

## 2010-2011 ENVIRONMENTAL LAW SURVEY

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### INTRODUCTION<sup>1</sup>

Here, we survey the federal and Indiana court decisions decided between October 1, 2010 and September 30, 2011 that are most likely to affect the Indiana environmental law practitioner.<sup>2</sup>

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1. All opinions expressed in this article are solely those of its authors, and should not be construed as opinions of Ice Miller LLP or any other person or entity.

2. Additional decisions, that because of space constraints could not be addressed here but that may nonetheless be of interest, include: *Huber v. New Jersey Department of Environmental Protection*, 131 S. Ct. 1308 (2011) (denying writ of certiorari in New Jersey appellate court decision upholding a warrantless search of residential backyard with wetlands, noting that denial of certiorari was appropriate because of procedural posture of case and not because of an agreement with the appellate court's holding); *Oceana, Inc. v. Locke*, 670 F.3d 1238 (D.C. Cir. 2011) (holding that National Marine Fisheries Service did not sufficiently establish standardized bycatch reporting methodology); *In re Aiken County*, 645 F.3d 428 (D.C. Cir. 2011) (holding that petitions challenging Department of Energy's attempt to withdraw application to license Yucca Mountain permanent nuclear waste repository were not ripe and policy announcement was not final agency action); *Sierra Club v. Jackson*, 648 F.3d 848 (D.C. Cir. 2011) (holding that discretionary EPA decision issuing permits for construction of major source facilities was not subject to judicial review); *United States v. Phillips*, 645 F.3d 859 (7th Cir. 2011) (holding that indictment of apartment building owner for removing and disposal of asbestos was sufficient); *Alcoa Power Generating Inc. v. F.E.R.C.*, 643 F.3d 963 (D.C. Cir. 2011) (affirming agency approval of license renewal of hydroelectric project); *Village of Barrington v. Surface Transportation Board*, 636 F.3d 650 (D.C. Cir. 2011) (holding that Surface Transportation Board had authority to impose environmental conditions when approving "minor" railroad mergers and that agency complied with National Environmental Policy Act when it approved merger); *Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011), *cert. granted*, 132 S. Ct. 845 (Dec. 12, 2011) (holding that Michigan resident had Article III and prudential standing to sue in action challenging Secretary of the Interior's decision

Continuing on the developments from the prior survey period, this year's survey period presented several key decisions. In Part I, we survey issues surrounding the Clean Air Act (CAA).<sup>3</sup> In Part II, we discuss federal cases involving CERCLA and RCRA. Part III examines cases involving water rights. In Part IV, we address other recent federal cases. Part V considers recent environmental case law arising under state law. Finally, Part VI examines recent opinions that may impact environmental insurance coverage cases under Indiana law.

### I. DEVELOPMENTS IN CLEAN AIR ACT CASES

In Part I, we survey issues surrounding the Clean Air Act, including a Supreme Court rejection of private suits relating to greenhouse gas emissions, California's regulation of automobile emissions, and judicial review of EPA rulemaking on emissions. Litigation in matters involving the CAA continued to play a role in shaping environmental law, primarily at the federal level.

#### A. *American Electric Power Co v. Connecticut: Clean Air Act Displaced Private Cause of Action Regarding GHG Emissions*

In *American Electric Power Co. v. Connecticut*,<sup>4</sup> the U.S. Supreme Court accepted review of a case involving a suit against a group of electric power corporations that owned fossil-fuel fired power plants. Plaintiffs brought a negligence suit based on the theory that the defendants' operations contributed

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to take a parcel of adjacent land into trust on behalf of Indian tribe for casino use); *Hardin v. Jackson*, 625 F.3d 739 (D.C. Cir. 2010) (affirming lower court decision granting Environmental Protection Agency's (EPA) motion to dismiss challenge of EPA pesticide registration for rice crops), *reh'g en banc denied* (Jan. 7, 2011); *United States v. Cinergy Corp.*, 623 F.3d 455 (7th Cir. 2010) (holding that expert testimony offered by the EPA was improper and without expert testimony to support an estimate of actual emissions caused by the modifications and that the EPA cannot prevail with respect to nitrogen oxide pollution); *Wickens v. Shell Oil Co.*, No. 1:05-cv-645-SEB-TAB, 2011 WL 3877102 (S.D. Ind. Aug. 31, 2011) (rejecting sanctions motion filed by formerly represented parties against their prior attorney, insurer, and environmental consultant; entering order finding Shell has satisfied the judgment against it); *Continental Insurance Co. v. NIPSCO*, Nos. 2:05-CV-156, 2:05-CV-213, 2011 WL 1322530 (N.D. Ind. Apr. 5, 2011) (rejecting request to continue stay of insurance proceeding during the pendency of further EPA investigation); *Bernstein v. Bankert*, No. 1:08-cv-0427-RLY-DML, 2011 WL 470430 (S.D. Ind. Feb. 3, 2011) (rejecting motion to reconsider summary judgment favoring defendant under the ELA based on statute of limitations and refusing to certify accrual question to the Indiana Supreme Court); *Gast v. Dragon ESP, Ltd.*, No. 1:09-cv-465-RLY-DML, 2010 WL 4702333 (S.D. Ind. Nov. 12, 2010) (dismissing plaintiffs' cause of action against local planning commission for insufficiency of process in dispute over noise and air pollution allegedly caused by manufacturing facility in rural community); *Indiana-Kentucky Electric Corp. v. Save the Valley, Inc.*, 953 N.E.2d 511 (Ind. Ct. App. 2011).

3. 42 U.S.C. §§ 7401-7671 (2006 & Supp. 2010).

4. 131 S. Ct. 2527 (2011).

to global warming and therefore the emissions substantially and unreasonably interfered with public rights, violating federal common law of interstate nuisance or, alternatively, state tort law.<sup>5</sup>

The Court held the CAA and the actions by the EPA in enforcing the CAA displaced the private cause of action brought by the plaintiffs.<sup>6</sup> In rendering its decision, the Court provided a historical perspective on the regulation of greenhouse gases by the EPA. In *Massachusetts v. EPA*<sup>7</sup> the Court held that the CAA authorized EPA to regulate greenhouse gas emissions.<sup>8</sup> As a result of that decision, the EPA began the rulemaking process, finding greenhouse gas emissions from motor vehicles caused or contributed to air pollution which could “reasonably be anticipated to endanger public health or welfare” and therefore rulemaking was appropriate.<sup>9</sup> While initial rulemaking focused solely on motor vehicles, EPA subsequently began developing rules requiring any new or modified major greenhouse gas emitting facility to use best available control technology to control emissions.<sup>10</sup>

The Court then turned its attention to the nuisance claim brought in the current action. Recognizing that it is not typical for courts to be legislative bodies establishing federal common law, the Court found that environmental protection is one area of law where it may be appropriate to do so.<sup>11</sup> However, where Congress has prescribed a regulatory scheme, the ability to develop federal common law judicially is displaced.<sup>12</sup> For example, the Court held in *Milwaukee v. Illinois*<sup>13</sup> that “when Congress addresses a question previously governed by a decision rested on federal common law, the need for . . . law-making by federal courts disappears.”<sup>14</sup> The question as to displacement of federal common law rests on whether a statute speaks directly to the question at issue.<sup>15</sup> The Court found that the Act and EPA’s rulemaking actions in regulating greenhouse gas emissions after the decision in *Massachusetts v. EPA* did displace “any federal common law right” to seek abatement of fossil fuel plant carbon dioxide emissions.<sup>16</sup> If EPA did not set emission limits for a particular source or pollutant, the appropriate action would be to petition rulemaking, and EPA’s response to such request would then be reviewable in court.<sup>17</sup>

Plaintiffs attempted to argue there is no displacement until EPA actually

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5. *Id.* at 2529.

6. *Id.* at 2537-38.

7. 549 U.S. 497 (2007).

8. *Am. Elec. Power Co.*, 131 S. Ct. at 2532 (citing *Mass.*, 549 U.S. 497).

9. *Id.* at 2533.

10. *Id.*

11. *Id.* at 2535.

12. *Id.* at 2536-37.

13. 451 U.S. 304 (1981).

14. *Am. Elec. Power Co. Inc.*, 131 S. Ct. at 2537 (quoting *Milwaukee*, 451 U.S. at 314).

15. *Id.* (citing *Mobil Oil Corp v. Higginbotham*, 436 U.S. 618, 625 (1978)).

16. *Id.*

17. *Id.* at 2538.

chooses to exercise its regulatory authority, or, in this scenario, until it sets standards for defendant's plants.<sup>18</sup> The Court held, however, that the delegation to EPA by Congress to determine whether and how to regulate carbon dioxide emissions from power plants is what displaces common law here.<sup>19</sup> A review of that delegated authority is subject to judicial review as a practical matter and if the plaintiffs are not satisfied with EPA's regulations, they can petition separately to have those reviewed.<sup>20</sup> The Court recognized that deference be given to EPA as the appropriate authority to study and develop standards, since judges lack the scientific, economic and technological resources an agency has at its disposal.<sup>21</sup> Because rulemaking had been delegated and undertaken by EPA in regards to carbon dioxide, the plaintiffs' request for judicial limits to be set on defendants' emissions was denied.<sup>22</sup> The question regarding state tort claims was remanded for further consideration by the lower court.<sup>23</sup>

### *B. Federal Preemption and Standing*

*Chamber of Commerce of the United States v. EPA*<sup>24</sup> involved the California waiver from federal pre-emption prescribed under the CAA. While the CAA generally bars states from adopting their own emissions standards for new motor vehicles, there is an exception to federal preemption for a State that has adopted standards "for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966," if the standards will be, in the aggregate, "as protective of public health and welfare as applicable [f]ederal standards."<sup>25</sup> California was the only state that had adopted emissions prior to March 30, 1966 and was the only one granted preemption.<sup>26</sup> In 1977 the CAA was amended, allowing other states to adopt and enforce standards identical to California's as long as manufacturers were given two years lead time.<sup>27</sup>

The Chamber of Commerce ("Chamber") and the National Automobile Dealers Association (NADA) sought review of an EPA decision granting California a waiver from federal preemption under the CAA. The waiver at issue involved a request by California to EPA to allow the State to develop rules regulating greenhouse gas emissions for new motor vehicles that would preempt any federal rules that may be developed.<sup>28</sup> After a battle between California and EPA over whether to grant the federal preemption, a waiver ultimately was

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18. *Id.*

19. *Id.*

20. *Id.* at 2539.

21. *Id.*

22. *Id.* at 2540.

23. *Id.*

24. 642 F.3d. 192 (D.C. Cir. 2011).

25. *Id.* at 196 (quoting 42 U.S.C. § 7543(b)(1) (2006)).

26. *Id.*

27. *Id.* (citing 42 U.S.C. § 7507 (2006)).

28. *Id.* at 197-98.

obtained, based in large part on California's demonstration that its standards were intended at least in part to address local or regional air pollution issues.<sup>29</sup> California then established emission standards for manufacturers to have in place for model years 2009-2011, and 2012-2016.<sup>30</sup> The Chamber and NADA sought review of the waiver decision and a challenge on the standards established by California for model years 2009-2011 and proposed limits for model years 2012-2016. However, as is common in litigation, during the pendency of this action the EPA and the National Highway Transportation Safety Administration adopted national standards to allow manufacturers to sell a "single light-duty national fleet" that satisfied California and federal standards for model years 2012-2016, and California agreed to use these standards as well.<sup>31</sup> As a result of negotiations and concessions by and between the various regulatory bodies and automobile manufacturers, the auto manufacturers agreed not to contest the California waiver or the 2012-2016 federal standards.<sup>32</sup> The Chamber and automobile dealers did not agree to such a restriction and brought the current challenge.

The central issue in the case at hand involved whether the Chamber and NADA had standing to sue. Neither brought the action on their own behalf, but rather sued on behalf of their members. When a petitioner claims associational standing, it is not enough to claim in general that its members have been harmed, but must name specific members that have suffered injury.<sup>33</sup> Although the Chamber failed to specifically name any members that were harmed, the NADA identified members that could be conferred with standing.<sup>34</sup>

Standing is demonstrated by showing an injury in fact that is concrete and particularized and actual and imminent, a causal connection between the injury and the conduct complained of, and that the injury is likely to be redressed by a favorable decisions.<sup>35</sup> In regards to the first element concerning injury in fact, the injury alleged by the dealers was based on a potential future injury rather than actual, and in order to prevail on a future claim the injury must be certainly impending to constitute an injury in fact.<sup>36</sup> Also, because the dealers represented by NADA are not the direct object of the government action (manufacturers are), they have a higher burden of proof to demonstrate causation and redressability of the injury alleged.<sup>37</sup>

In regards to the claims for the 2009-2011 standards, the NADA dealers alleged the regulations could impose a restriction on the ability of manufacturers to sell cars in certain areas if the standards could not be met in the design of the car. However, the court found the evidence presented to support this claim was

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29. *Id.*

30. *Id.*

31. *Id.* at 198.

32. *Id.*

33. *Id.* at 199.

34. *Id.*

35. *Id.* at 200.

36. *Id.*

37. *Id.* at 201.

too speculative and no actual injury or certainly imminent danger was demonstrated.<sup>38</sup> The plaintiffs also argued the possibility of manufacturers mix-shifting the car types sent to different states would impact the ability to meet consumer demand and also may increase the prices of automobiles.<sup>39</sup> The court, however, was not convinced this was “substantially probable” to occur and did not find it supportive of an injury claim.<sup>40</sup>

The standing analysis for NADA members did not improve for model years 2012-2016. Although NADA attempted to argue the regulations could pose an undue burden on manufacturers’ ability to produce cars meeting the standards, the court found that manufacturers would have difficulty proving an economic burden argument in light of fact they have corporate mission statements concerning a commitment to improving fuel economy and emissions.<sup>41</sup> Furthermore, because EPA set a national standard for model years 2012-2016, the other issues are moot because manufacturers will need to meet the standards for cars sold anywhere in the United States.<sup>42</sup> Thus, the issue of granting a waiver to California turned out to be inconsequential.<sup>43</sup> NADA attempted to argue that their members could still be harmed more than manufacturers in other states because they could face enforcement from EPA and California and that since the California regulations had not yet been amended to reflect the national standards, the members could still be subject to the California standards if the federal standards were invalidated. The NADA also expressed concern that California might not actually follow the national standard.<sup>44</sup> Again, the court felt these arguments were too speculative in nature to give rise to standing for NADA.<sup>45</sup> And while NADA also requested the EPA decision to grant the waiver to California be vacated in light of the federal standards, the court declined to do so, arguing an avenue exists for challenging standards promulgated by EPA and admonishing the NADA that their claims again would be more appropriate if brought by manufacturers themselves rather than dealers since this is the direct target of the regulations.<sup>46</sup>

### C. Challenge to EPA Rulemaking Procedures Under MACT

*Medical Waste Institute and Energy Recovery Council v. EPA*<sup>47</sup> involved a challenge to EPA’s resetting emission control performance standard applicable to hospital/medical/infectious waste incinerators (HMIWI). By way of general

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38. *Id.* at 202.

39. *Id.* at 203.

40. *Id.*

41. *Id.* at 205.

42. *Id.* at 205-06.

43. *Id.*

44. *Id.* at 206-09.

45. *Id.* at 209.

46. *Id.* at 211.

47. 645 F.3d.420 (D.C. Cir. 2011).

background, the CAA directs EPA to set “required levels of emissions reductions for nine listed air pollutants” and prescribes the factors to consider in establishing such standards.<sup>48</sup> The level of emission controls stated by EPA under this provision is typically referred to as a maximum achievable control technology, or MACT standard.<sup>49</sup> EPA is directed to establish MACT floors, i.e., minimum levels of stringency for meeting the standards, with an allowance to set more stringent standards if needed, and to review and revise them every five years.<sup>50</sup>

The plaintiffs alleged that the data used by EPA in establishing the MACT standard for HMIWI was deficient, that the “pollutant-by-pollutant” approach in determining target emission levels was impermissible, and that the EPA’s decision to remove the startup, shutdown, malfunction (SSM) exemption from the standards was arbitrary.<sup>51</sup> EPA responded, arguing that the Court did not have authority to review the last two issues and that the data set used by EPA in setting the standards was justified.<sup>52</sup>

EPA’s first attempt at setting the HMIWI MACT standards began in 1997 and was challenged and remanded for further consideration and explanation of how the EPA developed the standards.<sup>53</sup> After several more attempts at issuing proposed rules and refining its approach for calculating the MACT floor for HMIWI, EPA issued a final rule in 2009.<sup>54</sup> The plaintiffs challenged the data relied on by EPA in setting the MACT standard in final rule. They claimed the data set used by EPA was flawed data since it relied on calculations for data obtained after a number of HMIWI shut down in response to the first rulemaking attempt which skewed the emission results, and also on the fact that the original proposed rule was remanded and not vacated; so EPA should not have used a new data set but instead used the original data which included even those facilities that had been closed.<sup>55</sup> In turn, EPA argued it was not precluded from resetting the MACT floors to correct data errors and the court agreed, finding that although the time gap between remand and final rule was long, nothing prevented EPA from looking at additional data in setting the MACT floor in the final rule.<sup>56</sup> And the fact the original proposed rule was remanded rather than vacated was not to be seen as an affirmation by the court of the data used by EPA originally.<sup>57</sup>

Plaintiffs also disagreed with EPA’s decision to set a pollutant by pollutant standard, but the court found this argument was time-barred since the pollutant by pollutant regulatory approach was used in the first proposed rule and the

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48. *Id.* (citing 42 U.S.C. § 7429 (2006)).

49. *Id.* at 423.

50. *Id.*

51. *Id.* at 422.

52. *Id.*

53. *Id.* at 423.

54. *Id.* at 424.

55. *Id.* at 424-25.

56. *Id.* at 425.

57. *Id.*

plaintiffs failed to challenge it then.<sup>58</sup> Plaintiffs also challenged EPA's removal of the SSM exemption from the final rule. The SSM exemption was in place in the original proposed rule; but because the EPA had received judicial directive to remove the SSM exemption from other standards, it removed the SSM from the final HMIWI MACT standard as well.<sup>59</sup> Plaintiffs argued that because the exemption was in the proposed rules but taken out of the final rule they did not have an opportunity object during the comment period.<sup>60</sup> However, the court found plaintiffs could have filed a motion for reconsideration to include their challenge to the SSM exemption removal and their failure to do so resulted in the waiver of that objection.<sup>61</sup>

## II. DEVELOPMENTS IN FEDERAL REGULATION OF RCRA AND CERCLA

This year, several key opinions were rendered involving the Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response Compensation and Liability Act (CERCLA). The Seventh Circuit discussed the requirements for granting consent decrees and held that a RCRA citizen suit could proceed to the extent that it went beyond the scope of a prior IDEM action. The Northern District of Indiana also addressed the requirements for granting consent decrees, allowing a CERCLA action to proceed even though the accompanying ELA claim was precluded, holding that an administratively dissolved corporation that had not published notice of its dissolution could not avail itself of the statute of limitations, and finding that joint and several liability was inappropriate in a CERCLA action and apportioned liability instead.

### *A. Two-Year Statute of Limitations Did not Protect Administratively Dissolved Corporation Who Did not Properly Dissolve and Notify Creditors: United States v. ARG Corp.*

In *United States v. ARG Corp.*,<sup>62</sup> the United States sued ARG for contribution under CERCLA. ARG was an Indiana corporation that owned a 440,000 square foot industrial site located in South Bend, Indiana.<sup>63</sup> In October 2006, ARG sold its site to the South Bend Redevelopment Commission (SBRC).<sup>64</sup> The SBRC soon suspected that the property might be contaminated and contacted the EPA.<sup>65</sup> The EPA investigated and determined that "the site presented an imminent danger to the public health, welfare, and the environment."<sup>66</sup> The EPA ordered ARG to remedy the contamination, and the government subsequently spent over \$800,000

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58. *Id.* at 426-27.

59. *Id.* at 427.

60. *Id.* at 428.

61. *Id.*

62. No. 3:10-CV-311, 2011 WL 338818 (N.D. Ind. Jan. 31, 2011).

63. *Id.* at \*1.

64. *Id.*

65. *Id.*

66. *Id.*



in removing hazardous substances from the property.<sup>67</sup>

In 2008, ARG was administratively dissolved by the State of Indiana.<sup>68</sup> In July 2010, the United States filed a CERCLA action against ARG for reimbursement of the costs incurred in addressing the hazardous conditions at the site. ARG filed a motion to dismiss, claiming that the United States' complaint was filed past the two-year statute of limitations applicable to voluntarily dissolved corporations.<sup>69</sup>

The court began its analysis by examining administrative dissolution.<sup>70</sup> The court noted that administrative dissolution does not grant a corporation immunity from suit or absolute protection from its creditors.<sup>71</sup> An administratively dissolved corporation may not conduct any business except that which is necessary to “wind up and liquidate its business and affairs . . . and notify claimants.”<sup>72</sup> The court noted that the language of the voluntary dissolution statute is referenced in Indiana's administrative dissolution statute and thus an administratively dissolved corporation might be able to notify their creditors of their dissolution and cut off those claims.<sup>73</sup> Despite the fact that ARG had never followed any of the notice provisions, it sought to obtain the protections of the two-year limitation applicable to voluntarily dissolved corporations.<sup>74</sup>

The court agreed with the EPA that the two-year statute of limitations applicable to voluntarily dissolved corporations could not apply to ARG.<sup>75</sup> The court found that notice was necessary to trigger the statute of limitations based on a plain reading of the corporate dissolution statute.<sup>76</sup> The court, in explaining its holding, cited favorably to the Southern District of Indiana's decision in *Bernstein v. Bankert*,<sup>77</sup> a case which also rejected application of the two-year statute of limitations to an administratively dissolved corporation.<sup>78</sup> Thus, ARG's motion to dismiss was denied.<sup>79</sup>

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67. *Id.*

68. *Id.*

69. *Id.*; see also IND. CODE § 23-1-45-7 (2011).

70. *ARG Corp.*, 2011 WL 338818, at \*2.

71. *Id.*

72. *Id.* (quoting IND. CODE § 23-1-45-7) (alteration in original).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at \*3.

77. 698 F. Supp. 2d 1042 (S.D. Ind. 2010).

78. *ARG Corp.*, 2011 WL 338818, at \*3 (quoting *Bernstein*, 698 F. Supp. 2d at 1052-53).

79. *Id.* at \*3-4. A later decision in the same case was rendered in *United States v. ARG Corp.*, No. 3:10-CV-311, 2011 WL 3422829 (N.D. Ind. Aug. 4, 2011). There, ARG filed a third-party complaint against the City of South Bend, the party to whom ARG sold the contaminated property, alleging that the city was liable for cleanup costs under its purchase and sale contract. *Id.* at \*1. Because the contract stated that “[t]he Seller shall remain solely financially responsible for the Remediation Activities arising from the Seller's ownership, use or operation of the property prior to the Closing Date,” the court granted the City's motion to dismiss. *Id.* at \*2-3.

*B. Requirements for Granting Consent Decrees: United States v. George A. Whiting Paper Co. and United States v. Western Reman Industrial Inc.*

In *United States v. George A. Whiting Paper Co.*,<sup>80</sup> the United States and the State of Wisconsin brought a CERCLA action in 2009 against eleven potentially responsible parties (“PRPs”) for contamination of the Fox River in Wisconsin.<sup>81</sup> The governments subsequently entered into a *de minimis* consent decree with the eleven defendants because it had determined that each of the *de minimis* defendants were responsible for discharging no more than one hundred kilograms of Polychlorinated biphenyls (“PCBs”) into the Fox River.<sup>82</sup> Appleton Papers Inc. and NCR Corporation, two of several PRPs that were currently paying to clean up the Fox River in compliance with a 2007 EPA order, intervened, arguing that the proposed settlements underestimated the *de minimis* defendants’ contributions to the contamination.<sup>83</sup> The district court granted the settlement over the intervenors’ opposition.<sup>84</sup> The governments then moved to add a twelfth *de minimis* defendant, which the district granted.<sup>85</sup> Appleton and NCR appealed.<sup>86</sup>

The court noted that it was “constrained by a double dose of deference” because the trial court must defer to the “expertise of the agency and to the federal policy encouraging settlement,” and the court of appeals reviewed the lower court’s decision only for an abuse of discretion.<sup>87</sup> In reviewing a consent decree, the district court must approve it if it is “reasonable, consistent with CERCLA’s goals, and substantively and procedurally fair.”<sup>88</sup> Appleton and NCR challenged the substantive fairness of the consent decree.<sup>89</sup>

Appleton and NCR first argued that the district court had no rational basis for concluding that the consent decrees were substantively fair.<sup>90</sup> The Seventh Circuit disagreed, holding that “[a] consent decree is substantively fair if its terms are based on comparative fault.”<sup>91</sup> Moreover, comparative fault meets the test for substantive fairness unless it is “arbitrary, capricious, and devoid of a rational

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80. 644 F.3d 368 (7th Cir. 2011).

81. *Id.* at 371.

82. *Id.* at 371-72. The court also determined that the total amount of PCBs that had been discharged into the Fox River was approximately 230,000 kilograms. *Id.* at 372.

83. *Id.* at 371-72.

84. *Id.* at 371.

85. *Id.*

86. *Id.* at 372.

87. *Id.* (citations omitted).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 372-73 (citing *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207 (3d Cir. 2003); *United States v. Cannons Eng’g Corp.*, 889 F.2d 79, 87 (1st Cir. 1990)).

basis.”<sup>92</sup> The court held that there was adequate support in the record to determine that the district court had a rational basis for granting the consent decree.<sup>93</sup>

In *United States v. Western Reman Industrial Inc.*,<sup>94</sup> the United States brought a CERCLA action against Western Reman Industrial, Inc. (“Western Reman”) for contamination of a site that Western Reman operated from July 1996 to October 2004.<sup>95</sup> Western Reman subsequently entered into a consent decree with the court, under which Western Reman would pay \$300,000 to the government in reimbursement for costs associated with the cleanup and agreed not to sue the government regarding response costs incurred.<sup>96</sup> The consent decree, in turn, protected Western Reman from “contribution actions or third-party claims concerning response actions and response costs incurred under the consent decree.”<sup>97</sup> The government submitted the proposed consent decree with the court for approval.<sup>98</sup>

Like the court in *George A. Whiting Paper Co.*, the *Western Reman* court noted the strong public policy interest in encouraging settlement without litigation and went on to discuss the three factors to be considered when evaluating whether to approve a consent decree settlement: “(1) fairness, both procedural and substantive; (2) reasonableness, and (3) consistency with applicable law.”<sup>99</sup> The court then evaluated each factor in turn.<sup>100</sup>

To be procedurally fair, a consent decree must have been negotiated at arms-length and in an open fashion.<sup>101</sup> The court found that the procedural fairness requirement had been met because the government affirmed that “it result[ed] from several years of arms-length negotiations”<sup>102</sup> and was published in the Federal Register for public comments and none were received.<sup>103</sup> Furthermore, no objections had been received by the court, and there was no evidence of bad faith by the parties.<sup>104</sup> As in *George A. Whiting Paper Co.*, the court stated that the substantive fairness requirement was met if the terms of the consent decree are based on comparative fault.<sup>105</sup> Because each party accepted some measure of

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92. *Id.* at 373 (quoting *Cannons Eng’g Corp.*, 899 F.2d at 87) (internal quotation marks omitted).

93. *Id.*

94. No. 3:11-CV-0008-PPS-CAN, 2011 WL 2117006 (N.D. Ind. May 27, 2011).

95. *Id.* at \*1.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at \*2.

100. *Id.* at \*2-4.

101. *Id.* at \*2 (citing *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207 (3d Cir. 2003)).

102. *Id.* (internal quotation marks omitted).

103. *Id.*

104. *Id.*

105. *Id.* at \*3.

responsibility under the consent decree, Western Reman's payment and the government's continuing obligation to remediate the site, the court determined that it met the requirements of substantive fairness.<sup>106</sup>

The court then turned to the reasonableness analysis.<sup>107</sup> Factors relevant to this determination included:

[The consent decree's] likely efficaciousness as a vehicle for cleansing the environment; the extent to which it satisfactorily compensates the public for actual and anticipated costs of remedial and response measures; the extent to which approval of it serves the public interest; and the availability and likelihood of alternatives to the consent decree.<sup>108</sup>

The court found that the consent decree met this requirement.<sup>109</sup> It served the public interest because the government recovered a portion of its cleanup costs and protects the public health and environment.<sup>110</sup> Because no objections had been received after the opportunity for public comment, the court reasoned that the consent decree further served the public interest.<sup>111</sup> The consent decree also provided a cost-efficient alternative to litigation, the likely next step should the consent decree be denied.<sup>112</sup>

The court finally discussed the consent decree's consistency with CERCLA, the applicable law, and "the extent to which it comports with the goals of Congress."<sup>113</sup> The court noted that the purpose of CERCLA is "(1) to 'abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites,' and (2) to 'shift the costs of cleanup to the parties responsible for the contamination.'"<sup>114</sup> The consent decree met both of these requirements as it helped ensure the continued remediation of the site through Western Reman's payment and the government's cleanup efforts, and it "shift[ed] a portion of the cost to Western Reman that is commensurate with its share of responsibility for the contamination."<sup>115</sup> Thus, the consent decree was approved.<sup>116</sup>

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106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at \*4 (quoting *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007)).

115. *Id.*

116. *Id.*

*C. CERCLA Action Could Proceed Despite Preclusion of ELA Claim*

In *Valbruna Slater Steel Corp. v. Joslyn Manufacturing Co.*,<sup>117</sup> the defendant Joslyn Manufacturing Co. owned and operated a steel mill in Fort Wayne, Indiana from 1928 until 1981.<sup>118</sup> Joslyn sold the site to Slater Steels Corporation in February 1981.<sup>119</sup> Slater attempted several times to seek indemnification from Joslyn for the contamination spanning from 1988 until 1999, but Joslyn denied these requests.<sup>120</sup> Slater filed suit in Indiana state court in July of 2000 bringing two claims of contractual indemnification and another Environmental Legal Action (ELA) claim pursuant to Indiana Code section 13-30-9-1.<sup>121</sup> The trial court dismissed Slater's ELA claim.<sup>122</sup>

In June 2003, Slater filed for bankruptcy, and Valbruna Slater Stainless Inc. ("Valbruna") purchased the site.<sup>123</sup> The purchase agreement for the site noted the existence of the lawsuit and gave Valbruna the "right to seek to become a party to the [l]awsuit."<sup>124</sup> The bankruptcy court approved the purchase and found that Valbruna "was not a successor in interest to Slater except as detailed in the [purchase agreement], and therefore had no other liability for Slater's acts, omissions, or liabilities."<sup>125</sup>

After the bankruptcy order, Joslyn moved to dismiss the Slater suit for failure to prosecute, and the court dismissed it with prejudice.<sup>126</sup> Valbruna brought a lawsuit in the Northern District of Indiana in February 2010 under CERCLA and Indiana's ELA to recover cleanup costs from Joslyn and also sought a declaratory judgment stating that Joslyn would be liable for all future costs related to the contamination.<sup>127</sup> Joslyn then filed a motion to dismiss under the doctrine of res judicata, or claim preclusion, asserting that Valbruna's claims were barred by the prior suit Slater had filed.<sup>128</sup> The court concluded it had jurisdiction over this claim because the CERCLA and declaratory judgment claims raised federal questions and the ELA claim "derive[d] from the same nucleus of operative fact as the CERCLA claim."<sup>129</sup>

The discussion then turned to the requirements of res judicata in Indiana.<sup>130</sup> The court listed the four requirements to find that a claim is precluded:

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117. 804 F. Supp. 2d 877 (N.D. Ind. 2011).

118. *Id.* at 879.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 879-80.

124. *Id.* at 880 (quoting the purchase agreement).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 880-81.

129. *Id.* at 880.

130. *Id.* at 881.

(1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies.<sup>131</sup>

The court found that Valbruna's CERCLA claim was permitted because the state court could not have adjudicated contribution rights under CERCLA.<sup>132</sup> Because CERCLA claims are within the exclusive jurisdiction of the federal courts, the state court was not a court of competent jurisdiction to decide that claim.<sup>133</sup>

The court, however, concluded that the ELA claim was precluded by the prior *Slater* state court suit.<sup>134</sup> The state court was a court of competent jurisdiction over this state law claim.<sup>135</sup> The court determined that the state court's dismissal of the ELA claim for "failure to state a claim" was a dismissal on the merits.<sup>136</sup> The ELA claim brought by Valbruna was identical to that brought by Slater, so the matter was, or could have been decided, in the prior suit.<sup>137</sup> Finally, because Valbruna had an opportunity to join the Slater suit, but failed to do so, Valbruna was in privity with Slater.<sup>138</sup> For these reasons, Valbruna could not now pursue an ELA claim in the federal suit.<sup>139</sup>

*D. Liability to be Apportioned in a CERCLA Action: City of Gary v. Shafer*

In *City of Gary v. Shafer*,<sup>140</sup> the city filed CERCLA and ELA actions against a prior owner of a former auto salvage site.<sup>141</sup> In 2009, the parties agreed to bifurcate the issues of liability and damages in separate trials.<sup>142</sup> The court, in the trial on liability, declared that both the city and the defendant, Paul's Auto Yard, were liable for contamination.<sup>143</sup> The current case, decided on August 5, 2011, was limited to allocation of damages as to Paul's Auto Yard.<sup>144</sup> The court

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131. *Id.* (quoting *Hermitage Ins. Co. v. Salts*, 698 N.E.2d 856, 859 (Ind. Ct. App. 1998)).

132. *Id.* at 881-82.

133. *Id.*

134. *Id.*

135. *Id.* at 883-84.

136. *Id.* at 884.

137. *Id.*

138. *Id.* at 885-86.

139. *Id.*

140. No. 2:07-CV-56-PRC, 2011 WL 3439239 (N.D. Ind. Aug. 5, 2011).

141. For a more detailed discussion of the facts, including the initial trial on liability, see Seth M. Thomas et al., *2009-2010 Environmental Law Survey*, 44 IND. L. REV. 1165, 1177-79 (2011).

142. *Shafer*, 2011 WL 3439239, at \*1.

143. *City of Gary v. Shafer*, 683 F. Supp. 2d 836, 860-62 (N.D. Ind. 2010).

144. *Shafer*, 2011 WL 3439239, at \*1.

previously found that Paul's Auto Yard did only *de minimus* moving of soil at the site.<sup>145</sup> The substantial contamination of the site occurred from sometime in the 1950s until 1993.<sup>146</sup> Paul's Auto Yard's *de minimus* moving of contaminated soil occurred only over a one to two year time period, 1991 until sometime in 1993.<sup>147</sup> The court also found that "[i]n contrast, substantial contamination of the soil was caused by LeRoy Shafer over a time period of decades, by the City of Gary over a time period of decades, and by Waste Management during or after 1993 and continuing over an unspecified period of time."<sup>148</sup>

Ultimately, the court determined that, at most, Paul's Auto Yard caused contamination during approximately 3.95% of the total estimated time, and based on their experts' opinions, Paul's Auto Yard's proportionate share in the contamination of the soil "constituted no more than 0.24% of the whole of the contamination."<sup>149</sup> Noting that "CERCLA provides an express right of contribution among liable parties, and provides that the 'court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate[,]'"<sup>150</sup> the court then found that joint and several liability was inappropriate in this case and decided to apportion liability.<sup>151</sup> Accordingly, Paul's Auto Yard was found to be liable for 0.24% of the total costs.<sup>152</sup>

#### *E. RCRA Citizen Suit Not Barred by Prior IDEM Action*

In *Adkins v. VIM Recycling, Inc.*,<sup>153</sup> the defendant VIM Recycling, Inc. (VIM) operated a solid waste dump in Elkhart, Indiana.<sup>154</sup> Plaintiffs were residents who lived near the Elkhart dump.<sup>155</sup> In 1999, the Indiana Department of Environmental Management ("IDEM") ordered VIM to remove waste piles and stop outdoor grinding of solid waste at their location in Goshen, Indiana.<sup>156</sup> Instead of complying with IDEM at its Goshen facility, VIM moved its operations to Elkhart, Indiana. In 2005, IDEM inspected the Elkhart facility and found several violations.<sup>157</sup> IDEM and VIM entered into an agreed order in 2007, which in part focused on VIM's disposal and treatment of "C" grade waste.<sup>158</sup>

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145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at \*2.

149. *Id.*

150. *Id.* at \*3 (quoting 42 U.S.C. § 9613(f) (2006)).

151. *Id.*

152. *Id.*

153. 644 F.3d 483 (7th Cir. 2011).

154. *Id.* at 487.

155. *Id.* at 488.

156. *Id.*

157. *Id.*

158. *Id.*

However, VIM did not comply with the agreed order, and in October 2008, IDEM filed suit in state court to enforce the order.<sup>159</sup>

The Elkhart residents sought to intervene in the first IDEM lawsuit with the goal of expanding the scope of the proposed order.<sup>160</sup> VIM opposed the intervenors' claims and argued that they should be limited to the "scope of the first IDEM lawsuit as it was originally filed."<sup>161</sup> The state court, agreeing with VIM, instructed VIM to propose a new, more narrow intervention.<sup>162</sup> The intervenors, in turn, voluntarily withdrew their claims that fell beyond the scope of IDEM's suit, sent a Notice of Intent to File a Complaint under RCRA to VIM, IDEM, and the EPA, and when neither IDEM nor the EPA filed a lawsuit to assert the plaintiffs' claims, filed an action in the Northern District of Indiana under the RCRA citizen-suit provision.<sup>163</sup>

The plaintiffs' suit sought relief under both the "violation" and "endangerment" provisions of RCRA and additionally asserted common law claims of nuisance, trespass, negligence, negligence per se, and gross negligence.<sup>164</sup> Additionally, it went further than IDEM's claims and included "A" and "B" grade waste in addition to "C" grade waste.<sup>165</sup> After further inspections of the Elkhart site resulted in additional IDEM violations, IDEM filed a second suit in Indiana state court against VIM.<sup>166</sup> VIM then moved to dismiss the federal lawsuit, arguing that the federal court did not have jurisdiction over the RCRA claims because IDEM was addressing those same claims in state court.<sup>167</sup> The district court granted VIM's motion and declined to exercise supplemental jurisdiction over the state law claims, and the plaintiffs subsequently appealed to the Seventh Circuit.<sup>168</sup>

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159. *Id.*

160. *Id.* The intervenors "sought injunctive relief that would have required VIM to cease *all* operations pertaining to the illegal disposal of *all* solid waste at the VIM site (not just "C" grade waste), and to remediate the facility to its condition before VIM took it over. The intervenors also sought damages through common law claims of nuisance, negligence, and trespass." *Id.*

161. *Id.* at 489.

162. *Id.*

163. *Id.*

164. *Id.* (citing 42 U.S.C. §§ 6972(a)(1)(A)-(B) (2006)).

165. *Id.* at 490. The complaint alleged that

VIM was consolidating, disposing of, and causing combustion of wood and engineered wood waste . . . , construction and demolition waste, and "other solid wastes" without cover; was operating a non-compliant solid waste disposal facility; was "open dumping" solid wastes at the site; and was "stor[ing], contain[ing], processing and/or dispos[ing] of solid waste at the VIM site in a manner that has and continues to: create a fire hazard, attract vectors, pollute air and water resources, and cause other contamination."

*Id.* (citing the plaintiffs' complaint).

166. *Id.* The second suit dealt primarily with the handling of "B" grade waste.

167. *Id.*

168. *Id.* The district court also found that it should abstain from exercising jurisdiction over all RCRA claims under the doctrines established in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943),



After establishing that it had jurisdiction over the plaintiffs' claims, the court began its analysis with the second IDEM suit.<sup>169</sup> The court, looking at the plain language of RCRA, found that the second IDEM suit did not bar the plaintiffs' citizen suit.<sup>170</sup> Because the second IDEM suit was filed after the citizen suit, the citizen suit could proceed.<sup>171</sup> The court then turned to the first IDEM suit.<sup>172</sup> Looking again at the language of 42 U.S.C. § 6972(b)(1)(B), "the earlier government action bars this suit if it was a suit 'to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order,' *i.e.*, if it sought to require compliance with the same requirements that the plaintiffs seek to enforce in this suit."<sup>173</sup> The court concluded that to the extent the citizen suit exceeded the scope of IDEM's first suit, it could proceed.<sup>174</sup> However, the overlapping issues primarily dealing with "C" grade waste, were dismissed.<sup>175</sup>

VIM, argued that IDEM's grades of waste were not different but should fall under the same category of "solid waste" and thus, IDEM's suit and the plaintiffs' citizen suit completely overlapped.<sup>176</sup> The court rejected this argument for three reasons.<sup>177</sup> First, it looked to VIM's opposition to the plaintiffs' intervention in the prior suit, reasoning that had the plaintiffs' claims in their intervention

truly overlapped IDEM's allegations in their entirety, VIM's objection (and the court's ruling) would have been moot. Having convinced the state court to limit the case to IDEM's narrower "C" grade waste allegations, VIM cannot be permitted to take the opposite position in federal court and claim that there is no difference between the cases.<sup>178</sup>

Furthermore, the court noted that "A" grade waste is not regulated under Indiana state law but is under RCRA, and thus, IDEM's suit and the citizen suit could not have brought claims that completely overlapped.<sup>179</sup> Finally, IDEM's second suit dealt primarily with "B" grade waste, and the court reasoned that the second suit would not have been necessary had the first suit been broad enough to cover "B"

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and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). *Adkins*, 644 F.3d at 490.

169. *Id.* at 492.

170. *Id.* at 493.

171. *Id.* Under 42 U.S.C. § 6972(b)(1)(B), "a citizen's violation action may not 'be commenced' if the EPA or state agency 'has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State . . . ." The statute prohibits only *commencement* of a citizen suit, not the continued prosecution of such an action that has already been filed." *Id.* (alterations in original).

172. *Id.* at 494.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 494-95.

177. *Id.* at 495.

178. *Id.*

179. *Id.*

grade waste as well.<sup>180</sup> Accordingly, the court found that to the extent that the citizen suit brought claims beyond those of the first IDEM suit, the plaintiffs could proceed.<sup>181</sup>

### III. DEVELOPMENTS IN THE LAW RELATED TO WATER RIGHTS

During the survey period, the Supreme Court of the United States, the U.S. Court of Appeals for the Seventh Circuit, and the federal district courts within the Seventh Circuit decided, or indicated that they will decide, cases related to the Clean Water Act (CWA)<sup>182</sup> that touch upon a range of issues including property rights and the ability to challenge an agency's compliance order, facts that demonstrate injury for standing purposes, the Environmental Protection Agency's authority regarding state additions to certain national permits, the requirements for proving criminal "tampering," and a third-party's rights regarding the contents of a consent decree against a municipality for CWA violations.

#### A. *Sackett v. EPA: Supreme Court to Examine Property Rights Under the CWA Related to EPA Wetlands Determination*

During the survey period, the Supreme Court agreed to hear oral argument in *Sackett v. EPA*,<sup>183</sup> an important property rights case, involving a wetlands regulation dispute under the CWA and EPA's enforcement of this statute. The *Sackett* case involves the question whether a property owner—here, the Sacketts—can obtain judicial review of an EPA wetlands order even though the EPA itself has not brought its own lawsuit.<sup>184</sup> The Sacketts owned a lot in a platted residential subdivision upon which they planned to build a home.<sup>185</sup> Work was interrupted by EPA, who informed the Sacketts the property was a federally protected "wetlands."<sup>186</sup> The Sacketts received an Administrative Compliance Order (ACO)<sup>187</sup> from EPA stating they had violated the CWA by filling a wetland without a federal permit.<sup>188</sup> The ACO ordered the Sacketts to commence

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180. *Id.*

181. *Id.* The court also considered in depth and rejected the application of the *Colorado River* and *Burford* abstention doctrines. *See id.* at 496-507.

182. 33 U.S.C. §§ 1251-1387 (2006 & Supp. 2010).

183. 622 F.3d 1139 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1367 (2012).

184. *Id.* at 1141.

185. *Id.*

186. *Id.*

187. A compliance order "is a document served on the violator, setting forth the nature of the violation and specifying a time for compliance with the Act." *Id.* (quoting *S. Pines Assocs. by Goldmeier v. United States*, 912 F.2d 713, 715 (4th Cir.1990)). EPA issued the ACO pursuant to sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a). *Sackett v. U.S. Evtl. Prot. Agency*, No. 08-cv-185-N-EJL, 2008 WL 3286801 at \*1 (D. Idaho Aug. 7, 2008), *aff'd*, 622 F.3d 1139 (9th Cir. 2010), *rev'd*, 123 S. Ct. 1367 (2012). "EPA derives its power to issue compliance orders from 33 U.S.C. § 1319(a)(3) . . ." *Sackett*, 622 F.3d at 1142.

188. *Sackett*, 622 F.3d at 1142.

restoration of the wetlands, which cost more than the purchase price of the land, under the threat of substantial penalties.<sup>189</sup> The ACO indicated that civil penalties could be up to \$32,500 per day or \$11,000 in administrative penalties per day for each violation.<sup>190</sup> However, “the civil penalties provision is committed to judicial, not agency, discretion.”<sup>191</sup>

The Sacketts sought to challenge the ACO, believing that their land was not wetlands subject to federal regulation.<sup>192</sup> The EPA did not grant the Sacketts a hearing and continued to assert jurisdiction.<sup>193</sup> The CWA does not provide any basis for such a challenge in the absence of a civil action by the EPA.<sup>194</sup>

The Sacketts filed suit in federal court, claiming the ACO was “(1) arbitrary and capricious under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A); (2) issued without a hearing in violation of [their] due process rights; and (3) issued on the basis of an ‘any information available’ standard that [was] unconstitutionally vague.”<sup>195</sup> However, the district court and the United States Court of Appeals for the Ninth Circuit agreed with EPA that the ACO was not subject to a pre-enforcement challenge.<sup>196</sup> The Ninth Circuit noted that in lieu of waiting for an enforcement action, the Sacketts could have applied for a permit, and if the permit was denied, they could have challenged this permit in federal court.<sup>197</sup>

In agreeing to hear the case, the Supreme Court granted certiorari on two questions: 1) “[m]ay petitioners seek pre-enforcement judicial review of the [ACO] pursuant to the Administrative Procedure Act, 5 U.S.C. § 702”; and 2) “[i]f not, does petitioners’ inability to seek pre-enforcement judicial review of the [ACO] violate their rights under the Due Process Clause?”<sup>198</sup>

After the survey period, the Supreme Court issued its opinion reversing the Ninth Circuit.<sup>199</sup> The Supreme Court’s decision will be addressed in detail during the next survey period, but for environmental practitioners, we will highlight that the Court found that EPA’s compliance order to the Sacketts was a final agency action for which the only adequate remedy was judicial review as provided by the APA, allowing the Sacketts’ pre-enforcement judicial review of EPA’s compliance order.<sup>200</sup> The Court remanded to the Ninth Circuit for further proceedings.<sup>201</sup>

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189. *Id.* at 1141.

190. *Id.*

191. *Id.* at 1146 (citing 33 U.S.C. § 1319(d) (2006)).

192. *Id.* at 1141.

193. *Id.*

194. *Id.* at 1142 (citing 33 U.S.C. § 1319).

195. *Id.* at 1141.

196. *See id.* at 1141-47; *see also Sackett*, 2008 WL 3286801, at \*2-3.

197. *Sackett*, 622 F.3d at 1146.

198. *Sackett v. E.P.A.*, 131 S. Ct. 3092 (2011).

199. *Sackett v. E.P.A.*, 132 S. Ct. 1367 (2012).

200. *Id.* at 1372-74.

201. *Id.*

*B. Environmental Group May Challenge Permit Allowing Destruction of Wetlands Near State Park*

In *American Bottom Conservancy v. U.S. Army Corps of Engineers*<sup>202</sup> the Seventh Circuit Court of Appeals held that an environmental organization, American Bottom Conservancy (the “Conservancy”),<sup>203</sup> alleged sufficient injury to have standing to sue the United States Army Corps of Engineers (“Corps”) for improperly granting Waste Management of Illinois, Inc. (WMI) a permit to destroy wetlands located in a floodplain in southwestern Illinois called the American Bottom.<sup>204</sup> The American Bottom contains wetlands that provide a home for a diverse species of birds and other wildlife.<sup>205</sup>

In that case WMI ran a landfill in the American Bottom referred to as the “Milam Recycling and Disposal Facility” (“Milam Landfill”) located near St. Louis, Missouri, and near an Illinois state park containing the second largest lake in Illinois.<sup>206</sup> Since the Milam landfill is filling up with waste from St. Louis, WMI sought to build another 180-acre landfill (“North Landfill”) in the American Bottom on a 220-acre tract of land located between the Milam Landfill and the Illinois state park.<sup>207</sup> This tract contained five wetland areas, covering 26.8 acres, all of which were within a half mile of the state park.<sup>208</sup> This area attracted birdwatchers, some of whom were members of the Conservancy.<sup>209</sup> Construction of the North Landfill itself, which needed approval from Illinois Environmental Protection Agency (IEPA), did not require the destruction of wetlands.<sup>210</sup> However, WMI sought to remove soil from the wetlands to transport to the Milam Landfill to use to cover waste there.<sup>211</sup>

To destroy the wetlands, WMI needed a permit from the Corps.<sup>212</sup> WMI sought a permit from the Corps, as required by the CWA, to remove soil from 18.4 acres, sixty-nine percent of these wetlands to use a cover material at the

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202. 650 F.3d 652 (7th Cir. 2011).

203. “The American Bottom Conservancy is an environmental organization that seeks to preserve the wetlands. Its members include birdwatchers and other people who enjoy seeing wildlife in the wild.” *Id.* at 654.

204. *Id.* at 654-55. “‘American Bottom’ is a 175-square-mile floodplain of the Mississippi River in southwestern Illinois, across the river from St. Louis.” *Id.* at 654.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 654-55. The court noted that if construction of the landfill would have impacted wetlands on the property, WMI would have had to apply for a broader permit from the Corps. *Id.* at 655.

211. *Id.*

212. *Id.* at 654 (citing 33 U.S.C. §§ 1311(a), 1344(a), 1362(7) (2006); 40 C.F.R. § 230.3(s)(7) (2012)).

Milam Landfill.<sup>213</sup> Approval would result in the transformation of the wetlands into dry “borrow pit[s].”<sup>214</sup> The Corps granted WMI’s permit request, provided WMI create double the amount of wetlands on nearby land that it owned.<sup>215</sup> WMI accepted that condition.<sup>216</sup>

The Conservancy filed suit to challenge the Corps’ permit allowing the destruction of the wetlands near the state park.<sup>217</sup> The district court dismissed the Conservancy’s suit, holding that the Conservancy had not established standing to sue under Article III of the U.S. Constitution.<sup>218</sup> The Conservancy appealed.

On appeal, Seventh Circuit reversed with instructions to reinstate the suit.<sup>219</sup> The court noted that for standing to exist under Article III, a plaintiff “must allege, and if the allegation is contested must present evidence, that the relief he seeks will if granted avert or mitigate or compensate *him* for an injury—though not necessarily a great injury—caused or likely to be caused by the defendant.”<sup>220</sup> The Seventh Circuit further stated that “[t]he magnitude, as distinct from the directness, of the injury is not critical to the concerns that underlie the requirement of standing; and so denying a person who derives pleasure from watching wildlife of the opportunity to watch it is a sufficient injury to confer standing.”<sup>221</sup> The court held that “it is enough to confer standing that their pleasure is diminished even if not to the point that they abandon the site” for their bird- and wildlife-watching activities.<sup>222</sup> In this regard, the court noted that the Conservancy’s members frequented the state park and would feel a diminution in their birdwatching and wildlife-viewing activities if the wetlands are destroyed.<sup>223</sup> Moreover, it would be many years before the wetlands created by

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213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 655.

218. *Id.* Article III limits the federal judicial power to “Cases” and “Controversies.” *Id.* (citations omitted).

219. *Id.* at 660.

220. *Id.* at 656 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). The court further noted that the standing doctrine was needed “to limit premature judicial interference with legislation, to prevent the federal courts from being overwhelmed by cases, and to ensure that the legal remedies of primary victims of wrongful conduct will not be usurped by persons trivially or not at all harmed by the wrong complained of.” *Id.* (citations omitted).

221. *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000); *Lujan*, 504 U.S. at 562-63; *Sierra Club v. Franklin Cnty. Power of Ill., LLC*, 546 F.3d 918, 925-26 (7th Cir. 2008); *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1029-31 (D.C. Cir. 2008) (per curiam); *Cantrell v. City of Long Beach*, 241 F.3d 674, 680 (9th Cir. 2001)).

222. *Id.* at 658 (citing *Friends of the Earth, Inc.*, 528 U.S. at 183; *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972); *Heartwood, Inc. v. U.S. Forest Serv.*, 230 F.3d 947, 951 (7th Cir. 2000)).

223. *Id.* at 656-57. The affidavits of the Conservancy’s members regarding their activities at the state park were not challenged by either WMI or the Corps. *Id.* at 657. Moreover, WMI did not submit any evidence relating to standing. *Id.*

WMI in the mitigation area would develop to a point at which they provide an equivalent wildlife habitat.<sup>224</sup> The court further noted that “proximity distinguishes this case” from the other standing cases.<sup>225</sup>

*C. EPA Has No Authority to Amend or Reject Conditions in  
a State’s Certification of a CWA Permit*

The Court of Appeals for the District of Columbia recently handed down its decision in the case of *Lake Carriers’ Association v. EPA*,<sup>226</sup> which involved a challenge by several maritime trade associations of a nationwide permit for the discharge of pollutants under the CWA<sup>227</sup> issued by the EPA. This particular nationwide permit<sup>228</sup> was to address the discharge of pollutants incidental to the normal operation of vessels.<sup>229</sup> The trade associations alleged several procedural challenges under the APA related to EPA’s decision to incorporate conditions submitted by states to protect their own water quality into this nationwide permit.

The court explained the background of this permit, noting that shortly after the CWA was enacted, “EPA promulgated a regulation exempting incidental vessel discharges from the permitting (and therefore the certification) requirements of the [CWA].”<sup>230</sup> “Exempted discharges included ‘sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel.’”<sup>231</sup> After being in force for over thirty years, the Ninth Circuit in 2008 vacated the regulation, finding that EPA did not have the authority to exempt

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224. *Id.* at 657.

225. *Id.* (citing *Lujan*, 504 U.S. at 563-64; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376-78 (1982); *Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1024 (7th Cir.2006); *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 55 (1st Cir.2001)). The court specifically noted that the wildlife and wetlands at issue in this case was only a half mile from the state park. *Id.*

226. 652 F.3d 1 (D.C. Cir. 2011).

227. The Clean Water Act prohibits discharges of pollutants without a National Pollutant Discharge Elimination System (NPDES) permit. *Id.* at 3 (citing 33 U.S.C. §§ 1311, 1342 (2006 & Supp. 2010)).

228.

EPA regulations explain that permits may be individual (covering discharges from a single source, 40 C.F.R. § 122.21), or general (covering “one or more categories or subcategories of discharges . . . within a geographic area” . . . . Each permit must set out the specific conditions necessary to ensure that the permit holder’s discharge of pollution will comply with the water standards mandated by the CWA. 33 U.S.C. § 1342(a)(2).

*Id.*

229. *Id.*

230. *Id.* at 4.

231. *Id.*

“incidental vessel discharges.”<sup>232</sup> The regulation was vacated shortly after.<sup>233</sup>

EPA later enacted a permit covering the previously exempted incidental vessel discharges.<sup>234</sup> This draft permit set out “all of the general EPA-mandated conditions for vessel discharges” and noted that the agency was seeking certifications from all of the states as required by the CWA.<sup>235</sup> During this process, several states commented that they sought differing standards to address unique, local environmental conditions.<sup>236</sup> EPA eventually passed the permit, with approximately one hundred state specific conditions, noting in its response to public comments that the CWA required certifications by the states in which the discharges would originate.<sup>237</sup> The EPA provided notice of the rule for comment, but the associations challenged the rule because the specific states conditions were also not disclosed during the comment period.<sup>238</sup> In particular, the associations argued:

[1]) EPA erred in failing to provide notice and an opportunity for comment on the final [Vessel General Permit], which contained the state certification conditions; [2]) it was arbitrary and capricious for EPA to issue the permit without considering the possible ill-effects of the state certification conditions[; and 3]) EPA failed to consider the costs of compliance with state conditions in assessing the impact of the permit on small businesses. . . .<sup>239</sup>

In rejecting the associations’ arguments, the court of appeals found that the EPA was correct when it determined it did “not have the ability to amend or reject conditions in a [state’s] CWA 401 certification” and that the CWA “expressly grants States . . . the right to add conditions to federally issued NPDES permits as necessary to assure compliance with state water quality standards.”<sup>240</sup> Consequently, the court noted that under these circumstances, “providing notice and an opportunity for comment on the state certifications would have served no

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232. *Id.* (citing *Nw. Env'tl. Advocates v. Env'tl. Prot. Agency*, 537 F.3d 1006 (9th Cir. 2008)).

233. *Id.*

234. *Id.* at 4.

235. *Id.* For discharges into the waters of a state, the CWA provides that the states may review such permit application before issuance. *Id.* at 3-4. Furthermore, the CWA allows states to put conditions on the federal permit through the review process, also known as certification process. *Id.* (citing 33 U.S.C. § 1341). State conditions become part of the federal permit. *Id.*

236. *Id.* at 4-5.

237. *Id.*

238. *Id.* The final NPDES General Permit challenged by the associations can be found at 73 Fed. Reg. at 79,474. *Id.* “Vessels covered by the permit are required to adhere to the general provisions of the [general permit promulgated by EPA] with respect to all discharges, and are further required to adhere to any . . . certification condition imposed by a state into the waters of which the vessel is discharging pollutants.” *Id.* at 5.

239. *Id.*

240. *Id.* at 10 & 11 n.11 (citations omitted).

purpose” and the court refused to “require EPA to do a futile thing.”<sup>241</sup>

The court went on to note that:

EPA’s resolution of this matter does not leave the petitioners without recourse. If they believe that the certification conditions imposed by any particular state pose an inordinate burden on their operations, they may challenge those conditions in that state’s courts. . . . If they believe that a particular state’s law imposes an unconstitutional burden on interstate commerce, they may challenge that law in federal (or state) court. And if neither of these avenues proves adequate, they are free to ask Congress to amend the CWA, perhaps by reimposing the exemption for incidental vessel discharges.<sup>242</sup>

*D. No Private Right of Action Under the CWA for Breach of  
Inter-Municipal Wastewater Contract*

In *United States v. United Water Environmental Services Inc.*,<sup>243</sup> the court considered the elements of the CWA’s tampering provision, and in particular, what it means to “knowingly tamper” under the CWA.<sup>244</sup> In that case, the IDEM issued NPDES permits<sup>245</sup> to the Gary Sanitary District (GSD).<sup>246</sup> Under those permits, GSD could discharge “treated effluent,” provided the permit monitoring methods were adhered to.<sup>247</sup> The E. coli was at issue.<sup>248</sup> The permits permitted GSD to discharge effluent with “no more than 235 E. coli colonies per 100 milliliters of water.”<sup>249</sup> To abide by the limitations, GSD needed to disinfect its effluent “on a continuous basis such that violations of the applicable bacteriological limitations for E. coli do not occur” and to monitor E. coli by taking and testing a single “grab” sample each day to measure the E. coli concentration.<sup>250</sup> This information should be recorded and reported on a monthly basis to IDEM.<sup>251</sup>

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241. *Id.* at 10.

242. *Id.* (citations omitted).

243. No. 2:10-CR-217, 2011 WL 3751303 (N.D. Ind. Aug. 24, 2011).

244. *Id.* at \*1.

245. “Under the CWA, pollutants may be discharged into the Nation’s waters if the discharge is in compliance with the terms and conditions of a permit issued under the National Pollutant Discharge Elimination System (“NPDES”).” *Id.* at \*2 (citing 33 U.S.C. §§ 1311(a), 1342 (2006 & Supp. 2010)).

246. *Id.*

247. *Id.*

248. *Id.* at \*3.

249. *Id.*

250. *Id.* (emphasis added). Grab samples are “individual samples collected over a period not exceeding [fifteen] minutes and that are representative of conditions at the time the sample is collected.” *Id.*

251. *Id.* The permits required that all samples must be “representative of the volume and



The defendants, who operated and maintained GSD's treatment plant pursuant to a long-term contract, were charged with violations of the CWA in a twenty-six-count indictment.<sup>252</sup> The Defendants allegedly conspired to "knowingly tamper with a monitoring method required to be maintained by the Clean Water Act," and "[t]o defraud the United States Government, that is, to hamper, hinder, impede, impair, and obstruct by craft, treachery, deceit, and dishonest means the lawful and legitimate functions of the U.S. EPA in administering and enforcing federal laws and regulations."<sup>253</sup> The government claimed that the defendants did this by conspiring to "'tamper' with the required E. coli monitoring method by changing the levels of chlorine administered at the plant before and after taking samples for E. coli."<sup>254</sup> Furthermore, certain defendants were charged for twenty-five instances of tampering with a monitoring method by "knowingly tampering with a monitoring method required to be maintained under the Clean Water Act, by temporarily increasing the concentration of chlorine before taking E. coli compliance samples, and then decreasing it shortly after."<sup>255</sup>

The defendants attempted to have the indictment dismissed.<sup>256</sup> In particular, the defendants claimed that "it [was] not a crime to raise the level of chlorine added to the effluent [or] take a grab sample, [and thus] it cannot be a crime to raise the chlorine before taking the sample and lower it afterward" unless done with knowledge of wrongdoing.<sup>257</sup> The defendants also argued that even if true, the allegations "did not allege that the conduct at issue was undertaken with consciousness of wrongdoing, in furtherance of, or to conceal other violations."<sup>258</sup> Accordingly, the defendants argued that allowing the prosecution to proceed would violate the rule of lenity.<sup>259</sup>

In rejecting the defendants' claims, the court noted that dismissing an indictment is an "extraordinary measure."<sup>260</sup> The court found that such an extraordinary instance did not exist in this case because there was no ambiguity

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nature of the monitored discharge flow and shall be taken at times which reflect the full range and concentration of effluent parameters normally expected to be present." *Id.* (citation omitted). The 2006 permit ordered that the samples "not be taken at times to avoid showing elevated levels of any parameters." *Id.* (citation omitted).

252. *Id.* at \*1. The counts in the indictment were based on alleged violations of 18 U.S.C. § 371, 33 U.S.C. § 1319(c)(4) and 18 U.S.C. § 2. *Id.*

253. *Id.* (citation omitted).

254. *Id.* (emphasis omitted).

255. *Id.* (emphasis omitted).

256. *Id.*

257. *Id.* at \*3.

258. *Id.*

259. *Id.* "The rule of lenity 'insists that ambiguity in criminal legislation be read against the prosecutor, lest the judiciary create, in common-law fashion, offenses that have never received legislative approbation, and about which adequate notice has not been given to those who might be ensnared.'" *Id.* at \*6 (quoting *United States v. Thompson*, 484 F.3d 877, 881 (7th Cir.2007)).

260. *Id.* at \*2.

in the CWA's tampering provision.<sup>261</sup> In this regard, the court noted that the tampering provision of the CWA provides that:

[a]ny person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter [commits a violation against the United States].<sup>262</sup>

As such, a tampering violation occurs where: “(1) a person; (2) tampered with a monitoring method; (3) the method was required to be maintained under the CWA; and (4) the person acted knowingly.”<sup>263</sup>

Because “tampering” was not defined in the CWA, nor were there any reported decision defining this term, “tampering” was given its ordinary meaning.<sup>264</sup> In this regard, the court noted that from the definitions of “tamper” found in various dictionaries, it was “clear that tampering is not an innocent event: as Defendants note, there is no such thing as innocently tampering.”<sup>265</sup> “[F]rom the words of the statute itself, the purpose of the CWA tampering provision is clear: it is intended to prevent the corrupting of samples, and to ensure accurate, representative reporting.”<sup>266</sup> A general definition of tamper, consistent with the aim of the statute, was “to meddle so as to alter, in an improper, corrupting manner.”<sup>267</sup> Accordingly, there was no significant ambiguity of “tamper” in the CWA provision.<sup>268</sup>

The court also held that the term “tampering” was not made ambiguous by the scope of the conduct that might be included in the definition, i.e., uncertainty whether charged conduct could be considered tampering.<sup>269</sup> The court noted that the “fact that the individual acts making up the offense conduct are not in and of themselves illegal does not render an indictment insufficient.” The court held that “benign, legal acts can be performed in a manner that constitutes a violation of the CWA's tampering provision.”<sup>270</sup> The court pointed out that the defendants had been charged with “[t]emporarily increasing the concentration of chlorine before taking compliance samples and reducing it shortly thereafter will not always amount to tampering in violation of the CWA,” but it might depending on

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261. *Id.* at \*4-10.

262. *Id.* at \*4 (quoting 33 U.S.C. § 1319(c)(4) (2006)) (alterations in original).

263. *Id.* at \*4 (quoting 33 U.S.C. § 1319(c)(4); *United States v. Panyard*, No. 2:07-CR-20037, 2009 WL 37377 (E.D. Mich. Jan. 7, 2009)).

264. *Id.* at \*7.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* at \*9.

270. *Id.* at \*8.

the circumstances.<sup>271</sup> These allegations could support a finding that defendants tampered in violation of the CWA.<sup>272</sup>

The court further pointed out that the plain language of the provision showed Congress's intention "to prevent tampering even in the absence of any other violation."<sup>273</sup> Accordingly, the court declined to impose a requirement that an "[i]ndictment allege that [d]efendants' acts were in furtherance of, or to conceal other violations."<sup>274</sup> The court also rejected defendants' suggestion that the indictment must allege defendants knew their conduct constituted tampering and concluded the CWA only required defendants know what they did.<sup>275</sup>

The court also held that the rule of lenity only applied when there were "serious ambiguities in the text of the criminal statute."<sup>276</sup> "If the statute contains an ambiguity, and the text or structure of the statute cannot resolve that ambiguity, then it is proper to look to legislative history. Only then is the rule of lenity applied."<sup>277</sup> The court pointed out

[because] the [i]ndictment alleges [d]efendants tampered, it is alleging that [d]efendants engaged in the acts set forth in the [i]ndictment in a manner that is not innocent. Because [d]efendants are not charged with increasing chlorine, taking a grab sample, and decreasing chlorine for some legitimate purpose (i.e. because the flow into the plant had increased), this [c]ourt finds that the statute is not ambiguous with regards to whether the charged conduct violates the law.<sup>278</sup>

Accordingly, the court held that a "reasonable person would have known that the acts alleged in the [i]ndictment violate the CWA's tampering provision."<sup>279</sup> As such, the rule of lenity did not apply to this case.<sup>280</sup> Finally, the court noted questions relating to defendants' specific conduct and its violation of CWA "turn on the specific facts of this case, and are for the jury to decide."<sup>281</sup>

*E. Third Party Has No Right to Be Involved in Negotiation of Consent Decree to Correct a City's CWA Violations*

In *United States v. City of Evansville*,<sup>282</sup> the court held that a company

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271. *Id.*

272. *Id.* at \*9.

273. *Id.* at \*6.

274. *Id.*

275. *Id.* at \*9-10.

276. *Id.* at \*6, 10. "Whether the statute is ambiguous such that the rule of lenity may be utilized turns on statutory interpretation." *Id.* at \*6.

277. *Id.* at \*7 (citing *United States v. LaFaive*, 618 F.3d 613, 616 (7th Cir. 2010)).

278. *Id.* at \*10.

279. *Id.*

280. *Id.*

281. *Id.*

282. No. 3:09-cv-128-WTL-WGH, 2011 WL 2470670 (S.D. Ind. June 20, 2011).

contracted to operate a violating city's sewer system did not have the right to participate in negotiations between the city and the government to resolve those violations.<sup>283</sup> In that case, the plaintiffs sued the City of Evansville, Indiana ("the City"). They sought both injunctive relief and civil penalties for conduct that plaintiffs felt was in violation of the CWA and Title 327 of the Indiana Administrative Code.<sup>284</sup> Plaintiffs argued the City did not adhere to the terms of multiple National Pollutant Discharge Elimination System (NPDES) permits issued by IDEM.<sup>285</sup> These failures included improper maintenance and operation of the City's wastewater and sewer system as well as allowing untreated sewage and other pollutants to be discharged into various waters.<sup>286</sup> The City responded with a third-party complaint for indemnity and breach of contract against Environmental Management Corporation (EMC), the company operating the City's sewer system under contract.<sup>287</sup>

After lengthy negotiations, the City and the plaintiffs agreed to a proposed consent decree ("Decree") setting out the steps the City would take to obtain compliance with applicable laws and permits, which after the required period for public comment, they asked the court to approve and enter.<sup>288</sup> Third party defendant EMC opposed entry of the Decree.<sup>289</sup> EMC claimed that provisions in the Decree were improper in that they: 1) were "designed to benefit the City in its third-party claim against EMC"; 2) were procedurally unfair because neither EMC nor the City's insurers were included in the negotiations; 3) contained unreasonable agreed civil penalties; and 4) allowed the City to recover costs related to a supplemental environmental project (SEP) against EMC.<sup>290</sup>

The court stated that it "must defer to the expertise of the agency and to the federal policy encouraging settlement" and "must approve a consent decree if it is reasonable, consistent with [the CWA's] goals, and substantively and procedurally fair."<sup>291</sup> In finding that the Decree was reasonable and fair, the court explained that the Decree was a product of the parties' extensive arms-length negotiations, which included "substantial involvement" by the magistrate judge.<sup>292</sup> Furthermore, there was no indication that the resulting agreement was anything but a "fair and reasonable resolution based upon the considered

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283. *Id.* at \*6-8.

284. *Id.* at \*1.

285. *Id.* IDEM is authorized by the EPA "to administer the NPDES program in Indiana. The permits issued by IDEM implement the CWA as well as the analogous provisions of Indiana environmental law. The CWA provides that the United States may enforce the provisions of NPDES permits issued by states; Indiana law also provides for the state to enforce the permits issued by IDEM." *Id.* at \*1 n.2.

286. *Id.* at \*1.

287. *Id.* at \*2.

288. *Id.* at \*3.

289. *Id.* at \*5-8.

290. *Id.*

291. *Id.* at \*4 (citation omitted) (alteration in original).

292. *Id.* at \*5.

judgment of the parties regarding the relative strength of their legal positions, the expense of continuing the litigation, and the probability that either side would achieve a more favorable outcome at trial.”<sup>293</sup> Moreover, the Decree had the “distinct advantage” of implementing changes sooner rather than later, i.e., the end of the litigation, and thus was in line with the interest of the public in improving the quality of Evansville’s water.<sup>294</sup>

In rejecting EMC’s arguments regarding the impropriety of the Decree, the court noted that EMC’s arguments seemed to originate from concerns regarding how the Decree might affect the City’s third-party action against EMC.<sup>295</sup> The court pointed out that language alleged to benefit the City in its claim against EMC<sup>296</sup> stated no more than what the City “claimed” it was entitled to recover in its third-party complaint against EMC.<sup>297</sup> As the Decree did not address the question of whether the City was entitled to this recovery, this language could not be a basis for rejecting the Decree.<sup>298</sup> Similarly, the court stated that while “the potential exists for the City to recover some or all of the cost of the SEP from EMC, the fact remains that the City is solely responsible under the Decree for completing the SEP regardless of the outcome of the third-party suit.”<sup>299</sup> The court next found that the lack of involvement of EMC and the City’s insurers in the negotiation of the Decree also did not invalidate the Decree because the City “could and ultimately did obligate itself to the terms of the Decree without approval or input from its insurers” or EMC.<sup>300</sup> The court further noted that EMC had not provided any support for its contention that third-parties like EMC must be included in these types of settlement negotiations.<sup>301</sup> Indeed, the inclusion of parties like EMC would likely impair the process of reaching a settlement to further the goals of the CWA by introducing interests that conflict with the goals

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293. *Id.*

294. *Id.*

295. *Id.*

296. The provisions in question read as follow:

By paying civil penalties and implementing supplemental environmental projects, the Defendants do not release Environmental Management Corporation and will not dismiss their third party action for damages (specifically including these civil penalties and the costs of the supplemental environmental projects) while Environmental Management Corporation was a co-permittee and/or engaged in the operation and management of the Evansville WWTPs and Sewer System.

...

Defendants will not receive any reimbursement for any portion of the SEP from any person, except as permitted by Paragraph 50.e.

*Id.*

297. *Id.*

298. *Id.*

299. *Id.* at \*7.

300. *Id.* at \*6.

301. *Id.*

of the CWA.<sup>302</sup> Finally, the court noted that there was no evidence to suggest that the civil penalties in the Decree were unreasonable.<sup>303</sup>

*F. Vague Remedies Sought in Preliminary Injunction related to Asian Carp Would Get in the Way of Agency Action Already in Progress*

The case of *Michigan v. U.S. Army Corps of Engineers*<sup>304</sup> gained national attention when Michigan, Minnesota, Ohio, Pennsylvania and Wisconsin sought a preliminary injunction against government defendants to undertake several remedies to stop Asian carp,<sup>305</sup> an invasive non-native species, from entering the Great Lakes via the Chicago Area Waterway System (CAWS). The Corps constructed a waterway in northeastern Illinois that connected Lake Michigan to the Mississippi watershed through a series of locks, canals, channels and dams.<sup>306</sup> At the time of the suit, the Asian carp were on the “brink” of entering Lake Michigan and the plaintiff states were concerned about the impact the carp would have on the ecosystem and industries of the Great Lakes. The states claimed that the Corps and Metropolitan Water Reclamation District of Greater Chicago (the “District”) failed to close down part of the CAWS to stop the carp, thereby violating the federal common law of public nuisance.<sup>307</sup>

The United States District Court for the Northern District of Illinois denied the states’ motion for a preliminary injunction,<sup>308</sup> which sought to require the defendants to install extra physical barriers in the CAWS, use new procedures to stop the Asian carp, and accelerate the study of how to permanently separate the Great Lakes and Mississippi watersheds.<sup>309</sup> The district court believed that the states had only a “modest” likelihood of success; the Seventh Circuit found that the plaintiffs would be likely to succeed on the merits of their claim.<sup>310</sup>

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302. *Id.*

303. *Id.* at \*6-7.

304. 667 F.3d 765 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012).

305. As explained in the opinion, Asian carp are “voracious eaters that consume small organisms on which the entire food chain relies; they crowd out native species as they enter new environments; they reproduce at a high rate; they travel quickly and adapt readily; and they have a dangerous habit of jumping out of the water and harming people and property.” *Id.* at 768.

306. *Id.*

307. *Id.* The court held that federal common law applied in this case, even though this case did not involve a “traditional” pollutant. *Id.* at 771-72. The court also discussed the recent Supreme Court case, *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), in evaluating the applicability of federal common law. *Id.*

308. *Id.* at 769. To obtain a preliminary injunction, a plaintiff must show “that they are likely to succeed on the merits of their claims, that they are likely to suffer irreparable harm without an injunction, that the harm they would suffer without the injunction is greater than the harm that preliminary relief would inflict on the defendants, and that the injunction is in the public interest.” *Id.* (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

309. *Id.*

310. *Id.* at 769-70.

The Seventh Circuit held that the district court's denial of injunctive relief was not an abuse of discretion, even though the appellate court believed that the states had demonstrated that there was a "good or perhaps even a substantial likelihood of harm—that is, a non-trivial chance that the carp will invade Lake Michigan in numbers great enough to constitute a public nuisance."<sup>311</sup> The Seventh Circuit even agreed that the harm would be irreparable and likely based on the information presented about the potential impact of the invasive species on the Lake Michigan and Great Lakes ecosystems.<sup>312</sup> However, in balancing the harm caused by the carp with the harm to the defendants, the court found that an injunction would cause "significantly more harm" than it would avoid.<sup>313</sup> The plaintiff states presented several remediation measures, but after further analysis, the court determined that the proposed remedies were vague, duplicative, and costly without a demonstration of how those measures would reduce the risk of Asian carp entering Lake Michigan.<sup>314</sup> In light of the current efforts of the District and Corps to stop the Asian carp, the court viewed a preliminary injunction as a measure that would "only get in the way."<sup>315</sup> The District, the Corps, and other governmental agencies were better-equipped to weigh the issues and choose solutions than a court, and intervention by a court could undermine the efforts already being undertaken to solve the Asian carp problem.<sup>316</sup> The court emphasized, though, that if the agencies' efforts waned or new information came to light, this determination could be revisited at the permanent injunction stage.<sup>317</sup>

#### IV. OTHER ENVIRONMENTAL CASES UNDER FEDERAL LAW

##### A. *Critical Habitat Designation Reversal Under the Endangered Species Act, Otay Mesa Property, L.P. v. U.S. Department of Interior*

In *Otay Mesa Property, L.P. v. U.S. Department of Interior*,<sup>318</sup> the United States Court of Appeals for the District of Columbia Circuit remanded the case to the lower court to vacate the United States Fish and Wildlife Service's (FWS) determination that plaintiffs' property was occupied by San Diego fairy shrimp, an endangered species under the Endangered Species Act.<sup>319</sup> Four shrimp had

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311. *Id.* at 769, 799-800. The agency efforts and allocation of funds by Congress were not sufficient to displace the application of federal common law in this case, particularly when compared to the extensive regulatory scheme stemming from the Clean Air Act. *Id.* at 778-80.

312. *Id.* at 769, 788-89.

313. *Id.* at 789.

314. *Id.* at 791-94.

315. *Id.* at 769.

316. *Id.* at 796-87 (citing *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539-40 (2011)).

317. *Id.* at 799-800.

318. 646 F.3d 914 (D.C. Cir. 2011).

319. 16 U.S.C. §§ 1531-1544 (2006 & Supp. 2010); *Otay Mesa Prop.*, 646 F.3d at 918-19.

been spotted on the plaintiffs' property in a tire rut in 2001, which led FWS to designate 143 acres of plaintiffs' property as critical habitat, even though the shrimp were not seen again in six subsequent surveys during that same year or in any subsequent surveys after the initial sighting.<sup>320</sup> FWS was unable to present substantial evidence that the shrimp were present in 1997, the year of the species' endangered designation, and the ESA defines critical habitat to include "specific areas within the geographical area *occupied by the species, at the time it is listed.*"<sup>321</sup> The court did not prevent FWS from justifying redesignation under a different part of the critical habitat definition, but it emphasized that based on the record before the court, there was not enough evidence to support the designation.<sup>322</sup>

*B. Campground Was a Public Water System Under the Safe Drinking Water Act, United States v. Ritz*

In *United States v. Ritz*,<sup>323</sup> the District Court of the Southern District of Indiana addressed whether a campground with spigots and sewer hookups qualified as a public water system (PWS) that made it subject to the Safe Drinking Water Act (SDWA).<sup>324</sup> The owners of the campground disputed that the site was subject to the SDWA, which requires regular testing of water for nitrate and total coliform.<sup>325</sup> The campground had at least fifty campsites, and therefore met the definition of PWS in the SDWA, which requires at least fifteen service connections that provide water for human consumption or connections that regularly serve at least twenty-five people.<sup>326</sup> The court rejected an argument by the defendants that the spigots were not service connections and the court awarded summary judgment to the government on the issue of the applicability of the SDWA.<sup>327</sup>

There was however a question of fact as to whether one of defendants qualified as a PWS operator, which is not defined with the SDWA.<sup>328</sup> The court adopted the approach taken by the Supreme Court in *United States v. Bestfoods*<sup>329</sup> in which the Court applied the plain meaning of the word "operator" to determine the applicability of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).<sup>330</sup> Looking at the plain meaning of the word operator, the court found that the defendant's role as a maintenance manager who

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320. *Otay Mesa Prop.*, 646 F.3d at 915, 917.

321. *Id.* at 915 (16 U.S.C. § 1532(5)(A)).

322. *Id.* at 918.

323. 772 F. Supp. 2d 1017 (S.D. Ind. 2011).

324. 42 U.S.C. § 300f (2006 & Supp. 2010).

325. *Ritz*, 772 F. Supp. 2d at 1019-20.

326. *Id.* at 1020-21 (citing 42 U.S.C. § 300f(4)(A)).

327. *Id.*

328. *Id.* at 1021-24.

329. 524 U.S. 51 (1998).

330. *Ritz*, 772 F. Supp. 2d at 1021-22 (citing *Bestfoods*, 524 U.S. at 66-67).



occasionally took water samples was not sufficient to make him “someone who manages, directs, or conducts operations specifically related to the PWS’s compliance with, or violation of, the SDWA.”<sup>331</sup>

In a later proceeding, the district court assessed a civil penalty of \$29,754 against one of the defendants and issued an injunction to perform nitrate and coliform sampling and reporting.<sup>332</sup> There were a total of fifty-eight violations of the SDWA testing and reporting requirements for nitrate and coliform, but the United States did not seek the maximum penalty.<sup>333</sup> The court applied the following factors used by the EPA to calculate civil penalties in environmental cases: “(1) the seriousness of the violation; (2) the economic benefit, if any, resulting from the violation; (3) any history of violations and any good-faith efforts to comply with the applicable requirements; (4) the economic impact of the penalty on the violator; and (5) any other matters as justice may require.”<sup>334</sup> In evaluating each of these factors, the seriousness of coliform contamination, the long-standing violations of the testing requirements, and the need to deter additional violations at this site weighed in favor of imposing the civil penalty requested by the United States.<sup>335</sup> The use of a “non-potable” water label on each of the spigots was not sufficient to demonstrate that campers were not at risk when they used the untested water.<sup>336</sup>

## V. ENVIRONMENTAL CASES UNDER STATE LAW

### A. *Collateral Attack on Bankruptcy Injunction not Permitted Under ELA*

In *Day v. Chevron*,<sup>337</sup> a property owner had purchased a site for the purpose of selling cars. During construction at the site, three previously unknown underground storage tanks were discovered at the property. The site was later determined to be contaminated with petroleum compounds. Day alleged that Texaco (or Chevron whom Day alleged was the successor in interest) should be liable for cleanup costs at the site. However, in 1987 Texaco filed for bankruptcy and on March 23, 1988 the bankruptcy court had issued a permanent injunction barring litigation against Texaco.<sup>338</sup>

Day argued that Indiana’s post-order adoption of the ELA<sup>339</sup> and USTA<sup>340</sup>

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331. *Id.* at 1022.

332. *United States v. Ritz*, No. 1:07-cv-1167-WTL-DML, 2011 WL 1743740, at \*4-6 (S.D. Ind. May 3, 2011).

333. *Id.* at \*1-2.

334. *Id.* at \*2.

335. *Id.* at \*2-4.

336. *Id.* at \*4.

337. 2011 WL 4550160, No. 1:10-cv-01320-RLY-MJD (S.D. Ind. Sept. 29, 2011).

338. *Id.* at \*1.

339. *See* IND. CODE §§ 13-30-9-1 to -8 (2011).

340. *See id.* § 13-23-13-8.

permitted his direct lawsuit, notwithstanding the bankruptcy order.<sup>341</sup> Chevron opposed his lawsuit and argued that his pursuit of this litigation would subject him to sanctions from the bankruptcy court for violating the injunction. At issue in this order was whether Day could amend his complaint to seek a declaratory judgment that his ELA and USTA claims were not discharged by the bankruptcy order.<sup>342</sup>

The court declined Day's request to amend his complaint.<sup>343</sup> The court found that no "actual controversy" existed between Day and Texaco.<sup>344</sup> While Day argued that the potentiality of sanctions from the bankruptcy court created a justiciable dispute, the district court believed potential sanctions to be too remote to create a present controversy.<sup>345</sup> More importantly, the court stated that Day only sought an "advisory opinion as to the proper interpretation of the Bankruptcy Court's order" with regard to an ELA claim.<sup>346</sup> Finally, the court noted that Day could have filed a motion directly with the bankruptcy court for leave to file an ELA claim.<sup>347</sup> For all these reasons, the court found that Day's attempt to seek a declaratory judgment as to the viability of his ELA claim was improper.<sup>348</sup>

#### *B. Landlords of Commercial Business not Liable for Tenant's Contamination*

The property at issue in *Neal v. Cure*<sup>349</sup> has been the subject of numerous prior court opinions. The Cures owned commercial property that they leased to a dry cleaner (Masterwear) between 1986 and 1991.<sup>350</sup> The Neals operated a business a property close by. The Neals sued the Cures as landlords, Masterwear, and Masterwear's insurer. By the time this opinion was rendered the Neals had settled with Masterwear and its insurer and dismissed them from the case, but still pursued the Cures for additional amounts relating to the contamination.<sup>351</sup>

The Neals asserted four causes of action against the Cures, including claims under Indiana's ELA, nuisance, trespass, and negligence. The Cures requested summary judgment on all of the Neal's claims which was granted by the trial court on all counts and this appeal ensued.<sup>352</sup> As will be discussed in more detail below, the Indiana Court of Appeals affirmed summary judgment on all counts.<sup>353</sup>

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341. *Day*, 2011 WL 4550160, at \*1.

342. *Id.*

343. *Id.* at \*2.

344. *Id.* at \*1.

345. *Id.*

346. *Id.* at \*2.

347. *Id.*

348. *Id.*

349. 937 N.E.2d 1227 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1204 (Ind. 2011).

350. *Id.* at 1229-30.

351. *Id.* at 1229-30 & 1229 n.1.

352. *Id.* at 1230.

353. *Id.* at 1238.

First, the court found that the Neal's nuisance claim was not viable.<sup>354</sup> The undisputed evidence was that "the Cures did not know about the PCE contamination and did not exercise control over Masterwear's operations."<sup>355</sup> The court noted that a landlord can be held responsible for a tenant's nuisance if "the landlord knows about the tenant's nuisance and could stop it, but does not; or if the landlord consents to the tenant's maintenance of a nuisance."<sup>356</sup> The Neals argued that the Cures knew Masterwear used PCE, stored barrels of liquid on the property, and considered Masterwear a "sloppy housekeeper."<sup>357</sup> In addition, other tenants had complained to the Cures about Masterwear, but those complaints did not address the PCE contamination. Finally, while the Cures were aware of a reported spill of PCE in 1991, they were told "it didn't amount to anything."<sup>358</sup> For these reasons, the Indiana Court of Appeals found the Cures had no "actual knowledge of PCE contamination" that would support the Neal's nuisance claim.<sup>359</sup>

The Neals also argued that Indiana should adopt section 837 of the *Second Restatement of Torts*, which would produce liability if a landlord "knew," "should have known," or "had reason to know" that a nuisance was being created.<sup>360</sup> The court of appeals declined to adopt the *Second Restatement* under these facts based on the historic "actual knowledge" standard.<sup>361</sup> Thus, at least at this time, Indiana requires a claimant to meet a high bar to assert a nuisance claim against a landlord for environmental contamination.

The court next addressed the Neals' ELA claim. Under the ELA, a party is liable if they "caused or contributed" to a release of a hazardous substance.<sup>362</sup> The Neals did not argue that the Cures "caused" the contamination, but asserted that the Cures had "contributed" to the contamination. Because the ELA's "caused or contributed" standard is undefined, the court looked to the rule of statutory construction giving the undefined term its "plain and ordinary meaning."<sup>363</sup> The court noted that the ELA was enacted with the stated purpose of "shift[ing] the financial burden of environmental remediation to the parties responsible for creating contaminations."<sup>364</sup> Relying on dictionary definitions and prior decisions on contributory negligence, the court stated that any party who "help[s] to cause or to furnish some aid in causing the result" may be considered to have "contributed" to that result.<sup>365</sup>

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354. *Id.* at 1233.

355. *Id.* at 1231.

356. *Id.* (citing *Joseph Schlitz Brewing Co. v. Shiel*, 88 N.E. 957, 958 (Ind. App. 1909)).

357. *Id.* at 1232.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.* at 1233.

362. *Id.* (citing IND. CODE § 13-30-9-2 (2011)).

363. *Id.* at 1234.

364. *Id.*

365. *Id.* (citation omitted).

During prior federal litigation between the Cures and the City of Martinsville, the court concluded that the Cures liability could not be summarily decided because the City of Martinsville had failed to demonstrate that the Cures had “knowledge of the release.”<sup>366</sup> Thus, the federal court rejected the City of Martinsville’s motion for summary judgment of liability under the ELA. The Indiana Court of Appeals relied on this prior ruling to affirm summary judgment in favor of the Cures in this case.<sup>367</sup> This leaves some unanswered questions because the federal court’s decision on the ELA claim was based on designated evidence that the Cure’s had “no knowledge” of the release, whereas in this case, the evidence included knowledge of the 1991 release of contaminants. Second, the federal court case did grant summary judgment against the Cures under CERCLA, so the one-paragraph rejection of Martinsville’s motion for summary judgment as to the ELA was not an adjudication of non-liability for the Cures.<sup>368</sup> Nevertheless, the court affirmed summary judgment on the ELA claim.<sup>369</sup>

Third, the Indiana Court of Appeals affirmed summary judgment against the Neals’ trespass claim.<sup>370</sup> The trial court had rejected the claim because (a) Indiana law had historically required the trespasser to have committed an “intentional act . . . directly related to the trespass,” and (b) the trial court concluded that Indiana should not expand liability for trespass to an “acquiesced” standard for which the Neals advocated.<sup>371</sup> The Indiana Court of Appeals agreed with the trial court’s analysis of Indiana law and was not persuaded by the cases from other jurisdictions.<sup>372</sup>

Finally, the court of appeals considered whether the Cures could be liable to the Neals under a negligence theory.<sup>373</sup> The Neals alleged that the Cures were liable for negligence per se because the Cures had violated Indiana Code section 13-30-2-1 which required reporting of the spill.<sup>374</sup> The Indiana Court of Appeals noted that an “unexcused or unjustified violation” of a statutory duty would constitute negligence per se.<sup>375</sup> Yet, the court of appeals declined to impute negligence per se to the Cures based on the tenant’s actions.<sup>376</sup> Prior appellate decisions had found no private right of action under Indiana Code section 13-7-4-1, and the court doubted that the Neals could demonstrate a failure to report was the proximate cause of any injuries.<sup>377</sup> For these reasons, the Indiana Court of

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366. *Id.* at 1234-35 (citation omitted).

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.* at 1236.

371. *Id.* at 1235-36.

372. *Id.*

373. *Id.* at 1236-38.

374. *Id.* at 1237.

375. *Id.* (citation omitted).

376. *Id.* at 1238.

377. *Id.*

Appeals affirmed summary judgment on the negligence claim.<sup>378</sup>

*C. Government is not Liable for Water Damages Arising from Sewage Overflows Where Sewer Damage Previously Unknown*

In *Ka v. City of Indianapolis*,<sup>379</sup> Tat-Yik Jarvis Ka and Amanda Beth Ka sued the City of Indianapolis (“the City”) for negligence, negligent infliction of emotional distress, trespass, and nuisance when sewage from a City pipe backed up in their house.<sup>380</sup> The trial court granted the City’s summary judgment motion and the Kas appealed.<sup>381</sup>

The City had crews cleaning the sewers near the Kas’ home.<sup>382</sup> While the crew was cleaning near the Kas’ house, the Kas heard a noise and started smelling sewage.<sup>383</sup> The next day, the Kas had trouble with their toilets not flushing correctly and eventually their toilet and shower began to overflow, causing substantial damage to the Kas’ home and injury to Amanda.<sup>384</sup> Later, the City arrived and unblocked a clog in the Kas’ sewer line.<sup>385</sup> Testimony from sewer experts established that particular portion of the sewer line had pre-existing structural damage.<sup>386</sup>

In rejecting the Kas’ claims for damages, the Indiana Court of Appeals held that the City was not liable for the pre-existing structural sewer line damage because there was no evidence that the City had knowledge of this defect.<sup>387</sup> In this regard, the City introduced evidence that the sewers had passed several tests after it was constructed and the City’s contractor in charge of the sewers never informed the City of any problems.<sup>388</sup> The court also noted that the plaintiffs had not previously complained of sewer problems.<sup>389</sup> As such, the damage to the sewer line at issue was hidden.<sup>390</sup> Similarly, the court rejected the Kas’ nuisance argument because this claim was tied to a single isolated event and not a situation that was ongoing or that could be abated.<sup>391</sup>

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378. *Id.*

379. 954 N.E.2d 974 (Ind. Ct. App. 2011).

380. *Id.* at 375.

381. *Id.* at 975-76.

382. *Id.* at 976.

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.* at 977-81.

388. *Id.* at 978-79.

389. *Id.*

390. *Id.* at 979.

391. *Id.* at 981-82.

*D. Liability for Inter-Municipal Contract Breaches for Wastewater System Costs Are Based on State Law*

In 1988 the Town of New Chicago and the City of Lake Station agreed to construct an interceptor sewer system.<sup>392</sup> The combined waters of New Chicago and Lake Station were then treated at Gary Sanitary District (GSD).<sup>393</sup> New Chicago and Lake Station both agreed to comply with federal law, including the CWA, and agreed that Lake Station would charge New Chicago monthly at the “GSD rate.”<sup>394</sup> Lake Station also agreed to indemnify and hold harmless New Chicago for any losses or costs arising from Lake Station’s negligence or failure to act.<sup>395</sup>

GSD tripled its rate in 1989, but Lake Station failed to notify New Chicago of this, continuing to bill New Chicago at the old rate.<sup>396</sup> Lake Station attempted to reject the rate increase by GSD more than a year after the rate increase was implemented.<sup>397</sup> Lake Station never informed New Chicago of this rate dispute.<sup>398</sup> After Lake Station refused to pay the increased rates, GSD sued Lake Station in 1999.<sup>399</sup> Lake Station again declined to notify New Chicago of the suit.<sup>400</sup> Judgment was entered against Lake Station, and in favor of GSD, in 2005.<sup>401</sup>

Lake Station demanded approximately a half million dollars from New Chicago for its proportionate share of the judgment against it for over \$5 million in 2005.<sup>402</sup> Lake Station sued New Chicago in 2007 after New Chicago refused to pay.<sup>403</sup> New Chicago asserted multiple affirmative defenses, among them being laches and equitable estoppel.<sup>404</sup> Lake Station sought partial summary judgment on the issue of liability based on the agreement between the parties, which required compliance with federal law.<sup>405</sup> New Chicago responded by cross-moving for summary judgment on all issues on the grounds of equitable estoppel, laches, and breach of the intermunicipal agreement by Lake Station.<sup>406</sup> The trial court granted Lake Station’s motion for partial summary judgment based

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392. *Town of New Chicago v. City of Lake Station*, 939 N.E.2d 638, 641-42 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1208 (Ind. 2011).

393. *Id.* at 641.

394. *Id.*

395. *Id.* at 643.

396. *Id.*

397. *Id.* at 643-44.

398. *Id.* at 644.

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.* at 641, 644-45.

403. *Id.* at 641, 645.

404. *Id.*

405. *Id.* at 645-46.

406. *Id.*

on the terms of the contract, and in part, on the terms of the CWA, 33 U.S.C. § 1284(b)(1)(A), which requires that a recipient of waste treatment services must pay its proportionate share of the costs of operation and maintenance.<sup>407</sup> The trial court denied New Chicago's motion for summary judgment.<sup>408</sup> New Chicago appealed.<sup>409</sup>

In reversing the trial court, the Indiana Court of Appeals concluded that Lake Station's only possible claim against New Chicago was for breach of contract as there was no private right of action under the CWA.<sup>410</sup> With regard to the contract issue, the court found that the laches defense was unavailable for Lake Station's breach of contract claim because "laches acts as a limitation upon equitable relief, and an action for breach of contract is a legal claim."<sup>411</sup> However, the court found that New Chicago met its burden of proving the defense of equitable estoppel because:

(1) New Chicago lacked the knowledge or means of knowledge that Lake Station was not properly billing them because there was no indication that anything was wrong, (2) New Chicago relied on the monthly billings from Lake Station for more than fifteen years without any sort of notice from Lake Station, and (3) Lake Station's conduct caused New Chicago to prejudicially change its position in that New Chicago was prevented from budgeting for the increased rate or joining in the GSD/Lake Station litigation.<sup>412</sup>

As such, the trial court was reversed and summary judgment was entered in favor of New Chicago.<sup>413</sup>

#### *F. The Common Enemy Doctrine and Liability for Water Damages*

In *Kinsel v. Schoen*,<sup>414</sup> the Indiana Court of Appeals examined the common enemy doctrine with regard to liability when a homeowner's manmade pond leaked water, flooding a neighbor's septic drainage field, causing it to malfunction. After Kinsel's pond leaked water and flooded the Schoens' property, the county health department filed an action against the Schoens requiring them to replace their failed septic system.<sup>415</sup> The Schoens sued Kinsel and received a judgment against Kinsel at trial for nuisance, trespass, and negligence.<sup>416</sup> Kinsel alleged that the common enemy doctrine should have

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407. *Id.* at 646 (citation omitted).

408. *Id.*

409. *Id.* at 648.

410. *Id.* at 648-52.

411. *Id.* at 641.

412. *Id.*

413. *Id.* at 657.

414. 934 N.E.2d 133 (Ind. Ct. App. 2010).

415. *Id.* at 136-37.

416. *Id.* at 137.

barred the Schoen's claims and that the award of damages to the Schoens was improper because the Schoens did not mitigate their damages. He also argued that he should not have to pay the Schoens' attorneys' fees and expert witness fees.<sup>417</sup>

The trial court concluded that the common enemy doctrine was not applicable because Kinsel built his pond without a permit; therefore, it was a common nuisance.<sup>418</sup> The trial court also determined that the water from Kinsel's pond "trespassed" on the Schoens' property, making him liable for all damages resulting from the water flowing onto the Schoens' property.<sup>419</sup> In this regard, the court noted that Kinsel had admitted that his pond had been losing water and that the authorities notified him that the pond might cause other problems with the Schoens' septic system and drainage field.<sup>420</sup> He was also held negligent because he failed to take any steps to prevent pond water from infiltrating the Schoens' septic field.<sup>421</sup>

On appeal, Kinsel argued that the common enemy doctrine applied because the Schoens' claim was "based on an overabundance of natural water from snowmelt, rainwater, surface water and groundwater entering his property."<sup>422</sup> In rejecting Kinsel's claims, the Indiana Court of Appeals acknowledged that "all property owners hold dominion over their property with respect to the control of water."<sup>423</sup> It further stated that only "water classified as surface water is governed by the common enemy doctrine."<sup>424</sup> Furthermore, the court defined surface water as "[W]ater from falling rains or melting snows that is diffused over the surface of the ground or which temporarily flows upon or over the surface as the natural elevations and depressions of the land may guide it but which has no definite banks or channel, is surface water."<sup>425</sup> The court held that Kinsel's private pond was not surface water and therefore the common enemy doctrine did not apply.<sup>426</sup>

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417. *Id.* at 141.

418. *Id.* at 138.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* at 139 (citation omitted).

423. *Id.* (citation omitted).

424. *Id.* (citing *Argyelan v. Haviland*, 435 N.E.2d 973, 976 (Ind.1982)).

In its most simplistic and pure form the rule known as the "common enemy doctrine," declares that surface water which does not flow in defined channels is a common enemy and that each landowner may deal with it in such manner as best suits his own convenience. Such sanctioned dealings include walling it out, walling it in and diverting or accelerating its flow by any means whatever.

*Id.* (quoting *Haviland*, 435 N.E.2d at 975). "The common enemy doctrine may apply regardless of the form of action brought by the plaintiff, that is, regardless of whether the plaintiff asserts his claims as an action for negligence, trespass, or nuisance." *Id.*

425. *Id.* at 140 (citing *Kramer v. Rager*, 441 N.E.2d 700, 705 (Ind. Ct. App.1982)).

426. *Id.*



Consequently, Kinsel was liable for the Schoens' damages.<sup>427</sup> The court of appeals also noted that there was no evidence that the Schoens' actions aggravated or increased their injuries, and Kinsel did not offer any alternative to the solution required by the health department (putting in a new septic system).<sup>428</sup> Finally, the trial court had the inherent authority to assess attorneys' fees and expenses for the consequential damages suffered by the plaintiffs in this situation.<sup>429</sup>

*G. Liability Can Arise from Seller's Knowing Misrepresentations  
Regarding Presence of Wetlands*

The Indiana Court of Appeals recently held in *Wise v. Hays*<sup>430</sup> that a "a seller may be liable for any misrepresentation on the [real estate] sales disclosure form if the seller had actual knowledge of that misrepresentation at the time the form was completed."<sup>431</sup> In *Wise*, the buyers of a sixteen-acre parcel inquired of the sellers as to the designation of a wetlands on the property and whether it would affect future residential development of the parcel.<sup>432</sup> In response, the sellers stated that the property could be developed for additional residential housing.<sup>433</sup> The buyers also received a sales disclosure form in which the sellers responded that there were no structural problems with the house, that they had received no notices from any governmental agencies regarding the property, that there were no additions to the residence performed without a permit and that the property was not in a flood plain, among other things.<sup>434</sup> The buyers purchased the home following a home inspection by a licensed home inspector.<sup>435</sup> Following the purchase, the buyers began having concerns about the property and obtained copies of past correspondence from the Corps to the sellers, which stated that the property was in violation of the Clean Water Act due to earthwork or excavation work that had been performed by the sellers.<sup>436</sup> The Corps correspondence also warned that wetlands on the property may affect future development of the parcel.<sup>437</sup> In addition, post-purchase, the buyers hired a professional engineer to inspect the residence, who found numerous code

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427. *Id.*

428. *Id.*

429. *Id.* at 142.

430. 943 N.E.2d 835, 842 (Ind. Ct. App. 2011).

431. *Id.* at 842.

432. *Id.* at 836.

433. *Id.*

434. *Id.* at 836-37.

435. *Id.* at 837. The purchase agreement contained a clause that allowed the buyer to terminate the agreement if the inspection revealed a major defect that the sellers were unable or unwilling to remedy. *Id.* at 836.

436. *Id.* at 837.

437. *Id.*

violations and structural problems with the residence.<sup>438</sup> The buyers filed suit for negligence and fraud based on the sellers' alleged knowing misrepresentations on the sales disclosure form.<sup>439</sup>

The sellers filed a Trial Rule 12(B)(6) motion to dismiss the buyer's claims that cited to exhibits attached to the buyer's complaint.<sup>440</sup> The trial court granted the sellers' motion based on the sellers' argument that the buyer had no right to rely on the sellers' representations when the buyer had a reasonable opportunity to inspect the property.<sup>441</sup> This order also cited the exhibits attached to the complaint.<sup>442</sup>

In reversing the trial court decision, the Indiana Court of Appeals noted that in certain instances a seller has the duty to disclose material facts about the property where the buyer makes "inquiries about a condition on, the qualities of, or the characteristics of the property."<sup>443</sup> Furthermore, "[o]nce a seller undertakes to disclose facts within his or her knowledge, the seller must disclose the whole truth."<sup>444</sup> The court went on to state that "[f]or transactions covered by [Indiana Code] [c]hapter 32-21-5, a seller may be liable for misrepresentation on the sales disclosure form if the seller had actual knowledge of that misrepresentation at the time the form was completed."<sup>445</sup> The court held that the correspondence from the Corps and the inspection report from the professional engineer established genuine issues of material fact as to what the sellers had actual knowledge of at the time they made their disclosures.<sup>446</sup> Consequently, the court ruled that the trial court erred in granting summary judgment in favor of the sellers.<sup>447</sup>

## VI. DEVELOPMENTS IN INDIANA ENVIRONMENTAL INSURANCE LAW

In this section, we examine recent opinions that may impact environmental insurance coverage cases under Indiana law. Below is a summary of decisions relevant to environment practitioners in the context of insurance.

### A. *Travelers v. Maplehurst Farms*

In *Travelers Insurance Co. v. Maplehurst Farms, Inc.*,<sup>448</sup> the Indiana Court

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438. *Id.*

439. *Id.* at 838.

440. *Id.*

441. *Id.*

442. *Id.* The court of appeals treated the trial court's order as a ruling on a motion for summary judgment.

443. *Id.* at 840 (quoting *Fembel v. DeClark*, 695 N.E.2d 125, 127 (Ind. Ct. App. 1998)).

444. *Id.* (citing *Ind. Bank & Trust Co. of Martinsville v. Perry*, 467 N.E.2d 428,431 (Ind. Ct. App. 1984)).

445. *Id.* at 842.

446. *Id.* at 843.

447. *Id.* at 844.

448. 953 N.E.2d 1153 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 1831 (Oct. 21, 2011), *trans. denied*, 953 N.E.2d 1153 (Ind. 2012).

of Appeals considered an appeal by an insurer who had been ordered to pay costs to its insured for an environmental cleanup at one of the insured's former facilities.<sup>449</sup> The contamination arose from a UST used to store fuel oil during Maplehurst's sixty-plus years operating a dairy.<sup>450</sup> Maplehurst's successor at the facility, Dean Foods reported a leak from the underground storage tank to IDEM in 2002. In January 2002, IDEM ordered Maplehurst to investigate and remedy the leak. Maplehurst retained a law firm and an environmental consultant to help respond to IDEM's claims.<sup>451</sup> Maplehurst began preparing a corrective action plan and submitted that plan to IDEM. Dean, however, demanded that Maplehurst reimburse it for costs it previously incurred in responding to the release. In December 2002, Maplehurst agreed to pay Dean \$170,000 for past environmental costs at the site.<sup>452</sup>

During this time, Maplehurst attempted to locate its insurance policies.<sup>453</sup> It encountered difficulties in this process because its business was no longer operating and the executive responsible for purchasing insurance was deceased. By March 2003, it had notified two of its insurers, but it did not notify Travelers until May 30, 2003. Ten days later, Travelers notified Maplehurst that it was searching Travelers records for copies of insurance policies that it may have issued to Maplehurst.<sup>454</sup> In that letter, Travelers reserved the right to argue that Maplehurst violated the notice and voluntary payments provisions in any policies that Travelers issued.

Ultimately, Travelers produced copies of Maplehurst's policies from its own records.<sup>455</sup> On February 21, 2005, Travelers denied coverage on the basis of the notice and voluntary payment provisions. Travelers also objected to the claim on the basis that an IDEM proceeding did not constitute a "suit" under the policy, that the proceeding was not a suit for damages, that an "absolute pollution exclusion" in the policies barred coverage, and that there had been "no occurrence" as defined in the policy.<sup>456</sup>

At the trial court, the parties filed cross-motions for summary judgment regarding the "pre-notice, pre-tender expenditures."<sup>457</sup> Travelers argued that it was not obligated to pay any of the expenses that Maplehurst had incurred prior to May 30, 2003, and that Travelers was not obligated to cover the \$170,000 paid to Dean. Maplehurst argued that those expenses were properly reimbursable under the policies.<sup>458</sup> Maplehurst's other insurers argued that they were entitled to reimbursement from Travelers for expenses that those insurers paid Maplehurst

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449. *Id.* at 1154.

450. *Id.* at 1155.

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.* at 1156-57.

455. *Id.* at 1157.

456. *Id.*

457. *Id.*

458. *Id.* at 1157-58.

after they had been notified. Maplehurst also argued that Travelers' other coverage positions were frivolous and that an award of attorneys' fees should be awarded accordingly.

The trial court entered summary judgment for Maplehurst.<sup>459</sup> The court found that Travelers had breached its duty to defend under the policies and that Travelers was obligated to pay pre-tender costs.<sup>460</sup> In that decision, the court distinguished *Dreaded, Inc. v. St. Paul Guardian Insurance Co.*<sup>461</sup> because (a) St. Paul had immediately agreed to defend under the policies without reservation, (b) Dreaded expressly indicated that delayed tender may be "legally excused" in certain circumstances, (c) Dreaded did not address indemnity costs, and (d) no evidence suggested that Travelers had been prejudiced by Maplehurst's notice.<sup>462</sup> The trial court, however, rejected Maplehurst's argument that it should receive an award of attorneys' fees based on Travelers' other coverage positions.

The Indiana Court of Appeals reversed in a split decision.<sup>463</sup> Judge Baker, writing the majority opinion in which Judge Bradford concurred, held that summary judgment should be entered in Travelers' favor based on *Dreaded*.<sup>464</sup> The court found that "the fundamental holding" in *Dreaded* implied that "pre-notice, pretender costs . . . cannot be recovered."<sup>465</sup> Thus, the majority interpreted *Dreaded* as an inflexible prohibition to the recovery of pre-notice expenses. The court rejected Maplehurst's arguments that the difficulties it encountered in finding the policies and or Travelers' failure to demonstrate prejudice were relevant to whether late notice barred these claims.<sup>466</sup>

Judge May dissented from the majority decision.<sup>467</sup> She would have affirmed the earlier decision favoring Maplehurst.<sup>468</sup> She found the trial court's analysis of the "reasonableness" of notice to be compelling and would not interpret *Dreaded* in such a rigid manner.<sup>469</sup> She noted that the majority's conclusion that the late notice precluded pre-tender costs, as a matter of law, would act as a forfeiture of insurance rights that the insured had dutifully obtained by payment of its premiums.<sup>470</sup>

#### B. State Automobile Mutual Insurance Co. v. Flexdar, Inc.

During the survey period, the court of appeals affirmed summary judgment

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459. *Id.* at 1158.

460. *Id.*

461. 904 N.E.2d 1267 (Ind. 2009).

462. *Travelers*, 953 N.E.2d at 1158.

463. *Id.* at 1162-65.

464. *Id.* at 1159-61.

465. *Id.* at 1160.

466. *Id.* at 1161-63.

467. *Id.* at 1163 (May, J., dissenting).

468. *Id.*

469. *Id.* at 1163-64.

470. *Id.* at 1164.

against an insurer in *State Automobile Mutual Insurance Co. v. Flexdar*.<sup>471</sup> This opinion addressed whether subsequent forms of insurance policies can be used to demonstrate an ambiguity of a prior form and reaffirmed Indiana law finding the absolute pollution exclusion is ambiguous as a matter of law. After the survey period ended, the Indiana Supreme Court issued its opinion reversing this opinion.<sup>472</sup> The Indiana Supreme Court's decision will be addressed in greater detail during the next survey period, but we will highlight a few key points from the Flexdar litigation for environmental practitioners.

In the court of appeals' decision, the panel considered a trial court's summary judgment order finding coverage was available to Flexdar for losses arising out of environmental contamination from Flexdar's historical operations.<sup>473</sup> Flexdar's manufacturing equipment used trichloroethylene (TCE). Spent solvent was collected and stored for less than three months. During these processes, the solvent leaked from the premises and contaminated subsoil and groundwater. IDEM ordered Flexdar to investigate the contamination and notified the company that it could be liable for the costs of the cleanup and remediation. Flexdar's insurers, including State Auto, declined coverage, citing the pollution exclusion in their policies, and litigation over coverage ensued.<sup>474</sup>

During these proceedings, the trial court refused to consider Flexdar's citation to endorsements used by the insurer in years after the policies at issue in that suit. Flexdar argued that the endorsements were admissible to demonstrate an ambiguity in the older endorsements.<sup>475</sup> In other words, Flexdar argued that if the insurers had "clarified" the language in future insurance forms, then an ambiguity must have been present in the prior forms. The court of appeals affirmed the trial court's rejection of this evidence.<sup>476</sup> Relying on Evidence Rule 407, the court found that such modifications were "subsequent remedial clarifications" which are not admissible to interpret the insurance contract.<sup>477</sup> Because Flexdar had offered no basis for admitting the evidence, other than to prove State Auto was "liable," the evidence was inadmissible.<sup>478</sup>

The court of appeals then revisited the lengthy litigation history of the pollution exclusion under Indiana law. The court concluded that "pursuant to the last fourteen years of precedent, . . . [the] absolute pollution exclusion is ambiguous" and did not preclude coverage in connection with the claim at issue.<sup>479</sup>

In the recent Indiana Supreme Court decision, the court confirmed that

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471. 937 N.E.2d 1203 (Ind. Ct. App. 2010), *aff'd*, 964 N.E.2d 845 (Ind. 2012), *reh'g denied*, 2012 Ind. LEXIS 526 (June 21, 2012).

472. *Flexdar, Inc.*, 964 N.E.2d 845.

473. *Flexdar, Inc.*, 937 N.E.2d at 1206.

474. *Id.*

475. *Id.* at 1206-07.

476. *Id.* at 1208.

477. *Id.*

478. *Id.*

479. *Id.* at 1212.

Indiana law finds pollution exclusions ambiguous.<sup>480</sup> This opinion, however, was far from unanimous as it involved a splintered 2-1-2 decision with Justice Rucker (joined by Justice Dickson) writing the court's opinion.<sup>481</sup> Justice David concurred in result and Justices Sullivan (joined by Chief Justice Shepard) dissented.<sup>482</sup> Justice Rucker, writing the opinion of the court, concluded that "Indiana decisions have been consistent" in rejecting the pollution exclusions.<sup>483</sup> This recent trend continued with the rejection of State Auto's challenge to those prior opinions. The two dissenting justices would have accepted State Auto's argument and distinguished its policies and this litigation from prior caselaw.<sup>484</sup>

Interestingly, Justice Rucker's opinion also suggests that endorsements issued in subsequent policies may be used to suggest an ambiguity in a litigated insurance policy. While the court of appeals decision held that such references were impermissible, Justice Rucker makes explicit reference to a 2005 State Auto endorsement that was not at issue in the case.<sup>485</sup> He noted that "[b]y more careful drafting[, the insurer had] the ability to resolve any question of ambiguity."<sup>486</sup> Thus, the court tacitly approved the use by an insured of an endorsement that is not at issue in the case, to demonstrate ambiguities in policy language.

#### CONCLUSION

Recent decisions by both the Indiana and U.S. Supreme Court have increased the potential for environmental litigation. Indiana has reaffirmed its stance as a leader in insurance cost recovery for environmental matters. The U.S. Supreme Court affirmed a private parties' right to judicial review of an EPA compliance order. These two decisions, along with the other opinions discussed herein, indicate that environmental litigation will continue to increase on our courts' dockets in the years to come.

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480. State Auto. Mut. Ins. Co. v. Flexdar, Inc., 964 N.E.2d 845 (Ind. 2012), *reh'g denied*, 2012 Ind. LEXIS 526 (June 21, 2012).

481. *Id.* at 846.

482. *Id.* at 852 (Sullivan, J., dissenting).

483. *Id.* (majority opinion).

484. *Id.* at 852-54 (Sullivan, J., dissenting).

485. *Id.* at 852 (majority opinion).

486. *Id.*