MESSAGE FROM THE CHAIRS
Patrick Jacobi and Ben Snowden

This is the final issue of the Environmental Litigation and Toxic Torts Committee Newsletter of the 2014–2015 ABA year. It includes updates on the latest developments in environmental litigation from around the country, as well as two guest articles—one on a case study in environmental justice and community development from Camden, New Jersey; and the other a recap of recent developments in the law of preemption as it relates to the Clean Air Act.

This is also the final issue of our term as committee chairs. Through the dedicated efforts of our committee vice chairs, ELTT has brought a wide variety of useful programming and other content to committee members in the last year. It’s been a great pleasure working with this team and we thank them profusely. An extra-large helping of gratitude goes to newsletter vice chairs Shelly Geppert and Pete Condron, who invested their prodigious talent and energy in producing four excellent issues of this newsletter in a single year—a feat that ELTT hasn’t managed since at least the last millennium.

In light of the success Pete and Shelly have enjoyed as newsletter vice chairs, we’re pleased to announce that they will be taking over as co-chairs of the ELTT Committee in the coming ABA year. If they do half as good a job next year as they did this year, it should be a great year for the committee.

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NEW YORK COURT OF APPEALS UPHOLDS GENERAL PERMITTING SCHEME FOR MUNICIPAL STORM SEWER SYSTEMS

Louis Abrams

Natural Resources Defense Council v. N.Y. Dep’t of Envtl. Conservation, No. 48 (N.Y. May 5, 2015) On May 5, 2015, a divided New York Court of Appeals upheld a state permit program that allows small cities and towns to discharge storm water runoff, rejecting a challenge from environmental groups that the public was denied the opportunity to comment on the permitting scheme. See Natural Res. Def. Council v. N.Y. Dep’t of Envtl. Conservation, No. 48, slip op. at 3–4 (N.Y. May 5, 2015).

Under the Clean Water Act and New York state law, municipalities of over 100,000 residents are required to obtain a State Pollutant Discharge Elimination System (SPDES) permit before they can discharge storm water into rivers, lakes, or the ocean. Id. at 2. Such permits contain stringent testing and effluent limitation conditions. Id. at 10–12. Additionally, before an SPDES permit is approved, the New York Department of Environmental Conservation (DEC) must allow for a 30-day public comment period. Id. at 10 (Rivera, J., dissenting).

By contrast, smaller municipalities of under 100,000 residents can request coverage under the DEC’s current general permit program established in 2010. Id. at 2. Such permits do not contain the same costly testing and pollution limitation conditions as SPDES permits. See id. at 11–12. Instead, under this program, municipalities must file a “notice of intent” (NOI) with the DEC in which the municipality sets forth a general program to control storm water pollution. Id. at 2–3.

In 2010, the National Resource Defense Council (NRDC) and seven other environmental groups sued the DEC over the 2010 general permit program, claiming that not holding public hearings violated the Clean Water Act and state law equivalents. Id. at 3–4. The permit program amounted to an “impermissible self-regulatory system,” NRDC argued, because it did not push local governments to limit the discharge of pollutants to the “maximum extent practicable” in contravention of the Clean Water Act. Id. at 3–4, 19 (internal quotations omitted). The New York Supreme Court’s Appellate Division, Second Department, disagreed, rejecting NRDC’s federal and state law challenges to the 2010 permit. Natural Res. Def. Council, Inc. v. N.Y. Dep’t of Envtl. Conservation, 120 A.D.3d 1235, 1247 (2d Dep’t 2014).

In a rare 4-3 decision, the New York Court of Appeals upheld the appellate division’s decision, finding that the general permit program did not run afoul of the Clean Water Act or state law. Natural Res. Def. Council v. N.Y. Dep’t of Envtl. Conservation, No. 48, slip op. at 45–46. The majority noted that NRDC’s position, which was adopted by the dissent, “blur[s] the distinction” between general and individual permits, which represent “alternative ways” for local governments to get clearance for storm water discharges. Id. at 28–29. If the court were to force the DEC to subject “general permits” to the same scrutiny attendant to the SPDES permitting program, it would compromise the “resource-conserving benefits” that state lawmakers had in mind when they enacted a law allowing for general permits in 1988, according to the majority opinion. Id. at 29.

The majority added that the DEC had determined that reviewing NOIs for completeness was sufficient, as was the public’s limited participation in the process, which included notices in an agency bulletin when NOIs were submitted and a 28-day public comment period. Id. at 29–30.

Despite the ruling, NRDC is pursuing a related appeal before the Ninth Circuit seeking to force the U.S. Environmental Protection Agency to “modernize” its storm water regulations. http://www.nrdc.org/media/2014/141219.asp.
NEW YORK'S HIGH COURT WILL NOT EXTEND LEASED DRILLING RIGHTS DUE TO HYDRAULIC FRACTURING BAN
Louis Abrams


The dispute pitted owners of land in upstate New York against various drillers who had entered into oil and gas leases. Id. The resulting litigation focused on three clauses common to all of these leases. First, each of the leases contained an identical term clause, known as a “habendum clause,” “which establishes the primary and definite period during which the energy companies may exercise the drilling rights granted by the leases.” Id. at 3. The primary term ran out, per the lease language, after “FIVE (5) years from the date hereof[].” Id. Additionally, a “secondary term” would kick in if “said land is operated by Lessee in the production of oil or gas.” Id. (emphasis added). Finally, each lease contained a “force majeure” clause. Id. at 3. Generally, a force majeure event is an “event beyond the control of the parties that prevents performance under a contract and may excuse nonperformance.” Id. at 3 (internal citation omitted).

Because the energy companies were not able to engage in hydraulic fracturing on the landowners’ property because of the moratorium, the leases would have expired at the end of the primary term. Facing the expiration of many such leases, the defendant driller sent notices to various landowners in 2010, asserting that the moratorium constituted a force majeure event, thereby extending the contractual terms. Id. at 5.

In 2012, the landowners challenged the notices in the U.S. District Court for the Northern District of New York, seeking a judgment declaring that the leases had expired. Id. at 6–7. The district court agreed, finding that the force majeure clause had “no effect on the habendum clause and the lease terms[].” Id. at 7. On appeal, the Second Circuit certified this issue to the New York Court of Appeals for a definitive ruling on this aspect of oil and gas law in New York. Id. at 7–8.

Focusing on the language of these leases, the court of appeals agreed with the federal district court, holding that the force majeure clause did not apply to the habendum clause and, therefore, the leases could not have been extended under this theory. Id. at 10. By virtue of this holding, the leases at issue will have expired, forcing the drillers to renegotiate with landowners if they wish to engage in future drilling.

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PENNSYLVANIA COURT REFUSES TO QUASH ORDER FOR DISCLOSURE OF PROPRIETARY INGREDIENTS OF NATURAL GAS DRILLING PRODUCTS
Chris Johnson

Haney v. Range Resources-Appalachia, Inc., No. 1130 WDA 2014, Not Reported in A.3d (2015 WL 1812842 Apr. 14, 2015) In a non-precedential decision, the Superior Court of Pennsylvania quashed a company’s appeal from a trial court order compelling it to obtain and disclose data, including proprietary chemical ingredients of products provided by third-party manufacturers for
natural gas drilling operations at the company’s site. *Haney v. Range Res.-Appalachia, Inc.*, No. 1130 WDA 2014, Not Reported in A.3d (2015 WL 1812842 Apr. 14, 2015). Plaintiffs/appellees brought suit against Range Resources-Appalachia, Inc. and others in 2012, claiming they had suffered personal injuries and property damage as a result of environmental contamination caused by Range Resources in the course of its natural gas operations at a drill site. *Id.* at *1. In discovery, plaintiffs sought information regarding all chemicals and/or substances used at or brought to the site. *Id.* Material Safety Data Sheets (MSDSs) produced by Range Resources did not reveal the proprietary chemical ingredients of the products; however, Range Resources argued that those constituents would have been disclosed on the MSDSs if they were hazardous. *Id.* After few of the third-party manufacturers complied with the trial court’s subsequent order to provide information on the constituent ingredients of their products, the court ordered Range Resources to obtain and provide the information, including all proprietary ingredients, reasoning that as the party responsible for the drill site, it was in the best position to secure the information. *Id.*

Range Resources appealed from the order, arguing that it violated the Commonwealth’s public policy and erroneously placed the burden on Range Resources to obtain the information, when it had not been established that the relevance or necessity of the trade secret information outweighed the potential harm of disclosure to its owners. *Id.* In refusing to review this non-final order of the trial court, the superior court noted that the test for whether or not to exercise its collateral order review authority included an analysis of whether the right involved was too important to be denied review. *Id.* at *2. While acknowledging the importance of protecting trade secrets, the court found that Range Resources had no interest in the proprietary information it sought to protect, would not be adversely affected in any way by its disclosure, and thus lacked standing. *Id.* In the absence of standing by the appellant, the court could find no right important enough to satisfy the “importance” prong of Pennsylvania’s collateral order doctrine. *Id.* The court commented in closing that Range Resources could properly appeal after a final order in the matter was entered. *Id.* However, given that the order at issue placed immediate discovery obligations on Range Resources, it is unclear what meaningful relief the company could obtain via an appeal after final judgment.

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**Nominate Call for Nominations**

The ABA Award for Excellence in Environmental, Energy, and Resources Stewardship recognizes and honors the accomplishments of a person, organization, or group that has distinguished itself in environmental, energy, and resources stewardship. Nominees must be people, entities, or organizations that have made significant accomplishments or demonstrated recognized leadership in the areas of sustainable development, energy, environmental, or resources stewardship.

While nominees are likely to be a lawyer and/or law related organizations, this is not a requirement for nomination. Nominees may be lawyers, industry managers, public officials, non-government organization members, policy analysts, educators, or any other person who has demonstrated significant achievement or leadership or organizations that have demonstrated similar significant achievement or leadership. Persons and organizations active in sustainable development, environmental, energy, and resources stewardship, and environmental, energy, and resources law in the United States and abroad may submit nominations. Self-nominations will not be accepted.

The award will be presented at the 23rd Fall Conference in Chicago - October 2015.

The nomination deadline has been extended to August 10, 2015. For full details, please visit www.ambar.org/EnvironAwards
CASE LAW HIGHLIGHTS
SOUTHEAST

COURT LIMITS PUTATIVE CLASS MEMBERS’ CLAIMS AGAINST SELLER OF COAL PROCESSING CHEMICAL
Lisa Gerson

Good v. American Water Works Co., No. CIV-A-2:14-01374, 2015 WL 3540509 (S.D. W.Va. June 4, 2015) The U.S. District Court for the Southern District of West Virginia dismissed putative class members’ causes of action for prima facie negligence for violation of the Toxic Substances Control Act (TSCA) and for private nuisance, but otherwise denied the motion to dismiss as to plaintiffs’ claims for negligence, strict products liability, and public nuisance. Good v. American Water Works Co., No. CIV-A-2:14-01374, 2015 WL 3540509 (S.D. W.Va. June 4, 2015). A putative class of approximately 300,000 residents experienced a water service interruption caused by a spill of a coal processing chemical called “Crude MCHM,” which was sold and distributed by defendant Eastman Chemical Company (Eastman). Id. at *1. Plaintiffs’ prima facie negligence claim was based on Eastman’s alleged violation of TSCA—i.e., that Eastman violated TSCA because “it knew that Crude MCHM was toxic and yet it continued to sell it and to manipulate laboratory tests to affect available safety information about the substance[.]” Id. at 2. The court began with the premise that “[w]henever a violation of statute is the centerpiece of a theory of liability, the question arises whether the statute creates an implied private cause of action.” Id. at *4 (internal citation omitted). The court answered that question in the negative, relying on several decisions holding that the only citizen suits permitted under TSCA are to enjoin violations of the statute; money damages cannot be recovered. Id. at *4. Eastman further argued that plaintiffs had failed to assert a “special injury” required for a public nuisance claim and could not sustain a private nuisance claim based on an asserted common public right to clean water. Id. at *3. The court allowed the public nuisance claim to proceed, finding that plaintiffs had sufficiently pled “special injury”—such as expenses incurred for relocating to a hotel during the outage—but expressed doubt as to whether the evidentiary record ultimately would support the claim. Id. at *9–10. However, the court dismissed the private nuisance claim, finding that the presence of pollutants in a public water supply will not support a private nuisance claim. Id. at *9. Quoting the Fourth Circuit decision in Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88 (4th Cir. 2011), the court wrote that “[i]f the only interest that is invaded is an interest shared equally by members of the public, then the alleged nuisance is public in nature. . . . The fact that the water eventually was pumped into private homes did not transform the right interfered with from a public right to a private right.” Id.

EPA DOES NOT HAVE MANDATORY DUTY TO LIST ANIMAL FEED OPERATION AIR POLLUTANTS AS CRITERIA POLLUTANTS UNDER THE CLEAN AIR ACT
Lisa Gerson

Zook v. Environmental Protection Agency, No. 14-5187, 2015 WL 3372350 (D.C. Cir. Apr. 24, 2015) The U.S. Court of Appeals for the District of Columbia Circuit affirmed a lower court order holding that the Environmental Protection Agency (EPA) did not have a mandatory duty to regulate ammonia and hydrogen sulfide as criteria pollutants under the Clean Air Act (CAA). Plaintiffs brought a citizen suit under the CAA, alleging that EPA had unreasonably delayed fulfilling its “nondiscretionary duty to regulate air pollutants emitted from animal feeding operations (AFOs) under the Clean Air Act.” Zook v. Environmental Prot. Agency, No. 14-5187, 2015 WL 3372350, at *1 (D.C. Cir. Apr. 24, 2015). A citizen may bring an action against the EPA administrator under the CAA “where there is alleged a failure of the Administrator to perform any act or duty under [the Act] which is not discretionary with the Administrator.” Id. (citing 42 U.S.C. § 7604(a) (2)). However, the appellate court agreed with the lower court that plaintiff had not identified
any nondiscretionary act or duty that the administrator had failed to perform. Specifically, the relevant sections of the CAA required the administrator to “list an air pollutant upon a finding that ‘emissions of [the pollutant], in [the Administrator’s] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.’” Id. (citing 42 U.S.C. §7408(a)(1)(A)). In other words, “the Administrator’s duty to regulate is triggered by an endangerment finding,” and plaintiffs had not alleged that the administrator had made such a finding. Id. (internal citation omitted). The court further rejected plaintiffs’ argument that it had offered “clear evidence that air pollutants from AFOs endanger public health and welfare,” stating that “scientific evidence alone . . . cannot give rise to a mandatory duty to regulate.” Id. (internal quotation and citations omitted).

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CASE LAW HIGHLIGHTS
MID-CONTINENT

TEXAS SUPREME COURT CONFIRMS THAT LACK OF CONSENT IS AN ELEMENT OF TRESPASS ACTION RATHER THAN AN AFFIRMATIVE DEFENSE
Lisa Cipriano

Environmental Processing Systems, L.C. v. FPL Farming Ltd., 457 S.W.3d 414, 416–17 (Tex. Feb. 6, 2015) The owner of property used for rice farming sued its neighbor, the operator of a wastewater disposal facility, alleging “that deep subsurface wastewater trespassed beneath the landowner’s property.” Environmental Processing Sys., L.C. v. FPL Farming Ltd., 457 S.W.3d 414, 416–17 (Tex. Feb. 6, 2015). The jury charge included lack of consent as a necessary element of a trespass claim that the plaintiff must prove despite the property owner’s objection that consent was an affirmative defense under Texas law. Id. at 417. The jury found in favor of the facility operator, and the property owner appealed. After various proceedings, the Texas Supreme Court remanded the case to the court of appeals, which reversed the trial court’s judgment, “holding that: (1) Texas recognizes a common law trespass cause of action for deep subsurface water migration; (2) consent is an affirmative defense to trespass, on which EPS [Environmental Processing Systems] bore the burden of proof, and therefore the jury charge was improper. . . .” Id. at 418. The Texas Supreme Court reversed and reinstated the trial court’s judgment, holding “that the jury instruction properly included lack of consent as an element of a trespass cause of action that a plaintiff must prove. . . .” Id. at 416.

Under Texas law, trespass consists of three elements: “(1) entry (2) onto the property of another (3) without the property owner’s consent or authorization.” Id. at 419. The court reviewed its historical decisions addressing trespass, finding that “a common definition of trespass has emerged over time that is consistent with the trespass definition submitted to the jury in this case.” Id. In
short, Texas case law uniformly includes lack of consent in the definition of trespass. *Id.* at 422. The court noted, however, that it had never “squarely addressed the question of which party bears the burden of proving consent in a trespass action, nor have the courts of appeals answered it uniformly.” *Id.* at 418. In addition, the court stated that “no well-reasoned allocation of the burden of proving consent in trespass cases has emerged from our courts of appeals,” *Id.* at 423, and that although “[a] handful of courts of appeals have stated that consent is an affirmative defense to be pleaded and proven by the defendant . . . the issue [was] far from settled.” *Id.* at 422.

In addressing this issue, the court considered “(1) the comparative likelihood that a certain situation may occur in a reasonable percentage of cases; and (2) the difficulty in proving a negative.” *Id.* at 424 (internal quotations and citations omitted, brackets in original). The court found that consent was rarely contested in trespass cases, and that “the landowner or possessor who is bringing suit is in the best position to provide evidence on whether an alleged trespasser’s presence was unauthorized because only someone acting with the authority of the landowner or one with rightful possession can authorize, or consent to, the entry.” *Id.* (internal quotations and citations omitted). Moreover, if consent were treated as an affirmative defense, “a trespass cause of action would require plaintiffs to prove only an entry onto their property,” *Id.*, which would be inconsistent with the well-established definition of trespass under Texas law. Thus, the court concluded that “to maintain an action for trespass, it is the plaintiff’s burden to prove that the entry was wrongful, and the plaintiff must do so by establishing that entry was unauthorized or without its consent.” *Id.* at 425. Finally, because the jury had found in favor of the facility operator, the court declined to address “whether deep subsurface wastewater migration is actionable as a common law trespass in Texas.” *Id.* at 416.

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**EXPERT’S UNRELIABLE METHODOLOGY FOR CALCULATING BENZENE EXPOSURE REQUIRED EXCLUSION OF TESTIMONY**

Lisa Cipriano

*Burst v. Shell Oil Co., No. 14-109, 2015 WL 2341594, at *1 (E.D. La. May 14, 2015)* Plaintiff filed a products liability action against defendant petroleum companies, alleging that her late husband’s “regular exposure to gasoline containing benzene during the years he worked as a gas station attendant and mechanic caused his leukemia.” *Burst v. Shell Oil Co., No. 14-109, 2015 WL 2341594, at *1 (E.D. La. May 14, 2015).* More specifically, plaintiff alleged that her husband had worked at various gas stations during the years 1958 through 1971, “during which time he regularly used products manufactured, supplied, distributed, and sold by defendants.” *Id.* Plaintiff relied on an expert report from an industrial hygienist to establish her husband’s exposure to benzene. *Id.* Defendants moved to exclude plaintiff’s expert on the grounds that his opinions were unreliable and irrelevant. *Id.*

The court noted that “[a] district court has considerable discretion to admit or exclude expert testimony under Federal Rule of Evidence 702,” and that the U. S. Supreme Court has “held that Rule 702 requires the district court to act as a gatekeeper to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Id.* at *1–2 (internal quotations and citations omitted). Thus, “[t]he Court’s gatekeeping function thus involves a two-part inquiry into reliability and relevance.” *Id.* at *2. In determining whether testimony is reliable, the court “must assess whether the reasoning or methodology underlying the expert’s testimony is valid,” and “[t]he party offering the testimony bears the burden of establishing its reliability by a preponderance of the evidence.” *Id.* (internal citations omitted). The court’s goal “is to exclude expert testimony based merely on subjective belief or unsupported speculation.” *Id.* (internal citations omitted).
Plaintiff’s expert calculated the decedent’s exposure to benzene from four separate sources—two sources of inhalation exposure and two sources of dermal exposure. *Id.* at *3. The expert “attempt[ed] to reconstruct Mr. Burst’s work duties during a one-year period during which Mr. Burst worked at a Gulf Oil gas station between 1966 and 1968, almost 50 years ago, and then to estimate, based on various models, Mr. Burst’s exposure to benzene as a component of gasoline.” *Id.* Calculations were based almost entirely upon the testimony of plaintiff and several co-workers of plaintiff’s late husband regarding the decedent’s work habits and symptoms. *Id.* The defendants attacked both exposure assessments. *Id.* at *4. Defendants argued that the inhalation exposure estimates were “unreliable because [the expert] ignored the relevant data from the scientific literature, and instead relied on the self-reported symptoms . . .” *Id.* at *10; see also *id.* at *5. The court agreed, finding among other things that the expert’s methodology and calculations were unreliable because the expert relied “solely on self-reported symptoms” from witnesses and had “failed to validate his results against scientific literature measuring actual exposure levels.” *Id.* at *10. See also *id.* at *4–6. Although the court noted that “reasonably contemporaneous self-reported symptoms” may be relevant and form part of the basis for an exposure assessment, complete reliance on “self-reported symptoms from a secondary source from almost 50 years ago” was insufficient to demonstrate reliability. *Id.* at *11. In addition, “[w]hile validation against such studies is likely not necessary in every case, other courts have recognized that in the presence of comparable scientific data measuring actual exposures, an expert, at the very least, should validate an exposure assessment based on modeling against the scientific literature.” *Id.* at *12. Moreover, the expert failed to “cite any source indicating that his methodology is accepted or any study that utilized his methodology.” *Id.* at *11.

The court also found the expert’s “estimate of Mr. Burst’s hands and forearms were wet with gasoline for a minimum of 1.25 hours per day and a maximum of 10.5 hours per day is inconsistent with the factual record and failed to account for evaporation.” *Id.* at *8. The failure to account properly for evaporation was “especially problematic from a reliability standpoint because [the expert] accounted for evaporation when it increased his cumulative exposure estimate . . . but did not account for evaporation in this section of his report when it would likely have decreased his estimate significantly.” *Id.* at *9.

Accordingly, the court granted the defendants’ motion to exclude the expert’s testimony. *Id.* at *12–13. The court stated that the expert’s opinions were “not based on adequate data and instead demonstrate[d] an effort to produce particular results and support a causation opinion without a reliable basis.” *Id.* at *12. Moreover, the expert failed “to engage in any critical evaluation of his modeling results against empirical scientific literature measuring actual exposure levels.” *Id.* Thus, “[c]umulatively, [the expert’s] methodology produce[d] an exposure assessment that [was] likely artificially high and that [was] not reasonably based on the factual record but instead on speculation.” *Id.*

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CASE LAW HIGHLIGHTS

MIDWEST

AIRCRAFT MANUFACTURERS MAY BE LIABLE FOR INJURY FROM ASBESTOS-CONTAINING PARTS THEY DID NOT MANUFACTURE OR SUPPLY

Chris Johnson

Spychalla v. Boeing Aerospace Operations Inc., No. 11-CV-497, 2015 WL 3504927 (E.D. Wis. June 3, 2015) Three airplane and engine manufacturers must go to trial in a case involving the mesothelioma death of an aircraft pilot/mechanic, despite an absence of evidence that the defendants manufactured or supplied certain replacement parts that allegedly contained asbestos and caused the asbestos-related cancer. Leonard Spychalla flew and performed maintenance on aircraft manufactured by the Boeing Company (Boeing) and Cessna Aircraft Company (Cessna), and engines manufactured by General Electric Company (GE), for the 25 years from 1966 to 1991. Spychalla v. Boeing Aerospace Operations Inc., No. 11-CV-497, 2015 WL 3504927, at *1 (E.D. Wis. June 3, 2015). He was diagnosed with mesothelioma in May 2008 and died shortly thereafter. Id. His wife brought suit against a number of defendants in federal court in Wisconsin, and the case was transferred to the Eastern District of Pennsylvania for pretrial proceedings as part of Multidistrict Litigation (MDL) No. 875. Id. Boeing, Cessna, and GE brought a motion for summary judgment in the MDL on the basis that there was insufficient evidence Spychalla’s injuries were caused by any product for which they could be liable. Id. The MDL judge agreed with defendants that any exposure to asbestos dust was from replacement parts that the defendants did not manufacture or supply, rather than from the original aircraft or engines. Id. at *2. However, the MDL judge found that liability would turn on whether Wisconsin law would recognize the “bare metal defense,” pursuant to which manufacturers are not liable and have no duty to warn of hazards in asbestos products that they do not manufacture or distribute. Id. He denied the motion with leave to refile it in the trial court, determining that a court in Wisconsin was better situated to address that question. Id.

Upon remand, defendants refiled the motion and asserted the bare metal defense. Id. In denying the motion, the trial judge found it unnecessary to reach the question of whether Wisconsin courts would recognize the defense, noting instead that it was “far from clear” that the defense even applied. Id. at *3. The court found that the bare metal defense more properly applies in situations where a company manufactures a product to which component parts are added, for instance, asbestos-containing insulation added to boilers made by others, rather than where a company manufactures a completed product whose component parts need replacement with similar parts when they wear out. Id. “Thus, if the original completed products Defendants sold were unreasonably dangerous, they would seem to be defectively designed, and it makes little sense to preclude liability as a matter of law simply by virtue of the fact that the decedent did not come into contact with the defective products until some of the components had been swapped out.” Id. In addition, the trial court found that defendants had made no evidentiary showing to rebut plaintiff’s argument and expert testimony that these defendants controlled the specifications of what replacement parts could be used, and that requiring asbestos-containing replacement parts without providing warnings about asbestos either was negligent or rendered the product unreasonably dangerous. Id. at *3–4. Defendants argued that plaintiff’s evidence was insufficient but pointed to no evidence of their own that they did not specify asbestos-containing replacement parts. Id. at *4–5.
OHIO COURT PIERCES CORPORATE VEIL, HOLDS SHAREHOLDER PERSONALLY LIABLE FOR $6.1 MILLION IN CIVIL PENALTIES FOR HAZARDOUS WASTE SITE

Chris Johnson

State ex rel. Petro v. Pure Tech Systems, Inc., No. 101447, 2015 WL 1959935 (Ohio Ct. App. Apr. 30, 2015) An Ohio man, Robert Kattula, was found personally liable for more than $6 million in civil penalties in an action brought by the State of Ohio concerning environmental violations in connection with hazardous waste operations at a property owned or operated by two companies that Kattula owned and controlled. The dispute concerned hazardous wastes at a portion of a subdivided property at which petroleum and hazardous substance operations had been conducted as far back as the 1880s, when it was the site of a Standard Oil refinery. State ex rel. Petro v. Pure Tech Sys., Inc., No. 101447, 2015 WL 1959935, at *1 (Ohio Ct. App. Apr. 30, 2015). Defendant Kattula acquired the property in 1999, working through several companies that he formed and controlled, two of which—Pure Tech Systems, Inc. (Pure Tech) and K&B Capital, Inc.—also were defendants/appellants. Id. at *2. Kattula also acquired the company that had owned and operated the property for the previous ten years and which, at the time of the acquisition, owed several million in penalties to the Ohio EPA for citations and remediation that it had not performed. Id. at *2. After the acquisition, Pure Tech operated an oil reprocessing business on the property, and itself accumulated a number of environmental citations. Id. at *2–3.

The State initiated an action against defendants and others in 2006 to enforce numerous hazardous waste and water pollution laws involving both the pre-existing citations and new ones issued after Kattula and his companies acquired the property. Id. at *1. The trial court granted the State’s motion for summary judgment and, after a trial and a hearing, assessed civil penalties of $6.1 million, pierced the corporate veil, and found Kattula personally liable. Id. at **1, 7–9. In upholding the trial court’s rulings, the appellate court found that Kattula controlled the corporations to the extent they had “no separate mind, will or existence of [their] own” based on evidence that he was the sole shareholder of one, the other was a family business, and he used the companies to conduct his personal dealings. Id. at *8. Citing record evidence that, inter alia, Kattula conducted business for the companies on his own personal stationery, transferred the ownership of properties among companies without a corporate resolution, and sought personal reimbursement for certain remediation activities at the Pure Tech facility despite claiming that one of his companies had performed the work, the court also found that his manner of exercising control over the companies involved him personally in their violations of the law. Id.

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CASE LAW HIGHLIGHTS
MOUNTAIN/WEST COAST

NINTH CIRCUIT HOLDS THAT COURTS CAN USE DISCRETION IN ALLOCATING LIABILITY IN CERCLA PRIVATE PARTY CONTRIBUTION ACTIONS
Matthew D. Thurlow

_Ameripride Services Inc. v. Texas Eastern Overseas Inc._, 782 F.3d 474 (9th Cir. 2015)

The U.S. Court of Appeals for the Ninth Circuit recently held that trial courts can use their discretion in determining how to allocate damages between settling and nonsettling defendants in Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) private party contribution suits. _Ameripride Servs. Inc. v. Texas E. Overseas Inc._, 782 F.3d 474 (9th Cir. 2015). Texas Eastern Overseas (TEO), the successor-in-interest to a former dry cleaning operation in Sacramento, California, challenged the district court’s allocation methodology in a case brought against it by the current owner of the contaminated property, Ameripride Services (Ameripride). The Ninth Circuit held that the district court was not required to apply the proportionate share approach of the Uniform Comparative Fault Act (UCFA) or the pro tanto allocation approach of the Uniform Contribution Among Tortfeasors Act (UCATA). Instead, the court held that trial courts can apply whichever allocation approach is the most equitable under the particular circumstances of the case. _Id._ at 487–88.

Section 113(f) of CERCLA permits liable private parties to bring contribution actions against “any other person who is liable or potentially liable” and provides that “[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.” 42 U.S.C. § 9613(f)(1). In the absence of statutory guidance for determining how to account for private party settlements in which not all of the liable parties settle, courts have typically applied two different allocation approaches. Under the UCFA or proportionate share approach, courts have held that the settlement reduces the injured party’s claims against the nonsettling defendants by the settling tortfeasor’s proportionate share of damages. _Ameripride_, 782 F.3d at 483–84. This approach requires the fact finder to determine the shares of all settling and nonsettling parties. The amount the injured party may recover from nonsettling parties is reduced in proportion to the shares of the settling parties. _Id._ at 484. By contrast, the UCATA or pro tanto approach reduces the injured party’s claims against nonsettling parties by the dollar value of the settlement. While this approach can encourage early settlements, nonsettling tortfeasors may end up paying amounts disproportionate to their share of liability, especially if early settlements are unfair or collusive. _Id._ To address this concern, many courts require “good faith hearings” at which nonsettling defendants have an opportunity to challenge settlements. _Id._

In _Ameripride_, TEO, a nonsettling defendant, challenged the use of the pro tanto approach and argued that the district court was required to use the UCFA or proportionate share approach in allocating damages. _Id._ Although TEO cited several Ninth Circuit securities and admiralty cases applying the proportionate share approach, the Ninth Circuit declined to extend this precedent to CERCLA contribution cases: “Here, there are strong indications that Congress did not intend to require district courts to apply the UCFA proportionate share approach in cases involving litigation among private parties.” _Id._ at 486. CERCLA is silent regarding the allocation methodology to be used in private party contribution suits, but applies the pro tanto or UCATA approach in settlements between private parties and the government. _Id._ at 486–87. The court held that Congress’s preference for the pro tanto approach weighed against the use of the proportionate share approach. _Id._ at 487. But the court declined to go further and adopt the Seventh Circuit’s holding in _Akzo Nobel Coatings, Inc. v. Aigner Corp._, 197 F.3d 302 (7th Cir. 1999), that the pro tanto allocation approach must always be used in private party contribution suits. _Id._ at 487–88. The court concluded that the statutory language
of CERCLA “does not raise the inference that Congress required federal courts to adopt a single method of allocating liability among nonsettling parties. Rather, the statutory language raises the opposite inference . . . by directing the courts to ‘allocate responses costs among liable parties using such equitable factors as the court determines are appropriate.’” Id. at 488.

The Ninth Circuit vacated the district court’s judgment because the district court adopted the proportionate allocation approach, but then reversed course and applied the pro tanto approach. Id. at 489 (“Due to TEO’s justifiable reliance on the court’s UCFA ruling, TEO did not have a reasonable opportunity to present evidence and argument regarding the fairness of such an allocation. Nor did the district court explain how its approach complied with § 9613(f)(1) and furthered the goals of CERCLA.”). The court also held that the district court erred in determining the extent to which the settlement amounts of nonsettling defendants were necessary and consistent with the National Contingency Plan, erred in failing to determine the correct date for calculating prejudgment interest, and erred in assigning TEO’s claims against its insurers to Ameripride. The Ninth Circuit vacated the district court’s judgment and remanded the case. Id. at 492.

COLORADO SUPREME COURT HOLDS THAT LONE PINE CASE MANAGEMENT ORDERS IN TOXIC TORT CASES ARE NOT PERMITTED UNDER COLORADO’S RULES OF CIVIL PROCEDURE
Matthew D. Thurlow

Antero Resources Corp. v. Strudley, 347 P.3d 149 (Colo. 2015) The Colorado Supreme Court recently held that Lone Pine case management orders cannot be used in complex toxic tort cases to shift the burden to plaintiffs to present prima facie evidence of exposure, injury, and causation prior to discovery. Antero Res. Corp. v. Strudley, 347 P.3d 149 (Colo. 2015). The Strudley family brought suit against Antero Resources Corporation and other oil and gas defendants, alleging that natural gas drilling operations near their home contaminated the air, water, and soil and caused personal injuries and property damage. Id. at 151. Following the exchange of initial disclosures in the case, defendants sought a case management order under Colorado Rule of Civil Procedure 16(c), requiring that the Strudleys present prima facie evidence of exposure, injury, and causation from defendants’ operations. Id. at 151–52. The trial court issued the order and required the Strudleys to present prima facie expert opinion evidence of their “exposure to toxic chemicals” from defendants’ activities, “evidence of causation specific to those toxics,” and “identification and quantification of the contamination of [their] property” from the defendants’ operations. Id. at 152. Following the Strudleys’ failure to present this evidence, the trial court granted defendants’ motion to dismiss the Strudleys’ claims with prejudice. Id. at 153. The Strudleys appealed the decision, and a court of appeals held that the trial court had exceeded its authority in issuing the Lone Pine order and reinstated the Strudleys’ claims. Id. The Colorado Supreme Court granted certiorari to resolve whether the Colorado Rules of Civil Procedure authorized Lone Pine orders.

Lone Pine orders, which are designed to manage complex issues and reduce the burden on defendants and courts in toxic tort litigation, originate from an unpublished order issued by a New Jersey trial court. See Lore v. Lone Pine Corp., No. L 33606-85, 1986 N.J. Super. LEXIS 1626 (N.J. Sup. Ct. Nov. 18, 1986). Federal courts permit these case management orders under Federal Rule of Civil Procedure 16(c)(2) (L) to manage “potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.” Fed. R. Civ. P. 16(c)(2)(L) (2015); Antero, 347 P.3d at 154. In determining whether to issue a Lone Pine order, federal courts “seek to balance efficiency and equity.” Id.

Although the court acknowledged that the Colorado Rules of Civil Procedure are generally...
“patterned from” the Federal Rules of Civil Procedure, Colorado “did not adopt a counterpart to Fed. R. Civ. P. 16(c), which explicitly grants trial courts substantial discretion to adopt procedures to streamline complex litigation in its early stages[.]” Id. at 156. Rather, the language in Colorado Rule of Civil Procedure 16 is “markedly different” and “does not contain a grant of authority for complex cases or otherwise afford trial courts the authority to require a plaintiff to make a prima facie showing before the plaintiff fully exercises discovery rights under the Colorado Rules.” Id. Instead, Colorado Rule of Civil Procedure 16 simply “addresses basic scheduling matters.” Id. Because there was no statute, rule, or past Colorado decision authorizing the use of Lone Pine orders, the court held that the trial court lacked authority to issue the case management order. Id. at 156, 158 (“Whether presumptive or modified, case management orders under Rule 16 are instruments courts employ to streamline litigation and ensure the just progression of a case—not to eliminate claims or dismiss a case independent of mechanisms for eliminating claims and dismissing cases under the rules.”).

The court concluded that such an order “cuts off or severely limits the litigant’s right to discovery,” and Colorado courts have other rules and procedural safeguards to prevent “frivolous or unsupported claims and burdensome discovery.” Id. at 159. The court therefore affirmed the court of appeals’ decision.

Justice Brian Boatwright dissented from the majority’s decision. In his view, the trial court’s case management order was authorized under Colorado Rule of Civil Procedure 16 because it “simply accelerated the timeline for the Strudleys to disclose records and expert testimony and delayed the timeline for when the Strudleys could engage in full discovery.” Id. at 159–60 (Boatwright, J., dissenting). Justice Boatwright also argued that the trial court acted within its discretion in dismissing the Strudleys’ case because they had all the information needed to meet their prima facie burden of proof and failed to present evidence of exposure, injury, and causation. Id. at 161–62.

HAWAII DISTRICT COURT GRANTS SUMMARY JUDGMENT AGAINST NATIONAL MARINE FISHERIES SERVICE IN MARINE MAMMALS PROTECTION ACT AND ENDANGERED SPECIES ACT CHALLENGE

Matthew D. Thurlow


The MMPA prohibits the “taking” of marine mammals unless the taking “will have a negligible impact on such species or stock and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses.” 16 U.S.C. § 1371(a)(5)(A)(i); id. at *11. If takings are permitted, the method of taking must have the “least practicable adverse impact on such species or stock and its habitat.” 16 U.S.C. § 1371(a)(5)(A)(i)(II)(aa). The ESA requires federal agencies to ensure that any federal action carried out “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” 16 U.S.C. § 1536(a)(2). NMFS is responsible
for administering the ESA for marine species and preparing biological opinions that address whether proposed federal actions are likely to cause jeopardy to endangered or threatened marine species, and the effects of the proposed action on these species and their habitats. 50 C.F.R. § 402.14(h). If NMFS determines that there will be no jeopardy to a marine species it must prepare an “incidental take statement” that specifies the impact of the taking on the species. Id. at *13–14. NEPA requires federal agencies to prepare environmental impact statements (EISs) for major federal actions that significantly affect the quality of the human environment. 42 U.S.C. § 1502.1; id. at *14. Agencies must consider alternatives and “take[] a ‘hard look’ at the environmental consequences of the proposed action.” Id. Finally, APA is the vehicle through which third parties may challenge federal agency action, including actions under the MMPA, ESA, and NEPA. Id. at *15. Courts apply a highly deferential standard of review to agency actions, but can overturn actions that are arbitrary and capricious. Id.

In Conservation Council, the court granted the environmental groups’ motion for summary judgment under the MMPA because NMFS’s finding that the Navy’s proposed activities would have a “negligible impact” on marine species in the HSTT was “so insufficiently supported as to be arbitrary and capricious.” Id. at *21. After rejecting NMFS’s distinction between “anticipated take” and “authorized take,” the court held that NMFS “failed to consider the impact of the Navy’s activities on all the affected species and stocks.” Id. at *28–35. The court also held that NMFS failed to consider the “best scientific evidence available” because it disregarded evidence of “potential biological removal” (PBR) or the “maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.” Id. at *35 (internal quotations and citation omitted). Finally, the court held that NMFS failed to consider “least practicable adverse impacts” on affected species and stocks. With the exception of the Humpback National Marine Sanctuary, NMFS imposed no time or geographic restrictions on Navy activities and provided no explanation for this decision. Id. at *49. Accordingly, the court concluded that NMFS’s findings under the MMPA were arbitrary and capricious.

The court likewise held that NMFS’s conclusions under the ESA that there was “no jeopardy” to whales and its grant of an unlimited incidental take permit to the Navy for sea turtles were arbitrary and capricious. Id. at *51–52. With respect to the no jeopardy finding for whales, the court held that NMFS did not provide support for its conclusion and “ignored the effects of individual whale deaths or injuries on the survival or recovery of the species or stocks.” Id. at *53–54. Likewise, for turtles, the court held there was an “absence of analysis supporting the ‘no jeopardy’ finding” and “[a]uthorizing the Navy to take an unlimited number of turtles” rendered a “no jeopardy” finding patently absurd. Id. at *59–60. Finally, the court held that the EIS prepared by the Navy and adopted by NMFS failed to comply with NEPA because it did not include a no action alternative and did not take a “hard look” at alternative restrictions, including time and place restrictions on Navy activities that might reduce impacts on marine life. Id. at *71 (“[I]t is simply not feasible to say that there is even a single square mile outside of the Humpback National Marine Sanctuary that the Navy could possibly avoid using for any period without reducing military readiness. . . . The Navy does not have the vessels or manpower to occupy every single square mile of the HSTT Study Area continuously, and it cannot possibly need to do so any more than the Army needs to continuously occupy every square mile of land within the United States”). The court entered summary judgment in favor of environmental plaintiffs under the MMPA, ESA, NEPA, and APA.

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CLEAN AIR ACT PREEMPTION OF STATE-LAW TORT CLAIMS SINCE AEP V. CONNECTICUT
Ben Snowden

A common thread running through recent environmental cases is the preemptive impact of the Clean Air Act (CAA) on state-law tort claims. This long-standing question was raised but not decided by the U.S. Supreme Court in its 2011 decision in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (*AEP*), in which the Court held that federal common law tort claims arising from greenhouse gas (GHG) emissions at power plants were preempted by the CAA. 131 S. Ct. at 2537. Although some decisions issued soon after *AEP* extended that holding to state common law claims, recent decisions from state and federal courts have tended to agree that the CAA does not preempt all tort claims under state law. However, these cases also illustrate some nuances that make CAA preemption more complex than a simple yes or no question.

**Preemption by Federal Environmental Laws**

Federal preemption of state law (including private causes of action provided under state common law) arises from the Supremacy Clause of the U.S. Constitution, which provides that “the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. Whether and to what extent a federal statute preempts state law is a question of congressional intent, as indicated in the statute’s express language or through its structure and purpose. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008). Congressional intent to preempt may be express, or it may be inferred if the statute indicates that Congress intended federal law to “occupy the legislative field” (field preemption), or if there is an actual conflict between state and federal law (conflict or obstacle preemption). *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

A seminal U.S. Supreme Court decision on preemption of state-law tort claims by a federal environmental statute is *International Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) (*Ouellette*). The plaintiffs in *Ouellette* were Vermont property owners who alleged that the discharge of pollutants into Lake Champlain by a New York paper mill constituted a continuing nuisance under Vermont common law. The defendant maintained that the lawsuit was preempted by the Clean Water Act (CWA). The Court held that although a nuisance claim against a New York source under Vermont common law would conflict with the permitting scheme of the CWA and was thus preempted, the CWA did not preempt a nuisance claim under New York law. Id. at 498. The Court relied in part on the CWA’s two “saving clauses,” which expressed Congress’s intent to preserve both states’ jurisdiction over their own waters and also the common law right of “any person . . . to seek enforcement of any effluent standard or limitation or to seek any other relief[,]” *Id.* at 485, 498 (citing 33 U.S.C. § 1370 and 33 U.S.C. § 1367(e)). In light of these savings clauses, allowing a claim under New York law would not “disturb the balance among federal, source-state, and affected-state interests” established by Congress, nor would it subject a CWA-regulated source to “an indeterminate number of potential regulations” based on the laws of other states. *Id.* at 499.

*Ouellette* provided some clarity as to the scope of preemption of state-law tort actions under the CWA, but the Supreme Court has not opined on the preemptive effect of the CAA, which contains savings clauses (added in the 1990 amendments) similar to the CWA clauses that proved dispositive in *Ouellette*. See 42 U.S.C. § 7604(e), 7416. The issue arose, however, in the Court’s 2011 decision in *AEP*. The *AEP* plaintiffs were eight states, New York City, and three land trusts that brought nuisance claims under federal common law, seeking to enjoin GHG emissions from fossil-fueled power plants in multiple states. The Court held, 8-0 (Justice Sotomayor recused herself), that the CAA “displaced” any federal common law nuisance claims arising from emissions of...
air pollutants subject to regulation under the CAA. *AEP*, 131 S. Ct. at 2533–35. This holding, however, was limited to claims under federal common law. Plaintiffs had also asserted state-law tort claims, but the question of preemption with respect to those claims had not been addressed by the court of appeals and was not briefed. The Court therefore left the matter “open for consideration on remand.” *Id.* at 2540. It did, however, note that “[l]egislative displacement of federal common law does not require the ‘same sort of evidence of a clear and manifest [congressional] purpose’ demanded for preemption of state law.” *Id.* at 2537 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981)).

**Clean Air Act Preemption Since AEP**

Soon after *AEP* was decided, the U.S. District Court for the Western District of Pennsylvania relied in part on dicta from *AEP* in holding that the CAA and the Pennsylvania Air Pollution Control Act preempted state-law public nuisance claims brought by the State of New York and the Pennsylvania Department of Environmental Protection, and based on alleged violations of Pennsylvania air quality regulations. *U. S. v. EME Homer City Generation L.P.*, 823 F. Supp. 2d 274, 297 (W.D. Pa. 2011), *aff’d on other grounds*, 727 F.3d 274 (3d Cir. 2013) (*Homer City Generation*). The court reasoned that because the CAA and the Pennsylvania statute “establish the standards by which grandfathered power plants must reduce their emissions of air pollutants,” and because “Pennsylvania has a statutorily defined role through the [Pennsylvania State Implementation Plan] and permitting process,” the state’s public nuisance claims would conflict with the CAA and were preempted. *Id.* at 297.

The court in *Homer City Generation* also relied heavily on *Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 303 (4th Cir. 2010) (*Cooper*), a pre-*AEP* decision in which the Fourth Circuit held that the CAA preempted state-law public nuisance claims by the State of North Carolina against the Tennessee Valley Authority (TVA), seeking an injunction requiring TVA to abate emissions of certain CAA-regulated pollutants from power plants in Alabama and Tennessee. Among other things, the preemption holding in *Cooper* relied on “principles of federalism” implicated by the interstate litigation, the congressional delegation to EPA of the authority to set emissions standards, and the concern expressed in *Ouellette* about the “serious interference with the achievement of the ‘full purposes and objectives of Congress’” that would result “if affected States were allowed to impose separate discharge standards on a single point source.” *Cooper*, 615 F.3d at 304, 306–07 (quoting *Ouellette*, 479 U.S. at 493–94).

The following year, a federal district court in Mississippi endorsed broad preemption of state-law tort claims in *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012) (*Comer*). Plaintiffs there had alleged nuisance, trespass, and negligence claims based on the defendant oil companies’ alleged release of “by-products that led to the development and increase of global warming, which produced the conditions that formed Hurricane Katrina, which damaged [plaintiffs’] property.” *Id.* at 852. The court reasoned that the concerns expressed by the Supreme Court in *AEP*, that plaintiffs “were calling upon the federal courts to determine what amount of carbon-dioxide emissions is unreasonable as well as what level of reduction is practical, feasible, and economically viable,” applied equally to the state-law claims at issue. *Id.* at 865 (citing *AEP*, 131 S. Ct. at 2540). Although the *Comer* plaintiffs did not seek injunctive relief, implicit in their damages claims was a request that the court find the defendants’ GHG emissions unreasonable—a finding that would conflict with the regulatory scheme established by the CAA. Accordingly, the court held plaintiffs’ claims to be preempted.

More recent cases have been less enthusiastic about the preemptive effects of the CAA on state-law tort claims. The most influential decision on the issue since *AEP* has been *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3d Cir.
In *Bell*, the U.S. Court of Appeals for the Third Circuit overturned a district court decision holding that the CAA preempted state-law tort claims against the operator of a coal-fired electric generating facility whose fly ash and other emissions were allegedly impacting plaintiffs’ property. Plaintiffs sought damages and injunctive relief requiring the removal of particulate matter deposited on plaintiffs’ properties, but not abatement of the actual emissions. *(Id. at 192–93).* The Third Circuit reversed the trial court’s dismissal of these claims, holding that the rationale of *Ouellette* applied equally to the CAA, which contains savings clauses “virtually identical” to the CWA provisions at issue in *Ouellette.* *(Id. at 194–96)* (citing 42 U.S.C. 7415 and 479 U.S. at 492, 497). *Bell* also relied on *Her Majesty the Queen in Right of the Province of Ontario v. Detroit*, 874 F.2d 332 (6th Cir. 1989), in which the Sixth Circuit (also relying on *Ouellette*) held that the CAA did not preempt private-party claims under a Michigan environmental statute. The court said that its analysis was unaffected by *AEP*, which was limited to displacement of federal common law and in which the Court acknowledged that displacement of federal common law “does not require the same sort of evidence of clear and manifest [congressional] purpose demanded for preemption of state law.” *(Bell, 734 F.3d at 197 n.7 (quoting *AEP*, 131 S. Ct. at 2537)).*

**Post-Bell Preemption Cases**

Notwithstanding the contrary holdings in *Cooper, Comer*, and *Homer City Generation*, almost every court to have considered the question since *Bell* was decided has held that the CAA does not preempt all state-law tort claims. Courts have, however, come to different conclusions about the scope of claims and relief under state law that can escape preemption.

These include a cluster of related cases in federal and state courts in Kentucky, all arising from allegations that CAA-permitted ethanol emissions from distilleries were causing the growth of a nuisance fungus on nearby properties. In *Merrick v. Diageo Americas Supply, Inc.*, 5 F. Supp. 3d 865 (W.D. Ky. 2014) (*Merrick I*), the U.S. District Court for the Western District of Kentucky considered tort claims by property owners, seeking damages and injunctive relief requiring the defendant distillery to abate its ethanol emissions. Finding the reasoning of *Bell* more persuasive than the Fourth Circuit’s holding in *Cooper*, the court held plaintiffs’ claims were not preempted. *(Id. at 874–75)*. The court distinguished *Cooper* on the basis that it involved the application of “nonsource state laws,” rather than claims arising under the law of the state where the source of air emissions was located. *(Id. at 875).* However, recognizing the “substantial ground for difference of opinion on the preemptive effect of the [CAA],” the district court certified *Merrick I* for interlocutory appeal to the U.S. Court of Appeals for the Sixth Circuit. *Merrick v. Diageo Americas Supply, Inc.*, No. 3:12-CV-00334-CRS (W.D. Ky. June 12, 2014). The appeal has attracted the interest of several industry groups (including the U.S. Chamber of Commerce, the National Association of Manufacturers, and the Utility Air Regulatory Group) that have weighed in as amici. On June 15, 2015, oral argument was heard by the Sixth Circuit, which will presumably add its voice to the preemption discussion in short order.

Two Kentucky state court decisions in cases involving similar claims and some of the same plaintiffs as *Merrick I* reached contrary conclusions as to preemption. *See Mills v. Buffalo Trace Distillery, Inc.*, No. 12–CI–00743 (Franklin Cir. Ct., Div. 2, Aug. 27, 2013) (no preemption); *Merrick v. Brown–Forman Corp.*, No. 12–CI–3382 (Jefferson Cir. Ct., Div. 9, July 30, 2013) (claims preempted). However, the Kentucky Court of Appeals reversed the Jefferson Circuit Court decision in a non-precedential opinion, relying on *Bell* and *Ouellette* in finding no preemption. *Merrick v. Brown–Forman Corp.*, No. 2013-CA-002048-MR, 2014 WL 6092218 (Ky. Ct. App. Nov. 14, 2014). The court considered the *Cooper* decision but reasoned that *Bell*, rendered three years later, “may reflect the most recent iteration of
this evolving field of federal case law.” \textit{Id.} at *3.

Recent decisions from other courts have also tended to reject preemption defenses. For example, in \textit{Sciscoe v. Enbridge Gathering, L.P.}, a Texas court of appeals held that the CAA did not preempt nuisance and trespass claims against the operators of natural gas compressor stations—at least to the extent plaintiffs sought only damages. No. 07-13-00391-CV, 2015 WL 3463490, at *1 (Tex. App. June 1, 2015). Because plaintiffs’ claims “[d]id not seek to alter or change the emission standards under which [defendants] operate,” there was no conflict with the CAA. \textit{Id.} at *10. However, the court held that plaintiffs’ prospective claim for $1000 a day in damages for future trespasses “could be seen as an attempt to regulate or control” defendants’ activities and was preempted. \textit{Id.}

In its preemption analysis, the Texas court also observed that defendants’ compliance with the terms of their air permits would not shield them from private liability claims. As the court put it, “just because you are allowed by law to do something, does not mean that you are free from the consequences of your action. . . . Regulatory compliance or licensure is not a license to damage the property interests of others.” \textit{Id.} In a sort of counterpoint to this holding, the U.S. District Court for the Western District of Wisconsin recently adopted a quasi-preemption theory in holding that, although the CAA might not preempt state-law tort claims altogether, plaintiffs pursuing such claims may not rely on CAA requirements to establish the applicable standard of care. \textit{Boyer v. Weyerhaeuser Co.}, No. 14-cv-286-WMC, 2015 WL 3485262, at *2 (W.D. Wis. June 2, 2015).

Finally, in an extensively researched opinion, the Iowa Supreme Court followed \textit{Bell} in holding that the CAA did not preempt tort claims arising from air emissions at a corn wet milling facility. \textit{Freeman v. Grain Processing Corp.}, 848 N.W.2d 58, 75 (Iowa), \textit{cert. denied}, 135 S. Ct. 712 (2014). In addition to damages, the plaintiffs in \textit{Freeman} sought an injunction requiring defendants to install emission control equipment. In rendering its decision, the court reviewed the historical relationship between common-law torts and environmental regulation in Iowa and other jurisdictions, considered the text and context of the CAA’s savings provisions, and conducted an extensive review of relevant case law on preemption by environmental statutes. The Iowa court distinguished \textit{Cooper} on the ground that plaintiffs’ claims for damage to private property did not raise the same concerns about interference with the CAA regulatory scheme that the \textit{Cooper} plaintiff’s public nuisance claims did. \textit{Id.} at 84. The court in \textit{Freeman} did not, however, decide whether plaintiffs’ claims for injunctive relief were preempted.

\textbf{Conclusions and Observations}

As observed by the court in \textit{Merrick I}, “[i]n the years since the Supreme Court’s ruling in \textit{American Electric Power} that the CAA displaces federal common law claims, courts have increasingly interpreted the CAA’s savings clauses to permit individuals to bring state common law tort claims against polluting entities.” 5 F. Supp. 3d at 876. This is unquestionably true, although sufficiently few federal circuit courts or state supreme courts have weighed in that this could change.

Of course, CAA preemption of tort claims is not necessarily an up or down proposition, and this review of the recent case law reveals a few nuances. First, it has been clear at least since \textit{Ouellette} that while “source-state” tort claims may not be preempted, claims based on the law of states other than where the source is located are. \textit{See AEP}, 131 S. Ct. at 2540; \textit{Ouellette}, 479 U.S. at 494, 498; \textit{Merrick I}, 5 F. Supp. 3d at 875. Second, while pure damages claims are more likely to survive preemption than claims for injunctive relief, \textit{Sciscoe}, 2015 WL 3463490, at *10, some courts have allowed injunctive claims to proceed even when the relief requested consists of emission controls. \textit{Merrick I}, 5 F. Supp. 3d at 880–81.

Another factor that can make a difference is whether the plaintiff is a private party whose...
claims are based on the impact to its property, or a governmental entity proceeding under a public nuisance theory (in which case plaintiffs’ claims are more likely to interfere with the CAA’s regulatory scheme or to upset the balance of federal, state, and local power established by the act). Compare Homer City Generation, 823 F. Supp. 2d at 297 (environmental claims by state preempted) and Cooper, 615 F.3d at 303 (same), with Freeman, 848 N.W.2d at 85 (“If the plaintiffs do prevail on the merits, however, any remedy involving damages or remediation would simply not pose the kind of conflict with the permitting process that the sweeping injunction in [Cooper] presented. . . . As a result, we conclude that conflict preemption with the CAA does not apply to a private lawsuit seeking damages anchored in ownership of real property”). And even where claims are not preempted, the possibility of a conflict between private claims and CAA standards means that parties may not be able to use compliance or non-compliance with CAA requirements as either a sword (see Homer City Generation, 823 F. Supp. 2d at 297) or a shield (see Sciscoe, 2015 WL 3463490, at *10).

Litigators pursuing or defending tort claims implicating CAA-regulated entities are advised to consider these factors carefully, and to keep abreast of the Sixth Circuit’s consideration of the preemption issue in Merrick.

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Opinion

We welcome other viewpoints. Please contact Lisa Gerson (lgerson@mwe.com) and Stephen Riccardulli (sriccardulli@mwe.com) if you would like to offer a different view on the current legal landscape of environmental justice in the U.S.

SOUTH CAMDEN’S FIGHT FOR ENVIRONMENTAL JUSTICE
Sylvia Nichole Winston

“Just like the phoenix, Camden’s in the midst of its own rebirth,” exclaimed Camden, New Jersey, Mayor Dana Redd.1 On August 9, 2014, celebrating the creation of Phoenix Park, New Jersey state, county, and city officials gathered in a parking lot, adjacent to the five-acre former industrial lot in Camden’s Waterfront South neighborhood where the park will be located, to hold a groundbreaking ceremony.2 Although the transformation of this abandoned lot into a park is a major step forward for this blighted area, it falls short of what the Waterfront South residents truly require: environmental justice.

Formerly the site of an American Minerals Inc. factory, the five-acre lot—a brownfield—is contaminated with radium and thorium,3 and languishes in the shadows of a licorice factory and Camden County’s wastewater treatment plant.4 For years, residents have complained of a disturbing odor lingering from the wastewater treatment plant and noise and pollution from the surrounding industries.5 In addition to the licorice factory and the wastewater treatment plant, the residents of Waterfront South share their neighborhood with a trash incinerator, a cement-additive processor, scrap yards, a power generator, two Superfund sites, and more than 15 known contaminated sites.6 More than 90 percent of the residents are African-American and Latino.7 More than half of the residents of the Waterfront South neighborhood live at or below the federal poverty level.8 The neighborhood also suffers from disproportionately high rates of cancer and respiratory ailments.9 In
fact, South Camden is considered one of the top environmental justice communities in New Jersey, a designation given by the U.S. Environmental Protection Agency (EPA) to communities severely affected by pollution. EPA defines “environmental justice” as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, culture, education, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” After bearing the brunt of the negative consequences of siting industrial facilities in the Waterfront South neighborhood, residents fought for environmental justice in the landmark case of South Camden Citizens in Action v. New Jersey Department of Environmental Protection.

Title VI and Its Regulations

Title VI of the Civil Rights Act of 1964 (Title VI) regulates state programs that receive financial assistance from the federal government. Section 601 of Title VI prohibits discrimination against individuals on the basis of race, color, or national origin: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. Section 602 requires agencies that distribute federal funds to promulgate regulations implementing section 601 and creating a framework for processing complaints of racial discrimination. Specifically, section 602 provides:

Each federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

Congress did not define “discrimination” in Title VI. Instead, as Justice Brennan noted in Regents of Univ. of California v. Bakke, “[t]he legislative history shows that Congress specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine.” 438 U.S. 265, 337 (1978).

Following the enactment of Title VI, a presidential task force drafted model Title VI regulations that precluded funding recipients from using “criteria or methods of administration which have the effect of subjecting individuals to discrimination.” 45 C.F.R. 80.3(b)(2) (emphasis added). Every cabinet department and about 40 federal agencies adopted standards interpreting Title VI to bar programs with a discriminatory impact. Of relevance here, the EPA enacted regulations prohibiting the siting of facilities that have a discriminatory effect:

A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this Part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.

40 C.F.R. § 7.35(c) (emphasis added).

The Legal Decisions

The District Court’s Decision in South Camden

In 1999, St. Lawrence Cement Company (St. Lawrence) applied for construction and operating permits from the New Jersey Department of Environmental Protection (NJDEP) to open a cement grinding facility in the Waterfront South neighborhood of Camden, New Jersey. South Camden Citizens in Action v. N.J. Dep’t of Envtl. Prot., 145 F. Supp. 2d 446, 454 (D.N.J. 2001) [hereinafter “South Camden I”]. After conducting an air impact analysis and demonstrating to NJDEP that the grinding facility would not exceed...
the National Ambient Air Quality Standard for particulate matter (PM-10) or cause adverse health impacts to the surrounding community, NJDEP allowed construction to proceed (while the permits were pending). Id. at 454–55. Following a public hearing in August 2000 and despite the concerns of community members that the minority neighborhood was already environmentally disadvantaged, NJDEP finalized St. Lawrence’s permits. Id. at 469–70.

Plaintiffs, a citizen’s group and a number of Waterfront South residents, then sued NJDEP, claiming that NJDEP’s permit review procedures violated Title VI by failing to consider the potentially adverse discriminatory impact of permitting the construction and operation of a cement grinding facility in the Waterfront South neighborhood. Id. at 452. Plaintiffs alleged that St. Lawrence would emit various pollutants into the community’s air, including particulate matter (in this case, PM-10), mercury, lead, manganese, nitrogen oxides, carbon monoxide, sulphur oxides, and volatile organic compounds. Id. at 450. Plaintiffs also estimated that 35,000 inbound and 42,000 outbound St. Lawrence truck deliveries would pass through the Waterfront South neighborhood on an annual basis. Id. at 450–51.

At the time, the Waterfront South neighborhood had a population of 2132, of whom 41 percent were children and 91 percent were persons of color. Id. at 451. Specifically, 63 percent were African-American, 28 percent were Hispanic and 9 percent were non-Hispanic white. Id. The median household income of residents of the Waterfront South neighborhood was $15,082, with more than 50 percent of the residents living at or below the federal poverty level. Id. at 459. The residents of the Waterfront South neighborhood suffered disproportionately high rates of asthma and other respiratory ailments. Id. at 451, 461. Furthermore, the neighborhood was already home to multiple pollutant-producing industrial and commercial facilities, including Camden County Municipal Utilities Authority, a sewage treatment plant; the Camden County Resource Recovery facility, a trash-to-steam plant; the Camden Cogen Power Plant, a co-generation plant; Pneumo Abex Corporation; the G-P Gypsum Corporation; United Parcel Service; the Coastal Eagle Point Oil Company Refinery; two Superfund sites; four sites being investigated by EPA for the release or threatened release of hazardous substances; 15 known contaminated sites; and other industrial facilities. Id. at 459–60.

Plaintiffs’ primary concern with the St. Lawrence facility was its emission of PM-10 and PM-2.5. Specifically, plaintiffs alleged that “when the totality of the circumstances are considered, the addition of [the St. Lawrence] facility’s PM-10 emissions to the existing environmental conditions in Waterfront South will have an adverse impact on the health of residents of Waterfront South” and PM-2.5 “will adversely affect the health of residents of Waterfront South.” Id. at 461–62. In fact, plaintiffs’ expert opined that high PM-10 concentrations are linked to “increased emergency room visits for asthmas, impaired lung function, and the general state of respiratory health, particularly of children and the elderly,” and “PM-2.5 is the portion of PM-10 which is most dangerous to human health.” Id. at 462.

Taking this evidence into account, Judge Orlofsky of the U.S. District Court for the District of New Jersey granted a preliminary injunction and declaratory judgment that NJDEP had violated section 602 of Title VI and its implementing regulations by failing to consider the potential adverse, disparate impact of its decision to grant St. Lawrence’s application for air permits to operate its proposed facility. Id. at 481, 505. The court’s ruling was based on the assumption that section 602 and its implementing regulations contained an implied private right of action for disparate impact discrimination. Id. at 474.

The Supreme Court’s Decision in Alexander v. Sandoval
Five days after the district court decision, the U.S. Supreme Court, with Justice Scalia writing for the majority, held that Title VI does not “create a freestanding private right of action to enforce regulations promulgated under § 602.” Alexander v. Sandoval, 532 U.S. 275, 293 (2001). At issue
in *Sandoval* was a decision by the Alabama Department of Public Safety to administer state driver’s license examinations only in English; the department accepted financial assistance from the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT). *Id.* at 278–79. Respondent Sandoval, as class representative, brought suit to enjoin the English-only policy, claiming that it violated section 602 of Title VI and DOJ implementing regulations that forbid disparate impact discrimination. *Id.*

Justice Stevens, writing for the dissent in *Sandoval*, asserted that Supreme Court precedent and the text and structure of Title VI supported a private right of action under section 602. *Id.* at 294. The dissent further noted that the majority’s denial of relief was caused by the respondents’ failure to mention 42 U.S.C. § 1983 in framing their section 602 claim, *id.* at 299–300, as it is clear that plaintiffs can seek injunctive relief through section 1983, *id.* at 301. Section 1983 serves as a vehicle to bring a private civil cause of action for violations of a person’s constitutionally protected rights. Justice Stevens, in fact, suggested that “[l]itigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief[.]” *Id.* at 300.

### The District Court’s Supplemental Ruling in *South Camden*

Following the *Sandoval* decision, Judge Orlofsky issued a supplemental ruling on May 10, 2001, holding that section 1983, rather than section 602 of Title VI, provides the basis for private citizen claims seeking to enforce the EPA’s Title VI implementing regulations based on disparate impact. *South Camden Citizens in Action v. N.J. Dep’t of Envtl. Prot.*, 145 F. Supp. 2d 505, 509 (D.N.J. 2001) [hereinafter “*South Camden II*”]. The district court cited *Wright v. City of Roanoke*, 479 U.S. 418 (1987), for the proposition that valid regulations may create rights enforceable under section 1983. *South Camden II*, 145 F. Supp. 2d at 526–29. The court then applied the “federal rights” test, which seeks to determine whether Congress intended a federal right to be enforceable under section 1983, to EPA’s disparate impact regulations and concluded that the regulations were indeed enforceable under section 1983. *Id.* at 535–42. The court, therefore, ruled that its prior order in *South Camden I* “shall remain in full force and effect.” *Id.* at 549. NJDEP and St. Lawrence appealed the district court’s decision, seeking relief from the Third Circuit.

### The Third Circuit’s Decision in *South Camden*

In a two-to-one decision, a panel of the Third Circuit reversed the district court’s decision and remanded the case for further proceedings. *See South Camden Citizens in Action v. N.J. Dep’t of Envtl. Prot.*, 274 F.3d 771 (3d Cir. 2001), cert. denied, 536 U.S. 939 (2002) [hereinafter “*South Camden III*”]. The court held that the EPA’s Title VI implementing regulations, by themselves, did not create rights enforceable under section 1983. *Id.* at 790–91. Rather, the court held that the alleged right of which a plaintiff claims to have been deprived must be found in Title VI itself. *Id.* at 788. The court, therefore, ruled that: “[I]n light of *Sandoval*, Congress did not intend by adoption of Title VI to create a federal right to be free from disparate impact discrimination and that while the EPA’s regulations on the point may be valid, they nevertheless do not create rights enforceable under section 1983.” *Id.* at 790–91.

*Sandoval* and *South Camden III*, therefore, bar environmental litigants’ claims for disparate impact under Title VI and section 1983. The only remaining claim of right requires an environmental justice plaintiff to prove intentional discrimination under section 601. Environmental litigants are unlikely, however, to succeed in proving intentional discrimination.

### Conclusion

Almost 15 years after the *South Camden* decisions, residents of the Waterfront South neighborhood have obtained little relief. Although New Jersey state, county, and local officials are applauding the Phoenix Park project, major concerns remain. Jeff Tittel, executive director of New Jersey’s
chapter of the Sierra Club commended the project, but stated, “This area also has some of the worst air quality in the nation. What they really need to do to help the Camden Waterfront community is, close the incinerator and cement plant.”12 Another resident asked about the smell from the wastewater treatment plant. Jeremiah Bergstrom, a landscape architect with Rutgers Cooperative Extension, which designed the plans for Phoenix Park, said there will be a visual screen to separate the park from the treatment plant, but it will not be “a barrier from the odor.”13 Another long-time resident called the park “a great thing,” but said that it is challenging to live among industries; she is often awakened by the grinding metal of Camden Iron & Metal, which operates five blocks away.14

The citizens of the Waterfront South neighborhood deserve more than the current legal landscape of environmental justice offers. For a movement that stemmed from the concern that low-income and minority communities suffer disproportionate exposure to environmental hazards, we must do more than offer the Waterfront South residents a park—a park that provides no adequate remedy to shield residents from air, noise, or odor pollution—the primary concerns in the South Camden case.

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Endnotes

3 Phoenix Park Article.
4 Camden Neighborhood Article.
5 Id.
7 Id.
8 Id. at 239, n.30.
9 Id. at 239.
10 Camden Neighborhood Article.
12 Camden Neighborhood Article.
13 See id.
14 Id.