RECENT DEVELOPMENTS IN TOXIC TORT & ENVIRONMENTAL LAW

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I. INTRODUCTION

Over the last year, the fields of toxic tort and environmental law have experienced dynamic developments. This article analyzes some of these recent developments in an effort to provide legal practitioners a basic roadmap to a changing legal landscape.

II. THE EXTENT OF LIABILITY IN TAKE-HOME EXPOSURE CLAIMS

Tort law abandoned the notion of privity decades ago, but the reach of take-home liability is still contested. The enormity and scope of potential plaintiffs in this context strain the rational limits of the "duty" element in negligence and strict products liability cases.[1] Plaintiffs' attorneys pursue claims against employers, property owners, and manufacturers on behalf of individuals with both intimate and attenuated relationships to persons with real and unlikely exposure to toxic substances. Plaintiffs offer the causation element as a limiting principle, while defendants insist that duty is the appropriate place to impose policy limits on liability, especially

1. *See* Kesner v. Super. Ct., 384 P.3d 283, 1156 (Cal. 2016) ("We are mindful that recognizing a duty to all persons who experienced secondary exposure could invite a mass of litigation that imposes uncertain and potentially massive and uninsurable burdens on defendants, the courts, and society.").

where the availability of questionable expert "causation" opinions leads to "fact questions" that must be resolved in countless trials. These concerns have led courts across the country to debate the scope and breadth of take-home liability under their respective definitions of "duty."[2]

A. *Take-Home Liability in the Context of Asbestos Claims*

In California, lower courts continue to search for balance between the risk of limitless liability to an unknowable group of potential plaintiffs and the policy that "[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . ." reflected in California Civil Code section 1714(a). In *Petitpas v. Ford Motor Co.*, decided in July 2017, the California Court of Appeal held that no duty was owed to an allegedly exposed worker's girlfriend, relying upon the California Supreme Court's categorical delineation of those to whom a duty is owed in take-home asbestos cases: "members of a worker's household, i.e., persons who live with the worker. . . ."[3] The plaintiff was the then-girlfriend of an Exxon gas station worker who allegedly took home asbestos fibers on his clothing.[4] The plaintiff and the worker were not married and did not live together at all times during which she alleged exposure "and thus technically were not members of the same household."[5] The plaintiff argued that her "'status is close to that of a household member' because she and [the worker] hugged, kissed, and went places in [the worker's] car while [he] was wearing his work clothes."[6] The court ". . . decline[d] to expand *Kesner*'s duty to apply to a non-household member. . . . Inviting a trial to determine whether a non-household member's contact with the employee was 'similar to the status of a household member' appears to be exactly what the

2. *See, e.g.*, *In re* N.Y.C. Asbestos Litig., 5 N.Y.3d 486 (N.Y. 2005) (highest court held duty limited to employee); Riedel v. ICI Ams. Inc., 968 A.2d 17 (Del. 2009) (highest court held duty limited to employee); Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439 (6th Cir. 2009) (Sixth Circuit, construing Kentucky law, held duty limited to employee); CSX Transp., Inc. v. Williams, 608 S.E.2d 208 (Ga. 2005) (highest court held duty limited to employee); Doe v. Pharmacia & Upjohn Co., 879 A.2d 1088 (Md. 2005) (highest court held duty limited to employee); *In re* Certified Question from Fourteenth Dist. Ct. App. of Tex., 740 N.W.2d 206 (Mich. 2007) (highest court held duty limited to employee); *Kesner*, 384 P.3d 283 (California's highest court found duty limited to employees and their household members); Satterfield v. Breeding Insulation Co., 266 S.W.3d 347 (Tenn. 2008) (highest court found duty limited to employee and those who came into close regular contact with employee's clothes); Chaisson v. Avondale Indus., Inc., 947 So. 2d 171 (La. Ct. App. 2006) (appellate court found duty limited to employees and their spouses); Olivo v. Owens–Illinois, Inc., 895 A.2d 1143 (N.J. 2006) (highest court found duty limited to employees and their spouses); Lunsford v. Saberhagen Holdings, Inc., 106 P.3d 808 (Wash. Ct. App. 2005) (appellate court found duty limited to employees and family members).

3. 220 Cal. Rptr. 3d, 198–99 (Cal. Ct. App. 2017) (citing *Kesner*, 384 P.3d at 297–99).

4. *Id.* at 267.

5. *Id.* at 275.

6. *Id.* at 275–76.

Supreme Court was attempting to avoid with this bright-line rule."[7] As such, no legal duty was owed to the worker's girlfriend, despite her spending significant time with the allegedly exposed worker, because she did not live at his house and was simply not a member of his household.[8]

Similarly, Delaware courts continue to flesh out the meaning of the Delaware Supreme Court's distinction between misfeasance and nonfeasance in *Riedel v. ICI Americas, Inc.*[9] In a February 2017 unpublished opinion, a Delaware superior court granted the defendant's motion for summary judgment, holding that the defendant-manufacturer did not owe a duty to a worker's wife, even when she laundered clothing that was "caked" with asbestos debris.[10] The court reiterated that "misfeasance" is affirmatively creating a new risk of harm, whereas a "nonfeasance" is failing to act to prevent harm.[11] Misfeasance creates a duty and is a proper basis for pursuing claims against an employer.[12] When claims are based on nonfeasance, however, the plaintiff also has to prove a "special relationship" existed between the plaintiff (i.e., not the worker) and the defendant to impose a duty.[13] The court first held that the misfeasance/nonfeasance analysis applied, even though the defendant was a product manufacturer, whereas the defendant in *Riedel* was the allegedly exposed spouse's employer.[14] The court also held that the plaintiff's claim that the manufacturer *failed* to warn, test, or take other protective measures constituted a claim of nonfeasance,[15] and that the plaintiff failed to show that a special relationship existed between her and the defendant-manufacturer.[16] Thus, summary judgment was proper.[17]

In 2013, Maryland's highest court held in *Georgia Pacific, LLC v. Farrar* that a manufacturer/distributor of a product containing asbestos did not owe a duty to warn the household member of a worker-bystander who was present at facilities where the asbestos containing product was in-

7. *Id.* at 276.

8. *Id.* Other post-*Kesner* cases have held that a duty is owed to a worker's spouse as a "member of a worker's household." *See, e.g.*, Sandoval v. Am. Appliance Mfg. Corp., 2017 WL 3205751 (Cal. Ct. App. July 28, 2017) (unpublished opinion by California appellate court found a duty was owed to employee's stay-at-home spouse who lived in the same house as the worker); Beckering v. Shell Oil Co., 2017 WL 2417907 (Cal. Ct. App. June 2, 2017) (unpublished opinion by California appellate court found a duty was owed to the wife of a Shell employee who lived with her husband).

9. 968 A.2d 17 (Del. 2009).

10. Ramsey v. Atlas Turner Ltd., 2017 WL 465301, at *2 (Del. Super. Ct. Feb. 2, 2017).

11. *Id.* at *5.

12. *Id.* at *6.

13. *Id.* at *5–6.

14. *Id.* at *5–7.

15. *Id.* at *7–8.

16. *Id.* at *8–9.

17. *Id.*

stalled prior to 1972.[18] Maryland plaintiffs continue to probe the contours of this case. In a January 2017 unreported opinion, the Maryland Court of Special Appeals decided that, while a bright-line rule was not established in *Farrar*, any duty must be based on the foreseeability of the danger at the time the warning was to be given.[19] The plaintiffs failed to distinguish the facts of their case from *Farrar*, and the court granted the defendant's motion for summary judgment, finding no duty.[20]

Federal courts in states that have not addressed the question of whether a duty should be imposed for the protection of household members are also struggling with this issue. The Eleventh Circuit, applying Alabama law, issued an *Erie*-guess that the Alabama Supreme Court would impose a duty for the benefit of household members in asbestos cases, at least where the exposures occurred after a 1979 Tennessee Valley Authority safety and control manual was issued.[21] In *Bobo v. Tennessee Valley Authority*, the plaintiff-wife claimed take-home exposure from twenty-two years of washing her husband's work clothes and living in the same household.[22] The Eleventh Circuit surveyed other jurisdictions' approaches to household asbestos exposure claims[23] and found a duty was required in light of "Alabama's focus on foreseeability as the key to its duty analysis."[24] The court did not address whether this duty extends beyond family members.

B. *Take-Home Liability in the Context of Beryllium Claims*

In March 2017, the U.S. District Court for the Eastern District of Pennsylvania, applying New Jersey law, found a duty was owed to a worker's wife, who was his girlfriend during the alleged exposure to beryllium particulate.[25] In *Schwartz v. Accuratus Corp.*, Brenda Schwartz sued her now-husband's previous employer for take-home exposure to beryllium, which resulted in her having chronic beryllium disease.[26] All of the alleged exposures occurred in the 1970s when they were dating, prior to their marriage in 1980.[27] The plaintiff alleged that, as his girlfriend, she frequently visited his apartment, spent the night, cleaned the apartment, and washed his clothing.[28] The case previously went to the New Jersey Supreme Court to determine New Jersey state law limits on take-home exposure under ex-

18. 432 Md. 523, 541–42 (Md. 2013).
19. Hiett v. AC & R Insulation Co., Inc., 2017 WL 382908, at *9 (Md. Ct. Spec. App. Jan. 27, 2017).
20. *Id.* at *10–13.
21. Bobo v. Tenn. Valley Auth., 855 F.3d 1294, 1307, 1310 (11th Cir. 2017).
22. *Id.* at 1298.
23. *Id.* at 1302–04.
24. *Id.* at 1307.
25. Schwartz v. Accuratus Corp., 2017 WL 1177171, at *1 (E.D. Pa. Mar. 30, 2017).
26. *Id.*
27. *Id.*
28. *Id.* at *5.

isting precedent.[29] The supreme court in *Olivo v. Owens-Illinois, Inc.* previously held that companies working with asbestos "owed a duty to spouses handling the workers' unprotected work clothing based on the foreseeable risk of exposure from asbestos borne home on contaminated clothing."[30]

In this instance, the New Jersey Supreme Court declined to adopt a bright-line categorical rule, as seen in other states, and instead held that a landowner's duty of care may extend beyond a spouse of a worker exposed to the toxin in certain circumstances.[31] The court offered three factors:

> (1) ". . . the relationship of the parties is, of necessity, relevant and weighty[,]" (2) "the opportunity for exposure to the dangerous substance and the nature of the exposure that causes the risk of injury . . . [,]" and (3) ". . . the employer's knowledge of the dangerousness of exposure, assessed at the time when the exposure to the individual occurred and not later, when greater information may become available. In non-strict-liability negligence action, the dangerousness of the toxin, how it causes injury, and the reasonable precautions to protect against a particular toxin are relevant . . ."[32]

Applying these standards, the federal district court determined that the "duty-creating relationship threshold in this case must be considered relatively low" because beryllium is "known to travel on clothes to workers' homes, can remain dangerous in the home for some time, and importantly, can cause serious damage with only minimal exposure."[33] With respect to the boyfriend's relationship to the plaintiff, the court found that it was reasonably foreseeable that "virtually all of [defendant's] employees live with or have repeated close contact with *someone*, unless there is good reason to believe that its employees are disproportionately hermits and loners."[34] Based on this analysis, the court determined that, under New Jersey law and the facts of the case, a duty was owed to the plaintiff.[35] However, the court acknowledged that it would be "inappropriate to impose upon Defendant a duty to a random stranger on a bus or an occasional visitor to the home of an employee."[36]

C. *Take-Home Liability in the Context of Other Substances*

While allegations of take-home disease arising from exposure to silica, talc, and other substances have been made in trial courts around the coun-

29. *Id.* at *2.
30. *Id.* (quoting Olivo v. Owens–Illinois, Inc., 895 A.2d 1143, 1149 (N.J. 2006)).
31. *Id.* at *3.
32. *Id.* at *4.
33. *Id.* at *5.
34. *Id.*
35. *Id.* at *5–6.
36. *Id.* at *5.

try, there were no reported decisions on these matters in 2017. Courts can be expected to confront not only the question of whether defendants owe duties to remote and unknown plaintiffs, but also whether "take-home" exposure to countless other chemicals and potentially dangerous substances will expand the reach of tort law to the point where it is the equivalent of a regulatory scheme that governs interactions between people and companies that have no relationship of any kind.

III. DISCLOSURE TRENDS IN GENETICALLY MODIFIED ORGANISMS (GMO) LITIGATION

On June 21, 2017, a Kansas jury awarded a class of more than 7,000 farmers over $217 million due to a dispute involving two GMO-modified strains of corn.[37] Syngenta was held liable in *Five Star Farms v. Syngenta AG* based on its sale of the two genetically modified strains of corn that contained a genetic trait, known as MIR162, which helped protect these particular strains of corn from insects. Controversy arose when Syngenta marketed these strains to farmers who alleged that Syngenta did so without a full and accurate disclosure of the genetic modification. The Chinese government instituted a de facto embargo of corn from the United States based on the presence of MIR162, leading estimated losses of $5 billion for farmers across the United States and Canada. The Kansas farmers alleged in their complaint that Syngenta "actively misled farmers, industry participants and others about the importance of the Chinese market, the timing and substance of its application for approval in China, the timing of when China was likely to approve MIR162, its ability to "channel" [MIR162 strains of corn] to non-Chinese markets and otherwise contain the infiltration of [MIR162 strains of corn] into the U.S. corn supply."

In two other cases, plaintiffs alleged incomplete disclosure of the presence of GMOs where companies label their products as "natural" or "all natural." In *Frito Lay North America, Inc. v. All Natural Litigation*, the company agreed to a settlement agreement that avoided payment to the class, but did require it to change its labeling procedures in two respects.[38] First, Frito-Lay agreed to refrain from labeling, marketing, or advertising Tostitos, SunChips, and Fritos Bean Dip products as "natural" or "Made With All Natural Ingredients," unless federal or state legislation or regulatory guidance from the Food and Drug Administration authorizes the use of a "natural" claim on a product containing GMO ingredients. Sec-

37. Five Star Farms v. Syngenta AG, Docket No. 2:14-cv-02571 (D. Kan. Nov. 11, 2014).
38. Docket No. 1:12-md-02413, Final Order Approving Class Action Settlement (E.D.N.Y. Nov. 14, 2017).

ond, Frito Lay agreed to certify its non-GMO product claims through an independent third party.

In a separate instance, Conagra Brands, the manufacturer of Wesson-brand cooking oil, found itself embroiled in class-action litigation related to its claims that its cooking oil was "100% Natural," despite the presence of GMOs.[39] The district court certified the plaintiffs' class and the Ninth Circuit later affirmed. In doing so, the Ninth Circuit rejected arguments from Conagra that the plaintiffs failed to offer any evidence that "a reasonable consumer would consider the "100% Natural label material and understand it to mean GMO-free."[40] The Ninth Circuit rejected this argument and the U.S. Supreme Court refused to hear Conagra's appeal of the class-certification decision.[41]

IV. U.S. SUPREME COURT CLARIFICATION OF PERSONAL JURISDICTION

The Supreme Court resumed its recent foray into personal jurisdiction during the past term. In two important decisions, the Court further clarified the limits of both general jurisdiction and specific jurisdiction asserted by state courts.[42] Following its landmark 2014 opinion in *Daimler AG v. Bauman*,[43] the Court continued to pare down the reach of state courts in cases involving non-resident plaintiffs. The decisions have already begun to reverberate in product liability actions, particularly mass torts.

In May 2017, the Court issued its opinion in *BNSF Railway Co. v. Tyrrell*, which refined *Daimler* and placed stark limits on general jurisdiction. BNSF is a Delaware corporation with its principal place of business in Texas.[44] The plaintiffs, a North Dakota resident and a South Dakota resident, filed suit in Montana state court although neither had been injured in Montana.[45] The Montana Supreme Court declined to apply *Daimler* because the case involved a railroad and the court thought the Federal Employers' Liability Act (FELA) conferred personal jurisdiction. The Supreme Court reversed. Justice Ginsberg, writing for the majority, noted that "[t]he Fourth Amendment due process constraint described in *Daimler* . . . applies to all state-court assertions of general jurisdiction over non-

39. Briseno v. Conagra Foods, Inc., 674 F. App'x 654 (9th Cir. 2017).
40. *Id.* at 656.
41. *Id.*, *cert. denied*, 138 S. Ct. 313 (Oct. 10, 2017).
42. Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773 (2017); BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017).
43. Daimler AG v. Bauman, 134 S. Ct. 746 (2014).
44. *BNSF Ry. Co.*, 137 S. Ct. at 1554.
45. *Id.* at 1551.

resident defendants; the constraint does not vary with the type of claim asserted or business enterprise sued."[46]

The Court seemed almost exasperated in its holding: "BNSF, we repeat, is not incorporated in Montana and does not maintain its principal place of business there. Nor is BNSF so heavily engaged in activity in Montana 'as to render [it] essentially at home' in the state."[47] The Court also looked to factors that showed fairly substantial contacts with Montana. Though the opinion did not entirely foreclose a finding that a company was "at home" based on its business operations in a state, it articulated a very high bar for asserting general jurisdiction in locations other than the state of incorporation and principal place of business. The Court noted that BNSF had 2,061 miles of track and 2,100 employees in Montana,[48] representing only six percent of its total track mileage and less than five percent of its total employees. BNSF also generated less than ten percent of its total revenue in Montana.[49] These operations were not insubstantial, but not enough to confer general jurisdiction over BNSF.

Just a few weeks after the *BNSF* decision, the Court reversed the California Supreme Court's finding of specific jurisdiction in *Bristol-Myers Squibb Co. v. Superior Court* (*BMS*).[50] *BMS* involved more than six hundred plaintiffs, the majority of whom were not residents of California. The plaintiffs sued the drug company for injuries allegedly caused by the prescription pill Plavix. Bristol-Myers Squibb is a Delaware corporation with its headquarters in New York and "maintains substantial operations in both New York and New Jersey."[51] The Court noted that more than fifty percent of its employees were located in New York and New Jersey. The company did have some operations in California, including five research and lab facilities, a little over four hundred employees, and a "small" state government advocacy office.[52] BMS also sold nearly 187 million Plavix pills in California from 2006 to 2012 that yielded more than $900 million in revenue (slightly more than one percent of the company's national revenue). The plaintiffs, who asserted causes of action under California state law, included 592 non-residents who were not prescribed Plavix in the state, injured in the state, and did not receive treatment for their injuries in the state.

The California Supreme Court correctly held that there was no *general* jurisdiction (pursuant to *Daimler*), but affirmed a finding of *specific* juris-

46. *Id.* at 1558–59.
47. *Id.* at 1559 (quoting *Daimler*, 134 S. Ct. at 761).
48. *Id.* at 1554.
49. *Id.*
50. 137 S. Ct. 1773, 1777 (2017).
51. *Id.* at 1777–78.
52. *Id.* at 1778.

diction using a "sliding scale approach."[53] Specific jurisdiction, however, requires that the underlying controversy be "principally, [an] activity or an occurrence that takes place in the forum State."[54] The Supreme Court likened the California approach, which appeared to lower the bar for specific jurisdiction based on the defendant's overall activities in state, to "a loose and spurious form of general jurisdiction."[55] Since the plaintiffs were not residents, did not suffer harm in California, and the defendant's conduct occurred elsewhere, the Court held that the California state court did not have jurisdiction.[56]

The new Supreme Court decisions have already impacted other state court cases. For example, in mid-October 2017, the Missouri Court of Appeals reversed and vacated a $72 million verdict against Johnson & Johnson (J&J) in a talc case.[57] J&J and a subsidiary named in the case are both New Jersey corporations with headquarters in the state. Citing *BMS*, the Missouri court held that the plaintiff's claims did not arise out of J&J's activities in Missouri.[58]

Similar state court decisions are sure to follow and change the landscape of several ongoing mass tort litigations. To be sure, under this new, clearer precedent, defendants will be able to more effectively challenge jurisdiction in some of the most plaintiff-friendly jurisdictions in the country where many out-of-state claims have been litigated in the past.

V. ANOTHER FEDERAL CIRCUIT REJECTS PLAINTIFF'S ASBESTOS CAUSATION THEORY

In joining the Sixth and Ninth Circuits, the Seventh Circuit rejected a plaintiff's expert's causation theory that "each and every exposure" or the "cumulative exposure" may satisfy the plaintiff's causation burden. The Seventh Circuit further clarified that courts cannot require a defendant to exclude a potential cause—disprove that exposure to its product could be a cause—because that impermissibly shifts the plaintiff's causation burden onto the defendant.[59]

In *Krik v. Exxon Mobil Corp.*, the plaintiff developed cancer after smoking a pack and a half of cigarettes every day for thirty years. He also claimed occupational exposure to asbestos through his service in the U.S. Navy and later as a union pipefitter. The plaintiff sued hundreds of companies

53. *Id.*
54. *Id.* at 1781 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).
55. Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773, 1781 (2017).
56. *Id.* at 1782.
57. Fox v. Johnson & Johnson, 2017 WL 4629383 (Mo. Ct. App. Oct. 17, 2017).
58. *Id.* at *2.
59. Krik v. Exxon Mobil Corp., 870 F.3d 669, 677 (7th Cir. 2017).

claiming that they were responsible for exposing him to asbestos and that the combination of smoking and asbestos combined to cause his lung cancer. After a two-week trial, the jury concluded that cigarette smoking was the sole proximate cause of the plaintiff's cancer.[60]

In support of his claim, the plaintiff proffered expert witness testimony that every exposure to asbestos contributes to the total cumulative dose and that the cumulative dose caused the cancer. Thus, according to the plaintiff's theory, every exposure that contributes to the cumulative dose is a "substantial factor" in causing the injury. The defendants challenged the admissibility of this theory in pre-trial motions, and the district court held that the plaintiff "had not established that the 'any exposure' theory was sufficiently reliable to warrant admission under Rule 702 and the Supreme Court's seminal case on the admissibility of expert witness testimony, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)."[61]

During trial, the plaintiff tried to get around the district court's ruling and introduce the same causation theory, this time packaging it as a "cumulative exposure" theory. In excluding the expert witness testimony, the district court held that the "each and every" and the "cumulative exposure" theories were virtually identical, and equally lacking in scientific merit. Indeed, the theories were "not tied to the specific quantum of exposure attributable to the defendants, but [were] instead based on his medical and scientific opinion that every exposure is a substantial contributing factor to the cumulative exposure that causes cancer."[62]

Affirming the district court, the Seventh Circuit explained that the plaintiff's "each and every exposure" and "cumulative exposure" theories were scientifically and legally bankrupt and would nullify the substantial factor causation test. The Seventh Circuit joined the Ninth and Sixth Circuits that "such a theory of liability would render the substantial-factor test essentially meaningless. . . . This is precisely the sort of unbounded liability that the substantial factor test was developed to limit."[63]

VI. EPA PLANS TO REPEAL CLEAN POWER PLAN

On October 10, 2017, the Environmental Protection Agency (EPA or Agency) issued a proposed rule to repeal the Clean Power Plan (CPP) in its entirety.[64] The CPP is the hotly contested Obama-era rule promulgated

60. *Id.* at 671–72.
61. *Id.* at 672–73.
62. *Id.*
63. *Id.* at 677 (quoting McIndoe v. Huntington Ingalls Inc., 817 F.3d 1170, 1177 (9th Cir. 2016) and citing Lindstrom v. A–C Prod. Liab. Tr., 424 F.3d 488, 493 (6th Cir. 2005)).
64. U.S. Envtl. Prot. Agency, Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (proposed Oct. 10, 2017).

by EPA under the Clean Air Act (CAA). It is designed to curb carbon dioxide (CO_2) air emissions from existing fossil fuel-fired power plants.[65] With the repeal proposed, the Agency next plans to revisit whether and how to regulate greenhouse gas emissions from existing fossil fuel-fired power plants going forward.

A. *The CPP*

EPA promulgated the CPP under CAA Section 111.[66] CAA Section 111(b) permits EPA to set nationally applicable standards that limit air pollution from "new sources" in source categories that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."[67] In 2009, EPA determined that greenhouse gases like CO_2 endanger public health[68] and subsequently issued limits on CO_2 emissions from some fossil fuel-fired power plants.[69] CAA Section 111(d) requires EPA to set emission guidelines for existing sources that reflect the "best system of emission reduction" (BSER).[70] EPA promulgated the CPP under CAA Section 111(d) in October 2015.

Under the CPP, EPA found that the BSER for CO_2 emissions from existing fossil fuel-fired power plants was based on three types of measures, or "building blocks," that regulated power plants could take:

1. Improving heat rate at affected coal-fired units;
2. Substituting increased generation from lower-emitting existing natural gas combined cycle units for decreased generation from coal-fired power plants; and
3. Substituting increased generation from new zero-emitting renewable energy generating capacity for decreased generation from coal-fired power plants.[71]

Building block 1 requires measures that an owner of a power plant can apply directly to its source—for example, making changes to the operation of its power plant—while building blocks 2 and 3 do not; they instead

65. *See generally* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (EGUs), 80 Fed. Reg. 64662 (Oct. 23, 2015).
66. 42 U.S.C. § 7411 (1990).
67. 42 U.S.C. § 7411(b) (1990).
68. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009).
69. Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, 80 Fed. Reg. 64510, 64518 (Oct. 23, 2015).
70. 42 U.S.C. § 7411(d) (1990).
71. 80 Fed. Reg. 64707.

require measures that are designed to shift energy generation away from coal at a grid-wide level.[72]

With the change in administration came Executive Order 13783. The Trump administration directed all executive agencies, including EPA, to "review existing regulations that potentially burden the development or use of domestically produced energy resources."[73] Consequently, EPA reviewed the CPP.

B. *The Proposed Repeal*

In its October 10, 2017, rulemaking, EPA proposed to repeal the CPP in its entirety. EPA revisited its interpretation of CAA Section 111. Citing to statutory text, legislative history, prior agency practice, and policy concerns, EPA concluded that the BSER must be limited to "emission reduction measures that can be *applied to or at* an individual stationary source."[74] In other words, BSER measures must be based on a physical or operational change to the source, not on control measures like generation shifting.

EPA found in turn that it exceeded its statutory authority in promulgating the CPP. Building blocks 2 and 3 are outside the permissible scope of the BSER because they are measures "accomplished through actions that owners or operators take on behalf of an affected source that might lead only indirectly to emissions reductions from the source," such as investment in lower-emitting generation.[75] Even though owners of power plants can apply building block 1 to or at an individual source, EPA argues that building block 1 cannot stand on its own. The Agency based the CPP performance standards on the mixed use of all three building blocks, not building block 1 alone.[76] EPA also proposed to rescind two legal memos in the CPP docket to the extent those memos are inconsistent with EPA's statutory interpretation set out in the proposed rule. Additionally, the Agency issued a revised cost-benefit analysis, known as the regulatory impact analysis. As of November 29, 2017, EPA has received over 76,000 public comments on this proposed repeal.

C. *Looking Ahead*

The future of EPA's regulation of greenhouse gas emissions from fossil fuel-fired power plants is unclear. The Agency does not plan to revisit the 2009 greenhouse gas endangerment finding[77] and thus is still required

72. U.S. Envtl. Prot. Agency, Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, at 9 (proposed Oct. 10, 2017).
73. Executive Order 13783 (Mar. 28, 2017).
74. U.S. Envtl. Prot. Agency, Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, at 15 (proposed Oct. 10, 2017).
75. *Id.* at 30.
76. *Id.* at 12–13.
77. *Id.* at 8 n.3.

to explain why it is or is not regulating these emissions. To that end, EPA intends to gather information from the public on systems of emissions reduction that is in line with the legal interpretation of CAA Section 111 that the Agency has proposed. Interested parties are also likely to challenge the repeal of the CPP if and when it is finalized.

VII. ENDANGERED SPECIES ACT REFORM ON THE HORIZON, BUT CLIMATE CHANGE STILL LOOMS LARGE

The Endangered Species Act (ESA or Act), while more specific in its focus than other environmental statutes like the Clean Air Act or Clean Water Act, is a frequent target of criticism and suggested reform by states and industry groups. A major reason for this is the statute's inflexibility. Where the ESA's restrictions apply, they do so "whatever the cost."[78] If a species is designated as "threatened" or "endangered," industry and other private parties are required to take drastic steps to avoid killing, capturing, injuring, or harassing that species in any way.[79] It is no surprise then that proponents of deregulation, in keeping with the Trump administration's agenda, have advocated for reforms to the "draconian" restrictions imposed by the ESA.[80]

In July 2017, five separate ESA reform bills were introduced in the House of Representatives. These bills aim to benefit industry and states with specific changes, such as:

- placing more emphasis in the listing process on information provided by states;[81]
- requiring consideration of the economic costs of ESA protections;[82]
- limiting the Act's protections to species only native to the United States;[83]
- removing protections for a certain population of grey wolves;[84] and
- restricting the availability of attorney fees in citizen suits under the Act.[85]

The House Committee on Natural Resources passed these five bills on October 4, 2017. Similarly, in the Senate, a bill was introduced to remove ESA protections for species that are found only within the boundaries of a single state.[86]

78. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).
79. 16 U.S.C. §§ 1531, 1538 (1988).
80. Alaska Oil & Gas Ass'n v. Ross, 2017 WL 3206521 (July 21, 2017).
81. H.R. 1274, 115th Cong. (2017).
82. H.R. 717, 115th Cong. (2017).
83. H.R. 2603, 115th Cong. (2017).
84. H.R. 424, 115th Cong. (2017).
85. H.R. 3131, 115th Cong. (2017).
86. S. 1863, 115th Cong. (2017).

Despite the Trump administration's deregulatory agenda and Congress's initial steps to reform the ESA, the Act's restrictions remain a major concern for industry and states. Though the Trump administration is taking measures to roll back Obama-era climate change regulations such as the Clean Power Plan (*see* Section VI of this Article), the courts continue to grapple with the proper role of climate change in the ESA listing process.

In October 2016, the Ninth Circuit issued a decision that is likely to shape the future of ESA-related litigation. The case, *Alaska Oil & Gas Ass'n v. Pritzker*, concerned the Obama administration's listing of certain populations of the bearded seal as "threatened."[87] Although healthy populations of the species are currently found throughout its historic range, the National Marine Fisheries Service (NMFS) listed the species based on expected future loss of the sea ice on which the species depends for hunting, breeding, and raising pups.[88] NMFS relied on projections from the UN Intergovernmental Panel on Climate Change (IPCC) regarding future global temperature changes to inform modeling about levels of sea ice in the northern hemisphere in the next fifty to one hundred years.[89]

The U.S. District Court for the District of Alaska struck down the species' listing, finding the agency's action arbitrary and capricious because it relied almost entirely on speculation about future global temperatures and ice conditions, and the agency could not even predict when it expected the species to reach the extinction threshold.[90] The Ninth Circuit, however, reinstated the listing and re-asserted its previous finding that IPCC climate modeling data is the "best available science" under the Act and can serve as the basis for listing a species as "threatened" or "endangered."[91] Emphasizing deference to agency decision making, the Ninth Circuit held that uncertainties regarding climate science are insufficient to prevent species from being listed under the Act, based purely on future threats from climate change.[92]

Industry groups, including the Alaska Oil & Gas Association and the American Petroleum Institute, supported by the state and national Chamber of Commerce, have petitioned for Supreme Court review of the Ninth Circuit's decision.[93] The Trump administration has not yet indicated whether it intends to defend the listing and agency discretion. Either way, the case

87. 840 F.3d 671 (9th Cir. 2016).
88. *Id.* at 677.
89. *Id.* at 676–77.
90. *Id.* at 675.
91. *Id.* at 679.
92. *Id.* at 680.
93. Alaska Oil & Gas Ass'n v. Ross, 2017 WL 3206521, *petition for cert.* (No. 17-133) (July 21, 2017).

suggests that climate change will continue to be a major focus of ESA litigation in the years to come.

VIII. CITIZEN GROUPS ENFORCE AGAINST COAL ASH PONDS WHILE THE FEDERAL CCR RULE UNDERGOES TRANSFORMATION

In 2015, EPA promulgated a comprehensive federal program regulating the management of coal combustion residuals (hereinafter CCR Rule) and the closure of ash ponds at power plants.[94] The federal CCR Rule allowed enforcement by citizen suits (or states acting as citizens). The CCR Rule's unique enforcement framework raised questions about the role of EPA and states in enforcement, and 2017 marked the first enforcement action taken by a citizen group under the CCR Rule.

There have been several state and federal actions in the past year that foreshadow major changes to the CCR Rule and, depending on the outcome of the revisions, may also affect who has standing to enforce the CCR Rule. Some examples of the changes in the statutory, regulatory, and political landscape surrounding the federal regulation of CCRs include:

- On December 16, 2016, Congress passed the Water Infrastructure for Improvements to the Nation (WIIN) Act of 2016, which authorized EPA and states to enforce the CCR Rule. The Act also authorized state permit programs or systems of prior approval and conditions.[95]
- On March 28, 2017, the White House issued Executive Order 13783 (*Promoting Energy Independence and Economic Growth*), which states, in part, that it is the national policy of the United States and executive agencies to "immediately review existing regulations that potentially burden the . . . use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with law."[96]
- In August 2017, EPA issued an interim final guidance outlining the process and procedures EPA will use to review and make determinations about state CCR programs.[97] In the CCR Guidance, EPA confirms it will allow flexibility in state programs that EPA did not allow in the CCR Rule provided the program is at least as protective as the federal program.[98]

94. Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21301 (Apr. 17, 2015).
95. 42 U.S.C. § 6945(d)(1(A) (2016).
96. Executive Order 13783, § 1(c) (Mar. 28, 2017).
97. Coal Combustion Residuals State Permit Program Guidance Document; Interim Final, EPA Office of Land and Emergency Management, Aug. 2017.
98. *Id.* at 1-2, 1-5, 2-9.

- On September 14, 2017, EPA granted two petitions to reconsider substantive provisions of the CCR Rule. Included was a request for EPA to reconsider the prohibition on considering costs in making the alternative closure demonstration. Should EPA decide to amend specific provisions of the CCR Rule, it will initiate a rulemaking, including a notice and comment period, which could extend the deadlines in the current CCR Rule.[99]
- On October 25, 2017, EPA issued a report[100] announcing that EPA is planning to issue a proposal to modify the CCR Rule and address issues raised in the petitions for reconsider by the end of 2017.

Despite the changes to the CCR Rule expected as a result of these actions, citizen groups continue to litigate.

A. *Citizen Group Suit Tests the Enforcement Limits of the CCR Rule*

On June 20, 2017, the Southern Environmental Law Center (SELC) filed the first-ever suit enforcing the provisions of the CCR Rule.[101] The suit raises interesting questions about what provisions of the CCR Rule are enforceable. SELC, on behalf of the Roanoke River Basin Association, alleged Duke Energy's closure plan for its Mayo plant in North Carolina fails to meet the minimum requirements for closure and violates the CCR Rule by leaving coal ash in contact with groundwater.

The SELC claimed Duke Energy's closure plan for its ash basin violated the Resource Conservation and Recovery Act (RCRA), and CCR Rule.[102] SELC argues the plan fails to meet the requirements of the CCR Rule because it allegedly calls for leaving millions of tons of coal ash in an unlined pit, partly below groundwater level, which it claims could allow water to seep in and harm the environment—including groundwater, a lake, and a nearby stream—around Person County, North Carolina.[103]

Duke Energy claims the closure plan is "preliminary" and there can be no violation of the CCR Rule until closure begins. This case, if it survives, will be an indicator for whether citizen groups can sue over the contents of closure plans under the CCR Rule and when facilities preparing to

99. Letter from Scott Pruitt, Administrator, U.S. Environmental Protection Agency re: Petitions Concerning Coal Combustion Residuals Rule (Sept. 13, 2017) (granting petitions by Utility Solid Waste Activities Group, dated May 12, 2017, and from AES Puerto Rico LLP, dated May 31, 2017).

100. *Final Report on Review of Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources under Executive Order 13783*, U.S. Environmental Protection Agency, Oct. 25, 2017.

101. Roanoke River Basin Ass'n v. Duke Energy Progress LLC, No. 1:17-cv-00561 (M.D.N.C. 2017), *available at* https://www.southernenvironment.org/uploads/words_docs/2017-06-20_Mayo_CCR_Rule_Complaint_-_filed.pdf.

102. *Id.* at 15–17.

103. *Id.* at 9–10.

close will become subject to lawsuits under the CCR Rule over the adequacy of their plans.

B. *Amid the Announced Changes at the Federal Level, Two Courts Found Liability for CCR Contamination Under the Clean Water Act in 2017*

As the CCR Rule undergoes this evolution, citizen groups have continued to push forward litigation relating to coal ash ponds in an effort to close ponds and thwart facility plans to construct a cap over the surface impoundment and allow coal combustion residuals to remain in place (referred to as "closure in place"). In 2017, two courts found that ash ponds leaking contaminants to groundwater caused violations of the Clean Water Act (CWA).

1. Despite a Finding of Liability, a Federal District Court Applied a Reasoned Cost-Benefit Analysis to Mitigate Civil Penalties

A 2017 federal court ruling raises key questions about how courts will interpret "point source" and "navigable waters" relative to releases from ash ponds to groundwater and suggests a reasoned cost-benefit analysis can be used to substantially mitigate civil penalties and remedy selection.[104]

On March 23, 2017, a federal judge ruled that arsenic seeping from coal ash ponds to groundwater from a Dominion Virginia Power plant violated the CWA. While the Sierra Club prevailed on its CWA seepage claim, in the same decision the court denied the group's demand for civil penalties and its request that Dominion remove the coal ash from its ponds regardless of cost.

This ruling expounds expansive interpretations of "point source" and "navigable waters" relative to ash pond seeps, which may give rise to increased CWA enforcement. However, the court's cost-benefit remedy analysis indicates that dischargers may not be subject to a costly remedy when there is minimal demonstrated impact to human health or the environment.

First, the court determined that Dominion's coal ash ponds and coal piles qualify as a "point source" and groundwater directly connected to surface waters qualify as "navigable waters" as those terms are used in the CWA.[105] The CWA prohibits the discharge of pollutants from "point sources" into "navigable waters" without a discharge permit.[106] Given that Dominion did not have a permit allowing seeps containing arsenic—a constituent commonly found in coal ash—to discharge to groundwater, it was deemed to have violated the CWA.[107]

104. Sierra Club v. Va. Elec. & Power Co., 2:15-cv-00112 (E.D. Va. Mar. 23, 2017), *available at* https://www.southernenvironment.org/uploads/audio/CEC_Gibney_decision.pdf.

105. *Id.* at 14–15.

106. *Id.* at 15.

107. *Id.*

Ultimately, this court joined a growing number of jurisdictions in holding that groundwater with a direct hydrological connection to surface water is covered under the CWA. On the issue of whether the ash ponds and coal piles constitute a "point source," the court found they did because "Dominion created those piles specifically for coal ash, and they channel the pollutants away from the old power plant and directly into the groundwater."[108]

While the CWA's definition of navigable waters does not expressly include groundwater, over the past ten years courts have increasingly found the CWA applies to groundwater with a direct hydrological connection to surface waters that are themselves "navigable waters" or "waters of the U.S."[109]

In terms of remedy, the court rejected the Sierra Club's calls for civil penalties and instead required Dominion to monitor surrounding water bodies, sediment, and aquatic life for arsenic. In its analysis, the court highlighted Dominion's good faith efforts to comply, lack of environmental harm, cooperation, and general permit compliance. This approach indicates that certain factors may mitigate a civil penalty, or perhaps even obviate the need for a civil penalty at all. The court also denied the Sierra Club's request that Dominion move three million tons of coal ash to a landfill because the Sierra Club did not demonstrate all of the factors necessary to secure a permanent injunction—particularly, that removal would be economically reasonable given the lack of adverse impact to the environment. On April 21, 2017, Dominion Virginia Power and the Sierra Club both filed notices of appeal with the Fourth Circuit.

2. A Federal District Court Found Liability Under the CWA and Required Tennessee Valley Authority to Remove Coal Ash from Its Ash Ponds

On August 4, 2017, a federal court ordered the Tennessee Valley Authority (TVA) to excavate huge quantities of coal ash waste generated over many years by TVA's coal-fired power plant located in Gallatin, Tennessee. TVA owns two coal ash disposal sites located at a coal-fired power plant

108. *Id.*

109. Raritan Baykeeper, Inc. v. NL Indus., Inc., No. 09-CV-4117 JAP, at 15 (D.N.J. Jan. 8, 2013; Nw. Envtl. Def. Ctr. v. Grabhorn, Inc., No. CV-08-548-ST, 2009 WL 3672895, at *11 (D. Or. Oct. 30, 2009); Hernandez v. Esso Standard Oil Co. (P.R.), 599 F. Supp. 2d 175, 181 (D.P.R. 2009); N. Cal. River Watch v. Mercer Fraser Co., No. C-04-4620 SC, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001); Mut. Life Ins. Co. v. Mobil Corp., No. 96-CV1781, at 3 (N.D.NY. 1998); Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1319 (S.D. Iowa 1997).

complex near the Cumberland River.[110] In evaluating claims brought by a citizen group of unpermitted discharges and violations of the facility's CWA permit, the court ordered the closure and excavation of the coal ash disposal site and the removal of materials formerly located in them to a lined impoundment.[111]

Regarding the fundamental question of TVA's liability under the CWA, the court determined that the coal ash disposal area functioned as a "point source."[112] The parties largely agreed that the site had leaked and there was no evidence in the record demonstrating that all leakage had stopped. Based on these facts, "inevitable" leakage could provide the basis for CWA claims.[113]

The court agreed that the CWA regulates hydrologically connected groundwater. Moreover, a groundwater-focused CWA claim is possible because "the hydrologic connection between the source of the pollutants and navigable waters is direct, immediate, and can generally be traced."[114] The court ordered TVA to fully excavate the coal ash waste currently located in the ash pond areas and move the waste to a properly lined site.[115]

Although TVA has been ordered to remove the coal ash from these disposal sites, the district court declined to assess a civil penalty against TVA, as the cost of this remedy would be penalty enough, especially as the court could not conclude that the violations of the CWA were "particularly severe."[116] TVA has appealed and whether this will withstand appellate review remains an open question.[117]

110. Tenn. Clean Water Network v. TVA, 2017 WL 3476069, at *63 (M.D. Tenn. Aug. 4, 2017).
111. *Id.* at *61–63.
112. *Id.* at *51.
113. *Id.* at *52.
114. *Id.* at *51.
115. *Id.* at *63.
116. *Id.* at *61, 63.
117. Tenn. Clean Water Network v. TVA, No. 0:17-cv-06155 (6th Cir. Oct. 3, 2017).