCTRINE IN THE WAKE OF *AEP V. CONNECTICUT*

Andrew J. Marks

On June 20, 2011, the Supreme Court held that the Clean Air Act displaced the federal common law of nuisance insofar as it applied to the control of greenhouse gases (GHGs). *AEP v. Connecticut*, No. 10-174, slip op. (June 20, 2011). Congress, through the Clean Air Act (CAA), delegated to the U.S. Environmental Protection Agency (EPA) the authority over when and how to regulate GHG emissions from power plants. Reversing the Second Circuit, the Court ruled that displacement occurred upon such delegation. However, the Court explicitly left for remand whether the CAA preempted nuisance actions brought under state common law.

About six weeks before the Court issued its ruling, another group of parties initiated climate change litigation under a different federal common law theory. Relying on the public trust doctrine, these plaintiffs filed 13 lawsuits against federal and state regulators (one action in federal court and 12 in state courts) seeking to require them to limit GHG emissions from sources within their respective jurisdictions. (These groups have also filed administrative petitions seeking the same result—or the right to sue—in nearly all of the other 50 states and the District of Columbia.) Despite the fact that these suits target regulators rather than regulated emitters of GHGs, the *AEP* ruling may mean the end of the trust doctrine suit in federal court because it, like the *AEP* suit, seeks to have the court (rather than EPA) set GHG emission limits. As discussed more fully below, the trust doctrine suits in state courts, which were brought under each respective state's common law public trust doctrine (and certain state statutory provisions), have a better chance of surviving dismissal.

AEP v. Connecticut

In 2004, certain states, New York City, and several land trusts sued five entities (four private corporations and the federal Tennessee Valley Authority) that owned or operated major fossil fuel-burning power plants in

an effort to require them to reduce their GHG emissions (which are primarily six gases, of which carbon dioxide (CO₂) is the most prevalent). The plaintiffs argued that the millions of tons of CO₂ emitted by those facilities trapped heat in the earth's atmosphere, which elevated temperatures and caused harm to human health and the environment. They asserted that these emissions constituted an ongoing contribution to the public nuisance of global warming under federal common law. To cure this nuisance, the plaintiffs asked for relief in the form of court-established CO₂ emission limits, which were to be reduced further in years to come.

The case was initially dismissed by the district court on the grounds that the claims presented non-justiciable political questions (which made the parties' standing and displacement arguments moot). *Connecticut v. AEP*, 406 F. Supp. 265, 274 (S.D.N.Y. 2005). Relying on *Baker v. Carr*, 369 U.S. 186, 211–12 (1962), and *Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004), the court viewed the resolution of the plaintiffs' issues as requiring the “identification and balancing of economic, environmental, foreign policy, and national security interests,” which were clearly policy considerations best suited for Congress and the executive branch. *AEP*, 406 F. Supp. at 274. But the Second Circuit reversed on this threshold issue, finding that the federal courts' experience in adjudicating complex nuisance cases, and the discrete issues involved in this case, outweighed the political implications of allowing plaintiffs' claims to proceed. *AEP*, 582 F.3d 309, 323–32 (2d Cir. 2009).

The Second Circuit also addressed the standing and displacement issues that the district court never reached. As to standing, it held that the plaintiffs made an adequate showing. *Id.* at 349. The Second Circuit then moved on to the question of displacement. Under the doctrine of displacement, federal common law is deemed to have been extinguished when a federal statute “governs a question previously the subject of federal common law.” *AEP*, 406 F. Supp. at 371 (citing *Milwaukee II*, 451 U.S. at 316). The crux of the matter is when the “question” at issue becomes “governed.” Does this occur at the time the federal statute is passed or after the agency charged with its enforcement promulgates rules?

The Second Circuit relied on a series of Supreme Court cases addressing public nuisance to answer this question, but two cases drove the decision *AEP*, 582 F.3d at 358, 371. In *Milwaukee v. Illinois*, 451 U.S. 304, 316–19 (1981) (*Milwaukee II*), the Court held that the Clean Water Act had displaced the common law claim in that case because the legislation itself prohibited the discharge of pollutants. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court held the EPA is authorized to regulate GHGs under the CAA. The Second Circuit interpreted those holdings as requiring EPA to finalize its regulations of GHGs under the CAA before displacement may occur. Because EPA had not done so, the Second Circuit held that the federal common law of nuisance may still be used to seek reduction of GHGs.

Supreme Court Rules That the CAA Displaces the Federal Common Law of Nuisance

The Supreme Court analyzed the evolution of federal common law, and ultimately disagreed with the Second Circuit’s interpretation of *Milwaukee II* and *Massachusetts v. EPA*. The Court held that displacement occurs not when the agency charged with its enforcement promulgates rules, but rather upon the authorization by Congress to do so. *AEP*, No. 10-174, slip op. at 12.

In *Milwaukee I*, the Court recognized that federal common law—distinct from state common law—does exist in areas of national concern, such as addressing interstate air and water environmental issues. *AEP*, No. 10-174, slip op. at 7. Simply because an area of the law is suitable for federal governance, however, does not necessarily mean that the courts should create the law. *Id.* at 9. Where Congress steps in and “speaks directly to the question at issue,” then the federal common law that would otherwise control disappears and displacement occurs. *Id.* at 10. This “speaks directly” test is more deferential to Congress and is easier to satisfy than the test for preemption of state law by a federal statute, which requires evidence of “a clear and manifest [congressional] purpose.” *Id.* at 9. The Court expressly declined to rule on the question of whether the CAA preempts the state common law of nuisance.

In *Massachusetts v. EPA*, the Court held that CO₂ emissions are air pollutants subject to regulation by EPA under the CAA. *Id.* at 10. Because the CAA “speaks directly” to emissions of CO₂ from the power plant defendants in *AEP* under the Court’s decision in *Massachusetts v. EPA*, the Court held that displacement had occurred. *Id.* Whether EPA actually exercises its regulatory authority is irrelevant.

The Court also found another reason “to resist setting emissions standards by judicial decree under federal tort law.” *Id.* at 13. The Court, echoing the original district court decision, noted that regulation of GHGs is a question of national and international policy which requires the analysis of competing interests—both benefits and costs—by an expert agency. The Court was wary of individual district judges “issuing ad hoc, case-by-case injunctions,” as they lack the “scientific, economic, and technological resources an agency can utilize in coping with issues of this order” *Id.* at 14.

Although the displacement issue was center stage, the Court also addressed, albeit briefly, the threshold issues of standing and political question. On these issues, the Court was evenly split 4-4 (Justice Sotomayor, who was a member of the panel that heard oral argument when the case was pending before the Second Circuit, recused herself). This means that the Court affirmed the Second Circuit’s rulings as to standing (properly alleged) and political question (complaint raised justiciable issues), but the application is limited. Rulings by an equally divided court are not “authoritative precedent.” *U.S. v. Pink*, 315 U.S. 203, 216 (1942).

The Public Trust Doctrine Suits

While *AEP* was pending before the Supreme Court, a group of environmental organizations and individuals sued the federal government in an effort to force regulatory action on climate change. *See Alec L. v. Jackson*, No. 11cv02203 (N.D. Cal. May 4, 2011) (complaint). (Similar suits were filed in state court against 12 other states.) The plaintiffs allege that GHG emissions from various man-made sources are causing the climate to change, which in turn is causing harm to the environment (e.g., melting sea ice, rising sea levels,

plant and animal deaths, floods, ocean acidification). *Id.* The plaintiffs seek a court order declaring that the government is in violation of its fiduciary duty under the public trust doctrine to protect the atmosphere from the effects of GHGs emissions. *Id.* at 35–36.

The public trust doctrine is a common law concept that requires the sovereign to hold natural resources, such as rivers, lakes, parks, and wildlife, in trust and protect them for the benefit of its citizens. A successful trust doctrine suit must show that the sovereign has breached its fiduciary duty to protect a certain resource for all to use. To prove a public nuisance, on the other hand, the plaintiffs must show “an unreasonable interference with a right common to the general public.” *AEP*, 406 F. Supp. at 326 n.6 (citing Restatement (Second) of Torts § 821B(1) (1979)). And the enjoyment of clean air is one of those public rights. *AEP*, 406 F. Supp. at 367 (citing *Celanese Corp. v. Coastal Water Auth.*, 475 F. Supp. 2d 623, 639 (S.D. Tex. 2007)). Although these theories have their differences, the public trust plaintiffs, like the *AEP* plaintiffs, are asking the court to set CO₂ emission limits. *Alec L. v. Jackson*, at 36–37. Because the relief sought in both suits is essentially the same (i.e. court-determined CO₂ emission limits) the district court may well view *AEP* as binding precedent and dismiss the suit.

Traditional Uses of the Public Trust Doctrine and the Atmosphere as a Public Trust Resource

The public trust doctrine finds its origins in Roman civil law and English common law. It is premised on the concept that “certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than serfs,” and the government has a fiduciary duty to protect those interests. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1969–70).

During the reign of Emperor Justinian, the doctrine covered “the air, running water, the sea, and consequently the shores of the sea.” J. Inst. 2.1.1.

Drawing on certain provisions in the Magna Carta, and influenced by the continued power struggle between the Crown and Parliament, the public trust doctrine was limited in English common law to tidal waters and the land beneath those waters. Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980–81). American courts have since expanded the application of the doctrine somewhat to include certain non-tidal (i.e., freshwater) waters, in addition to those subject to the “ebb and flow of the tide” and the land beneath. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 478–81, 108 S. Ct. 791 (1988). American courts have also applied the doctrine to fish, wildlife, and public forests. *See, e.g., Cal. Trout, Inc. v. State Water Res. Control Bd.*, 255 Cal. Rptr. 184, 212 (Cal. Ct. App. 1989) (fish); *Wade v. Kramer*, 459 N.E. 2d 1025 (Ill. App. Ct. 1984) (wildlife); *Gould v. Greylock*, 350 Mass. 410, 215 N.E.2d 114 (1966) (forests).

But, applying it to GHGs has never been tried, possibly because the source of such pollution may emanate from an area well beyond the sovereign’s control as opposed to pollution from a factory piped into a local river. Many view Joseph Sax as the seminal expert on modern public trust law and his 1970 article as the beginning of this modern era. *See, e.g., Allan Kanner, The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State’s Natural Resources*, 16 DUKE ENV’T. L. & POL’Y F. 57, 72 (2005). Sax believed that the public trust doctrine was broader than its traditional application to water or land resources, and that it was indeed applicable to “controversies involving air pollution,” notwithstanding the diffuse nature of this form of pollution. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, at 556–57. The trust doctrine suits are putting Sax’s expansive view to the test.

Is the Atmosphere a Public Trust Resource?

Using the trust doctrine to force the government to regulate localized air emissions, such as volatile organic compounds, may be closer to the roots of the public

trust doctrine because the source of the pollution is often located in the same community that is affected by the emissions. Using the trust doctrine to force the government to address GHG emissions that may come from halfway around the world and that can remain in the atmosphere for decades, however, is quite another matter. In other words, if the sovereign has control over the polluter and the pollutants remain in the sovereign's jurisdiction to the detriment of its citizens, the trust doctrine may apply under existing precedent. When the pollutants travel over long distances and mix in the air, however, it would be more of a stretch to find that such emissions are subject to control under the public trust doctrine.

Indeed, the Court in *AEP*, in the public nuisance context, stated that “[w]e have not yet decided whether private citizens . . . may invoke the federal common law of nuisance to abate out-of-state pollution.” *AEP*, No. 10-174, slip op. 9. GHGs not only travel from one state to another but from one country to another and “become well mixed in the atmosphere” and linger for decades. *Id.* (citing 74 Fed. Reg. 66,514); *see also* GLOBAL CLIMATE CHANGE AND U.S. LAW 5–6 (Michael Gerard ed., American Bar Association 2008). So, global warming may be distinguishable “from the more bounded pollution giving rise to past federal nuisance suits,” as the *AEP* defendants argued. *Id.* at 8–9. The Court did not reach the academic question of whether public nuisance theory was applicable to international atmospheric pollution, however, because the CAA authorized EPA to regulate GHGs, which displaces nuisance law at the federal level.

In the public trust doctrine context, the question of the atmosphere as a trust resource may likewise remain academic if the district court analogizes *AEP*, and thereby rules that the CAA has displaced the public trust doctrine because the plaintiffs here, just like the *AEP* plaintiffs, are asking a court, rather than EPA, to set emission limits. If the court does not find the public trust doctrine displaced, the court may find that the atmosphere is a public resource subject to protection under the public trust doctrine. Greg Munro, law professor and David Mason Scholar at the University of Montana Law School, believes that is precisely

what the court should hold. According to Professor Munro, the *AEP* decision should not affect the public resource question because of the differences between nuisance and public trust theory (i.e., interference with the public's use and enjoyment of a resource by another versus the sovereign's obligations to protect that resource). And such a holding would be consistent with Professor Sax's view that the public trust doctrine should apply to air resources. Furthermore, such a ruling in federal court could give the state plaintiffs persuasive authority to do the same.

What Is Left of the Public Trust Doctrine Suits?

Whether or not the atmosphere is found to be a public resource, it seems likely that the federal public trust doctrine case will be dismissed because of displacement. Given the Court's pronouncement that it is for the EPA, and not the courts in the first instance, to set GHG emission limits, it would seem that the *AEP* ruling would preclude any federal common law claim seeking to limit GHGs.

Unlike its decision on displacement of federal common law, as discussed above, the Court in *AEP* expressly refrained from ruling on whether the CAA preempted the state common law of nuisance. This question is to be decided on remand. Because the public trust cases filed in state court rely on the doctrine under state rather than federal common law, these cases may yet survive. E.g., Complaint, *Martinez v. Colorado*, No. 2011-CV-491 (Dist. Ct., Boulder Cnty, filed May 20, 2011). For the CAA to preclude such suits, preemption (doctrine applicable to state common law), not displacement (doctrine applicable to federal common law), would have to apply. *AEP*, No. 10-174 at 10. The defendants would then have to demonstrate that the CAA contains “a clear and manifest [congressional] purpose” to preempt regulation of GHGs under state common law. *Id.* at 9. Such a showing is harder to make than showing that displacement has occurred. *Id.* at 9–10. In this regard, the *AEP* Court went through a detailed analysis of EPA's rulemaking process to regulate air pollutants, which include GHGs, under various sections of the CAA. Given this road map, the lower court on remand

may indeed find the required purpose for preemption to apply, despite the higher threshold.

Another aspect of these state suits that distinguish them from *AEP* is their reliance on statutory causes of action (codification of common law). E.g., Complaint at ¶¶ 91, 97, and 107, *Martinez*, No. 2011-CV-491; Complaint at ¶¶ 34, 87, *Shanders-Reed v. Martinez*, No. 0101CV2011-01514 (1st Dist. N.M. filed May 4, 2011.). So the courts' preemption analysis will have to address whether Congress has expressed a clear and manifest purpose to move aside not just common law, but the codification of such law by numerous state legislatures.

Conclusion

The Court in *AEP* clearly stated that EPA—not the courts—is to regulate GHGs. Such a pronouncement

appears to cover all suits asking a judge to set GHG emission limits under any type of federal common law and likely means the end is near for the federal public trust doctrine case. But suits relying on state common law are still viable, at least for the time being.

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AS STORMWATER DISCHARGE PERMITS PROLIFERATE, SO DO CITIZEN SUITS

Alex P. Basilevsky

Citizen suits under state and federal environmental laws are nothing new. But recent cases brought in California and Massachusetts may indicate a new trend of suits alleging violations of the National Pollution Discharge Elimination System (NPDES) associated with stormwater discharges. These suits have several characteristics that make them attractive to prospective plaintiffs and their lawyers. Further, the enforcement environment (no pun intended) suggests that there is no shortage of potential defendants.

Since the enactment of the landmark Federal Water Pollution Control Act in 1948 and the amendments to it known as the Clean Water Act in 1972, the United States has pursued a goal of eliminating pollution from America's waterways. Initially, that pursuit was focused on discharges of industrial wastewater and little thought was given to stormwater. That focus began to change, however, with a series of legislative and regulatory developments beginning in the late 1980s.

In 1987, the enactment of the Water Quality Act expanded the NPDES permitting system to explicitly cover stormwater discharges from industrial facilities, construction sites, and municipal separate storm sewer systems (commonly called MS4s). This expansion led to the adoption of so-called NPDES Phase I permit regulations in 1990, which required permits for certain categories of industrial facilities, construction sites disturbing more than five acres, and MS4s for municipalities with a population of 100,000 or more. Then in 1999, the Environmental Protection Agency adopted the NPDES Phase II permit regulations, further expanding the stormwater permit requirement to cover construction sites disturbing between one and five acres, and smaller municipal MS4 systems.

The expansion of the NPDES permit requirement to cover stormwater discharges has vastly increased the number of facilities and sites requiring permits. At the same time, over the past several years, regulators have

seen budgets cut. The result has been that while there is regulatory enforcement of the Clean Water Act's permitting requirements, that enforcement has been spotty at best, a fact recognized by EPA Administrator Lisa P. Jackson in a July 2, 2009, memorandum:

We are also falling short of this Administration's expectations for the effectiveness of our clean water enforcement programs. Data available to EPA shows that, in many parts of the country the level of significant non-compliance with permitting requirements is unacceptably high and the level of enforcement activity is unacceptably low. Our commitment to the rule of law as a foundational principle for EPA requires that we take action against significant violations and that we assure a consistent standard for compliance across the country.

<http://www.epa.gov/compliance/data/results/performance/cwa/jackson-ltr-cwa-enf.html>.

While EPA has undertaken an effort since 2009 to increase compliance with, and enforcement of, Clean Water Act permitting requirements, those efforts have understandably focused on the largest polluters. There are signs now, however, that the public is no longer content to wait for official action.

Under the Clean Water Act (and some equivalent state laws), enforcement of NPDES permits and permitting requirements is not limited to regulators alone. The Clean Water Act provides for citizen enforcement of its provisions, assuming certain notice requirements are met. 33 U.S.C. § 1365. Of great interest to prospective plaintiffs and their lawyers is the fact that the citizen suit provision provides for fee and cost shifting in favor of the prevailing party. *Id.* And the threat of a citizen suit is bolstered by the substantial civil penalties the Clean Water Act applies—up to \$32,500 per violation per day. *See* 33 U.S.C. § 1319(d), 69 Fed. Reg. 7121 (Feb. 13, 2004). In a stormwater case, a violation will often occur every time it rains. Though the plaintiff in a citizen suit does not receive these penalties, which are paid to the

government, they still represent a substantial hammer with which to force a favorable settlement.

Citizen suits for NPDES permit violations, like all suits under the Clean Water Act, must involve a discharge into the “waters of the United States.” That phrase has been the source of great confusion, especially since the U.S. Supreme Court’s decision in *Rapanos v. United States*, 547 U.S. 715 (2006), in which the Court split over the extent to which isolated wetlands fit within the definition of “waters of the United States” and, therefore, the extent to which the federal government may exercise regulatory power over them. But some parallel state legislation effectively does away with this requirement. For example, Pennsylvania has enacted the Clean Streams Law, which largely parallels the Clean Water Act, including a parallel citizen suit provision. 35 P.S. § 691.601. But unlike the Clean Water Act, the Clean Streams Law applies to discharges into “Waters of the Commonwealth,” which is defined to include virtually all water within the borders of the state. 35 PS. § 691.1. And because the Clean Streams Law is the statute under which the federal NPDES permit system is implemented in Pennsylvania, any NPDES permit violation is also a violation of the Clean Streams Law.

In recent years, starting in California and recently on the East Coast in Massachusetts, a number of cases have been filed by environmental groups invoking the citizen suit provisions of the Clean Water Act to pursue NPDES stormwater permit violators. One example is *Natural Resources Defense Council v. County of Los Angeles*, a citizen suit arising out of allegations of stormwater discharges by the county of Los Angeles and the Los Angeles County Flood Control District in violation of their NPDES MS4 permits *Natural Resources Defense Council v. County of Los Angeles*, 636 F.3d 1235 (9th. Cir. 2011). The *NRDC* case, which is still ongoing, alleges that the county of Los Angeles and the Los Angeles County Flood Control District have been discharging from their MS4 systems stormwater containing contaminants in excess of their NPDES permit limits into a series of four rivers that ultimately discharge into the Pacific Ocean.

At the district court level, on cross motions for summary judgment, the defendants successfully argued

that the plaintiff failed to provide sufficient evidence that the water quality exceedances were caused by the defendants. On appeal, the Ninth Circuit reversed in part and affirmed in part. *NRDC*, 636 F.3d 1235. Specifically, the Ninth Circuit held that, for two of the rivers in question, the plaintiff had presented sufficient evidence because the testing stations where the exceedances were measured were within the MS4 system itself, which was itself upstream from the rivers. As the court held:

At least some outfalls for the MS4 were downstream from the mass-emissions stations. The discharge from a point source occurred when the stillpolluted [sic] stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways. We agree with Plaintiffs that the precise location of each outfall is ultimately irrelevant because there is no dispute that MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.

Id. at 1252. However, for the other two rivers, the court focused on the fact that the monitoring stations in question were actually in the rivers themselves, rather than within the MS4 or one of its outflows. According to the court, while it was certainly likely that the exceedances measured by those stations were caused or contributed to by the MS4, that causation was merely an assumption without further data to back it up.

It is highly likely, but on this record nothing more than assumption, that polluted stormwater exits the MS4 controlled by the District and the County, and flows downstream in these rivers past the mass-emissions stations. To establish a violation, Plaintiffs were obligated to spell out this process for the district court’s consideration and to spotlight how the flow of water from an MS4 “contributed” to a water-quality exceedance detected at the Monitoring Stations.

Id. at 1253–54.

Also of interest in the *NRDC* case is the defendants' argument that they bore no legal responsibility for the discharges in question because they did not, in fact, generate any of the contamination at issue. The defendants argued that the contamination was generated by upstream sources, many of which were likely subject to their own NPDES permit limitations. The court was not impressed with this argument: "Although the District argues that merely channeling pollutants created by other municipalities or industrial NPDES permittees should not create liability because the District is not an instrument of 'addition' or 'generation,' the Clean Water Act does not distinguish between those who add and those who convey what is added by others—the Act is indifferent to the originator of water pollution." *Id.* at 1252–53.

Thus, the lessons to be learned from the *VRDC* case are twofold. First, the case highlights the necessity of having good data on water quality exceedances before bringing an action to enforce an existing NPDES permit. Second, the case stands as a warning to operators of MS4 systems. While state and federal regulators may be willing to cut cash-strapped municipalities a break, environmental groups are not necessarily going to be as understanding.

MS4s, however, are far from the only potential targets for NPDES related citizen suits. Of potential interest and concern to small businesses are a string of recent cases focusing on smaller facilities that are required to have an NPDES permit but do not. Under the current regulatory scheme, NPDES stormwater permits are required for the following categories of industrial facilities:

- Facilities subject to federal stormwater effluent discharge standards in 40 C.F.R. parts 405–71;
- Heavy manufacturing—i.e., paper mills, refineries, chemical plants, steel mills, foundries;
- Coal and mineral mining and oil and gas exploration and processing;
- Hazardous waste treatment, storage, or disposal facilities;
- Landfills, land application sites, and open dumps with industrial wastes;

- Metal scrap yards, salvage yards, automobile junkyards, and battery reclaimers;
- Steam electric power generating plants;
- Transportation facilities that have vehicle maintenance, equipment cleaning, or airport deicing operations;
- Treatment works treating domestic sewage with a design flow of one million gallons a day or more; and
- Light manufacturing (for example, food processing, printing and publishing, electronic and other electrical equipment manufacturing, and public warehousing and storage).

40 C.F.R. 122.26(a)(14). These categories, generally defined by Standard Industrial Classification (SIC) codes, cover a broad range of facility types. It is easy to imagine that a small business owner running such a facility might be unaware of the NPDES permit obligation, or unprepared to incur the expense of compliance. And until recently, that small business owner would have faced a limited risk of regulatory action.

A string of recent cases out of Massachusetts have been filed by CleanWater Action, a national environmental group, against a number of small facilities. *See, e.g., Clean Water Action v. Connecticut Valley Block Co., Inc.*, No. 07-cv-10253 (D. Mass.); *Clean Water Action v. The Newark Group, Inc.*, No. 07-cv-10353 (D. Mass.); *Clean Water Action v. R&R Industries*, No. 09-cv-11883 (D. Mass.); *Clean Water Action v. Allied Recycling*, No. 09-cv-11954 (D. Mass.). Most of the facilities in these cases are scrap metal recycling or junkyard facilities that lacked the requisite NPDES permit. To the extent it is discernable from the dockets, it appears that each of these cases was resolved with a relatively quick settlement. Based upon the consent decrees entered in some of these cases, it appears that the terms of the settlements generally require that the facility (1) come into compliance with the CleanWater Act; (2) pay the plaintiff's attorneys' fees, expert fees, and costs; (3) pay for ongoing monitoring of its stormwater discharges; and (4) donate money to various water-related environmental groups to abate past illegal discharges.

What should be of concern to business owners about these cases is that it is relatively easy for interested parties, whether environmental groups or plaintiffs' attorneys, to identify facilities that are required to have an NPDES stormwater permit. It is similarly easy to determine whether a facility actually has such a permit. For many states, current permit information is often available on EPA's ECHO Web site. Moreover, for stormwater cases, discharge dates are easy to determine from historical rainfall data. Depending on the nature of the facility in question, it may be relatively easy to identify facilities whose stormwater discharges are likely to contain contaminants even without testing. This makes facilities lacking the requisite permit low hanging fruit for litigious environmental groups and plaintiffs' attorneys emboldened by the fee and cost shifting provisions of the CleanWater Act.

In the Clean Water Action cases for which consent decrees are publicly available, the defendants have paid as much as \$190,000 each, in addition to their own attorneys' fees and costs, to resolve the case. See

Clean Water Action v. State Line Scrap Company, Inc., No. 09-cv-12008 (D. Mass.). That is a substantial amount of money for a small business, but likely far less than the defendant's possible exposure.

Given certain state and federal regulators' laxity with regard to the enforcement of NPDES permitting requirements, particularly with respect to smaller facilities, it seems likely that a large number of potential defendants have substantial exposure. Moreover, the success of groups like CleanWater Action in bringing these suits and securing favorable settlements may well encourage others to do likewise.

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CASE LAW UPDATE: A SUMMARY OF RECENT NOTEWORTHY DECISIONS

Daniel M. Krainin and Patrick R. Jacobi

Sixth Circuit Excludes Expert Proof for Failing to Address Exposure Level

Highlighting the importance of expert analysis of exposure levels in the context of toxic tort actions alleging personal injury from contamination, the Sixth Circuit affirmed a district court's decision to exclude an expert's specific causation testimony as unreliable and to grant summary judgment to defendant where the plaintiff's expert did not analyze exposure data or consider alternative causes of the alleged injuries. See *Pluck v. BP Oil Pipeline Co.*, No. 09-4572 (6th Cir. May 12, 2011), available at <http://www.bdlaw.com/assets/attachments/Pluck.pdf>.

Plaintiffs asserted claims for strict liability negligence, and loss of consortium in connection with benzene contamination in drinking water wells that allegedly caused illnesses, including non-Hodgkin's lymphoma. *Id.* at 3–4. Plaintiffs' expert on causation did not specify a diagnosis methodology in the initial report, and, after the court's submission deadline, the expert filed a supplemental report specifying a "differential diagnosis" (i.e., the elimination of potential causes) methodology. *Id.* at 4. The defendant moved both to exclude this testimony as unreliable under the standard set forth in *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), and for summary judgment for lack of specific causation. *Id.* The district court granted both motions.

The Sixth Circuit affirmed both the exclusion of the expert's testimony and the grant of summary judgment for defendant. *Id.* at 2. The Sixth Circuit rejected the expert's testimony as inadequate because he formulated his opinion without data as to the plaintiffs' exposure to benzene and instead relied on the theory that there is "no safe dose" when it comes to benzene exposure; a theory that has been rejected by other courts. *Id.* at 5. The Sixth Circuit also deemed the expert's testimony to be conjecture that failed both to consider benzene as the cause of illness and to rule out

alternative causes of illness. *Id.* at 10, 12. The Sixth Circuit further concluded that the expert's supplemental report was unreliable because it attempted to introduce a new diagnosis methodology that contradicted the expert's prior causation opinion. *Id.* at 13.

Eleventh Circuit Vacates Class Certification Where Court Failed to Rule on Conflicting Expert Testimony

In a decision that underscores the trial court's responsibility to make substantive determinations in the early stages of putative class actions, the Eleventh Circuit reversed a district court's decision to certify a class without first ruling on conflicting expert testimony presented during the class-certification stage. See *Sher v. Raytheon Co.*, No. 09-15798 (11th Cir. Mar. 9, 2011).

Plaintiffs alleged that the defendant's disposal and storage of hazardous waste at an industrial facility contaminated the groundwater in surrounding neighborhoods. *Sher*, slip op. at 3. In support of a motion to certify a putative class, plaintiffs presented expert testimony about the impacted area and plaintiffs' alleged damages. *Id.* at 3–4. Although expert testimony presented on behalf of the defendant directly contradicted the testimony of plaintiffs' experts, the trial court certified the class pursuant to Federal Rule of Civil Procedure 23(f), stating that a court need not engage in an analysis of the merits under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) at such an early stage of the litigation. *Sher*, slip op. at 5.

The Eleventh Circuit reversed, holding that the "district court must conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class" and that the burden to satisfy the Rule 23 requirements falls on plaintiffs. *Id.* at 6. Relying heavily on the Seventh Circuit's opinion in *American Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010), the Eleventh Circuit stressed that a class certification hearing may require consideration of expert testimony and "if the situation warrants, the district court must perform a full *Daubert* analysis before certifying the class." *Sher*, slip op. at 7. Because the district court failed to weigh the

conflicting expert testimony, the Eleventh Circuit found that plaintiffs failed to present sufficient evidence to support class certification and vacated the district court's order. *Id.* at 8–9.

Federal Court Upholds Six-to-One Ratio of Punitives to Compensatories in Exposure Case

In a decision applying U.S. Supreme Court due-process precedent, the U.S. District Court for the Northern District of Ohio upheld a jury's award of \$5 million in punitive damages—more than six times the compensatory damage award—in favor of a welder who claimed that four decades of exposure to manganese fumes from defendants' welding rods caused irreversible neurological damage. *See Cooley v. Lincoln Elec. Co.*, No. 1:05-CV-17734 (N.D. Ohio Mar. 7, 2011). The jury awarded \$787,500 in compensatory damages and \$5 million in punitive damages. *Cooley*, slip op. at 1–2.

In its analysis of whether the amount of the punitive damages award comported with constitutional due process, the district court relied on *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), in which the Supreme Court of the United States offered three guideposts to determine whether a punitive damages award is excessive: (1) the degree of reprehensibility of defendants' conduct; (2) the disparity between compensatory and punitive damages; and (3) the difference between the award and the civil penalties authorized or imposed in comparable cases. *Cooley*, slip op. at 54–55. In upholding the award, the court identified evidence of defendants' "willingness to sacrifice customers' safety in order to preserve profitability" as sufficient to characterize defendants' conduct as "highly reprehensible." *Id.* at 65. In addition, the court found that the ratio of punitive damages to compensatory damages—6.3 to 1—was not unjustifiably large given the degree of reprehensibility of defendants' conduct. *Id.*

Federal Court Dismisses Trespass Claim, Holding Homeowners Do Not Own Groundwater

In a case that may reinforce limits on certain claims by property owners to recover damages for contaminated

groundwater in Michigan, the U.S. District Court for the Western District of Michigan dismissed the plaintiffs' trespass claim and held that homeowners do not have an ownership interest in water located beneath their property. *See Abnet v. Coca-Cola Co.*, No. 1:10-cv-481 (W.D. Mich. Mar. 31, 2011).

Homeowners living down-gradient of defendants' manufacturing plant alleged that application of large quantities of contaminated wastewater to a field adjacent to the plant from 1979 to 2002 exceeded the permitted allowance, depleted oxygen in the soil, and thereby caused heavy metals to leach into the groundwater and migrate to the homeowners' property. *Abnet*, slip op. at 2. Plaintiffs claimed numerous harms from the alleged contamination, including property damage, gastrointestinal problems, developmental disabilities, and nausea. *Id.* The court dismissed the trespass claim, holding that Michigan does not recognize claims of trespass where groundwater contamination is the only alleged injury. *Id.* at 9. The court relied principally on a 2004 decision by the Michigan Court of Appeals which held that property owners do not have ownership rights over or exclusive possession of water beneath their property. *Id.* at 8.

Wisconsin Appellate Court Rejects Medical Monitoring Claims Absent Injury

Citing decisions from at least six other states and the U.S. Supreme Court, the Wisconsin Court of Appeals held that increased risk of future harm does not constitute an actual injury sufficient to state a tort claim, and therefore rejected claims seeking damages for future medical monitoring expenses. *See Alsteen v. Wauleco, Inc.*, No. 2010AP1643 (Wis. Ct. App. June 14, 2011), available at <http://www.bdlaw.com/assets/attachments/Alsteen.pdf>.

In the case at issue, the plaintiffs filed tort law causes of action against defendant, the operator of a window factory that plaintiffs alleged was responsible for dioxins, pentachlorophenol, and benzene in groundwater. *Alsteen*, slip op. at 3. Certain plaintiffs alleged that their mere exposure to any amount of these substances created an increased risk of future harm. *Id.* at 3–4. The defendant moved to dismiss the plaintiffs' claims, arguing that plaintiffs failed to allege

an actual, present injury as required under Wisconsin law. *Id.* at 4.

The Wisconsin Court of Appeals, the state's intermediate appellate court, affirmed the lower court's dismissal of plaintiffs' claim, concluding that Wisconsin law requires actual injury to maintain a tort action *Id.* at 5. The court clarified that neither increased risk of cancer, mere exposure to dangerous substances, nor a purported need for medical monitoring constitute an actual injury sufficient to state a claim *Id.* at 6–12. The court also relied on the U.S. Supreme Court's decision in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), in which the Court surveyed state common law cases addressing medical monitoring as a

basis for tort causes of action and declined to create a "new, full-blown, tort law cause of action" awarding such relief. *Alsteen*, slip op. at 14.

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Nomination deadlines: May 14, 2012.

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