MESSAGE FROM THE CHAIRS
Patrick Jacobi and Ben Snowden

This issue of the Environmental Litigation and Toxic Torts Committee Newsletter is the first of the 2014–2015 ABA year. It includes case law updates from around the country, as well as two excellent articles on issues of interest to environmental litigators. David M. Simon covers the U.S. Supreme Court’s resolution of a long-standing question about CERCLA’s pre-emptive effects on state statutes of repose in *CTS Corp. v. Waldburger*; and Scott E. Kauff provides practical tips for defending expert witness depositions in environmental litigation.

The committee co-chairs would like to express their appreciation both to the authors whose work appears in this issue, and also to our newsletter vice chairs, Shelly Geppert and Peter Condron, who took on leadership of the newsletter in August and put together this issue in very short order.

It is an eventful time for environmental litigators, with important cases coming out of the federal appellate courts and state supreme courts, as well as several issues of consequence lurking on the horizon. The Environmental Litigation and Toxic Torts Committee has identified focus issues for the coming ABA year, including tort liability related to energy production and development, pre-emption, vapor intrusion, ethics in tort suits, and the litigation impact resulting from public disclosure of compliance and monitoring data. If these topics are of interest to you—or if there are other issues that you would like to see the committee address—we welcome your input and your participation in committee activities.

As incoming chairs, we are energized about the work of the ELTT Committee and the outstanding team of vice chairs who have volunteered their time and expertise. We would also like to thank the outgoing committee vice chairs for their service, and in particular express our appreciation to Don Anderson, who has ably served as chair of the committee for the past two years.

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Any opinions expressed are those of the contributors and shall not be construed to represent the policies of the American Bar Association or the Section of Environment, Energy, and Resources.

**Action based on a 1987 land sale; split in the Circuits.** In 1987, CTS Corporation sold land in North Carolina. 134 S. Ct. at 2181. In 2011, subsequent purchasers of parts of the land and adjacent landowners filed a nuisance action against CTS in a North Carolina federal court, alleging that they had recently learned that CTS had contaminated the property. *Id.* CTS moved to dismiss based on a statute of repose, under which “no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.” *Id., quoting N.C. Gen. Stat. Ann. § 1–52(16).* (CTS did not assert the statute of limitations, which includes a “discovery rule.” *Id.* at 2180, 2182, 2184.) The motion was granted, *id.*, but a divided Fourth Circuit Court of Appeals panel reversed, with the majority ruling that section 9658 is “ambiguous” and that CERCLA’s remedial purpose favored interpreting section 9658 as pre-empting the statute of repose. 723 F.3d 434, 443–44 (4th Cir. 2013). The Fourth Circuit’s decision was consistent with a Ninth Circuit decision, see *McDonald v. Sun Oil Co.*, 548 F.3d 774, 779 (9th Cir. 2008), but contrary to Fifth Circuit and South Dakota Supreme Court decisions. *See Burlington N. & S.F.R. Co. v. Poole Chem. Co.*, 419 F.3d 355, 362 (5th Cir. 2005); *Clark Cnty. v. Sioux Equip. Corp.*, 753 N.W.2d 406, 417 (S.D. 2008).

**Statutes of limitation v. statutes of repose.** The Court first distinguished statutes of limitation from statutes of repose. “[A] statute of limitations creates ‘a time limit for suing in a civil case, based on the date when the claim accrued.’ . . . A statute of repose, on the other hand, . . . ‘bar[s] any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury.’ . . . The statute of repose limit is ‘not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered.’” *Id.* at 2182 (internal citations omitted). “One central distinction between statutes of limitations and statutes of repose” is that “[s]tatutes of limitations, but not statutes of repose, are subject to equitable tolling[.]” *Id.* at 2183.

**Text of section 9658 not dispositive.** The Court next examined the text of section 9658. Section 9658 “characterizes pre-emption as an ‘[e]xception’ to the regular rule . . . that ‘the statute of limitations established under State law shall apply.’ . . . Under this structure, state law is not pre-empted unless it fits into the precise terms of the exception.” *Id.* at 2185 (internal citation omitted). Section 9658 “defines the ‘applicable limitations period,’ the ‘commencement date’ of which is subject to pre-emption, as a period specified in ‘a statute of limitations’” and “uses the term ‘statute of limitations’ four times (not including the caption), but not the term ‘statute of repose.’” *Id.* (internal citation omitted). “This is instructive, but it is not dispositive[,]” however, because “the term ‘statute of limitations’ is sometimes used in a less formal way[ ]” that “can refer to any provision restricting the time in which a plaintiff must bring suit[,]” including statutes of repose. *Id.* (internal citation omitted).

**Other evidence and legislative history.** The Court then “examine[d] other evidence of the meaning of the term ‘statute of limitations’ as it is used in § 9658[,]” *id.*, including law dictionaries, court decisions, other federal statutes, the Restatements of Torts, law review articles and treatises. *Id.* at 2180–81, 2185–88. The Court also examined a 1982 Senate Committee Report, mandated by CERCLA, concerning “the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and
the environment caused by the release of hazardous substances into the environment,” including “barriers to recovery posed by existing statutes of limitations.”” *Id.* at 2180, quoting 42 U.S.C. § 9651(e)(1), (3)(F); Senate Committee on Environment and Public Works, Superfund Section 301(e) Study Group, Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies, 97th Cong., 2d Sess. (Comm. Print 1982) (“1982 Study Group Report”) (internal citations omitted).

This evidence, the Court concluded, establishes that the term “statute of limitations,” as used in section 9658, does not encompass statutes of repose. *Id.* at 2186. “[I]t is apparent that general usage of the legal terms has not always been precise, but the concept that statutes of repose and statutes of limitations are distinct was well enough established to be reflected in the 1982 Study Group Report,” which “called on States to adopt the discovery rule now embodied in § 9658.” *Id.* (internal citation omitted).

“The Report acknowledged that statutes of repose were not equivalent to statutes of limitations and that a recommendation to pre-empt the latter did not necessarily include the former. For immediately it went on to state: ‘The Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states[,] have the same effect as some statutes of limitation in barring [a] plaintiff’s claim before he knows that he has one.’ . . . The scholars and professionals who were discussing this matter (and indeed were advising Congress) knew of a clear distinction between the two. *The Report clearly urged the repeal of statutes of repose as well as statutes of limitations.* But in so doing the Report did what the statute does not: It referred to statutes of repose as a distinct category. *And when Congress did not make the same distinction, it is proper to conclude that Congress did not exercise the full scope of its pre-emption power.*” *Id.* at 2186 (quoting the 1982 Study Group Report) (emphasis added).

**Further support in the text.** The Court found that the text of section 9658 provides further support for this conclusion. *First,* the use of phrases that describe a single time period—“the applicable limitations period,” “such period shall commence,” and “the statute of limitations established under State law”—“would be an awkward way to mandate the pre-emption of two different time periods with two different purposes.” *Id.* at 2186–87 (internal quotation marks omitted). *Second,* section 9658 defines the “applicable limitations period” as “the period . . . during which a civil action under state law may be brought.” *Id.* at 2187 (internal quotation marks and citation omitted). This definition is insufficiently broad to encompass statutes of repose because statutes of repose also apply to actions that have not come into existence. *Id.*

**Third,** “the inclusion of a tolling rule in § 9658 suggests that the statute’s reach is limited to statutes of limitations,” because unlike statutes of limitation, statutes of repose are not subject to tolling. *Id.* at 2188.

**Implied pre-emption rejected.** The Court next rejected the argument that section 9658 “effects an implied pre-emption [of statutes of repose] because statutes of repose creat[e] an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress”—“to help plaintiffs bring tort actions for harm caused by toxic contaminants.” *Id.* (internal quotation marks and citations omitted). “CERCLA, it must be remembered, does not provide a complete remedial framework. . . . Section 9658 leaves untouched States’ judgments about causes of action, the scope of liability, the duration of the period provided by statutes of limitations, burdens of proof, rules of evidence, and other important rules governing civil actions. The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.” *Id.* (internal quotation marks and citations omitted). There was no showing, the Court noted, that “statutes of repose pose an unacceptable obstacle to the attainment of CERCLA’s purposes.” *Id.*

**Only three votes for narrowly construing pre-emption provisions.** Finally, in part II-D of the opinion, Justice Kennedy (joined only by Justices Sotomayor and Kagan) explained “that when the text of a pre-emption clause [such as section 9658] is
susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors preemption.” *Id.* at 2188–89 (internal quotation marks and citations omitted).

**Concurring and dissenting opinions.** Justice Scalia issued a concurring opinion, joined by Chief Justice Roberts and Justices Thomas and Alito, that disagreed with part II-D of the opinion and its “notion [ ] that express pre-emption provisions must be construed narrowly.” *Id.* at 2189. Justice Ginsburg issued a dissenting opinion, joined by Justice Breyer, which disagreed with the majority’s analysis of both the text of section 9658 and CERCLA’s legislative history. *Id.* at 2189–90.

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**Case Law Highlights Northeast**

**PLAINTIFFS FAIL TO ESTABLISH RCRA “IMMINENT AND SUBSTANTIAL ENDANGERMENT”**

Louis Abrams


Plaintiffs, the owners of two homes near a Lockheed facility in New Jersey, brought suit against Lockheed in 2011, alleging that the solvents perchloroethylene (PCE) and trichloroethylene (TCE) had been detected in the soil, groundwater, and indoor air on their properties. *Id.* at *4–6; see also *Leese v. Lockheed Martin Corp.*, 2012 U.S. Dist. LEXIS 50963, at *4–6 (D.N.J. Apr. 11, 2012). Their causes of actions included statutory claims under the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and New Jersey’s Environmental Rights Act. *Leese v. Lockheed Martin Corp.*, 2014 U.S. Dist. LEXIS 110889, at *2.

In support of their claims, plaintiffs offered data from 54 soil, air, and groundwater samples taken from their properties between 2008 and 2012. *Id.* at *8–21. At one property, two soil samples and one air sample detected PCE above the New Jersey Department of Environmental Protection (NJDEP) screening levels then in effect. *Id.* At another property, PCE and TCE were found in three soil samples, but all were below the NJDEP screening levels then in effect. *Id.* at *19–20 n.11.
During the pendency of the case, however, the NJDEP revised its screening levels for these contaminants upward. *Id.* at *11. For example, the NJDEP screening level for PCE in soil went from 34 micrograms per cubic meter to 470 micrograms per cubic meter. *Id.* As a result, none of the prior sampling data from plaintiffs’ properties exceeded the new, higher NJDEP screening levels. Moreover, all the detections were well below the U.S. Environmental Protection Agency’s (EPA) standards for what constitutes harmful amounts. *Id.* at *37.

In light of these sampling results, the court concluded that plaintiffs failed to meet the “imminent and substantial endangerment” threshold required to maintain a RCRA claim. *Id.* at *33–34. Further, while acknowledging that plaintiffs presented a voluminous amount of documentation about the harmful effects of PCE and TCE exposure at high levels, the court noted that plaintiffs failed to establish that the exposure to these contaminants at the *precise levels on plaintiffs’ properties* posed a health risk. *Id.* at *33–35. Likewise, the court granted summary judgment for Lockheed on the CERCLA and New Jersey Environmental Rights Act claims on similar evidentiary and procedural grounds. *Id.* at *26–31.

**SECOND CIRCUIT DECLINES TO IMPOSE CERCLA LIABILITY ON ESTATE’S BENEFICIARIES**

*Louis Abrams*


ASARCO LLC, as part of its emergence from chapter 11 bankruptcy, paid the federal government, the state of Washington and the port of Everett $50.2 million to settle pending CERCLA claims at two Superfund sites in Washington State. *Id.* at *4. ASARCO then filed a contribution action against the Rockefeller trustees, alleging that the contamination at these two Superfund sites was “fairly attributable” to the mining and smelting activities of corporations controlled by John D. Rockefeller nearly 100 years ago. *Id.* at *4–5.

ASARCO asserted that CERCLA should be interpreted to provide that the personal liability of a deceased potentially responsible party (PRP) is transferred to those who benefit from the PRP’s estate. *Id.* at *9–11. The court rejected this theory, noting that CERCLA is silent as to whether liability can be imposed on the estates of PRPs, “much less the beneficiaries of such estates.” *Id.* at *18–19. And while noting that state law should govern areas unaddressed by the CERCLA statutory scheme, the court held that it need not decide this issue under New York state law as ASARCO’s claims were barred by CERCLA’s three-year statute of limitations for contribution actions. *Id.* at *18–30. The court also determined that ASARCO’s bankruptcy reorganization did not entitle it to a more generous statute of limitations available to subrogees (i.e., entities that assume the legal right to attempt to collect a claim of another). *Id.* at **30–33.

**CONTRIBUTION CLAIMS MAY BE ASSERTED BEFORE FINAL APPROVAL OF REMEDIATION PLAN**

*Louis Abrams*

*Magic Petroleum Corp. v. Exxon Mobil Corp.*, 2014 N.J. LEXIS 800 (N.J. July 28, 2014) In a unanimous decision, the Supreme Court of New Jersey held that parties sued by the New Jersey Department of Environmental Protection (NJDEP) for remediation may immediately bring contribution actions against other potentially responsible parties. *Magic Petroleum Corp. v. Exxon Mobil Corp.*, 2014 N.J. LEXIS 800, at *11–12 (N.J. July 28, 2014). According to the court, a party need not wait until a remediation is complete, nor must it wait to receive final approval of a cleanup plan from the NJDEP before bringing suit. *Id.*
The NJDEP brought an administrative action under the Spill Compensation and Control Act (Spill Act) against Magic Petroleum (Magic), the owner and operator of a gasoline service station, asserting that Magic discharged hazardous substances from underground storage tanks on the property. Id. at *12–15. Although Magic maintained that other parties were responsible for the discharges at issue, it agreed to remediate the property under NJDEP oversight. Id.

While undertaking remedial efforts, Magic filed a contribution claim against ExxonMobil. Id. at *15. In response, Exxon asserted that Magic must defer its contribution claim for cleanup costs until after the NJDEP determined what remedial efforts were necessary. Id. Both the trial and appellate courts agreed, finding that the NJDEP had “primary jurisdiction” to define the contamination and formulate the proper remediation plan before liability among responsible parties could be allocated. Id. at *16–17. The primary jurisdiction doctrine applies when a court and an administrative agency have concurrent jurisdiction over a matter, but the court stays the litigation to refer the matter to the expertise of the administrative agency. Id. at *6–7.

The Supreme Court, however, disagreed. Id. at *30–31. It found no need for NJDEP approval of a remedial plan prior to assertion of a contribution claim because courts are capable of allocating liability percentages based upon equitable factors, regardless of whether the final cleanup costs for the site are known and have been approved. Id. at *36–37. In fact, the Spill Act directs plaintiffs to seek contribution relief from a court, not the NJDEP. Id. at *31. The court further reasoned that requiring a party to await NJDEP approval of the remediation plan before it can bring a contribution action undermines the purpose of the Spill Act by creating a disincentive to clean up the site when other parties share responsibility for the contamination. Id. at *37.

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**Case Law Highlights**

**Southeast**

**GROUNDWATER CONTAMINATION CLAIMS UNDER FEDERAL TORT CLAIMS ACT DISMISSED**

Lisa Gerson

**Horton v. United States, No. 3:13-cv-947-CMC, 2014 WL 2780271 (D.S.C. June 19, 2014)** The U.S. District Court for the District of South Carolina dismissed a suit by property owners against the federal government under the Federal Torts Claim Act (FTCA) that sought recovery for groundwater contamination underlying their property located near Shaw Air Force Base. Plaintiffs filed a lawsuit against the United States, alleging seven common law causes of action, after they were notified by the Air Force that testing had revealed the presence of trichloroethylene (TCE) and perchloroethylene (PCE)—chemicals used on the base—in groundwater underlying their property. Horton v. United States, 2014 WL 2780271, at *1 & n.1. The United States filed a motion to dismiss for lack of subject matter jurisdiction based on the “discretionary function exception” to the United States’ waiver of sovereign immunity under the FTCA. Id. at *2. The so-called discretionary function exception provides that the government’s waiver of sovereign immunity does not apply to claims that relate to discretionary functions of federal agencies or employees, as long as the government action “[1] involves an element of judgment or choice [2] that is based on consideration of public policy.” Id. at *3 (internal quotation marks and citations omitted). The court held that it was plaintiffs’ burden to identify “a specific statute, regulation, or policy that removed discretion from a federal agency’s or employee’s actions.” Id. at *4 (internal citations omitted). The only specific citation provided by plaintiffs—to a 1948 executive order directing federal agencies to cooperate with local authorities in preventing pollution of waters—was insufficient because the order failed to prescribe a specific and mandatory course of action, but rather clearly left discretion to the federal agencies on how to work with local authorities. Id. Plaintiffs’ further reliance on “regulations promulgated under
RCRA” was insufficiently specific. As to the second part of the analysis, the court cited cases from several other jurisdictions that found that decisions concerning issues such as remediation of contamination and public notice of contamination were subject to policy considerations. Id. at *6. Finding that Shaw Air Force Base’s decisions concerning TCE and PCE were grounded in public policy in the same manner, the court held that the base’s actions fell within the discretionary function exception and that the government, therefore, was immune from suit. Id.

**EPA’S “GASIFICATION EXCLUSION RULE” VIOLATES PLAIN LANGUAGE OF RCRA**

Lisa Gerson

_Sierra Club v. Environmental Protection Agency, 755 F.3d 968 (D.C. Cir. 2014)_ The U.S. Court of Appeals for the District of Columbia Circuit held that the so-called Gasification Exclusion Rule (the Rule) was contrary to the plain language of the Resource Conservation and Recovery Act (RCRA), and therefore vacated the Rule. The Environmental Protection Agency (EPA) promulgated the Rule in 2008, exempting from regulation under RCRA certain hazardous “residuals” left over from the petroleum refining process when they are inserted into gasification units to produce synthesis gas, a type of fuel. _Sierra Club v. Envtl. Prot. Agency_, 755 F.3d 968, 970. Petitioners Sierra Club, the Louisiana Environmental Action Network (LEAN), and the Environmental Technology Counsel petitioned the D.C. Circuit for review of the Gasification Exclusion Rule, arguing that it violated RCRA’s plain language requiring regulation of hazardous wastes used as fuel. Id. The court examined the statutory and regulatory history and noted that EPA originally interpreted RCRA not to require regulation of materials that were burned as fuel, reasoning that they were not “discarded” and, therefore, were not “waste” under the meaning of the statute. Id. at 971. Congress specifically addressed this issue in the 1984 amendments to RCRA, adding a section requiring the regulation of “hazardous waste used as fuel.” Id. Through a series of later rulemakings, EPA excluded from regulation certain petroleum refinery waste productions that were “reinserted” into specified refining processes, culminating with the Rule, which added “gasification” to the list of refining processes wholly exempted from RCRA. Id. at 971–72. Relying on the framework set forth in _Chevron U.S.A. Inc. v. Nat’l Res. Def. Council_, 467 U.S. 837 (1984), the court held that Congress had directly spoken to the precise question raised by the petitioners, and there was “no serious question that the Gasification Exclusion Rule exempts from RCRA hazardous materials” that RCRA specifically intended to be regulated. Id. at 977–78. The court rejected EPA’s efforts to distinguish the Rule from the clear directive of the 1984 amendments, asserting “we hold here that Congress meant . . . what it said.” Id. at 980 (internal citation omitted). However, in closing, the court noted that its ruling did not “require the EPA to subject all hazardous wastes used to produce a fuel to the full panoply of RCRA regulation[,]” and that EPA retained discretion to regulate residuals in a manner that promotes the goals of the law—to protect human health and the environment. Id.

**GEORGIA APPELLATE COURT INVALIDATES VARIANCE AS INCONSISTENT WITH STATE WATERSHED PROTECTION LAW**

Lisa Gerson

_Georgia River Network v. Turner, No. A14A0215, 2014 WL 3557407 (Ga. Ct. App. July 16, 2014)_ A Georgia appellate court invalidated a variance granted to a county board of commissioners to construct a fishing lake because the variance was inconsistent with a Georgia environmental protection statute. _Georgia River Network v. Turner_, No. A14A0215, 2014 WL 3557407 (Ga. Ct. App. July 16, 2014). Pursuant to Georgia’s Erosion and Sedimentation Act (GESA), so-called land-disturbing activities must conform to specified “best practices,” including that no land-disturbing activities may take place within a 25-foot buffer along the banks of all state waters, measured “horizontally from the point where vegetation has been wrested by normal stream flow[.]” Id. at *2 (internal quotation marks and citation omitted). Pursuant to one of the statute’s six exceptions, the Grady County Board of Commissioners was granted a variance in connection with the county’s plans to construct a 960-
acre fishing lake, permitting it to encroach on the 25-foot vegetative buffer. *Id.* at *1*. This administrative action was challenged by two environmental groups, which argued that wetlands constituted “state waters” pursuant to GESA, and that the county’s variance application was deficient because it did not address impacts to buffers along wetlands on the lake site. *Id.* at *2*. The Georgia Court of Appeals agreed with the petitioners and an earlier ruling by an administrative law judge. *Id.* at *7*. The court’s determination hinged on whether the statutory direction to measure the buffer zone “horizontally from the point where vegetation has been wrested” constituted an implied *seventh* exception from the buffer requirement, so that if no wrested vegetation was found, no buffer zone could be measured or imposed. *Id.* The court rejected this reasoning, finding that the “measurement” language merely specified the location of the required buffer along water banks and a method for measuring it, and adding that to do otherwise “would be to hold that no buffer is required along the banks of streams, rivers, and lakes that have rocky or sandy shores where lines of wrested vegetation cannot be found.” *Id.*

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**Case Law Highlights**

**Mid-Continent**

**RCRA CITIZEN SUIT CAN BE USED TO ENFORCE EPA-APPROVED STATE REGULATIONS**

Lisa Cipriano

*City of Hattiesburg v. Hercules, Inc., No. 2:13-cv-208-KS-MTP, 2014 WL 1276459 (S.D. Miss. Mar. 27, 2014)* A federal district court in Mississippi held that citizen suits may be brought under the Resource Conservation and Recovery Act (RCRA) to enforce state hazardous waste regulations approved by the Environmental Protection Agency (EPA) in lieu of the corresponding federal program. *City of Hattiesburg v. Hercules, Inc., 2014 WL 1276459* (S.D. Miss. Mar. 27, 2014). Plaintiff, the city of Hattiesburg, filed a RCRA citizen suit, along with various state law claims, against the current and former owners and operators of a chemical production plant that had operated in Hattiesburg for almost 90 years. *Id.* at *1 & n.1*. Plaintiff alleged that industrial waste from defendants’ plant “contaminated soil, groundwater, and air on, and around the facility[.].” *Id.* Defendants moved to dismiss the RCRA claim, arguing first that the district court should abstain from considering the RCRA claims under the doctrine of primary jurisdiction. *Id.* at *2*. The court rejected that argument, observing that although the Fifth Circuit had not addressed the issue, the majority of courts that had considered it had found that the doctrine did not apply to citizen suits under RCRA. *Id.* at *2–3*. The court further noted that “Congress expressly defined the limited circumstances under which . . . RCRA suits may be barred” and that the primary jurisdiction doctrine was not among them. *Id.* at *3* (internal quotation marks and citation omitted, ellipses in original). Second, defendants argued that plaintiff’s RCRA suit should be dismissed because Mississippi had “adopted its own EPA-approved regulatory program” and that RCRA’s citizen suit provision could not be used to enforce state regulations. *Id.* The district court disagreed. The court noted that section 6926(b) of RCRA “allows states to adopt their own hazardous waste regulatory programs, subject to approval by the
EPA[,]” and commented on the holdings of a few courts that in states where this has occurred, private citizens’ enforcement suits raised claims under state law, not under RCRA. *Id.* at *3. Based on the language of the relevant RCRA sections, however, the court “respectfully disagree[d]” with these authorities, finding that “according to the plain language of Section 6926, EPA-approved state regulatory programs ‘become effective pursuant to’ the RCRA, and citizens may enforce them via a citizen-suit[.]” *Id.* at *4* (quoting 42 U.S.C. § 6972(a)(1)(A)). The court further opined that defendants’ position “would leave Mississippi citizens without any private enforcement mechanism for hazardous waste regulations” because “Mississippi’s EPA-approved regulatory program does not provide a private cause of action.” *Id.*

**Counsel Subject to Personal Jurisdiction Resulting from Settlement Negotiations**

Lisa Cipriano


The U.S. Court of Appeals for the Eighth Circuit held that participating in settlement negotiations in Missouri was sufficient to confer jurisdiction on a Missouri federal district court in a dispute over class counsel’s refusal to contribute to a common benefit trust fund. *Downing v. Goldman Phipps, PLLC*, 2014 WL 4116792 (8th Cir. Aug. 22, 2014). In *Downing*, select plaintiffs’ counsel in a federal multidistrict litigation (MDL) filed a class action in the Eastern District of Missouri against other plaintiffs’ attorneys in the MDL, alleging unjust enrichment and quantum meruit. *Id.* at *1.* In the underlying action, a common benefit trust fund (CBTF) had been created to compensate plaintiffs’ counsel. *Id.* The CBTF drew funds from MDL recoveries as well as non-MDL recoveries in which counsel benefitted from MDL work product. *Id.* The *Downing* defendants—representing both MDL and state court plaintiffs in the underlying action—objected to the creation of the CBTF and did not contribute to the fund. *Id.* The *Downing* plaintiffs alleged that defendants relied on materials prepared and work performed in the MDL—including pleadings and motion papers, document coding, deposition testimony and exhibits, and materials prepared in connection with several bellwether trials—but failed to contribute to the fund. *Id.* at *2–3.* Defendants moved
to dismiss for lack of personal jurisdiction, and the district court granted the motion, finding that defendants’ contacts with Missouri, although “frequent and substantial,” were not “purposeful or voluntary since they directly related to their representation of clients in the [ ] MDL[,]” and noted that defendants “had opposed removal of their cases from state court and their federal cases had been transferred to Missouri with the consolidation of the [ ] MDL.” *Id.* at *3. The Eighth Circuit reversed and remanded. First, the court found that defendants, by traveling to Missouri to conduct settlement negotiations with the MDL defendants in relation to the state court cases, had transacted business in Missouri for purposes of the state’s long arm statute. *Id.* at *4. These actions were voluntary and purposeful, as defendants had moved the MDL court to permit them to attend the negotiations. *Id.* at *4–5. Second, the court found that defendants’ contacts with the state were sufficient to meet the “due process minimum.” *Id.* at *5. Among other things, defendants were physically present in Missouri on multiple occasions and Missouri had a clear interest in providing a forum for plaintiffs. In addition, defendants’ Missouri contacts and failure to pay into the CBTF were “sufficiently related to [plaintiffs’] claims to support personal jurisdiction[,]” *Id.* at *6.

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**Case Law Highlights Midwest**

**TANK OWNERS/OPERATORS MAY BE LIABLE WITHOUT TIES TO SPECIFIC RELEASE**

Chris Johnson


The owner or operator of an underground storage tank, or an owner of the real property on which it is located, may be held liable under Michigan law to remediate contamination based upon a showing only of responsibility for a circumstance that reasonably may be anticipated to cause a release, regardless of whether the owner/operator can be tied to a specific release that caused the harm. So held the Michigan Court of Appeals in *Dep’ t of Natural Res. & Env’t v. Strefling Oil Co.*, 2014 WL 3747347, at *3–4 (Mich. Ct. App. July 29, 2014), interpreting the leaking underground storage tank provisions in Michigan’s Natural Resources Environmental Protection Act (NREPA), Mich. Comp. Laws § 324.21301a, et seq. The case turned on interpretation of the statutory phrase “responsible for an activity causing a release or threat of release.” *Id.* at *3 (internal quotation marks and citation omitted). The court found that this phrase was unambiguous and “did not limit . . . liability to owners or operators who caused a release or threat of release . . . [or] to owners or operators who were responsible for the activity that caused the release at issue.” *Id.* (some emphasis added). The court had no difficulty finding the necessary level of responsibility to affirm summary judgment where the oil company defendant owned, operated, filled, and used the tanks. *Id.* at *4. In also affirming summary judgment against an individual and a real estate investment company that had an ownership interest in the real property, the court observed that the two corporate defendants were family businesses involving the individual defendant and his parents, and that all of the family members were knowledgeable about the fuel business and tank operations, so that “the use of underground storage tanks on their property may reasonably have been anticipated to have caused a release of petroleum.
products[.].” *Id.* at *5. One judge dissented from the portion of the opinion that imposed liability on the real property owners, noting that the majority’s interpretation amounted to a strict liability standard for landowners—a standard that had existed in the prior law but that was amended by NREPA. *Id.* at *8–9.

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**CERCLA CITIZEN SUITS CONCERNING COMPLETED REMEDIAL PLAN ARE REVIEWABLE DESPITE ADOPTION OF ADDITIONAL PLAN**

Chris Johnson

*Frey v. Environmental Protection Agency*, 751 F.3d 461 (7th Cir. 2014) The Seventh Circuit Court of Appeals ruled recently that courts have jurisdiction over, and may review, citizens’ claims concerning a completed stage of an ongoing, multistage remediation project, as long as the earlier plan is not directly affected by existing later plans. At issue in *Frey v. Envtl. Prot. Agency* was the cleanup of several sites in Indiana contaminated with polychlorinated biphenyls (PCBs). 751 F.3d 461, 462–63 (7th Cir. 2014). The first stage of the remedial work, completed in 2000, had required the polluter to remove sediment from certain spots and to install clay landfill caps to contain any remaining contaminated sediment. *Id.* at 464. The second and third stages, approved in 2006 and 2007 and ongoing at the time of the decision, involved water treatment plants, drainage, and collection systems. *Id.*

The district court ruled that it had no jurisdiction over plaintiffs’ suit concerning a completed stage of the site, and granted summary judgment in favor of the Environmental Protection Agency (EPA) regarding the first stage. *Id.* at 465 (internal quotation marks and citation omitted). The Seventh Circuit undertook a *sua sponte* review of its jurisdiction in view of the additional remediation action and concluded that claims relating to old, completed remedial work at a site could be reviewed even if additional plans later were adopted, to the extent that the plans were distinct from each other, such as targeting different areas, pollutants, or remedies. *Id.* at 468–69. To hold otherwise, the court reasoned, would render judicial review a near nullity either by allowing EPA to delay citizen suits indefinitely by proposing minor additional actions, or by preventing review of completed actions without also reviewing additional plans for the same sites, thereby raising the bar in § 113(h)(4). *Id.* at 468.

**PUBLIC DISCLOSURE OF COURT DOCUMENTS TURNS ON JUDICIAL RELIANCE**

Chris Johnson

*City of Greenville v. Syngenta Crop Protection, LLC*, No. 13-1626, ___ F.3d ___, 2014 WL 4092255 (7th Cir. Aug. 20, 2014) Intervenors in a lawsuit involving the herbicide atrazine failed in their attempt to obtain access to certain internal documents of atrazine manufacturer Syngenta that had been disclosed in discovery. *City of Greenville v. Syngenta Crop Prot., LLC*, 2014 WL 4092255, at *1. Although a protective order was in place to protect discovery material, it did not cover material filed in connection with dispositive motions; the documents in question were filed under seal as exhibits to plaintiffs’ response to Syngenta’s motion to dismiss. *Id.* The district court unsealed some of the exhibits but preserved the seal on others that either were legitimately confidential or had not been cited in plaintiffs’ papers. *Id.* In upholding the district court’s decision, the Seventh Circuit discussed the tension between secrecy of discovery and the presumption of public access to judicial records, and noted that “the presumption of public access turns on what the judge did, not on what the parties filed.” *Id.* at *2 (internal citation omitted). Because the district judge had not read or relied upon the remaining sealed documents, the Seventh Circuit held that they could not “aid the understanding of judicial decisionmaking” and therefore did not have to be disclosed. *Id.*

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NO RELIEF FOR DELAYED PSD PERMIT
Matthew Thurlow

Sierra Club v. Environmental Protection Agency, No. 11-73342, 2014 WL 3906509 (9th Cir. Aug. 12, 2014) On August 12, 2014, the Ninth Circuit vacated Avenal Power Center LLC’s (Avenal Power) Prevention of Significant Deterioration (PSD) permit because the permit did not incorporate current National Ambient Air Quality Standards (NAAQS) and Best Available Control Technology (BACT) requirements. Sierra Club v. Envtl. Prot. Agency, 2014 WL 3906509 (9th Cir. Aug. 12, 2014). The court held that the U.S. Environmental Protection Agency (EPA) lacked authority under the Clean Air Act to “grandfather in” Avenal Power’s permit and waive new standards that went into effect while EPA was considering the permit.

Avenal Power first submitted its PSD permit application in February 2008. Id. at *2. Over a year later, in June 2009, EPA issued a Statement of Basis describing its reasons for proposing approval of the permit. Id. At that point, EPA had already missed its statutory one-year deadline under the Clean Air Act for either granting or denying the permit. 42 U.S.C. § 7475(c). But Avenal Power’s permit still was not close to being issued. EPA held several public meetings and hearings regarding Avenal Power’s permit, and the Sierra Club and others filed comments opposing approval of the permit. Id.

In the meantime, in early to mid-2010, EPA tightened its air quality standards for nitrogen dioxide emissions, greenhouse gases, and sulfur dioxide. Id.; Primary NAAQS for Nitrogen Dioxide, 75 Fed. Reg. 6474, 6475 (Feb. 9, 2010); Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010); Primary NAAQS for Sulfur Dioxide, 75 Fed. Reg. 35,520 (June 22, 2010). In March 2010, still without a permit decision and facing new compliance obligations under these new regulations, Avenal Power brought suit against EPA in the U.S. District Court for the District of Columbia to force a decision on its permit. Id. EPA initially took the position that although it failed to meet the one-year statutory deadline for making a decision on Avenal Power’s permit, Avenal Power must still comply with its new nitrogen dioxide and sulfur dioxide standards. Id. at *3.

After another year slipped by and Avenal Power’s permit still had not been issued, and EPA’s greenhouse gas standards went into effect, EPA appeared to have had a change of heart and decided to “grandfather in” Avenal Power’s permit. Id. Following an order by the D.C. court, EPA finally issued Avenal Power its permit in May 2011. At this point, the Sierra Club and other petitioners appealed the issuance of the permit before the Environmental Appeals Board. Id. The Environmental Appeals Board upheld issuance of the permit, and petitioners then sought judicial review. Id.

The Ninth Circuit reversed the Environmental Appeals Board’s decision, holding that despite EPA’s failure to meet its statutory, one-year deadline, EPA did not have authority to “grandfather in” the Avenal Power permit. EPA’s decision was not entitled to Chevron deference because the “plain language” of the Clean Air Act “clearly requires EPA to apply the regulations in effect at the time of the permitting decision.” Id. at *7; 42 U.S.C. §§ 7475(a)(4), 7410(j). Although somewhat sympathetic to Avenal Power, the court ultimately decided it “must send EPA and Avenal Power back to the drawing board.” Id. at *11.

DISTRICT COURT UPHOLDS COLORADO’S RENEWABLE ENERGY STANDARD STATUTE
Matthew Thurlow

discriminated against out-of-state coal and natural gas
generators because the law requires that up to 30
percent of electricity in Colorado come from
renewable sources. The court dismissed plaintiffs’
challenge on summary judgment, holding that the
Colorado law “neither regulates wholly extraterritorial
commerce nor imposes Colorado’s policy decisions on
other states.” Id. at *25–26.

Colorado’s renewable energy standard includes a
renewables quota that requires Colorado utilities to
generate or obtain electricity from sources that
generate renewable energy or purchase renewable
energy credits. Id. at *6. The renewables quota
requires utilities to use renewable energy for between
10 percent and 30 percent of their retail electricity
sales by 2020 (varying on the basis of the type and size
of the utility). Id. In April 2011, plaintiffs sought to
invalidate the law under the dormant Commerce
Clause (U.S. Const. art. I, § 3, cl. 8), which prohibits
“state or municipal laws whose object is local
economic protectionism.” Id. at *10.

In upholding Colorado’s renewable energy statute, the
court applied a three-part analysis under the dormant
Commerce Clause. Id. at *10–11 (citing KT&G
Corp. v. Att’y Gen. of Okla., 535 F.3d 1114, 1143
(10th Cir. 2008)). First, the court determined that
Colorado’s renewables quota was not invalid per se
under the dormant Commerce Clause because
plaintiffs did not argue that the law discriminated
against out-of-state interests. Id. at *15–16. Second,
the court held that the law did not violate the dormant
Commerce Clause because there was no evidence that
it regulated “wholly extraterritorial commerce.” Id. at
*25–26. Finally, applying the Supreme Court’s
balancing test in Pike v. Bruce Church, Inc., 397 U.S.
137, 142 (1970), the court held that the burden of the
renewables quota on interstate commerce was not
excessive as compared to its benefits to the state. Id.
at *32–33. Plaintiffs have filed an appeal in the Tenth
Circuit.

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TIPS FOR DEFENDING EXPERT DEPOSITIONS IN
ENVIRONMENTAL CASES
Scott E. Kauff

All too often, experienced litigators ignore the
importance of properly preparing for and defending
expert depositions. Due to the very large number of
parties and counsel involved in complex environmental
cases, over the course of my career I have both
defended and attended dozens of expert depositions.
Like all of us, I also have reviewed scores of expert
deposition transcripts over the years. After nearly two
decades, I continue to be surprised by the number of
expert depositions where neither counsel nor the
expert is properly prepared. I can only assume that
such counsel believe that experienced experts are
capable of handling themselves during a deposition.
Unfortunately, most of the time that assumption is
unfounded. There is no substitute for proper
preparation. Several steps are the key to properly
defending an expert deposition.

Preparing Objections. Due to the federal
environmental statutes, the majority of environmental
litigation occurs in federal courts. In general, federal
courts limit the nature of the objections counsel can
raise. Federal Rule of Civil Procedure 30(c)(2)
expressly provides that an “objection must be stated
concisely in a non-argumentative and non-suggestive
manner. . . .” For those of us who do our best to
comply with the rule and keep our objections simple, I
have found it very helpful for witnesses to understand
the various types of objections and why we raise them.
For example, even seasoned experts do not
necessarily understand what an attorney means when
she or he objects for a “lack of foundation.” The
witness also might not know what an attorney means
when she or he says, “objection, compound.”
Discussing each of the common objections in advance
can be very helpful to the witness. It helps the witness
understand how to react to the objection. During
preparation sessions, make sure the witness
understands the reason for the objection and that when
you object, it is important to reevaluate the question
pending. The question might assume facts that are hotly
contested; the question might ask three different
questions and seek a single yes or no answer; the question might use vague terms that can later be twisted to argue something unintended by the witness. By working through objections in advance, the witness will be in a better position to evaluate and respond to the questions posed.

**Educating on Legal Case Theory and Defenses.** Another common witness mistake I have observed time and time again is the expert witness who thinks she or he is a lawyer. The witness expounds on a point that she or he thinks is helpful, while the witness is actually creating factual support for the opposing party’s motion for summary judgment. Environmental law is a complex web of federal, state, and local statutes, regulations, and guidance documents in addition to extensive and conflicting common law. Without thorough preparation, experts cannot be expected to appreciate the intricate battle going on between the plaintiff(s) and defendant(s) in a case. The expert might think she or he understands the legal workings of the case, and she or he likely has a rough idea of the general issues in the case. However, it is unlikely the expert is knowledgeable about all of the minutiae of environmental law. For example, in a case brought pursuant to the Resource Conservation and Recovery Act, there might be a dispute about whether the hazardous material constitutes a solid and/or hazardous waste. While an expert in the case might be very knowledgeable about engineering, chemistry, hydrogeology, or toxicology, it is unlikely the expert is highly knowledgeable about the detailed regulations and agency guidance regarding the definitions of a solid and hazardous waste. Oftentimes, the law and guidance are counterintuitive and not obvious without further explanation of the complex considerations that were made by the agency. Without proper preparation, the expert might offer testimony that she or he thinks is helpful, but that actually supports the adversary’s regulatory arguments. The bottom line is that we should never allow our experts to appear for depositions without an understanding of the key legal issues, themes, and parties’ legal and factual goals.

**Reviewing Expert Reports.** Most reputable experts are busy people. Thus, they often forget the details of their own and the opposing experts’ reports by the time they are deposed. Many experts think it is sufficient to simply read through their reports prior to a deposition. It is imperative, however, for experts to go through both their own and the opposing experts’ reports in detail. General discussions are insufficient; it is important to discuss each opinion and the bases for such opinions. In order to ensure experts are ready, during our prep sessions, I usually question them about every substantive statement in the report, including the bases for each statement.

**Practice.** Even the most experienced expert can benefit from practice. The only way to truly know if your witness is prepared is to ask pointed, direct, and difficult questions and to be persistent. Having a different member of your legal team conduct a mock examination of the witness may remove the comfort level that comes with being familiar with each other. It is important to make the practice as realistic as possible. Again, while practice seems obvious, not all counsel consider this important. I think those counsel are doing a disservice to their witness and client.

**The Deposition.** The morning of the deposition, meet with the witness to answer any last-minute questions or concerns that the witness might wish to discuss. I also refresh the witness’s recollection regarding my typical objections and the goals of the parties during the deposition.

**Conclusion.** By following these simple, although time-consuming steps, you will ensure that your expert witness is well prepared, advances your case theory, and proves to be a challenging witness for your adversary.

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