The ELTT Committee accomplished much in 2014 and looks forward to achieving even more in 2015. We encourage you to participate in the upcoming Committee conference call, hosted by Programs Vice Chair Chris Amantea, which will discuss current “hot topics” in environmental litigation. LinkedIn users are invited to join the ELTT group and participate in ongoing discussions. We welcome and encourage contributions from our members and wish to thank all of the contributors to this newsletter.

Happy New Year,
Ben and Patrick

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Join, Connect, Discuss

Join the Environmental Litigation and Toxic Torts Committee group on LinkedIn to discuss the latest developments and trends in environmental litigation and toxic torts actions: https://www.linkedin.com/groups?gid=6507520
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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.
Looking into the Crystal Ball of Environmental and Toxic Torts Litigation
Join the Discussion

Please join us for our first in a series of ELTT Committee “hot topics” conference calls on Wednesday, February 18, 2015, at noon (CST). Our focus will be Looking into the Crystal Ball of Environmental and Toxic Torts Litigation: Trends to Watch and Plan for in 2015. We will also discuss the federal environmental legislative climate, in light of the 2014 mid-term elections. Calls are in a roundtable format, giving members a chance to participate and share information and insights. Call-in details are available on our committee webpage: www http://apps.americanbar.org/dch/committee.cfm?com=NR350800. Dial in and keep abreast of the hot topics in environmental and toxic tort litigation. Be on the lookout for more exciting ELTT programming throughout 2015!

2014 Year in Review

ABA editors are working hard on The Year in Review, the ABA Section of Environment, Energy, and Resources’ annual compilation of the past year’s key cases and statutory materials. The electronic publication will contain 32 chapters covering a wide range of topics, including but not limited to natural resources litigation, marine resources, mining and mineral extraction, oil and gas, renewable energy resources, water resources, and much more. The publication will also feature a chapter on environmental litigation and toxic torts that will provide links to key cases from 2014. The Year in Review will be available at www.ambar.org/EnvironYIR, where Section members can also view past years’ publications. If you are not already a member of the Environmental Litigation and Toxic Torts Committee you can sign up at http://apps.americanbar.org/dch/committee.cfm?com=NR350800 to gain access to updates on environmental litigation and toxic torts throughout the year.

Case Law Highlights
Northeast

NEW JERSEY HIGH COURT REJECTS STATUTE OF LIMITATIONS FOR SPILL ACT CONTRIBUTION CLAIMS
Louis Abrams

Morristown Associates v. Grant Oil Co., No. A-38-13, slip op. (N.J. Jan. 26, 2015) The New Jersey Supreme Court recently reversed an appellate division ruling that would have applied a six-year statute of limitations for private contribution actions brought under the New Jersey Spill Compensation and Control Act (Spill Act), finding that the “plain language” of the statute did not permit a limitations defense.

The Spill Act was enacted in 1976 to assist the state of New Jersey in remediating contaminated sites and hold dischargers accountable for such cleanups. N.J.S.A. 58:10-23.11. The statute later was amended to allow private contribution claims. N.J.S.A. 58:10-23.11f(a)(2). The Spill Act does not explicitly include a limitations period for private contribution claims.

New Jersey courts historically held that there is no time limit for filing such claims. For example, in Pitney Bowes, Inc. v. Baker Industries, 649 A.2d 1325, 1327–28 (N.J. App. Div. 1994), the appellate division considered whether the ten-year statute of repose in N.J.S.A. 2A:14-1.1 barred a claim for contribution against the installer of underground storage tanks (USTs) at a property that was subsequently found to be contaminated. The court found that the statute of repose was not applicable to a Spill Act contribution claim, explaining that the Spill Act strictly limits the defenses available to a responsible party to those specifically enumerated in the statute. Id. The court further held that “[t]here is no provision of any defense available either to a direct or a contribution defendant based on the passage of time.” Id.
Although several state court decisions adopted *Pitney Bowes*, New Jersey federal courts had reached a different conclusion, finding that the six-year statute of limitations applicable to common law property claims found in N.J.S.A. 2A:14-1 applies to Spill Act contribution claims. See, e.g., *Reichhold, Inc. v. U.S. Metals Refining Co.*, 655 F. Supp. 2d 400, 446–47 (D.N.J. 2009). However, no state court had ever sided with its federal counterparts prior to the appellate division’s ruling in *Morristown Associates*.

In *Morristown Associates*, plaintiff, a shopping mall owner, sued fuel delivery companies and the prior owners of a dry cleaning business that leased space in the mall for Spill Act contribution to recover expenses related to a leaking UST. *Morristown Assocs. v. Grant Oil Co.*, 74 A.3d 968, 970–71 (N.J. App. Div. 2013). Plaintiff alleged that the fuel companies and the prior owners of the dry cleaning business neither inspected the UST nor made necessary repairs. *Id.* Defendants moved for summary judgment on the ground that plaintiff’s claims were barred by the general six-year statute of limitations for property damage claims because plaintiff should have been aware of the leaking fill pipes by at least 1999, when it removed another leaking UST at the property. *Id.* at 972–73. The trial court agreed with defendants, finding that the six-year statute of limitations applied. The appellate division subsequently affirmed. *Id.* at 975.

A unanimous New Jersey Supreme Court reversed, holding that the prior understanding of the Spill Act expressed by New Jersey’s state courts was correct and that no limitations period applied to Spill Act private contribution claims. The court held that the “plain language” of the Spill Act, which expressly limits defenses to Spill Act claims to “[a]n act or omission caused solely by war, sabotage, governmental negligence, God or a third party or a combination thereof,” does not contemplate a limitations defense to liability. *Slip op.* at 29–30. Although the court saw no ambiguity in the statutory scheme, it found further support for its decision in the legislative history and the “longstanding view” that “the Spill Act is remedial legislation designed to cast a wide net over those responsible for hazardous substances and their discharge on the land and waters of this state.” *Id.* at 32. The court noted that its “role is simply to discern as best as [it] can legislative intent and to implement that intent,” *id.* at 33, and it saw “no reason to interpose in these factually complex cases a new requirement to determine when one knew of a discharge in order to afford the remediating party the contribution right that the Spill Act confers as against all other parties.” *Id.* at 34. Finally, the court noted that if the New Jersey Legislature “intended something other than what [the court] perceive[d] to be a broad approach to holding parties responsible for their role in polluting the land and waters of New Jersey, then legislative correction can fix any misunderstanding.” *Id.* Thus, barring any future legislative action, Spill Act private contribution claims will not be subject to any time bar.

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**ENVIRO**

**NMENTAL GROUPS SECURE INJUNCTION COMPELLING COMPANY TO APPLY FOR DISCHARGE PERMITS**

Louis Abrams


Plaintiffs filed suit in 2012 under the Clean Water Act (CWA), the Resource Conservation and Recovery Act, and Pennsylvania’s Clean Streams Law, seeking a judgment ordering PPG to remedy
the alleged imminent and substantial endangerment to health and the environment presented by contamination at a site in Pennsylvania (site). *Id.* at 1. In particular, plaintiffs alleged that PPG illegally discharged arsenic, lead, mercury, and other pollutants into the Allegheny River. *Id.* at 2–3, 7.

PPG admitted that from 1949 to 1970, it deposited waste slurry into three lagoons at the site. *Id.* at 2. In March 2009, the Pennsylvania Department of Environmental Protection (PADEP) issued an administrative order, noting that “[PADEP] believes that discharges coming from the site [are] entering into the Allegheny River . . . and pose a significant threat to public health and the environment.” *Id.* at 3 (internal quotation marks omitted). The administrative order required PPG to submit a treatment plan and implement interim abatement measures. *Id.* at 4.

Plaintiffs sought an injunction ordering PPG to apply for two NPDES permits and to comply with the administrative order in the interim. *Id.* at 1–2. The NPDES permits would impose effluent limitations for discharges into surface water and would likely require PPG to construct a wastewater treatment system to comply with discharge limitations. In response to this injunction request, PPG argued: (1) an NPDES permit is a procedural requirement under the CWA and injunctive relief is inappropriate to address procedural violations, and (2) the irreparable harm prong of the preliminary injunction standard cannot be sustained because plaintiffs delayed two years after filing the lawsuit to seek an injunction. *Id.* at 24.

In ordering PPG to apply for the NPDES permits, the court noted that a NPDES permit is not a “mere procedural requirement” under the CWA but rather is the primary mechanism by which the act is enforced. *Id.* at 25. With regard to irreparable harm, the court determined that plaintiffs’ delay in seeking an injunction was “irrelevant” because environmental harm is irreparable by its very nature. *Id.* at 26. The court further noted that the “[environmental] harm did not become reparable (or ‘less immediate’) because of Plaintiff’s delay in filing for a preliminary injunction, whatever the reason.” *Id.* Finally, the court noted that PPG did not present any compelling evidence that its application for NPDES permits would compromise its ability to comply with the administrative order. *Id.* at 27. Although PPG may appeal this decision, environmental groups may try to use similar tactics in the future to force desired changes in industrial operations given the success of their efforts here.

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**FARM ORGANIZATION ASKS THIRD CIRCUIT TO DISMISS EPA’S CHESAPEAKE BAY PLAN**

*Louis Abrams*

*Am. Farm Bureau Fed’n v. EPA, 984 F. Supp. 2d 289 (M.D. Pa. 2013)* The U.S. Court of Appeals for the Third Circuit heard oral argument on November 18, 2014, in *American Farm Bureau Federation v. EPA*, an appeal of a 2013 district court decision upholding the U.S. Environmental Protection Agency’s (EPA) pollution restriction program for the Chesapeake Bay watershed (Chesapeake Bay plan). *Am. Farm Bureau Fed’n v. EPA, 984 F. Supp. 2d 289, 344 (M.D. Pa. 2013); see also Transcript of Nov. 18, 2014, Am. Farm. Bureau Fed’n v. EPA.* Plaintiffs, a consortium of business associations (with the support of a number of states), contend that the Chesapeake Bay plan infringes on states’ inherent authority over land-use management decisions. *Id.* at 313; *see also Brief of Various States as Amici Curiae in Support of Reversal, Am. Farm. Bureau Fed’n v. EPA, No. 13-4079 (3d Cir. Feb. 3, 2014).*

The Chesapeake Bay plan is a comprehensive “pollution diet” with accountability measures designed to restore water quality in the Chesapeake Bay, which is fed by a 64,000-square-mile watershed across six states and the District of Columbia. *Am. Farm. Bureau*, 984 F. Supp. 2d at 295, 298–305. The plan calls for 25 percent reduction of nitrogen and phosphorous levels and at least a 20 percent reduction in sediment by 2025.
through a combination of federal and state actions. *Id.* at 305–06.

On September 30, 2013, the U.S. District Court for the Middle District of Pennsylvania approved the Chesapeake Bay plan, applying the deferential standards applicable to a court’s review of executive agency actions. *Id.* at 344. The Third Circuit appeal centers on whether EPA overstepped the authority conferred on the agency in the Clean Water Act (CWA). Although plaintiffs acknowledge that EPA can set federal water quality standards, it asserts that the agency cannot “micromanage” how states achieve those standards. Brief of Various States as *Amici Curiae* in Support of Reversal, *Am. Farm. Bureau Fed’n v. EPA*, at 1. Of particular concern to plaintiffs were sections of the Chesapeake Bay plan that limited the amounts of pollutants that could enter the bay watershed from major pollution sectors in each state, such as wastewater treatment plans, agriculture, stormwater, and septic systems. Brief of Plaintiffs-Appellants, *Am. Farm. Bureau Fed’n v. EPA*, No. 13-4079, at 3 (3d Cir. Jan 27, 2014). Indeed, in their opening brief in the Third Circuit, plaintiffs note that “[t]his case is about whether the CWA authorizes EPA to make such local decisions as: whether particular lands can be farmed or developed . . . and how to allocate the burdens of achieving water quality goals among municipal sewers [and] stormwater systems. . . .” *Id.* Affirmance of the district court’s decision may pave the way for EPA to implement similar pollution-control plans in a number of watersheds that span several states, such as the Mississippi River basin.

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**CALENDAR OF SECTION EVENTS**

- **February 18, 2015**
  - *Stormwater Regulation: Geographic Differences, New Approaches, and Environmental Issues*
  - CLE Webinar

- **February 18, 2015**
  - *Looking into the Crystal Ball of Environmental and Toxic Torts Litigation: Trends to Watch and Plan for in 2015*
  - Committee Program Call

- **February 19, 2015**
  - *Anatomy of a Transaction: The Basics of a Career as an Environmental Transactions Attorney*
  - Non-CLE Webinar

- **February 25, 2015**
  - *Reusing Wastewater*
  - CLE Webinar

- **March 3, 2015**
  - *Key Environmental Issues in U.S. EPA Region 4*
  - Georgia State Bar Conference Center
  - Atlanta, GA

- **March 26-28, 2015**
  - *44th Spring Conference: The ABA Super Conference on Environmental Law*
  - San Francisco, CA

- **April 16-17, 2015**
  - *ABA Petroleum Marketing Attorneys’ Meeting*
  - Washington, DC

- **June 3-5, 2015**
  - *33rd Annual Water Law Conference*
  - Denver, CO

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For full details, please visit [www.ambar.org/EnvironCalendar](http://www.ambar.org/EnvironCalendar)
circuits speaking “favorably about Lone Pine orders,” but opined that “there is a time and place for everything.” Id. The court held that Lone Pine orders should not be used as “platforms for pseudo-summary judgment motions,” noting that if a district court considers materials outside the complaint on a motion to dismiss, it must convert the motion to one for summary judgment, with notice to all parties and an opportunity for mutual discovery. Id. at 1168 ("[I]f these procedural safeguards are not enforced, then Lone Pine orders might become the practical equivalent of a heightened, court-imposed quasi-pleading standard.").

AMENDMENT TO NORTH CAROLINA STATUTE OF REPOSE SUBSTANTIVE AND CANNOT BE APPLIED RETROACTIVELY

Lisa Gerson

The U.S. District Court for the Western District of North Carolina adopted a magistrate judge’s memorandum and recommendation dismissing a plaintiff’s toxic tort complaint under North Carolina’s ten-year statute of repose. Stahle v. CTS Corp., No. 1:14-CV-00048-MOC-DLH, 2014 WL 6879393 (W.D.N.C. Dec. 4, 2014). Plaintiff alleged that he was exposed to toxic solvents that defendant, as part of its manufacturing process, had discharged into a creek, and that the exposure resulted in his diagnosis with a form of leukemia. Stahle v. CTS Corp., Mem. & Recommendation, 1:14-CV-00048 (Dkt. # 18), at *2. In an earlier related case, the magistrate judge had held that North Carolina’s ten-year statute of repose was not preempted by the Comprehensive Environmental Response, Compensation, and Liability Act and dismissed the plaintiff’s claims. Id. at *4. That decision ultimately was affirmed by the U.S. Supreme Court. Id. at *3 (citing CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014)).
Shortly after the Supreme Court’s decision, North Carolina’s legislature amended the statute of repose to exclude actions for “personal injury, or property damages caused or contributed to by groundwater contaminated by a hazardous substance, pollutant, or contaminant, including . . . resulting from the consumption, exposure, or use of water supplied from groundwater contaminated by a hazardous substance, pollutant, or contaminant.” Id. (citing N.C. Gen. Stat. § 130A-26.3). The magistrate judge held that the amendment was a substantive change to the statute of repose and, therefore, could apply only prospectively. Id. at *4. In adopting the magistrate judge’s recommendation, the district court stated that to find otherwise would be “to ignore the fact that the changes made to [the statute] were substantive as a matter of well settled law,” despite “plaintiff’s argument that the legislature classified them as clarifying.” Stahle, 2014 WL 6879393, at *1.

EPA ACTION ON CLEAN WATER ACT PERMIT NOT ARBITRARY AND CAPRICIOUS
Lisa Gerson

Mingo Logan Coal Co. v. U.S. Envtl. Prot. Agency, No. 10-CV-0541 (ABJ), 2014 WL 4828883 (D.D.C. Sept. 30, 2014) The U.S. District Court for the District of Columbia determined that a U.S. Environmental Protection Agency (EPA) decision to withdraw two permitted disposal sites that had been approved by the Army Corps of Engineers (Army Corps) from Mingo Logan Coal Company’s (MLCC) Clean Water Act (CWA) permit was not arbitrary and capricious. MLCC filed suit against EPA after the agency withdrew approval for two locations as permitted disposal sites for fill material generated by MLCC’s West Virginia mine. Mingo Logan Coal Co. v. U.S. Envtl. Prot. Agency, 2014 WL 4828883, *1 (D.D.C. Sept. 30, 2014). Pursuant to CWA section 404, EPA may “veto” permitting decisions of the Army Corps regarding disposal sites for dredged or fill material—the Corps holds original decision-making authority for such materials—“whenever [the Administrator] determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . wildlife, or recreational areas.” Id. at *3 (citing CWA § 404(c)) (emphasis added). In 2011, following a public meeting and receipt of over 50,000 written comments, EPA invoked its veto authority as to MLCC’s permit. Id. at *5.

The district court rejected MLCC’s primary argument that after the Army Corps had issued a permit for a disposal location, EPA could withdraw it based only upon “substantial new information.” Id. at *8. The court noted that CWA section 404 is silent as to whether EPA must have substantial new information when exercising its veto authority after a permit is issued, and highlighted the authority of the administrator to act “whenever” she determines a discharge will have an unacceptable adverse effect. Id. at *8–9. Moreover, the court rejected MLCC’s argument that EPA’s veto was an “about-face” from the agency’s earlier position, noting that the administrative record was “replete with EPA’s expressions of concern regarding Mingo Logan’s application” and finding that any change in position was not so drastic as to require a heightened standard of scrutiny, such as a “substantial new information” test. Id. at *10–11 (“[I]n some cases it might be arbitrary and capricious for an agency to look at the same information it looked at four years before . . . this is not one of those cases.”). Finally, in deciding that EPA’s action was not arbitrary and capricious, the court found that EPA could consider the downstream consequences of disposal when determining whether discharges will have an “unacceptable adverse effect” under CWA section 404(c) (id. at *18–20), and EPA was not bound by state water quality standards when conducting its analysis. Id. at *21–22.

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**Case Law Highlights**

**Mid-Continent**

**LOSS OF “CONTROLLED CONFINEMENT” MAY RESULT IN CIVIL PENALTIES UNDER THE CLEAN WATER ACT**

Lisa Cipriano

*In re Deepwater Horizon, No. 12-30883, 2014 WL 5801350 (5th Cir. Nov. 5, 2014)* Construing the federal government’s civil enforcement authority under section 311 of the Clean Water Act (CWA) in a case arising from the 2010 Deepwater Horizon oil spill in the Gulf of Mexico, the U.S. Court of Appeals for the Fifth Circuit denied a motion for reconsideration of its prior ruling affirming partial summary judgment for the government and finding appellants liable under section 311, a strict liability provision “mandat[ing] the assessment of fines on the owners or operators of any vessel or facility from which oil or a hazardous substance is discharged.” *In re Deepwater Horizon, No. 12-30883, 2014 WL 5801350, *1 (5th Cir. Nov. 5, 2014) (internal quotations and citation omitted). The court held appellants, co-owners of the oil well at issue, liable for the discharge of oil from the well into the Gulf of Mexico, finding that the well was a point at which “controlled confinement” of the oil was lost. *Id.* at *1–2.

Appellants “challenge[d] the panel’s legal conclusion that ‘a vessel or facility is a point ‘from which oil or a hazardous substance is discharged’ if it is a point at which controlled confinement is lost.’” *Id.* at *3 (quoting *In re Deepwater Horizon, 753 F.3d 570, 573 (5th Cir. 2014)* (quoting 33 U.S.C. § 1321(b)(7)(A))). The court disagreed with appellants’ suggestion that only a “single instrumentality” could be responsible for a discharge. *Id.* at *3–4. The court stated that its holding was “consistent both with the caselaw interpreting Section 311 and with its history of enforcement. The panel opinion points to several cases and agency decisions where owners of facilities received fines under Section 311 for oil that was released from their facility, even though that oil subsequently flowed through conduits or over property owned by third parties before entering navigable water.” *Id.*

The appellants further “argue[d] that it was improper for the Panel to include a ‘control’ element in defining a ‘discharge’ under the CWA,” but the court was unpersuaded. *Id.* at *5. The court found that the term “discharge” included elements of both “loss of confinement,” and “loss of control,” that a control element was consistent with section 311’s “strict liability, locational test,” and that appellants had not provided any basis for their contention that “it would be difficult to determine where controlled confinement [was] lost in an interconnected system.” *Id.* at *6.

Finally, the court also disagreed with one appellant’s argument that it had been denied its Seventh Amendment right to a jury trial, stating that the district court had “placed no limit on the admissible evidence [appellant] could put forward” in summary judgment briefing on the issue of its liability under section 311, and that appellant was aware during summary judgment briefing that “control of the oil might be at issue.” *Id.* at *2 (internal quotations omitted).

**CERCLA DID NOT DIVEST COURT OF JURISDICTION TO ADDRESS PLAINTIFFS’ CLAIMS WHERE STATE ENVIRONMENTAL AGENCY WAS ACTING UNDER STATE LAW AT SUPERFUND SITE**

Lisa Cipriano

causes of action included statutory claims under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and the Resource Conservation and Recovery Act (RCRA), as well as claims under state law. Plaintiffs alleged that hazardous vapors threatened the health of residents, negatively impacted property values, and affected their use and enjoyment of their property. *Id.* at *2. In addition, plaintiffs claimed that they incurred out-of-pocket costs for investigatory and remedial measures, and that defendant’s failure to investigate and remediate the contamination adequately had resulted in the continued migration of hazardous vapors. *Id.* Defendant moved to dismiss plaintiffs’ claims.

The facility in question was placed on the U.S. Environmental Protection Agency’s (EPA) National Priorities List in 1984 and defendant had entered into a consent order with the Minnesota Pollution Control Agency (MPCA), pursuant to which groundwater at the facility had been remediated for a number of years prior to the homeowners filing their lawsuit. *Id.* at *1. In addition, EPA and the MPCA had entered into various agreements concerning remediation at the facility. *Id.* Defendant moved to dismiss plaintiffs’ claims for injunctive relief and under RCRA on the grounds “that CERCLA § 113(h) divests this Court of jurisdiction over those claims.” *Id.* at *5. The court stated that pursuant to CERCLA, a federal district court lacks jurisdiction over any challenge brought by a private citizen under federal or state law to any “removal and remedial action selected under sections 9604 of [CERCLA], or to . . . any order issued under section 9606(a) of [CERCLA].” *Id.* (citing 42 U.S.C. 9613(h)) (brackets in original). *Id.* Similarly, “the right to file suit under RCRA is constrained when a State” is engaging in certain remedial action under CERCLA. *Id.* Plaintiffs and defendant disagreed “about the meaning and significance of” the various “agreements between the MPCA, the USEPA, and [defendant].” *Id.* at *6. Based upon the language in the various agreements and public statements by EPA, however, the court concluded that that the remediation and removal activities at the facility had not been put in place under CERCLA, but rather under state law. Although the facility had been designated as a federal Superfund site and one agreement between the MPCA and EPA stated that it was made pursuant to CERCLA, the majority of the relevant documentation indicated that the MPCA was overseeing activities at the site and that it would be acting under state law. *Id.* at *6–8. Because the actions at the site were conducted under state law, the court held it was not divested of jurisdiction to hear plaintiffs’ claims.

Defendant also argued that plaintiffs’ claims for injunctive relief should be dismissed because plaintiffs had no Article III standing for failure to establish redressability. *Id.* at *4. “Specifically, [defendant] argue[d] that Plaintiffs lack[ed] standing for injunctive relief because [defendant had] already agreed to mitigate the threat of injury from the migration of TCE vapors through the installation of” vapor mitigation systems. *Id.* The court, however, found that plaintiffs’ allegations that vapor mitigation systems were inadequate to fully remediate the contamination or address the threat of vapor migration were sufficient to establish Article III standing. *Id.* at *4–5. The court also found that plaintiffs’ allegations were sufficient to withstand defendant’s motion to dismiss for failure to state a claim. *Id.* at *8–10. Significantly, the court found that plaintiffs’ allegations regarding defendant’s “behavior after it recognized Plaintiffs were potentially exposed to vapor contamination,” such as “wait[ing] until 2013 before performing any vapor testing of the properties” were sufficient to state a claim for “willful and wanton negligence.” *Id.* at *10.

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**Case Law Highlights Midwest**

**“PARTIAL RECUSAL” OF JUDGE OK IN SIXTH CIRCUIT**
Chris Johnson

*Decker v. GE Healthcare Inc.*, 770 F.3d 378 (6th Cir. 2014) The U.S. Court of Appeals for the Sixth Circuit joined a majority of circuit courts when it ruled recently that an Ohio district court judge did not abuse his discretion in recusing himself from ruling on a motion for pre-judgment interest but not from presiding over the trial or other post-trial proceedings. *Decker v. GE Healthcare Inc.*, 770 F.3d 378, 389–90 (6th Cir. 2014). Plaintiff’s lawsuit, alleging that he developed a debilitating kidney disease (nephrogenic systemic fibrosis, or NSF) after receiving a dose of a gadolinium-based contrast agent manufactured by defendant, was the first case to go to trial in a product liability/toxic tort multidistrict litigation (MDL) in the Northern District of Ohio concerning gadolinium-based contrast agents. *Id.* at 382–83. More than 600 cases in the MDL previously had been resolved by settlement, many of them with the judge’s active involvement, and he had played a major role in attempting to settle plaintiff’s case. *Id.* at 383, 390. After plaintiff won a $5 million jury verdict, he sought pre-judgment interest under an Ohio statute that entitles successful plaintiffs to pre-judgment interest if they made a good faith effort to reach a pre-trial settlement while defendants did not. *Id.* at 387. The judge recused himself from that portion of the proceedings *sua sponte*, reasoning that his involvement in settlement negotiations made him—impermissibly—a likely witness in any litigated dispute over the parties’ settlement efforts, but he specified that his recusal applied only to this discrete issue. *Id.* at 387–88.

In ruling on the propriety of such a “partial recusal” under 28 U.S.C. section 455, the Sixth Circuit noted that circuit courts were split on the issue, and determined it would join the majority that approve piecemeal recusal when it serves the interests of case management and judicial economy. *Id.* at 389. Construing section 455(a), the court also found “that the reasons for questioning judicial impartiality in one ‘proceeding’ in a case do not necessarily obtain in every ‘proceeding’ of that case.” *Id.* In this instance, the court agreed that the reasons for the limited recusal had no bearing on the judge’s overall impartiality, and also commented that because the defendant was a party in several remaining MDL cases, the judge’s ability to assist with pre-trial resolution of other cases could be impaired if he ruled on the defendant’s good faith settlement efforts in this matter. *Id.* at 390.

**TENNESSEE STATUTE OF REPOSE BARS SILICA CLAIMS**
Chris Johnson

*Adams v. Air Liquide America, L.P.*, No. M2013-02607-COA-R3-CV, 2014 WL 6680693 (Tenn. Ct. App. Nov. 25, 2014) A constitutional challenge to the Tennessee statute of repose by a plaintiff suffering from silicosis and silica-related lung cancer was rejected by the state’s court of appeals. *Adams v. Air Liquide Am., L.P.*, No. M2013-02607-COA-R3-CV, 2014 WL 6680693, *1* (Tenn. Ct. App. Nov. 25, 2014). The plaintiff alleged that his 2010 diagnosis was a result of employment-related exposure to silica while using products manufactured and supplied by defendants during his 30-year career as a sandblaster. *Id.* Plaintiff brought his lawsuit in 2011, 20 years after the latest date by which he may have been first exposed to the products. *Id.* In response to defendants’ motions for summary judgment based on Tennessee’s ten-year statute of repose, plaintiff argued that the statute of repose violated the equal protection clauses of the federal and state constitutions by making exceptions for asbestos and silicone gel breast implant claims, but not for silica-related claims. *Id.*
The court noted that although equal protection generally guarantees that all persons similarly situated will be treated alike, Tennessee courts apply a rational basis analysis to legislative choices in equal protection cases and have refused to substitute their judgment for the legislature’s unless the classification they were examining was clearly arbitrary and unreasonable. Id. at *3–4. If the classification rests on a reasonable basis, it does not violate equal protection simply because it results in some inequality. Id. The court commented that a long latency period alone, which is shared by asbestosis and silicosis, is not enough to make claims “similarly situated”; it differentiated the two, among other factors, by observing that asbestos has been classified as a toxic substance while silica has not, and that silicosis is by its nature an occupational disease while asbestos historically has been ubiquitous, being found in many products in homes, schools, and other settings as well as in the workplace. Id. at *5. With respect to silicone gel breast implants, the court stated simply that there is no similarity between them and silica. Id. Finding no violation of equal protection, the court affirmed dismissal of the claim.

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**NINTH CIRCUIT AFFIRMS “ABILITY TO PAY” CERCLA SETTLEMENT**
Matthew D. Thurlow

*United States v. Coeur d’Alenes Co.*, 767 F.3d 873 (9th Cir. 2014) The U.S. Court of Appeals for the Ninth Circuit recently affirmed a district court’s approval of an “ability to pay” consent decree under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *United States v. Coeur d’Alenes Co.*, 767 F.3d 873 (9th Cir. 2014). The United States agreed to a settlement with the Coeur d’Alenes Company at the Conjecture Mine site in Bonner County, Idaho (site) for less than its proportionate share of liability because Coeur d’Alenes had limited financial ability to pay the government. Federal Resources Corporation (FRC) intervened and objected to the settlement, arguing that the district court should have applied a comparative fault analysis and more closely evaluated Coeur d’Alenes’ ability to contribute to a settlement of EPA’s past costs at the site. *Id.* at 874.

In 2011, the United States filed separate lawsuits against FRC and Coeur d’Alenes to recover EPA’s cleanup costs at the site. The complaint against Coeur d’Alenes was filed simultaneously with a proposed consent decree resolving Coeur d’Alenes’ liability for $350,000. *Id.* at 875. FRC objected to the proposed settlement because it failed to account for Coeur d’Alenes’ relative fault at the site. *Id.* at 875–76. FRC also challenged the thoroughness of EPA’s review of Coeur d’Alenes’ financial records, including whether Coeur d’Alenes had insurance coverage that could pay for the cleanup. Following FRC’s intervention in the Coeur d’Alenes case, the district court approved the settlement. *Id.* at 876.

On appeal, the Ninth Circuit held that the district court did not have to assess the comparative fault of parties in determining whether the consent decree was “substantively fair.” While acknowledging that a comparative fault analysis is typically part of a district court’s assessment of a CERCLA settlement, the court held that this analysis is not required in “ability to pay” cases, given the “considerable deference” afforded to district courts in approving CERCLA consent decrees. *Id.* The court recognized the likelihood of FRC being disproportionately liable at the site as a result of the Coeur d’Alenes settlement, but held that “such an outcome would not be inconsistent” with CERCLA. *Id.* at 878 (“Congress explicitly created a statutory framework that left nonsettlers at risk of bearing a disproportionate amount of liability.”).

The court also rejected FRC’s “speculative” arguments that the district court and EPA failed to appropriately consider Coeur d’Alenes’ financial condition because EPA had hired a financial expert that reviewed Coeur d’Alenes’ ability to pay, and Coeur d’Alenes had investigated the possibility of insurance coverage. *Id.* Accordingly, the court affirmed the district court’s approval of the consent decree. *Id.* at 879.

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**NINTH CIRCUIT DISMISSES DECLARATORY RELIEF ACTION AGAINST ENVIRONMENTAL GROUPS**
Matthew D. Thurlow

*Shell Gulf of Mexico Inc. v. Center for Biological Diversity*, No. 13-35835, 2014 U.S. App. LEXIS 21442 (9th Cir. Nov. 12, 2014) The U.S. Court of Appeals for the Ninth Circuit overturned a district court order denying environmental groups’ motion to dismiss a declaratory relief action brought by Shell Gulf of Mexico Inc. and Shell Offshore Inc. (collectively, Shell). *Shell Gulf of Mexico v. Ctr. for Biological Diversity*, 2014 U.S. App. LEXIS 21442 (9th Cir. Nov. 12, 2014). Shell brought the action for declaratory relief against several environmental groups following the Department of Interior Bureau of Safety and Environmental Enforcement’s (Bureau’s) approval of two oil spill response plans related to Shell’s proposed drilling
operations in the Beaufort and Chukchi Seas. Id. at *2. The court held that Shell’s preemptive, declaratory relief action under the Administrative Procedure Act (APA) could not be sustained because Shell had not met the Article III “case or controversy” requirements in the U.S. Constitution. U.S. Const. art. III, § 2, cl. 1.

Shell filed the declaratory action in anticipation of challenges from environmental groups in order to obtain a “swift determination of the legality” of the Bureau’s approval of its oil spill response plans under the Oil Pollution Act. Id. at *4–5. The parties had a long history of prior litigation: “Shell alleged that the environmental groups were engaged in an ongoing campaign to prevent Shell from drilling for oil in the Arctic . . . [and] that the environmental groups’ history of opposing Shell’s activities through litigation, coupled with their public criticism, made it virtually certain that they would file litigation challenging the Bureau’s approval.” Id. at *4. Rather than await what it believed to be inevitable, Shell brought a declaratory action against the groups to “protect its investments and conduct exploratory drilling without the threat of judicial intervention.” Id. at *5.

The court, however, held there was no justiciable “case or controversy” under Article III because Shell could not establish any “adverse legal interests” at stake in the case. In determining if Shell’s interests were adverse to those of the environmental groups, the court held that it had to look to “the law underlying the request for a declaratory judgment.” Id. at *8. In this case, the basis for Shell’s declaratory relief action was the APA, which permits “a person ‘aggrieved’ by an agency action to seek judicial review . . . only against federal agencies.” Id. at *9 (“A claim under the APA cannot be asserted against a private party. . . . Thus, with respect to declaratory judgment claims arising out of the APA, the relevant ‘adverse legal interests’ are held by a federal agency and a person aggrieved by that agency’s action.”).

The court held that Shell could not bring an action for declaratory relief under APA against the environmental groups. Id. at *10 (“Put simply, the Bureau lies at the center of the underlying controversy and is the locus of the adverse legal interests created by the APA. Without its participation, no case or controversy can exist.”). Shell’s “practical interest” in the outcome of any lawsuit between the Bureau and the environmental groups was not enough to satisfy Article III’s “case or controversy” requirement. Because there were no “adverse legal interests” at stake, the court held that the case was not justiciable and it lacked subject matter jurisdiction.

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TENTH CIRCUIT APPROVES REGIONAL CAP-AND-TRADE PROGRAM FOR HAZE IN COLORADO PLATEAU
Matthew D. Thurlow

Wildearth Guardians v. Environmental Protection Agency, 770 F.3d 919 (10th Cir. 2014). The U.S. Court of Appeals for the Tenth Circuit upheld the Environmental Protection Agency’s (EPA) approval of a regional cap-and-trade program to control sulfur dioxide emissions over the Colorado Plateau. Wildearth Guardians v. EPA, 770 F.3d 919 (10th Cir. 2014). The Tenth Circuit denied petitions for review brought by environmental groups seeking to invalidate EPA’s approval of a cap-and-trade program including New Mexico, Utah, Wyoming, the city of Albuquerque, and Bernalillo County, New Mexico (hereinafter “the Colorado Basin group”), to control haze under EPA’s regional haze rule. 40 C.F.R. §§ 51.308, 51.309.

Section 169(a) of the Clean Air Act requires EPA to develop regulations to make “reasonable progress” toward meeting national goals for improving visibility in federal Class I areas, including national wilderness areas and major national parks. 42 U.S.C. § 7491. EPA’s 1999 regional haze rule imposes haze limits in Class I areas primarily through best available retrofit technology (BART) requirements. 40 C.F.R. § 51.308. BART
requires states to develop implementation plans that eliminate haze and improve visibility. States implementing BART must identify sources that contribute to regional haze and then determine which technologies must be adopted by those sources to reduce emissions and improve regional visibility. 40 C.F.R. § 50.308(d)(e).

As an alternative to BART, EPA also permits states to participate in a cap-and-trade program in which participants must achieve better results than they would under BART (the 309 program). 40 C.F.R. § 51.309. The 309 program allows participants to adopt voluntary measures that reduce sulfur dioxide emissions below key milestones through 2018. Under the 309 program, the Colorado Basin group agreed to a regional cap on sulfur dioxide emissions that would reduce haze in a number of national parks and national wilderness areas over the Colorado Plateau, including Grand Canyon, Zion, Bryce Canyon, Mesa Verde, Arches, and the Petrified Forest. EPA approved the Colorado Basin group’s revised plans in late 2012. *Wildearth Guardians*, 2014 U.S. App. LEXIS at *13.

The environmental groups challenged EPA’s approval of the group’s 309 program plans on the basis that (1) the 309 plans did not achieve greater “reasonable progress” on visibility than BART; (2) the 309 plans could not achieve “reasonable progress” on eliminating visibility impairment because only three of the nine states responsible for emissions over the Colorado Plateau participated in the program; and (3) New Mexico’s 309 program plan failed to analyze emissions from a coal-fired power plant. *Id.* at *14–15. The Tenth Circuit rejected each of these arguments and held that EPA had not acted arbitrarily and capriciously in approving the plans.

In upholding EPA’s approval, the court made several critical determinations. First, the court rejected the conclusions of the environmental groups’ experts that the 309 program participants were required to conduct a source-by-source analysis of BART emissions and could not apply BART benchmarks. *Id.* at *18. Second, the court rejected the environmental groups’ untimely arguments that EPA relied on qualitative factors in predicting emissions reductions from the cap-and-trade program and improperly compared the reductions to BART. *Id.* at *25–26. Finally, the court rejected the argument that the three states participating in the 309 program could not succeed in achieving “better than BART” reductions in haze because six other states and 211 Indian tribes did not participate in the program, and the program only represented 36 percent of the sulfur dioxide emissions over the Colorado Plateau. *Id.* at *41–44.

Notwithstanding the limited participation in the 309 program, the court upheld EPA’s determination that the participants would still make “reasonable progress” toward improvement of visibility. The 309 program does not require a minimum number of participants and even a smaller group of participants could impact regional haze. *Id.* at *45–46. Finally, the court concluded that New Mexico was not required to independently assess a coal-fired power plant because no source-specific analysis is required under the 309 program. *Id.* at *54–55. The court held that EPA had not acted “arbitrarily and capriciously” in approving the Colorado Basin group’s 309 program plans and denied the environmental groups’ petitions for review. *Id.*

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nuisance claims against a Canadian smelting plant operator, but allowed plaintiffs’ other causes of action to proceed. *Anderson v. Teck Metals, Ltd.*, No. CV-13-420 LRS, 2015 WL 59100 (E.D. Wash. Jan. 5, 2015). Plaintiffs alleged that emissions over the course of nearly a century from Teck Metals’ smelter in British Columbia caused personal injuries to class members in the Upper Columbia River Region (UCRR) in Washington State. Teck challenged the complaint on various grounds, including limitations (2015 WL 59100, at *1–2), causation (*id.* at *3), and lack of personal jurisdiction (*id.* at *12). The court rejected the limitations challenge, holding that because limitations was an affirmative defense, dismissal was appropriate only where the allegations in the complaint, construed in the light most favorable to plaintiffs, required dismissal and would not permit the plaintiffs to prove that the statute had been tolled. *Id.* at *2. The court noted that a plaintiff need not negate a limitations defense in its complaint, and that “resolution of whether the ‘discovery rule’ applies to each claim should be based on evidence presented at summary judgment proceedings after discovery is completed or, if necessary, at trial.” *Id.* The court also rejected Teck’s causation argument, finding that the complaint adequately pled facts “plausibly establishing that Teck’s emissions are the proximate cause of the diseases suffered” by plaintiffs. *Id.* at *5. The court held that, contrary to Teck’s arguments, it was unnecessary for the plaintiffs to plead exposure to a particular harmful level of pollutants; pleading that their injuries were the result of exposure to chemicals emitted by Teck’s plant was sufficient to avoid dismissal. *Id.* at *3–5. Likewise, the court rejected Teck’s personal jurisdiction argument, ruling that allegations that Teck’s plant “intentionally released millions of tons of toxins and hazardous chemicals into the atmosphere and the Columbia River knowing that these toxins would contaminate the UCRR and knowing or having reason to know that these substances would cause bodily injury to Plaintiffs and members of the proposed Class” were a sufficient nexus to Washington State, at least at the pleading stage. *Id.* at *12. The court also considered Teck’s argument that the complaint failed to state an abnormally dangerous/ultrahazardous activity claim, and found that the pleading was sufficient to withstand a motion to dismiss. *Id.* at *5–7.

The court agreed with Teck, however, that the complaint failed to state valid federal common law and state nuisance claims. Although the court rejected Teck’s argument that only state entities could assert claims under the federal common law of nuisance (*id.* at *8–9), it agreed that damages claims under federal common law had been displaced by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), despite CERCLA’s lack of a provision allowing recovery of personal injury damages. Relying on the Ninth Circuit’s decision in *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), the court found that what mattered was not whether Congress provided a particular type of remedy, but rather whether the statute evidenced an intent to occupy the field to the exclusion of federal common law. *Id.* at *9–10. Because CERCLA was enacted to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of hazardous waste sites, the court determined that it displaced federal common law on public nuisance. *Id.* at *10. Finally, the court also dismissed plaintiffs’ state law public nuisance claim, finding that “[n]o court has ever sanctioned such an extraterritorial application” of nuisance principles to activities taking place outside the jurisdiction. *Id.* at *11–12.

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CREATING “TRIAL-READY” DEPOSITION FOOTAGE
Joanne Redican

Will this deposition footage be played in court? While many may think the answer to this question is “probably not,” the reality is that in complex, high-stakes litigation, deposition testimony can come into play in multiple ways. From a snippet of testimony relied on in a motion to an impactful video clip played at a mediation or focus group, having trial-ready deposition footage can save hours of technical preparation and help provide a positive, more timely resolution. Having an at-trial focus during the deposition process will maximize the footage captured.

Know Your Documents and How You Want to Use Them

Whether you have 20 key documents, hundreds of thousands of pages in an electronic database, audio/video clips, or physical pieces of evidence, your exhibits need to be easily accessible at deposition. To create the most effective trial-ready end product, you will need to capture these exhibits electronically in sync with the witness’s testimony. This is called a picture-in-picture (PIP) recording. PIP depositions record the live use of exhibits during the deposition and capture the witness’s reaction on screen. This technology allows counsel to rely on short clips of powerful testimony.

A lawyer more comfortable using paper exhibits can still create a PIP recording. An electronic document camera—often referred to as an ELMO—allows a lawyer to create exhibits on the fly. Not only can you place a document on the ELMO and highlight or annotate it, but you can also create your own charts or lists, or place physical evidence on the device and have it all captured in a PIP format so both the witness and exhibit appear together on video for future playback. Before deposition, lawyers should confirm with the videographer that the equipment and the devices recording the feeds are doing so in a resolution high enough to convert static material to video format. Lawyers may also want to practice using the ELMO prior to deposition. While no specialized skills are necessary to use an ELMO, both instruction and practice are critical to ensure that the user understands how footage is captured and displayed on the live video feed.

Today, many lawyers rely exclusively on electronic exhibits at deposition. A laptop, iPad, or other mobile device storing electronic exhibits can be connected directly into an ELMO for an easy, quick display of exhibits. Displaying exhibits on an ELMO may obviate the need for a lawyer to bring hard copies of exhibits to hand out to deposition attendees. Trial technology consultants or “hot seat” technicians can assist with displaying electronic evidence in various trial presentation software applications so material is captured exactly the way it would be done live in the courtroom. While trial presentation software is not necessary, exploring and utilizing modern day software designed specifically for courtroom and legal-based presentations will only add to the impact and clarity of your examination. In addition, exhibits can be displayed electronically via a remote videoconference. Preparing exhibits in advance and knowing how you would like to use them at deposition can save time and money. Having a service provider you trust to discuss the best solution for your specific needs is the most efficient way to ensure a smooth and impactful deposition.

Obtain a Prepared Court Reporter and Videographer

Working with an experienced court reporter and videographer team prepared to meet your deposition needs is key. By way of example, a court reporter capable of capturing high quality real-time testimony can provide a live feed of testimony during the deposition, which serves as an excellent tool for a lawyer to review questions and answers during a break and determine if any testimony requires “cleanup.” Further, a videographer needs to ensure all technical components are in place.
and properly set up to capture the highest possible quality sound and picture. Audio needs to be clear, the witness needs to be framed correctly, and any exhibits displayed need to be properly focused. Poor audio/video quality can dramatically reduce the impact of any clips played back at mediations, focus groups, or trial.

**Checklist**

Ask yourself the following questions before retaining your next court reporter/videographer team to make certain you have retained the right team to help you accomplish your goals.

**What services are required from the court reporter by the lawyer taking the deposition?**

- Is real-time transcription necessary? If so, would you prefer to receive the feed on your personal electronic device or would you like the court reporter to bring an electronic device to display the feed for you?

- Is a “cleaned up” rough draft of the transcript required following the deposition? Rough draft transcripts are often helpful to review between days in a multi-day deposition.

- What is the time frame for finalizing a transcript and is there an option for receiving a final transcript on an expedited basis?

- Will you need the court reporter to bring exhibits from prior depositions in the case? This may only be an option if the same court-reporting firm covered the prior depositions.

- Can exhibits be marked prior to the start of the deposition?

**What services are required from the court reporter for lawyers covering the deposition remotely?**

- Is a live Internet feed necessary? If so, advanced notice is likely required to ensure proper connectivity at the deposition site.

- Is videoconferencing necessary? If so, will all exhibits need to be displayed via the videoconference?

**What services are required from the videographer?**

- Is an ELMO or document camera required to display exhibits? If it is your first time using an ELMO, ask your videographer to meet before your deposition to receive training on using the document camera.

- Is there an option available for displaying exhibits remotely via a videoconference or stream?

- Is there an option available for displaying exhibits at the deposition via monitors? If you are not planning on bringing hard copies of exhibits, ask your videographer what options are available for displaying exhibits during the deposition.

- Is a live PIP required? If so, provide notice to your videographer before the deposition, as special equipment may be required.

When advancing through the stages of litigation, experience consistently shows that planning depositions with an at-trial perspective from the outset is more cost-effective and will significantly increase the effectiveness of your evidence.

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