

RECENT DEVELOPMENTS IN TOXIC TORT & ENVIRONMENTAL LAW

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I. INTRODUCTION

This article addresses toxic tort subjects, including the growing judicial rejection of the “any exposure” causation theory, heightened party disclosure rules in asbestos litigation, and federal preemption of the *Engle* Phase I jury findings. In addition, this article addresses key developments in the interpretation of major environmental statutes, including the Clean Air Act; Clean Water Act; Resource Conservation and Recovery Act; and Comprehensive Environmental Response, Compensation, and Liability Act.

II. ASBESTOS

A. Multiple Courts Recently Rejected the “Any Exposure” Theory in Asbestos Cases

Federal courts in Illinois, North Carolina, and Louisiana joined the growing list of courts that reject the “any exposure” theory of disease causation in asbestos cases.¹ The “any exposure” theory argues that any exposure to asbestos, regardless of dosage or timing, is sufficient to cause an asbestos-induced disease and therefore satisfy the causation element of a cause of action.² These courts found that the “any exposure” theory fails to meet the Federal Rule of Evidence 702 and *Daubert* requirements. Rule 702 requires that expert testimony be (1) helpful to the trier of fact,

1. Federal court cases rejecting the “any exposure” opinion (or the nearly identical “each and every exposure” opinion) include *Moeller v. Garlock Sealing Technologies, LLC*, 660 F.3d 950 (6th Cir. 2011); *Martin v. Cincinnati Gas & Electric Co.*, 561 F.3d 439 (6th Cir. 2009); *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488 (6th Cir. 2005); *Barabin v. AstenJohnson, Inc.*, 700 F.3d 428 (9th Cir. 2012); *Davidson v. Georgia Pacific LLC*, No. 12-1463, 2014 WL 3510268 (W.D. La. July 14, 2014); *Anderson v. Ford Motor Co.*, 950 F. Supp. 2d 1217 (D. Utah 2013); *Sclafani v. Air & Liquid Systems Corp.*, No. 12-CV-3013, 2013 WL 2477077 (C.D. Cal. May 9, 2013); *Smith v. Ford Motor Co.*, No. 2:08-cv-630, 2013 WL 214378 (D. Utah Jan. 18, 2013); *Wannall v. Honeywell International, Inc.*, 292 F.R.D. 26 (D.D.C. 2013); *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603 (N.D. Ohio 2004); *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142 (E.D. Wash. 2009); *In re W.R. Grace & Co.*, 355 B.R. 462 (Bankr. D. Del. 2006), *appeal denied*, 2007 WL 1074094 (D. Del. Mar. 26, 2007).

State court cases rejecting the “any exposure” opinion (or the nearly identical “each and every exposure” opinion) include *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332 (Tex. 2014); *Howard v. A.W. Chesterton Co.*, 78 A.3d 605 (Pa. 2013); *Ford Motor Co. v. Boomer*, 736 S.E.2d 724 (Va. 2013); *Betz v. Pneumo Abex, LLC*, 44 A.3d 27 (Pa. 2012); *Parker v. Mobil Oil Corp.*, 857 N.E.2d 1114 (N.Y. 2006); *Butler v. Union Carbide Corp.*, 712 S.E.2d 537 (Ga. Ct. App. 2011); *Brooks v. Stone Architecture, P.A.*, 934 So. 2d 350 (Miss. Ct. App. 2006); *Daly v. Arvinmeritor, Inc.*, 2009 WL 4662280 (Fla. Cir. Ct. Nov. 30, 2009); *In re Asbestos Litigation (Certain Asbestos Friction Cases Involving Chrysler LLC)*, 2008 WL 4600385 (Pa. Ct. Com. Pl. Sept. 24, 2008); *Free v. Ametek*, 2008 WL 728387 (Wash. Super. Ct. Feb. 28, 2008); *Basile v. American Honda Motor Co., Inc.*, 2007 WL 712049 (Pa. Ct. Com. Pl. Feb. 22, 2007).

2. *Krik v. Crane Co.*, 76 F. Supp. 3d 747, 752 (N.D. Ill. 2014) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993)).

(2) based upon sufficient facts or data, (3) the product of reliable principles and methods, and that (4) the witness has applied the principles and methods reliably to the facts of the case.³ *Daubert* requires that the district court act as the evidentiary gatekeeper and ensure that the rule's requirements are met before admitting the expert testimony.⁴

In *Krik v. Crane Co.*, the plaintiff's experts argued that any exposure to asbestos was harmful.⁵ The basis for their argument was that they could not rule out that a single dose of asbestos causes injury.⁶ Paradoxically, the plaintiff's experts also acknowledged that the plaintiff's alleged asbestos-induced lung cancer was dose-dependent.⁷

The court rejected the "any exposure" theory.⁸ Instead, it held that more than de minimis exposure is required to prove that exposure to a product is a substantial contributing factor to a disease.⁹ The court pointed out that the plaintiff's experts failed to base their opinions on case-specific facts and provided no information regarding the amount of asbestos exposure the plaintiff may have had.¹⁰ The experts presented generalized citations to scientific literature and did not actually rely on that literature.¹¹ The experts also did not identify any peer-reviewed scientific literature adopting the "any exposure" theory.¹² As a result, the court barred the plaintiff's experts from offering their opinion at trial.¹³

A few weeks later, a Louisiana federal court followed the *Krik* court's reasoning. In *Comardelle v. Pennsylvania General Insurance Co.*, the plaintiff's experts planned to testify that any exposures the plaintiff had to the defendant's products would have been a substantial contributing cause of the plaintiff's mesothelioma.¹⁴ The court rejected this argument, stating "[a]lthough there may be no known safe level of asbestos exposure, this does not support [plaintiff's expert's] leap to the conclusion that therefore every exposure [plaintiff] had to asbestos must have been a substantial contributing cause of his mesothelioma."¹⁵ The court excluded the expert's opinion because it was not based on any case-specific facts and therefore was not reliable expert testimony.¹⁶

3. FED. R. EVID. 702.

4. *Krik*, 76 F. Supp. 3d at 750.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 753.

9. *Id.*

10. *Id.*

11. *Id.* at 754.

12. *Id.*

13. *Id.* at 754–55.

14. 76 F. Supp. 3d 628, 632 (E.D. La. 2015).

15. *Id.* at 634 (citing *Krik v. Crane Co.*, 76 F. Supp. 3d 747, 752 (N.D. Ill. 2014)).

16. *Id.*

Another Louisiana federal court followed course a few months later. In *Vedros v. Northrop Grumman Shipbuilding, Inc.*, the plaintiff's expert planned to testify that "every exposure above background" levels of exposure contributes to disease.¹⁷ The court excluded the testimony, finding no meaningful distinction between that theory and the "any exposure" theory.¹⁸ The court determined that the plaintiffs had to show that the expert's causation opinions were supported by facts or data or that the "above background" theory was testable or published in peer-reviewed works.¹⁹

Similarly, a North Carolina federal court excluded all testimony related to the "any exposure" theory in *Yates v. Ford Motor Co.*²⁰ The court explained that the theory "represents the viewpoint that because science has failed to establish that any specific dosage of asbestos causes injury, every exposure to asbestos should be considered a cause of injury."²¹ Holding that this theory lacks support in facts and data²² and fails to meet the *Daubert* standard,²³ the court excluded all testimony related to the "any exposure" theory.²⁴ The current trend of courts rejecting the "any exposure" theory will surely continue.

B. Legislation and Courts Ensure Increased Transparency in Asbestos Claims

New legislation and court cases that target attorney abuses are requiring increased transparency for asbestos claims.²⁵ Arizona and West Virginia have followed Wisconsin, Ohio, and Oklahoma's lead in passing legislation that requires plaintiffs to identify all asbestos-related claims they have made in the past or intend to make in the future.²⁶ Congress also introduced the Furthering Asbestos Claim Transparency Act of 2015

17. 2015 WL 4645604, at *5 (E.D. La. Aug. 4, 2015).

18. *Id.* at *7 (citing *Yates v. Ford Motor Co.*, 2015 WL 3948303, at *3 (E.D.N.C. June 29, 2015)).

19. *Id.* at *6.

20. *Yates*, 2015 WL 3948303, at *3.

21. *Id.* at *2.

22. *Id.* (citing *Comardelle*, 76 F. Supp. 3d at 632–33); *Krik*, 76 F. Supp. 3d at 752–53; *Anderson v. Ford Motor Co.*, 950 F. Supp. 2d 1217, 1225 (D. Utah 2013); *Sclafani v. Air & Liquid Sys. Corp.*, No. 2:12-CV-3013, 2013 WL 2477077, at *5 (C.D. Cal. May 9, 2013); *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1166 (E.D. Wash. 2009).

23. *Yates*, 2015 WL 3948303, at *2 (citing *Krik*, 76 F. Supp. 3d at 753–54; *Anderson*, 950 F. Supp. 2d at 1224–25; *Sclafani*, 2013 WL 2477077, at *5).

24. *Yates*, 2015 WL 3948303, at *3.

25. Alleged misrepresentations have garnered attention this year due to the highly publicized "Garlock bankruptcy decision" (*In re Garlock Sealing Technologies, LLC*, 504 B.R. 71 (Bankr. W.D. N.C. 2014)), which acknowledged misrepresentation by various plaintiff's firms of their client's asbestos exposure. The court focused on misrepresentations by plaintiff's firms, stating that "Garlock's evidence . . . demonstrated that the last ten years of its participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers." *Id.* at 82.

26. See Wis. STAT. ANN. § 802.025 (2014); OHIO REV. CODE ANN. § 2307.951–54 (2012), OKLA. STAT. ANN. tit. 76, §§ 81–89 (2013).

(FACT), which would require asbestos trusts to file regular reports detailing their payouts.²⁷ FACT has not yet been enacted.

In March 2015, West Virginia enacted Senate Bill 411 to increase transparency in asbestos litigation. The West Virginia Asbestos Bankruptcy Trust Claims Transparency Act and the Asbestos Silica Claims Priorities Act require plaintiffs to disclose to all parties any existing claims against asbestos bankruptcy trusts and to supplement regularly those disclosures with any new claims.²⁸ These disclosures must be made no later than 120 days before any trial date.²⁹ The law also allows defendants to use the evidence related to plaintiffs' asbestos bankruptcy trust claims in any civil litigation. Effectively, the law restricts plaintiffs from claiming that evidence related to bankruptcy trust claims is privileged or irrelevant.

Similarly, Arizona Bill H.B. 2603 requires plaintiffs to provide a sworn statement to all parties in asbestos litigation notifying those parties of all asbestos-related claims they have filed against any asbestos trust.³⁰ It further requires that plaintiffs disclose a list of each asbestos trust to which they reasonably anticipate filing a claim.³¹ Plaintiffs must supplement any information within thirty days after they file additional claims against asbestos trusts.³² The bill applies retroactively to claims pending on its effective date, July 3, 2015.³³

Finally, earlier this year, the U.S. House of Representatives introduced FACT, which is intended to increase transparency in asbestos litigation nationally.³⁴ The bill would require asbestos trusts in the United States to file quarterly reports with the bankruptcy court detailing payouts that have been made, including recipient identities.³⁵ FACT would add a paragraph to subsection (g) of Section 524 of the Bankruptcy Code, requiring each trust established pursuant to that subsection to file a public report with the bankruptcy court.³⁶ The Act would require the bankruptcy trust to list the name and exposure history of any claimant who has filed a claim with it.³⁷ The Act would also require each trust to provide, upon request, information related to payment and demands for payment from the trust to any party claiming asbestos exposure.³⁸ The U.S.

27. H.R. 526, Furthering Asbestos Claim Transparency Act of 2015.

28. W. VA. CODE ANN. §§ 55-7F-1 through 55-7F-11; §§ 55-7G-1 through 55-7G-10.

29. W. VA. CODE ANN. §§ 55-7F-1 through 55-7F-11; §§ 55-7G-1 through 55-7G-10.

30. ARIZ. REV. STAT. ANN. § 12-782.

31. ARIZ. REV. STAT. ANN. § 12-782.

32. ARIZ. REV. STAT. ANN. § 12-782 (C).

33. ARIZ. REV. STAT. ANN. § 12-782 (A).

34. H.R. 526, Serial No. 114-7, Furthering Asbestos Claim Transparency Act of 2015.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing on FACT on February 4, 2015.³⁹ In 2013, an identical version of the legislation passed the House of Representatives, but was never voted on by the Senate.⁴⁰

C. *New York Court of Appeals to Decide Whether Manufacturers Have a Duty to Warn About Products They Did Not Make or Sell*

The New York Court of Appeals will soon be confronted with the issue of whether a manufacturer has a duty to warn with respect to a dangerous third-party product used in conjunction with its own otherwise sound product. In July 2014, the Appellate Division of the Supreme Court of New York, First Judicial Department, in *In re New York City Asbestos Litigation* (hereinafter *Dummitt*) ruled that Crane Company, a manufacturer of metal-only valves, could be held liable for failing to warn about the dangers of third-party asbestos-containing parts added to its valves post-sale.⁴¹ In so holding, the court reasoned that Crane had a “significant role, interest, [and] influence” in selecting those parts for use with its valves.⁴² The Fourth Department reached a similar conclusion in *In re Eighth Judicial District Asbestos Litigation* (hereinafter *Suttner*), which also involved Crane valves.⁴³ Most recently, in *In re Eighth Judicial District Asbestos Litigation* (hereinafter *Holdsworth*), the Fourth Department cited *Dummitt* with approval and re-affirmed its holding in *Suttner*, again ruling that Crane could be held liable for failing to warn about a third party’s asbestos-containing products.⁴⁴ Crane’s appeals in *Dummitt* and *Suttner* are currently pending before the New York State Court of Appeals and are scheduled to be argued together in late 2015 or early 2016.

The outcome in both *Dummitt* and *Suttner* will, at least in part, turn on the court’s interpretation of *Rastelli v. Goodyear Tire & Rubber Co.*⁴⁵ In *Rastelli*, the plaintiff’s decedent was killed while inflating the defendant’s tire when the tire’s multipiece rim, which was manufactured by a third party, “separated explosively.”⁴⁶ The court held that the tire manufacturer was not liable for the failure, writing that “[u]nder the circumstances of this case, we decline to hold that one manufacturer has a duty to warn about another manufacturer’s product when the first manufacturer produces a sound product which is compatible for use with a defective prod-

39. *Id.*

40. H.R. 982 (113th), Furthering Asbestos Claim Transparency Act of 2013.

41. 990 N.Y.S.2d 174, 190 (N.Y. App. Div. 2014).

42. *See id.*

43. 982 N.Y.S.2d 421 (N.Y. App. Div. 2014).

44. 11 N.Y.S.3d 397, 399 (N.Y. App. Div. 2015).

45. 591 N.E.2d 222 (N.Y. 1992).

46. *See id.* at 223.

uct of the other manufacturer.”⁴⁷ The court reasoned that the defendant manufacturer had “no control over the production of the subject multi-piece rim, had no role in placing that rim in the stream of commerce, [] derived no benefit from its sale [, and] did not create the alleged defect in the rim that caused the rim to explode.”⁴⁸ The court further noted that the subject rim was one of twenty-four third-party rims that were compatible with the defendant manufacturer’s tire.⁴⁹

Crane maintains that *Rastelli* set forth the bright-line rule that manufacturers have no duty to warn with respect to products they did not place into the stream of commerce.⁵⁰ The plaintiffs counter that *Rastelli* was a fact-dependent decision and that a manufacturer may have a duty to warn about the dangers of a third party’s product under certain circumstances.⁵¹

To support its argument that *Rastelli* stands for a bright-line “stream-of-commerce” rule, Crane cites three cases in which New York courts interpreted *Rastelli* to mean that a manufacturer had no duty to warn with respect to a product it did not manufacture or distribute: *Tortoriello v. Bally Case*, *Surre v. Foster Wheeler*, and *Kiefer v. Crane Co.*⁵² These cases, however, did not necessarily apply the black-letter rule that Crane advances. Similar to the court in *Rastelli*, the respective courts in each case reasoned, in part, that the defendant manufacturer played no role in selecting the dangerous third-party product for use with its own.⁵³

To support their position, the plaintiffs cite two cases in which the courts applied *Rastelli* to hold that a manufacturer may have a duty to warn where its product required the use of a third-party product that was dangerous.⁵⁴ Similarly, the court in *Holdsworth* concluded that there was a triable issue of fact as to whether Crane knew its valves could not function without asbestos-containing parts.⁵⁵

Crane’s conduct in *Dummitt* probably fell somewhere in between indifference to and requiring the use asbestos-containing parts with its valves.

47. See *id.*

48. See *id.*

49. See *id.* at 223 n.1.

50. See Br. for Appellant in *Dummitt* (Dummitt App.) at 21; *Suttner* (Suttner App.) at 15; *Holdsworth*, 11 N.Y.S.3d at 388–89.

51. See Br. for Resp’t in *Dummitt* (Dummitt Resp.) at 31–32; *Suttner* (Suttner Resp.) at 49–50.

52. *Tortoriello v. Bally Case*, 606 N.Y.S.2d 625, 627 (N.Y. App. Div. 2014); *Surre v. Foster Wheeler*, 831 F. Supp. 797, 801–02 (S.D.N.Y. 2011); *Kiefer v. Crane Co.*, No. 12 Civ. 7613, at 12 (S.D.N.Y. Feb. 3, 2014); see *Dummitt App.* at 31–33; *Suttner App.* at 20–21.

53. See *Tortoriello*, 606 N.Y.S.2d at 625; *Surre*, 831 F. Supp. at 801–02; *Kiefer*, No. 12 Civ. 7613, at 12.

54. See *Berkowitz v. A.C. & S., Inc.*, 733 N.Y.S.2d 410, 412 (N.Y. App. Div. 2001); *Rogers v. Sears, Roebuck & Co.*, 701 N.Y.S.2d 359, 359 (N.Y. App. Div. 2000); *Dummitt Resp.* at 36–37; *Suttner Resp.* at 53.

55. See *Holdsworth*, 11 N.Y.S.3d at 399.

In *Dummitt*, the court found that Crane specified asbestos parts for use with the high-pressure, high-temperature valves that it sold the decedent's employer, sold its valves with the asbestos parts already in place, and marketed those parts under its own brand.⁵⁶

The facts in *Suttner* may be closer to those in *Berkowitz* and *Rogers* (the "requirement" cases).⁵⁷ In *Suttner*, the trial court (whose opinion was adopted by the court above) held the record contained sufficient evidence from which a jury could conclude that Crane supplied the valves with asbestos-containing parts, that it specified the use of those parts, and that the valves in fact would not function properly without them.⁵⁸

Thus, in its upcoming decision in *Dummitt* and *Suttner*, the Court of Appeals will likely be faced with the following questions: Do *Rastelli* and progeny articulate the bright-line "stream of commerce" rule advanced by Crane, the fact-dependent analysis advanced by the plaintiffs, or the "requirement" standard that *Berkowitz* and *Rogers* seemingly articulated? And, assuming a "requirement" standard, was Crane's conduct in *Dummitt* and/or *Suttner* enough to confer liability on it?

III. EMERGING PRODUCT REGULATIONS AND TORT CLAIMS

A. Autonomous Vehicle Laws Updated Across the Country

As manufacturers prepare to release autonomous vehicles, states are getting ready to have them on their roads. More states are considering autonomous vehicle legislation every year: sixteen states considered legislation in 2015, twelve in 2014, nine and the District of Columbia in 2013, and six in 2012.

In 2015, North Dakota⁵⁹ and Tennessee⁶⁰ enacted autonomous vehicle legislation, joining California,⁶¹ Florida,⁶² Michigan,⁶³ Nevada,⁶⁴ and

56. See *Dummitt*, 990 N.Y.S.2d at 190.

57. *Berkowitz*, 733 N.Y.S.2d at 412; *Rogers*, 701 N.Y.S.2d at 359.

58. See *In re* Eighth Judicial Dist. Asbestos Litig., No. 2010-12499, 2013 WL 9816609, at *3 (N.Y. Sup. Ct. Mar. 15, 2013).

59. 2015 N.D. Legis. H.B. 1065 (enacted).

60. 2015 Tenn. Laws Pub. Ch. 307 (S.B. 598) (enacted).

61. 2012 Cal. Legis. Serv. Ch. 570 (S.B. 1298) (enacted) (directing California Department of Motor Vehicles to establish testing and use regulations for autonomous vehicles).

62. 2012 Fla. Sess. Law Serv. Ch. 2012-111 (C.S.H.B. 1207) (enacted) (approving use of autonomous vehicles).

63. 2013 Mich. S.B. No. 169 (enacted) (allowing autonomous vehicle testing and setting limitations on original manufacturer liability when autonomous technology is added after vehicle purchase).

64. 2011 Nev. Laws Ch. 472 (A.B. 511) (enacted) (directing Nevada Department of Motor Vehicles to adopt rules for licensure related to autonomous vehicles and set testing standards).

D.C.⁶⁵ North Dakota's legislature commissioned a study to begin in 2016. That study would analyze the necessary laws to ensure autonomous vehicles can operate on North Dakota roads when the time comes.⁶⁶ The legislation also provides funding for research into the benefits of autonomous vehicles, specifically an anticipated reduction in crashes. Tennessee's law forbids local governments from prohibiting the use of autonomous vehicles.⁶⁷

The California Department of Motor Vehicles (DMV) missed its January 1, 2015, deadline⁶⁸ to establish regulations for the day-to-day use of autonomous vehicles. In 2012, the California legislature passed a law requiring the DMV to establish testing protocols and day-to-day use regulations.⁶⁹ The California DMV established testing protocols in 2014.⁷⁰ It cited safety concerns to justify its delay in establishing use regulations and held a public workshop on January 27, 2015.⁷¹ The DMV has been quiet since the workshop, and there is no indication as to when it will finalize use regulations.

B. *Eleventh Circuit Holds Engle Findings Preempted by Federal Law*

In April 2015, the Eleventh Circuit held that a Florida district court's use of *Engle* Phase I jury findings was reversible error because the plaintiff's strict liability and negligence claims, which were premised on the findings, were preempted by federal law.⁷²

The *Engle* class action saga began in the mid-1990s as Florida smokers brought strict liability, negligence, breach of express and implied warranty, fraud, conspiracy to commit fraud, and intentional infliction of emotional distress claims against the major U.S. tobacco companies.⁷³ The Florida District Court of Appeal certified a class and the trial court divided the trial into three phases.⁷⁴ At the conclusion of Phase I, the jury found the following facts: (1) smoking caused certain diseases, such as COPD and lung cancer; (2) nicotine was addictive; (3) cigarettes were defective and unreasonably dangerous; (4) the tobacco defendants concealed and misrepresented the risks of smoking cigarettes; (5) the to-

65. 2012 D.C. Laws 19-278 (Act 19-643) (enacted) (expressly permitting use of autonomous vehicles with a driver prepared to take control of the vehicle).

66. N.D. Legis. H.B. 1065 (enacted).

67. 2015 Tenn. Laws Pub. Ch. 307 § 1(a) (S.B. 598) (enacted).

68. 2012 Cal. Legis. Serv. Ch. 570 (S.B. 1298) (enacted).

69. *Id.* § 38750(b).

70. *Id.* § 38750(d).

71. California Div. of Motor Vehicles, Press Release, DMV to Hold Public Workshop on Autonomous Vehicle Operation Regulations (Jan. 26, 2015).

72. *Graham v. R.J. Reynolds Tobacco Co.*, 782 F.3d 1261, 1285 (11th Cir. 2015).

73. *Liggett Grp. Inc. v. Engle*, 853 So. 2d 434, 441 (Fla. Dist. Ct. App. 2003) (hereinafter *Engle II*).

74. *Graham*, 782 F.3d at 1265.

bacco defendants were negligent; and (6) punitive damages could be awarded.⁷⁵

The district court decertified the class.⁷⁶ The Florida Supreme Court affirmed and held that “[c]lass members can choose to initiate individual damages actions and the Phase I common core findings . . . will have res judicata effect in those trials.”⁷⁷ Confusion stemmed from the ruling, and the Florida Supreme Court clarified that the “Phase I jury findings produced a ‘final judgment’ in that they resolved all common liability issues in favor of the class.”⁷⁸

In *Graham v. R.J. Reynolds Tobacco Co.*, a Florida district court instructed a jury in accordance with the *Engle* Phase I jury findings.⁷⁹ The tobacco defendants objected to the instructions on the grounds that federal law preempted Graham’s claims.⁸⁰ The court overruled the objections and the jury returned a \$2.75 million dollar verdict for Graham.⁸¹ The tobacco defendants appealed to the Eleventh Circuit and argued that imposing tort liability based on the *Engle* Phase I findings conflicted with Congress’s intent “to foreclose the removal of tobacco products from the market despite the known health risks and addictive properties.”⁸²

The Eleventh Circuit agreed. The court held that because the *Engle* Phase I findings are not brand-specific and apply to any and all cigarettes smoked by class members at any point, the imposition of liability based on those findings is “in essence, a ban on cigarettes.”⁸³ The Eleventh Circuit further held that a ban on cigarettes is at odds with “Congress’s clear purpose and objective of regulating—not banning—cigarettes.”⁸⁴ The court pointed to seven legislative enactments that revealed that Congress was aware of the health risks associated with smoking cigarettes, yet never banned their sale or manufacture.⁸⁵ Thus, the court reasoned that because the *Engle* Phase I findings acted as a de facto ban on cigarette sales, Graham’s claims were preempted by Congress’s “clear purpose and objective of regulating—not banning—cigarettes.”⁸⁶ The court concluded that its

75. *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1269 (Fla. 2006) (hereinafter *Engle III*).

76. *Engle II*, 853 So. 2d at 442.

77. *Engle III*, 945 So. 2d at 1269.

78. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 434 (Fla. 2013).

79. *Graham*, 782 F.3d at 1273.

80. *Id.*

81. *Id.*

82. *Id.* at 1274.

83. *Id.* at 1282.

84. *Graham*, 782 F.3d at 1282.

85. *Id.* at 1276–79.

86. *Id.* at 1282.

ruling did not bar other tort claims premised on strict liability or negligence, but only those based on *Engle* Phase I jury findings.⁸⁷

IV. MEDICAL MONITORING

In *Pliva v. Mensing*, the U.S. Supreme Court held that certain state law failure-to-warn claims against generic drug manufacturers (hereinafter GDM) are preempted by federal law.⁸⁸ Many believed this preemption would extend to all failure-to-warn claims, but recent state and federal appellate decisions have held otherwise.⁸⁹ These cases have limited preemption to claims that allege the GDM should have included a stronger (or different) warning than that of its brand name counterpart.

In *Huck v. Wyeth*, the Iowa Supreme Court held that federal law did not preempt failure to update claims against generic drug manufacturers where the GDM could have updated its label without violating federal law.⁹⁰ In *Huck*, the plaintiff developed a neurological disorder after taking Pliva's generic version of Reglan, metoclopramide.⁹¹ The plaintiff sued, claiming Pliva's failure to update its warning label to reflect a warning approved by the U.S. Food and Drug Administration (FDA) in 2004 caused her injuries.⁹² The court concluded that because Pliva could have updated its label to include the 2004 warning, federal law did not preempt the plaintiff's claim.⁹³ Pliva sought review of the court's decision, but the Supreme Court denied certiorari in March 2015.⁹⁴

In *Teva Pharmaceuticals USA, Inc. v. Superior Court*, the California Court of Appeal held that federal law did not preempt the plaintiffs' failure-to-warn claims.⁹⁵ The plaintiffs alleged they suffered femur fractures due to the use of a drug used to treat osteoporosis.⁹⁶ The brand-name drug label had been updated to include a warning for femoral fractures, but the generic drug label had not.⁹⁷ The court first distinguished between claims that allege a GDM should have unilaterally updated its label in a way that would be consistent with the brand name drug's

87. *Id.* at 1284.

88. 131 S. Ct. 2567, 2580–81 (2011).

89. *See, e.g.*, *Teva Pharm. USA, Inc. v. Super. Ct.*, 158 Cal. Rptr. 3d 150 (Ct. App. 2013); *Huck v. Wyeth*, 850 N.W.2d 353 (Iowa 2014); *Fulgenzi v. Pliva, Inc.*, 711 F.3d 578 (6th Cir. 2013); *Johnson v. Teva Pharm. USA, Inc.*, 758 F.3d 605 (5th Cir. 2014); *Teva Pharm. USA, Inc. v. Hassett*, 135 S. Ct. 2310 (2015).

90. *Huck*, 850 N.W.2d at 356.

91. *Id.* at 359.

92. *Id.* at 362.

93. *Id.* at 364.

94. *Pliva, Inc. v. Huck*, 135 S. Ct. 1699 (Mar. 30, 2015).

95. *Teva*, 158 Cal. Rptr. 3d at 152–53.

96. *Id.* at 153.

97. *Id.* at 156–57.

label and those that allege the GDM should have updated its label to match that of the brand name drug.⁹⁸ The former, the court held, are preempted by federal law.⁹⁹ The latter are not.¹⁰⁰ The Supreme Court denied certiorari and *Teva* remains the law in California.¹⁰¹

These cases demonstrate that the protection provided to generic drug makers is not as complete as many once believed. Moreover, the FDA has proposed a modification to the existing rule that would allow generic drug manufacturers to independently update their warning labels without first obtaining FDA approval.¹⁰² This rule, which has been subject of a much-heated debate, would effectively eliminate the preemption protection *Mensing* established. The rule underwent two comment periods and in April 2015, the FDA held a public hearing to consider alternatives to the proposed rule. A final rule was expected in September 2015; however, as of the time of this writing, no rule has been announced.

V. CLEAN AIR ACT

A. D.C. Circuit Remanded State Budgets Under Cross-State Air Pollution Rule Back to USEPA

In July 2015, the D.C. Circuit remanded without vacatur several states' sulfur dioxide (SO₂) and nitrogen oxide (NO_x) emission budgets under the Cross-State Air Pollution Rule (CSAPR).¹⁰³ CSAPR is the USEPA program that regulates interstate air pollution under the Clean Air Act's (CAA) "good neighbor provision."¹⁰⁴ This provision prohibits "emissions activity within the State from emitting any air pollutant in amounts which will contribute significantly to nonattainment in, or interference with maintenance by, any other State. . . ."¹⁰⁵

CSAPR created a two-step emissions trading program. First, "EPA identified the upwind States that contribute significantly to nonattainment of NAAQS in one or more downwind States."¹⁰⁶ Then, "EPA calculated the pollution reductions necessary for those 27 upwind States to comply with their good neighbor obligations."¹⁰⁷ USEPA—citing the

98. *Id.* at 157–58.

99. *Id.* at 157.

100. *Id.* at 158.

101. *Teva Pharm. USA, Inc. v. Super. Ct.*, 135 S. Ct. 1152 (Jan. 20, 2015).

102. Supplemental Applications Proposing Labeling Changes for Approved Drugs and Biological Products, 78 Fed. Reg. 67985 (Nov. 13, 2013) (to be codified at 21 C.F.R. pts. 314 and 601).

103. *EME Homer City Generation, L.P. v. Env'tl. Prot. Agency*, 795 F.3d 118, 138 (D.C. Cir. 2015).

104. 42 U.S.C. § 410(a)(2)(D)(i).

105. 42 U.S.C. § 410(a)(2)(D)(i).

106. *EME Homer City Generation*, 795 F.3d at 125 (internal citations omitted).

107. *Id.*

complexity of assigning each state an individualized emission reduction obligation—imposed uniform emission reductions on all twenty-seven upwind states.¹⁰⁸

In 2012, the D.C. Circuit invalidated CSAPR because the rule's uniform emission reduction meant that "a State [] may be required to reduce its emissions by an amount greater than the significant contribution that brought it into the program in the first place."¹⁰⁹ On appeal, the Supreme Court agreed that this effect was problematic, but reversed, holding that "a particularized, as-applied challenge to [CSAPR]" was more appropriate than "wholesale invalidation" of the rule.¹¹⁰ Following the Supreme Court's reversal, Texas, Alabama, Georgia, and South Carolina challenged SO₂ emission budgets, and Florida, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Virginia, and West Virginia challenged NO_x emission budgets.¹¹¹ The D.C. Court of Appeals found each of the challenged emission budgets to be unnecessarily stringent. The matter was remanded without vacatur to USEPA to reconsider the emission budgets.¹¹² On November 16, 2015, USEPA proposed updates to CSAPR that would address the NO_x emission budgets remanded by the court.¹¹³

B. *U.S. Supreme Court Remands Mercury Air Toxics Rule*

In June 2015, the Supreme Court struck down the Mercury and Air Toxics Standard (MATS).¹¹⁴ In a five-to-four decision, the Court held that USEPA had not reasonably contemplated costs when deciding whether to regulate power plant mercury emissions.¹¹⁵ Promulgated under CAA § 112(n), the MATS required regulation of hazardous air pollutants when that regulation is "appropriate and necessary."¹¹⁶ The USEPA's regulatory impact analysis found that the MATS rule would require power plants to spend \$9.6 billion per year, but would result in direct benefits of \$4-\$6 million per year and ancillary benefits of \$37-\$97 billion per year. USEPA decided that the rule was "appropriate and necessary."¹¹⁷

108. *Id.* at 126.

109. *EME Homer City Generation, L.P. v. Env'tl. Prot. Agency*, 696 F.3d 7, 25 (D.C. Cir. 2012), *rev'd and remanded*, 134 S. Ct. 1584 (2014) (internal citations omitted).

110. *EME Homer City Generation*, 134 S. Ct. at 1608–09.

111. *EME Homer City Generation*, 795 F.3d at 138.

112. *Id.*

113. Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS (proposed Nov. 16, 2015) (to be codified at 40 C.F.R. pts. 52, 78, 97).

114. *Michigan v. U.S. Env'tl. Prot. Agency*, No. 14-46, slip op. (June 29, 2015).

115. *Id.* at *6.

116. 42 U.S.C. § 7412(n).

117. *Michigan*, No. 14-46, slip. op. at *2.

The Supreme Court disagreed and held that “appropriate and necessary” requires at least some consideration of cost.¹¹⁸

Because the MATS rule was not stayed during its appeal, many power plants had already moved to come into compliance with the rule before the Supreme Court’s decision.¹¹⁹ The ruling will likely impact USEPA’s future “appropriate and necessary” findings.

C. USEPA Issues Final “Startup, Shutdown, and Malfunction” SIP Call

In June 2015, USEPA published a final action requiring thirty-six states to revise provisions in their state implementation plans (SIPs) governing emissions from sources during startup, shutdown, and malfunction (SSM) periods.¹²⁰ The action was a response to recent court decisions and a petition for rulemaking filed by the Sierra Club.¹²¹ Opponents of the provisions argued that blanket exemptions from emission limitations during SSM periods violate the CAA.¹²² In the action, USEPA found substantial inadequacy in SIP provisions that (1) provided automatic exemptions for excess emissions that occur during SSM, (2) provided state regulatory personnel with discretion to allow exemptions for excess emissions that occur during SSM, (3) provided state regulatory personnel with discretion when enforcing violations of excess emissions that occur during SSM, and (4) allowed affirmative defenses for excess emissions that occur during SSM.¹²³ The action changes USEPA policy by rescinding an earlier interpretation stating that appropriately drafted affirmative defenses could apply to excess emissions during SSM.¹²⁴ The deadline for affected states to revise their SIPs is November 22, 2016.¹²⁵

D. USEPA Issues Strategic Plan for “Next Generation” Compliance and Enforcement

In October 2014, USEPA issued its Next Generation Compliance: Strategic Plan 2014-2017.¹²⁶ The plan is part of USEPA’s ongoing Next Generation Compliance initiative, which uses new and developing

118. *Id.* at *7.

119. 77 Fed. Reg. 9304 (Feb. 16, 2012).

120. 80 Fed. Reg. 33840 (June 12, 2015).

121. *Id.* at 33840-41.

122. *Id.* at 33844-45; *See e.g.*, *Sierra Club v. Jackson*, No. 3:10-cv-04060-CRB (N.D. Cal.).

123. 80 Fed. Reg. at 33957-59.

124. *Id.* at 33958-59.

125. *Id.* at 33840.

126. U.S. Env’tl. Prot. Agency, Office of Enforcement and Compliance Assurance, *Next Generation Compliance: Strategic Plan 2014-2017* (2014), available at <http://www2.epa.gov/sites/production/files/2014-09/documents/next-gen-compliance-strategic-plan-2014-2017.pdf>.

technology to modernize USEPA's regulation, monitoring, and enforcement procedures.¹²⁷

The five goals of the Next Generation Compliance program are to: (1) establish more effective regulations and permits to reduce pollution and achieve higher compliance;¹²⁸ (2) “[m]ake better use of existing pollution monitoring technologies and investigate new ones to help government, industry, and the public identify pollution problems and help solve them;”¹²⁹ (3) “[s]hift to electronic reporting in regulations and permits” to foster more accurate and timely reporting;¹³⁰ (4) make USEPA's monitoring and reporting information publicly available;¹³¹ and (5) use new technologies in its enforcement proceedings, including incorporating new monitoring technologies and increased electronic reporting into enforcement settlements and plea agreements.¹³²

E. Fifth Circuit Overturns Citgo Petroleum Corporation's Convictions

On September 4, 2015, the Fifth Circuit overturned Citgo Petroleum Corporation's two convictions under the CAA and three convictions under the Migratory Bird Treaty Act (MBTA).¹³³ The court held that the district court issued improper jury instructions and misinterpreted the MBTA's “take” provision.¹³⁴ Citgo's convictions stemmed from an alleged impermissible wastewater treatment program at its Corpus Christi Oil refinery.¹³⁵ Texas officials found a large volume of oil within two of the facility's uncovered equalization tanks, leading officials to believe that Citgo was using the tanks as water-oil separators.¹³⁶ Citgo was convicted because the CAA requires water-oil tanks to be covered, and the jury determined that Citgo's uncovered equalization tanks constituted water-oil separators.¹³⁷

The Fifth Circuit reversed the conviction, finding that the jury instructions impermissibly defined a water-oil separator “by how it is used”¹³⁸ and that this “purely functional” explanation was inconsistent with the CAA regulations. An oil-water separator is defined by the CAA “by

127. *Id.*

128. *Id.* at 3.

129. *Id.* at 4.

130. *Id.* at 5.

131. *Id.*

132. *Id.* at 7.

133. *United States v. Citgo Petroleum Co.*, No. 14-40128, 2015 WL 5201185 (5th Cir. Sept. 9, 2015).

134. *Id.* at *9.

135. *Id.* at *2.

136. *Id.*

137. *Id.*

138. *Id.* at *3.

how it is used *and* by its constituent parts.”¹³⁹ The court also reversed Citgo’s convictions under the Migratory Bird Treaty Act, citing the district court’s overly broad definition of the word “take.” The court deferred to reasoning by the Eighth and Ninth Circuits that a taking “is limited to deliberate acts done directly and intentionally to migratory birds.”¹⁴⁰

F. *Early Challenges to Legal Bases for USEPA’s Clean Power Plan Proposed Rule Prove Unsuccessful*

The hotly contested Clean Power Plan (CPP) is the regulatory centerpiece of the Obama Administration’s efforts to reduce carbon pollution from the power plant sector.¹⁴¹ The proposed rule for the CPP, published by the USEPA on June 18, 2014, provided the public with an opportunity to review and comment on USEPA’s rulemaking before the agency issued the final CPP regulation. It also set forth emission guidelines that states would have to use in developing plans to reduce greenhouse gas (GHG) emissions from existing fossil fuel-fired electric generating units.¹⁴²

The CPP sparked a flurry of lawsuits from states and industry members. The petitioners attacked the USEPA’s claim that CAA § 111(d)¹⁴³ granted the agency authority to regulate carbon emissions from existing power plants. The courts dismissed each challenge.

In June 2015, for example, the D.C. Circuit denied petitions for review and injunctive relief sought by Murray Energy Corporation and a coalition of states¹⁴⁴ (collectively, petitioners).¹⁴⁵ The petitioners argued that CAA § 111(d) did not “grant EPA authority to limit carbon dioxide [“CO₂”] emissions from existing power plants.”¹⁴⁶ The court, however, dismissed the case for lack of subject matter jurisdiction without reaching

139. *Id.*

140. *Id.* at *9.

141. During the proposed rule’s public comment period, the USEPA received over 4.3 million comments from various government and industry stakeholders. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, at 8–9 (proposed Aug. 3, 2015) (to be codified at 40 C.F.R. pt. 60); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830 (proposed June 18, 2014).

142. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830 (proposed June 18, 2014). For an overview of the notice-and-comment rulemaking process, see 5 U.S.C. § 553.

143. 42 U.S.C. § 7411(d).

144. The states included West Virginia, Alabama, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and Wyoming. *In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015).

145. *Id.*

146. *Id.* In so holding, the D.C. Circuit rejected all three of the petitioners’ arguments regarding why judicial review of the proposed rule was proper. First, the court concluded that the All Writs Act did not authorize a court to review proposed agency rules. *Id.* at 335. Second, it found that USEPA’s public statements about its legal basis for regulation of CO₂ emissions did not constitute final agency action. *Id.* at 335–36. Third, the court

the merits of the petitioners' argument.¹⁴⁷ It noted that while the court "may review final agency rules, . . . [it] do[es] not have authority to review proposed [agency] rules."¹⁴⁸ One judge disagreed, maintaining that the D.C. Circuit had jurisdiction to issue injunctive relief where, as here, the court "would have authority to review the agency's final decision."¹⁴⁹

A month after *Murray*, the Northern District of Oklahoma dismissed another challenge to the proposed rule for lack of subject matter jurisdiction.¹⁵⁰ In that case, the State of Oklahoma and the Oklahoma Department of Environmental Quality sought declaratory and injunctive relief.¹⁵¹ The plaintiffs argued that USEPA and its administrator, Gina McCarthy, were acting ultra vires by proposing a rule pursuant to CAA § 111(d) because the agency had already enacted emission standards for coal-fired power plants under CAA § 112.¹⁵² The district court dismissed the plaintiffs' challenge for lack of jurisdiction before reaching the merits.¹⁵³ "[T]his is a case where the judicial review sought by plaintiff is simply premature, rather than wholly prohibited by statute," the district court explained.¹⁵⁴ "[P]laintiffs will have a forum to challenge the emission standards before they take effect."¹⁵⁵

On August 3, 2015, USEPA Administrator McCarthy signed the final CPP rule after reviewing and addressing the over 4.3 million comments on the proposed rule. At 1,560 pages long, the CPP sets ambitious state guidelines and a national goal of achieving a 32 percent reduction in CO₂ emissions from power plants by 2030.¹⁵⁶ The final CPP rule was published on October 23, 2015, and became effective December 22, 2015.

Before the final CCP rule was published, a fifteen-state coalition,¹⁵⁷ along with Peabody Energy Corporation, sought judicial review of the final CPP rule in the D.C. Circuit.¹⁵⁸ The court denied these emergency

held that a 2011 USEPA settlement agreement did not provide a basis for review of the proposed rule because the petitioners were not parties to the agreement. *Id.* at 336.

147. *Id.* at 336.

148. *Id.* at 334 (internal citations omitted).

149. *Id.* at 337 (Henderson, J., concurring in the judgment) (internal quotation marks omitted).

150. Okla. *ex rel.* Pruitt v. McCarthy, 2015 WL 4414384, at *5 (N.D. Okla. July 17, 2015).

151. *Id.* at *2.

152. *Id.*

153. *Id.* at *5.

154. *Id.* at *4.

155. *Id.*

156. See Jane E. Montgomery and Raghav Murali, *Climate Action Plan Takes Shape*, Schiff Hardin LLP (Sept. 28, 2015), <http://www.energyenvironmentallawadviser.com/2015/09/climate-action-plan-takes-shape/>.

157. The coalition included the states of Kentucky, Alabama, Arkansas, Florida, Indiana, Kansas, Louisiana, Michigan, Nebraska, Ohio, Oklahoma, South Dakota, West Virginia, Wisconsin, and Wyoming.

158. *In re* State of W. Va., Case No. 15-1277 (D.C. Cir. Sept. 9, 2015) (consolidated with *In re* Peabody Energy Corp., Case No. 15-1284).

petitions for extraordinary writ, however, because the “petitioners ha[d] not satisfied the stringent standards that apply to petitions . . . that seek to stay agency action.”¹⁵⁹ The petitioners sought review of the final CPP just ten days after its announcement. The CAA, however, allows judicial review of final agency action “within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register.”¹⁶⁰ The petitioners could thus begin to challenge the CPP on October 23, 2015, the date on which the CPP was published in the Federal Register.¹⁶¹

On October 23, 2015, a broad band of industry members and states filed motions to stay EPA’s final CCP with the D.C. Circuit.¹⁶² States then filed a petition for judicial review before the D.C. Circuit on November 3, 2015.¹⁶³

G. *Biofuel Producers and Advocates Challenge USEPA Test Fuel Regulation as Arbitrary and Capricious*

On July 14, 2015, in *Energy Future Coalition v. USEPA*, the D.C. Circuit held that the “commercially available” requirement in USEPA’s test fuel regulation was reasonable and thus not arbitrary and capricious.¹⁶⁴ The CAA required USEPA to adopt the regulation, under which vehicle manufacturers must test emissions of new vehicles using a “test fuel” that is “commercially available.”¹⁶⁵ Biofuel producers and a biofuel advocacy group (collectively, petitioners) sought judicial review of the regulation, arguing that it was arbitrary and capricious.¹⁶⁶ Specifically, the petitioners wanted to use E30, a fuel containing 30 percent ethanol, as a test fuel.¹⁶⁷ E30 is not yet “commercially available,” however, and, thus, the regulation prohibits its use.¹⁶⁸ The petitioners argued that “a fuel should not have to be ‘commercially available’ in order to be approved as a test fuel.”¹⁶⁹ After disposing of threshold justiciability concerns,¹⁷⁰ the court

159. *Id.*

160. 42 U.S.C. § 7607(b)(1) (emphasis added).

161. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

162. Mot. for Stay of USEPA’s Final Rule, Chamber of Commerce of the U.S. v. Envtl. Prot. Agency, Case No. 15-1363 (D.C. Cir. Oct. 23, 2015).

163. Petition for Review, West Virginia v. U.S. Envtl. Prot. Agency, Case No. 15-1399 (D.C. Cir. Nov. 3, 2015).

164. 793 F.3d 141, 147 (D.C. Cir. 2015).

165. 40 C.F.R. § 1065.701(a), (c).

166. *Energy Future Coal.*, 793 F.3d at 143.

167. *Id.*

168. *Id.*

169. *Id.* at 146.

170. The court held the lawsuit was ripe and that the petitioners had Article III standing, were within the zone of interests protected by the CAA, and had challenged the regulation in a timely manner. *Id.* at 144–46.

disagreed with the petitioners and held that the “commercially available” requirement was not arbitrary and capricious.¹⁷¹ “It is entirely commonsensical and reasonable,” the court reasoned, “for EPA to require vehicle manufacturers to use the same fuels in emissions testing that vehicles will use out on the road.”¹⁷²

VI. CLEAN WATER ACT

A federal court dismissed a poultry farm’s lawsuit for lack of subject matter jurisdiction. The lawsuit argued that the state lacked the authority to require the farm to obtain a National Pollutant Discharge Elimination System (NPDES) permit. In *Rose Acre Farms, Inc. v. North Carolina Department of Environment & Natural Resources*,¹⁷³ the plaintiff challenged the state’s decision that it needed an NPDES permit for runoff carrying trace dust and feathers from the ground outside its hen houses. Rose Acre argued that the runoff was exempted as agricultural storm water discharge under federal law.¹⁷⁴ Therefore, the plaintiff sought an order declaring that the state agency could not require it to obtain an NPDES permit.¹⁷⁵

The federal court declined review, holding that it lacked subject matter jurisdiction, even though it acknowledged that the central issue of the case was federal in nature: does the agricultural storm water discharge exception in 33 U.S.C. § 1362(14) cover the potential discharge from Rose Acre’s hen houses?¹⁷⁶ The court determined that to hold otherwise “would upset the congressionally determined balance between federal and state courts,” potentially opening the doors to any party unhappy with a state agency’s permitting decision to file a federal lawsuit. The Clean Water Act’s “cooperative federal-state structure” “explicitly allows and encourages states to create their own permitting schemes.¹⁷⁷ The court held, therefore, that “Congress chose state courts to be the means by which parties may challenge state permitting decisions,” and purposefully decided “not to create a federal right of action.”¹⁷⁸ Rose Acre is appealing the decision to the Fourth Circuit.¹⁷⁹

171. *Id.* at 147.

172. *Id.* at 146.

173. No. 5:14-CV-147-D, 2015 WL 4603950 (July 30, 2015).

174. *Id.* at *2.

175. *Id.*

176. *Id.* at *1, *10.

177. *Id.* at *6, *8.

178. *Id.* at *7.

179. Docket No. 15-2003 (4th Cir. filed Sept. 2, 2015).

VII. EMERGING ENVIRONMENTAL CLAIMS

A. *Plaintiffs Have No Obligation to Demonstrate Injury and Causation Before Discovery in Colorado*

On April 20, 2015, in *Antero Resolution Corp. v. Strudley*, the Colorado Supreme Court ruled that plaintiffs in fracking litigation do not have to provide evidence of injury and causation before obtaining discovery.¹⁸⁰ In a suit alleging contamination of air, water, and soil caused by fracking-related activities, the court held that the Colorado Rules of Civil Procedure prohibit *Lone Pine* orders that require plaintiffs in toxic tort cases to “establish a prima facie case of injury, exposure, and causation” before asserting full rights to discovery.¹⁸¹ In *Strudley*, the plaintiffs sued fracking companies, alleging that gas drilling activities polluted air, water, and soil near their home and caused burning and bloody eyes, nausea, headaches, and coughing.¹⁸² The defendant petitioned for and was granted a *Lone Pine* order that required the plaintiffs to show through studies, reports, and affidavits that the injuries alleged were medically caused by exposure to contaminants.¹⁸³ The trial court subsequently granted the defendant’s motion for summary judgment, and the plaintiffs appealed.¹⁸⁴

The appellate court reversed, and the Colorado Supreme Court affirmed that reversal. The Supreme Court held the Colorado Rules of Civil Procedure and Colorado case law prohibit *Lone Pine* orders.¹⁸⁵ While recognizing that *Lone Pine* orders promote judicial efficiency and equity, the court noted that Rule 16 of the Colorado Rules of Civil Procedure omits key phrases contained in the Federal Rules of Civil Procedure that grant courts discretion to issue *Lone Pine* orders.¹⁸⁶ The court also determined that no other Colorado rules or case law permit *Lone Pine* orders.¹⁸⁷ Therefore, the defendant’s summary judgment was reversed.¹⁸⁸

B. *Pennsylvania Department of Environmental Protection Continues Efforts to Levy Fines for Fracking-Related Contamination*

As disputes continue over the effects of fracking on soil and groundwater, state agencies continue to seek fines from fracking companies. On February 20, 2015, the Commonwealth Court of Pennsylvania denied EQT

180. 347 P.3d 149, 151 (Colo. 2015).

181. *Id.*

182. *Id.*

183. *Id.* at 152.

184. *Id.* at 153.

185. *Id.* at 155–58.

186. *Id.* at 155–56.

187. *Id.* at 157–58.

188. *Id.* at 159.

Production Company's challenge to a multimillion dollar fine proposed by the Pennsylvania Department of Environmental Protection (DEP).¹⁸⁹ In 2012, EQT, an energy company whose commercial operations include fracking, discovered that one of its liners, which was intended to contain fracking water, was leaking and began a formal cleanup process to remediate soil and groundwater.¹⁹⁰ In May 2014, DEP sent a proposed consent assessment of civil penalty to EQT seeking \$1.27 million in civil fines.¹⁹¹ EQT then filed a complaint in action for declaratory judgment, challenging DEP's calculation of its proposed fine.¹⁹² In response, DEP filed preliminary objections to the complaint.¹⁹³ The Commonwealth Court of Pennsylvania dismissed EQT's complaint, holding that there was no actual controversy before the court. It determined that the Environmental Hearing Board, not DEP, had ultimate authority to impose civil fines, and DEP's letter merely expressed a "legal opinion" that the Environmental Hearing Board could subsequently reject or accept.¹⁹⁴ Therefore, the court agreed with DEP's preliminary objection that EQT failed to exhaust administrative remedies and dismissed EQT's complaint.¹⁹⁵

C. Seismicity Suits Are Potentially on the Horizon as Oklahoma Allows Case to Proceed

Increased litigation related to the potential seismic impacts of fracking may be on the horizon. On June 30, 2015, in *Ladra v. New Dominion, L.L.C.*, the Oklahoma Supreme Court allowed a homeowner to proceed to the district court on claims that fracking activities caused earthquakes and injury.¹⁹⁶ The decision did not discuss the merits of the claim, but instead examined whether a district court could hear this type of case.¹⁹⁷ The plaintiff alleged that fracking activities caused a 5.0 magnitude earthquake that shook her house and caused rocks from a two-story fireplace to fall on her.¹⁹⁸ The supreme court held the district court had jurisdiction over the case because the plaintiff alleged a private cause of action.¹⁹⁹ The court stated that although the Oklahoma Corporation Commission (OCC), a state agency, has exclusive authority to regulate "the exploration, drilling, development, production and operation of wells" in connec-

189. EQT Prod. Co. v. Dep't of Env'tl. Prot., 114 A.3d 438, 439 (Pa. Commw. Ct. 2015).

190. *Id.*

191. *Id.* at 439-40.

192. *Id.*

193. *Id.* at 440.

194. *Id.* at 441.

195. *Id.* at 442.

196. 353 P.3d 529, 530 (Okla. 2015).

197. *Id.* at 532.

198. *Id.* at 530.

199. *Id.* at 532.

tion with mineral extraction, the OCC's jurisdiction is limited to issues involving public rights.²⁰⁰ It concluded that district courts "have exclusive jurisdiction over private tort actions when regulated oil and gas operations are at issue," and allowing district courts to hear these cases does not give them "inappropriate oversight and control" of regulatory agencies.²⁰¹

VIII. RESOURCE CONSERVATION AND RECOVERY ACT

Courts are increasingly interpreting the Resource Conservation and Recovery Act (RCRA) in a broader fashion. In *Goldfarb v. Mayor and City Council of Baltimore*, the Fourth Circuit allowed the appellants' RCRA claims to proceed despite concurrent Clean Water Act (CWA) claims.²⁰² The court thereby limited the scope of the so-called "anti-duplication" provision, which prevents citizens from bringing RCRA actions that are "inconsistent" with the CWA.²⁰³

In *Goldfarb*, the district court dismissed the appellants' RCRA claims that alleged imminent and substantial endangerment from ongoing soil and groundwater contamination because the contamination was already addressed under a CWA permit issued to the appellees. The Fourth Circuit reversed. It concluded that "[i]t is not enough that the activity or substance is already regulated under the CWA; it must also be 'incompatible, incongruous, inharmonious'" with any requirements or mandates under RCRA.²⁰⁴ The court found the mere fact that contamination was being addressed under a CWA permit did not bar appellants from bringing RCRA claims alleging that the same contamination resulted in unlawful imminent and substantial endangerment to defendants' property in violation of RCRA §§ 7002(a)(1)(A) and (1)(B) (42 U.S.C. §§ 6972(a)(1)(A) and (a)(1)(B)).²⁰⁵ In remanding the question of whether the CWA's remedial requirements were inconsistent with RCRA, the court emphasized that "different" requirements are not necessarily "inconsistent."²⁰⁶

Further expanding RCRA into areas typically regulated by the CWA, the district court in *Community Association for the Restoration of the Environment, Inc. v. Cow Palace, LLC* held that land-applied manure can be regulated as a solid waste under RCRA.²⁰⁷ Historically, materials that are applied to land have been regulated under the CWA, especially where groundwater contamination is involved. In part, this is because RCRA

200. *Id.* at 531 (quotation marks omitted).

201. *Id.* at 532 (quotation marks omitted).

202. *See* 791 F.3d 500, 510–11 (4th Cir. 2015).

203. Resource Conservation and Recovery Act, 42 U.S.C. § 9605(a).

204. *See Goldfarb*, 791 F.3d at 510.

205. *Id.*

206. *Id.*

207. *See* 80 F. Supp. 3d 1180, 1229, (E.D. Wash. 2015).

specifically exempts agricultural waste from regulation, provided the waste is used for a beneficial purpose (such as fertilizer).²⁰⁸

The district court agreed with the plaintiffs that the concentrated animal farm's disposal of large quantities of manure went beyond what could constitute unregulated fertilizer application. Instead, the manure constituted a solid waste, regulated under RCRA.²⁰⁹ The fact that the land application of manure had resulted in groundwater contamination in excess of state and federal standards was undisputed. Accordingly, the district court found that the disposal of manure as a solid waste created a "substantial and imminent endangerment to the health or the environment," a finding necessary to establish liability under RCRA.²¹⁰

IX. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)

A. *Statute of Limitations for Contribution Action Under CERCLA Runs from Date the Agreement Is Signed*

On January 20, 2015, the U.S. Supreme Court denied review of the Sixth Circuit's decision holding that the statute of limitations for a CERCLA § 113 contribution claim runs from the date that the settlement is effective.²¹¹ In *Hobart Corp. v. Waste Management*, the Sixth Circuit found that the administrative settlement and order on consent (ASAO) resolved the PRP's liability and therefore authorized the PRP to bring a contribution action to recover costs, but not a cost recovery action.²¹² The court also determined that because the ASAO resolved some liability when it was executed, it triggered the statute of limitations for a contribution action and gave the PRP three years from that date to bring its contribution claim.²¹³

B. *Eastern District of Washington Holds That Contamination Caused by Direct Aerial Emissions May Be Actionable Under CERCLA*

In *Pakootas v. Teck Cominco Metals, Ltd.*, the court held that hazardous substances from direct aerial emissions that were later deposited "into or on any land or water" of the defendant's UCR site—a CERCLA "facility"—could constitute "disposal" and therefore result in CERCLA liability.²¹⁴ In other words, although the hazardous substances were first emitted

208. See 40 C.F.R. 261.4(b)(2).

209. See *Cow Palace*, 80 F. Supp. 3d at 1221–22.

210. *Id.* at 1228–29.

211. *Hobart Corp. v. Waste Mgmt.*, 758 F.3d 757, 773, 775–76 (6th Cir. 2014), *cert denied*, No. 14-575, 135 S. Ct. 1161 (Jan. 20, 2015).

212. *Id.* at 766, 769.

213. *Id.* at 775–76.

214. 2014 WL 7408399, at *2–3 (E.D. Wash. Dec. 31, 2014).

into the air, “disposal occurred in the ‘first instance’ into or on land or water of the UCR Site.”²¹⁵

C. CERCLA Displaces Common Law Nuisance Claims

On January 5, 2015, a court held for the first time that CERCLA displaces a federal common law nuisance claim for damages.²¹⁶ In *Anderson v. Teck Metals, Ltd.*, a federal district court for the Eastern District of Washington dismissed federal common law public nuisance claims brought by a group of residents seeking damages for personal injury allegedly caused by the release of hazardous substances from the defendant’s metal smelter and fertilizer manufacturing facility.²¹⁷ Although the plaintiffs argued their claims were not precluded because CERCLA does not include any provisions regarding personal injury, the court held the plaintiffs’ claims were displaced.²¹⁸

D. Monitoring and Testing (and Taxing): New York Appellate Court Imposes Sales Tax on Environmental Remediation Work

Keeping with a growing trend, a New York appellate court in *Exxon Mobil Corp. v. New York Tax Appeals Tribunal* upheld a ruling applying a sales and use tax assessment to environmental remediation work.²¹⁹ New York law imposes a sales tax on services related to “[m]aintaining, servicing or repairing real property, property or land.”²²⁰ The court held this language extended to environmental remediation work, including monitoring and testing.

After an audit of Exxon, the New York Department of Taxation and Finance found that Exxon owed \$500,000 in unpaid sales taxes on testing and monitoring of properties affected by petroleum spills. Exxon argued that these costs were incurred “to ascertain the condition of the affected property and not to remediate the petroleum spills.”²²¹ The court disagreed. It found that the testing and monitoring were part of remediation efforts because they may lead directly to active remediation or its cessation. Testing and monitoring were therefore an “integral part” of remediation efforts and subject to sales and use tax.²²²

215. *Id.* at *2.

216. *Anderson v. Teck Metals, Ltd.*, 2015 WL 59100, at *10 (E.D. Wash. Jan. 5, 2015).

217. *Id.*

218. *Id.*

219. No. 517504, 2015 WL 919788, at *2 (N.Y. App. Div. Mar. 5, 2015).

220. 20 N.Y.C.R.R. 527.7(a)(1).

221. *Exxon Mobil Corp.*, 2015 WL 919788, at *1.

222. *Id.* at *2.

E. *Ninth Circuit Holds District Courts Have Discretion in Accounting for CERCLA Private Party Settlement When Allocating to Non-Settling Parties*

In *AmeriPride Service Inc. v. Texas Eastern Overseas*, the Ninth Circuit decided that while federal common law has favored use of the proportionate-share approach of allocating liability, Congress did not intend to apply the proportionate-share approach to cases involving litigation among private parties.²²³ Moreover, CERCLA does not specify how private-party settlements affect liability of non-settling parties.²²⁴ As a result, the court held that district courts have discretion under CERCLA to determine the most equitable method of accounting for settlements between private parties in a contribution action.²²⁵

This decision is consistent with a First Circuit case,²²⁶ but splits with case law from the Seventh Circuit.²²⁷ The Seventh Circuit held that a court must use the pro tanto approach of the Uniform Contribution Among Tortfeasors Act in allocating liability to a non-settling defendant.

X. ENDANGERED SPECIES ACT

In May 2015, the Department of the Interior (DOI) proposed a rule that would increase the role played by states in listing species under the Endangered Species Act.²²⁸ The proposal would require those seeking to add a species listing to first send a petition to the state agency responsible for the management and conservation of wildlife resources in each state where the species occurs at least thirty days before submitting the petition to the U.S. Fish and Wildlife Service.²²⁹ The state agencies' responsive data or comments must then be included with the petition submitted to the DOI. This change would also apply to petitions for the designation of critical habitat.²³⁰

223. 782 F.3d 474, 487 (9th Cir. 2015).

224. *Id.* at 486.

225. *Id.* at 487.

226. *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 20–21 (1st Cir. 2004).

227. *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 308 (7th Cir. 1999).

228. Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions, 80 Fed. Reg. 29286 (proposed May 21, 2015).

229. *Id.* at 29288.

230. *Id.* at 29287.