Spring has sprung, and important court decisions on environmental issues are blooming like pied daisies in the meadow. Or, depending on your perspective, erupting like pollen, leading to sniffing, headaches, and watery eyes. Either way, the third issue of this ABA year’s Environmental Litigation & Toxic Torts Committee Newsletter is here to bring you rich, earthy handfuls of legal knowledge.

In our case updates, the Eastern District of Michigan opines on the circumstances under which voluntary response costs must be recovered in a CERCLA contribution action; the D.C. Circuit shoots down EPA’s claim that a TSCA petition to regulate spent ammunition “isn’t cognizable” under the statute; the Southern District of Ohio holds that air emissions of particulates and discharges to groundwater may constitute “disposal” under RCRA; and the Fifth Circuit takes plaintiffs to the cleaners in a PERC contamination case asserting CERCLA arranger liability for an equipment manufacturer. Finally, installation artists Christo and Jean-Claude make their first-ever appearance in the ELTT Newsletter, in a NEPA decision concerning a proposed installation over the Arkansas River. This issue also features an article on mindfulness in trial practice by Martin Sinclair, a private-practice attorney and commissioner on the Illinois Supreme Court Commission on Professionalism.

We also want to alert our committee members to upcoming programs of interest. On June 17, ELTT and SEER are sponsoring a CLE webinar (with ethics credit) on the challenges of joint defense groups in environmental litigation. In addition, in late June the committee will host a second “hot topics in environmental litigation” conference call.

As always, we invite all interested SEER members to get involved in the ELTT Committee—by arranging programming, penning an article for the newsletter, or organizing a public service event for committee members. The ELTT Committee can also co-sponsor and promote relevant programming with state and local bar associations or other professional groups. Contact your committee chairs—we’d be delighted to hear from you.

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May 18, 2015
Cybersecurity Summit
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May 27, 2015
New Rules for High-Hazard Flammable Trains
CLE Webinar

www.ambar.org/EnvironCalendar

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CASE LAW HIGHLIGHTS

NORTHEAST

NEW JERSEY SUPREME COURT HOLDS THAT TOWNSHIPS POSSESS BROAD ZONING POWERS TO PRESERVE ENVIRONMENTALLY SENSITIVE LAND

Louis Abrams

Griepenburg v. Township of Ocean, 105 A.3d 1082 (N.J. 2015) On January 22, 2015, the New Jersey Supreme Court unanimously affirmed a municipality’s right to designate property as “environmentally sensitive” in order to restrict “high-density development.” Griepenburg v. Twp. of Ocean, 105 A.3d 1082, 1097 (N.J. 2015). The case, which had been winding its way through New Jersey courts for seven years, involved a series of ordinances enacted by the New Jersey Township of Ocean (the township) as part of a comprehensive municipal zoning plan and “smart growth” planning process. Id. at 1086.

Plaintiffs, the Griepenburg family, owned 34 acres of land in Ocean Township. Id. at 1086–87. Their home is on a two-acre lot, and the balance of their 32 acres consists of undeveloped woodlands. Id. at 1087. Until recently, sections of the 32 acres were zoned commercial, permitting developments such as hotels, retail space, and offices. Id. Thus, the Griepenburgs enjoyed significant development potential under the zoning scheme, including several purported offers from hotel chains to purchase their property. Griepenburg v. Twp. of Ocean, 2013 N.J. Super. Unpub. LEXIS 2154, at *3 (N.J. App. Div. Aug. 29, 2013).

In 2004, the township became interested in concentrating development in a town center and slowing development in the outer portions of the township in an alleged effort to protect environmentally sensitive coastal areas through the creation of a so-called “green belt” of undeveloped forestland. Griepenburg, 105 A.3d at 1084–85, 1094. In furtherance of this plan, the township “down-zoned” the Griepenburg property in 2006 to an environmentally sensitive land use designation, thereby prohibiting any commercial development. Id. at 1085. This action effectively destroyed the Griepenburgs’ ability to commercially develop their land. Id.

As a result, the Griepenburgs sued the township, arguing that this exercise of municipal zoning power was arbitrary, capricious, and unreasonable. Id. at 1086. In support of this allegation, plaintiffs contended that the environmentally sensitive zoning designation was improper because the subject property contained “no environmentally sensitive characteristics” such as “open waters, wetlands, floodplains, steep slopes, or . . . documented [threatened and endangered species] habitat[s].” Id. at 1089 (internal quotations omitted). Without such environmental “constraints,” amici-supporting plaintiffs argued, the township was merely trying to acquire the Griepenburgs’ property for use as open space without paying fair market value. Id.

The Appellate Division invalidated the zoning ordinances, reasoning that the township “may not compel private property to be devoted to preservation for open space by restrictive zoning that is not justified by environmental constraints or other legitimate reasons.” Griepenburg v. Twp. of Ocean, 2013 N.J. Super. Unpub. LEXIS 2154, at *18.

The New Jersey Supreme Court took a broader view of a township’s ability to zone environmentally sensitive areas. Griepenburg, 105 A.3d at 1093–94. In reversing the Appellate Division, the court concluded that plaintiffs’ property itself need not contain “environmentally sensitive” conditions as long as the zoning decision fit into a larger scheme to protect the environment. Id. The court reasoned that the designation of plaintiffs’ property as “environmentally sensitive” was a valid exercise of the township’s authority pursuant to its plan to preserve “undisturbed, contiguous, forested uplands, of which plaintiffs’ property is an integral and connected part” to protect a surrounding “sensitive coastal ecosystem.” Id. at 1084–85.
The court further stated that plaintiffs should have sought administrative relief by way of a zoning variance application before challenging the ordinances. *Id.* at 1095–97. The court indicated that if the owners’ variance application is denied, they can then pursue their inverse condemnation claims. *Id.* at 1097. Notwithstanding the court’s emphasis on the failure to exhaust administrative remedies, plaintiffs noted that an administrative action would be futile because they would be unable to “establish the positive or negative criteria necessary to obtain relief” from the inclusion of their property in an environmental conservation district. *Id.* at 1089 (internal quotations omitted).

Although the New Jersey Supreme Court’s decision strengthened the ability of municipalities to rezone land they deem to be “environmentally sensitive,” the court left open the possibility that such decisions can still face judicial scrutiny. Nevertheless, challenges to such zoning classifications will be difficult given the court’s determination that even though a property may not contain “environmentally sensitive” characteristics, a municipality was justified in designating it as “environmentally sensitive” where it served as a buffer to other “environmentally sensitive” areas. *Id.* at 1093–94.

**NEW YORK APPELLATE COURT FINDS THAT ENVIRONMENTAL MONITORING AND TESTING SERVICES ARE TAXABLE**

Louis Abrams


In 2007, the state tax department informed Exxon Mobil it owed $500,000 for payments to contractors who conducted testing and monitoring activities at various retail sites pursuant to Tax Law section 1105(c)(5). This statute imposes a sales tax on “maintaining, servicing or repairing real property,” which is further defined by regulation to mean “all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition.” *Id.* at **1–2 (internal quotations omitted).

Exxon did not contest the imposition of sales tax for services rendered to remEDIATE petroleum spills. *Id.* at *3. Rather, it challenged the assessment on the basis that pre-investigation and post-remediation expenses fell outside the ambit of Tax Law section 1105(c)(5), as these activities did not alter the condition of the property. *Id.*

The Tax Appeals Tribunal rejected this argument, stating that Exxon was drawing a distinction without a difference. *Matter of Exxon Mobil Corp. v. State of New York Tax Appeals Tribunal*, 823437, NYLJ 1202602642496, at **23–25 (Tax Appeals Tribunal May 23, 2013). The tribunal concluded that pre- and post-remediation testing and monitoring services were required in accordance with Department of Environmental Conservation (DEC) cleanup procedures, and thus these activities were taxable. *Id.* Even absent the DEC requirements, the tribunal noted that a discharge of petroleum “inherently places a property into a state of disrepair and unfitness[,]” and requires testing and monitoring within the meaning of the relevant tax regulations. *Id.* at *25.

NEW JERSEY COURT PIERCES THE “LLC” VEIL, HOLDING SOLE MEMBER LIABLE FOR ENVIRONMENTAL CLEANUP
Louis Abrams

_Coty US LLC v. 680 S. 17th Street, LLC, ESX-C-122-13 (N.J. Super. Feb. 26, 2015)_ On February 26, 2015, the Superior Court of New Jersey, Chancery Division, pierced the veil of a New Jersey limited liability company and held its sole member liable for environmental cleanup costs that the company agreed to undertake in the purchase of real estate in Newark, New Jersey. _Coty US LLC v. 680 S. 17th Street, LLC, ESX-C-122-13, slip. op. at 32–33 (N.J. Super. Feb. 26, 2015)._ Del Laboratories, Inc. (Del) was the previous owner of the subject property, which had been home to a metal implements manufacturing complex. _Id. at 2._ As a former industrial site, the sale of the property triggered investigation and remediation obligations pursuant to the New Jersey Industrial Site Recovery Act. _Id._ Defendant, 680 S. 17th Street, LLC (680 LLC), is a New Jersey LLC whose sole and managing member is Airaj Hasan. _Id._ at 2–3. Mr. Hasan formed 680 LLC for the sole purpose of acquiring the subject property. _Id._ at 3. Under the purchase agreement with Del, 680 LLC agreed to assume all environmental liabilities. _Id._ 680 LLC further agreed to indemnify Del for all environmental liabilities associated with the property. _Id._ at 4. Finally, 680 LLC represented in the purchase agreement that it had “sufficient financial resources and ability to perform all of its obligations[].” _Id._ (internal citation and quotations omitted).

Despite these assurances, in April 2010 and August 2012, the New Jersey Department of Environmental Protection (NJDEP) notified Del, which had merged with plaintiff Coty US LLC (Coty), that 680 LLC failed to perform required vapor intrusion sampling and to submit required reports to the NJDEP. _Id._ at 5–6. Fearing that it might be liable for civil penalties, Coty retained a Licensed Site Remediation Professional to conduct the cleanup at the property. _Id._ at 7.

Subsequently, Coty initiated litigation against 680 LLC to recover its remediation expenses. _Id._ at 8–9. In initial proceedings before the court, 680 LLC stated that it had sufficient assets to meet the NJDEP directives. _Id._ at 9. When it later became clear through discovery that 680 LLC was financially insolvent, Coty asserted that the court should “pierce the corporate veil” and hold Mr. Hasan personally liable for Coty’s remediation costs. _Id._ at 14, 31. Coty specifically contended that piercing the LLC veil was appropriate as 680 LLC was deliberately undercapitalized in order to avoid meeting its environmental obligations. _Id._ at 14.

The court agreed and found that 680 LLC was nothing more than a “shell company” that had been established for the purpose of acquiring the property, and had no cash flow or assets other than the parcel of real estate. _Id._ at 31–32. If it held otherwise, the court stated, “Mr. Hasan would be able to use the limited liability form to evade the obligations and liabilities he consistently promised his company would satisfy[]” _Id._ at 32.

This decision to pierce the corporate veil is significant as it may increase the susceptibility of sole members of LLCs to environmental liabilities assumed in the purchase of real property. It further demonstrates that environmental liability can reach beyond the protection of the corporate or LLC forms to members, officers, directors, or shareholders.

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Environmental Litigation and Toxic Torts Committee, May 2015
CASE LAW HIGHLIGHTS
SOUTHEAST

EPA LACKS AUTHORITY TO REGULATE SPENT LEAD AMMUNITION UNDER TSCA
Lisa Gerson

_Trumpeter Swan Society v. Environmental Protection Agency_, 774 F.3d 1037 (D.C. Cir. 2014) The U.S. Court of Appeals for the District of Columbia Circuit held that spent lead ammunition was excluded from the definition of “chemical substances” under the Toxic Substances Control Act (TSCA). _Trumpeter Swan Soc’y v. Envtl. Prot. Agency_, 774 F.3d 1037 (D.C. Cir. 2014). Plaintiffs, 101 environmental groups, invoked section 21 of TSCA to petition the U.S. Environmental Protection Agency (EPA) to regulate spent lead bullets and shot. _Id._ at 1038. EPA rejected the petition as not cognizable on the grounds that it was largely duplicative of an earlier unsuccessful petition filed by five environmental groups, and noted that it would have denied the request on the merits because cartridges and shells are exempt from the definition of “chemical substances.” _Id._ at 1038–39. The district court upheld EPA’s determination to classify the petition as not cognizable, and dismissed the complaint. _Id._ at 1038.

On appeal, the court of appeals held that EPA had no authority to deem a petition that satisfies statutory requirements “not cognizable.” _Id._ at 1041. Rather, “section 21 gives EPA only three options: grant the petition, deny the petition, or take no action (which has the same effect as denial).” _Id._ at 1041. Further, it found that the prior petition denial had no effect on the numerous environmental groups who were not parties to the prior petition, relying on TSCA section 21’s provision granting “any person” the right to file a petition. _Id._ However, on the merits, the court agreed that EPA lacks statutory authority to regulate spent lead ammunition because TSCA section 3(2)(B)(v) “unambiguously exempts ‘article[s] the sale of which [are] subject to the tax imposed by section 4181 of the Internal Revenue Code’ from the definition of ‘chemical substance,’” and section 4181 taxes shells and cartridges. _Id._ at 1042–43. The court rejected petitioners’ argument that they were not seeking regulation of shells and cartridges, but rather the “lead in bullets and shot,” reasoning that since “bullets and shot can become ‘spent’ only if they are first contained in a cartridge or shell and then fired from a weapon, petitioners have identified no way in which EPA could regulate spent bullets and shot without also regulating cartridges and shells[.]” _Id._ at 1043.

HOOKAH CAFÉ AND LOUNGE NOT EXEMPT FROM VIRGINIA RESTAURANT SMOKING BAN
Lisa Gerson

_Virginia Department of Health v. Kepa, Inc._, 766 S.E.2d 884 (Va. 2015) The Virginia Supreme Court held that the Virginia Indoor Clean Air Act (VICAA) applied to She-Sha Café and Hookah Lounge, which was licensed as both a “full service restaurant” by the Virginia Department of Health and a “tobacco product retailer” by the Virginia Department of Taxation. _Virginia Dep’t of Health v. Kepa, Inc._, 766 S.E.2d at 886. Under VICAA, smoking in restaurants is unlawful, subject to a few narrow exceptions, but the law entirely exempts “retail tobacco stores, tobacco warehouses, [and] tobacco manufacturing facilities” from regulation. _Id._ (citing Va. Code § 15.2-2821). After receiving two health code violations and an unfavorable administrative hearing decision, She-Sha pursued its case in court, claiming that it was a “retail tobacco store” and, therefore, exempt from regulation under VICAA. _Id._ at 886–87.

A three-judge panel of the state court of appeals determined that She-Sha was a restaurant and, therefore, must comply with the smoking ban unless it fell within one of the six statutory exceptions. _Id._ Specifically, the court focused on code section 15.2-2825(A)(3), which exempts “[a]ny restaurants located on the premises of any manufacturer of tobacco products.” _Id._
The panel reasoned that the “express exemption of tobacco manufacturers, and corresponding omission of tobacco retailers, signaled an intent to regulate restaurants on the premises of tobacco retailers.” *Id.* The full court of appeals reversed, finding that She-Sha was both a restaurant and a retail tobacco store, and the plain language of regulations “clearly indicated that VICAA did not apply to retail tobacco stores.” *Id.* at 888.

The Virginia Supreme Court disagreed, reasoning that VICAA explicitly recognized three tiers of the tobacco industry—retail, warehousing, and manufacturing—but contained an express exception only for manufacturing. *Id.* at 889–90. The court also noted that the statute accommodates businesses, like She-Sha, that want to operate a restaurant and allow smoking, pointing to the fifth exception that allows smoking in separated smoking sections. *Id.* at 891. Finally, the court rejected She-Sha’s argument, which the court of appeals had accepted, that the retail sale of tobacco was its “primary business” and, therefore, it should be exempt from the ban on smoking in restaurants. *Id.* at 891–92. The court found no “primary business” test in the language of VICCA and refused to read such language into the statute. *Id.*

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CASE LAW HIGHLIGHTS

MID-CONTINENT

FIFTH CIRCUIT REVISITS CERCLA ARRANGER LIABILITY

Lisa Cipriano


The U.S. Court of Appeals for the Fifth Circuit recently held that a dry cleaning equipment supplier was not a “responsible person” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or state law in connection with contamination resulting from discharges at a dry cleaning business. *Vine St. LLC v. Borg Warner Corp.*, No. 07-40440, 2015 WL 178981 (5th Cir. Jan. 14, 2015).

Plaintiff property owner sued defendant, alleging that defendant was responsible for a portion of the costs to clean up a plume of perchloroethylene (PERC) originating from the earlier operation of a dry cleaning business on the subject property because defendant’s former subsidiary had supplied “dry cleaning equipment, design assistance, and an initial supply of PERC to the cleaning business.” *Id.* at *1. In particular, the subsidiary had designed the drainage system used in the cleaning business. The system was not completely effective, and some “PERC ultimately escaped from the sewer system and entered the soil and groundwater, contaminating both the [subject] property and another neighboring property.” *Id.* at *2. Plaintiff brought claims under CERCLA, as well as the Texas Solid Waste Disposal Act (TSWDA). *Id.* After a bench trial, the district court ruled that defendant was liable for 75 percent of the cleanup costs, and defendant appealed. *Id.* at *2. Defendant argued that its subsidiary did not intend to dispose of PERC when it sold the equipment and an initial supply of PERC to the dry cleaner. *Id.* at *1. Plaintiff, however, contended that the subsidiary was aware that the drainage system’s water separators, designed to release wastewater but not PERC into the sewer, were not entirely effective, and that this supported a finding of intent. *Id.* at *1. Relying on the U.S. Supreme Court’s opinion in
The court noted that the dispute rested on whether defendant was a “responsible person” under CERCLA and specifically whether defendant fell within the category of responsible persons known as “arrangers,” which extends liability to “any person who by contract, agreement, or otherwise arranged for disposal or treatment, or otherwise arranged with a transporter for transport for disposal or treatment, of hazardous substances. . . .” Id. at *2. In addressing the issue, the court “focus[ed] on the term ‘arrange,’ which implies a scienter requirement, and the term ‘disposal,’ which distinguishes between waste and useful products.” Id. The court stated that Burlington Northern had “clarified the standard applicable to CERCLA arranger claims,” and partially changed Fifth Circuit law. Id. at *3. Specifically, the Fifth Circuit previously had “not require[d] that a party intend to dispose of waste . . . as long as there was a sufficient ‘nexus’ between the purported arranger and the disposal of waste . . .” but “[u]nder Burlington Northern, the plaintiff must establish that the purported arranger took ‘intentional steps to dispose of a hazardous substance.’” Id. at *3–4 (internal citations omitted). The district court found that the discharges of PERC had not been intentional. Id. at *4. Furthermore, when considered in light of the Burlington Northern standards, the subsidiary’s actions clearly were unintentional—even though it may have been aware that some PERC would escape the water separators. Id. PERC was necessary to the cleaning business and its sale “centered around the successful operation of a dry cleaning business—not around the disposal of waste.” Id. at *5. Furthermore, under Burlington Northern, the fact that the subsidiary had developed some remedial measures after learning that the water separators were not entirely effective “cut against a finding of intent.” Id. at *6 (emphasis in original). The court held that the TSWDA claim failed for the same reason. Id. at *7.

Plaintiffs brought claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and common law relating to a Superfund site. Id. at *1–2. In advance of trial, plaintiffs filed a witness list that included defendant’s attorney, and defendant filed a motion to strike its attorney from plaintiffs’ witness list and for a protective order prohibiting plaintiffs from calling defendant’s counsel as a witness at trial to testify as to his communications with the U.S. Environmental Protection Agency (EPA). Wilson Road Dev. Corp. v. Fronabarger Concreters, Inc., No. 1:11-CV-00084, 2015 WL 269795 (E.D. Mo. Jan. 21, 2015).

In addressing defendant’s motion, the court noted that “[w]hile no rule prohibits a party from calling opposing counsel as a witness at trial, ‘[t]he practice of forcing trial counsel to testify as a witness . . . has long been discouraged.’” Id. at *1 (citing Shelton v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir.1986)). The court stated that in the Eighth Circuit, “a party is forbidden from deposing opposing counsel, except where the party seeking the deposition proves that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to

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the preparation of the case.” *Id.* (internal quotations and citations omitted). The court found that the same rule should apply in determining whether opposing counsel could be called as a witness at trial. *Id.* Plaintiffs contended that it had met the applicable burden for calling opposing counsel because “EPA ha[d] indicated that it [would] not make its representative available to testify.” *Id.* at *2 (internal quotations and citation omitted). The court rejected plaintiffs’ argument because, despite EPA’s alleged indication, “plaintiffs ha[d] provided no evidence that the EPA ha[d] refused to allow its representative to testify.” *Id.* Thus, the court entered an order prohibiting plaintiffs from calling defendant’s attorney as a witness. *Id.*

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**CASE LAW HIGHLIGHTS MIDWEST**

“VOLUNTARY” NATURE OF CLEANUP COSTS DOES NOT SAVE COST RECOVERY CLAIM UNDER CERCLA

Chris Johnson

*Ford Motor Co. v. Michigan Consolidated Gas Co.*, No. 08-cv-13503, 2015 WL 540253 (E.D. Mich. Feb. 10, 2015) The defendant in a case involving contamination that allegedly resulted in part from U.S. Army Corps of Engineers activity was denied the right to pursue a cost recovery claim against the United States when the U.S. District Court for the Eastern District of Michigan held that the “voluntary” nature of the defendant’s costs did not trump the procedural bars that would limit its remedy to contribution. *Ford Motor Co. v. Michigan Consol. Gas Co.*, No. 08-cv-13503, 2015 WL 540253 (E.D. Mich. Feb. 10, 2015). The defendant, Michigan Consolidated Gas Company (MichCon), and plaintiffs including Ford Motor Company owned adjacent parcels of riverfront land that is the subject of ongoing regulated corrective actions as a result of the parties’ activities on the properties. 2015 WL 540253 at *1. When the Corps of Engineers rechanneled the river in the area of these properties in 1968, it allegedly exacerbated the environmental issues by relocating large quantities of contaminated material onto additional areas of the sites and also by creating a “preferential pathway” that allowed contamination to migrate more easily to one area of the sites, referred to in the litigation as the “SRA.” *Id.* at *2. Plaintiffs’ case against MichCon, filed in 2008, sought cost recovery under section 107(a) and contribution under section 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for cleanup costs incurred at the SRA, and MichCon asserted counterclaims for cost recovery and contribution. *Id.* Plaintiff’s amended their complaint in 2011, asserting cost recovery and contribution claims against the United States and a new contribution claim against MichCon based on MichCon’s cost recovery claim against plaintiffs. *Id.* at *4. Plaintiffs also asked the court to enter a consent decree that had been negotiated in an earlier case and that resolved all of plaintiffs’ claims against the United States for the SRA; the court entered the consent decree in October 2012. *Id.* In the meantime, in May 2011, MichCon filed a third-party complaint against the United States over its alleged aggravation of pollution in the SRA. *Id.* at *5. MichCon later conceded that its section 113 contribution claim against the government was barred by the consent decree, but it pursued a claim under section 107(a) for recovery of its “voluntary” response costs. *Id.*

The court granted the United States’s motion for judgment on the pleadings and dismissed MichCon’s section 107(a) claim. It cited recent and emerging precedent in the Supreme Court and the U.S. Courts of Appeals that clarifies CERCLA’s cost-shifting provisions, including *Hobart Corp. v. Waste Management of Ohio, Inc.*, 758 F.3d 757 (6th Cir. 2014), and *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682 (7th Cir. 2014), explaining that sections 107(a) (cost recovery) and 113(f) (contribution) provide mutually exclusive
remedies, and that plaintiffs are limited to a section 113 claim if one is available. Id. at *6–*10. The court found that the “trigger” allowing MichCon to file a contribution claim against other potentially responsible parties—including the United States—had been pulled when plaintiffs made their section 107(a) claim against MichCon in 2008. Id. at *12. It rejected MichCon’s argument that the trigger had not been pulled because the costs that it sought were incurred voluntarily and not as a result of the section 107 action, pointing out that case law and the statutory language clearly state that a potentially responsible party has a contribution claim “during or following” a section 107(a) action against it; common liability need not have been established already. Id. The court found no support in MichCon’s papers or in its own research for the idea that costs related to a common liability are divisible and can be pursued via different mechanisms based on whether they were voluntary or compelled. Id. at *12–*14. Rather, it cited the “overriding consensus” of courts on the mutual exclusivity of sections 107(a) and 113(f), and the need to preserve the viability of the more restrictive and less popular section 113(f) and the statutory framework of CERCLA. Id. at *14.

CONTAMINATION OF LAND AND WATER CAUSED BY SEEPAGE OR AIR EMISSION MAY BE GOVERNED BY RCRA’S SOLID WASTE DISPOSAL PROVISIONS

Chris Johnson

A public water provider in Ohio may proceed with a Resource Conservation and Recovery Act (RCRA) citizen suit alleging that DuPont contaminated its well field through seepage and air emissions of perfluorooctanoic acid (C8) used by DuPont in some of its manufacturing processes from 1951 through 2013. Little Hocking Water Ass’n v. E.I. Du Pont de Nemours & Co., --- F. Supp. 3d ----, No. 2:09-CV-1081, 2015 WL 1038082 (S.D. Ohio March 10, 2015). Plaintiff claimed that the contamination occurred as a result not only of direct discharges into the Ohio River, but also of seepage into groundwater and the river from a landfill, from rainwater infiltration of contaminated soils at the DuPont facility, and from stormwater runoff that finds its way to the river. Id. at *12, *14. Ruling on DuPont’s motion for summary judgment, the court agreed with DuPont’s argument that any discharges from point sources—including some of the stormwater runoff—were excluded from RCRA’s definition of solid waste and rather were governed by the Clean Water Act under its permit program, despite the fact that C8 was not specifically identified in DuPont’s permits. Id. at *14–*15. However, it found that seepage and stormwater runoff that did not emanate from the specific point sources covered by the permits could constitute solid waste regulated by RCRA. Id. at *15. Further, the court reasoned that the broad reading of the solid waste exclusion urged by DuPont, which essentially would have defined its entire facility as a “point source,” would create a loophole in the statutory framework, undermining RCRA’s intent to give courts the authority to “eliminate any risks posed by toxic waste.” Id. at *16–*17. With respect to air emissions of C8 particles from DuPont’s smokestacks that plaintiff claimed were dispersed by wind, settled on the well field’s surface soil, and leached into the aquifer that supplied the wells through precipitation and flooding, DuPont did not dispute the mechanism described by plaintiff, but argued that the emissions did not constitute either “disposal” or “solid waste” under RCRA. Id. at *17. The court rejected this position. It had no apparent difficulty finding that solid particulate matter constituted solid waste within the meaning of the statute, id. at *19; and while acknowledging some ambiguity in RCRA’s definition of “disposal,” the court found that RCRA’s legislative history and purpose, as well as the actual wording of the definition, supported a finding that these circumstances constituted a type of “disposal” at which the statute was aimed. Id.

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In November 2011, after reviewing thousands of public comments and preparing a final EIS, the BLM issued a Record of Decision approving the project. *Id.* To reduce the project’s potential impact on wildlife, the BLM required Over the River to avoid work during migratory bird nesting season and bighorn sheep lambing season. The BLM also imposed traffic restrictions, required complete remediation of the project installation area, and ordered Over the River to post a bond to guarantee completion of the remediation. *Id.* Despite these mitigation measures, ROAR alleged that the BLM violated NEPA by failing to take a “hard look” at the environmental impacts that the project would have on bighorn sheep populations and traffic flow in the area. *Id.* at *4–6.

ROAR argued that the BLM failed to consider the impacts that drilling and installing steel support rods might have on bighorn sheep, that the BLM failed to conduct studies to “precisely examine how wildlife will respond to a temporary art installation of this magnitude,” and that the studies the BLM considered were out-of-date. *Id.* at *4. The court concluded that ROAR failed to meet its burden of showing that the BLM violated NEPA because the BLM acknowledged the limitations of its data on bighorn sheep in the area, and ROAR could not show that the “missing information was essential to making a reasoned decision about the Project” or that the public was unaware of the data limitations. *Id.* at *5. Likewise, the court determined that the BLM had adequately evaluated traffic mitigation measures, and that no supplemental EIS was required following the decision to eliminate a visitors center and parking lot from the project. *Id.* at *6–8. The court concluded that ROAR’s “argument essentially boils down to a disagreement with the BLM’s approval of the Project,” and “[s]uch disagreement is not sufficient to warrant reversal” when the “agency has complied with the procedural requirements of NEPA.” *Id.* at *8.

The court also dismissed ROAR’s challenges under the FLPMA, which requires the BLM to “manage the public lands under principles of multiple use and sustained yield.” *Id.* (internal
The court rejected ROAR’s contention that the BLM had to prove that the project was “clearly consistent” with the resource management plan, and held that the “BLM was justified in looking at the broad goals” of the resource management plan rather any of “its specific terms, conditions, and decisions.” *Id.* at *9. Likewise, the court rejected ROAR’s argument that the BLM failed to give priority to the protection of Areas of Critical Environmental Concern in the Arkansas Canyonlands. *Id.* at *11. The court upheld the BLM’s determinations that the project would not cause “irreparable damage” to the Arkansas Canyonlands, the bighorn sheep population, or raptor populations. Finally, the court agreed that the project would not violate the BLM’s policies regarding Visual Resource Management because the installation is temporary, and the court dismissed ROAR’s contention that mineral mining controls should have been considered by the BLM prior to approval of the project. *Id.* at *12.

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**DISTRICT COURT UPHOLDS EPA APPROVAL OF PACIFIC NORTHWEST STATES’ DECISIONS NOT TO LIST COASTAL WATERS AS IMPAIRED BY ACIDIFICATION**

Matthew D. Thurlow


Section 303(d) of the Clean Water Act requires states to promulgate lists of impaired water bodies and submit them to EPA every two years. *Id.* at *2. Once a state identifies a water body as impaired, the state must also develop a total maximum daily load (TMDL) capping the amount of each pollutant that can enter into the impaired water body. The state incorporates all TMDLs into its water quality management plan and retains discretion to regulate TMDLs by placing controls on point sources (specific sources like pipes) and nonpoint sources (diffuse sources like runoff). *Id.* at *2.

The court first evaluated whether CBD had standing to bring suit. The court found that CBD had established causation and redressability in presenting evidence of regional and local causes of ocean acidification in the Pacific Northwest, including human impacts from agriculture, wastewater, and urban runoff, impacts from major rivers, and vulnerability from coastal upwelling in the area. *Id.* at *8–9. CBD also established that local mitigation measures might reduce localized impacts in regional coastal waters. *Id.* at *11.

After determining that CBD had standing, the court turned to CBD’s claims on the merits. *Id.* at *13. First, the court rejected CBD’s argument that Washington and Oregon waters should have been listed because the waters exceeded numeric pH and narrative criteria for water quality. The court upheld EPA’s decision not to rely on a 2008 study showing high levels of pH off Tatoosh Island on the tip of Washington’s Olympic Peninsula: “Because analysis of the [Tatoosh Island] . . . data requires an evaluation of complex scientific data within EPA’s specialized technical expertise, EPA’s conclusion that the data cannot be extrapolated to show water quality violations in adjacent waters is entitled to great deference.” *Id.* at *19. The court likewise upheld EPA’s determination that observations of shellfish decline, laboratory studies, shellfish hatchery die-offs, and reports of aragonite saturation in Washington and Oregon coastal
waters were inconclusive and could not be linked to ocean acidification. *Id.* at *19–24. Because the “science surrounding ocean acidification and its causes and effects is complicated and still developing” the court refused to “second guess EPA’s decision to require more conclusive evidence before identifying coastal waters as acidified-impaired.” *Id.* at *24.

Second, the court rejected CBD’s argument that EPA should have independently evaluated pH data that were not considered by Washington and Oregon before approving their section 303(d) impaired waters lists. EPA’s regulations require the agency to independently review “overlooked” water quality data if a state “fails to assemble and evaluate all existing and readily available data[.].” *Id.* at *24. The court found “no basis” for overturning EPA’s decision to approve Oregon’s section 303(d) list for failure to consider all existing and readily available water quality data. *Id.* at *25. Likewise, although Washington’s consideration of available water quality data was not perfect, the court upheld EPA’s conclusion that Washington had adequately considered readily available water quality data. *Id.* at *31. The court granted summary judgment to EPA and dismissed CBD’s claims seeking listing of Washington and Oregon waters just as the states must prepare their next two-year update of their impaired waters lists.

The NRDC’s and Sierra Club’s citizen suit against EPA stemmed from EPA’s decision to lower the NAAQS for SO₂ in June 2010 to 75 parts per billion. *Id.* at *2; Primary National Ambient Air Quality Standard for Sulfur Dioxide; Final Rule, 75 Fed. Reg. 35,520, 35,525 (June 22, 2010). Following EPA’s decision to revise the NAAQS for SO₂, EPA gathered monitoring and modeling data, and states submitted their own air quality designations to EPA. *Id.* at *2–3. EPA then granted itself a one-year extension to publish its own NAAQS air quality designations for SO₂. *Id.* at *3. In August 2013, EPA published non-attainment designations for SO₂ in 29 different areas in 16 states, but deferred designations for other areas of the country. *Id.* at *3; Air Quality Designations for the 2010 Sulfur Dioxide (SO₂) Primary National Ambient Air Quality Standard, 78 Fed. Reg. 47,191 (Aug. 5, 2013). Within weeks, NRDC and Sierra Club brought suit seeking to compel EPA to make designations under the revised SO₂ standard for the rest of the country. *Id.* at *4. NRDC and Sierra Club subsequently brought a motion for summary judgment, which EPA did not contest.

At the court’s direction, Sierra Club, NRDC, EPA, and the intervening states engaged in settlement discussions. *Id.* at *4. After submitting competing proposals to the court, the plaintiffs and EPA...
reached a tentative settlement, and EPA issued the proposed consent decree for public comment. *Id.* The consent decree would require EPA to issue SO₂ designations for the remainder of the currently undesignated areas in the United States in three phases. *Id.* at *5. Within 16 months of entry of the consent decree, EPA would issue designations for undesignated areas (1) that have monitored violations of the SO₂ standard for the past three years; or (2) that have a stationary source not slated for retirement that emitted more than 16,000 tons of SO₂ in 2012 or that emitted more than 2600 tons of SO₂ in 2012 with an annual emission rate of SO₂ of 0.45 lbs/Mmbtu or higher. *Id.* In addition, by December 31, 2017, EPA agreed to designate areas that have not installed and begun operating a SO₂ monitoring network meeting EPA’s specifications in the proposed Data Requirements Rule. Finally, by December 31, 2020, EPA agreed to designate all remaining areas. *Id.*

After determining that it had jurisdiction to review EPA’s decision, the court rejected the intervenors’ challenges to the consent decree. *Id.* at *8. Several states objected on the basis that EPA should designate all remaining areas as “unclassifiable,” because EPA did not have the data to classify the areas as in attainment or not in attainment. *Id.* at *9. The court rejected these arguments because EPA did have the data, but could not reach a decision on how to designate the areas: “Contrary to the states arguments, the EPA has not stated that it lacks sufficient information to issue designations for the remaining areas, but rather that because of the uncertainty regarding how to best characterize emissions, it was not yet prepared to issue designations [in 2013].” *Id.* at *10 (internal citations omitted). The court also rejected the states’ argument that the consent decree improperly incorporated the EPA’s proposed Data Requirements Rule for 1-hour sulfur dioxide, which has not yet been finalized. *Id.* at *11; Data Requirements Rule for the 1–Hour Sulfur Dioxide (SO₂) Primary National Ambient Air Quality Standard (NAAQS), 79 Fed. Reg. 27,446 (May 13, 2014). The court held that EPA’s obligations under the consent decree are not dependent on the rule, and the proposed rule remains subject to EPA’s normal rulemaking process. *Id.*

Finally, the court rejected the argument that amici were not permitted to participate in settlement negotiations. *Id.* at *12. Seven state intervenors participated in “adversarial” settlement discussions with EPA, NRDC, and Sierra Club for a period of six months. *Id.* Although the proposed consent decree was the result of separate negotiations between EPA, NRDC, and Sierra Club, the approach adopted in the consent decree was discussed on general settlement calls, the states had an opportunity to participate in their own negotiations with EPA, and the final consent decree was subject to public notice and comment. *Id.* The court determined that there was “no support whatsoever” for North Carolina’s allegation that the settlement was “a collusive attempt” to obtain an illegal remedy. *Id.* The court granted the parties’ joint motion to approve and enter the consent decree. *Id.*

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**THINKING BEFORE DOING**

Martin Sinclair

Like the law itself, I have found that maintaining civility and professionalism is a practice. Keeping calm when challenged by co-counsel or a hot bench is not easy. In difficult situations, I must be mindful and deliberate in choosing my responsive action. Thankfully, my response is always that: a choice. I can choose to go with my immediate reaction (unfortunately, it’s usually a snarky quip) or I can take a moment to consider the motive of opposing counsel or the court and craft a response best suited to advancing my client’s case. Invariably, when I reflect before responding, I take the best possible care of my client, my firm, myself, and our profession. For me, and I’m sure for many of you, that’s the essence of being an attorney.
This deliberative process, however, did not come to me naturally. Nor is it something that I have perfected. I learned it from watching skilled and well-respected attorneys, and have found that it requires constant exercise and reinforcement. When I graduated from law school, my mettle under pressure was average at best. I started law school without the benefit of having been on a college debate team and compounded my lack of prior experience by favoring lectures and seminars over trial advocacy courses. Fortunately, I spent my first year after graduation as an elbow clerk for the Hon. William J. Bauer of the U.S. Court of Appeals for the Seventh Circuit. During that year, I watched scores of attorneys argue appeals before 14 of the finest judges I could hope to meet.

In watching those arguments, I was persuaded most often by advocates who exhibited a few consistent traits. They took their time to think before answering and approached oral argument not as an argument per se, but instead as an opportunity to explain to the court why their interpretation of the law should carry the day. Although this may seem obvious, the proper execution was a matter of nuance. The effective attorney genuinely listened to and thought about how best to respond to the questions posed by the panel of judges. He or she neither panicked nor reacted without thinking. And the response provided answered the actual question posed by the court, not a similar hypothetical question the attorney may have mooted the day before. In addition, I was drawn consistently to the argument or answer of the advocate who emphasized the primacy of her or his offered interpretation, and if necessary, referred to the competing argument to explore the strength of her interpretation. Ultimately, the effective advocate was not interested in beating her opponent; instead she was focused on helping the court understand why her argument should carry the day. In so doing, these attorneys were serving as officers of the court, by helping the judges on the panel work through the issues presented and arrive at the best answer, and serving their clients.

During that year, I learned too that the practice of law takes place within a community—and a small community at that. I came to know or recognize many of the judges, their clerks, and the building staff and security officers. I came to recognize the different attorneys that appeared in court. With that expanding recognition came the understanding that what happened in the courtroom did not exist in a separate sphere. It informed my understanding of who these people were as attorneys and in the world generally.

These twin impressions have been my crucial guides in private practice. When uncertain about how to handle a situation, I take that moment to think about whether my response addresses the core issue presented in the best possible form, and what that answer says about me as a member of our community. Again, though, this isn’t easy. Responding in kind to a condescending remark from opposing counsel can feel great. But I have found that feeling to be fleeting, and the momentary satisfaction might only worsen our overall working relationship. Further, taking a moment to think before acting requires energy that, at times, I may not have. Lack of sleep and stress leave all of us in a lesser state and more likely simply to react. But while words cannot be unspoken, a genuine apology goes a long way to make amends. Of course, that apology should be well thought out.

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ABA Super Conference on Environmental Law

ABA’s Section of Environment, Energy, and Resources held its 44th Spring Conference in San Francisco from March 26 – 28, 2015. In addition to a variety of informative panels, attendees had the opportunity to take part in a public service project that involved cleaning up Baker Beach, as shown below. We look forward to seeing all members of the Environmental Litigation and Toxic Torts Committee at the Section of Environment, Energy, and Resources’ 23rd Fall Conference in Chicago from October 28 – 31, 2015.

Photo courtesy of Julie McCullough, Program Assistant, Section of Environment, Energy, and Resources

Now Available!

Section members are now able to view Environment, Energy, and Resources Law: The Year in Review 2014 on the Section website at www.ambar.org/EnvironYIR.

This edition of The Year in Review provides convenient links to key cases and recent statutory material. The Year in Review 2014 is comprised of thirty-one chapters as well as an overview of chapter highlights. Topics include air quality, environmental transactions and brownfields, water quality and wetlands, energy infrastructure and siting, oil and gas, water resources, and many others. The publication also features a chapter on environmental litigation and toxic torts that provides links to key cases from 2014.

www.ambar.org/EnvironYIR