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## CLEAN WATER ACT

### WOTUS Supreme Court challenges briefed, heading toward argument

By Michael Nordskog

The National Association of Manufacturers, the Sierra Club and other groups say in recent U.S. Supreme Court filings that district courts, not federal circuit courts, have original jurisdiction to hear challenges to the Environmental Protection Agency's definition of "waters of the United States."

**National Association of Manufacturers v. U.S. Department of Defense et al., No. 16-299, petitioner's reply brief filed, 2017 WL 4022774 (U.S. Sept. 11, 2017).**

In several separate high court reply briefs, the groups say legal actions challenging the so-called WOTUS rule that are currently consolidated in the 6th U.S. Circuit Court of Appeals should be remanded to the district courts where they were originally filed.

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U.S. Supreme Court building

REUTERS/Brendan McDermid

## EXPERT ANALYSIS

### Fossil fuel projects and NEPA reviews: Two new decisions on the proper scope of analysis for indirect and cumulative greenhouse gas emissions

Jessica Wentz of Columbia Law School's Sabin Center for Climate Change Law analyzes two federal court rulings that addressed the scope of environmental review for projects involving greenhouse gas emissions.

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## EXPERT ANALYSIS

### Preparing clients for the next discovery request before it arrives

Joel Wuesthoff of Robert Half Legal discusses 10 strategies law firms can use to ensure their clients are prepared for litigation discovery requests.

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# Fossil fuel projects and NEPA reviews: Two new decisions on the proper scope of analysis for indirect and cumulative greenhouse gas emissions

By **Jessica Wentz**  
**Columbia Law School**

Federal courts recently issued decisions on two cases involving questions pertaining to the scope of environmental review for fossil fuel production and transportation projects.

Among other things, these cases examined the extent to which agencies had complied with obligations under the National Environmental Policy Act (NEPA) to examine the indirect and cumulative greenhouse gas emissions generated as a result of the proposed projects (and their impacts on fossil fuel development and consumption). This is a subject that Michael Burger and I have explored in our previous work.<sup>1</sup>

The first of the two cases, *Montana Environmental Information Center v. U.S. Office of Surface Mining*, No. CV-106-M-DWN (D. Montana, Aug. 14, 2017),<sup>2</sup> involved the U.S. Office of Surface Mining (OSM)'s environmental assessment (EA)<sup>3</sup> for the proposed modification of a federal mining plan in the Bull Mountains of Montana.

The proposed modification would expand the leased area by approximately 2,680 acres and allow the company operating the mine to access an estimated 61.4 million tons of additional coal reserves.

In the EA, OSM estimated that the combined annual CO<sub>2</sub>e emissions resulting from mine operations, coal transport, and combustion would be 23.16 million metric tons and would continue for an additional

nine years beyond that which would be anticipated under the no action alternative.

Despite the large increase in coal production and corresponding greenhouse gas emissions, OSM concluded that the proposed modification would not have significant environmental effects and thus a full environmental impact statement (EIS) was not required.

OSM argued that it need not monetize the impacts of the greenhouse gas emissions because a cost-benefit analysis is not a required component of NEPA reviews.

The court disagreed, holding that because OSM had projected the economic benefits of the proposal, it was therefore required to project the economic costs in order to provide a fair and balanced assessment of the proposal.

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The Montana federal court found that the U.S. Office of Surface Mining had failed to fully consider the level of uncertainty and controversy associated with the greenhouse gas emissions impacts.

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A group of advocacy organizations challenged the adequacy of the EA and OSM's finding of no significant impact (FONSI), citing various deficiencies in the agency's analysis.

One of these deficiencies was OSM's failure to use the social cost of carbon (SCC) protocol to calculate the cost of greenhouse gas emissions that would be generated as a result of the proposal, despite the agency's having calculated the economic benefits of the project.

Plaintiffs noted that, based on the projected emissions rate of 23.16 million metric tons per year, the cost of the emissions would be between \$277 million to \$2.5 billion annually.

The court cited *High County Conservation Advocates v. USFS*, 54 F. Supp.3d 1174 (D. Colo. 2014) and *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2008) as cases supporting this proposition. This aspect of the court's decision is consistent with recommendations in our paper on reviewing upstream and downstream greenhouse gas emissions.

The court also held that the FONSI was arbitrary and capricious, both due to the inadequacy of the analysis in the EA, as well as OSM's failure to fully account for the factors that must be considered in a significance determination pursuant to federal regulations.

In particular, the court found that OSM had failed to fully consider the level of uncertainty and controversy associated with the greenhouse gas emissions impacts, both of which are factors which weigh in favor of a significance determination.

The second case, *Sierra Club v. U.S. Department of Energy*, No. 15-1489 (D.C. Cir., Aug. 15, 2017),<sup>4</sup> involved the Department of Energy (DOE)'s review of a LNG (liquefied natural gas) export application for the Freeport LNG Terminal in Texas.



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At issue was whether DOE adequately accounted for the indirect and cumulative effects of LNG exports, including the greenhouse gas emissions associated with the potential increase in production and consumption of U.S. natural gas.

For this review, DOE adopted an EIS prepared by the Federal Energy Regulatory Commission (FERC) that did not analyze these effects. However, DOE did incorporate into its review independent studies from the Energy Information Administration (EIA) on how LNG exports affect energy markets and also commissioned a report from the National Energy Technology Laboratory (NETL) on the lifecycle greenhouse gas emissions of LNG exports.

One of the Sierra Club's primary challenges to DOE's review was that it did not tailor the indirect and cumulative impacts analysis, including the greenhouse gas emission estimates, to any particular volume of exports, specifically: exports that would be authorized at the Freeport terminal (which the Sierra Club argued should be evaluated as indirect effects of the proposal), and the total amount of exports from that terminal as well as other pending and anticipated LNG export facilities (which the Sierra Club argued should be evaluated as cumulative effects).

The Sierra Club noted that, based on the methodology used in the NETL report, the production, processing, and pipeline

With regards to that argument, the court concluded that it must defer to DOE's determination that adding other variables to the analysis would be too difficult and the results of the analysis would be too speculative to help inform decision-making.

This is not the first time the D.C. Circuit has ruled on the scope of the greenhouse gas emissions impact review for LNG exports. As discussed in a previous blog entry,<sup>5</sup> last year the court held that FERC was not required to evaluate the life-cycle greenhouse gas emissions in its review of LNG export terminals because it is DOE that has the ultimate authority to approve or disapprove the LNG exports.

The problem now is that this decision, together with the FERC decisions, means that no agency is required to look at the cumulative effects of LNG terminal development on greenhouse gas emissions when making decisions about whether to approve additional terminals and exports.

This is also a problem for other forms of fossil fuel infrastructure — now that the programmatic EIS for the federal coal leasing program has been terminated, there are no efforts underway to systematically evaluate the effect of federal fossil fuel infrastructure approvals on the climate or other environmental resources.

It is extremely difficult for civil society to compel agencies to conduct programmatic reviews of this sort. (This is another issue we discuss in our paper on reviewing upstream and downstream emissions.)

And while civil society can do the calculations on its own, as the Montana Environmental Information Center and the Sierra Club did in the cases above, there is no guarantee that this information will be considered by the action agency when making its significance determination, or its determination on what the best decision would be on a proposal. **WJ**

## NOTES

- <sup>1</sup> <http://bit.ly/2v2p7pg>
- <sup>2</sup> <http://bit.ly/2vHcaU6>
- <sup>3</sup> <http://bit.ly/2hromVO>
- <sup>4</sup> <http://bit.ly/2xS1Ngz>
- <sup>5</sup> <http://bit.ly/2aed5i8>

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## The *Sierra Club* decision means that no agency is required to look at the cumulative effects of LNG terminal development on greenhouse gas emissions when making decisions about whether to approve additional terminals and exports.

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The NETL report assessed the lifecycle emissions (production, transportation, consumption) of exported natural gas and compared these with emissions from electricity generated from coal or other sources of gas, but did not consider alternative energy sources such as renewables.

Notably, neither the EIA reports nor the NETL report considered the specific effects of the export authorization under review on greenhouse gas emissions — rather, the analysis was generalized and applicable to all LNG exports (e.g., lifecycle greenhouse gas emissions from LNG exports were estimated per MWh of end use generation, but there was no estimate of lifecycle emissions for the volume of the exports under review).

DOE did not use this information to calculate total greenhouse gas emissions associated with the exports authorized for the Freeport LNG Terminal.

During the case, DOE argued that it complied with NEPA by adopting the FERC EIS and that the supplemental environmental reports noted above were part of its effort to go “above and beyond what NEPA requires.” The court ignored this argument and treated the supplemental documents as part of the overall NEPA review.

transportation of 100 bcf/y of gas — the amount the EIA determined would likely be induced by the 146 bcf/y of exports authorized in this action — would emit 1.76 million tons per year of CO<sub>2</sub>e (this estimate does not include combustion emissions).

In addition, the Sierra Club argued that the greenhouse gas emissions analysis was inadequate because the study commissioned by DOE did not consider the possibility that U.S. LNG exports would compete with renewable energy sources which are already quite prevalent in some of the regions where the LNG exports would be consumed (Europe and Asia).

The court agreed that “DOE's generalized impact assessment is not tailored to any specific level of exports” but nonetheless upheld the analysis. It did not articulate a reason why DOE should not be required to estimate the greenhouse gas emissions for the specific exports under review.

The court did, however, briefly respond to the Sierra Club's argument that the NETL analysis was inadequate due to failure to consider the possibility that LNG exports would compete with renewables.

# Preparing clients for the next discovery request before it arrives

By Joel Wuesthoff, Esq.  
Robert Half Legal

As data proliferates across multiple networks and the use of digital records grows, client records management has become an increasingly pressing matter for law firms.

It isn't just that litigation is becoming more frequent or that companies are generating greater volumes of data. Rather, evolving information technology platforms — such as cloud-based repositories and mobile access devices — create many more places for discoverable information to hide beyond the line of sight of a firm's records manager.

As a lawyer from an outside firm advising a client company's legal, records and IT staff, you may be an exception. But some law firms tell us they are slow to assess both their and their clients' e-discovery and information governance programs and practices.

A reactive approach to these matters has generated new risks for firms and clients — and not all of them are obvious.

## CHALLENGES

Implementing defensible preservation practices covering all relevant custodians, matters and data repositories should be a concern for both law firms and their clients. Gaps might be exposed if, for example, the corporation were hauled into a deposition under Federal Rule of Civil Procedure 30(b)(6).

In this type of deposition, the company, or its designee, must explain — under oath — the process and methodologies it used, as well as the preservation method the company is using for the case at hand, in the event of a litigation hold.

These depositions are not uncommon; they were created under the Federal Rules of Civil Procedure to protect both parties from discovery abuses.

Outside counsel must prepare clients to describe and defend the way that retention policies, litigation hold notifications, and the execution and enforcement of those holds within the enterprise all fit together. In many client organizations, they fit together uncomfortably — if at all. Counsel should recognize that this is a “nondelegable” duty.

Law firms face several challenges in advising their clients when it comes to e-discovery records management, including the following:

multiple drafts of the same document, email threads replicating earlier messages, trivial personal communications and the like.

### **Cloud migration, BYOD (bring your own device), and hard copy disposition or centralization**

Employees increasingly access corporate data via personal tools, including mobile devices, that are not under the control of their IT department.

This means more individuals have custody of corporate data and even records — and not always by the design of the IT department. In other words, IT departments may be unaware of the location of their users' data.

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Evolving IT platforms — such as cloud-based repositories and mobile access devices — create many more places for discoverable information to hide beyond the line of sight of a firm's records manager.

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### **Data volume/growth**

The consulting firm IDC projects that the world will have produced about 44 zettabytes of digital data by 2020.<sup>1</sup> This amount is more than 24 times the volume from 2011. Each enterprise mirrors this trend in microcosm.

Most of that volume is in the form of unstructured data: documents, video and audio files, etc. Still more problematic from a discovery perspective is that a large percentage of this content is obsolete, redundant or irrelevant. These include

### **Changing standards**

Records management and discovery fall under the Federal Rules of Civil Procedure and applicable state and federal retention requirements, which are intended to make civil litigation more efficient by compressing early case management deadlines, streamlining discovery planning, narrowing discovery and revamping the rules regarding the preservation of electronically stored information.

The rules don't change often, but amendments — such as those published in December 2015 — can be significant. One such amendment introduces the suggestion that the parties to a lawsuit must collaborate to develop an explicit plan to preserve electronically stored information.<sup>2</sup>

This is not a recent development. Errors in document storage management and e-discovery can and do lead to sanctions, as demonstrated in *Morgan Stanley & Co. v. Coleman (Parent) Holdings Inc.*, 955 So. 2d 1124 (Fla. 4th Dist. Ct. App. 2007).



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The investment bank Morgan Stanley was found to have mishandled the release of responsive documents when it failed to account for emails stored haphazardly on backup tapes kept in various locations. The court deemed Morgan Stanley's failure to produce the emails to be misrepresentations by the bank's inside counsel.

Morgan Stanley's information governance policies should have included provisions addressing the effective cataloguing of old tapes.

A decade later, issues like this have been exacerbated by the prevalence of mobile devices and employees' widespread use of social media — both of which can put corporate data beyond the control of records managers.

## CURRENT REQUIREMENTS

To get ahead of the game, there are certain issues a law firm should advise clients to consider before a discovery request is ever made. How do enterprise policies align between records management and the legal department? In the event of a litigation hold, are these processes talking to each other?

Very few organizations have the right resources, tools and people in place to maintain this alignment. A large corporation is likely to have its own staff in charge of records management and information governance.

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Outside counsel has a duty to inform clients quickly and comprehensively when litigation is likely, and to oversee how clients prepare.

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But for most organizations, these are relatively esoteric disciplines. Most will need to engage outside specialists for whom records management and information governance are core competencies. Even if full-time staffers maintain records regularly, it can still make sense to bring in specialized expertise.

## 10 PROVEN STRATEGIES

It is useful to have the advice of legal and technical specialists because records management and discovery are supported by complex business processes and organizations can benefit from having someone look at these processes holistically.

These experts may be third parties or, in a large enterprise, the company's own audit department.

Regardless of where the specialists come from, here are 10 principles that can help any firm prepare its clients for the burden of discovery:

### **1. Establish complete enterprise integration between record retention and management, litigation hold and related policies.**

The first element of aligning a client's records with e-discovery is ensuring that its policies are married up: that they have a retention schedule and retention policy, and that those policies can be suspended when there is a litigation hold.

Once records management and IT are notified of a hold, the normal policy should no longer be operative with respect to the scope of that complaint.

### **2. Ensure timeliness in issuing, enforcing and releasing hold notifications for custodial and noncustodial data sources.**

At the front end, the timing of a litigation hold issuance is critical. If the litigation team waits too long, responsive documents can be deleted, potentially generating a spoliation charge.

But most litigation is settled or dismissed before it reaches trial. Often, that information doesn't trickle down to the records

management or IT people, so the litigation holds are not released. That lapse can impact the productivity of the entire organization.

### **3. Closely monitor changes in hold scope, across matters and custodians.**

Courts have had an interest not only in limiting the costs of discovery, but also in preventing those costs from disproportionately burdening one of the parties.

Standards of diligence can keep a large defendant from intimidating a small plaintiff with an enormous dump of millions of documents — a large percentage of which have dubious relevance to the matter and

for which an adequate search to discover relevant material would be cost prohibitive for the plaintiff. *Boeynaems v. LA Fitness Int'l LLC*, 285 F.R.D. 331 (E.D. Pa. 2012).

Lawyers may negotiate with the opposing party or a regulator on the scope of discovery. As a result, the scope of the retention may expand or contract. If IT or records management is not in the loop, they will proceed as if the scope of retention under the hold were broader or narrower than it actually is — increasing either the risk of missing responsive documents or the cost of discovery.

### **4. Manage custodians across individual and corporate data shares.**

With a steady stream of resignations, dismissals, retirements and new hires, companies — especially large ones — see a revolving door of people who have custody of records and documents.

In the event of litigation, a third party may be brought in to perform a collection. If some of the people needed to produce those documents are no longer around, the cost of gathering them will increase. At a minimum, the consultants will need to arrange a second or third visit.

This difficulty is exacerbated in organizations with a "bring your own device" policy. Managing this problem effectively requires at least a checklist to ensure that everyone who might have responsive documents is accounted for.

### **5. Align litigation hold policies and IT protocols, including system integration and reporting.**

Third-party consultants often are asked to audit the way in which a legal policy on litigation holds connects with information governance and IT policies. The auditor needs to see that the IT people have a contingency plan in place to suspend their normal policies during the hold.

### **6. Investigate system and archival mechanisms for preserving and disposing of electronically stored information.**

Companies typically have automated systems for deleting records and documents that have outlived their retention schedules. However, these systems need to have failsafe mechanisms to effectuate litigation holds by suspending automated deletion.

This may be a general hold or a system that halts deletions of documents for particular custodians or topical areas.

### **7. Understand and invest in search and retrieval tools and methodology (precision and recall of structured and unstructured data).**

Some in the legal world have long assumed that search is the gold standard that drives discovery. It is assumed that if you have the right search terms, you will find the documents you are required to produce for your client.

However, the reality is that search terms may be inadequate to produce all of the responsive documents. Search terms may be effective in retrieving only 20 to 25 percent of responsive documents, and lawyers are none the wiser.

There are generally accepted methods, driven by machine learning or technology assisted review, that go well beyond traditional search protocols. These tools are significantly broader and more specific than key word search alone; they also may be useful in identifying documents that can be reasonably withheld from discovery — or what metadata can be redacted — because the documents are privileged.

Thus, the method of retrieval, which is only partially search driven, is critically important and subject to court scrutiny. There is no bright line between effective and ineffective retrieval. The federal discovery rules and state corollaries do not prescribe any specific methods or tools.

You should advise your clients that the courts will evaluate whether they involved someone who was skilled in search and retrieval practices. If conducting a key word search is their — and your — primary method, you and your client will be expected to have tested the results from your search terms with appropriate diligence in quality assurance, and to have documented your methodology.

In recent cases, courts have looked with favor on the use of technology assisted review. In general, courts will evaluate the specific facts of the case in determining whether the retention or discovery methods were appropriate.

### **8. Use standard templates, notification procedures and reporting capabilities across all matters.**

Courts are likely to view consistency in application of tools, policies and methods as indicators of good faith.

### **9. Build and nurture a culture of respect for record retention.**

The legal world is dynamic, and records management best practices and legal rules around records procedures are likely to change periodically. Organizations must not only train staff annually but also provide regular refreshers on these practices and reinforce the importance of maintaining them.

Many employees, however, are likely to disregard the steps required for effective record retention because they do not see any personal benefits.

Don't let your client develop a culture of seeing records management as being esoteric, inconsistent and fussy. Build a compelling case for information governance, with buy-in and best practices starting at the top. Executives should be role models and cheerleaders for record retention.

### **10. Be selective when bringing in outside expertise.**

There are special risks associated with using e-discovery vendors. Firms that host applications or databases for corporate clients have a contractual obligation to protect their customers' data from exposure or theft.

The hosted content could contain responsive information covered by a litigation hold.

Thus, when researching third-party vendors, clearly define the scope of their obligations regarding retention, access and production.

## **BENEFITS OF A RISK-BASED, PROACTIVE APPROACH**

When advising a client on its preparation for discovery, it is appropriate to consider its risk profile — those factors specifically relevant for that firm.

But that is not enough. Law firms also need to shore up competency and records management, and get the legal team, IT department and records managers on the same page. Doing so will yield several benefits in the event of litigation:

- Time and money saved — reduced costs associated with document review, records storage, etc.
- Improved efficiencies — effective management of documents across the enterprise and faster record retrieval.
- More defensible processes and reduced risk of noncompliance.

## **CONCLUSION**

Outside counsel has a duty to inform clients quickly and comprehensively when litigation is likely, and to oversee how clients prepare — including their preparation for discovery. The law firm cannot simply delegate these processes to their clients. The above 10 strategies can help lawyers ensure that their clients are fully compliant in terms of litigation and records. **WJ**

## **NOTES**

<sup>1</sup> *The Digital Universe of Opportunities: Rich Data and the Increasing Value of the Internet of Things*, IDC, <https://www.emc.com/leadership/digital-universe/2014iview/executive-summary.htm> (last visited Sept. 3, 2017).

<sup>2</sup> Joseph F. Marinelli, *New Amendments to the Federal Rules of Civil Procedure: What's the Big Idea?*, AM. BAR ASS'N: BUSINESS LAW TODAY, [https://www.americanbar.org/publications/blt/2016/02/07\\_marinelli.html](https://www.americanbar.org/publications/blt/2016/02/07_marinelli.html) (last visited Sept. 3, 2017).

## 6th Circuit sends Flint water crisis class action back to state court

By Michael Scott Leonard

A class action blaming Michigan and the City of Flint for the town's ongoing water crisis belongs in state rather than federal court, the 6th U.S. Circuit Court of Appeals has decided.

***Mays et al. v. City of Flint et al., No. 16-2484, 2017 WL 3976703 (6th Cir. Sept. 11, 2017).***

In a 2-1 ruling Sept. 11, a 6th Circuit panel said the case should proceed in Michigan's Genessee County Circuit Court. That is where a group of Flint residents originally filed the suit accusing a dozen city and state officials of switching to a contaminated water source in 2014, the Flint River, and failing to switch back to clean Detroit water despite multiple opportunities.

Four Michigan Department of Environmental Quality employees had removed the case to the U.S. District Court for Eastern District of Michigan, asserting "federal officer" jurisdiction, which generally applies when a city or state official "acting under" a federal agency plans to raise federal defenses.

But U.S. District Judge John C. O'Meara declined jurisdiction last October, remanding the case to state court. *Mays v. City of Flint*, No. 16-cv-11519, order issued (E.D. Mich. Oct. 6, 2016).

The MDEQ officials appealed, and the 6th Circuit affirmed, finding that the state agency had not "acted under" the U.S. Environmental Protection Agency within the meaning of the federal officer removal statute, 28 U.S.C.A. § 1442(a)(1), when testing Flint's drinking water mainly for compliance with Michigan law.

Writing for the majority, U.S. Circuit Judge Ronald L. Gilman said removal requires a de facto supervisor-subordinate relationship between federal and state officials. The evidence MDEQ officials presented of EPA funding and interagency cooperation to enforce the federal Safe Drinking Water Act, 42 U.S.C.A. § 300f, was not enough to satisfy that standard, he said.

"The EPA was not involved in the key action underlying the plaintiff's complaint — approval of the decision to switch Flint's water supply," Judge Gilman wrote in an opinion joined by U.S. Circuit Judge Richard F. Suhrheinrich.

"The notice of removal does not identify any specific actions or inactions alleged in the complaint that the EPA required the MDEQ defendants to take or refrain from taking," he added, "and [the defendants] fail to identify any specific EPA officials who allegedly directed their conduct."

U.S. Circuit Judge David W. McKeague dissented, saying the majority should have given the MDEQ officials the benefit of the doubt, since defendants only have to make a "colorable" case for federal officer removal, not an ironclad one.

"The majority relies on a general rule favoring resolution of doubts against removal," Judge McKeague wrote. "But in this context, our precedents require us to resolve doubts in favor of the party or parties invoking federal jurisdiction."



REUTERS/Rebecca Cook

The ruling returns the case to state court, where the plaintiffs can move forward with claims that city and state officials not only caused the crisis but also ignored every opportunity to mitigate it.

According to the plaintiffs, state and local government officials knew before switching to the Flint River that the water would be unsafe to drink unless they treated it first with an anti-corrosive agent to prevent metals from leaching in.

A report commissioned by the city had reached that conclusion in 2011, and the MDEQ allegedly received a copy in 2013, the year before changing Flint's water supply.

But the government, led by Michigan's treasurer and Flint's state-appointed emergency manager, approved the switch anyway to save money, the plaintiffs say.

Moreover, officials began almost immediately after the switch to receive complaints that the water was cloudy, discolored, smelly and foul-tasting, the suit claims, as well as reports of serious health symptoms including hair loss, rashes, vomiting and high blood lead levels.

That was in mid-2014, but nobody in state or city government notified the public about the brewing health crisis for more than a year, until a report about the problem leaked to the press in August 2015, the plaintiffs claim.

The case also includes accusations that MDEQ and city officials repeatedly refused to take Detroit up on its offer in 2015 to resume supplying Flint with clean water, as it previously had.

The suit for gross negligence, fraud, assault and battery, and intentional infliction of emotional distress seeks a series of injunctions and declaratory judgments that would force officials to resolve the water crisis safely. **WJ**

**Related Filings:**

Opinion: 2017 WL 3976703

**See Document Section B (P. 29) for the opinion.**

## After Hurricane Harvey, Houston homeowners blame flooding on dam releases

By Michael Scott Leonard

Two groups of Houston-area homeowners are blaming severe flood damage to their properties during Hurricane Harvey and its aftermath on a government decision to release water from three large reservoirs to try to stop them from overflowing during the storm's record rainfall.

***Aldred et al. v. Harris County Flood Control District et al., No. 2017-57831, complaint filed (Tex. Dist. Ct., Harris Cty. Sept. 5, 2017).***

***Ross et al. v. San Jacinto River Authority et al., No. 2017-58385, complaint filed (Tex. Dist. Ct., Harris Cty. Sept. 6, 2017).***

The proposed class actions, filed Sept. 5 and 6, say the Harris County Flood Control District, the San Jacinto River Authority and the City of Houston intentionally flooded properties near the reservoirs in the hope of preventing them from failing during Harvey, a powerful Category 4 storm. The Houston-based Potts Law Firm filed both complaints in Texas' Harris County District Court.

"While much of Harris County was flooding, plaintiffs ... had property that was not," one of the complaints says. "The decision to release water ... flood[ed] not only the homes and businesses around the reservoirs but many homes and businesses downstream."

The local governments made that choice without obtaining consent or compensating

property owners fairly, in violation of the takings clause of the Texas Constitution, the suits claim.

"Neither Harris County Flood Control District nor the City of Houston knew how many properties would be affected ... but they

than 50 inches of rain — a record for the continental United States — on the Houston area as it churned in place for several days. Parts of Houston remain underwater weeks after the direct hit, the city's worst weather disaster in decades.

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"While much of Harris County was flooding, plaintiffs ... had property that was not," one of the suits says. "The decision to release water ... flood[ed] not only the homes and businesses around the reservoirs but many homes and businesses downstream."

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intentionally released the water knowing additional homes and business would be flooded," one of the suits says. "No plaintiffs have permitted or consented to the flooding of their properties, nor have they been compensated."

Harvey, boasting wind gusts up to 130 mph, made landfall Aug. 25, dumping more

The three reservoirs mentioned in the complaints — the Addicks Reservoir, the Barker Reservoir and Lake Conroe — all eventually overflowed during the heavy rains anyway, despite the controlled-release efforts.

According to the complaint against the Harris County Flood Control District and the City of Houston, years of poor planning are partly responsible for the lack of readiness at the Addicks and Barker reservoirs.

The government defendants have known for years that those two reservoirs likely could not withstand a major storm, thanks to a report by the Army Corps of Engineers rating them "extremely high-risk," that suit says.

They "have failed to adequately prepare each reservoir for the possibility of flooding and have permitted unmitigated development around [them] such that they knew homes and businesses would flood in a heavy-water event," the complaint says.

The other suit, involving Lake Conroe, does not include parallel allegations of unpreparedness, though it is otherwise nearly identical.

But both suits say the release of floodwaters from all three reservoirs left thousands of



REUTERS/Adrees Latif

Houston's Barker Reservoir, shown here, is one of three large reservoirs that had its water released during Hurricane Harvey.

properties submerged just when business and homeowners thought Harvey had spared them. Each seeks class-action status under Texas Rule of Civil Procedure 42.

Neither complaint claims the release of reservoir water was itself illegal. Instead, the plaintiffs seek fair compensation under the takings clause of the Texas Constitution

and nuisance damages, which are generally available to the owners of property harmed by a neighbor's non-negligent activity. **WJ**

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## CONSTRUCTION

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# Green group's new suit to stop Maryland train line stalled, for now

By **Conor O'Brien**

A federal judge has postponed ruling on a conservation group's request to halt construction of a planned light-rail system in the Washington, D.C., suburbs due to "complicated jurisdictional questions" presented by pending appeals in a related case.

***Friends of the Capital Crescent Trail et al. v. Federal Transit Administration et al., No. 17-cv-1811, 2017 WL 3994881 (D.D.C. Sept. 8, 2017).***

U.S. District Judge Richard J. Leon of the District of Columbia said Sept. 8 he would defer ruling on the Friends of the Capital Crescent Trail's request for a temporary restraining order until after a Sept. 19 hearing on the group's motion for a preliminary injunction.

The judge questioned whether he has jurisdiction to decide the group's newly filed lawsuit challenging construction of the Purple Line in Montgomery and Prince George's counties while appeals from his previous rulings in a related case are pending in the District of Columbia U.S. Circuit Court of Appeals.

Friends of the Crescent Trail and two Maryland residents filed the complaint Sept. 5, saying the National Environmental Policy Act, 42 U.S.C.A. § 4321, requires the Federal Transit Administration and other agencies to consider newly discovered information about the project's possible environmental impacts.

The agencies have not considered, for example, hazardous substances that may be found at the site, which includes an abandoned rail line, the plaintiffs say.

The project also calls for a "massive" appropriation of water that may starve trees

and threaten endangered species in the headwaters of a nearby stream, the Caquelon Run, according to the complaint.

### PLAINTIFFS' ONGOING CHALLENGE

The new lawsuit is the latest chapter in the plaintiffs' three-year battle to stop the light-rail line.

In August 2014 they filed a complaint in the District Court alleging the FTA and other agencies approved the line in violation of federal laws including NEPA; the Endangered Species Act, 16 U.S.C.A. § 1533; the Migratory Bird Treaty Act, 16 U.S.C.A. § 703; and the Federal Transit Act, 49 U.S.C.A. § 5309.

In August 2016 Judge Leon granted the plaintiffs a partial summary judgment on their NEPA claim, finding that the FTA based its approval of the project on an inadequate environmental impact statement. *Friends of the Capital Crescent Trail v. Fed. Transit Admin.*, 200 F. Supp. 3d 248 (D.D.C. 2016).

He vacated the agency's record of decision and enjoined construction of the Purple Line until the FTA prepares a supplemental EIS that considers ridership and safety on the nearby Metrorail, which services the district.

The defendants have appealed that decision, and a three-judge D.C. Circuit panel July 19 stayed Judge Leon's order vacating the ROD while the appeal is pending. *Fitzgerald v. Fed. Transit Admin.*, No. 17-5132, order issued (D.C. Cir. July 19, 2017).

One month before the appeals panel issued the stay, Judge Leon granted the defendants summary judgment on the plaintiffs' remaining claims, including a claim that the FTA had not made the findings necessary for Maryland to receive federal funding for the project. *Friends of the Capital Crescent Trail v. Fed. Transit Admin.*, No. 14-cv-1471, 2017 WL 2538574 (D.D.C. June 9, 2017).

Judge Leon dismissed that claim as not ripe for review because the Transportation Department had not yet executed the funding agreement.

The plaintiffs renew the claim in their new complaint, saying it is now ripe because Transportation Secretary Elaine Chao announced Aug. 28 the funding agreement has been executed and the project is about to break ground.

The plaintiffs have also appealed Judge Leon's June 9 decision. **WJ**

#### Attorneys:

*Plaintiffs:* David W. Brown, Knopf & Brown, Rockville, MD

#### Related Filings:

Sept. 8 order: 2017 WL 3994881  
Sept. 5 complaint: 2017 WL 3974180  
June 9 order: 2017 WL 2538574

**See Document Section C (P. 42) for the Sept. 8 order.**

# Hawaii high court tells state agency to analyze impacts of fish collecting

By Conor O'Brien

A Hawaii agency must analyze the environmental impacts of issuing permits to fish collectors for commercial aquariums, the state Supreme Court has ruled, handing a significant victory to conservationists concerned about the islands' reef ecosystems.

***Umberger et al. v. Department of Land and Natural Resources et al., No. SCWC-13-2125, 2017 WL 3887456 (Haw. Sept. 6, 2017).***

The state high court overturned the Hawaii Intermediate Court of Appeals decision affirming a lower court ruling that aquarium permits issued by the state's Department of Land and Natural Resources fall outside the scope of the Hawaii Environmental Policy Act.

In an opinion by Justice Richard W. Pollack, the Hawaii Supreme Court held that commercial aquarium collection triggers environmental review under HEPA, Haw. Rev. Stat. Ann. § 343-1, but remanded the case to the circuit court to determine whether under the law recreational aquarium collection may be exempt.

Whereas the DLNR limits collectors with recreational permits to extract up to five fish per day, the agency has not established any limits for commercial permit holders, the opinion said.

Environmentalists had filed suit in Hawaii Circuit Court, seeking declaratory and injunctive relief to stop the collection of marine life under existing permits and the approval of additional permits until the DLNR complies with HEPA.

The plaintiffs, led by the Conservation Council for Hawaii, the Humane Society of the U.S. and the Center for Biological Diversity, argued that permitting the collection of aquatic life from Hawaii's waters is an agency "action" constituting the use of state land, which triggers HEPA.

The DLNR responded that because applications are submitted online and automatically approved, issuing the permits does not constitute an agency action and therefore does not trigger HEPA.

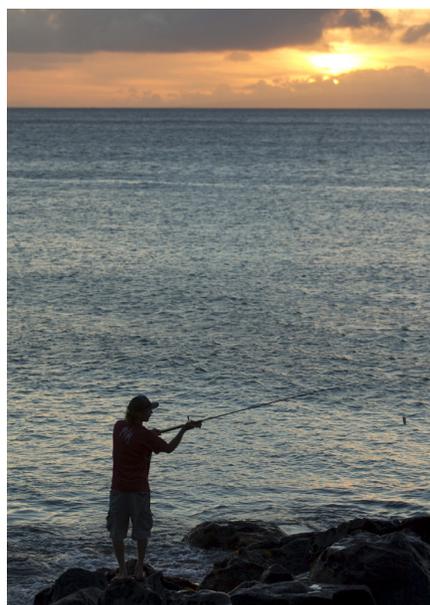
## APPELLATE PROCEEDINGS

The three-judge appellate court panel rejected the agency's argument, but concluded that the permits issued do not qualify as HEPA action on other grounds. *Umberger v. Dep't of Land & Nat. Res.*, 382 P.3d 320 (2016).

The statute governing aquarium fish permits, Haw. Rev. Stat. Ann. § 188-31, gives the agency discretion to provide safeguards to prevent abuse in the industry and to adopt rules for such purposes, the panel said.

However, the panel distinguished aquarium permitting from other "specifically identifiable programs or projects" that Hawaii appellate courts have found to trigger the HEPA environmental review process.

Aquarium collection includes both large scale commercial operations and a parent netting one or two fish from a stream for a child's fish tank, the panel said.



REUTERS/Marco Garcia

**Commercial aquarium collection falls within HEPA's requirements for environmental analysis, according to the Hawaii Supreme Court. Here, a man fishes in Maui.**

Applying HEPA's environmental analysis requirements to the latter set of facts would be unprecedented, according to the panel.

It also noted that the DLNR issues permits for activities similar to aquarium collection, such as bait and freshwater game fishing. There was no "logical reason why HEPA environmental review procedures should be required for aquarium fish permits, but not for ... other types of licenses," the panel said.

The panel also reasoned that there are other regulatory tools to curb the removal of large numbers of fish, including catch limits, restrictions for certain species and the DLNR's authority to attach conditions to commercial marine licenses and permits.

## AQUARIUM PERMITS TRIGGER HEPA REVIEW

The Hawaii Supreme Court disagreed with the appellate court, however, because the permitting program falls within HEPA's definition of the word "action," meaning "any program or project to be initiated by any agency or applicant," Justice Pollack's opinion said, quoting Haw. Rev. Stat. Ann. § 343-2.

Aquarium collecting is a "project" because it is a "planned undertaking" involving the "deliberate extraction of aquatic life using procedures, equipment, facilities, and techniques" authorized or required by state law, the state Supreme Court opinion said.

The practice also comports with the word's plain meaning, the high court said.

HEPA's legislative intent to apply the statute to a broad set of activities also supports this interpretation of the word "project" Justice Pollack said.

The high court was not persuaded by concerns that a parent requesting a permit to net a single fish for a child would trigger HEPA's requirements.

“The properly defined activity for the purposes of the HEPA analysis must encompass the outer limits of what the permits allow and not only the most restrictive hypothetical manner in which the permits may be used,” the opinion said.

The justices also said that other regulatory tools in place to curb fish removal have no bearing on whether aquarium collecting triggers HEPA’s environmental review process. **WJ**

**Attorneys:**

*Petitioners:* Paul H. Achitoff and Summer Kupau-Odo, Earthjustice Legal Defense Fund, Honolulu, HI

*Respondent:* William J. Wynhoff, Hawaii Attorney General, Honolulu, HI

**Related Filings:**

Opinion: 2017 WL 3887456

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## OIL AND GAS

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# Alaska opposes suit over Trump’s rollback of Arctic drilling protections

By Michael Nordskog

Ten environmental groups’ suit challenging President Donald Trump’s reversal of Obama-era executive orders limiting offshore oil and gas leases should be dismissed based on the doctrine of sovereign immunity and other reasons, the state of Alaska says.

***League of Conservation Voters et al. v. Trump et al., No. 17-cv-101, motion to dismiss filed (D. Alaska Sept. 5, 2017).***

The state, which was recently allowed to intervene as a defendant in the suit before the U.S. District Court for the District of Alaska, has adopted the arguments made in motions to dismiss previously filed by federal defendants and the American Petroleum Institute.

The environmentalists filed the suit in May, asking the court to declare that Trump’s April 28 order allowing offshore leases in the Arctic and North Atlantic oceans cannot be lawfully implemented and to enjoin administration officials from complying with the order.

The plaintiffs include the Natural Resources Defense Council, the League of Conservation Voters, the Sierra Club and Greenpeace.

The federal defendants moved to dismiss the case in June, arguing that the suit fails based on sovereign immunity, violation of separation of powers, lack of ripeness and lack of standing to sue.

After the District Court allowed API to intervene in July, the industry group filed its own motion to dismiss, saying the federal statute that governs drilling on the outer continental shelf requires such challenges to be heard in the District of Columbia U.S. Court of Appeals, among other arguments.



President Donald Trump

REUTERS/Mike Theiler

### OBAMA’S WITHDRAWAL; TRUMP’S RENEWAL OF OIL, GAS LEASING OPPORTUNITIES

President Barack Obama signed executive orders in January 2015 and December 2016 that withdrew certain offshore areas in the Arctic Ocean and Atlantic Ocean from consideration for oil and gas leasing due to threats to wildlife, the need to address climate change and other concerns.

Section 12(a) of the Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1341(a), authorizes presidents to withdraw unleased public lands of the outer continental shelf from leasing and other disposition.

The act defines the outer continental shelf as the submerged lands under U.S. jurisdiction that lie seaward of the states’ coastal waters, which generally end three miles from shore.

In April Trump announced a national policy to encourage energy exploration and production on the outer continental shelf by signing Executive Order 13795, titled “Implementing an America-First Offshore Energy Strategy.”

Section 5 of the order limits Obama’s prior orders to apply only to areas of the outer continental shelf that were designated as marine sanctuaries as of July 14, 2008.

The plaintiffs say no president before Trump has ever reversed a predecessor’s withdrawal of outer continental shelf areas, other than one with an express end date.

Trump’s order violates the property clause of Article IV, Section 3, of the U.S. Constitution as well as OCSLA, which does not authorize presidents to reopen for development areas that were previously withdrawn, the plaintiffs say.

### ALASKA ADOPTS PRIOR ARGUMENTS FOR DISMISSAL

After the District Court granted Alaska’s motion to intervene as a defendant Aug. 31, the state filed a short motion to dismiss that adopts and incorporates the other defendants’ arguments for dismissal.

Those arguments include the federal defendants' assertion, made in their June 30 motion to dismiss, that the complaint fails because Congress has not waived sovereign immunity, a common law doctrine that bars suits against the government, citing *Federal Deposit Insurance Corporation v. Meyer*, 510 U.S. 471 (1994).

The federal defendants say the statutes the plaintiffs rely on to support jurisdiction, such as 28 U.S.C.A. § 1361, which authorizes district courts to compel a government official to perform a duty, do not waive sovereign immunity.

Alaska also adopts the federal defendants' arguments that the plaintiffs lack a right of action under OCSLA or the Constitution's property clause, that their alleged claims are not ripe for review, and that they lack Article III standing because they have not alleged imminent, concrete or particularized harm.

In support of its July 28 motion, API added that the District Court lacks jurisdiction to hear the suit because the plaintiffs have not followed the four-stage administrative review process for outer continental shelf

energy leases, citing *Secretary of the Interior v. California*, 464 U.S. 312 (1984).

API also said that any judicial review must occur in the D.C. Circuit, citing 43 U.S.C.A. § 1349(c)(1).

Alaska adopts these arguments as well. [WJ](#)

**Attorneys:**

*Defendant-intervenor:* Bradley E. Meyen and Jennifer E. Douglas, Alaska Attorney General's Office, Anchorage, AK

**Related Filings:**

American Petroleum Institute motion to dismiss: 2017 WL 3222780

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## PFOA

# New York federal judge partially dismisses water contamination suit

By **Kenneth Bradley**

A federal judge has dismissed property damage claims an upstate New York man brought against two manufacturing companies alleging discharges from their facilities contaminated groundwater in his town and caused a significant decline in his home's value.

***Donavan v. Saint-Gobain Performance Plastics Corp. et al., No. 16-cv-924, 2017 WL 3887904 (N.D.N.Y. Sept. 5, 2017).***

The defendants did not have a duty of care toward the plaintiff because he did not allege damage to his own property, only to nearby properties in his town, U.S. District Judge Lawrence E. Kahn of the Northern District of New York said in a Sept. 5 order.

James Donovan filed the suit against Saint-Gobain Performance Plastics Corp. and Honeywell International Inc., alleging they discharged perfluorooctanoic acid, or PFOA, into the groundwater in Hoosick Falls Village, New York, making the drinking water nonpotable.

Honeywell and later Saint-Gobain owned a plant in the village and used PFOA in the process of making Teflon-coated materials and other products, according to the order.

Donovan alleged the chemical is associated with increased risk of several illnesses, including testicular and kidney cancer and thyroid disease.

The U.S. Environmental Protection Agency has advised against drinking water with PFOA levels of greater than 70 parts per trillion, the order said.

In 2015 the village's water system, from which 95 percent of Hoosick Falls residents received their drinking water, showed PFOA concentrations of 151 to 662 ppt, according to the order.

The EPA recommended that residents use an alternative source for drinking and cooking water.

Donovan says local banks then refused to offer mortgages for buying or refinancing homes in the town as long as they lacked potable water.

He brought claims against the defendants for negligence and gross negligence, seeking \$2.5 million in damages based on personal injury from his ingestion of PFOA and property damage.

The defendants moved to dismiss the property damage claims, saying Donovan did not allege physical damage to his property but merely economic harm, which fails to meet the criteria for property damage under state law.

Donovan's drinking water came from a private well that tested negative for PFOA, although he alleged several of his neighbors' wells tested positive, the order said.

Judge Kahn found that Donovan did not sufficiently allege any damage to his property.

"Because he has not alleged contamination of his drinking water or the presence of PFOA on his property, the court agrees with defendants that Donovan has not adequately pleaded a claim of negligence or gross negligence for property damages," the judge said.

He dismissed the property damage claims but granted Donovan 30 days to file an amended complaint that cures the deficiencies identified in the order. [WJ](#)

**Attorneys:**

*Plaintiff:* James J. Bilsborrow, Robin L. Greenwald and William A. Walsh, Weitz & Luxenberg, New York, NY; John K. Powers, Powers & Santola, Albany, NY

*Defendant (Saint-Gobain):* Douglas E. Fleming III, Lincoln D. Wilson and Mark S. Chefo, Quin, Emanuel, Urquhart & Sullivan, New York, NY

*Defendant (Honeywell):* Tal R. Machnes, Arnold & Porter Kaye Scholer, New York, NY

**Related Filings:**

Order: 2017 WL 3887904

## 9th Circuit affirms RCRA conviction for backyard hazardous waste storage

By Shari Pirone

An Idaho man has lost the appeal of his conviction and prison sentence for storing thousands of containers of hazardous and combustible paint materials at his home without a permit.

***United States v. Spatig, No. 15-30322, 2017 WL 4018398 (9th Cir. Sept. 13, 2017).***

Max Spatig's alleged diminished capacity was not relevant to his crime, a three-judge panel of the 9th U.S. Circuit Court of Appeals said.

Spatig knowingly stored more than 3,000 containers of hazardous waste, including ignitable and corrosive materials that "could explode at any moment," according to the panel's opinion.

He was convicted in the U.S. District Court for the District of Idaho for violating the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6928(d)(2)(A).

The appeals panel affirmed his conviction and 46-month prison sentence, which included an enhancement based on the magnitude of the required cleanup.

### HAZARDOUS WASTE CLEANUP

Spatig accumulated large quantities of paint-related materials during his 15 years running MS Enterprises, a cement floor resurfacing company, according to the opinion.

Spatig had a previous run-in with the law in 2005 when the Idaho Department of Environmental Quality removed hazardous materials from his property in Menan, the opinion said.

In 2010, a sheriff investigating nuisance complaints discovered Spatig was storing thousands of rusted containers marked "flammable" and "corrosive" at his residence in Rexburg, the panel said.

The containers were strewn around the backyard and packed into vehicles and trailers, the opinion said.

The U.S. Environmental Protection Agency was called in and removed roughly 3,400 containers of hazardous waste from the property at a cost of nearly \$500,000, the panel said.

Spatig was subsequently convicted on one count of knowingly storing and disposing of ignitable and corrosive hazardous waste on his Rexburg property without a permit, under RCRA Section 6928(d)(2)(A).

At trial, U.S. District Judge Wiley Y. Daniel excluded Spatig's proposed evidence of diminished capacity based on a neurocognitive disorder, saying it would only be admissible for a specific-intent crime.

### GENERAL-INTENT CRIME

On appeal, Spatig argued that violation of Section 6928(d)(2)(A) is a specific-intent crime for which diminished capacity is a relevant defense.

But the panel agreed with Judge Daniel that it is a general-intent crime for which there is no diminished-capacity defense.

To violate Section 6928(d)(2)(A), one needs only awareness of the facts constituting the offense, not specific intent of a particular purpose or objective, according to the opinion.

"Section 6928(d)(2)(A) fits within a class of general-intent crimes that protect public health, safety and welfare," the panel said.

"For these crimes, a less-exacting mental state is justified by the particularly strong

countervailing interest in protecting the public at large and the defendant's likely awareness that his actions are regulated," it added.

### ENHANCED SENTENCE WARRANTED

Spatig also argued Judge Daniel's application of a four-level sentence enhancement was improper.

Again, the panel affirmed the lower court.

An increase of four levels is appropriate under U.S. Sentencing Guidelines § 2Q1.2(b)(3) when an offense results in a cleanup requiring a "substantial expenditure," according to the opinion.

The guideline does not define "substantial expenditure," but sister circuits have found expenditures of less than \$200,000 to suffice, the panel said.

Here, the cleanup cost \$500,000 before factoring in local and regional hazmat costs, the panel said.

The panel declined to set a hard and fast rule, but said Judge Daniel did not abuse his discretion in characterizing the costs as substantial. [WJ](#)

#### Attorneys:

**Plaintiff:** Emily A. Polachek, Adam C. Cullman, Allen M. Brabender, Aaron P. Avila and John C. Cruden, U.S. Justice Department, Washington, DC; Michael J. Fica, U.S. Attorney's Office, Pocatello, ID

**Defendant:** Steven V. Richert, Federal Defender Services of Idaho, Pocatello, ID

#### Related Filings:

Opinion: 2017 WL 4018398  
Reply brief: 2016 WL 3577759  
Opening brief: 2016 WL 1104665

# Trash hauler's insurer can't get contribution for Superfund settlements

By Thomas Parry

A trash hauler's primary insurer waited too long to seek about \$1.6 million in contribution from an excess insurer toward environmental damage settlements related to three New Jersey Superfund sites, a Newark federal judge has ruled.

***Penn National Insurance Co. v. Crum & Forster Insurance Co. et al.*, No. 09-cv-4644, 2017 WL 3835667 (D.N.J. Sept. 1, 2017).**

U.S. District Judge Katharine S. Hayden of the District of New Jersey found that the six-year limitations period for Penn National Insurance Co.'s claims began in 1998, when the first of the Superfund cases settled.

However, Penn did not sue excess insurer North River Insurance Co. for contribution until 2009, Judge Hayden said.

In the remaining two settlements, Penn National did not exhaust the insured trash hauler's policy limits, the judge said, rejecting the primary insurer's argument that the hauler's activities at the three sites could be considered one occurrence.

## SITES AND SETTLEMENTS

Gus Bittner Inc. was a trash removal company that operated in southern New Jersey from the 1950s until the 1990s, hauling waste to three sites that spawned environmental damage litigation, Judge Hayden's opinion explained.

Bittner was named as a defendant in various Superfund suits and sought coverage from Penn National, the hauler's primary commercial general liability insurer from 1976 to 1986, the opinion said.

Penn National defended Bittner in each lawsuit and in May 1998 paid over \$2.5 million toward a settlement related to the Helen Kramer Landfill in Mantua, New Jersey.

North River paid out about \$350,000 in the Helen Kramer litigation.

Penn National then paid \$99,590 in 2007 to settle litigation over the Buzby Brothers Landfill in Voorhees, New Jersey, and about \$48,000 in 2011 for a settlement regarding the Burlington Environmental Management Services site in Southampton, New Jersey.

North River did not contribute to those settlements, the opinion said.

In 2009, before the BEMS litigation settled, Penn National sued North River, arguing the excess insurer had not contributed its fair share to Superfund settlements as required under the state Supreme Court's decision in *Carter-Wallace Inc. v. Admiral Insurance Co.*, 712 A.2d 1116 (N.J. 1998).

The District Court denied both parties' motions for summary judgment in 2012, finding fact issues still existed over the nature of Penn National's settlement in the Helen Kramer case and whether the primary policies had been exhausted.

After further discovery, the parties again moved for summary judgment, with Penn National seeking \$1.6 million from North River.

## SIX-YEAR WINDOW

Judge Hayden denied Penn National's motion and granted North River summary judgment.

The judge acknowledged that in paying more than \$2.5 million toward the Helen Kramer settlement, Penn National had indeed gone past the applicable \$500,000 policy limit and that perhaps North River would owe more than \$350,000 under the *Carter-Wallace* scheme.

However, N.J. Stat. Ann. § 2A:14-1 provided that Penn National had six years to seek reimbursement for the Helen Kramer settlement, she said.

That time period started when the suit settled in 1998, the same year that New Jersey adopted *Carter-Wallace* apportionment scheme, the judge explained, finding that Penn National missed its chance by not filing the reimbursement suit until 2009.

## MULTIPLE TRIGGERS

Penn National argued that the clock actually started in 2011 when the BEMS suit settled.

The insurer contended that Bittner's hauling activities at the three Superfund sites constituted a single occurrence, meaning that the accrual date was the 2011 settlement of the final Superfund suit.

The judge disagreed, finding that that Bittner's activities were at minimum three separate occurrences.

"Here, Bittner hauled to separate landfills, in separate geographical locations, at separate times over the course of nearly a decade, causing alleged environmental damage at distinct and discrete locations," Judge Hayden said.

The judge noted that Penn National filed the suit against North River two years prior to the BEMS settlement.

Furthermore, the fact that Bittner's dumping at the landfills constituted separate occurrences contradicted Penn National claims for partial reimbursement from the North River excess policy in regards to the Buzby and BEMS settlements, the judge said.

"Penn National's own *Carter-Wallace* calculations with respect to the Buzby and BEMS litigations rely on amounts paid toward the Helen Kramer litigation to establish exhaustion of Penn National's primary policies," she said.

Viewed on their own, Penn National's indemnity of the Buzby and BEMS settlements did not exhaust the applicable primary policy limits, the judge said.

Consequently, those cases could not touch the North River excess policy, she explained.

**WJ**

### Related Filings:

Opinion: 2017 WL 3835667

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## CATHODE RAY TUBES

# Ohio landlord seeks CERCLA recovery from 'sham' recycling operation

By **Conor O'Brien**

A "sham" recycling operation will cost a Columbus, Ohio, landlord more than \$14 million in cleanup costs for 64,000 tons of hazardous electronic waste the recycler dumped at the landlord's warehouses, a federal lawsuit says.

***Garrison Southfield Park LLC v. Closed Loop Refining & Recovery Inc. et al., No. 17-cv-783, complaint filed, 2017 WL 3908935 (S.D. Ohio Sept. 5, 2017).***

Garrison Southfield Park LLC says in a complaint, filed in the U.S. District Court for the Southern District of Ohio, that it leased two properties to Closed Loop Refining & Recovery Inc., a purported recycler of video display components known as cathode ray tubes, or CRTs.

The landlord later discovered that Closed Loop never had the capacity to recycle the components, which contain leaded glass and are regulated as hazardous waste under the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6901, the complaint says.

Closed Loop and several of its key employees are liable to Garrison as operators of the facilities under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9601, according to the complaint.

Five entities, including Federal Prison Industries Inc., Kuusakoski Inc. and Vintage Tech LLC, that arranged to transport "tens of millions of pounds of CRTs and other e-waste" to Closed Loop are also liable under CERCLA for the cleanup costs, the lawsuit says.

Garrison has already won a \$14 million judgment against Closed Loop in the Franklin County Court of Common Pleas, but says it has been unable to recover on it.

The state court judge found "Closed Loop was not engaged in legitimate CRT recycling," and that it had no "feasible means" of recycling the waste, which the company merely accumulated and then abandoned. *Garrison Southfield Park LLC v. Closed Loop Ref. & Recovery Inc., No. 16-cv-2317, final judgment entered* (Ohio Ct. Com. Pl., Franklin Cty. Aug. 7, 2017).

## RECYCLING 'SHAM'

Closed Loop leased a Columbus warehouse from Garrison's predecessor in April 2012 to conduct its recycling operations, according to the complaint.

Garrison alleges Closed Loop undercut the national e-waste recycling market by charging artificially low prices — as low as \$0.075 per pound as compared to the prevailing U.S. market rate of about \$0.11 per pound — to accept as many CRT-containing electrical devices as possible.

The company then "cherry-picked" the devices' valuable commodities, including aluminum and steel, and sold them for profit, according to the lawsuit.

In March 2014 Closed Loop licensed from Garrison a second property that it used to hide accumulated waste from the Ohio Environmental Protection Agency, which had begun investigating the recycler, according to the complaint.

After notifying the Ohio EPA on May 6, 2016, that it would cease operations, Closed Loop abandoned the properties, leaving nearly 10 acres of hazardous e-waste behind, the complaint says.

Garrison says the company was able to continue its scheme for nearly four years by misrepresenting that its recycling operations qualified for an exclusion from RCRA's hazardous waste regulations, according to the lawsuit.

In addition to about 64,000 tons of e-waste Closed Loop abandoned in Ohio, it left about 25,000 tons at an Arizona facility, the plaintiff says. [WJ](#)

### Attorneys:

**Plaintiff:** Jack A. Van Kley, Van Kley & Walker, Columbus, OH; Karl P. Heisler, Katten Muchin Rosenman LLP, Washington, DC; Matthew Parrott, Fried, Frank, Harris, Shriver & Jacobson, New York, NY

### Related Filings:

Complaint: 2017 WL 3908935

## Supreme Court

### CONTINUED FROM PAGE 1

The Supreme Court said in January it would hear NAM's petition for review of the 6th Circuit's interlocutory ruling that it could hear the 22 separate suits, which had been corralled in the Circuit Court as multidistrict litigation in July 2015.

Thirty states, other industry groups and environmental groups that are parties to those suits have filed briefs supporting NAM's call for reversal of the 6th Circuit ruling.

The case is set for argument in the Supreme Court on Oct. 11.

### 'WATERS OF THE UNITED STATES'

The EPA and the Army Corps of Engineers published the rule in June 2015, seeking to clarify the scope of waters protected under the Clean Water Act, 33 U.S.C.A. § 1251, and to provide consistency with Supreme Court precedent and scientific study. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054-01 (June 29, 2015).

The parties challenging the rule in the 6th Circuit MDL include business organizations, industry groups, municipalities and states arguing it is too broad, as well as environmental groups contending it improperly restricts federal jurisdiction under the Clean Water Act.

Some of them filed motions to dismiss the MDL, saying the district courts have exclusive jurisdiction over the consolidated disputes under 28 U.S.C.A. § 1331 and the Administrative Procedure Act.

The 6th Circuit denied the motions in a February 2016 split decision in which each member of the three-judge panel issued a separate opinion. *In re U.S. Dep't of Def.*, 817 F.3d 261 (6th Cir. 2016).

Two of the judges said the WOTUS challenges were subject to the Clean Water Act, 33 U.S.C.A. § 1369(b)(1)(F), which authorizes circuit court jurisdiction over actions by the EPA administrator "in issuing or denying any permit under Section 1342 of this title."

The challenges involve an EPA regulation that governs permitting under the National

Pollutant Discharge Elimination System, which is codified at 33 U.S.C.A. § 1342, the majority concluded.

The 6th Circuit has held briefing in abeyance pending the Supreme Court's review of the ruling.

### PRIOR BRIEFING

In its April 27 petitioner's brief, NAM says the 6th Circuit misread the CWA.

Section 1369(b)(1) calls for exclusive, original judicial review by federal circuit courts of seven types of actions by the EPA administrator.

Litigants whose claims fall outside these categories can invoke the jurisdiction of the district court under the Administrative Procedure Act, 5 U.S.C.A. § 701, and 28 U.S.C.A. § 1331, NAM says.

The EPA and the Army Corps filed their respondents' brief July 28, urging the Supreme Court to affirm the ruling and let the challenges proceed in the 6th Circuit.

They say the 6th Circuit has jurisdiction under Section 1369(b)(1)(E), which applies to challenges of actions that approve or promulgate "any effluent limitation or other limitation" under specified CWA provisions.

The federal respondents also raise efficiency concerns, citing *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), to argue that Section 1369(b)(1) should be construed to avoid "irrational bifurcation" of closely related matters.

The Natural Resources Defense Council and National Wildlife Federation also filed a joint respondents' brief July 28 supporting affirmance.

### REPLY BRIEFS SEEK REVERSAL

NAM says in its Sept. 11 reply brief that the WOTUS rule does not create effluent or other limitations for purposes of Section 1369(b)(1)(E) and does not involve EPA permitting decisions as provided under subsection (F).

The federal respondents' efficiency arguments misinterpret *Crown Simpson*, NAM says, noting that the agencies' position is opposed by 30 states charged with administering much of the CWA.

"[The] EPA may think it benefits by narrowing as much as possible the litigation it must defend; hardly anyone else sees benefits sufficient to twist Congress' scheme of review," the group says.

The states filed their own reply brief Sept. 8, saying the federal agencies wrongly suggest a presumption favoring circuit court review of cases involving statutes that divide jurisdiction between circuit and district courts.

This approach raises due-process concerns best addressed by allowing district courts to hear such matters, the states say.

Waterkeeper Alliance Inc., the Sierra Club and nine other environmental groups maintain in their reply brief that the WOTUS rule does not fall within Section 1369(b)(1)(E)'s "other limitation" category.

"It merely interprets the congressional definition of those waters to which existing limits apply," the green groups say.

The Utility Water Act Group, which represents water industry interests, says in a separate reply brief that the federal respondents have cited no statutory language supporting their "expansive interpretation" of Section 1369.

"One would expect the government to point to a plain statement from Congress that it intended so narrow an opportunity for review for a rule as vast as 'the waters of the United States' rule," the group says. [WJ](#)

#### Attorneys:

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#### Related Filings:

Petitioner's reply brief: 2017 WL 4022774  
Waterkeeper Alliance's reply brief: 2017 WL 4005673  
Utility Water Act Group's reply brief: 2017 WL 4005672  
States' reply brief: 2017 WL 4022773  
Federal respondents' brief: 2017 WL 3412010  
NRDC respondents' brief: 2017 WL 3277312  
Petitioner's opening brief: 2017 WL 1629229

**See Document Section A (P. 19) for the petitioner's reply brief.**

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