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Health & Environment Section Meeting:
Federal Environmental Law Update

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1. Update On CERCLA

Recent CERCLA cases took a broad view of owner liability, illustrated the impact of prior settlement representations and defined necessary response costs.

A. The Tenth Circuit Broadly Defines Owner Liability for CERCLA

In Chevron Mining, Inc. v. United States, Case No. 15-2209, 2017 U.S. App. LEXIS 12959, (10th Cir. July 19, 2017), the Tenth Circuit held that the United States was strictly liable under CERCLA for natural forest lands even if it lacked control of the property. Under CERCLA, owners and operators of facilities contaminated by a hazardous substance are strictly liable. 42 U.S.C. §§ 9601(9), 9607(a). The United States claimed that the General Mining Act of 1872 gave Chevron Mining, Inc. exclusive control of the property. 30 U.S.C. §§ 22 - 42. For that reason, the United States argued that "bare legal title," without more, should not trigger liability. After examining the traditional definitions of "owners," other provisions of CERCLA, and case law, the Tenth Circuit disagreed and held "the term 'owner' covers fee title holders for purposes of CERCLA liability irrespective of any additional indicia of ownership." Id. at *28. This broad definition of owners expands the universe of potentially liable parties under CERCLA.

B. The Tenth Circuit Decides Prior Bankruptcy Court Statements Do Not Contradict a CERCLA Claim

To obtain Bankruptcy Court approval of its settlement, Asarco, LLC (Asarco) represented to the Court that there may be other responsible parties, but the proposed settlement amounts represented Asarco's share of the clean-up costs. Asarco, LLC v. Noranda Mining, Inc., 844 F.3d 1201, 1208 (10th Cir. 2017). Later, Asarco sued Noranda Mining, Inc. (Noranda) to contribute to the settlement paid by Asarco in bankruptcy. Noranda moved to dismiss Asarco's lawsuit claiming the Bankruptcy Court statements contradicted the contribution claim, which is premised on the theory that the settling party paid for some of defendant's share, in other words, more than its fair share. The District Court agreed, but the Tenth Circuit disagreed, noting that "CERCLA allows a party to settle for an inexact amount and later seek contribution from other PRPs [potentially responsible parties] for any amounts it overpaid." Id. at 1209 (brackets added). Although ASARCO survived this challenge, this decision is a cautionary tale of the importance of using care with the representations about settlement made in agreements and pleadings.

C. A District Court Helps Define Necessary CERCLA Response Costs

A CERCLA plaintiff may recover "necessary costs of response" to clean up contamination, but CERCLA does not define "necessary costs of response" and defines "response" indirectly. Charter Twp. of Lansing v. Lansing Bd. of Water & Light, Case No. 1:14-cv-514, 2017 U.S. Dist. LEXIS 2280, *19-20 (W.D. Mich. Jan. 6, 2017). Plaintiffs alleged that a $12 million project to install a storm drain was necessary to prevent the threatened future release of contamination from a landfill into the groundwater. After noting that case law required that "'only work that is closely tied to the actual cleanup … may constitute a necessary

cost of response,'" the allegation that the drain project was necessary for an effective cleanup plan was sufficient to defeat a motion to dismiss. Id. at 21 (quoting Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 549 (6th Cir. 2001)); 23-24. Therefore, according to this Court, while response costs are not limited to actual cleanup costs, they must be closely tied to those costs.

2. Update On RCRA

Last year, a RCRA citizen suit case allowed a state to sue on behalf of its citizens, but another case refused to allow toxic tort plaintiffs to use RCRA for negligence per se.

A. A State May Bring a RCRA Citizen Suit for Its Residents

A District Court explained that a State may sue to protect its residents in a RCRA citizen suit. In Hanford Challenge v. Ernest Moniz, 218 F.Supp.3d 1171 (E.D. Wash. 2016), the State of Washington joined with other RCRA citizen suit plaintiffs against the United States and Washington River Protection Solutions, LLC, for their storage, handling and treatment of hazardous chemicals and radioactive waste at the Hanford Nuclear Site. Washington sued on behalf of its residents under the doctrine, parens patriae. Ordinarily, a plaintiff must prove standing by showing an injury-in-fact, which is: concrete or particularized; causally connected to the conduct complained of; and likely to be addressed by a favorable decision. Id. at 1179. The United States argued that the RCRA citizen suit provisions preclude a state from bringing an action on behalf of its residents. The District Court disagreed and held that parens patriae was an alternative basis of standing if Washington could show: an interest apart from the interest of private parties; injury to a substantial segment of its population; and a quasi-sovereign interest in the action. Id. at 1180. In this case, Washington properly alleged a quasi-sovereign to protect the health and well-being of the Hanford workers. Id. at 1182.

B. A District Court Refuses to Allow Plaintiff to Use RCRA to Frame Toxic Tort Claims

Toxic tort plaintiffs will often use statutory violations to support their negligence per se claims. In Hollingsworth v. Hercules, Inc., Case No. 2:15-CV-113-KS-MTP, 2016 U.S. Dist. LEXIS 177430 (S.D. Miss. Dec. 22, 2016), Plaintiffs alleged that Hercules, Inc. (Hercules) improperly disposed of hazardous waste near their homes, which contaminated the soil, air and groundwater of their property. Among other things, Plaintiffs argued that Hercules was negligent per se because its activities violated RCRA. The District Court dismissed the claim because RCRA does not create a private right to damages, only claims for injunctive relief, penalties and attorney's fees. In other words, plaintiffs cannot use the theory of negligence per se to "bootstrap a private cause of action for damages when one is not provided for by the RCRA." Id. at *12. Therefore, unless a statute allows Plaintiffs to recover the relief they seek, they cannot sue for negligence per se.

3. Update On Endangered Species Act

In the past year, the Ninth Circuit explained procedural requirements for ESA citizen suits, the Fifth Circuit defined critical habitat broadly, and the United States Fish & Wildlife Service (F&WS) sought a larger role in mitigation.

A. The Ninth Circuit Clarifies ESA Citizen Suit Procedures

A Ninth Circuit case explained the statute of limitations, jurisdictional requirements and the obligation to consult before taking action under the Federal Endangered Species Act (ESA). Center for Biological Diversity v. U.S. Envtl. Protection Agency, 847 F.3d 1075 (9th Cir. 2017), involved an ESA citizen suit challenge to the failure of the United States Environmental Protection Agency (EPA) to consult under Section 7 of the ESA. Section 7 requires any federal agency to consult with National Marine Fisheries Service (NMFS) and the F&WS when it takes action that may impact an endangered or threatened species. In this case, EPA re-registered certain pesticide active ingredients under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). In dismissing most of Plaintiff's claims, the Court of Appeal held that: (1) the statute of limitations for failure to comply with ESA's Section 7 requirements is the general six-year statute of limitations (18 U.S.C. § 2401(a)); (2) jurisdiction for Section 7 is based on the more specific ESA, instead of FIFRA; and (3) ESA Section 7 is triggered by affirmative action, e.g., registering a pesticide, not an ongoing duty, e.g., continued discretionary control and completion of product re-registration. Id. at 1087, 1089, 1091. The procedural clarifications of this case should help guide ESA citizens suits.

B. The Fifth Circuit Concludes Areas Uninhabitable by A Species May Still be Critical Habitat

Although contradictory on its face, the Fifth Circuit decided that areas designated as critical habitat for threatened or endangered species may include areas that are not habitable for the species. When the F&WS lists a species as threatened or endangered, the ESA requires it to designate habitat of such species which it considers "essential" for the conservation of the species. If the F&WS concludes occupied habitat is not enough, it may designate unoccupied habitat so long as it is "essential" for the conservation of the species. In Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 827 F.3d 452, 466 (5th Cir. 2016), the F&WS listed ponds that it contended were "essential" for the "conservation" of the endangered dusky gopher frog. By motion for summary judgment, plaintiff landowners objected to the designation because it did not conclude whether the frog can live on land "currently" or in the "foreseeable future." Id. at 467. A divided Fifth Circuit Panel held that the ESA does not have a "habitability requirement" or a "temporal requirement," and that FW&S properly found that the habitat was "essential" based on the best scientific data available. Id. at 468-473. This case is significant because designation of land as critical habitat can be very contentious to land owners since it can lead to significant limitations on its use and value.

C. F&WS Policy Seeks More Influence on Mitigation

The F&WS Final ESA Compensatory Mitigation Policy was issued effective December 27, 2016. Under the ESA, the F&WS lists endangered or threatened species, and the ESA prohibits the take of those species except under Section 10, where F&WS issues permits or enters into agreements to allow take that is incidental to otherwise lawful activities, or under Section 7, where F&WS concludes federal agency action is not likely to jeopardize the species or destroy its critical habitat. In consultations under Section 7, F&WS may provide alternatives or mitigation to minimize the effects on the species. The new F&WS policy on mitigation continues a shift from a project-by-project approach to a more holistic, landscape – scale project approach. Landscape scale considers conservation of the entire ecosystem, not just the effects of the project on the species and habitat. The new policy also follows a goal of "net gain or, at a minimum, no net loss" of sensitive species or their habitat. However, F&WS authority to require mitigation is limited and does not expressly include the "net gain" policy. It remains to be seen how aggressively F&WS pushes its authority in seeking mitigation.

4. Update on Clean Water Act

A. WOTUS Rulemaking

On July 27, 2017, the U.S. Environmental Protection Agency and Army Corps of Engineers published a proposed rule to redefine "waters of the United States," which are waterbodies that are subject to the Clean Water Act. A 2015 rule by the agencies (known as the Clean Water Rule) previously defined WOTUS; however, that rule is currently held up in the federal courts. As a result, the Clean Water Act is currently being implemented pursuant to pre-2015 guidance documents issued by EPA in the wake of the 2006 Supreme Court decision in Rapanos v. United States.

An Executive Order signed by President Trump on February 28, 2017, directed EPA and the Corps to rescind the 2015 rule and consider issuing a new definition based on the late Justice Scalia's opinion in the Rapanos case. The agencies are taking a two-step process to rescind and revise the WOTUS definition pursuant to the Executive Order. By rescinding the definition of WOTUS under the Clean Water Rule, the agencies are in the process of completing the first step. In step two, the agencies will engage in a notice-and-comment rulemaking to perform a substantive reevaluation of the WOTUS definition.

On January 13, 2017, the U.S. Supreme Court granted certiorari on the question of whether the court of appeals has original jurisdiction to review challenges to the 2015 rule. The Sixth Circuit granted petitioners' motion to hold in abeyance the briefing schedule in the litigation challenging the 2015 rule pending a Supreme Court decision on the question of the court of appeals' jurisdiction.

B. Second Circuit Upholds EPA's Water Transfer Rule Citing Chevron Deference

In Catskill Mountains Chapter of Trout Unlimited, Inc., v. EPA, 846 F.3d 492 (2d Cir. 2017), the Second Circuit found EPA's 2008 rule that exempts the transfer of water from one basin to another from discharge permits is a reasonable interpretation of the law. The Circuit Court upheld the rule saying the rule is "precisely the sort of policymaking decision that the Supreme Court designed the Chevron framework to insulate from judicial second- (or third-) guessing."

The District Court for the Southern District of New York had vacated and remanded the 2008 rule in a 2014 ruling, finding EPA misinterpreted the law's requirements. The Circuit Court's reversal of the District Court's ruling also dismissed arguments that the United States Supreme Court considered the water transfer rule to be unreasonable in Los Angeles County Flood Control District v. Natural Resources Defense Council.

C. CWA Settlement Addresses Pending Water Jurisdiction Issues

In Duarte Nursery, et al., v. Army Corps of Engineers, the Army Corps initiated a Cease and Desist enforcement action against Duarte Nursery for plowing long-disused farm lands. The Army Corps asserted that the plowing activities required a Section 404 permit based on a jurisdictional determination made under Justice Kennedy's "significant nexus" test. Duarte Nursery filed an action against the Army Corps for retaliatory prosecution, and the Army Corps cross claimed for violations of the Clean Water Act. On cross-motions for summary judgment, the court dismissed Duarte Nursery's claim without leave to amend and determined that Duarte Nursery violated the Clean Water Act. The court ordered a bench trial on the scope of injunctive relief.

Before the bench trial was held, Duarte Nursery and the Army Corps entered into a consent decree that enjoins Duarte Nursery from disturbing 44 acres of land. If approved by the court, the consent decree would also allow Duarte Nursery to go back to the Corps in two years after the effective date of the decree for a new jurisdictional determination under the then-existing definition of "waters of the United States." Thereafter, Duarte Nursery may conduct activities consistent with then-governing law.

D. Conduit Theory Gains Momentum

In Tennessee Clean Water Network, et al., v. Tennessee Valley Authority (TVA), No. 3:15-cv-00424 (M.D. Tenn., Aug. 4, 2017), the Middle District of Tennessee found the TVA liable for discharges from coal ash ponds through ground water into the Cumberland River, despite TVA possessing an NPDES permit for the ponds. The Court, relied, in part, on the judicially created "conduit theory" articulated in Hawai'i Wildlife Fund v. County of Maui, 24 F.Supp.3d 980 (D.C. Haw. 2014) (currently on appeal in the Ninth Circuit), to determine that the ash ponds and groundwater acted as a point source "conduit" to transport pollutants to the river through "direct, immediate, and … generally … trace[able]" means.

The district court also dismissed TVA's permit shield defense because the type of leaks from the ash ponds were not "within the scope of what was considered and authorized under the

permit." The court declined to issue monetary penalties against TVA, in part because "the evidence is scant of concrete harm beyond mere risk and the presence of pollutants in and of itself." Despite the lack of evidence of concrete harm, the court ordered TVA to fully excavate the coal ash waste and move the waste to a lined site that offers reasonable assurances that it will not discharge waste into the waters of the United States.

5. Update On Clean Air Act

A. EPA Issues and Delays RMP Rule

On January 13, 2017, EPA published in the Federal Register its final rule amending the Accidental Release Prevention Requirements for Risk Management Programs (RMP) under Clean Air Act (CAA) Section 112(r)(7). 82 Fed. Reg. 4594. The amendments are intended to modernize EPA's RMP regulations in response to Executive Order 13650, which directs the federal government to carry out certain tasks intended to prevent chemical incidents, such as the explosion in West, Texas, on April 17, 2013. Specifically, the amendments are intended to address and improve accident prevention program elements; enhance the emergency preparedness requirements; and ensure Local Emergency Planning Committees, local emergency response officials, and the public can access information in a user-friendly format to help them understand the risks at RMP facilities and better prepare for emergencies. The rule was effective March 14, 2017.

On June 14, 2017, EPA delayed for 20 months the effective date of the Risk Management Program (RMP) rule revisions under the Clean Air Act (CAA). 82 Fed. Reg. 27133. EPA states that the extension will allow it time "to conduct a reconsideration proceeding and to consider other issues that may benefit from additional comment." EPA received three petitions for reconsideration from two industry groups and the Attorneys General of Louisiana, Arizona, Arkansas, Florida, Kansas, Kentucky, Oklahoma, South Carolina, Texas, Wisconsin, and West Virginia. The new effective date of the rule is February 19, 2019.

B. EPA Delays and Reinstates Deadline for Ozone NAAQS

On August 10, 2017, EPA withdrew its one year extension of the deadline for promulgating area designations for the 2015 ozone National Ambient Air Quality Standards (NAAQS). 82 Fed. Reg. 37318. The decision reverses EPA's June 2017, announcement that it was extending the area designation deadline for one year. 82 Fed. Reg. 29246. In that notice, EPA Administrator Scott Pruitt announced that he was using his authority under Clean Air Act (CAA) Section 107(d)(1)(B)(i) to extend by one year, to October 1, 2018, the deadline for promulgating initial area designations for the 2015 ozone NAAQS. At the time, EPA explained that it was unclear whether it would be able to complete the designations by the initial deadline of October 1, 2017. EPA now states that "the information gaps that formed the basis of the extension may not be as expansive as we previously believed." It thus withdrew the one year extension and reinstated the original deadline of October 1, 2017.

C. Court Of Appeals Overturns Stay Of Oil And Gas Methane Rules

On June 3 2016, EPA issued a final rule establishing new source performance standards for fugitive emissions of methane and other pollutants by the oil and natural gas industries. 81 Fed. Reg. 35824. The rule required regulated entities to conduct an "initial monitoring survey" by June 3, 2017, to identify fugitive emission leaks. 40 C.F.R. Section 60.5397a(f). After EPA published the rule, several industry groups filed administrative petitions under the CAA seeking reconsideration of the rule. EPA Administrator Scott Pruitt on April 18, 2017, announced that EPA "[found] that the petitions have raised at least one objection to the fugitive emissions monitoring requirements" that warrants reconsideration. EPA then issued a stay of several provisions of the rule and issued a proposed rule announcing its intention to extend the stay for two years and to "look broadly at the 2016 Rule" during the reconsideration proceeding. 82 Fed. Reg. 27645. In coming to this decision, EPA concluded that the rule did not seek comment on portions of the rule that became final.

On July 3, 2017, the U.S. Court of Appeals for the D.C. Circuit rebuked the Trump Administration for delaying the rule. The decision, Clean Air Council, et al., v. EPA, 862 F.3d 1 (D.C. Cir. 2017), vacated EPA's stay and immediately reinstated it, determining "[t]he administrative record . . . makes clear that industry groups had ample opportunity to comment on all four issues on which EPA granted reconsideration, and indeed, that in several instances the agency incorporated those comments directly into the final rule." "Because it was thus not 'impracticable' for industry groups to have raised such objections during the notice and comment period [the CAA] did not require reconsideration and did not authorize the stay."