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ABA SECTION OF ENVIRONMENT ENERGY AND RESOURCES

Environmental Litigation and Toxic Torts Committee Newsletter

Vol. 9, No. 2 **April 2007**

MESSAGE FROM THE CHAIR

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

Happy 2007 and welcome to the first newsletter for the year from the Environmental Litigation and Toxic Torts Committee of the Section of Environment, Energy, and Resources. I hope that one or more of you participated in 36th Conference on Environmental Law at the Keystone Resort in beautiful Keystone, Colorado. If not, you missed a wonderful opportunity to learn, network and recreate—an opportunity that hopefully you will enjoy next year.

Our committee is one of the Section's largest with over 800 environmental and toxic tort practitioners and seeks to address and communicate on-going changes in toxic tort and environmental litigation issues in both substantive and procedural areas. We hope that you will consider taking an active role in our committee as we explore various facets of these issues in the coming year.

In the way of cutting edge issues, we have decided to kick off this year with a theme-based newsletter, designed to give you everything you need to know (and maybe then some) about natural resource damage claims. I have been involved in some cases asserting such claims and am honored to offer you my experience and knowledge on the topic. This is an area of the law that presents potentially catastrophic exposure (financially and politically) to alleged polluters, as well as, opportunities for states and others to hold accountable those that have violated the environment and force them to restore the natural resources they have damaged. I hope you enjoy the articles that have been written for you.

For those who like to get involved, there are many opportunities in our committee. For example, we welcome your input into our newsletter, either in the form of an article or news about a recent case you successfully tried or settled. Consider hosting a brown bag lunch in your community, volunteering for our committee public service project, or making a program proposal for an upcoming conference. Let us hear from you!

Please be sure to register for the 15th Section Fall Meeting, Sept. 26-30, 2007, in Pittsburgh, Pennsylvania.

NEW FEATURE: *CASES OF INTEREST AND INTERESTING CASES*

In this issue: *In re*: *The Exxon Valdez*, *City of St. Louis v. Benjamin Moore & Co.*, *Cline v. Ashland, Inc.*, *K.C. 1986 v. Reade Manufacturing*, and more...

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Environmental Litigation and Toxic Torts Committee Newsletter
Vol. 9, No. 2, April 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.

MESSAGE FROM THE VICE CHAIR, NEWSLETTER

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

This theme-based edition of the newsletter focuses on natural resource damage (NRD) issues and the high profile cases where the contours of this Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) created claim are being developed and defined. Long considered a sleeping giant of potential liability for potentially responsible parties (PRPs), the giant is awake and stirring in multiple jurisdictions where states have sued to recover damages for loss of their resources.

Our NRD journey begins with an article by the chair of this committee, Peter Gray, who has been personally involved in a number of NRD cases and provides us with his view of the landscape. You then will find articles focusing on some of the more significant cases and issues, including, among others, the New Jersey experiment, the 10th Circuit's recent decision in *New Mexico v. General Electric Co.*, the influence and impact of *Daubert*, and how the Europeans are approaching the NRD issue.

We are planning to have the next edition of our newsletter focus on recent actions seeking damages and injunctive relief for alleged air contamination and the impact, if any, the Class Action Fairness Act (CAFA) has had on such cases. We expect this newsletter to be published in August. If you are interested in contributing towards our next article or have specific topics that you would like to see us address in future newsletters, please let me know.

THE RISE OF NATURAL RESOURCE DAMAGE CLAIMS STATES AND PLAINTIFFS' ATTORNEYS LEADING THE CHARGE

Peter L. Gray, Esq.
McKenna Long & Aldridge LLP
Washington, D.C.
pgray@mckennalong.com

Natural resource damage (NRD) actions have long been regarded as the sleeping giant of Superfund. Potentially responsible parties (PRPs) are reminded of this lurking issue every time they sign a consent decree with the U.S. Department of Justice (DOJ), resolving their liability for cleanup of a Superfund site. DOJ almost always excludes NRD liability from the consent decree's "covenant not to sue" provision.

The federal government, however, does not always pursue these reserved NRD claims, leading settling parties to believe that their potential NRD liability will never get beyond the hypothetical stage. In the 26 years since Congress passed and President Carter signed into law Superfund—formally referred to as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675—there have been only a handful of reported NRD cases brought by the United States. Likewise, until the mid- to late-1990's, state prosecutions of NRD claims were equally rare. California was one of the few states to invest scarce public funds in this risky litigation, when it joined with the United States to file the *Montrose Chemical* NRD case in 1990.

In the late 1990's, however, states began to develop an appetite for NRD claims. Actions have been prosecuted by state trustees in New Mexico, New Hampshire, New York, Massachusetts, New Jersey, South Carolina, and even the U.S. Virgin Islands. By far the most active state in this wave of NRD activity is New Jersey, where over three dozen actions have been filed since 2000. One reason for New Jersey's willingness to bring so many NRD claims may be its decision to use private lawyers to pursue these claims on a contingent fee basis, and thereby minimize its cost to litigate these claims. New Jersey, however, is not the first state to use a contingent fee arrangement to prosecute NRD claims.

The first known instance of such an arrangement was the U.S. Virgin Islands' claim to recover damages from various oil company defendants for contamination of the Tutu Wellfields, the sole source of drinking water in St. Thomas. *See In re Tutu Water Wells Contamination Litig.*, 78 F. Supp. 2d 423 (D.V.I. 1999) (upholding validity of settlement agreement), *aff'd* 326 F.3d 201 (3d Cir. 2003), *cert. denied*, 540 U.S. 984 (2003). The Territory retained well-known plaintiff's lawyer John K. Dema to prosecute the NRD claim.

Since then, a number of other states have followed suit, most notably New Jersey and New Mexico. New Jersey has retained several plaintiffs' lawyers (Allan Kanner and Mr. Dema among them) to prosecute numerous NRD claims, including an action against a group of companies that allegedly contaminated the Lower Passaic River. Likewise, New Mexico retained outside counsel, including famed plaintiffs' lawyers Walter Lack (involved in the "Erin Brockovich" case) and Tom Girardi (involved in the Vioxx claims), on a contingent fee basis to prosecute a $5 billion NRD action against General Electric and ACF Industries for groundwater contamination in the South Valley of Albuquerque. *New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185 (D.N.M. 2004), *aff'd*, 467 F.3d 1223 (10th Cir. 2006). These contingent fee NRD cases raise novel legal issues. For example, does a contingent fee arrangement violate the CERCLA § 107(f) mandate that "sums recovered by a State . . . shall be available for use only to restore, replace, or acquire the equivalent of such natural resources"?

The discussion below provides a brief summary of NRD actions under CERCLA, and then profiles the New Jersey NRD program—ground zero for contingent fee NRD actions—and delves into problems that contingent fee prosecution of NRD claims may encounter.

Natural Resource Damages under CERCLA

CERCLA authorizes the United States, as well as States and Indian tribes where authorized by the United States, to clean up releases of hazardous substances and to impose the costs of such cleanup on defined classes of responsible parties. The liability of these parties for such cleanup costs is strict, joint and several. CERCLA also imposes strict liability on responsible parties for an "injury to, destruction of, or loss of natural resources" caused by releases of hazardous substances. CERCLA §107(a)(4)(C). "Natural resources" are defined broadly as encompassing "land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe." CERCLA § 101(16). Given that only resources controlled by federal, state, or tribal governments are subject to NRD claims, ordinary private citizens cannot seek NRD recovery. Rather, only natural resource trustees designated by the United States government, States or Indian tribes may seek NRD recovery. *See* CERCLA § 107(f)(1). Furthermore, damages recovered by natural resource trustees must be used by the trustee "only to restore, replace, or acquire the equivalent of" the affected natural resources. When the federal government is the trustee, the award can be used "without further appropriation." *Id.*

The required elements for an NRD claim brought under CERCLA are as follows: (1) there must be a release or threatened release of a hazardous substance (2) from a "facility" or "vessel" that (3) results in injury to natural resources, and (4) the defendant is a covered person as specified under § 107(a)(1) through (4). *See Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 1102-03 (D. Idaho 2003).

The three statutory defenses applicable to federal cleanup cost recovery claims also apply to NRD claims. Thus, one has a defense to a NRD claim where the injury to a natural resource was caused solely by: (1) an act of God, (2) an act of war, or (3) an act or omission of a third party not an agent or employee of the defendant or one whose act or omission occurred in connection with a contractual relationship with the defendant (provided the defendant can establish that he exercised due care with respect to the hazardous substances that caused the damage and took precautions against foreseeable acts or omissions of such third party). *See* CERCLA § 107(b).

Additional defenses based on the language of CERCLA that may be asserted by defendants in NRD cases include: (1) both the release of hazardous substances and the injury caused by such release occurred wholly before Dec. 11, 1980, the date Superfund was enacted (CERCLA § 107(f)(1)); (2) the natural resource damage was "specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environmental analysis" or was an expected consequence of a "decision to grant a permit or license" (provided the facility is "operating within the terms of its permit or license)" (CERCLA § 107(f)(1)); (3) the plaintiff failed to assert the NRD claim within the statute of limitations period, which is three years from the later of either discovery of the loss and its connection to a release, or the date the U.S. Department of Interior (DOI) issues its final regulations (or for sites listed on EPA's "National Priorities List," within three years after completion of the remedial action, excluding operation and maintenance activities in lieu of the foregoing limitations periods)(CERCLA § 113(g)(1)); and (4) plaintiff failed to demonstrate that the hazardous substances disposed of by the defendant caused the injury to the natural resource to be restored or replaced. *See* CERCLA § 107(a)(4)(C) which establishes liability for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss resulting from such a release" (emphasis added). *See also City of New York v. Exxon Corp.*, 766 F. Supp. 177, 196 (S.D.N.Y. 1990).

Federal Trustees

Pursuant to Section 107(f)(2) of CERCLA, federal, state, and tribal governments must designate trustees to act on behalf of the public in prosecuting claims for, and recovering damages to, natural resources. The secretaries of Agriculture, Commerce, Defense, Energy, and Interior have been designated by the president of the United States as the federal NRD trustees. *See* Exec. Order No. 12580, 3 C.F.R. 193 (Jan. 23, 1987). Of all these departments, the Department of Interior (DOI) plays the largest role both as the primary trustee for most federal lands and their supporting ecosystems and through regulations specifying how federal trustees should perform NRD assessments. The other federal departments that can have trusteeship are as follows: the Department of Agriculture serves as trustee for federal rangeland, fisheries, farmland, national forests, and wetlands enrolled in the Wetlands Reserve Program. The Department of Commerce, principally though the National Oceanic and Atmospheric Administration (NOAA), typically serves as the trustee for marine and coastal resources. The Department of Energy has trusteeship over natural resources within property under its control (e.g., national research and development laboratories, facilities and offices). Similarly, the Department of Defense has trusteeship over natural resources within property under its control (e.g., military bases and installations). Significantly, the U.S. Environmental Protection Agency (EPA), which administers the cleanup of sites under CERCLA, is not a trustee of federal natural resources. Instead, EPA has a supporting role, coordinating assessment, investigation and planning of NRD claims with the trustees and notifying the trustees of settlement negotiations with PRPs.

CERCLA does not specify procedures for a trustee to quantify NRDs. Instead, CERCLA § 301(c) directs the president to promulgate regulations for NRD assessment. The president delegated that responsibility to DOI. Between 1986 and 1994, DOI promulgated a series of regulations governing NRD assessments under CERCLA. These regulations were challenged, partially overturned by the Court of Appeals for the D.C. Circuit, and re-promulgated in final form for Type A assessments (covering coastal and marine environments) in May of 1996 and for Type B assessments (covering all other environments) in March 1994. These regulations are found at 43 C.F.R. pt. 11, Subparts D and E. NOAA issued its NRD assessment regulations in January 1996, which are found at 15 C.F.R. pt. 990. In general, the regulations provide an approach that trustees may use when conducting NRD assessments, including: (1) determining whether an injury to natural resources or services has occurred (*i.e.*, preassessment); (2) confirming the injury and developing an assessment plan; (3) gathering data to quantify the injury and damages; (4) identifying and evaluating alternatives; and (5) providing for the return of injured natural resources and services to baseline conditions and compensation for interim lost services (*i.e.*, restoration and implementation).

Although performing an NRD assessment is not a prerequisite to recovery of damages in a NRD action, a NRD assessment provides trustees with a significant advantage in litigation. Any determination or assessment of damages to natural resources made by a federal or State trustee in accordance with the NRD assessment regulations has the force and effect of a rebuttable presumption in a judicial proceeding. *See* CERCLA § 107(f)(2)(c)).

The New Jersey NRD Program

Pursuant to CERCLA § 107(f)(1), the governor of New Jersey has designated the commissioner of the New Jersey Department of Environmental Protection (NJDEP) to act as the trustee of natural resources controlled by the State and has authorized NJDEP to prosecute NRD claims under CERCLA § 107(f)(1).

Typically, however, NJDEP relies on the New Jersey Spill Compensation & Control Act (N.J. STAT. ANN. § 58:10-23.11 *et seq*, the "Spill Act")—rather than CERCLA—to obtain natural resource damages from responsible parties. Just as with the federal framework, damages that may be recovered under the Spill Act include the cost of restoration or replacement of the injured resources, the value of any lost use of the resources, and the cost of the assessment of the natural resource damage. *But see NJDEP v. Exxon Mobil*

Corp., Case No. UNN-L-3026-04, 2006 WL 1477161 (N.J. Super. Ct. May 26, 2006) (lost use damages not available under Spill Act). In addition, New Jersey's Spill Act provides authority for the State to collect treble damages if the responsible parties refuse to respond to the State Directive to restore the natural resource.

New Jersey has implemented an aggressive NRD program. On Sept. 24, 2003, the NJDEP commissioner published Policy Directive 2003-07, which communicates the State's plan to collect NRD for groundwater and other natural resources impacted by roughly 4,000 of the state's 13,000 contaminated sites. Under this policy, NJDEP will assess site remediation cases for natural resource damages claims, including both open and closed cases, and will postpone issuing a "No Further Action" letter for open cases where a natural resource damage claim has not yet been resolved.

Under New Jersey's NRD program, business owners and operators who receive a notice letter notifying them of potential legal responsibility for damages to natural resources have ten business days to respond and request to pursue NRD settlement negotiations with the State without judicial interaction. If the recipient fails to sign and return the notice letter within this short time frame, it will be "treated as a rejection of this early opportunity to resolve your NRD liability without civil prosecution."

Where unable to reach settlement with potentially responsible parties, NJDEP will prosecute NRD claims using special outside counsel, including Allan Kanner & Associates of Louisiana; John K. Dema of the Virgin Islands; Richardson, Patrick, Westbrook & Brickman, LLC of South Carolina; and others to evaluate, settle, or litigate NRD claims on a contingent fee basis. For example, NJDEP's arrangement with Kanner & Associates provides that for each NRD case that is settled after the state has initiated a lawsuit, the firm will receive at least 20 percent of the first $10 million recovered, 17.5 percent of the next $15 million and 15 percent of any amount recovered over $25 million.

Notices and directives under the Spill Act Directives continue to be issued pursuant to NJDEP's aggressive NRD program. One of the State's most ambitious NRD actions was filed on Dec. 14, 2005 against Occidental Chemical Corporation, Maxus Energy Corporation, and Tierra Solutions, Inc. for injuries resulting from discharges of dioxin and other contaminants into the Passaic River from the former Diamond Shamrock facility in Newark. Moreover, NJDEP issued a Spill Act directive against these companies to pay the state $2.3 million to be used to develop a dredging plan to remove dioxin-contaminated sediments in the river. Accordingly, it appears that NJDEP is not backing away from its proposed aggressive stance and potentially responsible parties should be aware of their possible exposure.

Contingent Fee Prosecution of NRD Claims Is Controversial

The use of private attorneys to prosecute claims a state's NRD claims on a contingent fee basis has generated significant controversy. Opponents argue that vesting power in outside counsel with a direct financial interest in maximizing monetary recoveries violates public trust and creates serious conflicts of interest for State attorneys general who may have received large campaign contributions from the same private attorneys. Thus far, legal challenges to such contingent fee arrangements (inspired by the tobacco litigation) largely have focused on state law issues regarding the separation of powers and government attorneys' obligations of neutrality. Discussed below are additional legal issues associated with the use of contingent fee arrangements in NRD litigation—namely, the issues of violation of the State's fiduciary duty and federal preemption.

The Public Trust Doctrine and States' Fiduciary Duties

The theory of the public trust doctrine is that by creating a government, the people delegate specific powers and duties to the government, including the duty to manage the natural resources. The government thus acts as trustee of the land and other natural resources and manages them for the people as beneficiaries. The government, in other words, holds the land and natural resources in trust for the benefit of the public. As trustee, the government owes a fiduciary

duty of loyalty to the beneficiary, the citizens of the state, and may not profit at the expense of the beneficiary. Defendants have argued that by appointing outside counsel to litigate NRD claims on a contingency fee basis, the State has breached its duty of loyalty. The argument is that contingency fees by their very nature will allow outside counsel to profit at the expense of the beneficiary because those fees would have otherwise gone to the public.

A lawsuit was filed by six trade associations against Commissioner Campbell alleging (1) that the contingency fee arrangement with special counsel violated the Public Trust Doctrine and the American Bar Association's Code of Professional Responsibility, and (2) that New Jersey had failed to promulgate its NRD program as a formal rule. *N.J. Soc'y for Envtl. and Econ. Dev. v. Campbell*, N.J. Sup. Ct., Law Div. (Docket No. MER-L-343-04). On June 18, 2004, Superior Court Judge Jack M. Sabatino upheld the contingency fee arrangement subject to certain conditions, and transferred the rulemaking issue to the Appellate Division. The rulemaking issue was recently resolved between NJDEP and the trade associations during settlement discussions and the DEP commissioner has agreed to utilize a public rulemaking process.

Preemption

CERCLA § 107(f)(1) requires that NRD recoveries may only be used "to restore, replace, or acquire the equivalent of such natural resources." Stated another way, CERCLA prohibits the use of NRD recoveries for anything other than restoration or replacement of the damaged natural resource. *See Ohio v. U.S. Dept. of Interior*, 880 F.2d 432, 444 (D.C. Cir. 1989) ("By mandating the use of all damages to restore the injured resources, Congress underscored in § 107(f)(1) its paramount restorative purpose for imposing damages at all"); 132 Cong. Rec. H9561, H9612-13 (Daily Ed. Oct. 8, 1986) ("The amendment of Section 107(f) clarifies that sums recovered by trustees are to be used only to restore the natural resources without further appropriation . . . The natural resource regime is not intended to compensate public treasuries. Nor are recoveries to be diverted for general purposes"). A looming issue for New Jersey, as well as other states that retain outside counsel on a contingency fee basis in NRD litigation, is whether the state statutory schemes authorizing such retention conflict with CERCLA's mandate to use NRD recoveries only for restoration or replacement of injured resources and therefore are preempted under the theory of conflict preemption. Conflict preemption occurs where it is "impossible to comply with both the federal and state laws or the state law stands as an obstacle to the accomplishment of Congress's objectives." *See, e.g., United States v. Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996).

In *New Mexico v. General Electric*, the defendants challenged the State's authority to recover contingent fees for outside counsel. 322 F. Supp. 2d 1237 (D.N.M. 2004). Defendants argued that the use of outside attorneys on a contingency fee basis violated Section 107(f)(1) of CERCLA. In response, New Mexico argued that the payment of attorneys' fees in the context of an NRD claim was consistent with the stated purpose of CERCLA. Citing *Pub. Serv. Co. of Colorado v. Gates Rubber Co.*, 175 F.3d 1177, 1181 (10th Cir. 1999) (citing *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997). The district court never directly resolved the issue, but the issue was addressed by the Tenth Circuit when the State appealed the district court's rejection of the State's NRD claim on summary judgment. The Tenth Circuit held that "CERCLA's comprehensive NRD scheme preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource." *New Mexico v. Gen. Elec.*, 467 F.3d 1223, 1247 (10th Cir. 2006). The court specifically rejected the use of monetary damage awards to pay attorneys fees:

> [I]n a case where an NRD claim is premised upon both CERCLA and state law, a portion of the recovery if earmarked for state law claims could be used for something other (for example, *attorney fees*) than to restore or replace the injured resource. Clearly, permitting the State to use an NRD recovery, which it would hold in trust, for some purpose other than to 'restore, replace, or acquire the equivalent of' the injured

> groundwater would undercut Congress's policy objectives in enacting 42 U.S.C. § 9607(f)(1).

Id. at 1248 (emphasis added). The court made clear that its holding does not mean that New Mexico's nuisance and negligence theories of recovery are completely preempted, but rather that an unrestricted award of money damages is unavailable because it conflicts with CERCLA's comprehensive NRD scheme.

Other New Issues Raised by *New Mexico v. General Electric*

Another lesson from *New Mexico v. General Electric* is the determinative role that State law can play in an NRD suit. As noted above, the Tenth Circuit rejected New Mexico's NRD claim, affirming the district court's ruling that the State had failed to prove the existence of any recoverable damages associated with the groundwater contamination. The State argued that the CERCLA-mandated remediation was insufficient to address deep contamination. The court rejected this argument as violating the "pre-enforcement review bar" of CERCLA § 113(h), in that the State in effect was challenging an ongoing remedial plan (pumping and treating contaminated groundwater until drinking water standards are attained). The court also noted that there was no evidence of deep contamination to support the claim. *Id.* at 1249-50.

The State also asserted that it should be entitled to recovery of damages for its loss of the interim right to appropriate the water for beneficial use. The Tenth Circuit, however, affirmed the district court's holding that such damages could not be demonstrated. Albuquerque was able to fulfill its groundwater needs from another diversion point located within the Middle Rio Grande Aquifer. Moreover, the court noted that the State's useable share of groundwater water in the aquifer had been "fully appropriated," meaning that no additional groundwater could legally be extracted (because to do so would lead to depletion of water entering the Rio Grande River). The court noted that there was no evidence that a permit had been denied due to the contamination. Thus, the court affirmed the district court's rejection of the loss of use damage claim. *Id.* at 1250-52.

In sum, the Tenth Circuit dismissed the State's NRD claim for "injury residual to the outcome of the EPA-ordered remediation." *Id.* at 1252. The case illustrates the importance of understanding the nature of a state's rights in resources alleged to be injured. Here, New Mexico's only right in groundwater was to authorize its withdrawal by the public, and the state had already reached its maximum extraction capacity within the Middle Rio Grande Basin. Thus, New Mexico could not demonstrate injury to a reserve capacity, and its current needs were being met by moving the extraction point away from the contaminated zone. In states with broader groundwater rights— or additional reserve capacity—a different outcome might attain.

AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events

Key Environmental Issues in U.S. EPA Region 1
May 8, 2007
Boston, Massachusetts

Wetlands Law and Regulation
May 9-11, 2007
Washington, D.C.
Cosponsored with ALI-ABA and Environmental Law Institute

Key Environmental Issues in U.S. EPA Region 4
May 17, 2007
Atlanta, Georgia

15th Section Fall Meeting
Sept. 26-30, 2007
Pittsburgh, Pennsylvania

For more information, see the Section Web site at www.abanet.org/environ/ or contact the Section at 312/988-5724.

SURVEY OF PENDING NATURAL RESOURCE DAMAGES CASES IN CALIFORNIA, MASSACHUSETTS, NEW JERSEY, AND OKLAHOMA

Heather P. Behnke
Stephen Louthan
Greenberg Traurig, LLP
Albany, NY
BehnkeH@gtlaw.com

Introduction

Natural resource damages (NRD) cases have gained momentum in the past few years, with more and more states bringing claims against and/or negotiating hefty settlements with potentially responsible parties (PRPs). Natural resource damages are compensation for the injury to, loss of, loss of the use of, or destruction of natural resources. Natural resources include: "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States…, any State or local government or Indian tribe, or any foreign government." 42 U.S.C. § 9601(16); 33 U.S.C. § 2701(20). Most federal NRD claims are brought under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 et seq., the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2700 et seq., and/or the Clean Water Act of 1972 (CWA), (33 U.S.C. § 1301 *et seq*.), and their accompanying regulations. However, many states have statutes and regulations governing NRD as well. This article provides a brief overview of some of the most significant NRD cases pending in four representative states, and illustrates the variety of methods states are using to pursue NRD claims, as well as some of the arguments being raised by PRPs to challenge those claims.

California

The primary state law at issue in California NRD cases is the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act. Cal. Gov't Code § 9574.1 *et seq*. This legislation established the primary state compensatory and liability system for damages resulting in marine oil spills.Under this act, responsible parties are required to fully mitigate adverse impacts to wildlife, fisheries, and their respective habitats resulting from oil spills. Furthermore, the California's primary NRD trustee, the California Department of Fish and Game, also receives funds through this act.

In California there are at least three significant NRD cases in the negotiation stage. In the ongoing Kinder-Morgan Suisin Marsh NRD negotiation, a corroded 14-foot pipeline section ruptured in April 2004, spilling over 70,000 gallons of diesel fuel directly into a brackish marsh. The spill polluted approximately 240 acres and, according to the Department of Fish and Game, over thirty species of birds and mammals have been impacted. A civil complaint has not been filed on behalf of the Department of Fish and Game and Kinder-Morgan accepted responsibility for the broken pipeline and resulting spill.

In a rare criminal prosecution, the Solano County district attorney and California attorney general brought criminal charges against the company while the Office of Spill Prevention and Response prepared a natural resource damage assessment. The criminal phase of the case ended over a year ago, where Kinder-Morgan pled guilty and paid $5 million in damages. However, the NRD negotiations with the Office of Spill Prevention and Response have yet to conclude. According to one State official actively engaged in negotiations with Kinder-Morgan, the State is not prepared to release much of their information in light of the ongoing negotiations and potentially pending litigation.

The Leviathan Mine Superfund site is another significant NRD case in the negotiation stage. The site covers approximately 656 acres in Alpine County, California, near the Nevada border. Hazardous substances resulting from continuing acid mine drainage have allegedly been released into a nearby creek and have migrated into the Carson River. The damages include in-stream habitat, wildlife, riparian habitat, tribal resource uses, and recreational uses.

The United States Environmental Protection Agency (EPA) has long been involved with the Superfund aspect of the site developing, among other things, the

Remedial Action Plan. The Washoe Tribe is the lead trustee for the NRD portion of the case. The California Department of Fish and Game is one of several other appointed NRD trustees. The PRPs entered into a Funding and Participation Agreement with the trustees in the late 1990's to conduct preliminary NRD assessment studies, but declined to extend the agreement when EPA proposed to list the site on the National Priorities List (NPL).

The NRD portion of the Leviathan Mine case is in the second phase, the assessment plan phase, whereby damages are quantified and a plan to restore the damaged resources is developed. This case is somewhat unique in that the quantification of damages has to account for injury to the Washoe Tribe's way of life, which requires a tribal specific model for damage quantification. The damage determination phase and post-assessment phase will follow, at which time the PRPs will be presented with a demand for a sum certain.

Another active NRD case nearing closure is the S.S. Jacob Luckenbach spill, which involved over 450,000 gallons of fuel that sporadically leaked from a sunken vessel. In the summer of 2002, the U.S. Coast Guard removed much of the fuel and sealed off the remaining portion; however, resource damages accrued from 1990 through 2003 as a result of the death of approximately 51,000 birds. The responsible party for the shipwreck no longer exists. Consequently, the NRD trustees, including the California Department of Fish and Game, are requesting funds for their assessment and habitat restoration from the National Pollution Funds Center. The final damage assessment and restoration plan for the incident was released a few months ago and the estimated cost for the proposed restoration projects is $21 million.

Unlike Massachusetts (discussed below), the State of California generally makes at least some information about ongoing NRD cases public during the negotiation stage. As previously mentioned, the California Department of Fish and Game Office of Spill Prevention and Response is the primary handler of California NRD cases and these cases rarely result in litigation. According to one attorney in that office, only two NRD cases in the negotiation stage ultimately ended up in litigation.

Massachusetts

Currently in Massachusetts there are no NRD cases in litigation. However, according to the Massachusetts Executive Office of Environmental Affairs (EOEA), the office which exclusively handles NRD cases for the Commonwealth, there are several NRD cases in the negotiation stage. In Massachusetts, when an NRD case is in the negotiation stage and has yet to result in litigation, the EOEA generally keeps all information concerning the case confidential.

The primary state law at issue is the Massachusetts Oil and Hazardous Materials Release Prevention and Response Act. MASS. GEN. LAWS. ch. 21E. Several NRD cases have recently settled and there is only one active NRD case in the negotiation stage with publicly available information—the Bouchard 120 Oil Spill—where 98,000 gallons of #6 fuel oil was discharged into Buzzards Bay. This case first resulted in criminal prosecution that ended with a guilty plea and a $10 million fine. As for the NRD portion of the matter, the damages involve lost public use of the shoreline and the recreational use of the bay for fishing and boating, significant bird kills, and damaged coastal habitat, as well as, injuries to shellfish and the marshes surrounding much of the coastline. The NRD settlement amount still has to be negotiated and the parties appear to be involved in a dispute concerning the settlement amount. The NRD assessment will not be based on volume of oil spilled, but actual documented injuries. However, the volume of oil can be taken into account when attempting to quantify actual aquatic injuries.

New Jersey

New Jersey's aggressive NRD initiative, which was launched in 2003 with the goal of addressing more than 4,000 potential claims for NRD, has not lost any momentum in recent years. *See* New Jersey Department of Environmental Protection (NJDEP) Policy Directive No. 2003–2007, *available at*: http://www.state.nj.us/dep/nrr/directives/passaic_dir01.pdf

(last visited Jan. 31, 2007), and http://www.nj.gov/dep/commissioner/policy/pdir2003-07.htm (last visited Jan. 31, 2007). According to the chief of the Cost Recovery and Natural Resource Damages Section at the New Jersey Division of Law, there are eighty-seven active NRD cases, sixty-five of which are being handled by the Division of Law and twenty-two of which are being handled by outside counsel. Most NRD cases in New Jersey are brought under the Spill Compensation and Control Act (Spill Act) (N.J. STAT. ANN. § 58:10-23.11a *et seq*.), although NJDEP claims to have authority to seek recovery of NRD under other State statutes, including the Water Pollution Control Act (N.J. STAT. ANN. § 58:10A-1 et seq.), the Industrial Site Recovery Act (N.J. STAT. ANN. § 13:1K-6 et seq.), and the Brownfield and Contaminated Site Remediation Act (N.J. STAT. ANN. § 58:10B-1 et seq.), as well as under federal environmental statutes such as CERCLA, the CWA, the OPA, and the common law.

The highest profile NRD case currently pending is *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, No. CIV.A. UNN-L-3026-04 and HUD-L-4414-04, 2006 WL 1477161, (N.J. Super. Ct. A.D. May 26, 2006). In that case, the trial court held that Exxon Mobil was liable for NRD to restore natural resources injured by discharges of hazardous substances as a result of oil refining and petrochemical manufacturing operations at various facilities owned by Exxon Mobil's predecessor in interest between 1909 and 1993. Before the suit was brought, Exxon Mobil had entered into Administrative Consent Orders (ACOs) with NJDEP to perform investigations and remediate the sites. Although the ACOs contained releases for fines, penalties, or other claims for any hazardous discharges occurring prior to the date of the ACO, the court believed the ACOs preserved the right of the State to pursue claims for "damages for injury to, destruction of, or loss of natural resources." *Id.* at *2.

The NJDEP's motion for summary judgment and Exxon Mobil's cross-motion raised two issues: (1) whether Exxon Mobil was strictly liable under the Spill Act for NRD; and (2) whether strict liability for NRD includes damages for the restoration of the natural resources and damages for the "loss of use" of the natural resource from the time between the contamination and the cleanup. The court relied on the New Jersey Supreme Court's interpretation of language in the Spill Act in *In re Kimber Petroleum Corp.*, 110 N.J. 69, 85, 539 A.2d 1181 (1988), finding that strict liability is available for "cleanup and removal costs," and that those costs "encompass 'restoration' of natural resources." 2006 WL 1477161 at *3. Consequently, the court found that Exxon Mobil could be held strictly liable for NRD under the Spill Act, "at least for restoration, as a matter of law," but NJDEP will have to demonstrate that restoration is necessary. *Id.* at *3 and *7. However, the court found no authority under the Spill Act to impose strict liability for the loss of use of natural resources. *Id.*

While the case is proceeding at the trial court level, NJDEP has brought an interlocutory appeal on the sole issue of whether a discharger may be held strictly liable for the "lost use, value and services of natural resources" under the Spill Act. *See* Brief of Plaintiff-Appellant at 2, *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, No.: A-6588-05T5 (N.J. Sup. Ct. A.D. Nov. 1, 2006). The State is arguing that the NJDEP's broad interpretation of the Spill Act to include recovery for "loss of use" damages should be given deference, while Exxon Mobil is arguing that the Spill Act does not provide for such damages. The New Jersey Chamber of Commerce has submitted an amicus brief in support of Exxon Mobil's position that the Spill Act does not provide statutory authority for NJDEP to impose strict, retroactive, and joint and several liability for damages for the "loss of use" of natural resources. Appellate briefs have been filed, but no date for oral argument has been set at this time.

Oklahoma

One of the most closely-watched NRD cases currently pending is *State of Oklahoma v. Tyson Foods, Inc., et al.*, Civ. No. 05-CV-0329 (N.D. Okla., Complaint filed June 13, 2005), due to its potentially significant impact on the agriculture industry. This case involves alleged runoff from the improper dumping of animal waste from contained animal feeding operations (CAFOs). In Oklahoma, CAFOs are defined by statute as "animal feeding operation[s]" where certain

threshold numbers of animals are confined and pollutants are discharged into the waters of the state. OKLA. STAT. tit. 2 § 9-202(b)(11).

The State of Oklahoma is seeking to hold 14 "integrated" poultry production and processing operations located in Arkansas liable for past, present, and future response costs and natural resource injuries under CERCLA, due to the release of animal wastes from the facilities into the Illinois River Watershed (IRW). The IRW consists of approximately 1,069,530 acres of land straddling the Arkansas-Oklahoma border and contains designated "State Scenic River Areas," which are given special protection under state law. *Id.*; OKLA. STAT. tit. 82 § 1451 *et seq*. (1970). The IRW also is a source of drinking water for twenty-two public water supplies in Oklahoma. The State has argued that the IRW "constitutes a 'site or area where a hazardous substance … has been deposited, stored, disposed of, or placed, or otherwise come to be located; …' and, as such, constitutes a 'facility' within the meaning of CERCLA, 42 U.S.C. § 9601(9)." Complaint at 72.

The Complaint also seeks relief under the Solid Waste Disposal Act (42 U.S.C. § 6972(a)(1)(B) and (b)(2)(A)). The State has also asserted federal common law nuisance claims, as well as private and public common law nuisance and trespass claims under state law, and seeks a permanent injunction requiring the defendants to cease all releases of poultry waste constituents to the soils and waters of the State, to remediate the IRW, and to pay all NRD and remediation assessment costs in addition to the amount of the natural resource damage itself. In addition, the State seeks civil penalties for alleged violations of the Animal Waste Management Plan in the Oklahoma Administrative Code and seeks restitution from the defendants.

Specifically, the Complaint alleges that the integrated poultry producers are responsible for generating hundreds of thousands of tons of poultry waste each year, which routinely has been disposed of by being dumped onto the lands within the IRW. See Complaint at 46, 49. This waste allegedly "causes large amounts of phosphorus and other hazardous substances, pollutants and contaminants to accumulate in the soils" and the IRW contains elevated levels of many of the contaminants found in the poultry waste, including nitrogen, arsenic, copper, zinc, and hormones. See Complaint at 53. The defendants have denied the allegations.

To date, the State has not taken legal or administrative action against the individual poultry growers that typically contract with the large poultry companies to raise the birds and manage their waste, although some are employees of the defendant companies. This is likely due to the fact that the State would not garner much public support by going after the local farmers and that the named corporate defendants supposedly have much deeper pockets. Although the poultry industry is being singled out, if the State succeeds in this action, the livestock industry as a whole may be subject to substantial costs and penalties in the future.

In November 2005, the State of Arkansas filed a petition with the U.S. Supreme Court to intervene in the lawsuit, which was denied. In May 2006, the Arkansas attorney general moved to intervene in the district court action. Arkansas alleges that the Oklahoma suit violates its sovereignty and the Commerce Clause by attempting to regulate economic activity that occurs in Arkansas.

Oklahoma opposes the motion to intervene, claiming that Arkansas lacks standing because it has not been injured by Oklahoma's attempt to seek redress from the poultry producers. Oklahoma has alleged that "Arkansas's proposed lawsuit is nothing more than an attempt by Arkansas to use its status as a state to shield private companies from being held liable for their intentional pollution of Oklahoma's natural resources." See Oklahoma's Brief in Opposition to Arkansas's Motion for Leave to File Bill of Complaint at 7, *State of Ark. v. State of Okla.*, (U.S. Sup. Ct. Jan. 6, 2006). As of the time of this writing, the district court has not issued a decision on Arkansas's motion to intervene and the rest of the suit is tied up in the discovery phase and is not expected to reach trial until early 2008.

The issues raised by the Tyson case, particularly the applicability of CERCLA and the Emergency Planning and Community Right to Know Act (EPCRA) (42

U.S.C. 11001 *et seq*.) to animal agriculture activities, have drawn the attention of Congress. See CRS REPORT FOR CONGRESS, ANIMAL WASTE AND HAZARDOUS SUBSTANCES: CURRENT LAWS AND LEGISLATIVE ISSUES (2006). Legislation was introduced in the 109th Congress "that would amend CERCLA to clarify that manure is not a hazardous substance, pollutant, or contaminant under that act and that the law's notification requirements would not apply to releases of manure (H.R. 4341 and S. 3681)." *Id.*

Proponents of the bill argued that CERCLA was never intended to apply to agriculture and that there are other methods for regulating such waste under the CWA, state law, and various interstate compacts governing shared watersheds. *Id.* Opponents argued that exempting animal manure from CERCLA will be a substantial change in CERCLA that will severely curtail the States' ability to respond to releases of hazardous substances caused by the animal agriculture industry. See Congressional Testimony of Kelly Hunter Burch, Chief of Environmental Protection Unit and Assistant Attorney General of the State of Oklahoma, before the Committee on House Energy and Commerce Subcommittee on Environment and Hazardous Materials, Nov. 16, 2005. It is likely these issues will be revisited by the 110th Congress.

Another significant natural resource damages suit currently pending in Oklahoma is *Quapaw Tribe of Okla., et al. v. Asarco Inc., et al.*, Civ. No. 4:03cv846 (N.D. Okla., Complaint filed Dec. 10, 2003). The suit involves the Tar Creek Superfund site, which consists of a forty-square mile area located in the northeast corner of Oklahoma and parts of Kansas and Missouri, where lead and zinc ore were mined from the early 1900's until the 1970's. The site was placed on the NPL in 1983. Milling the lead and zinc ore resulted in mine tailings and debris, known as chat, that was disposed of in on-site piles and floatation tailing ponds. The chat was sold and used as road base and surface material and for other uses throughout the Tar Creek region and around the country.

Remediation was performed in the early-1980's, but the mine water that had been discharged to Tar Creek did not significantly improve as a result. In the mid-1990's, tests showed that approximately 35 percent of the Indian children living in the area had elevated blood lead levels, and chat and tailings were located throughout residential properties within the site. Residents had until Sept. 30, 2006, to apply to participate in a federally-funded buyout and relocation program.

EPA entered into an Administrative Consent Order with three of the PRPs to conduct a Remedial Investigation/Feasibility Study to address undeveloped rural and urban areas of the site where mine and mill residues exist, as well as residential yards outside the city or town limits that have not been addressed by previous remediation. *See* EPA Region 6 Third Five-Year Report, Sept. 2005, *available at* http://www.epa.gov/region6/6sf/pdffiles/tc_5yr_2005-09.pdf (last visited Jan. 30, 2007).

Water runoff and sediment from the chat piles and former floatation ponds has allegedly migrated into downstream rivers and lakes and estimates for damages to these resources are several hundred million dollars. Much of the contaminated land belongs to the Quapaw Tribe, which filed a class-action lawsuit against the mining companies in December 2003. The Quapaw Tribe brought the action as trustee under the public trust doctrine, and seeks natural resource damages, as well as other common law claims, including public and private nuisance, trespass, unjust enrichment, strict liability, and fraud. The suit was stayed until Jan. 31, 2007, and the parties have until Feb. 15, 2007 to submit a case management plan to permit continuance of settlement discussions or provide a status report and request for a scheduling order.

Conclusion

Looking at the broad context of NRD cases pending in the four states noted above, some states, such as New Jersey, pursue NRD claims more aggressively than others. Often, state agencies that are seeking NRD try to avoid litigating these matters, preferring negotiation as the primary means of dispute resolution. Nevertheless, this is a growing area of the law and one can expect more NRD cases in the future.

NRD—THE NEW JERSEY EXPERIMENT

Richard F. Ricci
Adam B. Lavinthal
Lowenstein Sandler, P.C.
Roseland, New Jersey
RRicci@lowenstein.com

Introduction

In September 2003, the New Jersey Department of Environmental Protection (NJDEP) issued Policy Directive 2003-07 (the "Policy Directive") and thereby initiated the aggressive and systematic pursuit of what had long been considered the "sleeping giant" of hazardous site remediation, natural resource damages (NRD). NJDEP through its Site Remediation Program and its Office of Natural Resource Restoration, along with the New Jersey Attorney General's Office committed to address NRD at more than 4,000 sites in various stages of remediation. Now, more than three years after the issuance of Policy Directive 2003-07, what has been the impact of this revitalized program? This article reviews the elements of the Policy Directive, takes stock of New Jersey's NRD enforcement "experiment," and considers what the future holds for this program.

The Policy Directive

The Policy Directive defined NRD Claims as claims that "arise from releases of hazardous substances that have resulted in injuries to natural resources (loss or impairment of natural resource function) or the deprivation of natural resource services" to resources owned by, or held as trustee by the state for its citizens. Policy Directive, www.nj.gov/dep/commissioner/policy/pdir2003-07.htm. The Policy Directive outlined the "standards and process" that the state would follow in developing and ultimately resolving NRD claims, including establishment of a screening process to identify sites with NRD issues. It also recognized certain classes of claims that NJDEP would not pursue, such as sites where the only responsible parties are residential homeowners, or small businesses with a limited ability to pay. The Policy Directive further established the need for parties remediating a site to address NRD before receiving a No Further Action letter, thereby establishing resolution of NRD liability as an integral part of the site remediation process.

The Policy Directive raised the possible use of "special counsel," assigned by the attorney general, to assist in the "development and assertion" of NRD claims. In addition, the Policy Directive set forth the NJDEP's settlement policies for NRD claims. It emphasized the NJDEP's preference for restoration and protection of damaged resources, and in the context of groundwater contamination, its preference for the preservation of property with appropriate aquifer recharge, over payment of money damages. The Policy Directive also left open the possibility of securing substitute resources in the form of compensatory restoration projects, including wetlands restoration, infrastructure improvements to control stormwater runoff, or any other project that NJDEP considered effective and/or appropriate in compensating for an injured resource.

Perhaps the most controversial aspect of the Policy Directive was its groundwater valuation formula. By this formula, NJDEP attempted to reduce to a mathematical calculation what is, perhaps, one of the most difficult questions in NRD jurisprudence, how to value "damage" to a resource that is not being used and might possibly never be used. The NJDEP's groundwater injury valuation formula considered groundwater recharge rates, water rates, plume size, and duration of injury to assign a monetary value to the contaminated groundwater. While the scientific and legal validity for the formula remains highly controversial (an issue that the NJDEP will purportedly address in rulemaking,) what cannot be controverted is that the formula added a level of certainty to the valuation of groundwater NRD claims that gave rise to an unprecedented opportunity for the settlement of such claims. Whereas previously, a responsible party would have no basis for estimating the settlement value of a groundwater NRD claim, with the formula, the responsible party could perform the appropriate calculations, arrive at a number and assess whether it made legal and business sense to resolve its NRD liability at that number.

The Aftermath

The regulated community's reaction to the issuance of Policy Directive was quick and varied. On the one hand, the Policy Directive was criticized as lacking any scientific, legal, or regulatory basis. These views were crystallized in the lawsuit filed in February 2004 by six trade associations, alleging that NJDEP violated the New Jersey Administrative Procedure Act by failing to draft and implement the groundwater valuation formula as a formal rule subject to public notice and comment. *New Jersey Society for Environmental & Economic Development, et al. v. Campbell*, N.J. Super. Ct. Law Div., Mercer County, Dkt. No. MER-L-343-04. The plaintiffs further alleged that the state's retention of outside counsel on a contingency fee basis for the pursuit of NRD claims violated state law and was ethically questionable. In June 2004, the court upheld the state's retention of outside counsel but referred the rulemaking issue to the appellate court for consideration. Before the appellate court could consider the issue, however, the parties reached a settlement, pursuant to which NJDEP represented that it would issue proposed regulations for the NRD program, subject to public notice and comment, by August 2005. NJDEP has yet to promulgate the proposed regulations.

Another judicial challenge to the NRD program was mounted in *New Jersey Department of Environmental Protection, et al., v. Exxon Mobil Corporation*, N.J. Super. Ct. Law Div., Union County, Dkt. No. UNN-L-3026-04. This case resulted in the most comprehensive judicial analysis to date of the legitimacy of the NJDEP's NRD claims. Ruling on cross-motions for summary judgment, the trial court found that a party can be held strictly liable for natural resource damages under New Jersey's Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, *et seq*. The court further found, however, that such liability is limited to damages for the restoration of the injured resource, not for the loss of use of the natural resource. An appeal of the trial court's decision is pending.

Criticisms notwithstanding, many members of the regulated community, including some of New Jersey's largest corporate citizens, have employed the Policy Directive to settle their NRD liability. These settlements have ranged from resolution of NRD claims for a single site by the simple payment of money to the resolution of claims at multiple sites through complex, resource-to-resource agreements, including agreements to preserve recharge acreage, create wetlands and aquatic habitats, plant trees, and improve recreational access to state waterways.

With the issuance of the Policy Directive came representations by NJDEP that it would be pursuing, by litigation if necessary, NRD claims at many of the approximately 4,000 sites potentially subject to such claims. Currently, the state is actively litigating approximately eighty-seven cases, twenty-two of which have been assigned to private counsel and the balance of which are being handled by the Attorney General's Office. For a number of reasons, the massive onslaught of litigation that the state threatened has not been forthcoming. Many NRD claims have been settled without the necessity of litigation or in the nascent stages of litigation. In addition, the preparation and litigation of these cases has proven to be a burdensome task for NJDEP, the Attorney General's Office and outside counsel. Accordingly, since the issuance of the Policy Directive, the legislature has twice extended the statute of limitations for NRD claims in cases of known contamination. Initially set to expire on Jan. 1, 2002, the statute was first extended to Dec. 31, 2005, and later to June 1, 2007. N.J.S.A. 58:10B-17.1(b)(1). With the clock ticking and the flood of cases yet to materialize, the regulated community is left to speculate whether NJDEP and the Attorney General's Office will seek yet another extension of the statute of limitations, allow NRD claims subject to the statute to lapse, or muster the resources necessary to prosecute such claims.

In addition to addressing the NJDEP's concerns regarding the statute of limitations, the legislature has also addressed the concerns of the regulated community regarding the potential chilling effect that the state's NRD program could have on the redevelopment of Brownfield sites. The same legislation that extended the statute of limitations to June 1, 2007 also exempted from NRD liability

purchasers of contaminated property who purchased after Jan. 6, 1998, who are neither responsible for the discharge nor the corporate successor to a responsible party and who have not contractually assumed NRD liability. N.J.S.A. 58:10-23.11(f)(22)(a).

Conclusion

The final chapter of the New Jersey NRD experiment has yet to be written. The long-promised regulations could drastically alter the landscape of NRD claims, as could the June 1, 2007 statute of limitations deadline that looms on the horizon and the decision of the appellate court in *New Jersey Department of Environmental Protection, et al., v. Exxon Mobil Corporation*. In the meantime, the reviews of the New Jersey experiment are decidedly mixed. From the state's perspective, the Policy Directive has resulted in a number of settlements that would, in all likelihood, not have happened otherwise. On the other hand, both the aggressive pursuit of non-settlers and the promulgation of formal regulations have apparently proven to be more nettlesome than the state originally anticipated. From the perspective of the regulated community in New Jersey, the regulations have required that NRD claims be addressed under threat of litigation or the inability to close out the remediation of contaminated sites. On the other hand, the Policy Directive has enabled many members of the regulated community to resolve NRD claims against them, thereby removing a contingent liability from their books and creating a greater level of finality than was previously available.

NRD will continue to be an important and controversial issue in New Jersey. What remains to be seen is whether other states will look to the New Jersey experiment as a model for their own pursuit of NRD claims.

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environ-toxic_torts@mail.abanet.org

RECENT TENTH CIRCUIT DECISION ON NATURAL RESOURCE DAMAGES IS A MIXED BAG

James G. Derouin
Nicholas J. Wallwork
Fredric D. Bellamy
Mark E. Freeze
Steptoe & Johnson
Phoenix, Arizonia
JDerouin@steptoe.com

In a recent case decided by the Tenth Circuit Court of Appeals, *New Mexico v. General Electric Company*, 467 F.3d 1223 (10th Cir. 2006), the court precluded certain types of claims for natural resource damages to groundwater, but left the door open for other potentially significant types of groundwater claims. The decision prohibits future state law claims for unrestricted natural resource damages. However, it does not preclude claims, such as those for residual damage or interim loss of use, that are limited to restoration and replacement of damaged groundwater resources. The case concerned a lawsuit filed by the State of New Mexico (State) regarding contaminated groundwater in the City of Albuquerque (City). Specifically, that the groundwater in Albuquerque's South Valley is contaminated with volatile organic compounds resulting from industrial operations. In 1979, contamination was detected in certain of the City's municipal water supply wells. These water supply wells were subsequently decommissioned and replacement wells were installed. The United States Environmental Protection Agency (EPA) and the New Mexico Environment Department (NMED) then undertook to address the contamination. The contaminated area was placed on the federal National Priorities List and the EPA completed Remedial Investigations and Feasibility Studies for various Operable Units. The resulting Records of Decision provided for treatment of groundwater to meet Safe Drinking Water Act Maximum Contaminant Levels (MCLs). The State commented on and concurred with the selected remedies.

Later, during the pendency of the clean up, the State brought a claim for natural resource damages against

the current and former owners and operators of some of the facilities that caused the contamination, which included the United States. The State asserted state law claims for negligence and nuisance, as well as a statutory claim under Section 107(f) of CERCLA. The statutory claim was later dropped, as were the claims against the United States. The State alleged that the groundwater was permanently injured and would never be available for any beneficial use, including drinking water, because the remedy did not require that the groundwater be cleaned up to "appropriate" clean up levels lower than MCLs, but only required that it be cleaned up to MCLs. The State also asserted that the remedy would never address a very deep plume of contaminants. The State claimed that it was entitled to an unrestricted award of money damages, measured by the market value of the lost groundwater, which it could place in its general fund and not use to restore or replace the injured natural resource. Alternatively, the State sought an amount to restore or replace the natural resource that would address the residual injury to the groundwater that was not being addressed by the CERCLA remedial action. The State also sought damages for the loss of use of groundwater during the period of the remediation, which the State would use to acquire the equivalent of the damaged resource.

The district court granted summary judgment in favor of the defendants and the Tenth Circuit affirmed. On appeal, the court first addressed the State's claim for an unrestricted award of damages. The court noted that natural resource damage claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) are restricted in use and measure to the amount required to restore, replace, or acquire the equivalent of the injured natural resource. *Id.* at 1244-45. This is because it was the objective of Congress in passing CERCLA to accomplish the restoration or replacement of injured natural resources. *Id.* The court reasoned that if states asserting state law claims for natural resource damages were allowed to recover an unrestricted award, then an injured natural resource may never be restored or replaced. *Id*. at 1248. The doctrine of conflict preemption prevents the assertion of a state law claim that stands as an obstacle to the accomplishment of congressional objectives. The court held that CERCLA's comprehensive natural resource damage scheme preempts any state law remedy designed to achieve something other than the restoration, replacement or acquisition of the equivalent of the injured natural resource. *Id*. at 1247. Therefore, the State could not pursue its claim for an award of unrestricted natural resource damages. The court reached this conclusion notwithstanding the savings clauses contained in CERCLA Sections 114(a) and 302(d) because it did "not believe that Congress intended to undermine CERCLA's carefully crafted NRD scheme through these savings clauses." *Id.*

The court then considered the State's claim for restoration or replacement costs to address the residual injury to the groundwater. The court noted that the State's claims for residual injury were dependant on the argument that the ongoing CERCLA remedy being conducted by EPA and NMED was insufficient. *Id*. at 1248. Specifically, the State was arguing that the clean up level was not low enough and that a portion of the groundwater contamination would not even be addressed. *Id*. This position was contrary to the view expressed by both EPA and NMED. *Id.* at 1249. The court noted that any relief provided to the State would substitute a federal court's judgment for the authorized judgment of both EPA and NMED. *Id*. The court held that, absent certain circumstances that do not apply in this case, CERCLA Section 113(h) prevented challenges to the adequacy of a CERCLA remedy before the completion of the remedy. *Id*. Because the State's claim for residual natural resource damages amounted to a pre-completion challenge of the remedy, the State was not allowed to pursue its claim for residual natural resource damages at this time. *Id.* at 1250.

Finally, the Tenth Circuit considered the State's claim for interim loss of use of the contaminated groundwater during the period of remediation. Specifically, the State claimed that it had lost the ability to appropriate the contaminated groundwater during the pendency of the remediation. The court held that under New Mexico law, which included the State's obligations under the Rio Grand Compact, the groundwaters in question were already fully appropriated and there was no additional groundwater for the State to appropriate. *Id.*

at 1251. Therefore, the State did not have a claim for interim loss of use. The court also noted that the contamination had not prevented the City of Albuquerque, the principle holder of appropriated water rights in the area, from extracting and using the water to which it was entitled. *Id*. Even if the contamination had preventing the City from extracting all of the water to which it was entitled, the cause of action belonged to the City.

The Tenth Circuit's decision preventing state law claims for unrestricted natural resource damages may discourage states from hiring outside counsel to bring natural resource damage claims, as was done in the New Mexico case. However, the decision leaves open the possibility of future state claims limited to restoration and replacement of damaged groundwater resources. Specifically, a claim for residual damages arguably may still be brought in those situations where it is undisputed that an ongoing remedy will not address a particular contaminant or injury. Further, even if a claim for residual injury is viewed as a challenge to an ongoing remedy, CERCLA Section 113(h) would not prevent that challenge if the clean up were being conducted by a state, as opposed to EPA. Also, as the Tenth Circuit expressly acknowledges, a claim for residual damage that amounts to a challenge to an EPA remedy may be brought at the conclusion of the remedy. In addition, the Tenth Circuit decision expressly authorizes claims for interim loss of use of groundwater during the pendency of the remediation. In a situation involving an extended remedial time period, damages for interim loss of use could be significant. Finally, the decision does not prohibit water providers from bringing claims where the contamination prevents them from extracting the water to which they are entitled; a demonstration, however, must be made that a right to use the groundwater exists. It is unclear, however, whether the cost of any water provider "loss of use" remedy differs from the "interim loss" remedy. To the extent that the former is defined by the cost of alternative (*e.g.*, surface) water supplies, and the latter by the cost of treatment, the comparative costs could vary. If both are defined by the cost of treatment, then the cost of the two remedies would be similar.

USING *DAUBERT* IN NATURAL RESOURCE DAMAGES LITIGATION: A PRACTICAL PRIMER

Eric G. Lasker
Spriggs & Hollingsworth
Washington, D.C.
ELasker@SPRIGGS.com

Recent efforts to transform the natural resource damages (NRD) provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and state law into profit centers for state treasuries have heightened the importance of the court's role as gatekeeper against unreliable and irrelevant expert testimony. *Daubert v. Merrell Dow Pharms*., Inc., 509 U.S. 579 (1993). While there have only been a handful of adjudicated *Daubert* challenges in NRD litigation, recent experience in these and other environmental cases demonstrates that *Daubert* provides a powerful weapon against the often-novel methodologies put forth by NRD experts. This article sets forth some practical tips for using *Daubert* in defense of NRD litigation.

The "Avante Garde" Expert

In pursuing maximum financial recoveries, NRD plaintiffs will often rely upon novel expert methodologies to claim that ongoing remediation efforts are not protective or to increase their damages claim. Whether or not these methodologies might be validated in the future—and experience tells us that most almost certainly will not—they should not be admissible in court. As Judge Posner explained: "Law lags science; it does not lead it." *Rosen v. Ciba-Geigy*, 78 F.3d 316319 (7th Cir. 1996).

Defense counsel should highlight expert testimony that reaches beyond accepted scientific methodology. For example, in one recent environmental property damage case, plaintiffs' expert imposes a stringent PCB cleanup standard based on a "toxic equivalency factor" approach equating specific PCB congeners to dioxin. In deposition, the expert acknowledged that the Environmental Protection Agency (EPA) has not accepted this approach:

Q: Are there any EPA documents which require site specific evaluations of congeners in connection with cleanup levels?
A: Not that I am aware of. EPA has been extremely slow to move … in incorporating more avante-garde sampling protocols and applying … more avante-garde assessments of risk.

In excluding the expert's testimony under *Daubert*, the trial court repeatedly quoted this testimony: "The application of the highest draft slope factor in applying the 'avante garde' TEF approach renders Dr. Nolholt's risk assessment unreliable for present purposes." *Allgood v. General Motors Corp.*, No. 102CV1077, 2006 WL 2669337 (S.D. Ind. Sept. 18, 2006).

The Mouthpiece

Defense attorneys must assess an expert's qualifications against their proffered opinions. While a civil engineer may be qualified, e.g., in designing groundwater remediation systems, he may not have sufficient expertise to testify on the fate and transport of contaminants. *See, e.g., United States v. Cunningham*, 194 F.3d 1186, 1193-94 (11th Cir. 1999) (state EPA employee unqualified to testify about chemical composition of sludge); *Allgood*, 2006 WL 2669337, at *29 (EHS professor unqualified to design medical monitoring program); *Bahrle v. Exxon Corp.*, 652 A.2d 178, 191-190 (N.J. Super. Ct. App. Div. 1995) (hydrogeologist unqualified to testify about gasket deterioration in wells), *aff'd*, 678 A.2d 225 (N.J. 1996). Similarly, experts should not be allowed to testify about sophisticated analyses conducted by others. In *Dura Automotive*, the Seventh Circuit excluded a hydrologist's testimony about his assistants' groundwater modeling analyses. *See Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609 (7th Cir. 2002). The court held that without the independent expert testimony of the assistants "explaining and justifying the discretionary choices they made, [the expert's] testimony would have rested on air." *Id*. at 615.

Felix the Cat

Some experts are amazingly creative in "reaching into their bag of tricks" whenever evidence or rulings undercut their opinions. For example, following the court's rejection in *New Mexico v. General Electric* of the State's theory that groundwater was unavailable for use if it had even one part per billion contaminants, the State's hydrogeologist opined that there was more "damaged" groundwater using the less onerous MCL drinking water standards:

Q: The lost volume … based on the 1 part per billion standard was between 155,000 and 162,000 acre-feet; is that correct? …
A: Yes …
Q: …. after the issuance of the Court's ruling that injury was not based upon a 1-part-per-billion plume, but rather on a safe drinking water plume, the unusable buffer zone increased from 155,000 to 217,000 acre-feet a year. …
A: Yeah, we increased the depth to 1,000 feet ….

Courts are properly skeptical of such "Felixian" testimony. *See In re TMI Litig.*, 193 F.3d 613, 704 (3rd Cir. 1999) ("Not unexpectedly, [plaintiffs' expert] always found something in his magical basket .... However, we are as unimpressed with his 'Felixian' basket of tricks."); *Comer v. American Electric Power*, 63 F. Supp. 2d 927, 935 (N.D. Ind. 1999) (excluding expert's testimony based on the "breath-taking ease" with which he offered opinions, "surpassed only by his apparent ability to change them based on nothing more than the mere suggestion of counsel").

The Loch Ness Contaminant

Plaintiffs seeking an NRD payday sometimes eschew real world data in favor of an expert model predicting contamination not found in repeated testing. In the *New Mexico* NRD litigation, the State's experts relied on an alleged deep contaminant plume that had escaped detection from the array of monitoring wells at the site. The district court correctly rejected this testimony: "Much like Scotland's famed Loch Ness monster, the Plaintiffs' 'deep, deep contaminant plume'

is believed to be "down there somewhere," and has not been conclusively proven not to exist, but its proponents have yet to come forward with significant probative admissible evidence of specific facts affirmatively demonstrating that it does exist." *New Mexico v. General Electric Co.*, 322 F. Supp. 2d 1237, 1256 (D.N.M. 2004). In affirming, the Tenth Circuit noted: "There's so much data at the ... site we don't need to model it. We use models to predict things we don't know. We know where the plume is here." *New Mexico v. General Electric Co.*, 2006 WL 3072590, *11 n.26 (10th Cir. Oct. 31, 2006); *see also Ramsey v. Consolidated Rail Corp.*, 111 F. Supp. 2d 1030, 1036-37 (N.D. Ind. 2000) (excluding hydrologist's flow model as accurate "as anything else in contemporary hydrology as a predictor of the general direction of groundwater flow," because it failed to accurately predict real world findings); *Kalamazoo River Study Group v. Rockwell International Corp.*, 171 F.3d 1065 6th Cir. 1999) (excluding testimony that was not supported by actual data); *Carroll v. Litton, Sys. Inc.*, 1990 WL 312969, at *45 (W.D.N.C. Oct. 29, 1990) (excluding testimony regarding TCE concentrations contradicted by well monitoring data), *aff'd* in relevant part, 1995 WL 56862, at *5 (4th Cir. 1995).

The Reverse Pyramid

Closely related to the expert who ignores real world data is the expert who builds elaborate models based upon isolated data points. Illustrative of this phenomena is *Renaud v. Martin Marietta Corp.*, 749 F. Supp. 1545 (D. Colo. 1990), *aff'd*, 972 F.2d 304 (10th Cir. 1992), where experts relied on one sample from a wastewater treatment pond to opine about the concentration and release of contaminants over an eleven-year period. The court rejected this extrapolation as "unsound scientific practice," noting: "no one has any idea of whether this sample is representative of the 'normal' contaminants concentration." *Id*. at 1553; *see also Thomas v. Fag Bearings Corp.*, 846 F. Supp. 1382, 1396 (W.D. Mo. 1994) ("One unconfirmed sample result indicating traces of a breakdown product of TCE is wholly insufficient to withstand a motion for summary judgment.").

Analogies

Another gambit in the absence of confirming data is to borrow data from another site. This type of evidence likewise should be excluded under *Daubert*. *See In re Voluntary Purchasing Groups, Inc. Litig.*, 2000 WL 1842779, at *3 (N.D. Tex. Dec. 14, 2000) (rejecting expert opinion based on extrapolation from emissions at a different plant); *Bahrle*, 652 A.2d at 189-90 (excluding testimony regarding gasoline spills based on experience at other gas stations).

Company Documents

Plaintiffs' experts can be expected to pluck juicy quotes from company documents that allegedly "concede" the contamination plaintiffs are seeking to establish. These statements are often taken out of context and lack the perspective available from further testing and analyses. *See*, *e.g.*, *Glastetter v. Novartis Pharmaceuticals Corp.*, 252 F.3d 986, 991 (8th Cir. 2001) (rejecting experts' reliance on statements in company documents "lifted ... out of context"). Regardless, statements of company employees do not constitute scientific evidence and are no more reliable under *Daubert* than the evidence upon which they are based. *See Kalamazoo River Study Group*, 171 F.3d at 1070-71, 1072 (rejecting plaintiff expert's reliance on company consultant documents and focusing instead "on the factual underpinnings of [the expert's] conclusions").

Pie in the Sky

In addition to alleging contamination untethered to real world data, plaintiffs' experts will often allege damages based upon remediation or replacement costs that are wholly imaginary. In the *New Mexico* NRD litigation, the State's experts claimed over a billion dollars in damages based upon the alleged costs of (a) purchasing groundwater that could not be purchased as a matter of law, (b) storing the unavailable water in a vast above ground reservoir that the State had no intention of building, and (c) purchasing hundreds of thousands of acre-feet of additional unavailable groundwater to replace non-existent evaporation from the imaginary reservoir. The

district court correctly rejected this opinion. *See New Mexico v. General Electric Co.*, 322 F. Supp. 2d 1237, at 1261 ("Plaintiffs' damages theory sought to maximize the dollar amount of their damages award, largely unconstrained by practical considerations); *see also Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 628 F.3d 652, 676 (1st Cir. 1980) (rejecting damages theory based on the supposed costs of replacing millions of invertebrate animals killed in an oil spill); *Allgood*, 2006 WL 2669337, at *25, *30 (rejecting damages theory based upon costs of remediation and medical monitoring plan that plaintiffs had no intention of implementing).

Giving Hedonism a Bad Name

Plaintiffs' experts may offer hedonic or continent value analyses measuring the "existence value" of natural resources, *i.e.*, the public's "willingness to pay" for in situ groundwater, animal species, or other natural resources as to which there is no market value. The courts have been appropriately skeptical of these analyses: "The willingness-to-pay model on the issue of calculating hedonic damages is a troubled science in the courtroom, with the vast majority of published opinions rejecting the evidence." *Saia v. Sears Roebuck and Co.*, 47 F. Supp. 2d 141, 146 (D. Mass. 1999) (citing cases). Hedonic and contingent valuation models accordingly have been excluded in NRD litigation. *See Idaho v. Southern Refrigerated Transport, Inc.*, 1991 WL 22479, *18-*19 (D. Idaho 1991) (excluding contingent valuation study of existence value of injured fish population); *United States v. Montrose Chem. Corp.*, No. CV 90-3122-R (C.D. Cal. Apr. 17, 2000), Hrg. Tr. at 1 (rejecting contingent valuation study of fish and bird habitats and species).

If It Doesn't Fit, You Can't Admit

Finally, although often misunderstood as requiring mere relevance, the *Daubert* fit requirement is another important tool in NRD litigation. In the *New Mexico* NRD litigation, the court excluded State's experts' testimony because it did not fit any legally cognizable theory of damages. For example, the State's hydrogeologist ignored the fact that water allegedly lost for use due to contamination was already unavailable because of New Mexico's obligations under the Rio Grande Compact. The State's civil engineer opined that "loss of use" damages were unaffected by the fact that there had been no loss of drinking water services. And the State's economist opined about the market cost of new groundwater without reliable evidence that the existing groundwater could not be remediated. *New Mexico v. General Electric,* 335 F. Supp. 2d 1266, 1309-10 (D.N.M. May 7, 2004) (citing *In re Paoli* for the proposition that "the standard for fit is higher than bare relevance").

Conclusion

As the Supreme Court warned in *Daubert*, "[e]xpert evidence can be both powerful and quite misleading." *Daubert*, 509 U.S. at 595. By holding NRD plaintiffs and their experts to *Daubert*'s admissibility requirements, defense counsel can help insure that fact finders are not misled to their client's detriment.

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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.*

CERCLA JURISDICTION AND PREEMPTION OVER STATE LAW NATURAL RESOURCE DAMAGES CLAIMS: THE PASSAIC PERSPECTIVE

William Jackson
(*wjackson@connellybaker.com*)
Michael Dobbs
(*mdobbs@connellybaker.com*)
Glenda Kirsch
(*gkirsch@connellybaker.com*)
Connelly Baker Maston
Wotring Jackson, LLP
Houston, Texas

In December 2005, the New Jersey Department of Environmental Protection filed suit against Occidental Chemical Corporation (OCC), Maxus Energy Corporation (Maxus), and Tierra Solutions, Inc. (Tierra) and several of its parent companies in New Jersey state court for dioxin contamination in the Passaic River and Newark Bay. *See, generally, New Jersey Dep't of Envtl. Prot. v. Occidental Chem. Corp.*, Civ. No. 06-401, 2006 WL 2806231 (D.N.J. 2006). The Passaic River and Newark Bay are operable units in the Diamond Alkali Superfund Site. The State's Original Complaint asserted claims for response costs, compensatory damages and limited natural resources damages associated with groundwater under the Diamond plant. The State brought its claims under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, *et seq*., the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1, *et seq.*, and New Jersey common law. *Id.* at *2-3. The State's Original Complaint did not assert any federal causes of action. *Id.* Nevertheless, OCC, Maxus, and Tierra removed the suit to federal court, arguing that the State's claims were preempted by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. §§ 9601, *et seq. Id.* Based on CERCLA § 113(h), 42 U.S.C.A. § 9613(h). *Id.* at *6.

CERCLA provides states with a mechanism to recover natural resources damages in their capacity as a trustee. 42 U.S.C.A. § 9607. In addition, many states have common law and state statutory avenues for recovery of natural resources damages and other response costs associated with environmental contamination. The ability of states to seek natural resources damages in state court and under state law is impacted by both CERCLA's jurisdictional limitations and any preemptive effect thereof.

CERCLA provides that, except as provided in § 113(h), federal district courts will have "exclusive original jurisdiction over all controversies arising under [CERCLA], without regard to the citizenship of the parties or the amount in controversy." 42 U.S.C.A. § 9613(b). This is similar to the general grant of jurisdiction for federal district courts provided by 28 U.S.C.A. § 1331, granting jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Although CERCLA grants federal district courts exclusive jurisdiction over matters arising under the statute, it also limits federal courts' jurisdiction over certain "challenges" to removal or remedial actions selected by the Environmental Protection Agency (EPA). CERCLA § 113(h) provides that "[n]o Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under [CERCLA § 104], or to review any order issued under [CERCLA § 106]." 42 U.S.C. § 9613(h). Section 113(h) also lists several exceptions to the jurisdictional limitation, including costs recovery or natural resources damages under § 107, EPA enforcement actions under § 106, and citizens' suits after the remedial action has been completed. *Id.*

In New Jersey's lawsuit, OCC, Maxus and Tierra argued that the State's action "arose" under federal law because it constituted a challenge to a CERCLA cleanup action, despite the fact that no CERCLA claim was asserted by the State. Using this argument, the defendants removed the case for the purposes of seeking dismissal of the State's claims for lack of jurisdiction based on the § 113(h) bar. Defendants relied upon opinions from the Ninth Circuit and a

Pennsylvania district court, which had concluded that federal courts can take jurisdiction over challenges to an EPA action for the purpose of dismissing those claims for lack of jurisdiction. *See ARCO Envtl Remediation L.L.C. v. Montana Dep't of Health & Envtl Quality,* 213 F.3d 1108 (9th Cir. 2000); *Fort Ord Toxics Project, Inc. v. California Envtl Prot. Ag.,* 189 F.3d 828 (9th Cir. 1999); *North Penn Water Auth. v. BAE Systems,* No. Civ. A. 04-5030, 2005 WL 1279091 (E.D. Pa. May 25, 2005). The State moved to remand because all of its claims arose under state law and because its claims did not "challenge" any action by EPA and, even if they did, CERCLA expressly provides that federal courts do not have jurisdiction to review most challenges.

Judge Garrett E. Brown, Jr., chief judge of the United States District Court for the District of New Jersey, rejected the defendants' arguments for federal jurisdiction and remanded the suit to state court. *Occidental Chem. Corp.,* 2006 WL 2806231 *10 (D.N.J. 2006). Judge Brown first explained that, when diversity does not exist and the plaintiff bases its claims entirely upon state law, there are only two situations when federal jurisdiction will be available: "(1) when it appears that some substantial disputed question of federal law is a necessary element of one of the well-plead state claims or (2) when it appears that [the] plaintiff's claim is really one of federal law." *Id.* at *4 (internal citation omitted). However, under Third Circuit precedent, the federal jurisdiction inquiry collapses into a single issue: whether the plaintiff's state law claims were really ones of federal law. *See id. citing Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 310 (3d Cir. 1994). The court explained that, in order to find that a plaintiff's state law claims are "really" ones of federal law, federal law must completely preempt the plaintiff's state law claims. *Id.* In the Third Circuit, a claim is preempted only if a two-part test is met. *Id.* First, the federal statute must contain "civil enforcement provisions within the scope of which the plaintiff's state claim falls." *Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie Railroad Co.,* 858 F.2d 936, 942 (3d Cir. 1988). Second, there must be "clear indication of a Congressional intention to permit removal despite the plaintiff's exclusive reliance on state law." *Id.*

Judge Brown noted that CERCLA's savings clauses expressly permitted claims based upon state law and that there was no demonstration that Congress intended CERCLA to permit removal of actions based exclusively on state law claims. *Occidental Chem. Corp.*, 2006 WL 2806231, *6-7. The defendants had argued that Congress' intent to permit removal could be found in § 113(b) and (h). *See id.* at *5. They argued that Congress vested exclusive jurisdiction over claims challenging an EPA response action in the federal district courts, § 113(b), and provided that this jurisdiction may only be exercised in certain proceedings and at certain times to forbid any challenge to a CERCLA response action until after EPA's remedy is implemented. *Id.* Judge Brown noted, however, that § 113(b) "provides for exclusive federal jurisdiction of claims arising under CERCLA—it does not address whether cases based exclusively on state law claims should also be subject to federal jurisdiction. *Id.* at *6. With no legislative history suggesting that Congress intended to permit removal of state law claims, Judge Brown concluded that the State's claims for response costs, compensatory damages, and natural resources damages were not completely preempted by CERCLA and, therefore, not removable. *Id.* at *8.

Judge Brown also addressed the defendants' arguments that the State's claims actually constituted a challenge to a removal or remedial action and whether this might be considered a basis for federal jurisdiction. The defendants relied on *Fort Ord Toxics Project, Inc. v. California Environmental Protection Agency*, 189 F.3d 828 (9th Cir. 1999) and *North Penn Water Authority v. BAE Systems*, No. Civ. A. 04-5030, 2005 WL 1279091 (E.D. Pa. May 25, 2005) for the proposition that if a state law action relates to the goals of CERCLA it constitutes a challenge and is properly removable. Judge Brown distinguished these cases, however, on both their facts and underlying reasoning. *Occidental Chem. Corp.*, 2006 WL 2806231 at *8. First, the State's claims sought only monetary relief, unlike the plaintiffs in *Fort Ord* and *North Penn*, which sought injunctive relief in conflict with an EPA-ordered remedial action. *Id.* Thus, the State of New Jersey's claims did not constitute the type of challenge at issue in *Fort Ord*

and *North Penn*. Second, Judge Brown found that *Fort Ord* and *North Penn* were based on reasoning that appeared inconsistent with the requirements that the Third Circuit has set forth for complete preemption. *Id.* at. *9. Both cases used the Ninth Circuit's standard for federal jurisdiction, which includes state law claims that are necessarily federal in character or when a right to relief depends upon the resolution of a substantial disputed federal question. *Id. citing ARCO*, 213 F.3d at 1114. The Third Circuit, however, has rejected those standards in favor of a single complete preemption standard. *Id.* Furthermore, both *Fort Ord* and *North Penn* found federal jurisdiction because the plaintiffs' claims "directly related to the goals of the [CERCLA] cleanup itself." *Id.* (internal citation omitted). As Judge Brown explained, "a requirement that a case be 'directly related' to CERCLA is less stringent than the requirement for finding complete preemption." *Id.*

For these reasons, Judge Brown remanded the State of New Jersey's suit to state court. Judge Brown found that, although the State's claims may have some relation to EPA's actions in the Passaic River and Newark Bay, "relating to" an EPA action is insufficient to grant federal jurisdiction over state law claims. State law claims must be completely preempted by federal law to permit removal, and CERCLA neither completely preempts state law nor evidences Congress' intent to permit removal despite the plaintiff's exclusive reliance on state law.

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LIABILITY FOR NATURAL RESOURCE DAMAGE IN EUROPE

Valerie Fogleman
Consultant, Lovells, London
Visiting Professor, University of Ghent, Belgium
Valerie.Fogleman@LOVELLS.com

On April 30, 2007, the Environmental Liability Directive (2004/35/CE) (ELD) will impose liability for clean-up costs and natural resource damage (NRD) in the 27 Member States of the European Union (EU).

The ELD, which is the first "polluter-pays" law enacted by the European Communities (EC), has a long history. The European Commission first proposed liability for environmental damage in 1976. After several failed attempts, a draft green paper (that is, a document that discusses ideas for legislation) was leaked in 1991. Following numerous delays, background documents and papers refining draft legislative proposals, the Commission submitted its proposal for the Directive that would become the ELD in 2002. The ELD entered into force on April 30, 2004.

As a result of the time lapse, the ELD does not write on a clean slate because most Member States already have legislation imposing liability for clean-up costs. Liability for NRD, however, is a new concept in many Member States.

The ELD directs the EU-27 to enact legislation that is at least as stringent as the ELD into their domestic law by April 30, 2007. NRD liability under the ELD has many similarities with NRD liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Oil Pollution Act (OPA). There are, however, significant differences.

Liability under the ELD is channelled to an operator, that is, a company, public entity or individual whose activity causes an imminent threat of, or actual, "environmental damage" to a "natural resource." There are three categories of natural resources: land, water, and protected species and natural habitats.

Environmental damage to land occurs if "substances, preparations, organisms [including genetically modified organisms] or micro-organisms" create "a significant risk of human health being adversely affected." Land is cleaned up by removing the significant risk. The ELD does not impose NRD liability for damage to land.

Environmental damage to water occurs if water which is subject to the Water Framework Directive (2000/60/EC), that is, surface, transitional, coastal, and ground water, suffers a significant adverse effect to its ecological, chemical, or quantitative status, or its ecological potential.

Environmental damage to protected species and natural habitats occurs if a species or natural habitat which is protected by the Birds Directive (79/409/EEC) or the Natural Habitats Directive (92/43/EC) suffers a significant adverse effect on reaching or maintaining its favourable conservation status. Areas protected by the Natural Habitats and Birds Directives are called European sites and form the Natura 2000 network which covers approximately 15 percent of land in the EU.

There are three types of "remedial measures" for damage to water and protected species and natural habitats: primary, complementary, and compensatory remediation. The term "remedial measures" is defined to mean "any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services." The ELD, thus, subsumes liability for cleaning up water and protected species and natural habitats into liability for restoring or replacing them.

Primary remediation is described as "any remedial measure which returns the damaged natural resources and/or impaired services [provided by the resources to the public or other natural resources] to, or towards baseline condition [that is, their condition at the time of the damage]." Because a natural resource cannot be restored until it has been cleaned up, primary remediation necessarily includes liability for clean-up costs as well as NRD liability.

Complementary remediation, which does not include liability for clean-up costs, is conducted to compensate for the inability to restore water or a protected species or natural habitat to its baseline condition by providing a similar level of natural resources or services at another site in addition to partially restoring the damaged site.

Compensatory remediation, which also does not include liability for clean-up costs, is any action that is conducted to compensate for interim losses, that is, the loss of a damaged natural resource to the public or another natural resource from the time of its damage until its restoration or replacement.

Two types of operators are liable under the ELD. The operator of an activity conducted under legislation listed in the ELD is strictly liable for preventing or remedying environmental damage. Listed legislation includes the main EC environmental regulatory regime, called the Integrated Pollution Prevention and Control Directive (96/61/EC), and EC legislation that controls waste management operations, authorized discharges into surface and ground water, water abstraction, the manufacture, storage and use of various substances, the transportation of dangerous goods, the contained use of genetically modified micro-organisms, and the deliberate release of genetically modified organisms.

The operator of an activity under legislation that is not listed in the ELD is liable for preventing or remedying environmental damage only to protected species and natural habitats and only if the operator is at fault or otherwise negligent.

Provisions enforcing liability for the costs of clean-up and NRD measures under the ELD differ significantly from CERCLA and the OPA. Each Member State must designate competent authorities to enforce the ELD. NRD liability is not limited to the payment of damages.

The ELD imposes a duty on an operator to conduct emergency preventive or clean-up measures without the intervention of a competent authority. An operator who causes an imminent threat of damage to a natural resource must carry out preventive measures "without

delay" and must notify the competent authority "as soon as possible" if the measures fail to remove the threat. An operator who causes environmental damage must "immediately" carry out measures to "control, contain, remove or otherwise manage" the contamination and must notify the competent authority "without delay" of the damage. The provisions, therefore, are self-executing.

The provisions which require an operator to carry out primary, complementary, and compensatory remediation, including preparation of an NRD assessment, are not self-executing. The operator must conduct such remedial measures in co-operation with, and according to instructions from, a competent authority. The ELD includes a 2-1/2 page "common framework" for selecting appropriate measures. The framework states, among other things, that resource-to-resource or service-to-service equivalence approaches should be considered first, that is, actions to "provide natural resources and/or services of the same type, quality and quantity as those damaged." If such an approach is not possible, "alternative valuation techniques shall be used." The ELD does not specify any techniques.

The ELD does not direct Member States to prepare regulations or guidance on measures to clean up contamination or to restore or replace natural resources. It is likely, however, that many States will issue such guidance. As noted above, many Member States have already enacted legislation to clean up contamination; regulations and guidance on this aspect of the ELD, therefore, already exist in many Member States.

If an operator fails to prevent or remedy environmental damage, a competent authority must order it to do so. The competent authority is not required to remedy environmental damage but may do so "as a last resort." If the competent authority conducts preventive or remedial measures, it may bring an action to recover its costs within five years from the date on which it completes the measures or identifies the liable operator, whichever is later.

The ELD imposes liability only from April 30, 2007; it does not impose retroactive liability. As indicated above, the ELD imposes strict and fault-based liability depending on the nature of an operator's activity. Member States may impose joint and several or proportionate liability. The same burden of proof applies to liability for clean-up costs and NRD liability. The ELD does not impose liability for bodily injury, property damage or economic loss. Unusually for environmental liability legislation, the ELD has a thirty-year limitations period from the time of the emission, event, or incident which caused environmental damage.

The ELD does not apply to environmental damage caused by an act of God or an act of war including terrorism or if liability or compensation for environmental damage is within the scope of international conventions on marine oil pollution, nuclear risks, or the transportation of dangerous goods by road, rail, and inland navigation vessels. Other exceptions include an activity for which the main purpose is national defense.

The ELD has two "defenses" which Member States must adopt and two which they may adopt. An operator has a "defense" to liability if it proves that the imminent threat of, or actual, damage: (1) was caused by a third party and occurred despite appropriate safety measures; or (2) results from compliance with a public authority's mandatory order. The optional "defenses" are compliance with a permit under legislation listed in the ELD and the state-of-the-art "defense." The "defenses" are not true defenses due, among other things, to the duty of an operator to conduct preventive or remedial measures without the intervention of a competent authority.

In a citizen suit-type provision, the ELD authorizes natural or legal persons, including qualified non-governmental organizations, to submit comments to a competent authority if they consider that environmental damage has occurred or if (at a Member State's option), there is an imminent threat of such damage. Further, such persons may request a court or other independent and impartial public body to review the procedural and substantive legality of the competent authority's decisions, acts, or failure to act.

The ELD does not impose mandatory financial security. After much debate, the ELD requires Member

States to encourage the development of financial security instruments and markets. In addition, it directs the European Commission to prepare a report on this issue by April 30, 2010. The Commission may submit a proposal for mandatory financial security if it considers it appropriate.

Liability for NRD under the ELD, thus, differs significantly from NRD liability under CERCLA and the OPA in the following key respects.

- The natural resources to which NRD liability attaches do not include land, air or geologic resources. Liability for biological resources is limited to European sites and other specific areas such as the resting places of migratory birds and, at the option of a Member State, sites protected under equivalent domestic legislation.
- Liability for clean-up costs is subsumed into NRD liability. The competent authority which enforces the NRD provisions, therefore, may enforce the clean-up provisions—a situation which seems likely to lead to problems.
- A competent authority has the same burden of proving that an operator is liable for NRD as proving that the operator is liable for clean-up costs.
- Liability is channeled to one or more operators rather than a wide range of persons; Member States may impose liability on other persons such as landowners.
- Liability for NRD is not solely liability for damages for NRD; it is predominantly liability for the cost of conducting measures to restore or replace damaged natural resources and for interim costs.
- Liability for clean-up costs is not retroactive; the ELD imposes only prospective liability.
- Liability is strict or fault based depending on the activity conducted by an operator.
- Liability is joint and several or proportionate depending on each Member State.

Member States have been slow to transpose the ELD. Lithuania and Italy were the first States to transpose it in 2006, with other States including Belgium, Germany, Poland, and Spain, having issued proposed legislation by early 2007. Other Member States lag far behind. For example, the UK issued the first consultation on the ELD in December 2006, automatically making it impossible to meet the transposition deadline.

CASES OF INTEREST AND INTERESTING CASES

This section of the newsletter is new and we hope it becomes a recurring section that you find interesting and useful. 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 three of the committee's members: Alma Aguirre, Powers & Frost, Houston, Texas (aaguirre@powersfrost.com); Emily Poe, Balch & Bingham, Atlanta, Georgia (epoe@balch.com); and Laura Slaughter, Campbell University— Norman A. Wiggins School of Law, Buies Creek, North Carolina (slaughterlaura@yahoo.com). Thanks to each of them for bringing these cases to our attention.

HOW MUCH IS ENOUGH?—PUNISHING EXXON FOR THE VALDEZ SPILL

Emily Poe

On Dec. 22, 2006, the Ninth Circuit Court of Appeals considered for the third time the measure of punitive damages in litigation arising out of the 1989 grounding of the Exxon-Valdez oil tanker. *In re*: *The Exxon Valdez*, 472 F.3d 600 (9th Cir. Dec. 22, 2006). The case involves a number of private plaintiffs whose businesses suffered economic and quasi-economic harms as a result of the spill. Previously, the district court had reduced an original punitive award of $5 billion to $4 billion, and then restored it partially to $4.5 billion. On appeal, the plaintiffs sought to reinstate

the original measure of punitive damages. Exxon, citing two Supreme Court decisions, sought to have the punitive award reduced further.

The Ninth Circuit considered the two Supreme Court cases, each decided while *Exxon Valdez* was on remand, and both of which addressed the constitutional limits of punitive damage awards. *BMW v. Gore*, 517 U.S. 559 (1996), and *State Farm v. Campbell*, 538 U.S. 408 (2003). In *BMW v. Gore*, the Court identified three factors for reviewing punitive damages: (1) the reprehensibility of the defendant's misconduct, (2) the ratio of punitive damages to harm, and (3) comparable statutory penalties. The Court held that a ratio of punitive damages to harm of 500 to 1 was "breathtaking" and "grossly excessive." In *State Farm*, the Court focused on the reprehensibility of the defendant's conduct against the backdrop of five sub-factors: (1) whether the actual harm caused was physical or economic; (2) whether the conduct showed a reckless disregard for the health and safety of others; (3) whether the "target" of conduct was financially vulnerable; (4) whether the incident was isolated or involved repeated action; and (5) whether the harm caused was the result of intentional malice, trickery or deceit or mere accident. The Court suggested a ratio of 9 to 1 would test the outer limits of due process.

Applying the *BMW* and *State Farm* decisions, the Ninth Circuit concluded that a ratio of punitive damages to harm of 5 to 1 would be appropriate in light of the facts presented by the Valdez spill. *In Re*: *The Exxon Valdez*, 472 F.3d 600 (9th Cir., Dec. 22, 2006). Specifically, the court found that the grounding of the tanker was reckless, not intentional, and recognized that Exxon already had done a great deal to mitigate the harm, including reimbursing the plaintiffs for their losses in a timely manner. This justified a further reduction of the $4.5 billion punitive award that had been assessed by the district court. The Ninth Circuit accepted the district court's calculation of actual damages of $513.1 million, and set the punitive damages award at $2.5 billion.

MARKET SHARE LIABILITY FOR PUBLIC NUISANCES? SHOULD MORE BE REQUIRED?

Emily Poe

The City of St. Louis (City) filed a public nuisance suit against lead paint and lead pigment companies. The trial court granted defendants' summary judgment. The Missouri Court of Appeals has refused to overturn the summary judgment, electing instead to punt the case to the state Supreme Court for further review. *City of St. Louis v. Benjamin Moore & Co.*, No. 87702 (Mo. Ct. App., E.D. Dec. 26, 2006), 2006 Mo. App. LEXIS 1983. At issue is whether the City can prove causation using only a market-share liability theory that does not identify specific products belonging to defendants at particular locations.

The City argues that, in a public nuisance claim brought by a governmental entity, it only needs show that the defendants "substantially contributed to the lead paint problem in the city." They base their claim on the fact that defendants put lead paint into the stream of commerce, knowing that it was "dangerous, highly toxic, and unfit for use in homes." The defendants argued that, absent identification of their particular products, the City was unable to prove actual causation under the test set forth in *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984), which required identification in order to establish liability. Additionally, defendants argued that absent product identification, they were left with the "risk of being exposed to liability greater than their responsibility, while the actual wrongdoer may escape liability altogether."

While the appellate court gave some credence to the City's argument that a public nuisance suit does not fit within the constraints of tort claims based on individual injury, it ultimately held that it was required to abide by the standard set forth in Zafft. However, because the standards of proof for a public nuisance case were considered an important question of public interest, the Court of Appeals transferred the case to the Missouri Supreme Court for further review, which is now pending.

DEAR ALABAMA LEGISLATURE: WHEN DOES A CAUSE OF ACTION ACCRUE (AGAIN)?

Alma Aguirre

In a 5-4 special opinion, the Alabama Supreme Court reaffirms that it is for the Alabama Legislature to change the law regarding the accrual of the statute of limitations in toxic exposure cases, not the courts. *See Cline v. Ashland, Inc.*, No. 1041076, 2007 WL 30070 (Ala. Jan. 5, 2007). More than 25 years after its *Garrett* decision, the Alabama Supreme Court was presented once more with the opportunity to consider the question. *See Garrett v. Raytheon Co.*, 368 So.2d 516 (Ala.1979). Admitting that the issue deserves reexamination, another split court passes on the issue and once again turns it over to the legislative branch.

Plaintiff Mr. Cline claimed to be suffering from injuries caused by exposure to benzene. The date of his last exposure was in 1987 and the disease he alleges is benzene-related was diagnosed in 1999. He filed suit in 2001. The trial court disposed of his claims by granting the defendants' summary judgment motion on the basis that the claims were time-barred by the two year statute of limitations. The Supreme Court sustained the ruling on the grounds that the discovery rule does not apply in such cases citing its own precedent in *Garrett*. As it did in 1979, the court maintains that it cannot interpret the law any differently unless it is changed by the legislature.

For the last quarter century it has been the court's position that it lacks jurisdiction to change the last-exposure-date definition of "accrual" of a cause of action. *See* ALA. CODE § 6-2-30(a) (1979). In the view of the concurring justices in *Cline*, the court cannot consider the question or reverse itself as the issue was placed before the legislature following *Garrett* and there it remains. Further, any change requires the weighing of public policy concerns and the court is not endowed with the power to formulate such policies. The dissenting justices would overrule *Garrett* by redefining accrual as the occurrence of a "manifest, present injury." They agree with the majority in holding that it is only for the legislature to adopt a discovery rule in Alabama. Therefore, the manifestation rule would not be dependent on whether a person is actually aware of the injury or its origin, only that there is some physical manifestation of it.

Cline has practically assured that most toxic tort claims with latency periods of greater than two years will remain time-barred in Alabama. Since the *Garrett* decision, the legislature has only extended the statute of limitations for asbestos claims only. All other efforts have either not been enacted or have subsequently failed on constitutional grounds.

Mr. Cline succumbed to cancer just days after the Court ruled against him.

SUBSTANTIAL CONTINUITY ALIVE AND WELL…MAYBE

Alma Aguirre

The Eighth Circuit has overturned a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) judgment ordering DeAngelo Brothers to pay 15 percent of all clean up costs incurred by U.S. Borax in connection a Superfund site in Missouri. *See K.C. 1986 v. Reade Manufacturing*, No. 05-2064, WL 143612 (8th Cir. Jan. 4, 2007). The judgment was entered pursuant to the substantial continuity test adopted by the Eighth Circuit in 1992. *See United States v. Mexico Feed and Seed,* 980 F.2d 478 (8th Cir. 1992). DeAngelo argued that the test was invalidated by the Supreme Court in *Bestfoods*. *See United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). Agreeing that the continuing validity of the theory is in question, the court nonetheless reviewed the ruling under its elements.

Since 1968 until the sale to DeAngelo in 1997, the land and the assets at issue were owned almost exclusively by one man, Donald Horne. Critically, his ownership was not uninterrupted. In 1986, Horne sold the operating assets of the company to a third party

while retaining his interest in the land in a separate holding company. That third party continued operating the business at a different location but had Horne serve as its president for a short period. Two years after the sale the venture failed and it conveyed the assets back to Horne. Horne's new company continued the business never regaining an interest in the land and never returning to the site. DeAngelo purchased the stock and assumed the liabilities of this entity in 1997. DeAngelo never had an interest in the contaminated real property nor did it ever use the site for any purpose.

Borax argued that this case meets the elements for substantial continuity: same employees, supervisors, facilities, product, name, assets, and general operations. The intervening sale, they contended, is not relevant. Because Horne was shown to be aware of the pollution at the site in 1989, and he remained associated with the business throughout, the assets were in essence never de-contaminated. DeAngelo did not purchase "clean" assets and, therefore, could not escape liability. The court disagreed finding no evidence of CERCLA-defeating conduct, the element upon which the test ultimately rests. There is no evidence that the sale was anything but an arms length transaction or that Horne expected that the company would revert back to him. In the absence of any showing of intent to circumvent CERCLA, a successor cannot be held responsible for contribution costs.

The Eighth Circuit acknowledges that the substantial continuity test may be the type of rewriting of settled state rules that the Supreme Court concluded is not allowed under a federal statute. Accordingly, it also reviewed the case under the more relaxed mere continuation test and traditional common law exceptions to non-liability. Nevertheless, in the absence of binding authority that the more expansive reading of the statute is improper, the court has elaborated on how it is to be applied in the interim.

HURRICANE KATRINA SPAWNS ONE EXTRAORDINARY CLASS ACTION

Laura Slaughter

In *Comer, et al v. Murphy Oil, et al.,* Case No. 05-CV-00436-LTS-RHW (United States District Court for the Southern District of Mississippi) the plaintiffs, homeowners in Mississippi, have brought a class action on behalf of all Mississippi citizens who suffered injury and damage at the hands of Hurricane Katrina. Amended numerous times, the most recent complaint names literally hundreds of the nation's titans of industry (ExxonMobil, Shell, AEP, Southern Company, TVA, Dupont, Dow, et al.) claiming that greenhouse gas emissions from these oil, coal, and chemical companies caused the formation (or at least intensification) of Hurricane Katrina, resulting in hurricane-related damage to everyone (or most everyone) in Mississippi. The plaintiffs seek damages under several legal theories including public and private nuisance, trespass, and negligence.

Plaintiffs claim Hurricane Katrina evolved into a storm of unprecedented strength caused by unusually warm water conditions of the Gulf of Mexico and other environmental conditions. According to the plaintiffs, these conditions resulted from global warming, and the defendants' activities and greenhouse gas emissions are the cause of global warming, which was a direct and proximate result of the defendants' greenhouse gas emissions.

In the original and first amended complaint, the plaintiffs brought claims against oil companies, insurance companies, and mortgage lenders, but the court dismissed the claims against property insurers and mortgage lenders. The plaintiffs then filed a third amended complaint, which added numerous coal companies, utilities, and chemical companies. On Dec. 19, 2006, plaintiffs filed a motion to amend, requesting permission to file a fourth amended complaint. The district court has before it a mountain of motions to dismiss challenging the third amended complaint, as well as numerous oppositions to the plaintiffs' motion for leave to file a fourth amended complaint. Defenses raised include political question,

lack of subject matter and personal jurisdiction, failures to state a claim, and preemption. The motions are fully briefed.

WHO TURNED UP THE HEAT— SECOND CIRCUIT POSED TO RULE

Laura Slaughter

In *Connecticut v. AEP*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), the district court dismissed a complaint brought by group of states (Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin) asserting common law nuisance claims against five of the country's largest electric utilities (AEP, TVA, Xcel, Cinergy, and Southern Company) for emissions of greenhouse gases. According to the plaintiffs, emissions from the defendants contribute to global climate change. They alleged that the defendants emit millions of tons of carbon dioxide annually contributing to global warming and sought a court order requiring the defendants to cap and reduce carbon dioxide emissions annually over the next decade.

The district court concluded the plaintiffs' claims presented a classic non-justiciable political question outside the court's jurisdiction. Plaintiffs argued the litigation presents a simple nuisance claim, but the court found the "scope and magnitude the Plaintiff's requested relief revealed the transcendently legislative nature of the litigation." The court noted Congress and the Executive branch had taken decisive steps to address global climate change and greenhouse gases, and had affirmatively declined to regulate greenhouse gases. Thus, the court could not grant plaintiff's relief without an initial policy determination about the appropriateness of such relief.

The plaintiffs appealed the dismissal of their case and in June 2006, the Second Circuit Court of Appeals heard oral arguments. A decision is expected any day, and it likely will effect other pending climate change litigation and could stem the tide of existing cases or serve to spawn a whole new flood of climate related litigation.

GREENHOUSE GASSES: HAS EPA MISSED THE BOAT?

Laura Slaughter

Massachusetts v. EPA, 415 F. 3d 50 (D.C. Cir. 2005), *cert. granted*, 165 L.Ed. 2d 949 (June 2006), was argued before the Supreme Court Nov. 29, 2006. Petitioners sought certiorari in the Supreme Court to challenge a D.C. Circuit decision upholding the Environmental Protection Agency's (EPA's) decision **not** to regulate greenhouse gases emitted by motor vehicles. Petitioners had demanded that EPA regulate carbon dioxide and other greenhouse gases emitted by motor vehicles under Clear Air Act § 202(a)(1). Relying upon scientific evidence and policy considerations, EPA declined to do so. It concluded the Clean Air Act did not cover greenhouse gas emissions, and even if it did, EPA had discretion not to regulate.

The lower court denied the petitioners', holding that § 202(a)(1) gives "considerable discretion" to EPA whether to regulate. EPA can exercise its discretion not to regulate based on scientific evidence and also on policy judgments when resolving issues on the frontier of scientific knowledge.

In November 2006, the Supreme Court heard oral arguments on two issues. The first is whether EPA properly exercised its discretion when it decided not regulate greenhouse gases. The second is whether the Clean Air Act gives EPA the authority to regulate associated with global climate change where such gases are not themselves pollutants. The Court's decision is due out any day.

Editor's Update: After this newsletter had been submitted for publication, the Supreme Court released its decision in *Massachusetts v. EPA*, 549 U.S. ____ (Apr. 2, 2007). The Supreme Court reversed and remanded, holding that (1) because greenhouse gases fit well within Clean Air Act's "capricious" definition of air pollutant EPA has authority to regulate them, and (2) EPA must determine whether the emission of such gases "endanger public health or welfare" or explain why it cannot make such a determination.

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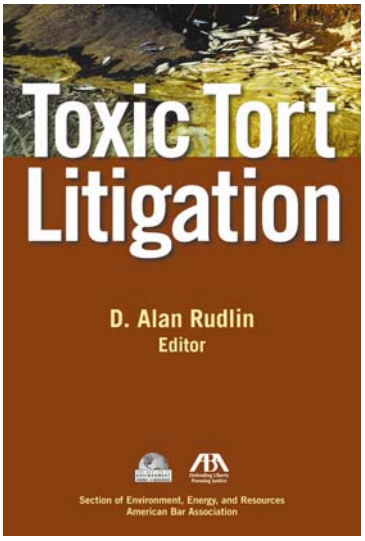
D. Alan Rudlin, Editor



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