Environmental Litigation and Toxic Torts Committee Newsletter

Vol. 10, No. 1 December 2007

MESSAGE FROM THE CHAIR

Peter Gray
McKenna, Long and Aldridge
Washington, D.C.
pgray@mckennalong.com

EPA enforcement appears to be down by most objective standards. According to a study by the Environmental Integrity Project, EPA enforcement actions from 2002-2006 fell on four out of five key statistics compared with actions taken from 1996 through 2000 under former President Clinton. The number of cases filed are down 75 percent; civil penalties declined by 24 percent; criminal fines are down by 38 percent; and criminal investigations decreased by 23 percent. The "value of settlements" statistic is the only one that didn't decline. A related environmental enforcement trend, however, has gone largely unreported, namely, that states and individuals appear to have stepped up the pace of enforcement during the same period in which EPA enforcement declined. In this issue of the Environmental Litigation and Toxic Tort (ELTT) Newsletter, authors Ed Haden, Thomas Casey, David Pope, Gil Rogers, and others, explore various aspects of this emerging trend.

Another related trend explored in this newsletter is the emergence of states and private citizens as the agents for climate change through litigation. Before the Supreme Court's ruling in *Massachusetts v. EPA*, 549 U.S. 1438 (2007), EPA took the position that it did not have authority to regulate carbon dioxide as a pollutant under the Clean Air Act. States and private citizens stepped into that regulatory vacuum, attempting to force action on the issue through litigation. Authors Karl Moor, Carlos Zelaya, and Mary Ellen Hogan examine the climate change litigation pursued by states and private citizens.

Climate change litigation and related topics also are prominently featured on the agenda for the Section's 37th Annual Conference on Environmental Law, which is being held March 13-15, 2008, in scenic Keystone, Colorado. Three breakout sessions concern climate change: (1) "The Rest of the Melting Iceberg: Courts and Climate, Other than *Massachusetts v. EPA*"; (2) "Energy Options in a Changing Climate: Assessing the Environmental Footprints of Renewables and New Nukes"; and (3) "Climate Change Carbon Trading and Accounting in the New World: What the Coming (New) Federal Legislation Means for You and Your Clients" (in which Yours Truly is a panelist). In addition to getting the latest thinking on global warming and other "hot" topics, the Keystone conference provides terrific opportunities to connect with your colleagues on the committee and to get involved. We gather at our Committee Roundtable to trade notes on cases, get the latest news, or discover a hot issue that could turn into a timely "quick teleconference," a newsletter article, or a program for one of the Section's meetings.

If you cannot attend, but nevertheless would like to get more connected to your peers, our committee is a platform for: (1) writing articles or case law updates for newsletter, (2) hosting a brown bag lunch in your

Environmental Litigation and Toxic Torts Committee Newsletter
Vol. 10, No. 1, December 2007
Mike Freeman, Editor

In this issue:

This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.

community on a "hot topic," (3) taking your dialogue nationwide by making it an ABA Quick Teleconference on a hot topic, (4) proposing an interesting public service project, or (5) working with our vice chairs to coordinate a program (pitch a proposal, help find speakers). We are always open to hearing from you—emails among members or postings to our committee list serve (environ-toxic_torts@mail.abanet.org) keep our committee in touch.

Our committee exists to serve its members' professional needs. If you have a suggestion or idea about how we might better accomplish that goal, please send me an e-mail. I look forward to hearing from you.

MESSAGE FROM THE VICE CHAIR, NEWSLETTER

Mike Freeman
Balch & Bingham
Birmingham, Alabama
mfreeman@balch.com

The Environmental Litigation and Toxic Tort Committee is one of the Section's largest and fastest growing committees, with over 800 members. This is not surprising with the explosion seen recently in environmental and toxic tort-related litigation. While federal enforcement actions may be down, that is not the case in other areas where more and more frequently litigation is being used to stop development, recover damages and as a tool for change.

As outlined by Peter Gray, in his "Message from the Chair," this volume of our newsletter focuses on the use of litigation as a weapon for change. As editor, I want to thank the many authors that made this newsletter possible by contributing their time, energy, and thoughts in the form of articles. I think you will enjoy and find useful their insight.

Your input and feedback is vitally important in ensuring that future newsletters address topics that most concern to you. Please let me know how we are doing

and what we could do to improve the newsletter. You may send your comments and suggestions to me at the e-mail address above. I look forward to hearing from you.

THE IMPORTANT, YET LIMITED, ROLE OF STATE ENVIRONMENTAL ACTIONS

Ed R. Haden
Thomas L. Casey, III
Balch & Bingham
Birmingham, Alabama
ehaden@balch.com

In the Clear Air Act (CAA) and the Clean Water Act (CWA), Congress created a vital role for states to play in achieving national goals through state development and enforcement of environmental regulations. These acts expressly provide for states to promulgate their own regulations, for the Environmental Protection Agency (EPA) to approve those regulations, and for states to bring enforcement actions to stop violations of their regulations within their borders. Such actions are important to protecting the environment and to fulfilling the express role provided to the states by Congress. Recently, however, a few states have filed lawsuits outside the parameters of this federal-state legal structure seeking remedies for global warming and interstate air and water pollution based on common law nuisance and trespass theories. In most of these cases, the relief sought extends far beyond the borders of the plaintiff states, could regulate commercial activity conducted in other states, and could even contradict EPA-approved state regulations in other states. Are such extraordinary actions appropriate in our legal system? No.

Since the earliest days of our nation, we have recognized that the mere assertion of a "right" does not mean that the particular legal remedy sought is available. The most famous example of this principle is *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). President John Adams had appointed William Marbury as a justice of the peace for the District of Columbia, but Secretary of State James Madison refused to deliver Marbury's written commission. *Id.* at 155. Chief Justice John Marshall, writing for the Supreme Court, concluded that Marbury had a common law right to have his commission delivered. *Id.* at 163 (citing III William Blackstone, Commentaries on the Laws of England, p. 23.) The particular remedy he sought, however—mandamus under the original jurisdiction of the Supreme Court as provided by the Judiciary Act of 1789 to compel Madison to deliver the commission—was prohibited by Article III of the Constitution. When faced with a choice between providing a remedy authorized by common law or remaining true to the Constitution, Marshall held "that a law repugnant to the constitution is void." *Id.* at 180. While there was a general right, the legal remedy sought was not available under our Constitution.

I. The Constitutional and Statutory Legal Structure

The Framers of our Constitution recognized that a legal structure of checks and balances was the best protection against the human tendency to arrogate power. *See* Federalist No. 51, at 322-23 (Madison) (Clinton Rossiter ed. 1961). In the context of economic regulation, experience under the Articles of Confederation taught that states competing against one another for commercial advantage and protection of local industry was counterproductive to the nation as a whole. The states thus ceded the "Powers . . . To regulate Commerce . . . among the several States" to the national Congress. *See* U.S. Const. art. I, § 8, cl. 3. The Supreme Court has recognized that the dormant aspect of the Commerce Clause precludes actions by one state to regulate the private commerce conducted in other states. *See generally, e.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852); *Baldwin v. G.A.F. Selig, Inc.*, 294 U.S. 511 (1935). Similarly, the Constitution's Supremacy Clause provides that where federal statute or regulation has occupied the field or conflicts with a state cause of action, the federal law wins. U.S. Const. art. VI, cl. 2. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 881 (2000).

Instead of leaving the entire power of regulating commercial activities that produce pollutants to the

federal government or enacting a statute to cede all regulatory power back to the states, Congress structured the CAA and CWA to provide an important role for states in promulgating and enforcing environmental regulations. *See, e.g., Nat'l Parks & Conservation Ass'n v. TVA*, 502 F.3d 1316, 2007 U.S. App. LEXIS 23257, at *3 (11th Cir. 2007); *New York v. United States*, 505 U.S. 144, 167 (1992). This "cooperative federalism" structure recognizes that states are more familiar with local interests and conditions and that the federal government is better suited to balance national interests. Under the CAA, for example, EPA develops National Ambient Air Quality Standards for various pollutants, and then each state formulates a State Implementation Plan (SIP) which limits emissions for specific sources of pollution. *See* 42 U.S.C. §§ 7401(b)(1), 7409, 7410; *Nat'l Parks & Conservation Ass'n*, 2007 U.S. App. LEXIS 23257, at *3. EPA must approve a SIP that adequately provides for the implementation, maintenance, and enforcement of those national standards. *See* 42 U.S.C. §§ 7401(b)(1), 7409, 7410. Similarly, under the CWA, states may implement their own CWA discharge permitting program after review and approval by EPA. *See* 33 U.S.C. § 1342(b). EPA must approve any such program as long as it meets the specific requirements of the act. *Id.*

This division of responsibility between the federal government and the tates also ensures that regulations enforced by an agency affect those citizens whose elected representatives appoint members to and oversee that agency. While EPA's job is to promulgate national air quality standards for specific pollutants, the states are responsible for deciding how to achieve those standards within their own borders through state regulations, which must include schedules, compliance timetables, and emission limitations for specific sources of emissions. So long as the "ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air," a state is "at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. National Res. Def. Counsel, Inc.*, 421 U.S. 60, 78-79 (1975). With limited exceptions, standards that effect specific sources of pollution are therefore set by the states first, with approval of EPA to ensure consistency with national standards. While this system is often slow and can be frustrating, it ensures no regulation without representation.

II. Practical Application to Environmental Cases

These principles of federal constitutional and statutory law are not just grand theories to be mused upon in law school seminars. They have practical binding effects in real cases.

When a state environmental agency acts to enforce its own EPA-approved air or water protection regulations, it acts consistently with the national standards. The nation then benefits from the state agency's superior familiarity with sources in its state and its ability to act quickly. In fact, most environmental monitoring and enforcement occurs at the state and local level. States (and state agencies) are responsible for over 85 percent of all environmental enforcement actions. *See* Jonathan H. Adler, *Judicial Federalism & the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 454 n.524 (Jan. 2005). The State of Texas alone performed twice as many inspections as EPA, 41,803 to 18,530, respectively, in 1997. *Id.*

When a state acts to circumvent the cooperative federalism structure created by Congress and implemented by EPA in an attempt to create a right for which the federal legal structure provides no remedy, the system breaks down in several ways. For example, in *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), on appeal to the Second Circuit, eight States brought a common law public nuisance claim to obtain a remedy for global warming, capping CO_2 emissions from electric power plants in several other States and mandating percentage reductions in such emissions over a ten-year period.

This case demonstrates the difficulties facing a court when it is asked <u>not</u> to enforce an EPA-approved state pollution regulation, but rather to create a remedy to match an asserted right. First, judges are not suited to be interstate environmental regulators. They do not have large staffs of researchers and do not hold

hearings at which scientists from across the political spectrum, as opposed to the parties' experts, testify. *See, e.g., Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982); *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 331 (1978) (Powell, J., dissenting). Similarly, judges generally do not, like congressmen and Senators, share decision-making responsibility with other judges from other states impacted. Such rulemaking, which is designed to take competing economic and environmental interests into account, is inherently legislative in nature. *See LeFevre v. Sec'y, Dep't of Veterans Affairs*, 66 F.3d 1191, 1196 (Fed. Cir. 1995); *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 335 (2002).

Second, should a judge sitting in New York impose a consent decree on a power company located in Ohio to reduce air pollutant emissions to a level lower than the EPA-approved SIP for Ohio? It would seem that in addition to preemption concerns, *see, e.g., Geie*r, 529 U.S. at 881, the lack of uniformity that would result in judges setting air quality standards at various levels would not serve to promote National Ambient Air Quality Standards based on the best scientific expertise the country has to offer.

Third, what type of relief would a federal judge provide in a global warming case? How is a judge to determine what level should be set for CO_2 emissions and whether the minor contribution to global CO_2 emissions made by the defendants in his case will contribute to the increase in the level of the Atlantic Ocean? *See Massachusetts v. EPA*, 127 S. Ct. 1438, 1456 (2007) (holding that the State of Massachusetts had standing to challenge EPA's decision not to regulate CO_2 in response to global warming, and stating: "These rising seas have already begun to swallow Massachusetts' coastal land").

Moreover, can any remedy the judge provides solve the global warming problem? Should there be a patchwork of consent decrees in lieu of uniform national and international standards? A judge sitting in North Carolina, for example, does not have the power to enjoin industrial plants in Beijing and Calcutta from producing ever increasing amounts of CO_2. Such international limitations come from treaties. *See, e.g.*, Kyoto Protocol to the United Nations Framework Convention on Climate Change (Dec. 11, 1997).

Indeed, the district court in *Connecticut*, 406 F. Supp. 2d at 272, found that the "political question" doctrine barred a judicial decision in the matter. *See Nixon v. United States*, 506 U.S. 224 (1993); *Baker v. Carr*, 369 U.S. 186, 198 (1962). Specifically, the district court found that it could not fix CO_2 emission and reduction levels over a ten-year period without Congress or EPA first making an initial policy determination on what such levels should be. The district court explained:

> Such relief would, at a minimum, require this Court to: (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants; (2) determine the appropriate percentage reduction to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security-all without an "initial policy determination" having been made by the elected branches.

Connecticut, 406 F. Supp. 2d at 272-73.

If Congress or EPA does not move quickly towards finding a solution to global warming, there could be a reason beyond a lack of concern or diligence. It could be that the proposed solutions (e.g., capping CO_2 emissions) do not make scientific, economic, or regulatory sense. The proposed cost to the economy of all the states (in terms of higher energy costs and lost jobs) may be viewed as more important than the insignificant or speculative benefit to the environmental interests of just some states.

Building consensus between states, as congressional approval of a bill requires, may be slower, but it will produce better national standards than a patch-work

of uncoordinated consent decrees. For example, EPA's Clear Air Interstate Rule successfully regulated problems caused by air pollutant emissions in certain upwind states to protect East Coast states. *See* 70 Fed. Reg. 59,581 (Oct. 12, 2005). After taking into consideration the competing interests of various states, EPA promulgated standards to reduce sulfur dioxide and nitrous oxides and covers twenty-eight eastern states and the District of Columbia. *See* EPA, Basic Facts on CAIR, *available at* www.epa.gov/interstateairquality/basic.html. The problem was interstate. The solution was federal.

III. Conclusion

The carefully constructed system of cooperative environmental federalism established by Congress provides an important role for states to enforce air and water pollution statutes and regulations. When acting consistent with this constitutional and statutory legal structure, state actions ensure prompt compliance with and support of national air and water quality standards. When acting outside this legal structure, however, a state lawsuit may impose a legislative task upon a judge, disregard the legislative process of consideration of all competing interests, and result in inconsistent and ad hoc pollution standards.

The federal democratic regulatory process is slow, but it is uniform and is accountable to those citizens affected by the regulations. While gaps in federal rule-making and enforcement may occur, one should consider that a court may not be able to fill a square regulatory gap with a round common law claim.

PICKING UP THE SLACK: IN DEFENSE OF STATE ENVIRONMENTAL ENFORCEMENT ACTIONS

David H. Pope
Gilbert B. Rogers
Adam M. Kron
Southern Environmental Law Center
Atlanta, Georgia
dpope@selcga.org

There has been increased focus on states' efforts toward environmental protection via enforcement actions under federal environmental statutes and the common law. One reason for this increased focus is that, though environmental enforcement actions by states are not new, the intended aim of many of these suits—global warming—is a recent and hot topic. Another reason for this increased focus is that some of the issues addressed in these suits, like global warming, interstate air pollution, and large-scale water pollution, are seemingly bigger environmental issues than states have addressed in the past.

Accordingly, some in the legal community have raised questions as to the propriety of these state enforcement actions: Do they make sense? Is it appropriate for states to take such a role in environmental issues that cut across state lines? Should the states leave these interstate problems to federal enforcement and legislation? In this article, we contend that these state actions are appropriate and even necessary. In an ideal world, the federal government would diligently enforce its environmental laws, thereby protecting states from harm at the hands of large-scale or interstate pollution. For reasons discussed below, this federal enforcement does not always occur. Therefore, in cases where environmental harms are taking place and the federal government is not there to fill its enforcement role, it is appropriate for states to protect their interests and "pick up the slack" via state enforcement actions.

I. State Enforcement Serve the Rights of States and Their Citizens and Is Consistent with the Common Law

A basic principle of English and American common law is that, where there is a legal right, there must also be a

legal remedy. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (Univ. of Chicago Press 1979) (1765-1769); *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (quoting *id.*). Thus, where an individual's rights are invaded, the individual may bring suit to protect those rights. One of these rights under the common law is "the [landowners'] right to enjoy the benefits of their land free from 'unwanted and unreasonable invasions by people or pollution.'" Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. 1, 3 (2007) (internal citations omitted). Traditionally, the appropriate remedy for this legal right is the common-law nuisance cause of action. RESTATEMENT (SECOND) OF TORTS §§ 821D, 821E, 822 (1977).

Just as individuals have rights and remedies under the common law, so do states. According to the U.S. Supreme Court, the state itself has "an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *North Carolina v. Tenn. Valley Auth.*, 439 F. Supp. 2d 486, 489 (W.D.N.C. 2006) (quoting *Georgia v. Tenn. Copper*, 206 U.S. 230, 237 (1907)). In other words, the state "has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." *Id.* If these public rights are violated, the state's remedy is to exercise its police power against such "public nuisances." *See Lawton v. Steele*, 152 U.S. 133, 136 (1894) ("[The police power] is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance.").

Under the public nuisance cause of action, a state—or, in certain situations, a private citizen— may bring suit to cure "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B(1). Circumstances under which an interference with a public right may be unreasonable include situations where "the conduct involves a significant interference with the public health, the public safety, the public comfort, or the public convenience…." *Id.* at § 821B(2)(a). Historically, such interferences have included "widely disseminated bad odors, dust and smoke," the keeping of livestock with contagious diseases, the construction and maintenance of defective sewer systems, and offensive and poisonous odors from factories. RESTATEMENT (SECOND) OF TORTS § 821B cmt. b. From this perspective, it does not seem to be a great leap to use the public nuisance cause of action to address more recent interferences, such as the improper disposal of hazardous wastes, the emission of harmful air pollutants, and the release of pollutants to public waters. *See, e.g., State v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150 (1983) (affirming trial court's finding that defendants were liable "under common-law principles for the abatement of the resulting nuisance and damage" of long-term mercury pollution); *North Carolina v. Tenn. Valley Auth.*, 439 F. Supp. 2d 486 (W.D.N.C. 2006) (rejecting motion to dismiss public nuisance claims over emissions from coal-fired power plants); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (dismissing complaints alleging public nuisance with respect to carbon dioxide emissions from power plants); *Oklahoma v. Tyson Foods, Inc.*, No. 05- 329 (N.D. Okla. filed June 18, 2005) (alleging Oklahoma state public nuisance due to large-scale discharges of poultry waste into state waters).

Nuisance, trespass, and other common law causes of action historically have been no strangers to larger-scale environmental issues or even interstate controversies. Indeed, controversies between states can be unavoidable. Every state in the Union possesses the same great interests in protecting its environment and citizenry, but some invasions of the states' rights and interests —particularly environmental—inevitably will come from other states. In the words of the Supreme Court:

> When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.

Georgia v. Tenn. Copper, 206 U.S. at 237 (citing *Missouri v. Illinois*, 180 U.S. 208 (1901)). Accordingly, nuisance actions between states have long

been the appropriate means for states to protect their interests and resolve cross-border environmental disputes, and current state enforcement actions across borders and against large-scale environmental harms carry on this tradition.

II. State Enforcement Actions Serve the Purposes of Federal Environmental Laws

Looking beyond state interests and traditions, state enforcement also serves federal purposes and interests. Most federal environmental statutes begin with a basic purpose: the remedying of an environmental wrong. *See, e.g.*, 33 U.S.C. § 1251 (2006) ("The objective of this [Clean Water] Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."); 42 U.S.C. § 7401(b)(1) (2006) ("The purposes of this title [the Clean Air Act] are … to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population…."). The statutes then set out the means by which the federal government aims to correct the respective wrongs, such as performance standards, permitting systems, penalties, and enforcement actions. While the federal statutes begin with broad and high-reaching purposes, the actuality is that the statutes have yet to achieve these goals, even after more than thirty years of regulation, tighter standards, and enforcement.

There are many reasons for this lack of success, but some of the more obvious reasons are that the statutes' goals are difficult, federal funding is limited, and the federal government simply cannot be everywhere. Accordingly, significant gaps exist between the statutes' goals and the current environmental state of things. Given these reasons and gaps, it seems like a stroke of luck that states would be willing—of their own accord and free of charge—to fill the gaps by their attempts at enforcement. From the perspective of the statutes' purposes, any help from the states is simply another step toward achieving these ends.

One could raise the objection that, in some cases, the federal government is exercising its discretion *not* to enforce its environmental statutes. The principle of prosecutorial discretion is, after all, a part of the American legal tradition. *See generally* Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens, Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401 (2004). To this objection, there are two rebuttals: First, state enforcement actions protect the rights of the states and their citizens. If the federal government chooses not to correct an environmental problem, must a state also sit back and allow harm to befall its citizens—no matter the consequences? Such a scenario offends notions of a state's basic duties toward its citizens, and many would view this scenario as a dereliction of duty.

Second, in many of the federal environmental statutes, the federal government has made special provisions for state implementation and enforcement of the environmental programs set out in the statutes. *See, e.g.*, 42 U.S.C. § 7410 (2006) (states set "emissions limitations on air pollution sources and mechanisms to administer and enforce the limitations"); 33 U.S.C. §§ 1311(a), 1342 (2006). *See also* Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens, Part Two: Statutory Preclusions on EPA Enforcement*, 29 HARV. ENVTL. L. REV. 1, 9-12 (2005) [hereinafter Miller, Part Two]. The federal government just as easily could have reserved implementation and enforcement power exclusively for itself, but Congress made a choice to provide important roles for both the federal government and the states. Legal scholars have termed this arrangement "cooperative federalism," and it sits as the "bedrock" principle of many federal environmental laws. Miller, *Part Two*, *supra* note 4, at 10.

Beyond this, courts also have allowed states to bring common law claims. For example, in *North Carolina v. Tennessee Valley Authority*—an exemplary recent state enforcement case—the court noted that not only did "state law nuisance claims against private entities for the abating of air pollution survive[] passage of the Clean Air Act," but also that such actions could be brought against federal facilities otherwise immune from state regulation. 439 F. Supp. 2d at 496 (internal quotations omitted). Indeed, the Supreme Court has

allowed for the same under the Clean Water Act (CWA), even where state common law action impose more stringent requirements than the CWA itself. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 328 (1981) ("States may adopt more stringent limitations . . . through state nuisance law, and apply them to in-state dischargers.").

Accordingly, state enforcement—via federal environmental statutes and common law actions— is often precisely aligned with federal interests and purposes. Such has been the case even where states have sought more stringent requirements than the federal statutes. Where the interests of the federal government have not aligned with state enforcement, the federal government and the courts have expressly closed such avenues. *See, e.g.*, *Int'l Paper*, 479 U.S. at 491-92. For the vast majority of environmental cases, however, state enforcement has worked hand-in-hand with federal interests.

III. State Enforcement Actions Are Able to Address New and Unforeseen Environmental Harms More Quickly than Federal Enforcement

As noted above, the federal government does not—and simply cannot—enforce against every environmental harm. Whether this is due to a lack of funding, manpower, or political will, enforcement gaps remain, especially where new and unforeseen environmental harms appear. In the past half century, we have experienced new and unforeseen harms, such as pesticides affecting people and animals, hazardous pollutants contaminating our groundwater, air pollutants emitted from "upwind" states moving long distances to affect "downwind" states, and, most recently, the variety of threats associated with global warming.

As to some of these harms, the federal government eventually has acted. For example, since the 1972 prohibition on the use of the pesticide dichlorodiphenyltrichloroethane (DDT) in the United States, the bald eagle finally has been removed from the endangered species list. *See* Press Release, U.S. Dep't of Interior, Bald Eagle Soars Off Endangered Species List (June 28, 2007), *available at* http://www.fws.gov/migratorybirds/issues/BaldEagle/FINALEagle%20release.pdf. On the other hand, it took more than thirty years for the Environmental Protection Agency (EPA) to realize DDT's negative effects and reach a decision to ban it, during which time the populations of the bald eagle, osprey, and peregrine falcon were decimated. This is to say that, while federal environmental enforcement can eventually get the job done, the turnaround time is not always ideal, especially in comparison to the short timeframes in which new environmental harms can begin to have impacts.

In this respect, state enforcement actions are important due to the quickness and directness with which they can respond to new environmental harms. State environmental actions do not require the same sorts of legislative wrangling, start-up costs, and long-term implementation that new means of federal enforcement would. Essentially, state enforcement actions can achieve the same purposes of the federal statutes—"timely restoration of damaged natural resources and polluted lands"—but in a shorter timeframe and with direct remedies to specific harms. Czarnezki & Thomsen, *supra*, at 3.

Take global warming as an example. Carbon dioxide is not yet defined by EPA "as a CAA criteria air pollutant requiring National Ambient Air Quality Standards, nor as an air pollutant requiring emission standards for new motor vehicles." *Id.* at 12. Due to the Supreme Court's ruling in *Massachusetts v. EPA* "that EPA has the statutory authority to regulate the emission of [carbon dioxide]," and that EPA must explain whether or not it will regulate carbon dioxide, this may well change. 127 S. Ct. 1438, 1462-63 (2007). For the time being, however, a gap in regulation and enforcement of carbon dioxide pollution remains.

In response to this gap, eight states and the City of New York filed suit—on a theory of public nuisance—against eight of the largest power companies in the nation. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005); *see also* Czarnezki & Thomsen, *supra*, at 14 (internal citations omitted). Though the plaintiffs lost at the trial court level, plaintiffs have since appealed the case to the U.S. Court of Appeals for the Second Circuit, and the suit is an ideal

example of how state enforcement should work. Global warming is an area in which the federal government has refused to enforce. However, as noted by plaintiffs, "global warming is a public nuisance because it adversely affects public health (for example, heat deaths due to prolonged heat waves and asthma), coastal, water, and agricultural resources, the water levels of the Great Lakes, and flora and fauna." Czarnezki & Thomsen, *supra*, at 14 (quoting plaintiffs' complaint). Given that the environmental harm in this case has such great and new impacts on the states and their citizens, and is yet to be federally regulated, it is the plaintiffs' prerogative to enforce where the federal government will not. While it is most ideal to have a strong, cohesive federal enforcement scheme in place, state enforcement actions can respond to new harms until such a scheme is implemented and can continue to fill any gaps in enforcement once such a scheme is in place.

IV. Conclusion

In an ideal world, the federal government would diligently enforce its environmental laws and would quickly respond to new and unforeseen environmental harms, thereby preventing states from harm at the hands of large-scale or interstate pollution. For a variety of reasons, federal enforcement does not always occur and often has large gaps. Fortunately, states have a strong history of filling these gaps with state enforcement. This state enforcement protects the rights of states and their citizens, is supported by common-law tradition, and is in accordance with the purpose of the federal environmental laws. Therefore, where environmental harms are affecting the states and the federal government is not fulfilling its enforcement role, it is appropriate for states to protect their interests and "pick up the slack" via state enforcement actions.

THE POLITICAL QUESTION DOCTRINE IN GLOBAL WARMING LITIGATION

Karl R. Moor
Vice-President and
Associate General Counsel
Southern Company Services
kmoor@southernco.com

Alexia B. Borden
Balch & Bingham
Birmingham, Alabama
aborden@balch.com

These days, it's hard to ignore the barrage of media articles about global warming and the calamities attributed to it. Our leaders in Washington have taken notice. Increasing amounts of ever more stringent legislation is being introduced and debated, offering all sorts of proposed solutions—from mandating that energy production come from renewable sources, to congressionally mandated increased fuel efficiency standards, to carbon cap and trade systems, to a carbon tax. And this is as it should be. If man-made climate change is occurring, it is not a local phenomenon. It is not even just a national issue. It is of international concern. And the solution—if there is to be one—will have to be found at the international and national political levels.

But there are many, including some state leaders, who are determined to create a judicial role in addressing climate issues. Courts across the country have seen a flurry of activity in the way of lawsuits attempting to place liability for "global warming" on a variety of defendants. This article is limited to a discussion of four of those cases: *Connecticut v. American Electric Power*, No. 05-5104 (2d Cir. 2006), *Comer v. Murphy Oil*, No. 05-00436 (S.D. Miss. 2005), and *Barasich v. Columbia Gulf Transmission Co*., 467 F. Supp. 2d 676 (E.D. La. 2006), and *California v. General Motors Corp*., No. 06-05755 (N.D. Cal. 2006). Specifically, this article will focus on one of the many issues raised in these cases, the "political question doctrine."

I. What is the "Political Question Doctrine"?

Article III of the Constitution limits federal-court jurisdiction to "Cases" and "Controversies." No justiciable "controversy" exists when parties seek adjudication of a political question. *See Mass. v. EPA*, 127 S. Ct. 1438, 1452 (2007). To determine whether a political question exists, the Supreme Court looks to six independent factors and asks whether there is or has been:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Vieth v. Jubelirer, 541 U.S. 267, 277-78 (2004) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). In *Baker v. Carr*, the Supreme Court stated that the determination of whether a political question exists is "a delicate exercise in constitutional interpretation" that must be conducted on a "case-by-case inquiry." 369 U.S. at 211. Courts must "analyze representative cases and . . . infer from them the analytical threads that make up the political question doctrine." *Id.* However, the political question doctrine is to be cautiously invoked only for "political questions," not simply for "political cases." *Id.* at 217.

II. *Connecticut v. American Electric Power*

Eight states and three land trusts filed a nuisance suit under New York law and "federal common law" against five major U.S. power companies claiming that these utilities emit large quantities of carbon dioxide, which are contributing to an elevated level of carbon dioxide in the atmosphere. *Conn. v. American Electric Power*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005). Plaintiffs claimed that global warming is a public nuisance, which in turn harms their property and the property of their citizens, and since these defendants were the five largest emitters of CO_2 in the United States they should be held accountable. Through the lawsuit, plaintiffs sought an order to hold each defendant jointly and severally liable for contributing to an ongoing public nuisance, and global warming, and to enjoin each defendant to abate its contribution to the nuisance by capping its emissions of carbon dioxide. *Id.* at 268.

The defendants moved to dismiss on several grounds. First, defendants contended that the plaintiffs failed to state a claim upon which relief can be granted because the separation of powers principles precludes the court from adjudicating these actions, i.e., plaintiffs raise a non-justiciable political question that should be decided by Congress. *Id.* at 270. Second, the defendants contended that the court lacked jurisdiction over the plaintiffs' claims. *Id.* With respect to the "political question" issue, the defendants' argued specifically that global warming is an issue of international concern, and as such, implicates the exclusive foreign policy province of the federal political branches. *Id.* at 271.

The Southern District Court of New York agreed. In words that still resonate, U.S. District Court Judge Loretta Preska observed:

> The Framers based our Constitution on the idea that a separation of powers enables a system of checks and balances, allowing our nation to thrive under a Legislature and Executive that are accountable to the People, subject to judicial review by and independent Judiciary. Cases presenting political questions are consigned to the political branches . . . not to the Judiciary, and the Judiciary is without power to resolve them. This is one of those cases.

Id. at 267. Judge Preska determined that

> the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests, 'an initial policy determination of a kind clearly for non-judicial discretion' is required. Indeed, the

> questions presented here 'uniquely demand single-voiced statement of the Government's views.' Thus, these actions present non-justiciable political questions that are consigned to the political branches, not the Judiciary.

Id. at 274 (internal citations omitted).

The plaintiffs appealed to the Second Circuit, submitted briefs, and the court heard oral argument on June 7, 2006. When the *Massachusetts v. EPA* decision was released by the Supreme Court, the Second Circuit asked the parties to submit letters regarding the effect of that decision on this case. The case is still pending before the Second Circuit.

III. *Comer v. Murphy Oil*

On Aug. 29, 2005, Hurricane Katrina made landfall devastating the Mississippi Gulf Coast. A few weeks later, attorney Gerald Maples filed a class action suit on behalf of Mississippi's injured citizens in the U.S. District Court for the Southern District of Mississippi. The suit was originally brought against insurance, mortgage, and oil companies; however, the court dismissed the insurance and mortgage company defendants. The plaintiffs amended their complaint to add additional oil companies, as well as numerous new coal, utility, and chemical company defendants. As to the electric utilities, plaintiffs claim these defendants: (1) burn coal that releases CO_2, (2) that the CO_2 has contributed to global warming, (3) that global warming caused Hurricane Katrina to form and intensify, and (4) that Hurricane Katrina caused damage to the citizen's of Mississippi. The defendants filed motions to dismiss based on among other claims, that the plaintiffs' complaint presents nonjusticiable political questions.

On July 11, 2007, U. S. District Court Judge Louis Guirola, Jr. issued an order setting a hearing for Aug. 30, 2007 to determine whether the plaintiffs had standing to bring the suit, and whether the plaintiffs' claims were barred by the political question doctrine. At the hearing, the defendants asserted that the plaintiffs did not have standing to bring the suit, and the plaintiffs' claims were not justiciable pursuant to the political question doctrine. During that hearing, the judge dismissed the complaint on both accounts and noted the following:

> [The issue of global warming] is an important debate, but it is a debate which simply has no place in the court, until such time as Congress enacts legislation which sets appropriate standards by which this Court can measure conduct, whether it be reasonable or unreasonable, and, more important, develops standards by which a group of people, we call them juries, can adjudicate facts and apply the law, these standards, and judge whether conduct crosses the line between reasonable and legal conduct and unreasonable or tortious conduct.

Transcript of Hearing on Defendants' Motions to Dismiss, at 39 (Aug. 30, 2007). On Sept. 17, 2007, plaintiffs' filed a notice of appeal to the Fifth Circuit. The opening brief for the plaintiffs was just filed with the Fifth Circuit.

IV. *Barasich v. Columbia Gulf Transmission Company*

In the weeks after Hurricanes Katrina and Rita, two other lawsuits were filed and consolidated in Louisiana alleging that activities of oil- and gas-producing companies and oil and gas pipeline companies contributed significantly to the hurricanes' destructive impact. The nine plaintiffs, who are residents of Jefferson, Orleans, and St. Bernard Parishes, "assert[ed] that defendants damaged the marshland that lies between Louisiana's habitable regions and the Gulf of Mexico, thereby weakening a protective barrier against hurricanes and exposing Louisianans to the prospect of greater harm from these storms." *See Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 678 (E.D. La. 2006). In ruling on a motion to dismiss based on the political question doctrine and for failure to state a claim upon which relief might be granted, the court first analyzed the political question doctrine. The court found the claims asserted did not implicate the political question doctrine as set forth in *Baker v. Carr* because none of the individual tests listed in *Baker* applied. The court referenced *Connecticut v. American Electric Power* and found it distinguishable because plaintiffs in this

case did not seek such extensive policy determinations as the plaintiffs have requested no injunctive relief just damages. However, the court ultimately determined that the plaintiffs failed to state a claim and would be unable to establish that defendants owed them a duty or that defendants' conduct was a cause-in-fact of their injuries. Therefore, the case was dismissed.

V. *California v. General Motors Corporation*

On Sept. 20, 2006, California Attorney General Bill Lockyer filed a lawsuit against the leading U.S. and Japanese auto manufacturers including Chrysler, General Motors, Ford, Toyota, Honda, and Nissan, seeking to hold them liable for damages caused by the greenhouse gases that their products emit. Specifically, the complaint alleged that the auto makers have created a public nuisance by producing vehicles that collectively emit "massive" quantities of carbon dioxide. Defendants filed a motion to dismiss, arguing that the complaint raises nonjusticiable issues properly reserved for resolution by the political branches of the federal government. On Sept. 17, 2007, the court dismissed the case concluding it was up to Congress and the government to deal with the climate change question. On Oct. 17, the State of California appealed the decision to the Ninth Circuit.

VI. Conclusion

The political question doctrine features prominently in global warming litigation. One can expect its application to be hotly contested and for the issue to work its way eventually to the Supreme Court.

GLOBAL WARMING LITIGATION— A MATTER FOR THE COURTS

Carlos A. Zelaya, II
F. Gerald Maples Law
New Orleans, Louisiana
czelaya@fgmapleslaw.com

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. "[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and that every injury its proper redress." The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803), quoting William Blackstone, Commentaries on the Laws of England Vol. 3 at 109 (Oxford 1765-1769).

On Aug. 29, 2005, the worst natural disaster to strike the continental United States took the form of a tropical cyclone named Katrina. Weeks later, our office filed a class action lawsuit in the United States District Court for the Southern District of Mississippi (*Comer, et al. v. Murphy Oil USA, Inc., et al.*, No. 05-436). In *Comer*, the plaintiffs who were harmed by Hurricane Katrina alleged that Katrina was fueled and intensified by the abnormally warm waters in the Gulf of Mexico which, in turn, were caused by global warming. Plaintiffs further alleged that the defendants' (some of the largest oil, coal, gas and halocarbon producers and emitters in the United States) ongoing emissions of greenhouse gasses increased storm and flood risk to plaintiffs' property, increasing plaintiffs' insurance premiums. The defendants filed Motions to Dismiss on multiple grounds, and the parties extensively briefed the pertinent issues.

On Aug. 30, 2007, the district court heard argument regarding whether plaintiffs had standing to bring the lawsuit and whether plaintiffs' claims are justiciable

under the political question doctrine. Following the hearing, the court dismissed plaintiffs' claims for lack of standing. In its oral reasons, thecCourt suggested that the determination of allowable levels of green house gas emissions was beyond its purview, and that such determinations were best left to the legislative and executive branches. Plaintiffs appealed the dismissal of their case, and briefing is underway. This article discusses the implication of the political question doctrine in *Comer* and sets forth the reasons that the *Comer* claims are justiciable.

In their memoranda to the trial court, the defendants cited and relied upon the U.S. Supreme Court's decision in *Baker v. Carr*, and its progeny to dissuade the court from fulfilling its constitutional charge to adjudicate disputes between private parties. 369 U.S. 186 (1962). As noted by the Supreme Court, "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990).

Comer, quite simply, presented damage claims seeking remuneration for harm caused by the defendants' tortious conduct. *Baker* involved a challenge to a Tennessee statute apportioning the members of the state General Assembly. The *Baker* plaintiffs alleged the statute violated their constitutional rights to equal protection of the laws. In reversing the trial court's dismissal of the action, the Supreme Court engaged in a detailed analysis of situations in which judicial relief is withheld, distinguishing between those based on lack of subject matter jurisdiction and those in which judicial consideration is inappropriate, the latter being termed "non-justiciable."

The Court noted:

> The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not 'arise under' the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, s 2), or is not a 'case or controversy' within the meaning of that section; or the cause is not one described by any jurisdictional statute.

Baker, 369 U.S. at 198. The Court went on to review "political question" cases pointing out that "it is the relationship between the judiciary and the coordinate branches of the Federal Government. . . which gives rise to the 'political question'," and noting that "[t]he non-justiciability of a political question is primarily a function of the separation of powers." *Id*. at 210.

The Court enumerated six factors that may render a case non-justiciable:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment of multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is **inextricable** from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of 'political **questions**,' not one of 'political **cases**.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.

Id. at 217 (emphasis added).

The Court explicitly recognized the power, authority and obligation set forth in the U.S. Constitution for courts to adjudicate disputes between parties while

refraining only from cases in the rare circumstances in which the Constitutional Separation of Powers is implicated. Each of the *Baker* factors militates against application of the political question doctrine to *Comer*. First, the textually demonstrable constitutional commitment of the resolution of the **tort claims** presented by Plaintiffs is to the judiciary. *See* U.S. Const. art. III, § 2. Plaintiffs asserted common law claims of nuisance, unjust enrichment, negligence, civil conspiracy, and intentional torts including fraudulent misrepresentation and concealment and trespass. All of these claims sound in tort and are ripe for adjudication. Plaintiffs' claims are not, as defendants argued, within the exclusive purview of the legislative or executive branches of our government.

Second, long-established principles of tort law provide the "judicially discoverable and manageable standards" for resolving the claims presented by plaintiffs even if the science involved or issues of allocation of fault and causation may appear complicated on their surface. "The crux of th[e] inquiry [into the existence of judicially discoverable and manageable standards to adjudicate the dispute presented] is thus not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'" *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)).

Third, there is no need to make an initial policy determination of a kind clearly outside judicial discretion to decide plaintiffs' claims. On the contrary, the evaluation of the defendants' conduct and the relationship of that conduct to the damages sustained by plaintiffs is precisely the function of the courts. Adjudication of plaintiffs' claims and the award of monetary damages upon establishing the defendants' liability require the exercise of judicial discretion. There is no need, as the defendants argued, for the courts to "formulate core national policies concerning energy development and production, the economy, national security, foreign relations, and environmental protection." Nor was the court being asked to solve the issue of global climate change. Rather, the court was asked only to fulfill its constitutionally mandated role of adjudicating plaintiffs' claims for damages.

The defendants' cited *Connecticut v. American Electric Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), in support of their position that Plaintiffs' claims were nonjusticiable. That reliance was, and remains, misplaced. That case arose from a complaint filed by eight states and the City of New York against six energy companies seeking declaratory and injunctive relief. The plaintiffs therein complained that the defendants contributed to global warming and therefore sought judgment:

a. Holding each defendant jointly and severally liable for creating, contributing to, and/or maintaining a public nuisance;
b. Permanently enjoining each defendant to abate its contribution to the nuisance by requiring it to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade; and
c. Granting such other relief as this Court deems just and proper.

Complaint, *Conn. v. Am. Elec. Power Co., Inc.*, 04-5669 (S.D.N.Y. July 22, 2004).

In response to that complaint, the defendants filed various motions including Rule 12(b)(6) Motions to Dismiss for failure to state a claim. In ruling on the motions, the district court dismissed the complaint finding that the actions presented non-justiciable political questions. That determination does not hold for *Comer* because the underlying complaint and the causes of action pled therein are completely different from the causes of action asserted by the *Comer* plaintiffs.

The *Connecticut* plaintiffs sought injunctive relief specifically capping the defendants' carbon dioxide emissions at a level to be determined by the court and further requiring the defendants to reduce those emissions annually by a specified percentage (again to be determined by the court) for a period of at least ten years. The *Comer* plaintiffs did not seek injunctive relief, did not ask the court to set a cap on the

defendants' emissions and did not seek an annual reduction in those emissions. Rather, the *Comer* Plaintiffs sought monetary compensation for the damages they suffered due to the defendants' tortious conduct.

The distinction between a request for injunctive relief and a request for monetary damages is key, and has been recognized as such by the Fifth Circuit Court of Appeals:

> [R]equests for injunctive relief can be particularly susceptible to justiciability problems, for they have the potential to force one branch of government-the judiciary-to intrude into the decisionmaking properly the domain of another branch-the executive. . . . as compared to injunctive relief, requests for monetary damages are less likely to raise political questions. Monetary damages might but typically do not require courts to dictate policy to federal agencies, nor do they constitute a form of relief that is not judicially manageable.

Gordon v. State of Tex., 153 F.3d 190, 195 (5th Cir. 1998). Accordingly, the ruling of the district court in *Connecticut v. American Electric Power Co., Inc.* is inapposite to *Comer*.

Finally, the fourth, fifth, and sixth *Baker* factors are not implicated. A court's undertaking resolution of the *Comer* claims would not express "lack of respect due coordinate branches of government," would not present an "unusual need for unquestioning adherence to a political decision already made," and would not pose "the potentiality of embarrassment of multifarious pronouncements by various departments on one question." The *Comer* plaintiffs did not ask the court to craft a solution to global warming; rather, they petitioned the court seeking compensation for their injuries. The adjudication of plaintiffs' damage claims would not contradict a political decision made by the Congress or the Executive branch; nor would it establish the policy of the nation so as to cause embarrassment by providing contradicting positions in the eyes of the world. The true threat of embarrassment is adopting the defendants' arguments and thereby denying justice to those who have suffered harm as a result of the defendants' conduct.

UPDATE ON CALIFORNIA CLEAN VEHICLE LITIGATION

Mary Ellen Hogan
Holme Roberts & Owen LLP
Los Angeles, California
MaryEllen.Hogan@hro.com

California's campaign to reduce global warming began in earnest in 2002, when the state decided to tackle the problem of greenhouse gas (GHG) emissions by mandating reductions at the largest source in the state: gasoline fuel emissions from passenger vehicles and light duty trucks. State law was passed and regulations to control these emissions were promulgated. Automakers and car dealers in California sued to block these regulations, and initiated a federal court battle that is still ongoing in November 2007. This article will provide the background and context for the litigation, as well as provide an update on its current status.

Background: In 2003, California's then Gov. Gray Davis signed Assembly Bill (AB) 1493 that directed the California Air Resources Board (CARB) to promulgate motor vehicle emission standards that would reduce carbon emissions for new motor vehicles starting in model year 2009. CAL. HEALTH & SAFETY CODE § 43018.5. At the time of its passage, Gov. Davis described the legislation as the first law in the United States to address what he referred to as the "greatest environmental challenge of the 21st Century"—global warming.

The operative statutory language in AB 1493 guiding CARB's rulemaking was that the regulations were to achieve the "maximum feasible" and "cost effective" reduction of GHG emissions. After a lengthy rulemaking process, CARB approved new vehicle emission standards limiting certain GHGemissions (hydrofluorocarbons, carbon dioxide, methane and nitrous oxide) in September 2004 and the standards became effective in October 2005. While geared at "fleet average" emissions for the automakers beginning in 2009, the emission standards become more stringent annually through 2016, reducing emissions up to 40 percent by 2016. According to CARB's staff report,

these standards are designed to reduce GHG emissions by approximately 30 million metric tons by 2020 and by over 50 million metric tons in 2030.

Passing these standards was a significant accomplishment for CARB. But before these rules could be applied to the auto industry, there was one more procedural hoop to jump before California could have more stringent motor vehicle emission standards than the federal government—California was required to request a waiver under the Clean Air Act (CAA) from the U.S. Environmental Protection Agency (EPA) to implement the standards. This waiver would be granted if California could demonstrate that these standards were required to meet, according to the words of the act, "compelling and extraordinary conditions."

CARB requested the waiver from EPA in December 2005, and Gov. Schwarzenegger renewed the request by letter in April 2006, and in person via meetings with EPA in October 2006. EPA did not even hold hearings on the waiver request until summer 2007, although EPA has stated that it would make a decision on the waiver request by the end of 2007. Having lost patience with the EPA's nearly two year long process of evaluating the waiver, the California attorney general filed suit against EPA to compel a decision on the waiver request in November 2007. *State of California v. EPA*, No. 07-0 2024 (D.D.C. Nov. 8, 2007).

In addition to EPA's failure to approve California's request for a waiver, opposition to the California emission standards got underway in federal court in California shortly after the standards were approved by CARB. In December 2004 the major automakers predictably filed suit against CARB (the defendants) in federal district court in Fresno, California, to block implementation of the California emission standards. The plaintiffs are the Alliance of Automotive Manufacturers, which represents GM, Ford, Daimler/ Chrysler, Toyota, and other manufacturers, in addition to thirteen auto dealers located in California's Central Valley. *Central Valley Chrysler-Jeep v. Witherspoon*, No. 04-6663 (D.E.D. Ca. Dec. 7, 2004) ("*Central Valley Chrysler-Jeep*"). Since the case was filed, there has been significant intervenor activity in the litigation including both intervening environmental groups (Sierra Club, Natural Resources Defense Council and Environmental Defense, Bluewater Network, Global Exchange and Rainforest Action Network) and the auto industry (Association of International Automobile Manufacturers).

After more than two years of legal wrangling and the retirement of the original federal judge, *Central Valley Chrysler-Jeep* was set for trial in January 2007. In January 2007, Federal District Judge Anthony W. Ishii continued that trial date pending a decision from the U.S. Supreme Court in *Massachusetts v. EPA*, a landmark opinion by the Court that would affirm the EPA's authority to regulate carbon emissions under the CAA. That decision was issued on April 2, 2007.

The Supreme Court opinion in *Massachusetts* was closely followed by an important Vermont district court opinion in *Green Mountain Chrysler Plymouth Dodge Jeep v. George Crombie*, No. 05-302 (D. Vt.) that challenged Vermont and New York's adoption of CARB's new motor vehicle emission standards. The federal court in *Green Mountain* upheld the states' efforts to copy California's emissions standards, pending those standards becoming effective upon EPA's approval of California's CAA waiver request. Now it became California's turn to address the validity of its carbon reduction emission standards in the *Central Valley Chrysler-Jeep* case before Judge Ishii.

Procedural Summary: The original complaint in *Central Valley Chrysler-Jeep* sought declaratory and injunctive relief on five claims: (1) preemption under the federal Energy Policy and Conservation Act of 1975 (EPCA), (2) preemption under § 209(a) of the CAA, (3) preemption under United States' foreign policy and the foreign affairs powers of the federal government, (4) violation of the dormant Commerce Clause of the United States Constitution, and (5) violation of the Sherman Act.

In June 2006, CARB moved for judgment on the pleadings on all claims of the plaintiffs, and the court granted judgment in favor of the defendants regarding

the dormant Commerce Clause and Sherman Act claims. Turning to the dormant Commerce Clause allegation, the auto dealers asserted that the regulations were impermissible because they were a burden on the production and sale of new motor vehicles while providing "no local environmental benefit, or insubstantial benefits in the least."

Judge Ishii held that the legislative history of the CAA made it clear that Congress duly considered that unique California regulations would substantially burden interstate commerce. California's waiver provision was enacted, however, in spite of the acknowledged burden. Therefore, according to the court, in order to prevail on their motion, the plaintiffs must point to explicit Congressional intent to revoke the permission given to California under the CAA waiver provisions. Finding no such intent in the references to the EPCA cited by the plaintiffs, Judge Ishii ruled that they did not state a claim under the dormant Commerce Clause and entered judgment on the pleadings in favor of the defendants.

The plaintiffs argument under the Sherman Act were an "as-applied" challenge, in contrast to a facial challenge, which focused on proof of anticompetitive acts that trigger preemption under the act. Here Judge Ishii held that while "specific anticompteitive effects" of the California regulation may exist, "principles of federalism and state sovereignty preclude invalidating all or part of the statute based on such effects," thus granting judgment on the pleadings for defendants on the Sherman Act count. This ruling left three remaining grounds for relief: the two preemption arguments (CAA and EPCA), as well as preemption under the so-called "foreign policy/foreign affairs" preemption.

In October 2006, the Defendants filed for summary judgment on ripeness and/or mootness under the CAA claim and requested a stay. While that motion was pending, the plaintiffs filed a motion for summary judgment, while the defendants filed substantive motions on foreign policy preemption and preemption under EPCA. In January 2007, Judge Ishii stayed those motions pending guidance from the Supreme Court in the *Massachusetts* case.

But in his January 2007 opinion, the Judge nonetheless made some critical rulings. For example, he ruled that the CAA unequivocally prevents enforcement of the emissions standards absent a waiver from EPA, and if EPA grants a waiver, there is no feasible way for the standards to be preempted under the CAA. Accordingly, the auto dealers' claims under the CAA were effectively moot and by, in effect, stating the obvious, the court entered injunctive relief that neither the State of California nor any of its subdivisions can enforce the carbon emissions standards until a waiver is granted from EPA or Congress has acted to permit such regulation by California.

In contrast, the plaintiffs' claims for preemption under EPCA and the foreign policy/foreign affairs theories were alive and well, but according to CARB, not "ripe" for adjudication. The court denied the motion for summary judgment for CARB on the issue of ripeness of those theories on the basis of very real and tangible hardship to the auto manufacturers and dealers. This was so, reasoned the court, because the plaintiffs were faced with the "hobson's choice" of costly compliance now, only to find out later that the waiver is never granted (and therefore the regulations would never be enforced). Or if they chose to delay, they run the significant risk of running into an inability to comply in accordance with the mandates in the regulations.

Current Pending Matters: In the months since Judge Ishii issued his January 2007 order, the *Massachusetts* case has been decided by the U.S. Supreme Court and both sides have been given the opportunity to brief the Court on the significance of the ruling. On Nov. 19, 2007, the Court will hear motions for summary judgment and summary adjudication on the two remaining claims pending: EPCA and foreign policy/ foreign affairs preemption. Here's what is in store with these legal proceedings.

Judge Ishii's Sept. 26, 2006 Order denying defendants' motion for judgment on the pleadings on the issue of EPCA's preemption can arguably give some insight into the court's thinking on the pending EPCA summary judgment motion. Simply put, the plaintiffs argue that EPCA regulates and completely preempts the field of fuel economy regulations, and

because the California emissions regulations fall into the area of fuel economy, they are preempted.

EPCA authorizes the National Highway Traffic Safety Administrator to set so-called "CAFE" or Corporate Average Fuel Economy for each manufacturer's new vehicle fleets. 49 U.S.C. §§ 32902(a) and 32902(c). The CAFE standards were to be set at the "maximum feasible level" based on careful consideration of explicit statutory factors. Furthermore, at the time that EPCA was enacted in 1975, Congress included the following express provision for preemption:

> When an average fuel economy standard prescribed under this chapter is in effect, a State or political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

42 U.S.C. § 32919.

Plaintiffs strongly argued that the California emissions regulations were "an obstacle" to EPCA's objectives to set fuel economy standards. And since there was no evidence before the court showing Congressional intent to permit California regulations to be an obstacle to EPCA's objectives, the court held that the plaintiffs stated a claim for EPCA preemption. The court was not persuaded by CARB's argument that the California regulations were permissible because they were required to be taken into account, assuming EPA's prior approval of the waiver, when NHTSA sets the CAFE level.

Turning to the foreign policy preemption argument, the court stated that "generally," there is nothing in foreign policy jurisprudence that appears to prohibit preemption of a law that "interfers" with foreign policy. The focus of the law in this area is "whether the practical effect of the state law is to disturb foreign relations or impair a proper exercise of Presidential authority."

The plaintiffs winning argument at the pleading stage appears to be that the current Bush administration policy is to negotiate with other nations regarding GHG emissions reductions. And therefore California's unilateral mandate to reduce such emissions "potentially" undercuts the administration's negotiating position. (This may be even more convincing at the summary judgment stage considering more than thirteen states have adopted the California standards, should EPA grant the waiver.)

A ruling from Judge Ishii on the remaining claims is eagerly awaited. His ruling may determine if, in the words of the California Clean Cars Campaign, the legal challenge is "an attack on the state's right to protect its citizens from auto air pollution" or a proper assertion of federal preemption in the area of auto emission standards.

LIKE TO WRITE?

The Environmental Litigation and Toxic Torts Committee welcomes the participation of members who are interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact the editor, Mike Freeman, at (205) 251-8100 or mfreeman@balch.com.

Back issues of this newsletter can be found at *www.abanet.org/environ/committees/toxictorts/newsletter/archive.html.*

TRACKING TRENDS IN ENVIRONMENTAL TORTS: COMMON LAW NUISANCE, DOWN ON THE FARM

Thomas P. Redick
Global Environmental Ethics Counsel
St. Louis, Missouri
tpr@geeclaw.com

This article discusses emerging environmental claims and defenses arising from agricultural exposures or impacts. In the agricultural setting, state environmental remedies may dominate over federal environmental remedies and defense, and provide farm-belt litigators with their best route to seek redress from environmental causes ranging from pesticides to concentrated animal feeding operations (CAFOs) emissions and discharges—via air or water—or even the economic impacts of agricultural biotechnology.

I. The State-Federal Tort Tug of War in Agricultural Environmental Torts

The U.S. Constitution and U.S. Congress have traditionally left tort causes of action to the states, particularly when it comes to agricultural environmental impacts and injuries. Historically, the standards applied to common law claims for nuisance and trespass arising out of contamination varied from jurisdiction to jurisdiction. A claim that might succeed in one jurisdiction might fail in another.

Federal legislation passed by Congress has been held to preempt state tort claims for tobacco, child vaccines, railroad safety, and, until recently, claims arising out of pesticide handling. But in 2005, the U.S. Supreme Court surprised the defense bar by holding that pesticide labeling and packaging requirements under the Federal Insecticide, Fungicide, and Rodenticide Act did not preempt certain state tort claims. *See Bates v. Dow Agro Sciences, LLC*, 544 U.S. 431 (2005). Since *Bates*, federal preemption of pesticide-related claims is not the powerful defense it used to be. *See* James C. Chen and Ashley Rivera, *Bates at One Year: An Effective Solution to FIFRA Preemption?,* ABA Section of Environment, Energy, and Resources Pesticides, Chemical Regulation, and Right-to-Know Committee Newsletter (Jan. 2007), *available at* http://www.abanet.org/environ/committees/pesticides/newsletter/archive.html.

State courts are increasingly citing this decision and letting farmers sue for claims arising from harm allegedly caused by herbicides or pesticides. In *Peterson v. BASF Corp.*, 711 N.W.2d 470 (Minn. 2006), the Minnesota Supreme Court found an herbicide manufacturer liable for fraud, deception and unconscionable conduct in violation of the New Jersey Consumer Fraud Act (NJCFA) by giving "non-label deceptive statements and conduct" that were not a "requirement for labeling or packaging." *See also Mangan v. Brierre*, 2007 WL 475820 (E.D. Pa. Feb. 9, 2007) and cases collected by Jennifer Fiser, National Agricultural Law Center Case Law Index, Pesticide Regulation, *available at* http://www.nationalaglawcenter.org/assets/caseindexes/pesticides.html.

While federal courts have been limiting the defense of preemption, state common law tort remedies appear to have been expanding in the agricultural setting. This expansion is occurring primarily in two areas—the economic/environmental impacts of biotech crops, and the environmental impacts of CAFOs.

II. CAFO Nuisances and the "Right to Farm"

A prime example is the surprising expansion of state liability risks in CAFOs. This expansion of liability is occurring in a field where most states have "Right to Farm" laws that preempt the usual nuisance claims of neighboring landowners who can't stand the smell in the morning. Various exceptions to such laws are being pled now—alleging that the CAFOs are a new threat to health or well-being not imagined before—and claims are succeeding in some states.

CAFO litigation is rapidly becoming a thriving practice for firms in the farm belt. In *Wendinger, et al. v. Forst Farms, Inc.*, 662 N.W.2d 546 (Minn. App. 2003), plaintiff claimed nuisance by presenting evidence that the defendant has intentionally maintained a condition causing nuisance. The Minnesota "right to farm" law, MINN. STAT. § 561.19, subd. 2(b) (2002), did not

provide an affirmative defense against nuisance if evidence of negligence was presented. Interestingly enough, the corporate defendant that owned the hogs in the facility, exercised enough control to allow it to be potentially responsible for damages caused by the hog operation. This lawsuit also generated a related case involving the denial of insurance coverage for the "pollutants" emitted from the feedlot in June 2007. *Wakefield Pork, Inc. v. Ram Mut. Ins. Co.,* 731 N.W.2d 154 (Minn. App. 2007).

Some states allow nuisance claims to be brought in anticipation of the construction or expansion of a CAFO. For example, the State of Illinois has taken the lead in recognizing a claim for "anticipatory nuisance" from a CAFO, which sets a precedent other states may follow in agricultural environmental litigation. In *Nickels v. Burnett*, 343 Ill. App. 3d 654, 798 N.E.2d 817 (2d Dist. 2003), the Illinois court of appeals affirmed an injunction against operation of a CAFO even though the operator had obtained all necessary permits from the state. The operator was so confident in the power of its permit, the presentation of evidence was lacking at trial, which may account for this surprising decision.

At last count, similar anticipatory nuisance suits against CAFOs were pending in Illinois and Iowa. Even if the defendants prevail in these cases, the threat of adverse publicity and the prospect of high litigation costs is often enough to drive their operations to another location.

III. Agricultural Biotechnology and Nuisance Law

In the past two years, anticipatory nuisance suits also have been filed to stop the introduction of biotech crops. These suits are the product of an over-reactive litigation environment in United States and Canada, driven in large part by "precautionary" European Union (EU) approval policy that closes export markets to corn, soybeans, canola, rice, and other crops with "unapproved-in-EU" events in commodity chains of commerce. The power of U.S. tort law has enabled the EU policy to slow innovation in biotech crops that await marketing in the United States and Canada.

For example, certified-organic canola and wheat growers in Canada filed suit seeking an injunction restraining the sale of RRW in Canada, and only dismissed the claim in early 2005 when Monsanto withdrew this trait from the market before commercial launch. *Hoffman v. Monsanto Canada*, 2005 SKQB 225 (2005) (appeal pending). To date, however, no court has reached the hearing stage where such an "anticipatory nuisance" claim might be considered.

In the United States, growers are taking care to avoid commingling of biotech crops that cannot be exported overseas, where regulators may not allow entry to a biotech crop that is a "genetically modified organism" (GMO) which overseas authorities have not approved. As one law professor in Iowa, Neil Harl, warned in 1999, even "non-GMO crop likely isn't completely free of GMO germ plasm" and "tolerances vary depending upon the importing country" for GMO content in export commodity shipments. Neil E. Harl, *Genetically Modified Crops: Guidelines for Producers, available at* http://www.extension.iastate.edu/NR/rdonlyres/B8946662-F0FA-4D6E-9502693A67B8CC3/0/0010harl1.pdf

Nuisance is a truly "novel" tort when applied to economic impacts that biotech crops can have on crops bound for export. In agricultural biotechnology, the seminal published decisions arise from the recall in 2000-2001 of the Starlink corn sold by Aventis Crop Sciences USA. *Kramer v. Aventis CropScience USA Holding, Inc.* (*In re StarLink Corn Products Liability Litigation*), 212 F. Supp. 2d 828, 840 (2002) ("*Starlink*"). StarLink was marketed for livestock feed and feedstock for biofuels, but lacked approval for food use in the United States (the approval had been sought but was not yet granted at time of sale). However, commingling of this crop in the food supply triggered a domestic food recall in the United States and various trading partners barred entry to U.S. corn and subjected it to costly genetic testing that has continued for the last seven years.

The *Starlink* court denied a motion to dismiss and endorsed broad claims for nuisance arising out of grain exports to the EU that were rejected because of biotech commingling. In doing so, the court took a very

broad view of "physical injury" to personal property and held the approved grain has been injured merely by being commingled with unapproved grain. At the pleading stage, in denying a motion to dismiss, the court held that damages could be assessed for economic losses arising from the commingling. The case settled soon thereafter for $110 million, adding that hard cost to a rising tally of financial impacts, including estimated uncompensated economic loss (e.g., shareholder value of Aventis) well in excess of $1 billion.

After *Starlink*, growers of corn, soybeans, and canola knew that they had to beware of accidental commingling of unapproved-for-export biotech crops, or run the risk of having their buyers hold them liable for causing significant economic loss, which can be readily recovered under warranty law. For seed companies, the risk can arise from sale of seed that contains impurities that are not approved for export, and in some cases for U.S. domestic use.

For example, a federal court in St. Louis may be asked to address the elements of claims for public and private nuisance arising from the accidental release of biotech rice—Liberty Link rice, also developed by Aventis Crop Sciences USA. The consolidated case to watch is *Bell v. Bayer CropScience LP*, No. 06-00128 (E.D. Mo. filed Sept. 13, 2006). The corporate successor to Aventis Bayer Crop Sciences USA (Bayer) abandoned efforts to market this experimental herbicide-resistant biotech rice, which was grown in Louisiana for a couple years circa 2000. Bayer did not seek approval in the United States and major markets overseas, but the experimental biotech somehow became commingled with other rice seed offered for sale throughout the Midwest. This commingling went undetected for some time, but once discovered, it led to massive rejections of shipments and steep drops in rice prices.

The EU and Japan began testing U.S.-origin long-grain rice in August 2006 and reports of shipments being denied entry to Mexico and Europe are in the news. In early 2007, growers in the Midwest filed multiple nuisance claims arising out of traces of Bayer's Liberty Link rice being found in grain shipments. Bayer pled as an affirmative defense an "Act of God" and various acts of third parties. The U.S. Department of Agriculture (USDA) investigated the commingling in Louisiana and could not trace the cause (e.g., was it pollen drift, insect or bird transport, or other causes?). Bayer's risk management approach to avoid pollen drift and other commingling risks was state of the art, taking a more conservative approach than the USDA's recommended planting distance for experimental biotech rice.

The USDA issued a notice of approval of Liberty Link LL601 rice for release in the United States in November 2006, but plaintiffs claim the economic harm had already occurred because of Bayer's delay in detecting and reporting the commingling. Estimated export losses to Mexico and the EU were still being tallied as this article went to press, with over $100 million in lost markets (but no noticeable decline in rice prices, making the proof of "economic loss" more complex at trial than the initial drop in rice futures ($0.80) that is cited by plaintiffs counsel in the media at the time the complaints were filed. The *Starlink* case has already been cited in the Liberty Link case for its "physical injury" standard of liability which allows growers to recover their economic losses. Whether a successful defense can be mounted in *Bayer* based on the USDA's subsequent approval of the rice remains to be seen.

IV. Conclusion

In sum, the fast-evolving state common law addressing gaps in federal regulation of agriculture require practitioners to dig beyond the surface of published precedents, since today's emerging theories might become tomorrow's legal precedents. Evolution applies to environmental law—what is lawful today might be unlawful, and very costly to clean up many years down the road. The fittest of corporations will survive by assessing trends and avoiding enterprise-threatening mass tort or environmental liability. Corporations that are complacent and do not adapt to changing federal and state remedies will face the consequences.

RESTORATION DAMAGES: *SUNBURST SCHOOL DISTRICT V. TEXACO*

Ted A. Warpinski
Friebert, Finerty & St. John, S.C.
Milwaukee, Wisconsin
taw@ffsj.com

On Aug. 6, 2007, the Montana Supreme Court, in *Sunburst School District No. 2 v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007), ruled that restoration damages can be an appropriate measure of damages even when they substantially exceed the damaged property's fair market value. While the facts and reasoning of the case are significant, the bottom line determination may have far reaching implications because a $15 million award for restoration damages was upheld when a monitored natural attenuation remedy valued at $1 million had been implemented and the value of the impacted properties was only $2 million. With these kinds of potential damages, responsible parties and the potential plaintiffs next door should all take notice.

I. Facts

The case concerned a lawsuit filed by the Sunburst School District and approximately ninety adjoining landowners against Texaco arising out of benzene contamination emanating from a nearby refinery in the Town of Sunburst, Montana. Texaco had operated the refinery for nearly forty years until the early 1960s, during which period gasoline was released into the soil and groundwater. Texaco conducted a partial cleanup in 1955 after vapor from the groundwater plume caused a house to explode. Then, in 1981, Texaco notified the Enviromental Protection Agnecy (EPA) and Montana's Department of Environmental Quality (DEQ) that contamination might remain. Over the ensuing twenty years, first EPA and then Texaco investigated the extent of contamination and conducted extensive monitoring. At one point, DEQ concluded no further action was necessary but the site was re-opened after Montana promulgated new benzene standards. After a consent order was entered into, and additional investigations were performed, in 2003 Texaco proposed a monitored natural attenuation (MNA) remedy at an estimated cost of $1 million over active remediation with an estimated price tag of $30 million.

The plaintiffs' lawsuit was commenced in 2001 and alleged nuisance, trespass, strict liability for abnormally dangerous activity, violation of a constitutional right to a clean environment, wrongful occupation of property, and constructive fraud. After a three-week jury trial in mid-2004, the trial court ruled as a matter of law that Texaco was strictly liable for conducting an abnormally dangerous activity and liable for trespass to all plaintiffs who owned property above the contaminated plume. The jury was then instructed to award damages to all such plaintiffs, with the damages including past and future investigation costs, damages for loss of use and enjoyment, and restoration damages. The jury's verdict included roughly $16 million in compensatory damages, including $15 million for restoration costs. An additional $25 million in punitive damages were awarded. Texaco appealed.

II. Reasoning

The primary issue on appeal was whether restoration damages may be awarded in excess of a property's market value. The Montana Supreme Court started with the general proposition that, in Montana, the proper measure of damages is the difference between the value of the property before and after the injury. *Sunburst*, 165 P.3d at 1086. The court also recognized that restoration damages may be awarded for temporary injuries and defined temporary injuries as those capable of abatement, with the catch being that an injury is presumed permanent if the restoration costs exceed the market value. *Id.* Ultimately, the court looked to the Restatement (Second) of Torts § 929 for guidance.

Section 929 supports restoration costs as the proper measure of damages for injury to real property in certain circumstances:

(1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for
   (a) the difference between the value of the land before the harm and the value after

> the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred. …

Id. The court recognized that the Restatement offered flexibility for a "court to craft an appropriate remedy … that restores a plaintiff as nearly as possible" to the pre-injury condition. *Sunburst*, 165 P.3d at 1087. The court then looked at cases from other jurisdictions where restoration costs were awarded in reliance on § 929, including: *Weld County Bd. Of County Com'rs v. Slovek*, 723 P.2d 1309, 1314 (Colo. 1986) (awarding restoration damages where a flood deposited silt and debris over plaintiff's land, damaging a fishing pond and a dike); *Roman Catholic Church v. La. Gas*, 618 So. 2d 874, 877 (La. 1993) (awarding restoration damages where owner would be unable to use the property for desired purposes without making costly repairs).

Based on this rationale, the court acknowledged that the plaintiffs included owners of personal residences whose properties were contaminated with benzene and concluded that personal residences "represent the type of property in which the owner possesses a personal reason for repair." *Sunburst*, 165 P.3d at 1088. The court did not discuss whether there was any minimal level of contamination or risk that might not justify a restoration cost award. With regard to the plaintiff School District, the court noted that, as public property, the "personal residence" exception would not apply but, because remediation of the groundwater would, by necessity, have to include the groundwater beneath the school, the damages were still proper. *Id.* In this regard, the concurring opinion of Chief Justice Gray is worth reviewing since it suggests that the record did not support a "personal use" exception. Instead, Justice Gray would have supported a broader flexibility and a case-by-case approach **untethered** to any requirement of personal use. *Id.* at 1106-1107. *See also* James R. Cox, *Reforming the Law Applicable to the Award of Restoration Damages as a Remedy for Environmental Torts*, 20 PACE ENVTL. L. REV. 777 (2003).

While the court did not address whether certain levels of contamination or risk would need to be tolerated, the court did respond to an argument by Texaco that such an award would be a windfall because the plaintiffs would not be legally obligated to use the award to actually repair the property. The court tacitly recognized that the intent of a restoration award is that it should actually be used for that purpose and, though no express requirement was ordered, concluded that the record indicated an intent by the plaintiffs to do so. *Id.* at 1089. (For more on this topic, *see* Comment, *Private Actions Seeking Remediation or Restoration Damages: Who Ensures the Cleanup Actually Occurs?* 17 TUL. ENVTL. L.J. 355 (2004)).

The court then evaluated whether the $15 million award was simply unreasonable because the property values were around $2 million. As a starting point, the court identified public policy concerns with strictly capping damages to the pre-tort value.

One public policy consideration was that a strict cap would equip a responsible party with the equivalent of a private right of inverse condemnation. Another consideration was that a strict cap could deny a meaningful remedy for injuries to the environment and sensitive ecological properties in particular. *Sunburst*, 165 P.3d at 1090. The court concluded that the award was reasonable as it fit comfortably in the middle of the MNA cost estimate of $1 million and the active remediation cost estimate of $30 million.

The Montana Supreme Court's application of § 929 to environmental restoration costs beyond those required by the state DEQ or EPA, while perhaps constrained by its facts, could foretell a trend toward such claims in the future. One reason is that numerous jurisdictions have already cited § 929 with approval. *See, e.g.*, *Osborne v. Hurst*, 947 P.2d 1356 (Alaska 1997); *Dixon v. City of Phoenix*, 845 P.2d 1107 (Ariz. Ct. App. 1993); *Worthington v. Roberts*, 803 S.W.2d 906 (Ark. 1991); *Heninger v. Dunn*, 162 Cal. Rptr. 104 (Cal. Ct. App. 1980); *Klingshirn v. McNeal*, 520 S.E.2d 761 (Ga. App. 1999); *Leavitt v. Continental Tel. Co. of Maine*, 559 A.2d 786 (Me. 1989); *Allgood v. General Motors Corp.*, 2006 WL 2669337 (S.D. Ind. 2006); *Keitges v. VanDermeulen*, 483 N.W.2d 137 (Neb. 1992); *Huberth v. Holly*, 462 S.E.2d 239 (N.C. App. 1995); *Land v. Wonnenberg*, 455 N.W. 832 (N.D. 1990);

Ayers v. Jackson Tp., 525 A.2d 287 (N.J. 1987); *Denoyer v. Lamb*, 490 N.E.2d 615 (Ohio Ct. App. 1984); *Gross v. Jackson T.*, 476 A.2d 974 (Pa. Super. Ct. 1984); *U.S. v. Garfield County*, 122 F. Supp. 2d 1201 (D. Utah 2000); *Thre-fall v. Town of Muscoda*, 527 N.W.2d 367 (Wis. Ct. App. 1994). Another reason is that there has been a substantial trend toward the use of natural attenuation as the remedy of choice for more and more sites with more and more neighbors left to live with some levels of contamination for decades. *See* J.E. Odencrantz, et al., *Natural Attenuation: Is Dilution the Solution*, LUSTline, Bulletin 40, March 2002 (pp. 8-12). And, perhaps most significantly, the potential damage awards could be substantial in light of the cost of active remediation systems and restoration activities making such claims worth a serious look by plaintiff lawyers.

YAKAMA TRIBE V. UNITED STATES: FORCING PRPS TO PAY FOR NRD ASSESSMENTS

Connie Sue Manos Martin
Marten Law Group PLLC
Seattle, Washington
cmartin@martenlaw.com

Sometimes called the "sleeping giant" of the Superfund law, relatively few natural resource damage (NRD) cases have been litigated by natural resource trustees, in part because of the enormous up-front cost of performing an injury assessment to prove damages. But a ground-breaking decision by a federal district court in Washington allows trustees to recover in a declaratory judgment action the costs of injury assessment as they are incurred, even before a trustee has established its damages. The Sept. 4, 2007 decision in *Confederated Tribes and Bands of the Yakama Nation v. United States*, 2007 WL 2570437 (E.D. Wash. 2007), allows trustees—federal and state resource agencies and tribes—to recover their reasonable assessment costs as soon as they establish the liability of one or more responsible parties, even well before establishing the amount of natural resource damages owed.

I. The Hanford Site

The Hanford Nuclear Reservation (Hanford), a former Department of Energy (DOE) production site for nuclear materials, is divided into six areas: the 100 Area, the 200 Area, the 300 Area, the 400 Area, the 600 Area, and the 1100 Area. In 1989, the Environmental Protection Agency (EPA) proposed to list four of the six Areas as sites on the National Priorities List (NPL). 54 Fed. Reg. 41,015 (Oct. 5, 1989). EPA further divided the four listed Areas, for investigation and remediation purposes, into dozens of Operable Units (OUs). EPA has selected remedial actions for all OUs in two Areas and some, but not all, OUs in two other Areas.

II. The Claims for Declaratory Relief

The Yakama Tribe filed suit against the United States, DOE, and the U.S. Department of Defense (collectively, the "United States") in September 2002. The complaint, in its current amended form, seeks past and future response costs, a declaratory judgment of liability for natural resource injury assessment costs, natural resource damages, and an order compelling the United States to comply with risk assessment standards that will adequately assess the risk posed to Yakama tribal members and others, and to the environment. In March 2006, the State of Washington and the Nez Perce Tribe intervened in the Yakama Tribe's lawsuit, followed in July 2006 by the State of Oregon and the Umatilla Tribe. The intervening Trustees sought only declaratory judgment of liability for natural resource injury assessment costs.

III. The United States' Motion to Dismiss: NRD as the "Residue" of a Cleanup Action?

On Oct. 2, 2006, the United States moved to dismiss the Hanford Trustees' claims for declaratory judgment of liability for assessment costs, and the Yakama Tribe's claim for natural resource damages, for Areas where a final remedy has not been selected. The United States argued that claims for natural resource damages may not be brought until the final remedy is selected at federal facilities or NPL sites as long as EPA is diligently proceeding with a Remedial

Investigation/Feasibility Study (RI/FS). *See* CERCLA § 113(g)(1)(B), 42 U.S.C. § 9613(g)(1)(B). Because EPA had not selected the final remedy at each of the OUs in the Areas at issue, the United States argued, the Hanford Trustees' claims for assessment costs—which are a component of natural resource damages—and the Yakama Tribe's claims for natural resource damages, are premature.

Further, the United States argued, under the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA's) statutory framework, natural resource damage claims are a "residue of the cleanup action," based on the condition of the natural resource after the cleanup, and therefore cannot properly be assessed until the remedial action has been selected and the likely effects of the remedy on the resource have been taken into account.

The Hanford Trustees argued, in opposing the United States' motion to dismiss, that the plain language of CERCLA § 113(g)(2) creates a cause of action for declaratory judgment and the recovery of natural resource injury assessment costs as they accrue. At the heart of the Trustees' argument is the premise that Congress intended injury assessment costs to be recoverable in the same manner, and to the same extent, as response costs, and that all the policy reasons that support permitting the recovery of response costs as they accrue also support allowing injury assessment costs to be recovered as they accrue. *See* CERCLA §§ 107(a)(4)(B), 113(g)(2).

In response to the United States' argument that a selected remedy has to be final in order for a claim under CERCLA § 113(g)(1) to be ripe, the Hanford Trustees argued that the plain language of CERCLA does not support such a construction. Pointing to other sections of CERCLA where Congress distinguished between "remedies" and "final remedies," the Trustees argued that if Congress had intended to modify "remedial action" in § 113(g)(1) with "final" it certainly knew how to do so. Absent such Congressional intent, an interim remedial action will suffice to trigger a claim under § 113. Finally, the Trustees argued that sound policy considerations warrant allowing costs incurred assessing natural resource damages to be recovered in an ongoing basis in order to facilitate the integration of natural resource damage assessment (NRDA) and restoration activities with response and remediation activities.

IV. The Decision

The court, based on a plain reading of the statute, held that the section of the statute relied on by the United States applied only to "damages" and not to "costs."

> Simply put, "costs" are intended to reimburse a party for certain expenses incurred by it, whereas "damages" are intended to compensate a party for an injury or a loss. In the context of §9607(a)(4)(C), this means that injury assessment costs reimburse a party for costs incurred in determining the extent of an injury (a damages assessment), whereas damages compensate for the injury (the loss) itself in order to make the party whole. This plain meaning is evident from the plain language of §9607(a)(4)(C), as well as the plain language of (a)(4)(A), (B), (C), and (D), all of which refer to categories of costs.

2007 WL 2570437, at *3.

Actions for the recovery of costs, the court concluded, need not await the selection of a remedial action before they may be commenced. *Id.* at *5. The court went even further, however, finding that the limitations period contained in § 113(g)(2)—the section requiring actions for the "recovery of costs referred to in § 107" for removal or remedial actions—did not apply to the recovery of NRDA costs. Specifically, it held that the prohibition applied only to "response costs" specified in §§ 107(a)(4)(A) and (B), and not to the costs of assessing natural resource injury under § 107(a)(4)(C) or the costs of a health assessment carried out under §107(i). *Id.* at *4. In reaching this result, the court pointed to the last half of § 113(g)(2), which provides that "[a] subsequent action to recover further *response* costs … may be maintained at any time during the response action, but must be completed no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under § 9607 of this title for recovery of costs at any time after such costs have been incurred."

Seizing on the difference between "response costs" specified in §§ 107(a)(4)(A) and (B) and "assessment costs" incurred under § 107(a)(4)(C), the court concluded that the three year statute of limitations in § 113(g)(2) applied only to response costs, and that "assessment costs" could be recovered at any time after such costs have been incurred. *Id.* at *5. The court's decision essentially reads any statute of limitations for recovering assessment costs out of the statute. The court did not have before it the question as to whether the United States is a Potentially Responsible Party (PRP) at the Hanford Reservation, and therefore responsible for assessment costs. But, the court noted in dicta, if the Trustees subsequently prove that the United States is a PRP, then the United States will be liable for the costs the Trustees have already incurred, and for their future assessment costs, provided that they are "reasonable." *Id.* at *5 - *6.

V. Implications

The integration of NRDA activities with response and remediation activities is not a new proposition. What *is* novel is the proposition that a natural resource trustee may secure a declaratory judgment of liability for injury assessment costs after the first assessment dollar has been spent, and thereafter periodically recover costs incurred as the assessment proceeds. Trustees—especially tribal and state trustees—often lack the resources to perform an NRDA. For that reason, trustees may not have brought certain claims, and/or may have sought to have the PRPs fund or perform the assessment. If the decision at the Hanford site is followed, trustees will have gained a distinct tactical advantage in NRD litigation, by being in a position to obtain a declaratory judgment allowing them to recover their assessment costs "as they go," putting them in a better financial position to prosecute those claims.

While significant, the decision is unlikely to open the floodgates of NRD litigation. Certainly, there are some sites where trustees have significant unreimbursed assessment costs, and they may be emboldened by this decision to seek to recover those costs. But trustees will still have to prove the liability of the PRPs, and there remain substantial areas of controversy in this area of law. This decision will more likely cause parties in NRD litigation to reconsider the way NRD claims are prosecuted and defended. The battle lines will likely be drawn earlier, at the liability phase, because, under this decision, both trustees and PRPs benefit from an early liability determination. From the trustees' perspective, if the government (federal, state, or tribal) has a limited amount of money to spend, it may want to spend it establishing who is liable for assessment costs, and then shift those costs, and the damages, to the PRPs.

THE APPLICATION OF *DAUBERT* IN ENVIRONMENTAL COST RECOVERY AND TOXIC TORT CASES

Dean M. Cordiano
René A. Ortega
Day Pitney LLP
Hartford, Connecticutt
dmcordiano@daypitney.com

In complex environmental and toxic tort cases, expert testimony is key to the presentation of claims and to the defense of those claims. Experts are typically environmental engineers, scientists, geologists, and, when physical injuries are involved, toxicologists and environmental and occupational health doctors. Getting that expert testimony heard by the fact-finder in your case, be it judge or jury, requires satisfying Federal Rule of Evidence 702 (Testimony by Experts) and the standards set forth by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as refined by subsequent Supreme Court and circuit court case law. By presenting several representative federal circuit court and district court decisions, this article discusses how the federal courts have applied the standard of reliability under *Daubert* to the admissibility of expert testimony in the context of environmental cost recovery and toxic tort cases.

I. Background

Daubert replaced the *Frye* standard for expert testimony, which focused on the general acceptance of the expert's methods within the field. *Frye v. United*

States, 293 F. 1013 (D.C. Cir. 1923). *Daubert* articulated several non-exclusive factors for the courts to apply to expert scientific testimony in determining admissibility. *Daubert* specifically held that, while acting as "gatekeeper" against unreliable and untrustworthy scientific testimony, district judges were to weigh the value of a scientific theory by taking into consideration factors beyond the mere issue of general acceptance in the relevant scientific community. The Supreme Court offered guidance in this endeavor, suggesting five factors to analyze, while warning that it was not setting out a "definitive checklist": (1) "whether a theory or technique . . . can be (and has been) tested," (2) "whether the theory or technique has been subjected to peer review and publication," (3) "the known or potential rate of error," (4) "the existence and maintenance of standards controlling the technique's operation," and (5) general acceptance of the technique in the relevant scientific community.

The impact of *Daubert* was to make it possible—although not to assure—that legitimate and "new" scientific theories could be brought to juries even if not yet a part of mainstream thought. The Court refined its approach in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), where it imposed a deferential standard of review of trial judges' decisions to exclude or admit expert testimony and extended the analysis to an expert's conclusions as well as methodology. Thus, while *Daubert* set forth a detailed roadmap for trial judges, the *Joiner* Court held that the trial judge's decision would be reviewed only for an "abuse of discretion"—essentially retreating from any perceived attempt to micromanage the *Daubert* decision-making process.

In 1999, the Supreme Court held that the *Daubert* approach applies to non-scientific expert testimony as well as "hard science." *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). No longer was *Daubert* limited to keeping "junk science" from impressionable juries, but now experts testifying to opinions based on specialized knowledge or experience must also undergo *Daubert* scrutiny. Stressing the flexibility of the reliability inquiry, however, the *Kumho* Court explained that "Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination."

In 2000, Congress amended Federal Rule of Evidence 702 (Testimony by Experts) to embody the effects of these decisions. Currently, Federal Rule of Evidence 702 states as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

II. Reliable Environmental Expert Testimony

This article uses four questions to present the typical reliability issues that appear with expert testimony in environmental and toxic tort cases. These four inquiries are: (1) whether the expert is sufficiently qualified as an expert, (2) whether the underlying facts and data are reliable, (3) whether the expert uses reliable methods, and (4) whether the expert has reliably applied those methods.

1. Is the expert qualified?

Courts have generally held that an expert may only testify in his or her own area of expertise. For example, in *Niagara Mohawk Power Corp. v. Cons. Rail Corp.*, 291 F. Supp. 2d 105, 132 (N.D.N.Y. 2003), the district court excluded the testimony of an organic geochemist hired to testify about the presence of asphalt-like weeps in the Hudson River. The expert used gas spectrometry/flame ionization detection to determine whether the defendant was the source of the pollution. The plaintiffs claimed that the method was a reliable and generally accepted technique, and the geochemist had significant experience using this technique. However, over 99 percent of his experience with chromatograms involved analyzing the chromatograms for gas pollution, not asphalt pollution.

Because he had no experience in analyzing chromatograms for asphaltic pollution, and because he relied on no other scientific basis, the court determined that his testimony was unreliable.

Although experts can rely on data and information prepared by others, an expert cannot rely on information that is beyond the expert's own area of expertise. The Seventh Circuit in *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 616 (7th Cir. 2002), affirmed the district court's exclusion of an expert's testimony. In *Dura*, a cost recovery action, the plaintiff employed an expert hydrogeologist and expert computer groundwater flow modelers. However, the plaintiff failed to submit the affidavits of the computer modelers in a timely manner. This procedural failure resulted in the exclusion of the computer modelers from the trial. In an attempt to bring in the otherwise excluded testimony of the computer modelers, the plaintiff had the hydrogeologist incorporate the groundwater flow analysis into his opinion. The plaintiff argued that the computer modelers were his assistants, invoking the proposition that experts can rely on data prepared by assistants. However, the court found that the hydrogeologist's area of expertise was analyzing capture zones, and that computer models of groundwater flow were outside of this area of expertise. If the hydrogeologist had simply discussed a computer model of present groundwater flow, the court suggested that this may have been within his area of expertise. However, the fact that the groundflow modelers had to "tinker" with their model means that the expert exercised discretion beyond a hydrogeologist's knowledge.

2. Are the underlying facts or data reliable?

Generally, courts do not require that an expert have direct evidence supporting a theory of causation. In *Nutra Sweet v. XL Engineering*, 227 F.3d 776, 790 (7th Cir. 2000), the Seventh Circuit reaffirmed the principle that "an expert is not always required to personally perceive the subject of his analysis." Moreover, in *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 527 (2d Cir. 1996), the Second Circuit reversed the district court's exclusion of expert testimony. The district court held that the expert had no direct evidence that the defendant illegally dumped tire products. However, the circuit court disagreed with the lower court and held that requiring such direct evidence would be overly burdensome: "[b]ecause plaintiffs usually lack direct evidence that a defendant dumped hazardous substances, the potentially responsible parties would only be found liable in those rare instances in which a 'smoking gun' is discovered." *Id.* at 526.

3. Is the testimony based on reliable principles and methods?

Courts are more likely to admit expert opinions that are based on conventional and accepted scientific principles. However, courts will still allow experts to employ unusual methods if there are other reliable factors present, such as the qualifications of the expert or if the novel method is combined with other more generally accepted methods. These other factors boost the reliability of the opinion despite the use of an otherwise novel or controversial method.

Nutra Sweet is an example of a court allowing unusual methods when there were other, countervailing, indicators of a reliable expert opinion present. In *Nutra Sweet*, the expert used aerial photography to assess the contamination of a certain geographical area. 227 F.3d at 788. The defendants claimed that aerial photography was an unreliable method and should not be admissible. However, the expert had over twenty years experience using aerial photos as a means of analysis. The court noted that this method was not particularly novel in this field, and that the expert used this method in conjunction with several other highly scientific methods, including chromatography, solvent degradation, and Darcy's equation for groundwater migration. Aerial photography was but one method within a group of methods that the expert used. Therefore, the expert's overall method was reliable despite the claim that one sub-method may have been controversial.

4. Did the expert reliably apply the method to the facts?

In some cases, an expert may be fully qualified, may use reliable facts, and may use reliable methods. If, however, there is too wide an analytical gap between

the method, facts, and the conclusion that the expert ultimately reaches, then courts may exclude that testimony.

The Sixth Circuit in *Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 171 F.3d 1065 (6th Cir. 1999), dealt with this issue in reviewing a district court decision granting summary judgment. In *Kalamazoo River*, the court upheld the district court's exclusion of the expert's testimony because of an overly-speculative conclusion. The expert relied on an assumption about groundwater flow that was one possible explanation for how water flowed down a ditch to the Kalamazoo River. However, the court held that explanations that are merely possibilities do not create material issues of fact for trial. The court found that the expert's conclusion was overly-speculative, and therefore, not reliable.

The Eight Circuit in *Bonner v. ISP Technologies, Inc.*, 259 F.3d 924, 931 (8th Cir. 2001), affirmed the trial court's admission of expert testimony. This toxic tort case involved a toxicologist who concluded that a workers' exposure to solvents at a plant caused their illness. The defendant challenged the expert's conclusion claiming that it was not supported by a sufficient factual basis. Specifically, the defendant claimed that the expert relied on case studies which were not generally considered to be reliable sources for this particular type of case because they focused on the ingestion rather than the inhalation of the toxin. However, the court held that the trial court did not abuse its discretion because there was a close "temporal proximity" between the inhalation and the acute symptoms of the illness to render a conclusion as to causation sufficiently reliable. The *Bonner* court stated: "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility….Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded."

III. Conclusion

The revolution in the way courts handle expert testimony spawned by *Daubert*, and as refined by subsequent case law, has been applied in thousands of cases and analyzed in a flood of commentaries and articles. Federal courts, and practitioners alike, involved in the area of environmental and toxic tort litigation have now had fourteen years to grapple with the standards set for the in the Supreme Court's seminal decision. Nevertheless, there remain pitfalls for the unwary. Yet even as the rigors of *Daubert* are applied to new and unanticipated scenarios, the law in this area reduces to the basic requirement of demonstrating the reliability of proposed expert testimony.

ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events

26th Annual Water Law Conference
Feb. 21-22, 2008
San Diego, California

37th Annual Conference on Environmental Law
March 13-16, 2008
Keystone, Colorado

Eastern Water Resources
May 1-2, 2008
Charlotte, North Carolina

ABA Annual Meeting
Aug. 7-12, 2008
New York, New York

16th Section Fall Meeting
Sept. 17-20, 2008
Phoenix, Arizona

For more information, see the Section Web site at www.abanet.org/environ/.

CASES OF INTEREST AND INTERESTING CASES

Anyone may submit case notes for publication consideration and we encourage you to do so by sending them to mfreeman@balch.com. We are looking for cases in the toxic tort and environmental litigation genre that are newsworthy, interesting, or just downright funny. In this edition we have cases submitted by two of the committee's members: Alma Aguirre, Powers & Frost, Houston, Texas, and Emily Poe, Balch & Bingham, Atlanta, Georgia.

SMELTER IN SPELTER ORDERED TO CLEAN UP, PAY UP

Emily Poe

In an October 2007 trial, ten residents of Spelter, West Virginia, defeated Delaware-based DuPont Co. in a multi-stage dispute over a former smelting plant site. The trial, conducted in Harrison County Circuit Court, focused on the effects of a 112-acre waste site contaminated with arsenic, cadmium, and lead, all byproducts of the zinc-smelting process, which produces slab zinc and zinc dust for use in rust-proofing products, paint pigments, and battery anodes. DuPont was named as a defendant in the case, along with T.L. Diamond & Co., a New York-based company that owned and operated the plant from 1975 to 2001, when it was closed as an imminent and substantial threat to public health.

In each stage, the jury sided with the Spelter residents, who argued that the company should be made to clean up the mess and compensate the residents through medical monitoring and the award of damages. At the conclusion of the first stage, the jury found that DuPont was negligent in the creation of the waste site, that the company created a public and private nuisance as well as trespass, and that they should be held strictly liable for exposing the Spelter residents to the contaminants.

That decision opened the door for three subsequent phases of the trial. In the second phase, the jury decided that DuPont was obligated to finance and provide medical monitoring over the next 40 years to the roughly 7,000 residents of Spelter who had been exposed to the arsenic, cadmium and lead. The third phase of the trial addressed the amount of property damage claims, and resulted in an award of $55.5 million to clean up private properties. The fourth and final phase of the trial addressed the award of punitive damages. In that phase, the jury ordered that DuPont pay $196.2 million for deliberately dumping dangerous heavy metals. Attorneys and spokesmen for DuPont have said that the decision would be appealed.

WHEN COST IS NO LONGER AN ISSUE IT CAN GET EXPENSIVE

Alma Aguirre

The D.C. Court of Appeals recently upheld a provision of the Safe Water Drinking Act (SWDA) whereby the Environmental Protection Agency (EPA) imposed new rules regardless of cost. *City of Portland v. EPA*, 2007 WL 3254333 (D.C. Cir. Nov. 6, 2007). In 2006, EPA determined there was no safe level of cryptosporidium in drinking water. As a result, all drinking water must now be treated. Portland and New York City did not treat their water. Instead, they chose to strictly control the sources of the water and store the final product in rigorously controlled, yet uncovered, reservoirs. Facing a clear increase in cost imposed by the new rules, the cities challenged EPA failure to perform a cost benfit analysis.

Under the SWDA, a cost-benefit analysis is required when considering what safeguards are to be instituted for drinking water. The SWDA requires that the agency consider imposing less stringent techniques to guard against contamination if the most stringent technique is shown not to be cost effective. However, there is one exception to that rule in that EPA is prohibited from considering the cost-benefit of any technique when it comes to cryptosporidium. The agency must still conduct the analysis but the results cannot be used to choose a less stringent technique to control against this particular microbe. Therefore, even if there was evidence that the EPA's cost-benefit analysis in this case was flawed, it was harmless error,

as it could not take the results of such analysis into consideration when dealing with cryptosporidium.

The inclusion of cost-benefit analyses was one of several highlights of the 1996 amendments to the SWDA. However, in the wake of the 1993 cryptosporidium outbreak in Milwaukee (which resulted in some fifty deaths and hundreds of other affected), Congress eliminated cost as a consideration when it comes to that particular contaminant. In light of the ever-increasing reports of consumer-product contaminations, it is yet to be seen if Congress will embrace this precedent and instruct agencies to disregard cost when considering and imposing public protections.

FUEL EMISSIONS STANDARDS FOR LIGHT TRUCKS TOO LITE

Alma Aguirre

In a decision expected to be appealed to the U.S. Supreme Court, the Ninth Circuit Court of Appeals struck down the new fuel emission standards for light trucks model years 2008-2011. *Center for Biological Diversity v. NHTSA*, 2007 WL 3378240 (9th Cir. Nov. 15, 2007). Various environmental groups challenged the new standards on the basis that the National Highway Traffic & Safety Administration (NHTSA) either improperly failed to consider certain factors or the analyses used by the NHTSA were incorrect.

Ruling mostly in favor of the petitioners, the Ninth Circuit determined, first and foremost, that the NHTSA failed to assign a value to "the most significant benefit" of fuel emissions standards: reduction in carbon emissions. In addition, the court observed that in setting efficiency standards, the NTHSA improperly ignored that "scientific knowledge of climate change and its causes" is more advanced than it was in the past. Further, "[t]he need of the nation to conserve energy is even more pressing today than at the time" of the original mandate to set fuel economy standards. Unequivocally the court is requiring the agency to accept that there has been a definite shift in the climate in which energy regulations must now be considered and enacted.

The three justice opinion also went on to make other findings that, if not overturned by the Supreme Court, will force the NHTSA to make some other changes that it has long fought against. The court determined that NHTSA acted in an arbitrary and capricious manner when failing to revise the definition of a light truck. Acknowledging an argument environmentalists have been making for a number of years, the court recognized that small trucks are manufactured primarily for passenger transport and not for off-highway operations as the agency maintains. The definitions must be revised or a "valid" explanation for not doing so must be provided. The court also questioned the NHTSA's continued refusal to set fuel economy standards for Class 2 vehicles, those between 8,500 and 10,000 lbs. "That Class 2b trucks have never been regulated by NTHSA is not a reason for not regulating them now."

WHO PAYS FOR CLEAN UP? U.S. SUPREME COURT CLARIFIES CERCLA § 107(A)

Emily Poe

In *United States v. Atlantic Research Corp*., 127 S. Ct. 2331 (2007), the U.S. Supreme Court addressed the issue of whether Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601, *et seq*., permits a party that has engaged in a voluntary cleanup of a contaminated site to recover costs from other potentially responsible parties (PRPs). The Court unanimously held that such recovery was possible under § 107(a), opening the door for a significant incentive to induce parties to voluntarily begin cleanup of contaminated property.

Within CERCLA, §§ 107(a) and 113(f) allow private parties to recover expenses associated with cleaning up contaminated sites. Section 107(a) identifies four categories of PRPs, and holds them liable for "(A) all costs of removal or remedial action incurred by the

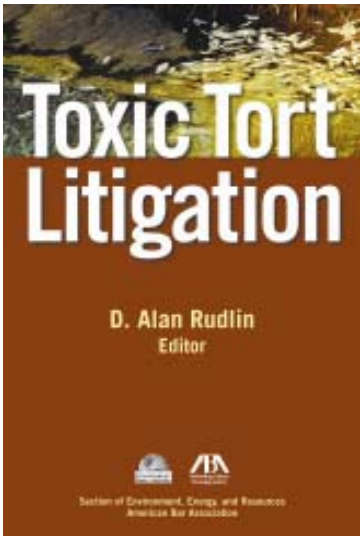
U.S. Government or a State or an Indian tribe not inconsistent with the national contingency plan" and "(B) any other necessary costs of response incurred by any other person consistent with [such] plan." 42 U.S.C. § 9607(a)(4)(A)-(B). Section 113(f), which was enacted later, provides an alternative remedy and authorizes one PRP to sue another for contribution. Prior to this case, courts had held contribution actions brought under § 113(f) to be the exclusive remedy for recovery of costs incurred by PRPs. *Atlantic Research* reopened the remedy offered under § 107(a)(4)(B) to include PRPs in the category defined by the phrase "any other person."

Atlantic Research retrofitted rocket motors for the government at a facility that was operated by the U.S. Department of Defense. Atlantic Research leased the property from the government when the contamination occurred, and later voluntarily cleaned up soil and groundwater contamination at the site and sought to recover some of its costs from the government. The government argued that § 107 (a)(4)(B) did not include PRPs among the parties that could recover costs under that provision

The Supreme Court adopted a broad interpretation of § 107(a), and found that § 107 (a)(4)(B) provided a cause of action for cost recovery to anyone other than the United States, a state, or an Indian tribe. Any private party, including a PRP, could therefore bring an action under that section of CERCLA. Further, the Court held that a cost recovery action under § 107(a) was distinct from and complimentary to an action for contribution under § 113(f)(1), which could only be brought during or following a suit under §§ 106 or 107(a). While the *Atlantic Research* decision provides clarity that brings together PRPs who undertake a voluntary cleanup of a contaminated site as well as PRPs that caused or contributed to the original contamination, it remains to be seen if the impact of this decision will in fact increase voluntary cleanup initiatives.

New from ABA Publishing and The Section of Environment, Energy, and Resources

Toxic Tort Litigation
D. Alan Rudlin, Editor



Trying a toxic tort case is very different from other high-stakes litigation. Cases are complex, involving large numbers of plaintiffs and defendants with multiple lawsuits brought in more than one jurisdiction, and can entail difficulties in identifying the source of the claimed harm. Toxic tort cases require innovative complex litigation procedures and heavily rely on establishing scientific concepts to resolve causation issues. **Toxic Tort Litigation** is a new, practice-focused guide that explores the specific and often unique elements that distinguish this type of litigation.

Toxic Tort Litigation explains the differing theories of liability and damages within the toxic tort context, as well as the key procedural and substantive defenses to toxic tort claims. Subsequent chapters cover the important aspects of scientific and medical evidence and causation, including dealing with the opinions of experts in the context of *Daubert* or *Frye* challenges. The book also addresses the important aspects of case strategy, trial management, and considerations in settlement. The final part of **Toxic Tort Litigation** highlights critical aspects in litigating specialized cases, including mold, lead, asbestos, silica, food product and pharmaceutical liability, and MTBE. Includes extensive notes and comprehensive index.

2007 6 x 9 paperback 491 pages
Product Code: 5350152
Price: Section of Environment, Energy, and Resources members $129.95;
Regular $149.95

TO ORDER ABA BOOKS, CALL 1-800-285-2221 OR VISIT THE ABA PUBLISHING WEB SITE AT WWW.ABABOOKS.ORG QUESTIONS? E-MAIL: SERVICE@ABANET.ORG