Environmental and Administrative Case Law Update
(Cases Decided in January – May 2017)

I. United States Supreme Court

- On March 21, 2017, the United States Supreme Court decided the case of *National Labor Relations Board v. SW General, Inc*. This case concerns the operation and application of the Federal Vacancies Reform Act of 1998 (FVRA). The NLRB's Regional Director, exercising authority on behalf of Lafe Solomon, the agency's acting General Counsel (who served in that capacity for many months without Senate confirmation), filed a complaint against SW General alleging that the ambulance company had committed unfair labor practices. An NLRB Administrative Law Judge (ALJ) agreed, and SW General filed an appeal with the US Court of Appeals for the DC Circuit arguing that the complaint was invalid because the NLRB's General Counsel could not legally perform the duties of the General Counsel under the restrictions of the FVRA. The DC Circuit agreed, and vacated the Board's orders. The Board then appealed to the Supreme Court, which has now ruled, in a decision written by Chief Justice Roberts, that Mr. Solomon's "continued service" violated the statute thereby affirming the decision of the court of appeals. The Court's decision is certain to focus the attention of both the Executive Department and the Senate on the necessity of having these important positions filled expeditiously and in compliance with the law to ensure that the machinery of government functions properly.

- In the case of *Koresh v. Securities and Exchange Commission*, decided on June 5, 2017, a unanimous Supreme Court held that 28 USC § 2462, which applies to "any action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise", also applies to SEC disgorgement actions. A few years ago, in *Gabelli v. SEC*, the Court held that Section 2462 applies when the SEC seeks statutory monetary penalties. Both decisions arguably may have application to other federal enforcement actions where the governing statute does not contain a specific statute of limitations.

  According to the Court, in 2009, the SEC brought an enforcement action against Charles Koresh, whose investment-adviser firms provided investment advice to business development companies, alleging that he violated several securities laws for which "disgorgement" was an appropriate remedy. The jury determined that Koresh misappropriated $34.9 million, and the US Court of Appeals for the Tenth Circuit agreed that a disgorgement judgment in the amount of $34.9 million was appropriate (as well as a civil penalty and prejudgment interest). Koresh argued that the disgorgement action was subject to Section 2462's five year statute of limitations, and the Court agreed, reversing the Court of Appeals. The Court held that: (a) the SEC disgorgement action was a "penalty"; (b) triggering Section 2462; and (c) insofar as the action was commenced in October 2009, the five year statute of limitations applied to $29.9 million of the overall $34.9 disgorgement judgment that took place outside the statute's limitations period.

- On May 30, 2017, the U.S. Supreme Court decided the case of *BNSF Railway Company v. Terrell, et al*., reversing the Montana Supreme Court. The Montana Supreme Court held that Montana state courts had jurisdiction over two Federal Employers' Liability Act (FELA) lawsuits filed on behalf of former employees against BNSF Railway Company even though, "while doing business in Montana, [it] was not incorporated in Montana nor did it maintain its principal place of business there."

  The Supreme Court, in an 8-1 ruling, rejected this interpretation of FELA. As stated by the Court, "FELA does not authorize state courts to exercise personal jurisdiction over a railroad solely on the ground that the railroad does some business in their States."

  The plaintiffs did not reside in Montana nor were their injuries related to work performed in Montana and they did not work for BNSF Railway Company in Montana. Nevertheless, the Montana Supreme Court held that local Montana courts could exercise general personal jurisdiction over BNSF Railway Company pursuant to Section 56 of FELA as construed by the court, or pursuant to Montana law which can apply to persons "found within Montana." With regard to the Montana Supreme Court's holding that Montana law established jurisdiction simply because BNSF Railway Company is "found within" the state, this argument raises issues as to whether such an exercise of personal jurisdiction "comports with the Due Process Clause of the Fourteenth Amendment." The U.S. Supreme Court confirmed that such an assertion would be contrary to a number of important U.S. Supreme Court precedents.

II. FEDERAL COURTS OF APPEAL AND DISTRICT COURTS

D.C. CIRCUIT

Court of Appeals

- In *Government of the Province of Manitoba v. Zinke*, the DC Circuit reversed the US District Court for the District of Columbia and held that the State of North Dakota could begin designing a water treatment plant for an area of North Dakota whose public drinking water quality has been substandard for a long time. The project is known as the Northwest Area Water Supply Project, and the lower court rejected the State's request to modify an injunction that kept the project from moving forward. In 2015, a comprehensive NEPA analysis was completed, and North Dakota asked the lower court to modify its long-standing injunction to allow design planning to begin. The lower court refused, and now the DC Circuit has held that the lower court abused its discretion in not accepting North Dakota's argument that a significant change in circumstances warranted this relief.

- In the case of *Defenders of Wildlife v. Zinke*, the DC Circuit reversed the US District Court, and reinstated the Interior Department's 2012 decision to delist the Wyoming Gray Wolf, which had been listed as an endangered species under the ESA in 1973. The lower court had vacated the rule, holding that the Fish and Wildlife's determination that that the State of Wyoming had put in place adequate regulatory mechanisms in its Management Plan to protect the wolf was arbitrary. The Court of Appeals held that the Service exercised its judgment in a reasonable way in concluding that the Wyoming Management Plan will adequately protect the Gray Wolf after delisting. This case is important because it confirms the importance of sound federal and state cooperative approaches to the protection of these species, and the opinion of the appeals court, in its exposition of the ESA and the plans before it is really exceptional.

- In *US v. Brownstein*, the DC Circuit reversed the lower court, which had held that a federal law regulating conduct in the Supreme Court Building (see 40 USC § 6134) is constitutionally infirm.

  On April 1, 2015, the defendants interrupted oral argument to announce their displeasure in the Court's ruling in the *Citizens United* political speech case. Noting that the defendants had fair notice of the rules governing conduct in this area, the court noted, citing the movie, "My Cousin Vinny", that a "person of ordinary intelligence could read this law and understand that, as a member of the Supreme Court's oral argument audience, making disruptive public speeches is clearly proscribed behavior."

- On April 11, 2017, the DC Circuit vacated EPA's 2008 rule that created hazardous substance reporting exemptions for all farms, except large animal raising operations known as CAFO's. The case is *Waterkeeper Alliance, et al. v. EPA*. The case was argued in December 2016, or almost eight years after the rule was promulgated.

  The November 18, 2008 rule amended CERCLA's Hazardous Substance Notification rules set forth at 40 CFR § 302.6, and the EPCRA Emergency Release Notification rules set forth at 40 CFR § 355.3. The CERCLA rule exempted from the law's notification requirements any releases of hazardous substances into the air from farms, while the EPCRA rule exempted such releases of hazardous substances from decomposing animal waste, unless the farming facility can be classified as a "CAFO," based on the large number of animals being raised in confined conditions. The challenges to the rule stressed the fact that decomposing animal waste can generate two specific hazardous substances—ammonia and hydrogen sulfide—and the statutes do not permit EPA to grant reporting exemptions for releases above the regulatory reportable quantity. EPA argued in response that the reports generated by such reports are unnecessary because "in most cases, a federal response is impractical and unlikely", and that it had an implied de minimis authority to create certain categorical exemptions "when the burdens of regulation yield a gain of trivial of no value." The DC Circuit, however, disagreed with the agency.

- On April 11, 2017, the DC Circuit reversed the lower court and held, in a unanimous opinion, that the American Forest Resource Council has standing to challenge the US Fish and Wildlife Service's 2012 designation of 9.5 million acres of federal forest lands

as a protected critical habitat for the northern spotted owl. The case is *Carpenters Industrial Council, et al. v. Zinke*. The court noted that a designation of so much federal land as a critical habitat for this threatened species under the Endangered Species Act would place off-limits for timber harvesting "a huge swath of forest lands in the Pacific Northwest". The Council is a trade organization which represents lumber companies that obtain timber from these designated forest lands, and the declarations furnished by the Council persuaded the appeals court that this group has standing, consistent with circuit precedent, to litigate and challenge the designation.

- On April 21, 2017, the DC Circuit issued another ruling adverse to the Consumer Financial Protection Bureau, which was established by the Dodd-Frank Act. In *Consumer Financial Protection Bureau v. the Accrediting Council for Independent Colleges and Schools*, the court affirmed the lower court's ruling that the Bureau has no authority to issue a Civil Investigation Demand (CID) to the Council seeking information held by the Council related to "unlawful acts and practices in connection with accrediting for-profit colleges." The Secretary of Education recognizes national accrediting services which set accreditation standards for for-profit colleges. Students attending accredited colleges are eligible to receive federal student loans and funding, and the Bureau was investigating the allegedly deceptive practices of some for-profit colleges. When the CID was received, the Council asked the Bureau to reconsider its issuance, but the Bureau refused and brought an enforcement action in federal court. Reviewing the Bureau's authority, the court held that the agency does not have the authority to conduct this kind of investigation of accrediting agencies. Moreover, the CID itself failed to adequately describe the unlawful conduct it was investigating or the applicable law.

- On May 9, 2017, the DC Circuit decided a FOIA case, *AquAlliance v.US Bureau of Reclamation*. The Act exempts nine categories of government records from disclosure, and in this case, the issue was Exemption 9, which provides that there is no duty to disclose "geological and geophysical information, data, including maps, concerning wells". AquAlliance is a non-profit organization concerned with protecting the Northern California ecosystem and watersheds. The Bureau's Central Valley Project is the largest water management project in the country, serving 20 million people and 7 million acres of farm land. The plaintiff was concerned about the impact of water transfer applications routinely processed by the Bureau, and it filed a FOIA request seeking all documents related to water transfer applications in 2013 and 2014. The Bureau largely complied, but withheld or redacted information relating to water-well construction, completion, depth, and location. AquAlliance then filed a FOIA action in the district court, which granted the Government's motion for summary judgment, based on the plaint text of the statutory exemption. The court of appeals affirmed the ruling, rejecting the plaintiff's contention that this exemption, if properly understood, only protected oil and gas well information.

- On May 9, 2017, the DC Circuit decided the case of *Kahl v. Bureau of National Affairs, Inc.* (BNA). In 1983, Kahl was convicted in federal court of murdering two US Marshals, and he was sentenced to life in prison. He has since filed many unsuccessful appeals to have his conviction overturned or his sentence vacated. On one of these occasions, BNA's Criminal Law Reporter published a short story on Kahl's unsuccessful

2005 mandamus petition in the Supreme Court, and the story erroneously attributed damaging statements about Kahl to the presiding judge and not to the prosecutor. Kahl sued the BNA for defamation under the law of the District of Columbia in the United States District Court for the District of Columbia, and that court denied BNA's request for summary judgment, holding that the inaccuracy of the BNA report allows him the right to have a trial on his defamation claims. The Court of Appeals reversed the district court decision, holding that Kahl was a "limited purpose" public figure, and that there is no evidence that BNA acted with actual malice in its reporting.

- On May 19, 2017, the DC Circuit decided the case of *Limnia, Inc. v. US Department of Energy*. Limnia, a manufacturer of battery systems in electric cars, twice filed applications for clean-energy loans pursuant to a federal clean energy loan program administered by the Department. However, both applications were rejected by the Department in 2009, and Limnia, believing these rejections were the result of a process "infected by bias and favoritism," filed a lawsuit challenging these decisions as being contrary to the Administrative Procedure Act because they were not based on merit or technical specifications. The trial court denied the Department's motion to dismiss the APA claim, but it did grant the government's motion for a voluntary remand to the agency to allow Limnia an opportunity to submit new applications. In so doing, the trial court stayed Limnia's APA action so that it could supervise the progress of the new agency proceedings. These proceedings were unsuccessful, and the lower court, facing Limnia's refusal to submit new applications, relinquished jurisdiction, and closed the case. This appeal followed, and court of appeals ruled that the lower court erred when it granted the agency's request for a voluntary remand when it was clear that the Department was not inclined to take further action with respect to "the original agency action on review."

- On May 19, 2017, the DC Circuit, in the case of *Taylor v. Huerta, Administrator of the Federal Aviation Administration*, held that the FAA was not authorized to promulgate new rules to compel the owners and operators of model aircraft, described as "small unmanned aircraft operated or recreational purposes" to register with the FAA. The growing popularity of drone aircraft caused the agency to issue the new rules in 2015, and in promulgating these rules, for the first time the agency also subjected model aircraft enthusiasts to this form of federal regulation. The plaintiff, a pro se litigant, challenged the new rule in the court of appeals, and was successful. The court held that this action by the FAA directly conflicted with the 2012 FAA Modernization and Reform Act, and, as the court noted, "statutory interpretation does not get much simpler."

District Court

- On March 7, 2017, the US District Court for the District of Columbia issued a ruling denying a motion for a preliminary injunction filed by the Cheyenne River Sioux Tribe which challenged an easement granted on February 8, 2017 by the US Army Corps of Engineers to Dakota Access, LLC, the owners and operators of the Dakota Access Pipeline. The plaintiffs argued that the presence of oil in a pipeline constructed beneath Lake Oahe, a "federally regulated waterway that forms part of the Missouri River and straddles North and South Dakota," will cause irreparable harm to its members' religious

beliefs in violation of the Religious Freedom Exercise Act (RFRA). According to the court, the Lake Oahe crossing is the only portion of the pipeline that is not finished.

The pipeline originally requested an easement in October 2014, and submitted its application to the Corps in June 2015. The Corps granted an easement to the pipeline pursuant to its authority under the Rivers and Harbors Act in July 2015, and then the present litigation commenced in this court. No RFRA claim was made by the plaintiffs at that time. Then, in December 2016, the former chief of the Corps took action to delay any grant of an easement to cross Lake Oahe pending the completion of a robust environmental review, but this directive was terminated once the new administration took office. On February 8, 2017, the Corps notified Congress of its intent to issue the easement, and the tribe filed this litigation the next day. The court determined that "because of the Plaintiff's delay in raising this religious-exercise objection and the negative impact of that delay on the Corps and Dakota Access, the court concludes that the requested preliminary-injunctive relief is barred by laches." In addition, the court found that the Plaintiff was unlikely to establish that the "grant of this easement imposes a substantial burden on its religious exercise such that it will succeed on the merits of its RFRA claim." The case is *Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe v. US Army Corps of Engineers*.

- On March 14, 2017, in the case of *United States of America ex rel. Harry Barko v. Halliburton Company, et al.*, United States District Court granted Halliburton's motion for summary judgment and dismissed Mr. Barko's claims against Halliburton, filed under the False Claims Act (FCA).

  As a result of the court's ruling, this long and protracted litigation may be nearing an end after twelve years and several decisions by the federal district court and the US Court of Appeals for the District of Columbia Circuit. The case involves a Halliburton subsidiary, Kellogg, Brown & Root (KBR) a Department of Defense contractor providing support services to the United States military during the war in Iraq, and KBR's contracting practices. Barko was a former KBR subcontract administrator in Iraq from July 2004 to June 2015. His FCA complaint alleged that KBR submitted false claims to the federal government and otherwise engaged in improper procurement practices with its subcontractor, D&P. The principal issues decided by the federal courts in Washington involved Halliburton's argument that certain discovery requests made by Mr. Barko implicated important attorney-client privilege issues, which were decided in Halliburton's favor (the DC Circuit opinions are reported at 756 F.3d 754 (2014) and 796 F.3d 137 (2015)). The court concluded that while "Mr. Barko has presented an incredible amount of information to this Court regarding, among many other things, KBR's subcontracting practices and other activities in Iraq…not every instance of waste, fraud, mismanagement, or breach of contract translates into a False Claims Act violation". Moreover, Barko failed to present admissible evidence to support his clams, and ultimately failed to make a FCA case that would survive a motion for summary judgment.

- On March 22, 2017, in the case of *Delaware Riverkeeper Network, et al, v. FERC*, the US District Court dismissed the plaintiffs' complaint that the statutory requirement that the

Commission recover its annual operating costs directly from the entities it regulates results in perceived or actual bias against plaintiffs who contest applications for needed certificates from the Commission. Because of this bias, the plaintiff asked the court either to declare the agency's reimbursement mechanism to be unconstitutional or declare its power of eminent domain or authority to preempt state and local laws to be unconstitutional. Holding that the plaintiffs failed to state a claim (because allegations of actual bias cannot create structural bias where the court determined there is none, and the law does not on its face create an unconstitutional funding mechanism), the agency's motions to dismiss were granted.

- On May 4, 2017, the United States District Court issued a "Deepwater Horizon" ruling. The case is *Center for Biological Diversity v. Zinke*, and it concerns the ongoing review conducted by the Department of the Interior of its "categorical NEPA exclusions" with respect to offshore oil and gas operations, which are subject to the Department's scrutiny. Following the April 2010 disastrous Deepwater Horizon oil spill, the Department announced on October 8, 2010 that it was planning to conduct a review of these categorical exclusions. This review is still ongoing after more than six years, which has caused the Center to file a lawsuit seeking to compel the Department to decide whether any revisions to its NEPA policies are needed. The court dismissed this lawsuit, holding that the plaintiff was unable to prove that the Department failed to take an action that is both discrete and mandatory under the APA. Also, its review of the pertinent CEQ regulations indicated that the rule, as properly construed, does not require agencies to complete their review of NEPA procedures even after they have embarked on such a review.

Second Circuit

Court of Appeals

- On January 18, 2017, the US Court of Appeals for the Second Circuit reversed the lower court and held that EPA's 2008 promulgation of the "Water Transfers Rule" (see 73 FR 33697, June 13, 2008), was entitled to "Chevron Deference," and reinstated the rule. The regulation is codified at 40 CFR § 122.3 (i), and provides that water transfers, as defined in the rule, do not require NPDES permits because they do not result in the addition of a pollutant. The case is *Catskill Mountains Chapter of Trout Unlimited, Inc. v. US EPA*.

  To provide drinking water to New York, water is moved or transferred from the Schoharie Reservoir to New York City, serving the residents of the city's five boroughs. Requiring this movement of water to be permitted in accordance with the Clean Water Act's NPDES permitting system would impose substantial regulatory costs on New York City and other municipalities that depend on water transfers. The majority reasoned that while the Rule "may or may not be the best or most faithful interpretation of the Act…it is supported by valid arguments," and EPA's interpretation involves "the kind of difficult policy choices that agencies are better equipped to make than courts."

- On April 20, 2017, the Second Circuit issued a unanimous ruling that may terminate much of the litigation triggered by the bankruptcy of Tronox Inc. On February 1, 2016,

the US District Court for the Southern District of New York granted the motion of Kerr-McGee Corporation to dismiss, with prejudice, the Pennsylvania state court personal injury claims linked to Tronox's operation of a wood-treatment plant located in Avoca, Pennsylvania. The lower court held that these claims were derivative and duplicative of class claims that were part of a $5.15 billion bankruptcy settlement and were barred by a permanent anti-suit injunction. The appeals court held that the lower court did not modify or construe the injunction, its order was therefore not final, and therefore the Second Circuit had no jurisdiction to hear the case. The earlier Pennsylvania class action was stayed by the bankruptcy proceedings filed in the Southern District of New York. Kerr-McGee spun off Tronox, and this spin-off left the Tronox debtors with "immense environmental and tort liabilities," as recognized by the bankruptcy court in its ruling in *Tronox, Inc. v. Kerr-McGee*, 503 BR 239 (2013). The $5 billion settlement included $600 million set aside for the Tort Claims Trust, which included the Avoca Plaintiffs. The injunction, entered at the behest of the settling parties, meant that this attempt to revive the Pennsylvania litigation could not proceed.

Third Circuit

Court of Appeals

- On April 4, 2017, the US Court of Appeals for the Third Circuit decided the case of *Mirabella, et al. v. Villard, et al.*, a civil rights case brought under Section 1983 (42 USC § 1983). The plaintiffs alleged that the management of a local public wetlands controversy by members of the Montgomery Township, Pennsylvania, Board of Supervisors amounted to a violation of their constitutional rights. They had petitioned their local government for assistance in resolving a contentious dispute with their neighbors regarding the wetlands abutting their properties. At some point, the plaintiffs were barred from communicating directly with any members of the local government other than through the Township's counsel. Moreover, if they filed a lawsuit in response, then the officials would move the court to impose sanctions on the plaintiffs. The plaintiffs complained that these actions were unconstitutional, and sought redress in a Section 1983 action. The lower court dismissed most of their complaint, but agreed that the constitutional violations could be heard, and denied qualified immunity to two of the local supervisors.

  The appeals court agreed that these actions adversely affected the plaintiffs' First Amendment rights to petition their government, and to be free of any retaliatory action, but also held that the officials were nevertheless entitled to qualified immunity because the rights allegedly violated were not clearly established. The lower court's ruling was set aside, and the court remanded the matter to the lower court to enter judgment in favor of the local government officials.

Fourth Circuit

Court of Appeals

- The Fourth Circuit decided a closely-watched CWA Citizen Suit on January 4, 2017 in the case of *Ohio Valley Environmental Coalition, et al. v. Fola Coal Company, Limited*. The West Virginia DEP granted and renewed the coal company's permit, and supported the company's interpretation of West Virginia law, buttressed by two recent laws enacted by the West Virginia legislature. The plaintiff citizen groups alleged that, nonetheless, the defendant coal company had violated its state-issued NPDES permit and its narrative water quality limits, and the trial court agreed, filing a very long opinion ruling in favor of the plaintiffs. Apparently there was no specific EPA regulation on "conductivity" limits, but there was some administrative history to reckon with; in any case, conductivity limits can apply with special rigor to coal mining companies. It is also apparent that the relations between the West Virginia state authorities and EPA have been pretty tense.

  Fola received an NPDES permit from the West Virginia DEP in 1996, and it was renewed in 2009. It was alleged that Fola's discharge into Stillhouse Branch violated a West Virginian regulation that was incorporated into Fola's renewed permit; this regulation provided that Fola's discharge would not cause a violation of the applicable Water Quality standards adopted by the DEP in accordance with applicable state law. More specifically, it was alleged that Fola violated this rule by discharging ions and sulfates in sufficient quantities to cause increased conductivity in Stillhouse Branch, which resulted in a violation of water quality standards which were expressed in a narrative format. In its defense, Fola argued that it was entitled to the Clean Water Act's statutory permit shield because it disclosed to the permitting agency the nature of its discharges when it applied for the 2009 renewal permit, and that its discharge contained ions and would be highly conductive. Nevertheless, the West Virginia DEP set no limits on conductivity in the permit, and Fola otherwise complied with all the effluent limits set forth in the permit. Finally, Fola cited a 2001 Fourth Circuit decision, *Piney Run Preservation Association v. City Commissioners*, 268 F. 3d 255 (CA 4, 2001), which recognized this defense.

  The court noted that in 2015, the West Virginia DEP attempted to remove the regulatory language at issue in this case, and in so doing, it admitted that when it issued the renewed permit in 2009 it required coal mining NPDES permittees to meet water quality standards whether or not such standards were delineated in the permit or contained in the administrative record of the permitting process. In any case, EPA refused to approve of these proposed changes because the elimination by the state of the water quality standards language in the rule would conflict with federal law and weaken the state's NPDES program. The Fourth Circuit approved the lower court's findings that the West Virginia rule was an enforceable permit condition, that Fola's discharge deposited significant amounts of ions into the receiving water, the amount of ions so deposited are measured by conductivity standards, and increasing conductivity in the receiving waters adversely affected sensitive insect species which decreased aquatic diversity. This in turn lowered the stream's score on the West Virginia Stream Condition Index, to a level EPA considered to be an impairment of water quality.

The court rejected the reliance on the *Piney Run* decision, and observed that EPA never diverged from its consistent position that the West Virginia regulations imposed water quality obligations on NPDES permit holders. The court also rejected Fola's argument that the lower court, in finding a water quality violation based on its consideration of "mountains of expert evidence," in effect engaged in an "unlawful rulemaking."

- On January 19, 2017, the Fourth Circuit upheld the criminal conviction of Donald Blankenship, the former Chairman and CEO of Massey Energy Company, which operated the Upper Big Branch Coal Mine in Montcoal, West Virginia. In April 2010, an accident at the mine resulted in the death of 29 miners, and Mr. Blankenship was indicted and convicted of conspiring the violate federal mine safety laws. He was sentenced to be imprisoned for one year and to pay a fine of $250,000, the maximum punishment that could be assessed pursuant to 30 USC § 820(d). The case is *United States v. Donald L. Blankenship*.

  Evidence was presented to the jury that Mr. Blankenship was aware of many mine safety violations at the mine, but ignored them and reduced the mine's safety staff before the accident took place. The Fourth Circuit held that the defendant could be convicted for willfully violating mine safety laws through his "reckless disregard" of the applicable regulations. The court noted that it has previously held that reckless disregard and plain indifference can constitute criminal willfulness.

- On March 9, 2017, the Fourth Circuit issued a ruling affirming the lower court's rejection of Virginia common law property damage claims based largely on negligence, nuisance, trespass, and for which CERCLA's federal statute of limitations arguably preempts the application of the Virginia's 5 year statute of limitations. The case is *Neal and Emma Blankenship v. Consolidation Coal Company, et al*.

  In 1994, the defendant Consolidation Coal Company, following the provision of required public notice, obtained the necessary state permits to authorize the "dewatering" of Consolidation's Buchanan Mine by pumping water to the nearby Beatrice Mine, which was an "exhausted" coal mine. This dewatering operation concluded in 2003. Several years later, the plaintiffs, who owned property above portions of the Beatrice Mine, filed federal lawsuits against Consolidation asserting damage claims based on trespass, nuisance, negligence and related grounds, and demanded hundreds of millions of dollars in compensation, punitive damages, and injunctive relief. The lower court rejected these claims, holding that they were barred by the Virginia statute of limitations. In addition, the court also rejected the plaintiffs' argument that that CERCLA's statute of limitations and its "discovery rule" preempted the Virginia statute of limitations. To invoke the CERCLA statute of limitations (see 42 USC Section 9658), there must be a CERCLA cause of action. Here, the plaintiffs did not establish this claim; it was not a claim that alleged there was a release of hazardous substances which triggered response costs by the plaintiffs. The Fourth Circuit agreed with this reasoning, and also pointed out that CERCLA Section 9607(j) excludes from CERCLA Section 107 those claims that may be based on a federally-permitted release. Here, the defendants had received the necessary permit from the state agencies and accordingly it was a "federally authorized permit under federal law".

- On April 3, 2017, the Fourth Circuit decided the case of *North Carolina v. Alcoa Power Generating, Inc*. The court affirmed, in a 2 -1 ruling, the decision of the lower court (the US District Court for the Eastern District of North Carolina) that a relevant segment of North Carolina's Yadkin River—on which Alcoa has constructed and operated for many years hydroelectric dams to supply power to its neighboring aluminum smelter—was not "navigable" at the time of North Carolina's statehood (1789). Consequently, the State could not claim title to this segment as an aspect of state sovereignty.

  Despite the fact that Alcoa appeared to have acquired title to this riverbed land in 1915, and that North Carolina, in its submissions to the Federal Power Commission, confirmed that Alcoa owned the land on which these facilities were constructed and operated, the closing of the smelter and the dismissal of many of its employees, caused the State to withdraw its permission to operate these facilities on this land. The State argued that it has owned this section of the riverbed since 1789, and Alcoa operations were always subject to its permission. North Carolina filed a declaratory judgment action in state court, seeking a judgment that the riverbed was "the sole and exclusive property of the State". Alcoa then removed this lawsuit to federal court, contending that the issue of navigability for title was a federal question warranting the jurisdiction of the federal courts. The lower court agreed, and granted Alcoa's motion for summary judgment because the State had not demonstrated that the contested segment of the Yadkin River was navigable at the time of statehood; if it had done so, then the State would, in law and in fact, have owned this land. The lower court applied the Supreme Court's standard for determining navigability in such cases (see *PPL Montana LLC v. Montana*, 132 S. Ct. 1215 (2012)), and concluded that Alcoa held title to 99% of the contested riverbed under North Carolina's Marketable Title Act, and 1 % through adverse possession.

  On appeal, North Carolina argued that the lower court lacked jurisdiction to decide this case because the PPL "navigability principle" only applied to the 37 "later-admitted" states, and not to the original 13 states, such as North Carolina. The appeals court disagreed, holding that the lower court had jurisdiction, and it was correct in rejecting the state's motion to return the case to the state courts. Based on the historical evidence presented at trial, the lower court was also correct to hold that this segment of the Yadkin River was not navigable in 1789, and accordingly, North Carolina cold not claim title to this segment "as an aspect of state sovereignty".

  Circuit Judge King filed a long dissent, concluding that North Carolina "has owned the Yadkin River free and clear since 1776".

The District Court

<u>District of South Carolina</u>

- On April 20, 2017, the United States District Court for the District of South Carolina Anderson Division dismissed the plaintiffs' Clean Water Act (CWA) Citizen Suit which alleged that the defendant pipeline operators had violated the Act by discharging pollutants into navigable waters without a permit. The case is *Upstate Forever and Savannah Riverkeeper v. Kinder Morgan Energy Partners, L.P. and Plantation Pipe Line*

Company, Inc. The remedial action is continuing and 209,000 gallons of gasoline and petroleum products have been recovered from the site of the spill, under the direction of the South Carolina Department of Health and Environmental Control. In December 2014, a leak in the pipeline resulted in a release of 369,000 gallons of petroleum products. The court noted that the CWA requires proof that the defendant in such an enforcement action discharged a pollutant into navigable waters from a point source without a permit. While a pipeline can be a point source, the court observed that the plaintiffs failed to allege any facts to support their argument that the defendants discharged this pollutant directly into navigable waters. The theory that the migration of pollutants through groundwater to surface waters is sufficient to trigger CWA liability if a hydrological connection can be demonstrated is not the law—yet –in the Fourth Circuit. The only federal courts of appeal to have considered this argument have rejected it (namely the Fifth and Seventh Circuits).

Fifth Circuit

Court of Appeals

- On December 29, 2016, the US Court of Appeals for the Fifth Circuit decided the case of *Delek Refining, Limited v. Occupational Safety and Health Review Commission*. Delek purchased a Tyler Texas oil refinery from Crown Central in 2005, and the facility was inspected by OSHA for four months in 2008 (February- May 2008). In August 2008, the agency cited the refinery for several alleged violations of OSHA's rules regulating "Process Safety Management of Highly Hazardous Chemicals." According to the court, these rules are intended to prevent or minimize the consequences of catastrophic releases of toxic, flammable, or explosive chemicals. Delek sought the Commission's review of three citations.

  One citation alleged a failure to resolve "open findings and recommendations" identified during earlier process hazards analysis conducted in 1994, 1998, 1999, 2004, and 2005, or before Delek took control of the refinery. Another citation faulted Delek for failing to determine and document a response to the findings of a 2005 compliance audit in a timely manner, an audit that also took place before Delek assumed control. The last challenged citation was based on Delek's failure to inspect a "positive pressurization unit" that is a component of the refinery's fluid catalytic cracking unit.

  Delek challenged the first two citations on the basis that they are barred by the law's six month statute of limitations (29 USC Section 658(c)). The Secretary of Labor argued that these violations were "continuing violations" and therefore the statute of limitations did not apply. Agreeing with Delek and the US Court of Appeals for the District of Columbia's decision in the case of *AKM LLC dba Volks Contractors v. Secretary of Labor*, 675 F. 3d 752 (CADC 2012)), the Fifth Circuit rejected the agency's reliance on a "continuing violations" exception to the provisions of the statute, at least in cases in which there are no overwhelming threats to worker safety. On the other hand, the court affirmed the Secretary's interpretation of the application of the OSHA regulatory inspection rules to certain refinery process units.

This decision is noteworthy, not only because the Fifth Circuit is now aligned with the DC Circuit on this important issue, but also because the agency has published a final rule amending its recordkeeping regulations "to clarify that the duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation". See 81 FR 91792 (December 19, 2016). This rule became effective on January 18, 2017. These revisions are a response to the DC Circuit ruling in the "*Volks*" case which, as noted above, held that the Act does not provide authority for the Secretary to impose a continuing recordkeeping obligation on employers.

- On February 13, 2017, a sharply divided Fifth Circuit, by a vote of 8 to 6, rejected a petition seeking an en banc rehearing of the court's initial decision in the case of *Markel Interests, LLC, et al v. United States Fish and Wildlife Service, et al*. The initial decision is reported at 827 F. 3d 452 (CA 5, 2016). That decision held that 1500 acres of private land located in Louisiana is subject to the requirements of the Endangered Species Act with respect to the dusky gopher frog, which was determined to be an endangered species in 2001, but whose "critical habitat" was not designated until 2012. At the present time, the species is located only in Mississippi, but the Fish and Wildlife Service designated not only several thousand acres of Mississippi land as its critical habitat, but the Louisiana land as well, reasoning that the presence of five ephemeral ponds on the Louisiana land could support the species' reproduction. Apart from the presence of these ponds, all parties appear to agree that the Louisiana land is otherwise uninhabitable.

  On June 30, 2016, the Fifth Circuit issued its initial ruling in this matter, involving critical habitat designations on private land. The case was decided on a 2 to 1 vote, with Judge Owen providing a strong dissent. The majority was at pains to state that "critical habitat designations do not transform private land into wildlife refuges". Nevertheless, the extension of the ESA to this private land may conceivably have federal permitting consequences later if the future development of the land triggers, for example, Clean Water Act considerations.

  The district court upheld this designation, and the Fifth Circuit affirmed that decision in a holding that the dissent described as "unprecedented and sweeping". The landowners argued that this designation of their land: (1) violates both the ESA and the APA; (2) exceeds the Service's constitutional authority under the Commerce Clause, and (3) violates NEPA. The appeals court held that the landowners have standing to contest the critical habitat designation, but no standing under NEPA to challenge the Service's failure to prepare an environmental impact statement because in this instance, they were asserting purely economic injuries and this is insufficient.

  Judge Jones filed a long opinion for the dissenters to the court's decision not to re-hear this case. She wrote that the panel majority, relying on administrative deference, reasoned that (1) the ESA and the Service's implementing regulations have no "habitability requirement", (2) the unoccupied Louisiana land is essential to the conservation of the frog even though it contains only one of the three features the Service believes are critical to its habitat, and (3) the Service's decision not to exclude this Louisiana tract from the critical habitat designation is judicially unreviewable. Judge Jones, after conducting a review of the provisions of the statute and its legislative history,

argued that these conclusions were untenable, and in view of the importance of this case, "illustrate the importance of further review". Otherwise, the Service's critical habitat designation power is "virtually limitless."

- In *Board of Commissioners of the Southeast Louisiana Flood Protection Authority v. Tennessee Gas Pipeline Company, et al.*, the Fifth Circuit issued a unanimous ruling affirming the lower court's decision to: (a) reject the Board's motion to remand this cost recovery and injunctive action to the state courts of Louisiana; and (b) dismiss, for failure to state a claim. The Board's claims were made against 97 oil and gas companies that have been involved in oil and gas operations and activities off the Gulf Coast for many years.

  The Board alleged that these operations have caused ecological and infrastructure damages to the coastal lands overseen by the Board, and increased the risk of flooding. The causes of action were claims for negligence, public and private nuisance, and breach of contract adversely affecting third party beneficiaries. Both the lower court and the Fifth Circuit noted that the regulatory framework in which these defendants operate is that of federal law—namely the Clean Water Act, the River and Harbors Act and the Coastal Zone Management Act of 1972. These claims therefore necessarily raise a federal issue, and that the defendants' motion to dismiss is grounded in the argument that the plaintiff's claims fail to state a claim under federal law that can be granted.

- On April 18, 2017, the Fifth Circuit affirmed the lower court's ruling in a Louisiana case that dismissed the plaintiff's claims for property damage based on contamination caused to his property by long-term oil and gas operations conducted by the predecessors of Hess Corporation. The case is *Guilbeau v. Hess Corporation*. The courts agreed with Hess Corporation's argument that Louisiana law (known as the "subsequent purchaser rule") bars claims for damages that occurred before the plaintiff's purchase of the property. According to the court, Hess's predecessors obtained mineral leases and conducted oil and gas operations until 1971; the leases themselves expired in 1973. Holding that Louisiana law was clear, the court saw no need to certify this case to the Louisiana Supreme Court.

- On May 4, 2017, the Fifth Circuit issued a ruling clarifying the use of a privilege log to invoke the protections of the attorney-client privilege. The case is *Equal Employment Opportunity Commission v. BDO USA, LLP.*, and it involves the agency's investigation of employment discrimination claims. The court reversed the trial court, and held that the defendant's use of a privilege log to shield many documents and communications from the EEOC was not sufficient to establish that the attorney-client privilege protected these communications (with the corporation, its in- house counsel and outside counsel) from disclosure. The agency had made several requests for this information, which were rejected, forcing the agency to subpoena these records, followed by filing an enforcement action in the court. The appeals court ruled that the lower court (and the presiding Magistrate) erred when they held that the log's cataloged communications were "per se" privileged, and returned the case to the lower court for "a determination consistent with this opinion". The court noted that the log itself was too vague to enable the courts to

determine whether a sphere of confidentiality existed, and that an in camera review will be necessary to resolve the issue.

The District Court

Southern District of Texas

- On December 17, 2014, US District Judge David Hittner issued a ruling rejecting all of the claims for relief requested by Environment Texas Citizen Lobby and the Sierra Club against ExxonMobil Corporation. Judge Hittner conducted a 13 day non-jury trial in this case, in which the plaintiffs requested a declaratory judgment, penalties of $643,000,000 and the appointment of a Special Master to oversee Exxon's compliance with the injunction that was requested with respect to the huge petrochemical complex operated by Exxon in Baytown, Texas. Judge Hittner described the complex as having a vast array of equipment, including roughly 10 thousand miles of pipe, 1 million valves, 2500 pumps, 146 compressors and 26 flares. It employs over 5000 people including a large environmental staff. The complex operates under Clean Air Act permits issued by the TCEQ, and "taking all permit conditions together, the complex is regulated by over 120,000 permit conditions related to air quality, each of which is tracked for compliance purposes". Consequently, the emissions emitted by the complex have been sharply reduced over time, and the TCEQ generally seems to view Exxon as making good faith efforts to comply with the requirements of the law. The court noted that Exxon had earlier settled allegations of violations with the TCEQ and Harris County, amounting to $1.7 million. Judge Hittner reviewed the allegations and proof made by the plaintiffs in exhausting detail, and concluded that there were very few "actionable" violations established by the Sierra Club, and any penalties assessable under the Clean Air Act as a result of this lawsuit were more than offset by the penalties already paid by Exxon to the TCEQ and Harris County.

  Judge Hittner found that the allegations made were not supported by the evidence (mostly compiled in spreadsheets submitted to the court), their expert witnesses, and the testimonial evidence of a few residents living or who visit the area. He then evaluated his findings against the penalty factors provided in the Clean Air Act, and concluded that "the most reasonable estimate of Exxon's economic benefit of noncompliance is $0". The plaintiffs in this case sued a number of refineries in the Houston area, but Exxon chose not to settle, and mounted a very strong defense in this case. Because of these findings, Judge Hittner declined to address the affirmative defenses mounted by Exxon.

  On May 27, 2016, the US Court of Appeals for the Fifth Circuit vacated the judgment and remanded the case to Judge Hittner. The appeals court held that the district court had erred in its analysis of Exxon's liability under Counts I though IV and abused its discretion in assessing three of the Clean Air Act's mandatory penalty factors. See *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, 824 F. 3d 507 (CA 5, 2016). The court also noted that the District Court could, on remand, consider Exxon's affirmative defenses which it did not believe to be necessary in its initial decision to review since it awarded no penalties.

On April 26, 2017, the District Court, on remand, issued "Revised Findings of Fact and Conclusions of Law". Briefly, the court denied the plaintiffs' request for a Declaratory Judgment, injunctive relief, and the appointment of a Special Master, but granted the plaintiffs' requests for penalties in the amount of $19,951,278, and their request for attorney's fees and costs. A major issue was how to treat 241 "reportable emission events," 3735 "recordable emission events," and 901 "Title V Deviations"—many of which were not emission events. In any case, under Count I, the court found that, by a preponderance of the evidence, the plaintiffs proved that Exxon violated the Special Conditions of a TCEQ permit on 10,583 days; 13,023 days of violations under Count II; 13 days of violations under Count III, 44 days of violation under Count IV; a few violations under Count V; no violations under Count VI; and no violations under Count VII. On remand, Exxon argued that it was entitled to an "Act of God" affirmative statutory defense during the time covered by the Governor's Hurricane Ike proclamation and the regulatory affirmative defenses that are provided in the rules of the TCEQ which cover certain unanticipated emissions that take place during unforeseen accidents or upsets. The court rejected these defenses, holding that the "Act of God" defense was not incorporated in the Texas State Implementation Plan (SIP) and that the invocation of the regulatory affirmative defense, while satisfactory to the TCEQ, did not satisfy Exxon's burden of proof in this proceeding. Exxon was obliged to prove that it had met all eleven regulatory criteria to trigger the application of this defense, which it was not able to do. The court noted that the plaintiffs originally requested over $1 billion in penalties, which was later reduced to $643,000,000, and then lowered again to $41,000,000 on remand. Injunctive relief was denied, with the court observing that there was no credible evidence that any of these "Events or Deviations" were harmful to the public or the environment".

Sixth Circuit

Court of Appeals

- In a case argued on February 1, 2017 and decided on February 13, 2017, the US Court of Appeals for the Sixth Circuit held, in *Maxxim Rebuild Company, LLC v. Federal Mine Safety and Health Commission* that Maxxim's Sidney, Kentucky small manufacturing facility (seven workers are employed there) which makes and repairs mining equipment for Alpha Natural Resources, Maxxim's parent company, and which is not located adjacent to or part of a working coal mine, is not a "coal mine" subject to MSHA's jurisdiction. Following workplace safety inspections of this facility, MSHA issued several notices of violation to Maxxim: (a) the absence of a written hazardous chemicals communication plan; (b) a dirty bathroom; (c) an accumulation of oil, fuel and dust on a Caterpillar 988 loader; and (d) citations in connection with a heater and a boiler at the facility. Each citation referenced a pertinent MSHA rule which Maxxim challenged before an Administrative Law Judge, who ruled that the shop was "a coal or other mine", a decision which the Commission later upheld.

  The court subjected the relevant statute (30 USC § 802(h)(1)) to a painstaking review, and concluded that MSHA's jurisdiction is limited to only such facilities if they are in or adjacent to a working mine. Moreover, the alleged workplace safety violations are, in truth, subject to OSHA's jurisdiction, and the court reminded the reader that the

violations referred to problems with bathrooms, welders, loaders, heaters and safety plans, and were not related to equipment sold to Alpha Natural Resources which actually operates coal mines. The court concluded that the Congress could not have intended to transform such a machine shop into a coal mine simply because it makes equipment that is used or is to be used in a coal mine.

Seventh Circuit

Court of Appeals

- On January 30, 2017, the US Court of Appeals for the Seventh Circuit held that the extraterritorial effects of Indiana's 2015 Vapor Pens and E-Liquid Act violated the dormant Commence Clause of the US Constitution. The court described its holding as follows: "The Act is written so as to have extraterritorial reach that is unprecedented, imposing detailed requirements of Indiana law on out-of-state manufacturing operations." While the goals of the Act may be laudable, "Indiana may not try to achieve these health and safety goals by directly regulating out-of-state factories and commercial transactions." The court reviewed the history of dormant Commerce Clause litigation, and its research "has not revealed a single appellate case permitting any direct regulation of out-of-state manufacturing processes and facilities comparable to the Indiana Act." The case is *Legato Vapors, LLC et al., and Right to be Smoke-Free Coalition, Inc. v. David Cook, et al*.

The District Court

Northern District of Indiana

- On April 14, 2017, a United States Magistrate serving with the United States District Court for the Northern District of Indiana issued a ruling in a matter involving the attorney-client and attorney work product privileges. The case is *Valley Forge Insurance Company v. Hartford Iron & Metal, Inc.* Hartford Iron & Metal is cleaning up a recycling facility under the auspices of the Indiana Department of Environmental Management (IDEM)—a site that is also a concern of EPA. Valley Forge is Hartford's insurer, and to resolve their differences, the parties entered into a round of settlements. Valley Forge was authorized to appoint defense counsel to represent Hartford in its dealings with EPA and the IDEM. The defense counsel exchanged email communications with contractors working on the project, and insisted that these communications were subject to the attorney client and attorney work product privileges. Valley Forge objected, and the Magistrate's opinion discussed the scope of these privileges. The judge held that the attorney's communications with third party contractors were not entered into for the purpose of rendering legal advice, and the attorney-client privilege did not obtain. However, some of the emails were protected by the attorney work product doctrine.

Eighth Circuit

Court of Appeals

- On January 31, 2017, the US Court of Appeals for the Eighth Circuit held that, under the terms of a commercial general liability insurance policy, natural gas condensate, a valuable commercial product, once released, is a pollutant that triggers the policy's "pollutant exclusion." The case is *Hiland Partners GP Holdings, LLC, et al. v. National Union Fire Insurance Company of Pittsburgh, PA*. Hiland owns and operates a natural gas processing facility in Watford City, North Dakota, and it entered into a master service contract with Missouri Basin Well Service. The contract required Missouri Basin to obtain insurance policies that named Hiland as an additional insured. In October 2011, Hiland requested Missouri Basin to remove water from its hydrocarbon condensate tanks, and Missouri Basin then employed a subcontractor to haul the water. Unfortunately, the subcontractor's employee was seriously injured when the condensate, a very volatile material, exploded. After settling with the employee, Hiland filed a declaratory judgment action against National Union, which refused to defend Hiland as an additional insured. National Union argued that the policy's pollution exclusion obtained, and denied coverage. The court agreed with National Union, holding that condensate, being flammable, volatile, and explosive, is a contaminant when released into the environment, and most court's ruling on this issue have held the same.

Ninth Circuit

Court of Appeals

- Last summer, in the waning stages of the Supreme Court's 2015 – 2016 Term, the Court issued an opinion reversing the Ninth Circuit's use of *Chevron* deference to overrule the lower court which had decided that neither the FSLA nor the varying interpretations of the special automotive dealership regulatory interpretations excluded service advisors from the exemptions for overtime compensation. The case is *Encino Motorcars v. Navarro*. Now, on remand, the court of appeals again concluded that service advisors are entitled to overtime pay and compensation.

  The law requires employers to pay overtime compensation to covered employees, but in 1966, the law was amended to exempt automotive salesmen, partsmen, and mechanics from this requirement. The Department of Labor later interpreted "salesman" to include service advisors as also being excluded, but this interpretation changed from time to time. In 2011, the Department issued a final rule reaffirming the agency's original position: service advisors are not exempt. However, as noted above, a federal district court held that they were not exempted, but the Ninth Circuit reversed this determination, holding that the Department's regulation was entitled to Chevron deference. The Supreme Court disagreed, ruling that *Chevron* deference did not apply to a rule whose promulgation was defective, as was the rule here because the agency's change in position was insufficiently explained. On remand to the Ninth Circuit, the court held, on January 9, 2017, that the service advisors were not exempted from the benefits of overtime compensation.

The Ninth Circuit assumed it must now give no weight to the agency's interpretation, so "we interpret the statute in the first instance." What follows is a careful review of the statutory, text, and legislative history, covering over twenty pages. The court concludes by stating that, "after a thorough de novo review of congressional intent, we hold the exemption does not cover service advisors" The court also notes that its decision conflicts with published opinions by the Fourth and Fifth Circuits, and the Supreme Court of Montana, suggesting further appeals are in prospect. The fate of *Chevron* deference may now be a bit murkier.

The District Court

Eastern District of Washington

- On January 9, 2017, the US District Court for the Eastern District of Washington issued a ruling that a National Fish Hatchery operated by the Fish and Wildlife Service has, in effect, been discharging pollutants without a NPDES permit since 1979. The case is *Center for Law and Policy v. US Fish and Wildlife Service*. A NPDES permit was issued by EPA in 1975, with an expiration date of August 31, 1979, but it was never renewed. In 1981, the Service received a letter from EPA stating that the old permit was automatically extended, and the terms of the old permit would remain in effect until a decision is made on a renewal application. EPA stated that this decision was made due to budgetary constraints. However, the permit was never renewed despite several applications being made. The court held that the 1981 letter was "manifestly incorrect," and granted summary judgment to the plaintiffs.

Tenth Circuit

Court of Appeals

- On January 3, 2017, the US Court of Appeals for the Tenth Circuit issued a ruling reversing the lower court's decision that Asarco could not proceed with its claims for cost recovery at a Utah CERCLA mining site. The case is *Asarco, LLC v. Noranda Mining, Inc*.

  Asarco declared bankruptcy in August 2005, and, as the appeals court notes, "it had the dubious distinction of having the largest amount of environmental claims brought against it in any bankruptcy proceeding, totaling approximately $6.5 billion of non-duplicated proofs of claims". In 2009, the bankruptcy court of the Southern District of Texas approved a comprehensive global settlement by which Asarco agreed to pay $1.7 billion to resolve claims at 52 sites in 19 states. Included in this global settlement is a group of claims described as the "Miscellaneous Federal and State Environmental Settlement Agreement" which addressed Asarco's CERCLA liability at the Lower Silver Creek/Richardson Flat Site located in Utah. The agreed settlement was $7.4 million. Believing the global settlement that the state and federal governments have negotiated with Asarco was consistent with both the Bankruptcy Code and CERCLA, the Texas bankruptcy court approved the settlement in June 2009 as being "procedurally and substantively fair". In particular, the Miscellaneous Agreement not only benefited the

bankruptcy estate, but it was fair to both the governments and other Potentially Responsible Parties (PRPs). In addition, the Miscellaneous Settlement preserved certain rights for Asarco, including any claims it might have against non-settling PRPs at these sites.

Asarco was reorganized, and the "new Asarco" has been vigorously pursuing cost recovery claims it may have against non-settling PRPs. In June 2013, Asarco filed a cost recovery lawsuit against Noranda Mining, also a PRP at the site, asserting that it has paid more than its fair share of the cleanup costs at the Lower Silver Creek site. Noranda filed a motion for summary judgment, arguing that, as a matter of law, Asarco could not proceed with this claim. One of Noranda's chief arguments was that Asarco was "judicially estopped" from seeking contribution because it had represented to the Texas bankruptcy court that it was in fact paying its fair share of the cleanup costs when it agreed to pay $7.4 (now $8.7 million) to resolve its liability at the Lower Silver Creek site. The lower court agreed, and granted summary judgment to Noranda in March 2016. The Tenth Circuit reversed this ruling, holding that Noranda had not made a case for the imposition of judicial estoppel, which is a drastic remedy, and Noranda had not satisfied the required burden of proof. In addition, summary judgment was not appropriate at this stage of the litigation because there are contested matters of fact with respect to whether or not Asarco has paid its fair share of the cleanup costs at this site. Therefore, Asarco should have an opportunity to present evidence on this issue to the court.

- On March 29, 2017, in the case of *People For the Ethical Treatment of Property Owners (PETPO), v. the United States Fish and Wildlife Service*, the Tenth Circuit issued a unanimous decision that the Endangered Species Act (ESA) and its implementing regulations can, consistent with the Commerce Clause, regulate the "take" of the Utah Prairie Dog, a threatened and purely intrastate species, even when it is located on nonfederal land. The lower court granted summary judgment to PETPO, a nonprofit organization that was founded by Utah residents, mostly local property owners, "who suffer as a result of the regulation of the Utah prairie dog". That court reasoned that neither the Commerce Clause nor the Constitution's Necessary and Proper Clause authorized the Congress to regulate this species when it resides only in Utah, and when it is located on nonfederal land. The Tenth Circuit emphatically rejected this reasoning.

  The Tenth Circuit agreed that PETPO had standing to file and prosecute these claims. However, applying the Commerce Clause criteria spelled out by the Supreme Court in its 1995 decision in *United States v. Lopez* (and as employed in other rulings), the appeals court held that Congress was empowered by the Commerce Clause to regulate activities that substantially affect interstate commerce, and here the Congress had a rational basis, acting through the Fish and Wildlife Service, to find that this regulated activity, taken in the aggregate, would substantially affect interstate commerce. The court referenced the Supreme Court's celebrated 1942 decision in *Wickard v. Fillburn* for the proposition that even if a challenged activity is local, and even if it may not be regulated as commerce, still it may be reached by Congress if it exerts a substantial economic effect on interstate commerce. Extending protection to the Utah prairie dog was only part of the ESA's broader regulatory scheme which, in the aggregate, affects interstate commerce. To rule otherwise, and carve out an exception for the Utah prairie dog, would condemn the ESA

"to a lingering death" since so many ESA-regulated species exist as "purely intrastate" status.

Finally, the court noted that all federal appeals courts that have confronted this argument have agreed that the regulation of a purely intrastate species under the ESA is an essential part of the law's regulatory scheme, and accordingly Congress had ample authority to regulate ESA-activities on nonfederal land.

Northern District of Oklahoma

- On January 23, 2017, the US District Court for the Northern District of Oklahoma issued a ruling dismissing the plaintiff's pro se complaint that the recycling practices of the Tulsa City-County Library Commission placed an "undue obstacle" on the plaintiff's practice of Environmentalism. The case is *Krause v. Tulsa City-County Library Commission*. It was alleged that the defendant's placement of "fake" recycling bins in the downtown Central Library mounted to a hindrance to his faith, and warrants the protections of the First Amendment because the exercise of his "secular and political choices", being rooted in environmental advocacy, constitutes a religion. The court noted that the complaint contains no factual support for the plaintiff's conclusory assertion that Environmentalism is religious, and not a secular practice or lifestyle.

  The court also notes that this claim is a matter of first impression in the Tenth Circuit, but that the US District Court for the Eastern District of California, in the case of *McDavid v. City of Sacramento*, addressed an analogous claim, and held that veganism is not a religion: "All courts recognize some distinction between a religious belief and a non-religious lifestyle decision; courts will protect the former, but not the latter." The complaint suffered from other defects, requiring its dismissal.

The District Court

Western District of Oklahoma

- The US District Court for the Western District of Oklahoma has dismissed the Sierra Club's RCRA Citizen Suit, filed against several oil and gas producers seeking declaratory and injunctive relief. The case is *Sierra Club v. Chesapeake Operating, LLC, et al.*, decided on April 4, 2017.

  The plaintiff alleged that the deep well injection of liquid waste from oil and gas exploration and production activities contributed to a very large increase in the number of earthquakes experienced in Oklahoma and southern Kansas. In its complaint, the Sierra Club argued that these operations and activities present an imminent and substantial threat to public health or the environment, a situation that is subject to the relief that can be granted pursuant to Section 6972 (a)(1)(B). However, the court noted that a state agency, the Oklahoma Corporation Commission, in accordance with the regulatory powers delegated to the agency under the Safe Drinking Water Act, has been diligently engaged in developing a vigorous and aggressive response to the injection well question, and therefore the court will invoke the *Burford* abstention and primary jurisdiction

doctrines to step away from this case and dismiss this RCRA complaint without prejudice. Under the *Burford* doctrine, federal courts sitting in equity will abstain from asserting federal jurisdiction if it is necessary to protect a complex state administrative process from undue federal influence. The exercise of federal jurisdiction in this case "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern". With respect to the "primary jurisdiction" doctrine, the court described this as a determination that administrative agencies are more nimble and better equipped than the courts to handle particular questions, and that "referral of appropriate questions to an agency ensures [a] desirable uniformity of results". Monitoring and regulating the wastewater discharge practices by innumerable producers spread across thousands of square miles is a much more appropriate task for the Oklahoma Corporation Commission than a federal district court.

UNITED STATES COURT OF FEDERAL CLAIMS

- Nearly $100 million has been awarded to plaintiff oil companies by the Federal Court of Claims. On January 6, 2017, the United States Court of Federal Claims awarded Shell Oil Company, Union Oil Company of California, Richfield Company, and Texaco, Inc. this sum in a breach of contract claim litigated before the Court of Claims. Initially, in 1991, the Government filed CERCLA cost recovery actions against these companies based on the aviation gas waste generated by their Southern California refineries in World War II. They were under contract to produce aviation gas in large quantities, and the resulting waste was disposed at the McColl Site, which was placed on EPA's CERCLA NPL list. The oil companies' CERCLA defense, that the Government was also liable as an "arranger" under CERCLA, was unsuccessful, but in 2005, the California federal court transferred their breach of contact claims to the US Court of Federal Claims. Each of these World War II procurement contracts contained a "Tax Clause," which the claims court held obligated the Government to reimburse the companies for these costs. The case is *Shell Oil Company, et al. v. The United States.*

III. STATE APPELLATE COURTS

Texas

- The Texas Supreme Court has released several decisions involving aspects of environmental law.

  In *ExxonMobil Corporation v. Lazy R Ranch, et al.*, the Court reversed in part and affirmed in part the decision of the Court of Appeals for the Eighth Judicial District (sitting in El Paso) that had itself reversed the trial court's decision to grant ExxonMobil's motion for summary judgment in an oil and gas contamination case. A lawsuit was filed against ExxonMobil by the owners of the Lazy R Ranch, which encompasses nearly 20,000 acres in West Texas. For nearly 60 years, Exxon conducted oil and gas drilling and production operations on the Lazy R, and after it sold its operations in 2008, an environmental manager engaged by the ranch reported that Exxon left behind 4 areas on the ranch (totaling 1.2 acres) where hydrocarbon contamination exceeded limits established by state law. The lawsuit was filed in October 2009 seeking

$6.3 million in damages as the cost of remediation of the land. However, under Texas nuisance law those claims could not be sustained, and the lawsuit was amended to seek injunctive relief to abate or remediate the contamination, whatever the cost. Exxon moved for summary judgment on a number of grounds, including an argument that the claims were barred by a 2 year statute of limitation. The motion was granted by the trial court which did not specify it reasons for doing so. The court of appeals reversed and remanded, holding in part that the statute of limitations could not be granted as a matter of law until a number of factual issues were decided.

After scrutinizing the evidence provided to the trial court, the Supreme Court agreed that two of the four sites were subject to the statute of limitations. The court also rejected the plaintiff's argument that the "discovery rule", which plays a large role in the operation of the statute, should not apply to delay the commencement of the limitations period because the conditions on the ground were objectively verifiable. With respect the other sites, the court decided that the issue of injunctive relief was not properly before the trial court, and the remaining issues must be remanded to the trial court for disposition.

- In *ExxonMobil Pipeline Company, et al. v. Coleman*, the Court reversed the decision of the Court of Appeals for the Fifth Judicial District (sitting in Dallas). This is an employment dispute; the plaintiff (Coleman) was terminated following an internal investigation into his performance of his duties. An internal email exchange between other pipeline employees surfaced, indicating that the plaintiff failed to gauge a storage tank that was used to contain noxious and flammable fluids, whose release could result in adverse safety and environmental consequences. The former employee sued for defamation, and the defendants, including ExxonMobil Pipeline, invoked the Texas Citizens Participation Act (TCPA) to dismiss the lawsuit. The trial court denied the motion to dismiss, and this action was affirmed by the court of appeals. The lower courts were of the opinion that the TCPA does not apply to both public and private communications, but the Texas Supreme Court held that the law can apply to both forms of communication. In addition, since the concern of ExxonMobil Pipeline and its employees involved environmental and safety issues, these clearly were matters of public concern which also motivate the application of the TCPA.

- *Valero Refining-Texas, LP v. Galveston Central Appraisal District* is a complex property tax assessment case. There are three petroleum refineries located in Texas City (Marathon, BP and Valero), which are subject to property appraisal and evaluation by Galveston County, and they were appraised in 2011. Valero argued before the appraisal review board and in the courts that its property has been "over appraised", especially with respect to the valuations made for the neighboring BP and Marathon refineries, and a jury agreed with Valero. At trial, the Appraisal District argued that claims of inequality must be made against the appraised value of the entire tract on which the refinery is located, and not on an account by account basis, which reflects different units and components of the refinery. The trial court rejected this argument. The jury decided that the adjusted value of the Valero refinery should be $337 million, and not $527 million as the Appraisal District determined, taking account of the value of the refinery's pollution control equipment. The trial court then awarded Valero $5 million as well as its attorney's fees. The Appraisal District appealed, and the Fourteenth Court of Appeals

(sitting in Houston) held there was no evidence to support the jury verdict. The Supreme Court has now reversed the court of appeals and remanded the case to that court.

The very narrow issue before the court was whether a property owner's complaint of unequal taxation may be directed "to only some of the multiple accounts" established by the Appraisal District for a complex industrial property, or must it be directed to the entire tract. The Court held that, as a matter of law, the individual accounts may be challenged as unequal, noting that Valero, like other taxpayers, has the "constitutional right to equal and uniform taxation" under the Texas Constitution. The case was returned to the appeals court to decide, among other matters, whether there was sufficient evidence to support the verdict.

- On March 17, 2017, in *Engelman Irrigation District v. Shields Brothers*, the court affirmed the ruling of the Thirteenth Court of Appeals (sitting in Corpus Christi) that a decades-old (circa 1998) final judgment against a government entity—the Engelman Irrigation District—could not be declared void on the grounds that a 2006 ruling of the Texas Supreme Court on government immunity should be given retroactive effect in this instance. The Court refused to permit a collateral attack on a final judgment that became final several years before the 2006 decision was issued.

  The Irrigation District was sued in 1992 for breaching a contract to supply water. The jury awarded the plaintiff over $271,000.00 in damages, along with interest and attorney's fees. This judgment has never been paid although the verdict was affirmed by the courts in 1998. Thereafter, the Irrigation District sought authorization to file for bankruptcy under the Water Code, but this request was denied and the administrative order was also affirmed. However, one of the pillars of the Corpus Christi's court's 1997 ruling on sovereign immunity, the 1970 Texas Supreme Court decision in *Missouri Pacific Railway Co. v. Brownsville Navigation District*, was overruled by the Court in 2006 in the case of *Toole v. City of Mexia*, which held that in this context, a governmental entity had not waived its ability to claim sovereign immunity. Here, the Court held that while judicial decisions generally operate retroactively, it is the judiciary's role to map the contours of a judge-made doctrine such as sovereign immunity, and consequently, the earlier judgment was not subject to a collateral attack.

- Another case is *D Magazine Partners, et al. v. Rosenthal*, where the Court again confronts the Texas Citizens Participation Act (TCPA). This law has played a prominent role in some recent environmental controversies, where the complaint protests allegedly defamatory news items reported in the press or in the media, and the defendant invokes the protections of the TCPA to secure his or her First Amendment rights. In this case, the plaintiff alleged that D Magazine defamed her by publishing an article and posting an old photograph that argued that she was a "welfare queen" although residing in a toney Dallas neighborhood. The courts agreed that the plaintiff satisfied her evidentiary burden under the statute that she had been falsely accused—which was borne out by communications from the relevant state agency, the Texas Health and Human Service Commission. The Texas Supreme Court affirmed the Fifth Court of Appeals (sitting in Dallas) that denied the publication's motion to dismiss under the TCPA, and the case was remanded to the trial court for further proceedings. The Court, however, cautioned the

lower courts against relying on the online service Wikipedia as a primary source for their decisions. Wikipedia was consulted for the common understanding of the term "welfare queens". It noted in part that "Wikipedia consultants do not necessarily represent a cross-section of society, as research has shown they are overwhelmingly male, under forty years old, and living outside the United States."

- On April 28, 2017, The Texas Supreme Court, affirming the First Court of Appeals (sitting in Houston) issued a unanimous ruling in the case of *Forest Oil Corporation v. El Rucio Land and Cattle Company, Inc., et al*. This case involves claims for environmental contamination caused by oil and gas operations on the land of the McAllen Ranch, whether the Texas Railroad Commission has primary jurisdiction to respond to these claims, and whether the courts should overturn the decision of an arbitration panel the parties earlier agreed to in order to resolve their disputes. The court held that there is nothing in the Texas Water Code and other statutory provisions that give the Railroad Commission primary jurisdiction over oil and gas contamination disputes if the parties exercise their common law remedies in court.

  In the 1990s, the parties agreed to settle the McAllen's claims for underpayment of royalties and the underproduction of the leases with a "Settlement Agreement" which incorporated an arbitration agreement. In 2007, McAllen asked the Railroad Commission to investigate contamination of the Ranch by Forest, and the agency referred Forest to the Commission's voluntary Operator Cleanup Program. Forest submitted cleanup plans to the Commission, but the agency has yet to approve Forest's final remediation plans. Forest also moved to compel arbitration, and a three person panel was selected by the parties. However, the arbitration panel, in a divided ruling, refused to abate the proceedings pending final action by the Railroad Commission, and then awarded the McAllen interests $15 million for actual damages, $500,000 for exemplary damages, $6.7 million in attorney fees, and James McAllen personally $500,000 for personal injury actual damages. The arbitration panel also ordered Forest to provide McAllen with a $10 million bond to assure performance of Forest's continuing cleanup obligations. Forest then moved to vacate the award, arguing that the Railroad Commission has exclusive or primary jurisdiction, precluding the disputed arbitration, and that there was evidence that one of the arbitrators selected to serve on the panel had a conflict of interest. The courts, including the Texas Supreme Court, vacated the $10 million bond requirement, but rejected all the other arguments of Forest Oil. This decision is an important statement of the Court's views on primary agency jurisdiction when the courts themselves have broad jurisdiction to decide these matters.

- The Court also decided that Texas counties can levy property taxes on natural gas held in storage in Texas while awaiting future resale and shipment to out-of-state consumers. The case *is ETC Marketing, Ltd. v. Harris County Appraisal District*. Affirming the First Court of Appeals, the Court rejected the argument that taxing the temporary storage of natural gas conflicts with the Commerce Clause. Applying the test developed by the United States Supreme Court in Complete Auto Transit v. Brady, 430 US 274 (1977), the Court held that this action passes constitutional muster because the tax is fairly apportioned, does not discriminate against interstate commerce, applies to an activity with a substantial nexus with the state, and is fairly related to the services provided by the

state. Accordingly, the taxing authority's decision to appraise the value of approximately 33 billion cubic feet of natural gas was upheld. However, Chief Justice Hecht dissented, remarking that "Gas storage is integral to interstate transportation as a matter of fact. To hold as the Court does that storage of gas to facilitate its interstate shipping is nothing more than a shipper's business choice directly contradicts not only the Supreme Court, but the Federal Energy Regulatory Commission, and most importantly, the laws of physics."

- On May 19, 2017, the Texas Supreme Court decided the case of *Town of DISH, et al., v. Atmos Energy Corporation, et al*. Reversing the Seventh Court of Appeals (sitting in Amarillo, Texas), the Supreme Court reinstated the summary judgment ruling of the trial court which dismissed the complaints of the Town of Dish and some of its residents regarding the operations of the energy companies located just outside the Town of Dish and within a half-mile of the residents' properties. The plaintiffs generally complained in 2006 that the operation of three natural gas compressor stations and a nearby metering station generated intolerable odors and noise, and they alleged that a nuisance and a trespass was taking place. The trial court held that these lawsuits were untimely, as they were not filed within two years of their accrual, as required by statute. The Seventh Court of Appeals reversed the trial court, holding that the energy companies failed to prove as a matter of law that the residents' claims accrued before February 28, 2009 (the case was filed on February 28, 2011). However, the Texas Supreme Court, noting from the record that the last compressor station came on line in August 2008, and there were town meetings convened to address these problems as early as 2006, held that the limitations period began to run at least as late as 2008.

- The Court also decided the case of *Lightning Oil Company v. Anadarko E&P Onshore, LLC.*, in which it affirmed the ruling of the Fourth Court of Appeals sitting in San Antonio. The question before the Court was this: can an oil and gas operator drill through a mineral estate it does not own to reach minerals it has leased which are located under an adjacent tract of land? Is the mineral estate, through which the company wished to drill, the dominant estate whose permission is required before such directional drilling can begin? Lightning Oil Company sued Anadarko for trespass and tortious interference with its mineral lease. Considering the "attributes of severed mineral interests" and balancing the interests of Lightning Oil and Anadarko, the Court ruled that Lightning's arguments in this case did not support claims for trespass and tortious interference.

Texas Court of Appeals

Third Court of Appeals (Austin)

- On March 24, 2017, the Texas Third Court of Appeals (sitting in Austin) issued an important decision regarding the application of the state's statute of limitations in a class action lawsuit. The case is *Asplundh Tree Co. v. Abshire, at al*. Following a devastating 2011 fire in Bastrop County, Texas, which damaged scores of homes, hundreds of lawsuits were filed against Asplundh, a utility contractor that conducts tree pruning and vegetation management. It was hired by the local electric utility to maintain electric easements in the area in which the fire started and spread with calamitous results. The

original plaintiffs, mostly home and business owners and their insurers, alleged that the acts or omissions of Asplundh led to the ignition of the fire that damaged their properties. These claims were settled, but in May 2012, a class action was filed on behalf of a second set of plaintiffs (numbering in the hundreds), known as the "Bastrop Plaintiffs." Initially, their claims were based on claims of alleged negligence, gross negligence and nuisance. The complaint was amended to base their damage claims on a decline in property values, while seeking actual and exemplary damages. The trial court dismissed the class certification in March 2015, and three groups of the Bastrop Plaintiffs filed separate lawsuits in March and April 2015. Asplundh then filed a motion for summary judgment arguing that the applicable two year statute of limitations had expired with respect to all claims except those based on a diminution in land values. In response, the trial court held that the filing of the class action and its subsequent amendments tolled the statute of limitations. The court, however, permitted Asplundh to seek permissive review in the court of appeals.

The Third Court of Appeals affirmed the lower court, holding that a 1974 decision of the United States Supreme Court, *American Pipe & Construction Company v. Utah*, 414 U.S.538 (1974), which held that the Utah statute of limitations was tolled by the filing of a class action. Asplundh argued that American Pipe's tolling doctrine only applied to federal claims, and a similar tolling doctrine has "not been explicitly adopted by the Texas Supreme Court." While acknowledging that the Texas Supreme Court has not been asked to determine whether a tolling doctrine similar to that recognized by American Pipe applies in Texas, the Third Court of Appeals noted that every Texas intermediate appellate court that has addressed this issue has held that a similar doctrine does indeed exist in Texas.

First Court of Appeals (Houston)

- On April 20, 2017, an intermediate Texas court of appeal, the First Court of Appeals (sitting in Houston), reversed the trial court and directed that court to reinstate an environmental enforcement action that had purportedly been settled by agreement of the officials of Brazoria County, Texas and the defendants. The case is *The State of Texas v. Brazoria County and Daniel Infante, Humberto Lumbrero, Isidro Dejesus Luna, and Ma Dejesus Luna*. Brazoria County brought an environmental enforcement action against the defendants for violating state and county regulations regarding sewage disposal and the use of on-site sewage facilities. By law, the Texas Commission of Environmental Quality (TCEQ) is a "necessary and indispensable party" to these proceedings, and the TCEQ participated in this proceeding as an "aligned party." Notwithstanding these state law requirements, Brazoria County and the defendants negotiated a settlement without the participation of the State of Texas, and the trial court accepted the agreement. The State objected to the settlement, and did not sign it; however, the trial court overruled the State's objections. The court of appeals reversed, holding that none of the parties had complied with the requirements of the Texas Water Code that governs such proceedings. The final judgment of the trial court was set aside and the matter was returned to the lower court for further proceedings.

California

- On February 27, 2017, the California Supreme Court issued a ruling regarding interpretation of the California Endangered Species Act (CESA). The case involved a group that was seeking to have the coho salmon delisted from waters south of San Francisco. The Court of Appeals had dismissed the plaintiffs' case on procedural grounds, finding that a delisting petition could not be used to challenge an original listing decision under CESA. The Supreme Court reversed and remanded to the lower court for consideration on the merits, finding that CESA allows the agency to consider new evidence of pre-listing conditions in order to reconsider and earlier listing, rather than being limited to consideration of only new, post-listing, conditions. On remand, the Court of Appeals will consider the meaning of "native species" and "range" under CESA, and also decide whether the agency can delist only a portion of the listed species based on population locale. The case is *Central Coast Forest Association, et al. v. Fish and Game Commission*.

- On March 30, 2017, the California Supreme Court found that an Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA) was inadequate because it omitted any consideration of potential environmentally sensitive habitat areas (ESHA) on the project site, as well as ESHA that were already identified. The case involved a conservancy group that opposed a development project by alleging that the EIR was inadequate for failing to consider ESHA and accounting for those areas in its analysis of project alternatives and mitigation measures. The case is *Banning Ranch Conservancy v. City of Newport Beach, et al*.

- On March 2, 2017, the California Supreme Court issued a ruling involving the scope of writings that may be subject to disclosure under the California Public Records Act (CPRA). The Court held that when a city employee uses a personal account to communicate about the conduct of public business, those communications can be subject to disclosure under CPRA. The case is *City of San Jose v. The Superior Court of Santa Clara County.*

- On January 23, 2017, the California Supreme Court addressed the level of deference that a court should give to an agency's interpretation of its own relevant statutes. The Court reaffirmed previous decisions in which it held that when the legislature uses open-ended language that implicates policy choices of the sort the agency is empowered to make, then a court may find that the legislature delegated the task of interpreting or elaborating on the statutory text to the administrative agency. Further, where an agency has been granted both the power to adjudicate and to promulgate rules, the court will defer to the agency's choice of how to proceed. The case is *Association of California Insurance Companies v. Jones*.

Colorado

- On March 23, 2017, the Colorado Court of Appeals issued a ruling reversing the trial court and the Colorado Oil and Gas Conservation Commission which had denied the petitioners' request that the Commission, when promulgating rules affecting oil and gas

production operations and activities in Colorado, must essentially consider public health and environmental conditions to be determinative. The case is *Martinez et al. v. Colorado Oil and Gas Conservation Commission*. The American Petroleum Institute and the Colorado Petroleum Association were intervenors, and a large number of environmental groups supported the petitioners.

The petitioners proposed a rule whereby the Commission would not issue any drilling permits unless an impact review was first conducted which determined that the "best available evidence demonstrates, and an independent third party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources…and does not contribute to climate change." The Commission, after conducting a hearing and receiving comments, basically decided that the requested rule mandated action that was at variance with the limited statutory authority delegated to the Commission. Moreover, any interpretation of the statutory authorizations as advocated by the petitioners would upset the balancing of interests mandated by law. The trial court held that the law requires that there be a balance between developing oil and gas resources and public health and safety. The court of appeals reversed in a 2 to 1 decision, holding that the Commission must proceed, as the law provides, "in a manner consistent with public health and safety," and any balanced development must be subject to these predominant values. Consequently, the "balancing test" employed by the Commission is based on an erroneous interpretation of the Commission's legal authority.

Massachusetts

- On February 14, 2017, the Supreme Judicial Court of Massachusetts reviewed the application of the state's "anti-SLAPP" law in the case of *Cardno Chemrisk, LLC v. Cherri Foytlin & Another*.

  Following the 2010 Deepwater Horizon Oil Spill, Chemrisk, a scientific consulting company, was engaged by BP to assess the toxic effects of the oil spill on cleanup workers. Chemrisk concluded that any exposures were "substantially below the permissible limits set by the Occupational Safety and Health Administration." Two environmental "activists" took exception to the conclusion, and produced a very critical review of Chemrisk's BTEX report and published their critique in the Huffington Post. They were critical of BP's environmental record, and the reports Chemrisk prepared in the "Erin Brokovich case." Chemrisk demanded a retraction, and when this was not forthcoming, sued the activists for defamation in New York and Massachusetts. The New York litigation was dropped, and the Massachusetts litigation commenced in 2014. In 2015, the defendants filed a "special notice" to invoke the protective provisions of the Massachusetts "anti-SLAPP" law, but this motion was denied by the trial court which held that the defendant's blog posting did not concern or advance the defendant's own interests, but those of the cleanup workers.

  The Supreme Judicial Court has now ruled, in a unanimous opinion, that the lower court's decision was erroneous, and that the Massachusetts "anti-SLAPP" law obtains. The defendants were engaged in a "protected petition activity" which was the sole basis

of the plaintiff's defamation claim, and therefore, they met the threshold burden imposed by the law. The burden then shifted to the plaintiffs to provide by a preponderance of the evidence that the allegations in the blogged article were devoid of any reasonable factual support or arguable basis in law," and the plaintiffs failed to meet this test. The case was remanded to the trial court to enter a judgment consistent with this opinion, and the defendants were authorized to apply for reimbursement of their appellate fees and costs.

Oregon

- On February 9, 2017, the Oregon Supreme Court affirmed the decisions of the Oregon Environmental Quality Division and the Oregon Court of Appeals that Oil Re-Refining Company (ORRCO) was strictly liable for "simple" violations of the Oregon state Resource Conservation and Recovery Act (RCRA) rules. The case is *Oregon Re-Refining Company v. Environmental Quality Commission of the Department of Environmental Quality for the State of Oregon*.

  ORRCO is a waste management company whose customer was Absorbent Technologies, Inc., (ATI) a company that made a "starch-based soil amendment" for which methanol was used to extract water from the mixture. In 2004, ATI determined that its processes produced too much wastewater, and an arrangement was made with ORRCO to pick up and treat the waste. ORRCO was not permitted to handle hazardous wastes, and following site visits and a review of ATI documents, determined that the wastewater was a non-hazardous waste that it was authorized to handle. ATI did not provide ORRCO with any hazardous waste manifests to accompany and document the transportation of the waste material. In 2005, EPA opened an investigation into ATI which eventually led the Oregon agency to investigate ORRCO. In 2009, the department issued notices of violation to ORRCO, alleging several violations of the Oregon rules that require all hazardous waste shipments to be accompanied by a RCRA manifest, and several alleged violations the state's permitting rules (i. e., operating a hazardous waste treatment facility without a permit). At the administrative hearing, ORRCO argued that the waste material was not a hazardous waste, and, in any event it reasonably relied upon the assurances of ATI that the water/methanol waste was not hazardous. However, the ALJ determined that the waste material was hazardous waste, and that regardless of the intentions of ORRCO, it was subject to a strict liability standard that applied to these RCRA hazardous waste rules. The Environmental Quality Commission then assessed a civil penalty of $118,800. The penalty was approved by both the Oregon appellate court and the Oregon Supreme Court.

  In front of the Oregon Supreme Court, ORRCO argued that the Commission erroneously held that these manifest and permit requirements imposed a standard of strict liability. The court, after analyzing RCRA, concluded that RCRA's civil enforcement provisions establish a strict liability regime for "simple violations" (such as the manifest and permitting rules). In addition, public welfare considerations support the strict liability view of the law and its state implementing regulations, and accordingly, ORRCO's reliance on the assurance of its customer were unavailing.

Pennsylvania

- On January 11, 2017, the Commonwealth Court of Pennsylvania decided the case of *EQT Production Company v. the Department of Environmental Protection of the Commonwealth of Pennsylvania*, and granted EQT's application for summary relief. EQT owns and operates natural gas wells and an adjoining impoundment, fitted with an impervious synthetic liner to contain the water produced by EQT's natural gas production. According to the court, in May 2012, EQT notified the DEP that its impoundment was leaking into the subsurface beneath the impoundment. In short order, EQT undertook remedial actions in response to the leak, including actions required by state law to remediate the spill, which seems to have been satisfactory. In May 2014, the DEP made a settlement offer to EQT for its alleged violations of the Clean Streams Act, proposing that the EQT pay $1.3 million to settle these violations. According to the DEP, most of the penalty amount was based on "new, continuing and ongoing impacts to the multiple waters of the Commonwealth after the initial May 2012 release from the impoundment. EQT challenged the action in court, and in discovery, EQT learned that the agency's proposed penalty was based on continuing violations of the Clean Streams Act (the continuing pollution to groundwater), and that the agency's internal deliberations disclosed that it believed it could make a claim for almost $82 million.

  The Commonwealth Court rejected the agency's interpretation of the Clean Streams Act that every time a person allows its industrial waste to flow from one body of water to another that person is committing a new and separate violation of the law. The court held that the agency's argument was not supported by a close reading of the text of the law, and moreover, if that interpretation were to be sustained, a simple unpermitted release would confront the defendant with potentially limitless liability.

Washington

- On January 12, 2107, the Supreme Court of the State of Washington issued a unanimous ruling holding that both the Court of Appeals and the state's Shorelines Hearing Board had erroneously interpreted the state's Ocean Resources Management Act (ORMA) as having no application to applications submitted to the Board to expand two large oil terminals located on the shores of Grays Harbor. The case is *Quinault Indian Nation, et al. v. Imperium Terminal Services, LLC, et al*.

  Westway Terminal wanted to expand its existing oil terminal by constructing four new above ground petroleum storage tanks. Imperium Terminal Services also hoped to expand its existing oil terminal by constructing nine additional above ground storage tanks. If both expansion projects were approved and constructed, there would be substantially increased train and ocean vessel traffic. Both applicants filed for substantial shoreline development permits, and not ORMA, arguing that these were shoreline developments, not ocean-based projects subject to ORMA. The Washington Department of Ecology made a determination that both projects would not result in any substantial environmental impairment. The Washington Supreme Court held that ORMA and its provisions do in fact apply here, because the law is to be broadly interpreted, and it specifically addresses threats posed by the "fossil fuel industry along the Pacific Coast."

To the extent the Department of Ecology rejects this interpretation of ORMA, the court held that it could substitute its interpretation of the law for that of the agency. Consequently, revised applications for the necessary permits must be submitted in accordance with the procedures established by ORMA.

If you have any questions or comments, or would like to have a copy of any of the opinions, please let us know.

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