MESSAGE FROM THE CHAIRS
Peter Condron and Shelly Geppert

Dear Members:

Welcome to the latest issue of the Environmental Litigation and Toxic Torts Committee’s award-winning newsletter. We strive to keep our members apprised of the latest important developments in environmental and toxic tort litigation, and our team of outstanding contributors does just that in this issue. Highlights include important decisions on veil piercing and successor liability, standing and ripeness, choice of law, permitting requirements, and challenges to EPA regulations. We’re sure you’ll find these articles interesting and useful.

Membership in SEER and ELTT provides tremendous benefits to environmental practitioners and the profession as a whole, and our newsletter is only one small part of what ELTT has to offer—conferences, webinars, continuing legal education, networking opportunities, and much more. We encourage you to share the word with your friends and colleagues about the value of SEER and ELTT membership. As summer associates and interns spend time with your firm or organization over the next couple of months, let them know how much benefit your ABA membership provides to your practice and encourage them to join. Similarly, when the fall classes of bright, eager, newly minted lawyers arrive in the fall, encourage them to join—and to participate in—SEER and ELTT. We’d particularly like to increase our membership among government attorneys, so please, spread the word!

Until next issue,

Shelly and Pete

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Because toxic tort cases are complex, with various plaintiffs and defendants and often multiple jurisdictions, trying cases requires knowledge of strategic litigation procedures and established scientific concepts. Authors focus on the elements that distinguish these cases and provide guidance on case strategy, trial management, settlement considerations, and regional and state causation standards.
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CASE LAW HIGHLIGHTS: MOUNTAIN/WEST COAST

NINTH CIRCUIT BROADLY INTERPRETS CLEAN WATER ACT DEFINITION OF POINT SOURCES RELATED TO OYSTER HATCHERY DISCHARGES
Whitney Jones Roy, Whitney Hodges, and Alison N. Kleaver

Olympic Forest Coalition v. Coast Seafoods Company, __ F.3d __ (9th Cir. 2018), 2018 WL 1220506. Environmental advocacy group Olympic Forest Coalition (the Coalition) brought a suit against Coast Seafoods Company (Coast Seafoods), owner of a cold-water oyster hatchery adjacent to Quilcene Bay in the state of Washington. Id. at 1. The Coalition alleged Coast Seafoods violated the Clean Water Act (33 U.S.C. § 1251 et seq.) by discharging pollutants from the hatchery through pipes, ditches, and channels without the required National Pollution Discharge Elimination System (NPDES) permit. Id. The Ninth Circuit agreed, holding that pipes, ditches, and channels discharging pollutants from non-concentrated aquatic animal production facilities are point sources requiring an NPDES permit. Id. at 7.

Coast Seafoods’ hatchery is the world’s largest shellfish hatchery, capable of producing over 45 billion eyed oyster larvae per year. Id. at 1. As part of its operation, the hatchery discharges pollutants, including “suspended solids, nitrogen, phosphorous, ammonia, nitrites, nitrates, Chlorophyll $a$, Phaeoshytin $a$, heat, pH, salinity, dissolved oxygen and chlorine,” into Quilcene Bay. Id. Coast Seafood relied on the opinion of the Washington Department of Ecology, which articulated two reasons why Coast Seafoods was not obligated to comply with the Clean Water Act’s permitting requirements. Id. at 2. First, the hatchery did not meet the criteria for automatic designation as a concentrated aquatic animal production facility (CAAPF), a subcategory of the “concentrated animal feeding operation,” which is a point source under the Clean Water Act and requires an NPDES permit. Id. Second, the Department of Ecology determined the facility’s discharge activities were unlikely to alter the Quilcene Bay water quality. Id.

The Ninth Circuit began its review by noting that the purpose of the Clean Water Act is to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” Id. To attain the goals of the Clean Water Act, Congress placed limitations on point source discharges of pollutants through the NPDES permit system. Id.

Considering the issue of whether the hatchery, a non-concentrated aquatic animal production facility, includes a point source, the Ninth Circuit interpreted section 1362(14) of the Clean Water Act, which defines “point sources” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” Id. The Ninth Circuit stated it was “undisputed” that discharges from point sources must obtain NPDES permits. Id. at 3. The court also determined it was “undisputed” that, under section 1362(14), “pipe[s], ditch[es], [and] channel[s]” are point sources, and that a CAAPF, a kind of “concentrated animal feeding operation,” is also a point source. Id.

The court interpreted the use of the word “any” in section 1362(14) as being broad and all encompassing. The court observed, “Where exceptions or exemptions are meant in the [Clean Water Act], they are expressly provided.” Id. The act does not exempt point sources conveyances, such as pipes, ditches, and channels, that discharge pollutants from aquatic animal production facilities that are not CAAPFs. Id. The court concluded that, according to the plain meaning of the text of the Clean Water Act, “pipes, ditches, channels” and “concentrated animal feeding operations” that discharge pollutants into navigable waters are all “point sources” subject to the NPDES permit requirement. Id. at 4. Therefore, the court further
concluded, as a necessary corollary, that pipes, ditches, and channels that discharge pollutants from an aquatic animal production facility that is not a CAAPF are point sources for which an NPDES permit is required. \textit{Id.}

**NINTH CIRCUIT DETERMINES THAT ENVIRONMENTAL AGENCIES MISUSED CLIMATE CHANGE INFORMATION WHEN CONCLUDING PERMIT WAS “NO JEOPARDY” TO SEA TURTLES**

Whitney Jones Roy, Whitney Hodges, and Alison N. Kleaver

\textit{Turtle Island Restoration Network v. U.S. Dept. of Commerce, 878 F.3d 725 (9th Cir. 2017).}

Environmental groups led by the Turtle Island Restoration Network (collectively, petitioners) brought an action challenging the decision of the National Marine Fisheries Service (NMFS) to allow Hawaii-based fisheries to increase swordfish fishing, alleging misuse of climate-change data, resulting in violations of the Endangered Species Act (ESA) and Migratory Bird Treaty Act (MBTA). \textit{Id.} at 726. Because these fishing efforts could result in the unintentional deaths of endangered loggerhead and leatherback sea turtles, petitioners also challenged the related decision of the U.S. Fish and Wildlife Service (USFWS) to issue NMFS a “special purpose” permit authorizing fisheries to incidentally kill migratory birds. \textit{Id.} The petitioners alleged the environmental agencies’ decisions were not supported by the available evidence and presented a threat to the continued existence of a number of species.

The Ninth Circuit held that (1) USFWS’s decision to issue the special purpose permit was arbitrary and capricious; (2) NMFS’s biological opinion concluding that an increase in fishing efforts would result in no jeopardy for loggerhead sea turtles was arbitrary and capricious; (3) NMFS’s biological opinion concluding that an increase in fishing efforts would result in no jeopardy for leatherback turtles was supported by the scientific record; (4) NMFS was entitled to a climate-based population assessment model in formulating the biological opinions; and (5) NMFS’s determination that there was no available data from which it could credibly predict impacts of climate change was not arbitrary or capricious. \textit{Id.} at 740–41. Thus, the summary judgment was affirmed in part and reversed in part. \textit{Id.} at 741.

Under the MBTA section 21.27(a), the USFWS may issue a “special purpose” permit that allows a person to lawfully take migratory birds where the applicant makes a sufficient showing that the activity would be “of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.” \textit{Id.} at 734. The Ninth Circuit determined USFWS’s interpretation of section 21.27 is contrary to the language of the statute, which only permits a narrow exception to the MBTA’s general prohibition on killing migratory birds. \textit{Id.} USFWS’s construction of section 21.27’s special purpose activity exception as applying to basic commercial activities like fishing that have no articulable special purposes is inconsistent with the existing permitting scheme enacted by USFWS. \textit{Id.} at 735. The court concluded that because the grant of the special purpose permit did not conform to either the MBTA’s conservation intent or the plain language of the regulation, the issuance of the permit was arbitrary and capricious. \textit{Id.}

With respect to the loggerhead turtles, NMFS’s biological opinion acknowledged that the climate-based model predicted a decline in the loggerhead population to a level that “represents a heightened risk of extinction,” but still upheld a finding of “no jeopardy” of the species’ continued existence on the grounds there was “little to no difference in the extinction risk when the annual removal of one adult female loggerhead resulting from the proposed action is considered in the model.” \textit{Id.} 737. ESA requires agencies to rigorously ensure their actions will not tip a species from a state of precarious survival into a state of likely extinction. \textit{Id.} at 735. Relying on the \textit{Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.} (9th Cir.
2008), 524 F.3d 917, holding that “where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm,” the court in this matter found NMFS improperly minimized the risk to the species’ survival by only comparing the effects of the increase in fishing against the baseline conditions that have already contributed to the turtles’ decline. *Id.* at 738. Based on this impermissible comparison, the agency concluded that the proposed action’s adverse impacts would not appreciably reduce the loggerheads’ likelihood of survival. *Id.* The court found NMFS violated the requirement that the agency articulate a rational connection between the population viability model upon which NMFS relied and its “no jeopardy” conclusion. *Id.* at 737.

As it relates to the leatherback sea turtles, the NMFS biological opinion did not present such issues. *Id.* at 739. Instead, the court found the “no jeopardy” conclusion was supported by the scientific record and was not arbitrary and capricious. *Id.*

Last, the court found that NMFS was entitled to rely on the climate-based population assessment model despite the fact the model could only predict changes in the turtle population for 25 years. *Id.* The court found that the constraints in the available data constituted a reasonable justification for NMFS to limit its analysis. *Id.* Because the impacts of climate change are not globally uniform, the court further held that NMFS’s determination that there were no available data from which it could credibly predict climate change impacts on loggerhead and/or leatherback survival rates, resulting in the inability to reliably qualify or quantify the effects of climate change on the species, was not arbitrary, capricious, or contrary to NMFS’s obligation to base its jeopardy decision on the best scientific data it could obtain. *Id.* at 740.

**WATER DISTRICT CANNOT PURSUE BILLION DOLLAR DAMAGES CLAIM FOR COMPLIANCE WITH MAXIMUM CONTAMINATION LEVELS NOT YET IN FORCE BECAUSE SUCH CLAIMS ARE NOT RIPE**

Whitney Jones Roy, Whitney Hodges, and Alison N. Kleaver

*Sacramento Suburban Water District v. United States of America, ___ Fed. Cl. ___ (2018), 2018 WL 636665.* Plaintiff Sacramento Suburban Water District (Water District) sued the United States in the Court of Federal Claims for inverse condemnation and over a billion dollars in damages claiming activities at the McClellan Air Force Base in Sacramento, California, contaminated the aquifer with chromium. *Id.* at *1. The Water District argued that it must expend substantial funds to clean up the contamination in order to comply with future regulations. *Id.* The court granted the United States’ motion to dismiss for lack of jurisdiction, concluding the case was premature because regulations limiting chromium levels below 50 parts per billion (“ppb”) will not go into effect until at least 2020. *Id.*

At present, no state or federal regulation limits the amount of chromium contamination in drinking water in California below 50 parts per billion. *Id.* In 2014, California enacted a regulation limiting “carcinogenic hexavalent chromium” in public drinking water to 10 parts per billion, effective January 1, 2020. *Id.* In 2017, a California state court invalidated the regulation and ordered the State Water Resources Control Board to establish new limits. *Id.* The new limits have not yet been determined. *Id.*

In its complaint, the Water District alleged that manufacturing activities at McClellan Air Force Base, which was decommissioned in 2001, caused chromium contamination above 10 parts per billion in the aquifer. In anticipation of the 2020 limits, the Water District alleges it was forced to remove wells from service and install expensive equipment to
treat the contamination in the aquifer. *Id.* The Water District also filed tort claims based on similar allegations in California federal court, which were stayed pending the court’s ruling in this action. *Id.*

In granting the motion to dismiss, the court noted that “[t]he judicial power of the federal courts is constitutionally restricted to ‘cases’ and ‘controversies’” and that parties “seeking to invoke federal jurisdiction must show ‘an injury in fact, i.e., a concrete and particularized, actual or imminent invasion of a legally protected interest.’” *Id.* Claims that are contingent on a future event that may or may not occur are not ripe for federal court review. *Id.*

Here, the court found that the Water District’s claim was based upon maximum contamination regulations that are not currently in effect. *Id.* at *2. Further, the court found that California is still developing a maximum contamination level for chromium and that the level set in the regulation in 2014 may or may not remain. *Id.* As a result, the court held that “any damages to plaintiff from the possibility that maximum contamination regulations could become effective in January 2020 at a particular level are self-inflicted.” *Id.* The court concluded that at this time and under these circumstances, the Water District can not seek recovery of its voluntarily incurred costs. *Id.*

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**CASE LAW HIGHLIGHTS: MIDWEST**

**WISCONSIN DISTRICT COURT AWARDS SUMMARY JUDGMENT TO DEFENDANTS IN LANDOWNERS’ LAWSUIT ALLEGING PCB CONTAMINATION**
*Sonia H. Lee*

*Liebhart v. SPX Corp.*, No. 16-CV-700-JDP, 2018 WL 1583296 (W.D. Wis. Mar. 30, 2018). A federal judge in Wisconsin awarded summary judgment to defendants in an action arising out of allegations that defendants’ demolition of an industrial facility on a nearby property caused plaintiffs’ land to be contaminated with polychlorinated biphenyls (PCBs). In granting summary judgment to defendants on claims asserted under the Resource Conservation and Recovery Act (RCRA), the Toxic Substances Control Act (TSCA), and several theories of state common law, the court explained that “[t]he reason is failure of proof,” as plaintiffs failed to produce any evidence to show that the alleged PCB contamination occurred as a result of the demolition. *Id.* at *1.*

Plaintiffs own properties adjacent to a site owned by SPX Corporation (SPX), which was used as an industrial manufacturing facility and office building to make items such as heat-treating furnaces, transformers, and hot plates. The facility was used for industrial manufacturing as far back as around 1920 and ceased industrial operations in around 2005.

In around 2009, SPX retained environmental consultants to conduct a “Phase I Environmental Site Assessment” and evaluate the potential presence of PCBs at the facility. During testing, SPX discovered the presence of PCBs in the concrete floor of the facility.

In early 2015 the U.S. Environmental Protection Agency (EPA) approved SPX’s plan to demolish the facility, which was completed by the end of March 2015. Following the demolition, SPX conducted a sampling analysis of some of the soil in both the demolition site and plaintiffs’ property,
which revealed that soil from both sites contained varying levels of PCBs. In September 2016, SPX submitted a remediation plan to the Wisconsin Department of Natural Resources for the purpose of removing contaminated soil. After SPX made multiple revisions, the department approved SPX’s sampling plan.

Plaintiffs’ lawsuit followed, in which they alleged that dust containing PCBs settled on their property as a result of the demolition and caused plaintiffs to suffer from various health problems, such as chloracne.

In awarding summary judgment to defendants, the court found, inter alia, that plaintiffs “simply have not adduced evidence that defendants have violated the relevant standards under the RCRA or TSCA.” Id. at *1. Having found no violation of RCRA or TSCA, the court declined to exercise supplemental jurisdiction over plaintiffs’ remaining state law claims.

With respect to the RCRA claim, the parties did not dispute that the soil in plaintiffs’ property contains varying levels of PCBs. However, the court agreed with defendants that this fact alone was not sufficient to support a claim under RCRA for two reasons: (1) plaintiffs failed to adduce evidence that any of the PCBs discovered on their property are the result of the demolition; and (2) even if some of the PCBs are the result of the demolition, plaintiffs failed to adduce evidence that the level of PCBs attributable to the demolition poses an “imminent and substantial” threat of harm.

As to plaintiffs’ claim brought under TSCA, the court found that plaintiffs failed to show there is an “ongoing violation” of TSCA because the demolition was completed before plaintiffs filed the lawsuit. In reaching this conclusion, the court rejected plaintiffs’ contention that the alleged ongoing violation is that defendants failed to clean up a PCB “spill” in violation of 40 C.F.R. § 761.125. However, the court observed that the regulation applied “to all spills of PCBs at concentrations of 50 ppm or greater,” and that plaintiffs failed to adduce evidence that there was a PCB spill of a concentration greater than 50 ppm on their property. Id. at *6.

**Sixth Circuit Rejects Efforts to Pierce Corporate Veil in Dispute Over Liability for Cleanup Costs Under CERCLA**

*Sonia H. Lee*

*Duke Energy Fla., LLC v. FirstEnergy Corp.,* No. 17-3024, 2018 WL 1730168 (6th Cir. Apr. 10, 2018). In a case involving a dispute over liability for hazardous waste cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq., the Sixth Circuit rejected efforts by a corporate successor to pierce the corporate veil and hold a predecessor accountable for such costs. In affirming the district court’s decision, the Sixth Circuit held that the corporate successor failed to present sufficient evidence to show that piercing the corporate veil was warranted under Florida law.

Duke Energy Florida, LLC (Duke)—as corporate successor to Florida Public Service Company (FPSC) and Sanford Gas Company (Sanford)—contended that FirstEnergy Corp. (FirstEnergy)—as corporate successor to Associated Gas & Electric Company (AGECO), the holding company of FPSC and AGECO—was liable for cleanup costs associated with hazardous waste released between 1929 and 1943 at two manufactured gas plants operated by FPSC and Sanford.

Beginning in 1998, Duke Energy and other previous owners of the gas plant sites entered into a series of agreements with the U.S. Environmental Protection Agency (EPA) to conduct remediation at the sites and reimburse EPA for response costs it had incurred. In the instant case, Duke Energy asserted that FirstEnergy, as AGECO’s corporate successor, should be required to contribute to the cleanup costs based on the theory of indirect liability.
In ruling on motions for summary judgment, the district court declined to pierce the corporate veils to separate FPSC and Sanford from AGECO. Applying Florida law, the district court determined, inter alia, that although Duke Energy had successfully shown that AGECO dominated and controlled FPSC and Sanford, it had not proven by clear and convincing evidence that AGECO had used the two subsidiaries for an improper or fraudulent purpose.

On appeal, at issue was whether Duke Energy, the corporate successor to the local companies that operated manufacturing plants, must bear that liability for cleanup costs on its own or may force contribution from FirstEnergy, the successor to the former corporate parent.

Applying Florida law, the Sixth Circuit observed that a corporate parent may be held indirectly liable under CERCLA only if the corporate veil separating parent and subsidiary may be pierced under the corporate law of the relevant state. Duke Energy, however, failed to show evidence that AGECO officials had a fraudulent or improper purpose in allowing the hazardous waste to be released.

“This waste was released decades before most major environmental legislation, including CERCLA, was passed,” the court observed. Id. at *9. Further, there was no record showing AGECO officials were aware of the environmental costs of their business model.

The court went on to note that “the lapse of decades does not undermine the conclusion that CERCLA liability attaches to a site’s former operator—but the lapse of time and resulting sparsity of the record undermines the conclusion that AGECO officials’ subjective motivations in releasing the waste were fraudulent or improper.” Id. at *9.

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CASE LAW HIGHLIGHTS: MID-CONTINENT

EIGHTH CIRCUIT REVERSES DISTRICT COURT’S DENIAL OF SUCCESSOR LIABILITY DEFENSE

Brian Wauhop

Kirk v. Schaeffler Group USA, Inc., et al., __ F.3d __, 2018 WL 1630005 (8th Cir. Apr. 5, 2018). The Eighth Circuit Court of Appeals reversed the district court’s judicial estoppel ruling on the issue of successor liability. The plaintiff filed a personal injury action in the U.S. District Court for the Western District of Missouri alleging injuries resulting from the release of thousands of gallons of trichloroethylene (TCE) at FAG Bearings Corporation’s (FAG Bearings) manufacturing facility in Joplin, Missouri. For years leading up to 1982, FAG Bearings released thousands of gallons of TCE at the facility. Subsequently, the substance was detected in residential wells in the villages of Silver Creek and Saginaw, located south of the FAG Bearings plant.

In 2002, Jodelle Kirk—who had spent her entire childhood in Silver Creek—was diagnosed with autoimmune hepatitis (AIH), a liver disease that can cause fibrosis and cirrhosis. In 2013, her parents filed a federal diversity complaint against FAG Bearings and its parent corporation, Schaeffler Group USA (Schaeffler), seeking compensatory and punitive damages. Schaeffler acquired FAG Bearings in 2005. Plaintiff alleged Schaeffler’s (via FAG Bearings) negligent release of TCE and the failure to warn the community of TCE contamination caused her to develop AIH.

Schaeffler filed a motion for summary judgment arguing that as a corporate successor to FAG Bearings, it cannot be held responsible for FAG Bearings’ tortious conduct. The district court denied the motion, ruling that Schaeffler was “judicially estopped” from making this defense because in a previous trade dispute before the U.S. Court of International Trade (USCIT), Schaeffler argued that FAG Bearings had been absorbed into Schaeffler. On the basis of this determination, the district court allowed Schaeffler to remain in the
case to trial, at which the jury awarded the plaintiff $7 million in compensatory damages and $13 million in punitive damages.

Schaeffler appealed to the Eighth Circuit arguing that the district court erred when it held that Schaeffler was judicially estopped from asserting the corporate successor defense to torts allegedly committed by FAG Bearings prior to Schaeffler’s acquisition. The Eighth Circuit held that Missouri law (which applies in a diversity action) does not allow the doctrine of judicial estoppel to bar Schaeffler’s defense that it is not a liable party. Applying the analysis required by Missouri law, the court of appeals found that the USCIT litigation was not sufficiently similar to the personal injury action for judicial estoppel to apply. Accordingly, the Eighth Circuit held that Schaeffler was entitled to summary judgment on the successor liability issue and should be dismissed from the case.

Further, the Eighth Circuit held that because the jury returned a general verdict against both Schaeffler and FAG a new trial was required on the issue of punitive damages. As the court explained, because the general verdict “failed to distinguish how much [Schaeffler] owes from how much [FAG] owes . . . the general verdict cannot be upheld against [FAG] only.  Id. at 8.

STATE TORT LAW GOVERNS NEGLIGENCE ACTION AGAINST OIL AND GAS PLATFORM OWNER

Brian Wauhop

Hicks et al. v. BP Exploration & Production, Inc. et al., __ F. Supp. 3d __, 2018 WL 1635694 (2018). In an order issued April 5, 2018, disposing of motions for summary judgment, the U.S. District Court for the Eastern District of Louisiana ruled that state tort law governs a rig electrician’s tort claims for injuries he sustained while being transferred in a personnel basket from a floating living quarters area to the platform. The plaintiff argued that maritime law should apply to its claims and the defendants argued Louisiana tort law governs the case.

In resolving the question, the court first considered whether the tort action at bar arose under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331–1356b. Applying the Fifth Circuit’s “but-for” test, the court concluded that the action did arise under OCSLA because the plaintiff’s employment on the platform in the OCS “undoubtedly furthered mineral development on the OCS,” and the plaintiff would not have been injured but for his employment on the platform.

Next, the court examined whether general maritime law would apply in this case “of its own force”—in other words, whether the plaintiff’s tort claims sound in admiralty. The court concluded that while the facts of the case satisfied the “maritime situs” requirement and one element of the “maritime connection” requirement, maritime law did not apply because the type of incident at the center of the case—i.e., injury to a platform worker during transfer to the platform in a personnel basket—is not an incident that poses a risk to disrupting maritime commerce. Accordingly, the court held that maritime law did not apply and that adjacent state law, that is, Louisiana state law, should apply.

In its decision, the court distinguished its holding from an earlier case in Louisiana federal court which found that maritime law did apply to claims stemming from a platform worker injury. Indeed, the court distinguished the previously decided Menard v. LLOG Exploration Co., LLC, 259 F. Supp. 3d 475 (E.D. La. 2017), on the grounds that the Menard court did not consider whether that case arose under OCSLA; did not apply the Supreme Court’s test for determining whether a plaintiff’s claims are maritime in nature; and did not acknowledge that it had previously applied adjacent state law in similar cases. The instant court agreed with BP that part of the legal authority cited by Menard was simply dicta, and related to determining choice of law for contracts in relation to maritime issues, and not tort cases.

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CASE LAW HIGHLIGHTS: SOUTHEAST

D.C. DISTRICT COURT VACATES AND REMANDS TRASH TMDL FOR THE ANACOSTIA RIVER
Laura Glickman and Kimberly Leefatt

Nat. Res. Def. Council v. EPA, No. 16-1861, 2018 WL 1568882 (D.D.C. Mar. 30, 2018). On March 30, 2018, the District Court for the District of Columbia vacated the joint plan developed by Maryland and the District of Columbia and approved by the Environmental Protection Agency (EPA) to limit the amount of trash that entered the Anacostia River. The court held that EPA’s approval of the plan was arbitrary and capricious because there was no basis for determining a total maximum daily load (TMDL) for trash based on the minimum amount of trash that must be removed from the river instead of the maximum amount of trash that could enter the river. Id. Accordingly, the court remanded approval of the plan to the agency, but held that the vacatur will be stayed to allow time to develop a new plan. Id.

In evaluating EPA’s approval of the trash TMDL, the court first applied the Chevron standard, turning first to the text of the Clean Water Act. Id. at *4. The Clean Water Act does not define the term “TMDL,” and no court has yet addressed the meaning of the terms “maximum” and “load” in TMDL. Id. at *2, 5. The court therefore turned to the D.C. Circuit’s decision in Friends of the Earth, Inc. v. EPA, 446 F.3d 140 (D.C. Cir. 2006). Id. at *5. In that case, EPA had approved TMDLs that limited the “annual” discharge of certain pollutants into the Anacostia River and limited the “seasonal” discharge of other pollutants. Id. Rejecting EPA’s interpretation of the term “daily” at Chevron’s first step, the D.C. Circuit noted that “[t]he law says ‘daily.’ We see nothing ambiguous about this command. ‘Daily connotes ‘every day.’” Id. Applying the court’s rationale in Friends of the Earth, the district court turned to the dictionary definitions of “maximum” and “load” and found that they “each have an unambiguous meaning” that is confirmed by EPA’s regulatory definitions. Id. Specifically, EPA’s regulations define “load” as “[a]n amount of matter . . . that is introduced into a receiving water” and “loading capacity” as the “greatest amount of loading that a water can receive without violating water quality standards.” Id. at *6 (quoting 40 C.F.R. §§ 130.2(e)-(f)). Moreover, “nothing in the Clean Water Act suggests that the word ‘maximum’ can mean ‘minimum,’ or that the word ‘load’ can refer to a quantity of pollution either that is removed from or that is prevented from entering a waterbody.” Id. The court analogized that this would be akin to creating a speed limit that simply required drivers to slow down by ten miles per hour. Id.

The court was unpersuaded by a Second Circuit case in which that court held that a TMDL could be expressed in time frequencies other than daily because effective regulation may best occur by some other periodic measure. Id. (discussing Nat. Res. Def. Council, Inc. v. Muszynski, 268 F.3d 91, 98 (2d Cir. 2001)). Like the pollutants at issue in Muszynski, EPA suggested that trash has “unique characteristics” that make it more difficult to measure the quantity of trash that has entered a river than to measure the quantity of trash that has been removed from it. Id. at *7. Although the court did not doubt EPA’s assertions regarding the difficulties of measuring trash pollution, it found that the D.C. Circuit had explicitly rejected the Second Circuit’s approach. Id. Moreover, the D.C. Circuit had also explained that courts cannot ignore a statute’s plain language simply because the agency believes that the language would lead to undesirable consequences in certain circumstances. Id.

Accordingly, the court vacated and remanded approval of the trash TMDL to EPA. Id. at *8. Notably, in vacating and remanding EPA’s approval of the trash TMDL for the Anacostia River, the court concluded that it was not necessary to direct EPA to establish a new TMDL within a “reasonable amount of time” so that EPA could determine whether to cooperate with Maryland and the District of Columbia to develop a new trash TMDL or instead to disapprove the trash TMDL, thereby triggering the agency’s statutory responsibility to establish a federal TMDL. Id. at *9.
D.C. Dist. CTR. ORDRS EPA TO PROMULGATE REGULATIONS FOR NINE SOURCE CATEGORIES FOR HAPS BY OCTOBER 2021
Laura Glickman and Kimberly Leefatt


The court rejected EPA’s request for an additional seven years to promulgate the standards. Id. at *15. Specifically, the court found that having “limited number of personnel with the expertise needed to conduct the necessary reviews and develop additional regulations” and the need to “utilize contractors for certain tasks” and to “use personnel from areas of [the] EPA other than the [Sector Policies and Programs Division] to work on the [Risk and Technology Review] rulemakings” were inadequate to excuse agency inaction. Id. at *16. These proffered rationales did not demonstrate that beginning rulemaking procedures by January 2019 and completing the rulemakings for all nine source categories by October 2021 were an “impossibility,” which is the only justification permitted under the law. Id. at *13–18 (citing Nat. Res. Def. Council, Inc. v. Train, 510 F.2d 692, 713 (D.C. Cir. 1974)). In the absence of a showing that “it is impossible for the agency to hire new personnel, including outside contractors, or to reprogram additional existing agency resources right away” in order to comply with overdue rulemakings subject to court order and “a persuasive claim that it is currently so cash strapped that it cannot possibly start the mandated reviews,” EPA must comply with a faster rulemaking schedule. Id. at *13, 15–17. The court further posited that resources dedicated to discretionary actions such as enforcement are “inappropriate” as these resources could be redirected to fulfill obligation “clearly mandated by Congress.” The court did not permit the agency to take a “discretionary approach” when managing its resources that would prevent it from fulfilling its “nondiscretionary duty.” Id. at *20–21 (citing Sierra Club v. Johnson, 444 F. Supp. 2d 46, 57 (D.D.C. 2006)).

The court also rejected plaintiff’s proposed schedule, which would have required that the rulemakings be completed by 2019, as “draconian” and unsupported by the statutory framework, as the statute did not “speak to how much of the 8-year timeframe should be dedicated to the mandated” rulemaking process. Id. at *24. Accordingly, the court ordered EPA to complete all nine overdue rulemakings by no later than October 1, 2021.

D.C. CIRCUIT REJECTS CHALLENGE BY ENVIRONMENTAL GROUPS AND OTHERS TO EXECUTIVE ORDER 13771
Laura Glickman and Kimberly Leefatt


On January 30, 2017, President Trump issued Executive Order No. 13771, “Reducing Regulation
and Controlling Regulatory Costs,” which directed all federal agencies to eliminate two regulations for each newly implemented regulation and to reduce new regulatory costs to zero for fiscal year 2017. The “two-for-one” order also directed all regulatory plans to identify the offsetting regulations for each regulation that increases incremental cost, and provide the agency’s best approximation of the total costs or savings associated with each new regulation or repealed regulation. Finally, the “annual cap” provision works in the aggregate and prohibits agencies from adopting new regulations that exceed their total incremental cost allowance for the year. “[N]either the Executive Order nor the OMB guidance provides a mechanism for notifying interested parties that an otherwise desirable regulation is being delayed or withheld in order to comply with the Executive Order or that a deregulatory action was initiated in order to comply with the Executive Order.” Id. at *14. Plaintiffs challenged these requirements as preventing the enforcement of multiple federal statutes, “none of which permits the implementing agencies—or the President—to premise those decisions on the adoption or repeal of other, unrelated regulations.” Id. at *5. The court rejected plaintiffs’ challenge on jurisdictional grounds, ultimately holding that plaintiffs lacked Article III standing.

The court found that plaintiffs lacked associational standing under the Hunt test, which required that (1) the plaintiff have at least one member who “would otherwise have standing to sue in [her] own right;” (2) “the interests” the association “seeks to protect are germane to [its] purpose;” and (3) “neither the claim asserted nor the relief requested requires the participation of [the] individual members in the lawsuit.” Id. at *19 (citing Hunt v. Wash. State Apple Advert. Comm’n, 432 U.S. 333, 343 (1977)). The court found that plaintiffs satisfied the second and third elements of the Hunt test. However, plaintiffs could not simply allege that the “the consequences are so sweeping that there is substantial likelihood that at least one member may have suffered an injury-in-fact.” Id. The court agreed that while plaintiffs could not show that the executive order and OMB guidance will certainly cause their members injury, the plaintiffs can show injury if they “aver facts or proffer evidence sufficient to show both a ‘substantially increased risk of harm’ and a ‘substantial probability of harm with that increase taken into account.’” Id. at *6 (quoting, Food & Water Watch v. Vilsack, 808 F.3d 905, 914 (D.C. Cir. 2015)). Plaintiffs also failed to allege with specificity any facts identifying specific regulatory initiatives that have been, or are likely to be, discarded or weakened as a result of Executive Order 13771. The court rejected the claim that beneficial regulations would be repealed without those specific regulations having been identified: “Absent greater specificity, such predictions [were] too abstract and too speculative to support standing.” Id. at *25.

Plaintiffs argued that they were at risk for harm because the executive order had caused a delay in finalizing certain regulations, which the court recognized. Id. at *45. However, since the “increased-risk-of-harm cases often depend on the government’s regulation of someone else . . . they implicate a further level of uncertainty” because “the asserted injury ‘hinge[s] on the response of the regulated . . . third party.’” Id. at *29. Because the plaintiffs could not “show that the relevant third parties will react to the challenged action in such manner as to create that substantial risk,” the court held that the claimed injury was “overly speculative.” Id. at *28–29, 48–51. The court dismissed plaintiffs’ argument that without each of the following regulations – OSHA Infectious Disease Standard; Department of Transportation Proposed Rules on V2V Communications Technology, Speed-Limiting Devices, and Railroad Oil Spill Response Plans; Department of Energy Proposed Energy Efficiency Standards for Residential Conventional Cooking Products; EPA Proposed Rule on Paint Removers – plaintiffs would experience harm because they failed to “show that the relevant third parties will react to the [absence of regulation] in such manner as to create [] substantial risk.” Id. at *29. The court emphasized that “[o]pening the courthouse to these kinds of increased-risk claims
would drain the “actual or imminent” requirement of [Article III standing]” and “would expand the proper—and properly limited—constitutional role of the Judicial Branch.” *Id.* at *63–64. The court noted that the “increased-risk-of-harm” argument is not foreclosed in future challenges if properly presented.

The D.C. Circuit similarly rejected that plaintiffs had organizational standing and accordingly dismissed plaintiffs’ claims without addressing the merits. *Id.* at *76.

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### CASE LAW HIGHLIGHTS: NORTHEAST

#### SECOND CIRCUIT FINDS NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION WAIVED AUTHORITY TO REVIEW WATER QUALITY CERTIFICATION APPLICATION

Lisa Gerson

**New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission, 884 F.3d 450 (2d Cir. 2018).** The Second Circuit denied a petition for review of the Federal Energy Regulatory Commission’s (FERC) order permitting construction to proceed on a natural gas pipeline. In November 2015, respondent Millennium filed an application with FERC pursuant to the Natural Gas Act, requesting a certificate to construct and operate a natural gas pipeline. *Id.* at 452. Because the pipeline would cross several streams in New York, Millennium was required to apply to the New York State Department of Environmental Conservation (NYSDEC) for a water quality certification under the Clean Water Act. *Id.* at 453. Section 401 of the Clean Water Act provides that “[i]f the State . . . fails or refused to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements . . . Shall be waived with respect to such Federal application.” *Id.*

Millennium submitted an application to NYSDEC in November 2015, but was informed by NYSDEC on two occasions that its application was incomplete. *Id.* Millennium submitted additional information in August 2016, and by November the NYSDEC had acknowledged that Millennium had fully responded to the notice of incomplete application. *Id.*

On July 21, 2017, a few months shy of two years since Millennium had first submitted its application to NYSDEC, Millennium filed a request that FERC determine that NYSDEC had waived its authority to issue a certification under the Clean Water Act and thus permit Millennium to proceed with construction. *Id.* at 454. While the request was
pending, NYSDEC finally acted on Millennium’s application, issuing a denial.

FERC held that the plain language of section 401 required NYSDEC to act on Millennium’s application within one year of the initial submission—i.e., by November 2016. Because it failed to do so, NYSDEC had waived its opportunity to act on the application. *Id.*

The Second Circuit reviewed FERC’s determination de novo. As an initial matter, the court rejected NYSDEC’s argument that its interpretation of section 401—that it need act only within a year of receiving a completed application—should be granted deference. *Id.* at 455. The court found that deference was required only to an interpretation by the federal agency—the Environmental Protection Agency—charged with administering the statute. *Id.* at 455. The Second Circuit then considered NYSDEC’s argument that the trigger for action was a completed application, and agreed with FERC that the plain language of the statute precluded such an interpretation. *Id.* at 455–56. The court was not swayed by NYSDEC’s argument that FERC’s interpretation would require the department to act on an application prematurely. Calling this concern “misplaced,” the court noted that “[i]f the state deems an application incomplete, it can simply deny the application without prejudice—which would constitute ‘acting’ on the request under the language of Section 401.” *Id.* at 456.

Finally, the court considered an argument by intervenor group, Protect Orange County, that FERC lacked jurisdiction under the Natural Gas Act to regulate the pipeline. The court dispensed with this argument quickly. The Natural Gas Act provides FERC with plenary authority over the transportation of natural gas in interstate commerce. *Id.* at 456–57. Natural gas that “cross[es] a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey.” *Id.* at 457. Although the pipeline at issue was located entirely in New York, it falls within FERC’s jurisdiction as a “lateral” line receiving gas from an out-of-state mainline. *Id.*

**Conservation Law Foundation v. Pruitt, 881 F.3d 24 (1st Cir. 2018).** The First Circuit affirmed dismissal of two suits contending that EPA was required, but failed, to send notice required by a Clean Water Act regulation, 40 C.F.R. 124.52(b). *Id.* at 25. Section 124.52(b) requires EPA to send a written notice to a discharger of storm water whenever the EPA “decides that an individual permit is required” for the discharge. *Id.* at 25–26. The question presented to the First Circuit was whether the Environmental Protection Agency’s (EPA) role in developing and approving total maximum daily loads (TMDLs) in Massachusetts and Rhode Island constituted a decision requiring EPA to send notice pursuant to section 124.52(b). *Id.* at 26. The court concluded that it did not and rejected plaintiff’s request that the court issue an order requiring EPA to “notify commercial and industrial dischargers of storm water within the watersheds covered by the TMDLs that they must obtain discharge permits.” *Id.* at 28, 32.

This case implicated several provisions of the Clean Water Act (CWA). First, amendments to the Clean Water Act dictate that discharge permits are required for two types of storm water discharges and also authorize EPA to determine that certain other storm water discharges also require permits. *Id.* at 26. This authority is referred to as EPA’s “residual designation authority.” *Id.* Second the CWA requires states to establish water quality standards and to identify waters failing to meet those standards. *Id.* at 27. To bring such waters into compliance, states are required to develop “total maximum daily loads” (TMDLs). Finally, the CWA contains a citizen-suit provision, which is intended to “increase the likelihood that these and other requirements [of the CWA] are implemented and enforced[.]” *Id.* Plaintiff invoked these three
components of the CWA in an effort to force EPA to require certain third-party storm water dischargers in Rhode Island and Massachusetts to obtain discharger permits. *Id.* at 28.

As an initial matter, the court was required to decide whether the cases were properly within the scope of the CWA’s citizen-suit provision. That provision permits a citizen to commence a civil action against the EPA administrator “where there is an alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary[.]” *Id.* at 27 (quoting 33 U.S.C. § 1365(a)). Plaintiff contended that EPA, by helping to develop the Rhode Island and Massachusetts TMDLs and approving the same, had made a “determination” that storm water controls were needed and/or that the type of discharges identified in the TMDLs “contributes to a violation of a water quality standard.” *Id.* at 29. Plaintiff argued that this “determination” triggered the notice requirement of 40 C.F.R. 124.52(b) and, because EPA’s duty to notice is nondiscretionary, plaintiff brought a permissible CWA citizen suit. *Id.*

EPA raised a number of arguments in response, but the court focused on the one it found to be dispositive—that EPA’s approval of a TMDL “is not a decision for which an individual permit is required within the meaning of 40 C.F.R. 124.52(b).” *Id.* First, although the court acknowledges that EPA sometimes gets involved in the development of TMDLs, that involvement does not change that the “express determination [made by EPA] is limited to confirming that the TMDLs meet the requirements of § 303(d) of the [CWA], and of EPA’s implementing regulations.” *Id.* (quotations omitted) (emphasis added).

The court next explained that “[p]ractical consequences and past practice in this highly regulated arena also counsel against treating the approval of TMDLs as drive-by permitting determinations by the EPA.” *Id.* As to the practical consequences, the court reasoned that even if it were to accept that EPA’s involvement in developing and approving TMDLs constituted EPA’s adoption of the “findings” contained in the TMDL, “those findings do not identify specific dischargers from whom individual permits are required.” *Id.* Accordingly, plaintiffs’ requested relief—that EPA send notices and permit applications to “identified” dischargers—was not practical. *Id.* at 30. As to past practice, the court noted that EPA has historically issued residual designations in response to citizen petitions. *Id.* at 31. Unlike TMDL approvals, however, those residual designations contained EPA “independent analyses” and identified “with particularity the dischargers[.]” *Id.* at 32. The court concluded with the admonition that “Plaintiffs have provided no reason why they could not, pursuant to regulation, petition the EPA for such a designation” as opposed to the instant relief sought. *Id.* In conclusion, the court held that EPA’s approval of TMDLs was not a decision that triggered the regulatory notice requirement and, therefore, the complaints did not allege a failure by EPA to perform a nondiscretionary act. *Id.*

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On December 22, 2017, President Trump signed into law the 2017 Tax Cuts and Jobs Act (TCJA), which, among other things, has made it more difficult for companies facing environmental enforcement to deduct payments to the government. The TCJA narrows the scope of deductible payments and, for certain eligible payments (e.g., property remediation expenses or compliance costs), requires that specific language be included in settlements and court orders for those payments to be deductible.

Given the law’s impact, the Treasury Department and IRS will be issuing proposed regulations regarding these tax changes. In the meantime, the law is already significantly affecting settlement negotiations at sites across the country, including recently filed consent decrees that modify prior settlement agreements. Environmental attorneys who regularly negotiate enforcement and compliance agreements should be aware of these changes. This article provides basic information about the new law, how it differs from the old, and key updates that will shape it and its upcoming regulations in the future.

Old Section 162(f)

Although a company generally is allowed to deduct the expenses it incurs in its trade or business, section 162(f) of the Tax Code has historically barred companies from deducting any “fines or penalties” paid to a government for the violation of any law. Under old section 162(f), determining whether a payment was deductible depended on whether the payment was punitive (e.g., a fine or penalty) or compensatory. Compensatory payments (e.g., remediation expenses) were deductible, but the law did not require the parties to specify in a settlement agreement or consent order whether a particular payment was punitive or compensatory. This often led to disputes with the IRS about whether a payment was punitive or compensatory.

Deductible Payments Under New Section 162(f)

New section 162(f) is more restrictive. It generally prohibits the deduction of payments made to a government or at a government’s direction to resolve a violation or potential violation of any law. A “government” includes any federal, state, or local government or governmental entity and, in some circumstances, now includes certain nongovernmental entities.

There are three exceptions to the general prohibition: (1) amounts constituting restitution (including remediation of property) or paid to come into compliance with the violated or potentially violated law; (2) amounts paid or incurred pursuant to court orders in cases among private parties; and (3) amounts paid or incurred as taxes due. An amount constitutes “restitution” if it is for damage or harm that was or may have been caused by the violation of any law or the potential violation of any law. Restitution or compliance payments do not include any payments to reimburse the government for investigation or litigation costs.

Section 162(f)’s Identification Requirement

To be eligible for new section 162(f)’s restitution or compliance exception, a payment must be identified as restitution or compliance in the relevant court order or settlement agreement. If the agreement or court order does not identify the payments as such, they will not be deductible under the new section.

Although identification of the payment as restitution or compliance is necessary, it is not sufficient to ensure deductibility. Regardless of the designation, in the event of an audit, the taxpayer must retain evidence to show that a payment was in fact made for restitution or compliance activities.
Section 6050X’s Governmental Reporting Obligation

The TCJA also imposes a new reporting requirement on governmental entities. Under section 6050X, if the entity receives a payment exceeding $600 pursuant to a court order or settlement agreement, it must report the amount to the IRS and the taxpayer.12 Importantly, the report also must separately identify any amounts that are for restitution, remediation of property, or correction of noncompliance.13

Developments Since the Law’s Enactment

Since the law’s enactment, there have been several important developments of which practitioners should be aware.

First, regarding the government’s reporting requirement, a number of federal and state government officials have contacted the Treasury Department and the IRS, requesting additional time to make the necessary changes to their systems in order to comply. The IRS has acknowledged that it needs more time as well. As a result, in early April 2018, the IRS issued guidance that suspended governmental reporting obligations until at least January 1, 2019, in order to ensure efficient administration of the new provision.14

Second, also in April 2018, the Treasury Department and the IRS announced that they planned to issue proposed regulations amending and adding sections to the income tax regulations with respect to sections 162(f) and 6050X.15 To assist in the development of these rules, the IRS asked interested parties to offer comments on several important issues, including (1) the timing of the reporting required under the governmental reporting requirement; (2) the threshold amount for reporting under the governmental reporting requirement; (3) any anticipated administrative difficulties in securing information needed to report under section 6050X, including situations involving multiple payors or payees; (4) how to define key terms under section 162(f); and (5) what entities qualify as nongovernmental entities under section 162(f)(5).16

In response, the IRS received a number of comments from key stakeholders. For instance, regarding the reporting obligation, EPA urged the IRS not to require government agencies to report the value of settlements, and instead either allow settlements’ performance requirements to be reported or shift the reporting burden to the settling party.17 As explained in EPA’s letter, “the amount that a violator actually spends to achieve compliance is generally not information that the EPA obtains even after the case concludes, nor would there be any way for the Agency to reliably validate such costs, especially if the actions necessary to come into compliance take some time to complete.”18 In a separate letter, DOJ suggested that section 6050X’s $600 reportable amount should be raised to $10 million because the low reporting threshold would be burdensome to state and local agencies and the larger amount “appropriately reflects the more significant matters handled by the Department.”19 The IRS is currently reviewing these and other comments, and may issue proposed rules by the end of 2018.20

Third, while the IRS is considering proposed rulemaking, both EPA and DOJ are proceeding to modify consent decrees that were filed in the waning days of 2017, just after the president signed the law. These decrees did not comply with section 162(f)’s identification requirement. On May 25, 2018, DOJ filed the first of these modified decrees in United States v. Columbian Chemicals Company.21 There, the federal government and state of Louisiana alleged new source review violations against carbon-black manufacturer Columbian Chemicals Company. (Carbon black is a powder used in, among other things, automobile tires, which produces significant amounts of sulfur dioxide (SO2) and nitrogen oxides (NOx).) The original decree, filed on December 22, 2017 (the same day that President Trump signed the TCJA), required the company to install state-of-the-art pollution controls (estimated to cost $100 million), pay civil penalties, and perform environmental remediation projects valued at $375,000.22 The
modified decree, filed on May 25, 2018, is identical to the original except that it, in order to satisfy section 162(f), adds language that identifies the restitution and compliance actions that Columbian Chemicals must perform.\textsuperscript{23}

Interestingly, the modified decree does not identify the total payment amount for the restitution or compliance activities; this raises questions regarding how EPA will satisfy section 6050X’s requirement that government agencies must separately identify any amounts that are for restitution, remediation of property, or correction of noncompliance. The IRS will hopefully address issues like this in its anticipated regulations. In the meantime, Columbian Chemicals modified decree will serve as precedent for other carbon-black manufacturers, including Sid Richardson Carbon, Ltd., and Orion Engineered Carbons, LLC, which settled enforcement actions in late December 2017.

**Conclusion**

Going forward, companies making restitution or compliance payments should be sure to include in their settlement agreements, and if possible have courts include in their orders, appropriate language characterizing payments for purposes of section 162(f). That language should specifically refer to section 162(f) and identify, at the very least, performance that will constitute restitution or compliance. Practitioners should also closely follow IRS updates as the agency considers rulemaking for the new law and monitor how EPA and DOJ are modifying previously filed consent decrees in order to comply with the new law.

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**Endnotes**

1 Internal Revenue Code of 1986, as amended.
2 \textit{Id.}
3 \textit{Id.} § 162(f)(1).
4 \textit{See} § 162(f)(5).
5 \textit{Id.} § 162(f)(2)(A)(i).
6 \textit{Id.} § 162(f)(3).
7 \textit{Id.} § 162(f)(4).
9 \textit{Id.} § 162(f)(2)(B).
12 § 6050X(a)(2)(A)(ii).
13 § 6050X(a)(1).
15 \textit{Id.}
16 \textit{Id.}
18 Letter from Susan Bodine, Assistant Administrator for Enforcement and Compliance Assurance, EPA, to Christopher Wrobel, Associate Chief Counsel, IRS, p. 2 (May 17, 2018).
19 Letter from Richard Zuckerman, Principal Deputy Assistant Attorney General Tax Division, DOJ, to David Kautter, Assistant Secretary for Tax Policy, Department of the Treasury, and William Paul, Acting Assistant Chief Counsel, IRS, p. 4 (May 18, 2018).