

In-House Counsel Committee Newsletter

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MIGRATORY BIRDS AND NUCLEAR WASTE CLEANUP

Raymond Takashi Swenson

The Hanford Nuclear Site in eastern Washington was established in 1943 by the Manhattan Project to manufacture plutonium for nuclear bombs. The Army Corps of Engineers condemned 580 square miles of apple orchards, a cattle ranch, two small towns, a railroad, and 35 miles of the Columbia River, the owners were evicted, and nine nuclear reactors were built along the river. The “B Reactor” was the first operational nuclear reactor on earth and is now part of the Manhattan Project National Historical Park. The reactors transmuted a small percentage of uranium fuel rods into plutonium. The “cooked” uranium was then run through chemical processes that produced a small amount of plutonium, and millions of gallons of highly radioactive nitric acid and other waste chemicals. Eventually some 75 percent of America’s weapons plutonium came from Hanford, which is now operated by the U.S. Department of Energy (DOE) primarily for the purpose of cleaning up the legacy of contamination.

Ironically, the need to exclude the public from the Hanford Site preserved most of the land as habitat for a thousand species of migratory birds, protected under the Migratory Bird Treaty Act (MBTA). 16 U.S.C. §§ 703–712. In 2000, President Clinton issued a proclamation under the Antiquities Act of 1906, 54 U.S.C. §§ 320301–320303, and created the Hanford Reach National Monument

out of some 250 square miles of the Hanford Site, mostly large security buffer zones to the west, and north across the Columbia River, as well as the submerged lands under the river and a one-quarter-mile strip of riparian land on the south bank that runs through the nuclear reactors. The monument is administered by the U.S. Fish and Wildlife Service (USFWS). Since cleanup of the Hanford Superfund Site began officially in 1989, one of the ongoing challenges for DOE has been the demolition of radioactively contaminated buildings, and the excavation of radioactive soils, in the midst of thousands of nesting swallows, terns, owls, and bald eagles.

The MBTA does not state that federal agencies are “persons” subject to the statute, and does not waive the inherent sovereign immunity of federal agencies, so it fails the standard described by the U.S. Supreme Court in *Department of Energy v. Ohio* for statutes that seek to regulate federal agencies. 503 U.S. 607 (1992). Additionally, the enforcement penalties for “taking” a migratory bird or its eggs are criminal fines and imprisonment, sanctions that cannot be exercised against a government entity. These limitations were not discussed by the U.S. Court of Appeals for the D.C. Circuit when it ruled that it could enjoin federal agencies from “taking” Canada geese without first getting a permit from the USFWS. *Humane Soc’y of the U.S. v. Glickman*, 217 F.3d 882, 888 (D.C. Cir. 2000). USFWS adopted this as the official source of the agency’s authority to regulate actions by

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Ceara Flake, Editor

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other federal agencies that may intentionally or incidentally “take” migratory birds. On the other hand, other circuit courts have ruled that agency decisions that alter bird habitat but do not directly “take” them, such as the Forest Service licensing the cutting of timber, are not prohibited by the MBTA. *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297 (9th Cir. 1991).

The obligation of federal agencies to support the mission of the MBTA is most directly defined by Executive Order 13186. 66 Fed. Reg. 3583 (Jan. 17, 2001). While EO 13186 does not create any legal liability for federal agencies, it tasks the agencies to identify “where unintentional take reasonably attributable to agency actions is having . . . a measurable negative effect on migratory bird populations” and develop “practices that will lessen the amount of unintentional take.” *Id.* at 3855. While this obligates DOE to support the goal of the MBTA, it does not create a direct legal liability for companies that contract with DOE to perform environmental remediation and waste management on facilities like Hanford. Additionally, when federal contractors are performing their authorized scope of work, they have the same sovereign immunity as the agency. *Boeing Co. v. Movassaghi*, 768 F.3d 832 (9th Cir. 2014).

USFWS has enforced the MBTA against companies under contract to DOE when they are not performing specific work for the federal government. Several years ago, a major DOE contractor was building a new facility on its own land adjacent to the Hanford Site. Topsoil had been set aside for use in constructing landscaping berms. A lower tier subcontractor used a backhoe to distribute the topsoil. Unfortunately, over a weekend hundreds of birds dug out nests in the cut face of the soil piles, and began laying eggs. By Monday, the backhoe operator resumed moving the earth, unfortunately without regard for the nesting birds. The final result was a settlement in which the DOE contractor paid \$96,000 to the

National Fish and Wildlife Foundation in return for a non-prosecution agreement from the U.S. attorney.

The uncertain enforceability of the MBTA on a federal facility like the Hanford Site is often resolved for practical purposes by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 42 U.S.C. § 9601 et seq. Section 121 of CERCLA specifically preempts the need for federal agencies conducting remediation of hazardous contamination to obtain permits under other federal or state environmental, land use, and natural resource laws. Instead, section 121 requires DOE to identify the substantive standards of those laws, which are classed as “Applicable, or Relevant and Appropriate, Requirements” (ARARs), and achieve them during cleanup of contamination. Thus, regardless of whether the MBTA could directly require DOE to protect cliff swallows that build their nests on the walls of nuclear reactors, CERCLA requires DOE to identify protection of the swallows as a goal incorporated into the overall cleanup design. This often requires DOE to wait for the nesting season to end before it can demolish such inhabited structures.

Migratory birds have built nests inside buildings as soon as their walls are breached during demolition. They have laid eggs on large cranes and other heavy equipment, preventing the movement of large items containing plutonium, strontium 90, and cesium 137 from demolition sites into the mile-square CERCLA disposal facility at the center of Hanford. They have built nests of mud made with radioactive water. Workers climbing onto the roofs of plutonium extraction buildings to repair roof leaks have been attacked by nesting ravens.

Many other migratory bird species build their nests directly on the ground, relying on their eggs looking like gravel to protect them from coyotes, owls, and other predators. This was the case in the “BC control area,” a tract of several square miles where the soils were radioactively contaminated. A helicopter mounted with radiation sensors and

a GPS system flew a low-altitude grid over the area and identified “hot spots” with the highest radioactivity.

DOE’s CERCLA response action contractor worked with Hanford’s wildlife biologists to create a plan of operations to avoid harm to ground-nesting birds and their young. Each morning biologists walked through the zones intended for excavation, to identify where birds and nests were not present, so they could focus their removal of soil and vegetation in the bird-free zones. Over the summer, they were able to complete soil cleanup without harming the birds. By methodically avoiding protected birds, they completed the CERCLA action without a bird “take” that could, in the eyes of the MBTA enforcement office in the USFWS Portland region, require a permit under 50 C.F.R. part 21, or require DOE to assert its preemptive authority under CERCLA section 121.

More recently, the contractor began the complex process of disassembling the plutonium finishing plant (PFP), which shipped plutonium “hockey pucks” to the Rocky Flats plant near Boulder, Colorado, where they were fabricated into fission “triggers” for hydrogen fusion bombs. The contractor was concerned that, once the outer walls of the PFP were breached, barn swallows and other birds would enter and nest inside the contaminated structure. Workers could be attacked by birds protecting their nests, breaching workers’ protective anti-radiation suits, and the birds could become contaminated and harm other birds. The contractor obtained a USFWS special purpose “take” permit that endorsed DOE actions to prevent intruding birds from carrying radioactive contaminants out to the external bird population. USFWS also acknowledged that, under the mandate of CERCLA to prevent the spread of hazardous substances, DOE was justified in “taking” additional birds to protect the public and thousands of Hanford workers from radiation.

On December 22, 2017, the Office of the Solicitor in the U.S. Department of the Interior issued a memorandum entitled “The Migratory Bird

Treaty Act Does Not Prohibit Incidental Take.” It specifically reverses the conclusion of Solicitor’s Opinion M-37041, *Incidental Take Prohibited Under the Migratory Bird Treaty Act* (Jan. 10, 2017), and concludes “that the MBTA’s prohibition on pursuing, hunting, taking, capturing, killing or attempting to do the same applies only to direct and affirmative purposeful actions that reduce migratory birds, their eggs, or their nests, by killing or capturing, to human control.”

How does this new interpretation of the MBTA affect how to resolve situations like those discussed above? In the case of the nesting birds and eggs that were destroyed during construction, the USFWS would likely assert that the operation of a backhoe was a direct and purposeful action that killed birds and not merely an incidental one. In the cases involving planned CERCLA remedial actions, the combination of EO 13186, which requires consideration of “incidental take” during federal planning, with the CERCLA section 121 requirement to include the MBTA as an ARAR would still govern DOE’s actions and its direction to its contractors. The criminal enforcement provisions of the MBTA never governed these actions, so the narrowing of criminal enforcement does not affect DOE’s activities.

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DEFENDING RCRA CLAIMS IN MASS TORT LITIGATION: PRACTICAL TIPS

Hal Segall, Bina Reddy, and Ben Apple

Consider the following scenario: Solvents from historical industrial activities at a long-ago dismantled and sold manufacturing site have spread to groundwater beneath a neighboring residential community. No one appears harmed to date. The community is connected to public water, there is no reported pattern of illness, and solvent vapor has been found only in some homes. Where vapor has been found, the levels have been below those associated with illness in scientific studies, and a simple ventilation fan connected to a plastic pipe has eliminated the low level of vapor from indoor air. Has litigation been averted?

As corporate counsel finds too often, the answer to this question is no. In fact, potential financial exposure could easily be in the tens of millions of dollars. One reason is that plaintiffs' counsel are increasingly leveraging the citizen suit provisions of the federal Resource Conservation and Recovery Act (RCRA) in the mass tort context. With no proof of illness due to contamination, plaintiffs nevertheless may claim attorney fees and costs under RCRA that can be in the range of millions of dollars. While RCRA does not authorize damages, it does provide for injunctive relief and penalties of up to \$72,000 per violation per day. *See* 42 U.S.C. § 6972(a) (referencing 42 U.S.C. § 6928(g)); Civil Monetary Penalty Inflation Adjustment Rule, 83 Fed. Reg. 1190, 1193 (Jan. 10, 2018).

There are two different RCRA citizen suit provisions that plaintiffs' attorneys may invoke. The first provides for injunctive relief where a party's past or present handling, storage, transportation, or disposal of waste has contributed to conditions that "may" present an imminent and substantial endangerment (ISE) to health or the environment. 42 U.S.C. § 6972(a)(1)(B). The ISE provision does not require any violation of a regulatory standard, nor any actual (as distinct from potential) endangerment. Plaintiffs must provide notice 90 days before filing

a claim. The second type of RCRA citizen suit claim is based on alleged RCRA regulatory violations. *Id.* § 6972(a)(1)(A). This provision provides for the award of penalties of up to \$72,000 per violation per day. *See id.* § 6972(a) (referencing 42 U.S.C. § 6928(g)); 83 Fed. Reg. at 1193. For this provision, plaintiffs must provide notice 60 days before filing suit. Both provisions provide a court with discretion to award attorney fees and costs to the "prevailing" party. Even when a RCRA claim fails, defendants are rarely considered prevailing and thus rarely are awarded fees. *See, e.g., Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 241 (9th Cir. 1995) (affirming refusal of attorney fees for prevailing defendant because plaintiffs' claim was not frivolous). Notably, RCRA is a strict liability statute; a plaintiff need not prove negligence.

RCRA's fee-shifting provision and the lack of a need to plead actual harm make the statute appealing to plaintiffs' attorneys in mass tort cases. In the scenario described above, plaintiffs' attorneys may file a putative class action based on common law tort theories and a separate RCRA complaint on behalf of a few named plaintiffs alleging conditions that *may* pose an imminent and substantial endangerment. An RCRA penalty claim may be included, typically premised on alleged historical failures, e.g., to complete the closure of certain "waste management units" where contaminants were placed on or below the ground. Claimed penalties, although ultimately payable only to the U.S. Treasury rather than plaintiffs, can put additional pressure on defendants when they are evaluating litigation risk and settlement value. While RCRA can be a powerful tool for plaintiffs' counsel, defense counsel can marshal some effective strategies and defenses. This is particularly true where plaintiffs' counsel is seeking to leverage a large fee settlement or award from a case where plaintiffs have little or no damages and stand to recover little individually.

1. Act before plaintiffs' counsel does

Early and efficient measures to address contamination risks can defeat claims of imminent

and substantial endangerment. For example, if vapor intrusion is suspected or alleged, defendants should consider testing indoor air and installing mitigation systems if needed. If the purported immediate threat or harm is eliminated, there are strong arguments that the ISE claim must fail to the extent it is based on human health risk.

Testing can be complex and should be considered carefully because of both the possible detection of vapors from other sources and the possibility that the results may be interpreted to support plaintiffs' claims. Mitigation systems, however, can help limit the financial risk associated with any unknown or disputed causes of vapor intrusion, and can be relatively inexpensive. It also may be necessary to stem the migration of any off-site contaminant release to avert risks to human health or the environment, e.g., potential impacts to streams or other bodies of water and wildlife. The costs of such measures are often, but not always, quite substantial.

2. Work with the regulators to strengthen defenses

Consider working with the applicable agency—often a state agency to which RCRA authority has been delegated—to undertake an agency-approved and enforced investigation and cleanup (if needed), preferably well before litigation is filed. Similarly, consider working with the agency to remedy alleged violations of RCRA regulatory provisions, such as waste management unit closure requirements.

State approval and oversight can go a long way in defeating an RCRA citizen suit. For instance, federal courts—which have exclusive jurisdiction over RCRA claims—can be loath to impose a remedy that might come into conflict with ongoing governmental action.

Defendants have successfully invoked doctrines such as primary jurisdiction and abstention to defeat ISE claims where there is active state involvement, although such decisions are

relatively few. *See, e.g., Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194 (W.D. Okla. 2017) (dismissing RCRA ISE claim on primary jurisdiction and abstention grounds); *McCormick v. Halliburton Co.*, No. CIV–11–1272–M, 2012 WL 1119493 (W.D. Okla. Apr. 3, 2012) (dismissing RCRA ISE claim on primary jurisdiction grounds). Primary jurisdiction contemplates that agencies should handle technical matters outside the expertise of a court. Abstention is premised on avoiding encroachment by federal courts on the independence of state policy.

In addition, RCRA expressly provides that prior agency enforcement bars subsequent RCRA citizen suits. In some instances, it may be worth pursuing this defense by entering into a judicially enforced consent decree requiring agency-approved action. Whether this is an appropriate strategy depends on factors such as whether there actually is a substantial liability risk associated with a release or regulatory violation, and potential business concerns regarding entry into a consent decree. Government action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is also an enumerated RCRA defense, and negotiating a consent decree under CERCLA in lieu of civil litigation may be an option.

3. Argue that any regulatory violation or endangerment is wholly past, if applicable

RCRA only applies to *ongoing* regulatory violations and to conditions that *currently* may present an imminent and substantial endangerment. If the alleged violation or endangerment is wholly in the past—e.g., a spill has been entirely remedied or the endangerment mitigated—there is no legitimate ISE or penalty claim by a private party.

4. Consider a statute of limitations defense

Under the five-year statute of limitations applicable to RCRA, some courts have ruled that civil penalties cannot be recovered for violations that occurred more than five years in the past, even

where violations are continuing. *See, e.g., Glazer v. Am. Ecology Envtl. Servs. Corp.*, 894 F. Supp. 1029, 1044 (E.D. Tex. 1995) (citing *Pub. Interest Research Grp. of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 75 (3d Cir. 1990)). With penalties accumulating daily, this can limit exposure substantially. Other courts have ruled, however, that continuing violations toll the limitations period. *See, e.g., Harmon Indus., Inc. v. Browner*, 19 F. Supp. 2d 988, 998–99 (W.D. Mo. 1998), *aff'd*, 191 F.3d 894 (8th Cir. 1999).

5. Consider removing state tort claims to the federal court where a RCRA claim is pending

Plaintiffs may file RCRA actions separately from tort lawsuits because the latter can be filed in state courts, which are often more favorable to class certification and less amenable to summary judgment motions than federal courts. In addition to these potential advantages for plaintiffs, parallel proceedings in separate courts can pose challenges of efficiency for defendants. If diversity, the federal Class Action Fairness Action Act (CAFA), or other considerations provide grounds for removal to federal court, removal and possible consolidation of at least discovery are worth considering. The presence of a RCRA claim will also provide more reason for the federal court to decline to remand the tort case to state court.

6. Set up a potential defense fee motion

Although RCRA's fee-shifting provision has mainly been invoked by courts on behalf of prevailing plaintiffs, fees have been awarded to prevailing defendants in frivolous lawsuits. *See, e.g., Compass Bank v. Walter C. Keller Distributor, Inc.*, No. 5:08-cv-00068, at 15–17 (S.D. Tex. Sept. 28, 2012) (unreported). As a practical matter and in terms of the impact on a judge's sense of equity, it can be helpful to set the stage for a fee motion by using contention discovery early in a case regarding the basis of the RCRA claim, and by documenting the deficiencies of the claim as warranted by the facts in correspondence to

plaintiffs' counsel. The resulting more robust record of notice to plaintiffs may sway the equities.

Defendants may mistakenly give insufficient attention to RCRA claims in the face of the typically exaggerated damage figures that plaintiffs often attach to their parallel toxic tort claims, including class actions. But with its fee-shifting and penalty provisions and its strict liability scheme, RCRA can pose an even greater threat, especially where damages are weak. Thus, it is important to focus on RCRA claims as early as possible—preferably before suit—when facts that can lead to such a claim become apparent and potential defenses can most effectively be put in motion.

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GASOLINE, DIESEL, AND OIL: RECENT CASE DEVELOPMENTS AND THE AVENUES FOR CLEANING UP SITES CONTAMINATED BY PETROLEUM

Gregory J. DeGulis and Lauryn Kitchen

Because of the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA) petroleum exclusion, plaintiffs historically relied upon RCRA's citizen suit provision to compel petroleum contamination cleanups. *See* 42 U.S.C. § 9601(14); *White Plains Hous. v. Getty Props. Corp.*, 13-CV-6282, 2014 U.S. Dist. LEXIS 174308 (S.D.N.Y. Dec. 16, 2014). This article reviews recent RCRA case law involving petroleum and also considers the use of Clean Water Act citizen suits to bolster the argument for cleanup.

Recent case law confirms that plaintiffs seeking to clean up petroleum-contaminated sites can still utilize Resource Conservation and Recovery Act (RCRA) citizen suits. 42 U.S.C. § 6972(a)(1)(B). The difficulty in establishing an imminent and substantial endangerment under RCRA, however, remains prevalent in the case law. *Clean Harbors Servs., Inc. v. Ill. Int'l.*, No.12-CV-7837, 2018 U.S. Dist. LEXIS 24583, at *26 (N.D. Ill. Feb. 15, 2018) (describing the imminent and substantial endangerment standard). A recent controversial Ninth Circuit opinion may also allow plaintiffs to seek injunctive relief under the Clean Water Act (CWA) citizen suit provision for petroleum-contaminated groundwater. *See Hawaii'i Wildlife Fund v. City of Maui*, No. 15-17447, 2018 U.S. App. LEXIS 2582 (9th Cir. Feb. 1, 2018).

RCRA

An RCRA civil action may be brought against past or present generators or owners or operators of a storage, treatment, or disposal facility for contributing solid or hazardous waste that may present an imminent and substantial endangerment to the environment. 42 U.S.C. § 6972(a)(1)(B); *Meghrig v. KFC W., Inc.*, 516 U.S. 479

(1996) (petroleum contamination under RCRA); *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 874 F.3d 1083 (9th Cir. 2017) (endangerment finding not dependent on RCRA statutory violation); *Town & Country Co-op, Inc. v. Akron Prods. Corp.*, 2012 U.S. Dist. LEXIS 66128 (N.D. Ohio May 11, 2012) (successor owner not liable under RCRA citizen suit).

Several cases have held that petroleum-contaminated soil is considered a "solid waste" under RCRA. *Del. Riverkeeper Network v. Soil Safe, Inc.*, No. 14-1349, 2017 U.S. Dist. LEXIS 101980, at 61 (D.N.J. June 30, 2017); *Little Hocking Water Ass'n v. E.I. du Pont De Nemours & Co.*, 91 F. Supp. 3d 940, 959–62 (S.D. Ohio 2015); *Agric. Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co.*, 878 F. Supp. 1091, 1097 (N.D. Ill. 1995); *Zands v. Nelson*, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991). Citizen suits can result in injunctive relief to order the defendant to clean up the petroleum-contaminated soil. Citizen suits may result in reasonable attorney's fees and expert witness expenses paid to the prevailing party. *See* 42 U.S.C. § 6972(e); *Clean Water Action v. Searles Recycling Corp.*, No. 16-12067, 2018 WL 457171 (D. Mass. Jan. 17, 2018).

Recently, a federal judge in New Jersey held that gasoline leaking out of an underground storage tank may be a discarded "solid waste" in violation of RCRA. *Soil Safe*, 2017 U.S. Dist. LEXIS 101980, at *74–75. Soil Safe, Inc. ("Soil Safe") operated a recycling center for Class B recyclable materials, permitting Soil Safe to recycle non-hazardous, petroleum-contaminated soil. *Id.* at *3, 15–16. Members of the Delaware Riverkeeper Network alleged the petroleum-contaminated soil had not completely been remediated and was contaminating portions of the Delaware River Watershed from the construction sites. *Id.* at *4–11.

The *Soil Safe* court held that when petroleum contamination "involve[s] intentionally deployed material [that is] permitted to migrate into the environment through neglectful cleanup or containment mechanisms," petroleum may be

considered discarded solid waste that may pose a substantial endangerment to the environment. *Id.* at *76.

Although the *Soil Safe* court recognized that petroleum contamination can be a solid waste, the court also held remediated soil that formerly contained petroleum is not solid waste because Safe Soil did not intend to dispose of petroleum-contaminated soil. *Id.* at *63. The *Soil Safe* court noted that petroleum-contaminated soil is capable of being remediated, as evidenced by the “extensive testing [Soil Safe] undertakes of its product” and “the careful procedure governing receipt of the soil to be recycled.” *Id.* at *67–68.

Ultimately, Delaware Riverkeeper also failed to show that an imminent and substantial endangerment existed because it could not demonstrate that recycled soil resulted in higher contamination than normal soil conditions. The difficulty in overcoming the imminent and substantial endangerment standard is the impetus to consider the CWA.

CWA

For years, the RCRA citizen suit action was the only federal action a plaintiff could bring to compel cleanup of petroleum-contaminated soil or groundwater. While a CWA citizen suit is not a typical avenue for petroleum-contaminated sites, a recent CWA Ninth Circuit case involving the city of Maui is worth considering as an option to seek injunctive relief. *Hawai’i Wildlife Fund*, 2018 U.S. App. LEXIS 2582; *see also*, *Waste Action Project v. Astro Auto Wrecking*, No. C15-0796, 2017 U.S. Dist. LEXIS 51591 (W.D. Wash. Apr. 4, 2017) (court awarded injunctive relief under CWA citizen suit for violation of NPDES permit by releasing petroleum).

Citizens may commence a CWA citizen suit against a person, entity, or the government who is alleged to be in violation of “an effluent standard or limitation” or “an order” pertaining to that limitation. 33 U.S.C. § 1365(a)(1)–(2).

To establish a CWA violation, a plaintiff must show defendant (1) discharged; (2) a pollutant; (3) into navigable waters; (4) from a “discernible, confined and discrete” conveyance, called a point source; (5) without a permit. 33 U.S.C. § 1311(a). If a court finds a defendant in violation of the CWA, the court may award the successful citizen reasonable attorney’s fees and expert witness expenses. 33 U.S.C. § 1365(d).

In *Hawai’i Wildlife Fund*, the Ninth District determined that Hawai’i Wildlife Fund demonstrated a Maui wastewater treatment plant was discharging pollutants into the Pacific Ocean, an obvious navigable water. 2018 U.S. App. LEXIS 2582, at *22–23. The treated effluent “collected” in wells, the point source in this case, and was discharging pollutants into the Pacific Ocean through groundwater. *Id.* at *15–16.

In other words, groundwater served as an indirect connection between the point source (wells) and the navigable water source. *See Id.*; *see also* *Yadkin Riverkeeper v. Duke Energy Carolinas*, 141 F. Supp. 3d 428 (M.D.N.C. 2015) (groundwater can serve as a conduit for point source discharge in violation of CWA). The Environmental Protection Agency recently requested comments on the issue of groundwater as a conduit to surface water impacts. 40 C.F.R. § 122.2 (2018). *But see*, *Ky. Waterways All. v. Ky. Utils. Co.*, No. 5:17-292, 2017 U.S. Dist. LEXIS 212329 (E.D. Ky. Dec. 28, 2017) (holding pollutants discharged into navigable waters through groundwater is not a CWA violation); *Red River Coal Co. v. Sierra Club*, 2018 U.S. Dist. LEXIS 8590 (W.D. Va. Jan. 18, 2018) (court denies motion to dismiss concerning allegation of groundwater discharges).

The *Hawai’i Wildlife Fund* holding means petroleum-contaminated sites that are discharging petroleum into navigable waters through groundwater are potentially violating the CWA. This could also include discharges of petroleum to sewer systems, which are also recognized as conduits for point source discharges. *See, e.g.*, *United States v. Velsicol Chem. Corp.*, 438 F.

Supp. 945, 946–47 (W.D. Tenn. 1976); *Foti v. City of Jamestown Bd. of Pub. Utils.*, No. 10-CV-575, 2011 U.S. Dist. LEXIS 119873, at *43–44 (W.D.N.Y. Aug. 15, 2011); *United States v. Boldt*, 929 F. 2d 35, 37 (1st Cir. 1991).

A recent District of South Carolina case highlights the difficulty in asserting a CWA violation for petroleum contamination from an underground storage tank (UST) release. In this case, a pipeline failure caused 369,000 gallons of petroleum product to contaminate the surrounding environment. *Upstate Forever v. Kinder Morgan Partners, L.P.*, 252 F. Supp. 3d 488, 490–91 (D.S.C. 2017). The leak was repaired within a few days. *Id.* As remediation was under way, the plaintiff filed a CWA citizen suit alleging two creeks and two wetlands had been impacted by petroleum product. *Id.* The plaintiff attempted to argue that the pipeline was a point source and the actual migration of the petroleum (“seeps, flows, fissures”) was a point source. *Id.* at 493.

The *Upstate Forever* court concluded the pipeline was not a point source because the discharge was not continuing. *Id.* at 494. Furthermore, the groundwater, in this case, was nonpoint source pollution because “diffuse, downgradient migration of pollutants . . . through the soil . . . [is] outside the purview of the [CWA].” *Id.* Nonpoint source pollution is “pollution . . . that arises from many

dispersed activities over large areas” that cannot be traced back to the polluter, making it difficult to regulate. *Ecological Rights Found. v. Pac. Gas. & Elec. Co.*, 713 F. 3d 502, 509 (9th Cir. 2013). According to the *Upstate Forever* court, a past leak that may at some point in the future pollute a navigable water source “would result in the CWA applying to every discharge into the soil and groundwater no matter its location.” 252 F. Supp. 3d at 494.

The *Upstate Forever* holding weakens the argument that the CWA could apply to a UST leak *if* it is removed and the leaked petroleum has ceased. *See also Conservation Law Found. v. Recycled Materials*, No. 16-12451, 2017 U.S. Dist. LEXIS 92803 (D. Mass. June 16, 2017).

As the legal community waits to see if the *Hawai’i Wildlife Fund* decision will be appealed to the U.S. Supreme Court, RCRA remains a solid avenue to establish a “solid waste” violation for petroleum-contaminated site cleanups. Based on the *Hawai’i Wildlife Fund* decision, petroleum-contaminated groundwater may, in unique circumstances, provide CWA relief for petroleum-contaminated sites.

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INGREDIENT COMMUNICATION AND TRANSPARENCY IN CLEANING PRODUCTS: A WIDENING LANDSCAPE

Douglas M. Troutman

Since the era of the seventies, requirements for more information about cleaning product ingredients have been part of the legislative and regulatory landscape. In just the past decade, stakeholders including industry, nongovernmental organizations, and consumer interest groups have engaged on many fronts. Changes in federal chemical management laws, interest in supply chain transparency, digital trends, and competition inside the industry have mainly driven these developments.

Retailers have watched these developments and many are looking at a hazard-based listing regime to eliminate certain chemical ingredients from products on their shelves. Some retailers are considering a sort of scorecard or similar evaluation scheme to achieve designated or desired goals. Others have focused on the removal of specific chemicals. Some others have designed and implemented fully scaled initiatives pushing ingredient disclosure on major items, with ingredient disclosure on all products in their inventory as a future goal.

In 2017 California legislation was signed into law requiring ingredient disclosure for consumer cleaning products, resetting the landscape yet again. New York is likely to continue its work on a similar approach through regulatory requirements. With all the engagement and recent developments, manufacturers up and down the supply chain are undoubtedly affected by requests for more information about exactly what is in a product. The reasons for these requests range from perceived reputational risks to consumer exposure interests.

Common to all these developments and interests, there continues to be a “push and pull” on prospective and progressive ingredient communication and transparency initiatives of

various types versus mandated right-to-know and disclosure requirements. In the course of trying to figure out, among other things, what type of information should be transmitted, how it should be done, and to what extent, a related question to the so-called push and pull aspect is why? Why communicate product ingredients? Is the basis for the information transmission grounded in a risk-based analysis for product ingredient information recognizing exposure and use considerations? Or, is it a hazard-based evaluation grounded in mandated disclosure that could perhaps lead to eventually no level of the ingredient being subject to any permissive use at all?

Industry has provided active leadership on these questions and more. In the mid 2000s, the cleaning products industry developed a consumer-focused ingredient communication initiative for four major product categories: air care, automotive care, cleaning, and polishes and floor maintenance products. In 2010, the industry rolled out a proactive voluntary program creating a uniform system for providing ingredient information to consumers in a meaningful and easy-to-understand way. The initiative largely followed the risk-based U.S. labeling conventions that consumers are familiar with for food, drugs, and cosmetics, listing ingredients present at concentrations greater than 1 percent on the product label. These listings were provided electronically, via a toll-free telephone number, or through some other non-electronic means. The initiative balanced confidential business information (CBI) needs through the use of functional class descriptors so that manufacturers could continue to innovate. In 2017, the industry went further and publicly identified available hazard data through an inventory of 582 ingredients used in consumer cleaning products sold in the United States (*available at* www.cleaninginstitute.org/CPISI/).

Notwithstanding industry efforts, several states have at some point sought cleaning product ingredient disclosure, the genesis generally starting with phosphate content in dish detergents. Over time some of these state measures have developed

into right-to-know disclosure requirements, but these state activities have been spotty and uneven. For instance, on the regulatory front, the New York State Department of Environmental Conservation (DEC) currently is pursuing guidance on household cleansing product information disclosure. This regulatory move is pursuant to DEC's interpretation of seventies-era requirements originally governing disclosure of phosphate content in cleaning products (*see* Environmental Conservation Law Article 35 and New York Compilation of Codes, Rules and Regulations part 659). With a nod to the modern era, it is anticipated that any final DEC disclosure guidelines will rely on information via manufacturers' websites. Massachusetts, on the other hand, repealed its phosphate disclosure regulation because it was found to be unnecessary in light of voluntary industry activity (that is likely to expand) in this arena (*see* 105 Code of Massachusetts Regulations 680.000: Phosphates in Household Cleaning Products, which contained an ingredient disclosure provision).

In addition to New York and Massachusetts, several other states have their own legislative proposal regarding phosphate content and/or ingredient disclosure for cleaning products. Oregon considered, but never acted on, a cleaning products ingredient disclosure legislative measure in 2013 (H.B. 2937, referred to Oregon House Committee on Health Care). New Jersey has an ingredient labeling and phosphate content bill currently pending (A. 624 Wolfe; and S. 285 Holzapfel). Of interest, but more broadly, New Jersey passed a right-to-know statute in 2013 requiring disclosure of primary ingredients above certain concentrations in the workplace (New Jersey Worker and Community Right to Know Act (N.J.S.A. 34:5A-1 et seq.)). Current 2018 legislative proposals also exist in Maryland (H.B. 1080; died at the end of session) and Minnesota (H.F. 2647). Federally, Representative Raul Ruiz (D-CA-36) was the sole sponsor of the Cleaning Product Labeling Act of 2017 (H.R. 2728), which was referred to the Subcommittee on Digital Commerce and Consumer Protection in June 2017. The measure

is substantively similar to prior congressional introductions directing the U.S. Consumer Product Safety Commission to provide ingredient information on cleaning product labels.

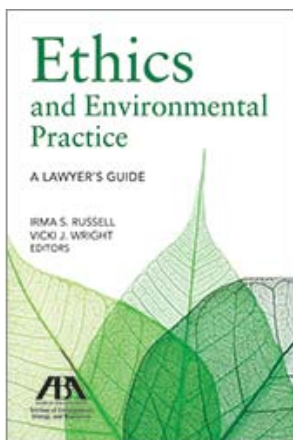
Fast forward to October 15, 2017, when California Governor Jerry Brown signed California Senate Bill 258, the Cleaning Product Right to Know Act of 2017, http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB258. For the first time in law, designated cleaning products are now subject to ingredient transparency requirements of cosmetics and food products. The new law requires manufacturers of designated products, as defined by the law, to disclose certain chemical ingredients on the manufacturer's website by 2020, or on the product label by 2021. Designated products are "a finished product that is an air care product, automotive product, general cleaning product, or a polish or floor maintenance product used primarily for janitorial, domestic, or institutional cleaning purposes." Cal. Health & Safety Code § 108952(f). Exceptions apply, such as referencing that the ingredient information is available on a website, or providing a toll-free phone number.

The thrust of voluntary industry initiative focuses on risk-based principles, which is consistent and aligned with much of the federal approaches on chemical management. For example, manufacturers of consumer and institutional products subject to the Federal Hazardous Substances Act (FHSA) are required to provide certain warnings about the principal hazard and recommended emergency care, but FHSA does not require the disclosure of a list of chemical ingredients. However, under the new California law, for the first time intentionally added chemicals that are included on designated or hazard-based lists or, certain fragrance allergens designed under EU regulations, must now be disclosed (chemicals on the so-called Proposition 65 list published by California are not required until January 1, 2023). Notably, the California law does not designate an agency to administer provisions or to consider changes through notice and comment rulemaking.

Under the new California law, protected CBI includes any intentionally added ingredient that the U.S. Environmental Protection Agency has approved for inclusion on the Toxic Substances Control Act (TSCA) Confidential Inventory, or a chemical ingredient claimed under the Uniform Trade Secrets Act. This inclusion is a departure from functional class descriptors under the voluntary industry initiatives. Balancing CBI considerations with demands for disclosure will continue to be a key element in future ingredient communication and transparency efforts.

While the trend toward ingredient transparency and communication is real and growing, continued challenges remain for consumer products industries to innovate, quickly get sustainable products to market, and protect intellectual capital. A simple reliance on hazard-based lists is likely to forgo the important work of a focused opportunity for notice and comment rulemaking on ingredients or chemical lists. A reliance on 'look no further' hazard-based lists may actually impair innovation in sustainable chemistries and products. Therefore, incentivizing innovation through CBI protections and a risk-based system is paramount.

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FAST FASHION TRANSFORMING TO A GREEN STYLE

Elaine (Wuping) Ye

Unless you are familiar with fashion production processes, it may hardly cross your mind that everyday garments can be a major source of pollution to the environment. To provide affordable and continued cycles of seasonal fashion designs in short periods, fast fashion companies replace expensive natural materials, such as cotton, wools, and cashmere, with synthetic substitutes. Fast fashion companies tend to adopt nonsustainable production methods to drive down costs and keep up with the production demand. These production methods and the use of synthetic substitutes have become some of the largest polluters to the environment where upstream manufacturing and downstream disposals are located.

In 2017, several major news media reported that multiple U.S. and European fast fashion brands had been purchasing viscose fiber from factories in Asian countries. Tansy Hoskins, *H&M, Zara and Marks & Spencer Linked to Polluting Viscose Factories in Asia*, THE GUARDIAN, June 13, 2017, 8:24 AM, <https://www.theguardian.com/sustainable-business/2017/jun/13/hm-zara-marks-spencer-linked-polluting-viscose-factories-asia-fashion>. Viscose is a cheap and durable alternative to cotton. Even though viscose is considered more sustainable because it is made from bamboos that are fast-growing plants, the production of viscose is chemically intensive as it involves highly volatile and flammable substances that are then exposed to residents living near manufacturing plants. Other non-environment-friendly materials and production methods, such as use of acrylics and improper disposing of apparel waste, are also widely used in the fast fashion industry. Reports indicate that investigators found severe environmental damage, including water pollution from untreated contaminated waste surrounding factories, and air pollution in ten manufacturing sites in China, India, and Indonesia. *Id.*

Both the apparel manufacturing and importing countries like China, India, and Indonesia have developed some forms of regulations to reduce pollution including air emission and wastewater discharge limits on manufacturing plants and chemical use restrictions in apparel imported to the United States and the European Union. These existing regulations, however, do not directly press the fast fashion industry to clean up their manufacturing sites and production processes, or to provide any apparel disposal solutions. In fact, the consumer awareness of sustainability has played a more effective role in gradually changing the industry's perspective on environmental and ethical practices. Thus, to promote green practices in the fast fashion industry, efforts should be more focused on encouraging consumers to choose greener fashion brands to motivate the industrial green transformation through public promotion of the sustainability concept and policy support in importing countries.

Regulatory Incentives

Mandatory environmental regulations enforced on producers and importers of apparel are expected to drive companies to engage in sustainable practices in their businesses. For instance, at the upstream of apparel production, the Chinese government has strengthened its control on factories' air emissions and wastewater discharge under China's environmental regulations derived from China's 13th Five-Year Plan. *See* Outline of the 13th Five-Year Plan for the National Economic and Social Development (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2016, effective Mar. 16, 2016) (CLI.1.266682) (China). The enforcement is strictly implemented across industries, including textile manufacturing and dyeing. As to downstream disposal and recycling, China has been gradually implementing recycle and reutilization programs for used apparel and textile products under the Circular Economy Promotion Law of China. Circular Economy Promotion Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 8, 2008, effective Jan. 1,

2009), art. 15 (CLI.1.107971) (China). However, the compliance obligations are limited to producers within China and are too attenuated to bind their foreign parent companies directly because the fashion companies may not have control over the details of production. The nominal impact on fashion companies abroad is through sanctions on production of Chinese factories. The cost of sanctions may be partially passed on to the companies, but the impact is remote.

Products regulations are also enforced in apparel importing countries. For instance, importing apparel into the United States pursuant to the Customs and Border Protection (CBP) and Toxic Substance Control Act (TSCA) requires importers to ensure statutory markings are in place showing the content of the apparel and certifying the content is free from toxic chemicals that might be used in processing the textiles. *See Marking Requirement for Wearing Apparel*, U.S. Customs and Border Protection (2008), https://www.cbp.gov/sites/default/files/assets/documents/2016-Apr/icp039_3.pdf; Karen Reczek & Lisa M. Benson, *A Guide to United States Apparel and Household Textile Compliance Requirements*, Nat'l Inst. of Standards & Tech. (June 28, 2016), <https://www.nist.gov/publications/guide-united-states-apparel-and-household-textiles-compliance-requirements>. In importing countries like the EU, certain chemical substances used in apparel production are prohibited or restricted under the Restriction of Hazardous Substances Directive (RoHS) and equivalent chemical restrictions. Such regulations may motivate industry to choose environment-friendly materials and dyes used in apparel imported to the regulated countries, but these regulations may not have direct environmental impacts in manufacturing countries.

Environmental risks not only arise in the manufacturing process, but also in the disposal of the apparel waste. Most of the garment wastes are shipped to waste-importing countries, which inevitably become a source of pollution to soil and water in the waste-importing countries. In response to the waste pollution and to the shock of

waste-exporting countries, China, one of the largest waste importers, adopted a law banning all foreign apparel waste in 2017. Christine Cole, *China Bans Foreign Waste—But What Will Happen to the World's Recycling?* SCI. AM., Oct. 21, 2017, <https://www.scientificamerican.com/article/china-bans-foreign-waste-but-what-will-happen-to-the-worlds-recycling/>. Such a drastic change may force waste-exporting countries to find alternatives for apparel disposal and turn to the fashion companies for a solution. As there has been no policy development in response to the waste import ban, it is uncertain whether, in the future, the fast fashion industry will be required to take back and recycle the apparel products it sells.

Social Responsibilities and Consumer Awareness

The mandatory laws on sustainable fashion production are far from sufficient. Fortunately, increased consumer awareness and change of market dynamics have become the major drivers for the fast fashion industry to transform to sustainable practices. Consumers' sustainability awareness in importing countries has created a sense of social responsibility for companies to fulfill their corporate duties of protecting the environment in production and apparel waste disposal.

According to a survey conducted by the Harvard Business Review, consumers have rapidly become more concerned about sustainability. Mark Esposito, *Companies Are Working with Consumers to Reduce Waste*, HARV. BUS. REV., June 7, 2017, <https://hbr.org/2016/06/companies-are-working-with-consumers-to-reduce-waste>. When media exposed the polluting apparel manufacturing process, some of the fast fashion companies began to take initiatives to reduce the negative environmental implications in the manufacturing process. Linda Greer, *Top Clothing Brands Linked to Water Pollution Scandal in China*, China Dialogue (Sept. 10, 2012), <https://www.chinadialogue.net/blog/5203-Top-clothing-brands-linked-to-water-pollution-scandal-in-China/en>. In

addition, ethically and environmentally focused fashion start-ups have emerged in the past few years and quickly attracted consumers who are very conscious of the practice behind brand names. To avoid the risks of losing customers, polluting companies started special lines to stay competitive with rising fashion brands focused on ethical and environmental practice. *Id.* The public exposure of unsustainable practice and competition with environmental start-ups have motivated so-called polluting fashion companies to transform their business model toward sustainability.

Government-recognized programs and sustainability policy also contribute to the formation of consumer awareness, which in turn elevates companies' sense of social responsibility. For example, the Singapore government initiated the 3Rs (Reduce, Reuse, Recycle) Program giving recognition to companies and retailers who promote sustainable practices. *See Guidebook on Waste Minimisation for Industries*, Singapore National Environment Agency, <http://www.nea.gov.sg/docs/default-source/training-knowledge-hub/guidebook-on-waste-minimisation-for-industries.pdf?sfvrsn=2>.

To be sure, consumers can effectively incentivize the industry to be greener through social influence and recognition of sustainability. Therefore, consumer awareness will likely remain a key component to the transformation of the fast fashion industry to sustainable practices while laws in both apparel manufacturing and importing countries are unable to address every environmental aspect of the fast fashion industry. In light of consumer power, more companies will, inevitably, factor ethics and environmental costs into their business models. However, a more developed and uniform legal regimen with associated cost of compliance and investment in sustainable practices will drive more long-term and widespread benefits to the environment, consumers, and the fashion industry at large.

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SUSPENSION AND DEBARMENT: EPA AS A BALANCED FEDERAL PROCUREMENT GATEKEEPER

Elias Ancharski

The U.S. Environmental Protection Agency (EPA), like other federal offices, has the power to determine the fate of many contractors who work or wish to do business with or receive financial assistance from the federal government. Federal contracting includes a wide variety of activities such as contracts to repair bridges, permits to discharge pollutants into a river, and participation in renewable fuel incentive programs. To protect the integrity of these programs, the federal government has established suspension and debarment authorities under the Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 9.400 and the Nonprocurement Common Rule (NCR), 2 C.F.R. part 180.

Suspension and debarment are administrative tools used to protect the federal government from doing business with contractors that have been determined to not be “presently responsible.” “Present responsibility,” arguably the most important phrase in suspension and debarment, is used to evaluate the conduct of contractors wishing to do business with the government, for example, through contracts, subcontracts, and certain types of federal assistance programs. Comm. on Debarment & Suspension, *The Practitioners Guide to Suspension and Debarment* 53, 53–55 (3d ed. 2002).

Poor performance of a contract can lead to suspension and debarment, as well as violations of federal law or business integrity issues. Some shared causes for suspension or debarment are commission of fraud, embezzlement, theft, making false statements, and violating federal criminal law; willful, or a history of, failure to perform; and any other cause that affects present responsibility. Fed. Acquisition Inst., *Suspension & Debarment: The Fundamentals*, FAI Media Library, accessed Apr. 4, 2018, https://www.fai.gov/media_library/items/show/68.

While suspensions and debarments are similar in some respects, there are key differences. For instance, length of time between suspension and debarment varies widely. The government may impose a suspension “when it has been determined that immediate action is necessary to protect the government’s interest” or “to protect the public interest.” 2 C.F.R. § 180.700(c); 48 C.F.R. § 9.407-1(b)(1). Suspensions are temporary in effect and imposed pending the completion of an investigation or legal proceedings. *Id.* On the other hand, debarment is a final agency action, usually for a term of three years, and is imposed following the conclusion of agency proceedings. *Id.* Additionally, the standards of proof differ: suspension is based upon adequate evidence, usually an indictment, whereas debarment is based upon a preponderance of evidence, usually a conviction. *Id.*

Notably, neither suspension nor debarment is designed to be punitive. They are useful vehicles to protect the public interest by ensuring the integrity of federal government programs. COMM. ON DEBARMENT & SUSPENSION, *THE PRACTITIONERS GUIDE TO SUSPENSION AND DEBARMENT* 53, 53–55 (3d ed. 2002). Specific agencies have suspension and debarment offices, but the real power of suspension and debarment lies with the reciprocal effect of suspensions and debarment across the federal government. 48 C.F.R. § 9.401. This means that if one individual agency determines a contractor, business, or individual, is not “presently responsible,” that agency has the power to exclude that contractor from doing business with any other government entity. *Id.* Essentially, “bad contractors” can be excluded from doing business with the entire federal government.

Any environmental misconduct that would lead the EPA to conclude that a contractor is not presently responsible could result in a ban from receiving funds from any federal government agency, regardless of history or standing with that agency. 2 C.F.R. § 1532. For example, in the wake of the BP Deepwater Horizon disaster, initially the EPA

placed BP on “temporary suspension,” precluding BP from receiving government contracts. Abraham Lustgarten, *EPA Officials Weigh Sanctions Against BP’s U.S. Operations*, PROPUBLICA, Nov. 28, 2012, <https://www.propublica.org/article/epa-officials-weighing-sanctions-against-bps-us-operations>. The BP suspension had the potential to and did cost the company billions while suspending operations on federally controlled lands. *Id.* After several years, the EPA Suspension and Debarment Office and BP were able to reach an administrative agreement that would allow the company to bid for government contracts by agreeing to follow “a set of safety and operations, ethics and compliance, and corporate governance requirements. . . .” BP Reaches Administrative Agreement with EPA Resolving Suspension and Debarment, BP (Mar. 13, 2014), <https://www.bp.com/en/global/corporate/media/press-releases/bp-reaches-administrative-agreement-with-epa.html>.

The EPA Suspension and Debarment Program, unlike some other federal agencies, is separated into the Suspension and Debarment Division and the Suspension and Debarment Official’s Office. A multi-level system allows for two-tiered review, promoting unbiased and fair decision-making throughout the process. Once the EPA determines there is a cause for suspension or debarment, the contractor is sent a notice of suspension regarding the debarment consideration, presenting the reasons and causes for the proposed debarment, and explaining the effects of debarment. COMM. ON DEBARMENT & SUSPENSION, THE PRACTITIONER’S GUIDE TO SUSPENSION AND DEBARMENT 73 (3d ed. 2002). Under the FAR and NCR, the contractor on notice has the opportunity to present evidence of present responsibility and plead that suspension and debarment are not necessary or in the public interest. *Id.* at 77. The agency official makes a final decision regarding the contractor’s “present responsibility” after careful review of the administrative record and any additional findings. *Id.* at 84–85. Final decisions are appealable by the suspended or debarred contractor and reversible “if found to have been ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Id.* at 94.

In comparison to EPA’s multi-level review system, the Suspension and Debarment Official of the Department of Transportation Federal Highway Administration (FHWA), as well as other agencies, follows a single-level system of review. The Suspending and Debarring Official, sometimes called the Nonprocurement or Procurement SDO, ensures a final action is taken regarding each specific referral. Fed. Highway Admin., Dep’t of Transport., *Order: FHWA Suspension and Debarment Process*. Referrals to the Federal Highway Administration come from the Office of the Inspector General or a FHWA Division Office. *Id.* The SDO follows the notice procedures by notifying the person or firm of potential suspension or debarment actions and providing 30 calendar days to contest the action. *Id.* Following this contest, if requested, the SDO issues a final decision regarding suspension and debarment. *Id.*

Additionally, the EPA Suspension and Debarment Program is unique due to provisions contained in section 306 of the Clean Water Act (CWA) and section 508 of the Clean Air Act (CAA). COMM. ON DEBARMENT & SUSPENSION, THE PRACTITIONERS GUIDE at 15. All federal agencies have the option to initiate discretionary suspension and debarment actions but EPA has to follow special provisions found within the CWA and CAA to initiate statutory or automatic debarment triggers when a contractor violates the corresponding act. This automatic debarment is site-specific, meaning that only the convicted contractor is estopped from doing work with federal funds at that site, unlike the contractor or company-specific “blanket” debarment. *Id.* Other agencies, for example, the Secretary of Health and Human Services, retain provisions that automatically exclude individuals and entities from participation in any federal programs based on certain conditions. 42 U.S.C. § 1320a-7(a).

While EPA’s core mission is to “protect human health and the environment,” U.S. Environmental Protection Agency, *About EPA*, <https://www.epa.gov/aboutepa> (last updated May 22, 2017), the agency is also responsible for protecting the

integrity of federal procurement and assistance programs. Suspension and debarment reflects the strong desire of the federal government to collaborate with responsible and ethical contractors. Violations of rules and regulations can have far-reaching consequences that extend to all sectors and departments of government. EPA is uniquely positioned to make these difficult

decisions for the entire government in a balanced way through a multi-tiered approach. Such positioning demonstrates why Suspension and Debarment is a crucial EPA function.

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A photograph of the Marriott Marquis San Diego Marina at dusk. The building is a curved, modern skyscraper with many windows lit up, reflecting the twilight sky. In the foreground, there is a marina with several boats docked. The image is framed by vertical purple and green bars on the left and right sides.

Marriott Marquis San Diego Marina
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