

# Oil and Gas, Natural Resources, and Energy Journal

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## Recent Case Decisions

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Oklahoma Oil and Gas, Natural  
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RECENT CASE DECISIONS

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OIL AND GAS*Upstream*

*Ctr. For Env'tl. Law and Policy v. State Dep't of Ecology*, 468 P.3d 1064 (Wash. 2020).

The Respondents, Center for Environmental Law and Policy (“Center”), brought suit against Petitioners, Department of Ecology (“Ecology”), to challenge the validity of Ecology’s summer minimum instream flow rate rule, alleging Ecology exceeded its authority with an arbitrary and capricious rule and failed to fulfill its public trust responsibilities, and then moved to supplement the record. The trial court denied the motion to supplement and dismissed the challenge to Ecology’s rule validity. The Court of Appeals affirmed rejection of the motion the supplement and the public trust argument but invalidated the rule, holding Ecology had exceeded its authority. Ecology appealed to the Washington Supreme Court. The court asserted the Washington Administrative Procedure Act places the burden of asserting an administrative rule’s invalidity on the challenger. Subject to de novo review, the rule may only be invalidated if it is (1) unconstitutional, (2) is outside the statutory authority of the agency, (3) is arbitrary or capricious, or (4) was adopted without complying with statutory rule making procedures. Center asserted the rule was arbitrary and capricious; they argued Ecology failed to consider statutory recreational, navigational, and aesthetic values when setting the rule. The court held the challenge fails under the plain language of the statute in question because the record shows Ecology did consider those values—and in fact set a rate that sustains recreation and navigation—but even if they did not, the statute only provides guidelines and not required elements. The court held that Center failed to meet its burden showing Ecology exceeded its authority by setting an arbitrary and capricious rule and thus reversed the Court of Appeals invalidation of Ecology’s rule.

*Slawson Expl. Co., v. Nine Point Energy, LLC*, 966 F.3d 775 (8th Cir. 2020).

Exploration Company and Production Company entered into an exploration and development agreement (EDA) to drill and develop in an area of North Dakota. Included in the EDA was a Promote Obligation to pay an additional 10% of Production Company’s costs in electing to drill. Production Company later filed for bankruptcy. Exploration Company filed for a proof of claim in the bankruptcy proceeding claiming the Promote

Obligation was not subject to discharge. The bankruptcy court allowed Exploration Company to commence litigation on the issue. Exploration Company filed a declaratory action against Production Company claiming the Promote Obligation (1) is a covenant that runs with the land, (2) an equitable servitude, or (3) is a real property interest. The district court granted Production Company's motion for summary judgment. Exploration Company failed to demonstrate that the Promote Obligation ran with the land. Covenants that run with the land must directly benefit the land, and because the Promote Obligation is a cost that personally benefits the Exploration Company and the cost was not directly tied back into benefiting the land, it, therefore, did not directly benefit the land. Second, Exploration Company contended the Promote Obligation was an equitable servitude, because it had many similarities of an easement by estoppel. An equitable servitude and an easement by estoppel have similar characteristics but had different elements a Promote Obligation could not satisfy. Third, Exploration Company contended that an overriding royalty interest, recognized as a real property interest, and a Promote Obligation are the same except for different payment periods. The Ninth Circuit held royalties operate as profits issuing out of the land. Because drilling was not necessarily profiting out of the land, it could not be considered a real property interest. The Ninth Circuit affirmed the judgment of the district court.

#### *Downstream*

*Total E&P USA, Inc. v. Marubeni Oil & Gas (USA), Inc.*, No. 19-20271, 2020 WL 4460002 (5th Cir. Jul. 31, 2020).

Operator-1 filed three lawsuits seeking declaratory judgment against Operator-2 after the bankruptcy court deemed Operator-1 liable for Operator-3's abandonment costs associated with three interrelated assets, a pipeline, and two oil and gas fields. During bankruptcy court proceedings, Operator-3's creditors pledged proceeds from one half of the overriding royalty interest to Operator-2, reducing Operator-3's abandonment liability. Before filing, Operator-1 assigned interest in all assets to Operator-3. Operator-2 removed all cases to federal court. Parties cross-motivated for summary judgment on liability for two out of three cases. The third case is pending in district court. On summary judgment, Operator-1 asserted the assignment of interest to Operator-3 relieved Operator-1's liability for abandonment costs. Both trial courts found Operator-1 jointly and severally liable and granted partial summary judgment for Operator-2. The trial

courts both entered judgment for Operator-2, awarding Operator-2 damages subtracted by the value of the royalty interest. Operator-2 motioned for judgment as a matter of law and to alter the judgment related to the royalty interest. The court denied Operator-2's combined motion. Both parties appealed, and Operator-1 motioned for consolidation of appeals. On appeal, The Fifth Circuit Court of Appeals consolidated both appeals and looked to both assets' operating agreements. The court reversed the trial court's judgment for Operator-2 on case one, holding that the operating agreement contained an express provision that relieved Operator-1's liability. Conversely, the court affirmed the trial court's judgment for Operator-2 on case two, holding absent an express provision, like one in case one, Operator-1 remained liable for Operator-3's abandonment costs. Further, the court affirmed the denial of Operator-2's motion, allowing a royalty interest setoff to Operator-1's liability. This is an unpublished opinion of the court; therefore, federal court rules should be consulted before citing the case as precedent.

*Par. of Plaquemines v. Chevron USA, Inc.*, 969 F.3d 502, 2020 WL 4582196 (5th Cir. 2020).

In 2013, several Louisiana Parishes ("Parishes") sued several Oil and Gas Companies ("Companies") seeking relief under the Louisiana State and Local Coastal Resources Management Act of 1978 ("SLCRMA"). SLCRMA required anyone who wished to start using Louisiana's coastal zone for any activity significantly impacting coastal waters to apply for a permit. However, SLCRMA's grandfather clause did not require anyone already legally using the coastal zone, prior to SLCRMA's enactment, to have a permit. Parishes alleged Companies continued use of coastal zone canals and wells, built prior to SLCRMA, violates SLCRMA and the grandfather clause did not apply.

Companies initially tried to remove the case; however, the district courts denied their motion. After Parishes expert report, Companies tried to remove the case for a second time. This time, Companies claimed first notice of federal question jurisdiction as Parishes' expert report indicated Parishes sued Companies for use of wells and canals built during World War II when Companies were under a federal wartime agency, the Petroleum Administration for War. Parishes moved to remand.

The Eastern and Western Districts of Louisiana granted Parishes' motion to remand. Companies appealed the remand. The Fifth Circuit Court of Appeals affirmed the remand because Companies filed notice of removal too late. The court held Companies' first notice of a federal question did not

come from Parishes' expert report. Initial notice came from a previous report filed by Parishes with the court long before initiation of this suit and Parishes' expert report merely repeated that same information about the wells violating SLCRMA. The court affirmed the remand motions.

*Cline v. Sunoco, Inc. (R&M), et al.*, No. CIV-17-313-JAG, 2020 WL 4748026 (E.D. Okla. August 17, 2020).

A class of Royalty Owners sought compensatory and punitive damages against Fuel Distributor for unpaid interest accrued on late royalty payments. Royalty Owners sued under theories of breach of statutory obligation to pay interest and fraud. Fuel Distributor disputed class certification based upon an inability to identify an accurate list of affected Royalty Owners and Royalty Owners' individual damages. The class was maintained because Royalty Owners' expert witness sufficiently determined the members of the class and their respective interest owed. Trial court found that Fuel Distributor's expert witness's untimely completion of their report sufficiently burdened Royalty Owners' expert witness and warranted striking Fuel Distributor's expert witness's testimony. Trial court also found that Fuel Distributor breached their statutory obligation to pay interest by routinely withholding interest owed under Oklahoma's Production Revenue Standards Act ("PRSA") unless it was requested by Royalty Owner. Interest begins to accrue and compound at the default rate of 12% upon the date the royalty payment is due. Fuel Distributor contended that they were only subject to the 6% rate applicable in circumstances where title to royalties is not marketable. Trial court rejected this argument because marketability is irrelevant once Fuel Distributor has made an initial payment. Fuel Distributor further argued that Royalty Owners with unclaimed payments should be excluded. Trial court rejected this argument because paying the state the unclaimed funds amounts to paying a third party on behalf of the Royalty Owner. Trial court rejected Royalty Owners' fraud claim because they failed to show reliance upon the information contained within Fuel Distributor's payments. Trial court awarded both compensatory and punitive damages. Punitive damages were warranted under both the Energy Litigation Reform Act ("ELRA") and Oklahoma's punitive damages statute because of Fuel Distributor's intentional unwillingness to pay the statutorily required interest.

WATER*Federal*

*Schmucker v. Johnson Controls, Inc.*, No. 3:14-cv-1593 JD, 2020 WL 4593867 (N.D. Ind. Aug. 10, 2020)

A manufacturing facility contaminated the soil, groundwater, and indoor air of a nearby residential neighborhood. The company operating the manufacturing facility connected the exposed houses to the city waterline and installed vapor mitigation systems when it became aware of the contamination. Residents of the neighborhood brought suit against the manufacturing facility claiming the company was in violation of the Resource Conservation and Recovery Act and that the contamination could endanger their environment and health. The Northern District Court of Indiana had previously ruled on the violation claim, granting summary judgement and turned to the endangerment claim at bench trial. The only disputed element of the endangerment claim was whether imminent and substantial endangerment was present to health or environment. The residents claimed that the groundwater contamination will present a danger through different routes of exposure to the city wellfield, private wells, water pipes, and a general threat to the environment. The court found there was no imminent or substantial endangerment to any of the avenues of groundwater, through the evidence presented by the residents. The residents also asserted an endangerment threat of vapor intrusion. The court found that the vapor mitigation systems the company had installed in every structure that exceeded the appropriate indoor air screening levels have been successful in preventing any endangerment. “An endangerment claim ‘was designed to provide a remedy that ameliorates present or obviates the risk of future “imminent” harms[]’” and the mitigation systems had already accomplished this. The unmitigated structures and houses, and preferential pathways, presented no serious health risk through vapor intrusion.

*Arconic, Inc. v. Alcoa, Inc.*, No. 19-55181, 2020 WL 4579511 (9th Cir. Aug. 10, 2020).

A refrigerants and solvents recycling company contaminated nearby soil and ground water, and customers of this company were held responsible for the cost of the clean-up process. Under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), the group of customers had three years to seek contribution for the cost of the contamination from other entities that contributed to the contamination

through owning property and operating businesses near the facility. These parties settled with the group, and the group assumed the parties' responsibilities for the site. Years later, the EPA learned of other contaminations by this company from another facility and this group of customers brought another suit against the same de minimis parties. The de minimis parties claimed that the earlier settlement triggered the Act's three-year statute of limitations for contribution claims under a judiciary approved settlement. The group of customers appealed after the District Court for the Central District of California granted summary judgment in favor of the de minimis parties. The Ninth Circuit Court of Appeals held the customer's claims are not untimely because the first settlement can not be characterized as covering the costs of the second clean up even if the remediation of the second clean-up was foreseen in the first suit. Under the Act, the limitation period of a settlement is only for the response cost imposed as a basis for seeking contribution. A statute of limitations may not run or expire before a party has an opportunity to assert the claim, therefore the limitation period of the Act starts upon the entry of a settlement imposing a specific liability, not before.

This case focused on the procedural aspect of the statute of limitations for the Comprehensive Environmental Response, Compensation and Liability Act.

*MPM Silicones, LLC., v. Union Carbide Corp.*, 966 F.3d 200 (2d Cir. 2020).

Subsequent Owner sued Original Owner under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for reimbursement of money spent removing pollutants and future costs associated with cleaning up pollutants. The district court held that the recovery for remedial actions was barred by the statute of limitations and entered a declaratory judgment that the Original Owner was responsible for 95% of future removal expenses. Both parties appealed. To determine the statute of limitations under CERCLA, a party's efforts to remove pollutants are classified as remediations or removals. Remedial actions are permanent remedies, whereas removal actions are defined as the "cleanup or removal of released hazardous substances from the environment." On appeal, the Second Circuit emphasized that the definitions of remedial and removal actions often overlap and the statutory definitions make it difficult to distinguish between the two. The court follows the rule that removal actions deal immediately with the source of an imminent threat to public health. The court held that the Subsequent Owner's responses to the pollution, such



as an earthen cap and a diversion ditch, were remedial rather than removal. The court reasoned that these actions are remedial because they were not designed to eliminate an immediate threat, but instead mitigate any potential harm caused by not containing pollutants. Further, the court clarifies that subsequent actions on the same land may count as separate and distinct remedial actions for statute of limitations purposes, correcting the district court's analysis. The court held that the Subsequent Owner's actions were correctly classified as remedial but are not barred by the statute of limitations. Further, the court found that the district court did not abuse its discretion to order the Original Owner to pay 95% of future remedial actions and remands the case for proceedings consistent with its order.

#### *State*

*Little Big Warm Ranch, LLC v. Doll*, 2020 MT 198.

Three Landowners filed six claims for adjudication of decreed water rights after a dispute arose from a series of property conveyances. The basis for these claims focused on the original decree of two historical water rights, which later comingled to irrigate lands now owned by all parties. Landowner-1 asserted ownership allocation based on the percentage of historical irrigation of respective lands. Alternatively, Landowner-2 asserted ownership of both historical rights based on prior conveyance to their predecessor. The water court found that both historical rights became appurtenant to the respective lands through comingled irrigation and therefore each landowner, through deeded language, is entitled to a pro-rata share of the decreed rights on their respective properties. Additionally, the water court found that absent water measurement records, flow rates for the rights are equitably determined by the percentage of irrigated acreage on each property. Landowner-2 motioned for post-judgment relief claiming the water court over-allocated the flow rate awarded to Landowner-1 based on previously undisclosed expert opinion. The water court found that the opinion obtained by Landowner-2 did not warrant post-judgment relief, and denied Landowner 2's motion. Landowner-2 appealed to the Montana Supreme Court, challenging (1) the water court's method of interpreting the conveyances, (2) the pro-rata allocation of the decreed rights, and (3) the alleged misallocation of rights to Landowner 1. The court affirmed each decision of the water court, employing contract principles to substantiate the water court's finding of clear intent from prior conveyances. Further, the court ruled that the water court, based on lack of record, correctly determined equitable flow rates and subsequent allocation thereof.

*United States v. State of Washington, Dept. of Ecology*, No. C01-0047Z, slip copy, 2020 WL 4756460 (W.D. Wash. Jun. 30, 2020).

Water Master provided his annual report for 2019-2020 to the court. Water Master recommended that the Water User Fees (“Fees”) of both Tribe and Landowners be waived for 2020-2021 (agreed to by Tribe, Landowners, and Department). This is due to the financial hardships caused by the Covid-19 pandemic. Water Master provided two justifications to waive the Fees. First, Water Master’s account had enough funds to withstand one year of nonpayment of Water Fees by both Tribe and Landowners. This is in part because Water Master has maintained lower operations costs than what were expected from the original 2007 agreement. Additionally, the interest gained from Water Master’s account would help cover the operating costs. Second, Water Master suggested waiving Fees instead of deferring because of the ongoing financial uncertainty of Covid-19. Specifically, it is difficult to know whether financial outlooks will be better when the deferred Fees would become due. Water Master also suggested that the Department send letters explaining the Fee waiver and including procedures for contacting Water Master if Landowners believe these recommendations were incorrect. Additionally, Water Master’s report included that Tribe paid its Fees for 2019-2020, but that Landowners underpaid, and this underpayment should be added to Landowner’s Fees for 2021-2022. The Department owed no payment for 2019-2020 per the settlement agreement. The court accepted Water Master’s report and approved Water Master’s suggestion on August 17, 2020. *Id.* No. C01-47 TSZ, slip copy, 2020 WL 4747895

*White Bear Lake Restoration Ass’n, ex rel. State v. Minnesota Dep’t of Nat. Res.*, 946 N.W.2d 373 (Minn. 2020).

White Bear Lake Restoration Association (“Association”) sued Minnesota Department of Natural Resources (“DNR”) for declaratory and injunctive relief for alleged violation of the Minnesota Environmental Rights Act (“MERA”) and violation of public-trust doctrine stemming from groundwater-appropriation permits that DNR had issued that caused the lakes levels to fall below legal levels. The trial court found in favor of Association on both grounds. DNR appealed and the court of appeals reversed and remanded on both grounds. The Supreme Court of Minnesota granted review and affirmed in part, reversed in part, and remanded.

The court held that the legislature that had created structures for public water use was to be prioritized and balanced, and because no private encroachment or diversion to a separate state had occurred, the common-

law public trust doctrine need not apply. The court held that Association claims under MERA were merited and that they had stated claims upon which relief could be granted because the alleged activities by the DNR were covered by the “any conduct” language in the statute. Two justices signed a concurrence and dissent, disagreeing that the “any conduct” language was broad enough to provide a claim. Case remanded to appellate court for a decision on the remaining issues on appeal.

*Bates Energy Oil & Gas, LLC v. Complete Oil Field Servs., LLC*, No. 5:17-cv-808, 2020 WL 4677668 (W.D. Tex. Aug. 11, 2020).

(Note: this is largely a case of fraud and incidentally involves fracking sand.)

Fracking sand supplier (“Supplier”) originally sued Purchaser over a contract between the parties to provide fracking sand. Purchaser removed to federal court and counter-sued, joining multiple parties related to Supplier as Counter-Defendants (“Cohorts”) and alleging an elaborate scheme by which the Supplier and many Cohorts jointly worked to defraud Purchaser of hundreds of thousands of dollars from the escrow account set up for use of the contracted parties. Supplier’s original suit was dismissed, and several defendants in the counter suit settled, defaulted, or were dropped from the claims, leaving the court to rule on its findings against the remaining non-defaulting Cohorts. Purchaser’s causes of action against non-defaulting Cohorts addressed by the court are (1) fraud and conspiracy to commit fraud, (2) theft and conspiracy to commit theft, (3) breach of fiduciary duty and conspiracy to commit breach of fiduciary duty, (4) restitution or money had and received, (5) conversion, and (6) attorney’s fees. The court found for Purchaser on the counts of fraud, theft, and restitution, holding various Cohorts jointly and severally liable for the Supplier’s fraud, for their share of the stolen funds, and for individualized restitution depending on who held the money. The court found Purchaser failed to establish fiduciary duty or meet the elements for the tort of conversion, and the court declined to rule on attorney’s fees pending a motion yet to be filed. The court concluded by noting Texas’s one-satisfaction rule applies to this case despite the litany of Supplier’s and Cohorts’ bad conduct because Purchaser suffered only a single financial injury.

*Elk Grove Dev. Co. v. Four Corners Cty. Water & Sewer Dist.*, No. 19-0599, 2020 WL 4462831 (Mont. Aug. 4, 2020).

Subdivision Developer filed suit seeking an injunction to prevent Water District from using the subdivision’s water outside of the subdivision.

Subdivision Developer possessed several covenants for the property. One of the covenants gave Subdivision Developer control over the water in dispute. Subdivision Developer moved for summary judgment arguing “[t]he Covenants unambiguously restrict off-subdivision use of water.” At the hearing on the motion, the district court decided two issues. First, whether the covenant restricts the water supply to use within the subdivision and if the covenant precluded any change to that right. Second, whether the covenant was an “unreasonable restraint on alienation.” The district court opined that the covenant was not unreasonable as it served its intended purpose of protecting the subdivisions exclusive right to the water. The district court granted the Subdivision Developer’s motion for summary judgment and entered an injunction preventing the use of the subdivisions water for uses outside of the subdivision. Water District appealed. The Supreme Court reviewed the issue of whether the covenant was an unreasonable restraint on alienation. The court disagreed with the district court’s holding that the covenant was not unreasonable. The court acknowledged the factors that the district court considered in their decision. However, the court articulated that the factors do not carry as much weight as statutes. Moreover, under Montana law, water belongs to the people and should be used for public benefit. Therefore, although water may be held by a party, “it is not ‘owned’ in the usual sense.” Parties who hold water rights are to make use of the water which does not included the right to physical ownership. Therefore, the court held that Water District is entitled to summary judgment on the issue of whether the covenant was an unreasonable restriction on alienation.

LAND*Easement*

*Hardy v. United States*, 965 F.3d 1338 (Fed. Cir. 2020).

Central of Georgia Railway Company (“CGA”) operated a rail line located within Landowner’s property. CGA applied with the Surface Transportation Board (“STB”) to abandon a portion of the rail line. Subsequently, the Newton County Trail Path Foundation (“NCTPF”) reached an agreement with STB to establish recreational trails along the abandoned rail line and issued a Notice of Interim Trail Use (NITU). Amidst negotiations, CGA mistakenly described the location of the rail line but an amended description was accepted by NCTPF. Landowners sued the United States (“Government”), alleging STB improperly approved a conversion of railroad rights-of-way to recreational trails under the National Trail Systems Act (“Trails Act”). Landowners contended that the deeds executed with CGA were for an easement and CGA could not convey their interest to NCTPF. The trial court granted summary judgment for Landowners, ruling that the deeds conveyed only easements. The trial court also found that the NITU constituted a temporary taking. On appeal, Government argued that the deeds conveyed a fee simple interest in CGA and Landowners lacked the requisite interest to allege a takings. Additionally, Government argued that NITU did not affect a takings because the erroneous description showed a lack of intent to abandon. The United States Court of Appeals for the Federal Circuit rejected Government’s first argument and affirmed the trial court’s finding that Hardy conveyed an easement. The appellate court relied upon authority prioritizing the intent of the parties at conveyance and held that the executed deeds were intended to act as a railroad right-of-way, not a fee simple conveyance. Additionally, the appellate court vacated the trial court’s finding that the NITU was a temporary taking for lack of evidence regarding when Railroad would have abandoned the easements and remanded for further proceedings.

*DCP Sand Hills Pipeline, L.L.C. v. San Miguel Elec. Coop.*, No. 04-19-00288-CV, 2020 WL 4607062 (Tex. App.-San Antonio August 12, 2020).

Company 2 sued Company 1 seeking a declaration that Company 1’s easement was invalid, Company 2’s lignite lease was superior to the easement, and a permanent injunction requiring Company 1 to move its pipeline. Company 2 countersued that the lignite lease had expired and

sought to condemn the land covered by the easement. The trial court awarded summary judgement to Company 2, Company 1 appealed. The appeals court reversed and remanded the grant of summary judgement on the condemnation claim, but affirmed the remainder of the grant of summary judgement. The appeals court affirmed the validity of the lease because Company 2 was not seeking to establish possessory or ownership rights to the land and the trespass to try title statute did not apply to this claim. The appeals court reversed on the grounds that Company 2 had not shown that the land covered by the easement was already devoted to a public use as Company 2 had not applied for a mining permit at the time of the installation of the pipeline. The appeals court also held that the condemnation would not practically destroy or materially interfere with the current use as the condemnation would affect at most 14.6% of the strip mining potential of the land. The case was remanded for further proceedings on the condemnation issue.

#### *Other Use*

*Smith v. B&G Royalties*, 2020 WY 106, 2020 WL 4783125 (Wyo. 2020).

Mineral Owner's father owned mineral interest in a property in Wyoming. In 1989, Mineral Owner's father, through a warranty deed, conveyed an undivided one-eighth interest to Company for all of minerals from what the property produced. The deed mentioned no reservation of a royalty interest. In 2017, Mineral Owner's father died, and Mineral Owner received the remaining interest. In 2018, Mineral Owner filed for declaratory judgment and to quiet title to a 1.0417% royalty interest against Company. Company filed a counterclaim seeking quiet title and a declaratory judgment. Parties filed cross-motions for summary judgment. The district court granted summary judgment for the Company. Mineral Owner contended that the 1989 warranty deed conveyance did not include the royalty interest because Mineral Owner's father kept the interests unbundled, which was the intention in the conveyance. On appeal, Company requested attorneys' fees and costs. The Wyoming Supreme Court held that the 1989 warranty deed was unambiguous and subjected to rules of contract interpretation. When conveying mineral interests, there must expressed intent. The warranty deed's plain language clearly did not state a clear expression of retaining royalty interest. Due to the warranty deed's language, combined with no mention of the royalty interest, the Mineral Owner was estopped from claiming anything less than the unrestricted 1/8 interest originally conveyed. Company was not entitled to

attorneys' fees. Awarding of attorneys' fees requires lack of a cogent argument or failure to support the claims. Mineral Owner's brief was sufficient to meet the requirement of a cogent argument. The court affirmed the lower court's decision and declined to award attorneys' fees.

*Florida Rock Properties, Inc. v. Jemal's Buzzards Point L.L.C.*, No. 18-483, 2020 WL 4583523 (D.D.C. Aug. 10, 2020).

Developer owns and develops real estate (Developer's Property) adjacent to a former bulk fuel distribution terminal (the "Fuel Terminal Property"). Developer brought this suit against Former Owners of the Fuel Terminal Property, alleging that petroleum contamination from the Fuel Terminal Property had migrated onto the Developer's Property. Former Owners brought indemnification and contribution claims against other companies. Former Owners and Other Companies moved for summary judgment on statute-of-limitations grounds.

The court held that the issue is ripe for summary judgment, because fact discovery regarding "the statute of limitations issue" was completed.

Under the discovery rule, the statute of limitations shall not begin to toll until the injury is discovered or, with reasonable diligence, should have been discovered. The discovery rule effectively creates a duty of inquiry, and knowledge is deemed sufficient if the plaintiff has "reason to suspect" that the defendant did something wrong. The court held that Developer discovered or with reasonable diligence should have discovered its claims in February 2000 when it received the Phase II report that identified the Fuel Terminal Property as a likely source of the soil and groundwater contamination.

However, Developer may still recover for injuries from injurious acts committed within the limitations period, and it is Developer's burden to identify injurious action within the limitations period that caused harm. Summary judgment is inappropriate as the full discovery of "migration-related issues" is not completed. So, the court granted in part and denied in part Former Owners' and Other Companies' motions for summary judgment.

*Baptiste v. Bethlehem Landfill Co.*, 965 F.3d 214 (3d. Cir. 2020).

The Baptistes on behalf of a class of homeowners and renters brought suit against the Bethlehem Landfill Company. Due to noxious odors and other air contaminants coming from the landfill, the action claims interference with the use and enjoyment of their homes and loss and

property value. The action was brought under the following theories: (1) public nuisance, (2) private nuisance, and (3) negligence.

The United States District Court for the Eastern District of Pennsylvania dismissed the complaint on the basis that there were too many residents in the area similarly affected to sustain a private claim for public nuisance, the odors affected too many people and the landfill was too far away from them to constitute a private nuisance, and that the Baptistes had failed to identify a duty of care to maintain a negligence claim.

The United States Court of Appeals found that the Baptistes sufficiently alleged a “particular damage” to sustain a private claim for public nuisance because they asserted their claims specifically on behalf of a class of homeowners and not the community at large. The Appellate Court further found that there existed no support under Pennsylvania law for rejecting a private nuisance claim on the ground that the property affected was too far from the alleged nuisance. Lastly, the Appellate Court reversed the District Court’s dismissal on the negligence claim because there is no longer any dispute Bethlehem had a common-law duty to operate the landfill in a reasonable manner that avoids unreasonable harm to the Baptiste. The United States Court of Appeals reversed the United States District Court for the Eastern District of Pennsylvania’s decision and remanded the action for further proceedings.



ELECTRICITY*Rate*

*Wal-Mart Stores E., LP v. State Corp. Comm'n*, 844 S.E.2d 676 (Va. 2020).

Customer appealed from a State Corporation Commission (“SCC”) order denying Customer’s petitions seeking SCC’s permission to aggregate the demand of multiple locations to qualify to buy electricity from someone other than the public utilities. This case involves a statute that gives SCC discretion to authorize retail choice to nonresidential customers who aggregate their demand to exceed five megawatts.

The SCC, in its decision, focused on the question of whether granting the petitions would be consistent with public interest. SCC found that Customer’s departure would cause an increased cost to remaining public utility customers and could possibly lower the return for the public utility, which would decrease their ability to credit or refund customers. SCC concluded these outcomes were contrary to the public interest and denied Customer’s petition.

Customer argued (1) that SCC didn’t use the term “public policy” in line with legislative intent, (2) the factual record was insufficient for the SCC to make their decision, and (3) SCC abused its discretion in denying Customer’s motion for reconsideration. The Virginia Supreme Court held that legislative intent shows that SCC has broad discretion and that they did not abuse it with their decision regarding public policy. The court also held that SCC is responsible for considering the factual record, is entitled to draw conclusions contrary to those Customer made, and that the burden of proof is not on SCC. Finally, the court held SCC did not abuse its discretion in denying the motion to reconsider, because Customer did not ask them to reconsider a prior decision. Because SCC used its broad discretion consistent with statutory authority, the court affirmed SCC’s order denying Customer’s petition.

*Nat’l Ass’n of Regulatory Util. Comm’rs v. Fed. Energy Regulatory Comm’n*, 964 F.3d 1177 (D.C. Cir. 2020).

Petitioners, (“Utility Commissioners”) appealed a rehearing denial by the Federal Energy Regulatory Commission (“FERC”) over its passing of Order(s) 841 and 841-A. 841, aimed to remove barriers to utility distribution in the free market regarding electric storage technologies (ESR), such as batteries. 841-A, prevented state and local authorities from “broadly prohibit[ing] all retail customers from participating in RTO/ISO markets”.

The court began by establishing that the Utility Commissioners had standing and that the issue was ripe for appeal. Regarding Utility Commissioners' claim that FERC exceeded its jurisdiction with 841, the court made a three-part evaluation. First, did the prohibition "directly affect[ ] wholesale rates?" Next, did FERC regulate state regulated facilities? Lastly, the court must ensure that its determination does not conflict with the APA's "core purpose[ ]" of "curb[ing] prices and enhance[ing] reliability in the wholesale electric market."

The court determined that 841 does affect wholesale rates by opening up the market to ESRs. The court held that 841 does not directly regulate distribution systems which are under state jurisdiction, therefore, 841 does not infringe on the rights guaranteed to states under the Federal Power Act (FPA). However, through the Supremacy Clause, it is under FERC's jurisdiction to determine who participates in the wholesale markets. This leaves states with the same authority they possessed prior to 841's passing.

Finally, the decision did not foreclose judicial review should a conflict arise between states and FERC. Next the court held that by passing 841, FERC, was in accordance with law and it was not an abuse of its authority due to the level of detail and issue awareness surrounding the passage of 841. The court held that Utility Commissioners failed to show that Order 841 and 841-A are not in compliance with the FPA's bifurcation of state and federal jurisdiction.

TECHNOLOGY AND BUSINESS*Corporations*

*Keane Frac, LP, v. SP Silica Sales, LLC*, No. 01-19-00847-CV, 2020 WL 4589751 (Tex. App. Aug. 11, 2020).

Note – This case seems to be procedural in nature. While it deals with two companies regarding an alleged breach of contract for the purchase of fracking sand it deals more on the application of an already settled question. During the initial filing, the statutory interpretation of the Texas Citizens Participation Act was quite broad and there were various splits amongst appellate courts in Texas. However, prior to this case being settled the Texas Supreme Court held on an extremely similar case in *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*. The court in that case found that a certain phrase within the TCPA should be interpreted in a certain manner. In this case, the appellate court is just applying the already established case law of the Texas Supreme Court. While the *Creative* case dealt with a singular well and this case handles fracking sand the section of the statute in question is still the same. Summary Below

Completer appealed the decision of the lower court to deny their motion to dismiss under the Texas Citizens Participation Act (The “Act”), alleging that their contract was related to their right of free speech about a matter of public concern regarding goods in the marketplace. In the lower court, Producer sued Completer alleging breach of contract, fraud, and fraudulent inducement. Producer and Completer were previously in an agreement that provided for Producer to supply Completer with a certain tonnage of fracking sand monthly. The original agreement provided a credit system if Producer failed to provide all the ordered sand from a certain plant that was under construction but would be finished before the contract’s beginning. Contract also provided a right of termination for Completer if Producer failed to produce a certain amount on three separate occasions. Through the first three months, the plant was not operational, and Completer had to purchase the sand on a “spot market” rate with Producer providing the difference in cost. The two companies then entered into a separate contract to control their interactions due to Producer’s failures, altering the agreement between the two. Completer later gave notice of termination and Producer sued alleging the above. Completer moved to dismiss under the Act. The trial court held that the act did not apply and the dismissal was frivolous, awarding costs and fees to Producer. The appeals court found that the Act did not apply, since the communications were only between the two

parties and had no impact on outside groups. The court relied on established caselaw regarding the interpretation of “in the marketplace” to arrive at this outcome. The court affirmed the denial of the motion to dismiss but overturned the award of costs and fees.

#### *Patents / Intellectual Property*

*Bennett Regulator Guards, Inc. v. Atlanta Gas Light Co.*, No. 17-1555, No. 17-1626, 2020 WL 4743511 (Fed. Cir. Aug. 17, 2020).

Appellant (“Bennett Regulator”) appealed to the Federal Circuit following the loss of multiple claims in a patent dispute before the Patent Trial and Appeal Board as well as the “adequacy” of the board’s sanctions award against Appellee (“Atlanta Gas”) for failure to terminate its inter partes review decision. Atlanta Gas cross-appealed to overturn the sanctions award.

First, Bennett Regulator’s challenged the narrowness of the board’s scope regarding four terms used within the claim. On each of the terms, the court determined that there was a lack of intrinsic evidence in the record to support appellant’s view and they were under no obligation to allow in appellant’s extrinsic evidence, therefore upholding the Appeal Board’s decision on this issue.

The second challenge accused the Patent Trial and Appeal Board of violating the Administrative Procedures Act which was based upon the Board’s duty to “make the necessary findings and have an adequate ‘evidentiary basis for its findings.’” The court determined that the Board adequately examined the patent’s claim and held that its wording purportedly conflicted with the testimony provided by Bennett Regulator.

Lastly, the court held that the award of sanctions against Atlanta Gas for abuse of discretion in failing to provide adequate notice over issues surrounding a merger/acquisition was outside of the court’s jurisdiction. This was based on the sanctions order not being a final judgement by the Board for lack of an award amount. Furthermore, the court declined to exercise pendent jurisdiction in the sanctions award matter. The court affirmed the Appeal Board’s’ finding that the patent was unpatentable and remanded the case back to the Board to quantify the sanctions awarded in light of the court’s opinion. This is an unpublished opinion of the court; therefore, state (or federal) court rules should be consulted before citing the case as precedent.

ENVIRONMENTAL*Federal*

*Northern Alaska Envtl. Ctr. v. US Dep't of the Interior*, 965 F.3d 705 (9th Cir. 2020).

Environmental Center sued the US Department of the Interior (Department) after Department failed to conduct a new NEPA report prior to the 2017 lease sale, violating its own regulations. In 2012, Department conducted an environmental impact statement (EIS) and claimed that was sufficient to satisfy NEPA for this sale. The district court granted summary judgment to the Department in full. Environmental Center appealed, claiming the EIS was inadequate for the 2017 lease sale. The Ninth Circuit affirmed the district court in full, holding the 2012 EIS to include the 2017 sale. The court held that nothing in their case law prevented a programmatic-level EIS from also serving as a site-specific analysis needed for NEPA, and cited several examples of that actually being expressly allowed. In this case, the court held that the type of analysis used in the 2012 EIS may qualify given the right factual circumstances. The court rejected both an approach that solely looked at the NEPA adequacy to decide if an action separated by time from the initial EIS because it makes the statute of limitations meaningless in certain situations and an approach that looks at deviation from the underlying plan or program because the tiering regulations assume that site-specific studies would also be conducted. Rather, the court held that the initial EIS ought to be examined to see if it purported to be the EIS for a subsequent action because it provides insight into what the agency was planning to do as a result of the EIS. NEPA regulations require EISs to carefully define the proposals under consideration. In this case, the defined scope of the study was nebulous but the court found it reasonable that it considered future lease sales and questions of its adequacy for that purpose were time barred.

*Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior*, No. 18-CV-4596 (VEC), 2020 WL 4605235 (S.D.N.Y. Aug. 11, 2020).

Natural Resources Defense Council (“NRDC”) sued U.S. Department of Interior (“DOI”) after DOI issued a memorandum fundamentally altering the agency’s interpretation of “takings” and “killings” under the Migratory Bird Treaty Act of 1918 (“MTBA”). This policy shift eliminated any legal consequence for incidental “takings” and “killings” reversing almost five

decades policy interpretation by DOI. NRDC sued to vacate the memorandum and the guidance given in reliance on the memorandum.

NRDC argued that DOI interpretation of the MTBA was in violation of the Administrative Procedure Act (“APA”). NRDC moved for summary judgement and DOI cross-moved. The court granted NRDC motion for summary judgement and subsequently denied DOI cross motion for several reasons. First, DOI’s memorandum read into the MTBA a “mens rea” component that does not exist in the act. Second, DOI should not be given deference because the memorandum was “a recent and sudden departure from long-held agency positions”, as well as “an informal pronouncement lacking notice-and-comment” and, that there “is no evidence of input from the agency actually tasked with implementing the statute.” Third, that legislative history did not indicate congress intended for the MTBA to be read so narrowly. Finally, the court found that the memorandum violated the APA and that vacatur was necessary. Memorandum Vacated and remanded to DOI for further proceedings.

*New York v. Env'tl. Prot. Agency*, 964 F.3d 1214 (D.C. Cir. 2020).

New York petitioned EPA to find that power-generating and other facilities in nine different States violated the Good Neighbor Provision (“GNP”) by producing emissions that significantly contributed to New York’s difficulty attaining or maintaining compliance with the 2008 and 2015 National Ambient Air Quality Standards for ozone. EPA denied the petition because it failed to meet the standard for establishing a violation of the GNP.

The U.S. Court of Appeals for the District of Columbia Circuit held that EPA’s reasons for rejecting New York’s petition were arbitrary and capricious in two ways. First, EPA did not give a good reason as to why New York’s petition failed, and their test demanded an impossible showing from New York, requiring a detailed comparison of all known and unknown pollution sources.

Second, EPA incorrectly interpreted the Clean Air Act by evaluating downwind air quality at a time past the statutory deadline, when it should be evaluated at that deadline. EPA also incorrectly tried to say that states can only challenge interstate transport of pollution within their geographical borders, when New York should be able to challenge since they are part of a multistate nonattainment area. The circuit court vacated and remanded EPA’s decision for further proceedings.

*POET Biorefining, LLC v. EPA*, No. 19-1139, 2020 WL 4745274 (D.C. Cir. Aug. 14, 2020).

Cellulosic Biofuel Producer (“Producer”) petitioned for review of EPA’s guidance on the measuring methods for cellulosic biofuel as regulated by EPA’s Pathways II Rule. Pathways II Rule requires certification of cellulosic biofuel by either, the voluntary consensus standard body (“VCSB”) method or a peer-review method. Cellulosic biofuel is a renewable fuel promoted by the Clean Air Act’s Renewable Fuel Standard program. Following EPA’s implementation of Pathways II Rule, biofuel producers’ measurements indicated significant variation, so EPA issued guidance to help explain the requirements for certification.

Producer registered for cellulosic-biofuel Renewable Identification Numbers using measurements certified by the peer-review method; but EPA denied Producer’s request because Producer did not “reasonably approximat[e] the amount of cellulose that is actually being converted into fuel.” Producer argued EPA’s guidance lacked proper notice and comment, imposed arbitrary requirements that could not be met, and disregarded the Pathways II Rule. As there are two methods to achieve cellulosic biofuel certification, by VCSB or peer-review, the D.C. Circuit Appellate Court evaluated each method separately.

First, the court dismissed, for lack of ripeness, the discussion of VCSB-certified method because no method exists. Second, the court held the peer-review method was ripe for review

because EPA denied Producer’s registration that utilized the peer-review method. Third, the court established jurisdiction, under the Clean Air Act, because EPA’s peer-review guidance reflects a settled agency stance. Fourth, the court held EPA’s guidance is interpretive because EPA further explained an existing rule, the Pathways II Rule, and its requirements for certification. Therefore, the guidance did not require notice or comment. Fifth, EPA’s guidance was reasonable, not arbitrary or capricious, and in accordance with the Pathways II Rule because it demonstrates how biofuel producers obtain accurate results through the peer-review method. The court dismissed the petition in part and denied in part.

*Clean Wisconsin v. Env’tl. Prot. Agency*, 964 F.3d 1145 (D.C. Cir. 2020).

Public health and environmental organizations, municipal governments, and State of Illinois petitioned for review of area attainment designations promulgated under Clean Air Act (CAA) by Environmental Protection Agency (EPA) for National Ambient Air Quality Standards (NAAQS) involving control for ozone.

For jurisdiction, the court held both environmental petitions and governmental petitions have Article III standing, because environmental harms that constitute cognizable injuries including: (1) reduced aesthetic and recreational values of the area; (2) adverse health effects of asserting realistic health concerns; (3) the health and economic costs of increased pollution.

On the merits, as EPA has (1) treated similarly-situated areas differently, (2) drawn conflicting conclusions from the same data, (3) had inconsistencies in the record and conflicting characterizations of data, and (4) centrally relied on one apparently mistaken interpretation of data, the court held that alleged EPA's designations, except designation of Lake County, are arbitrary and capricious. The court held the EPA must provide further explanation showing how the evidence supports its attainment designation or make a different designation if it concludes on re-examination that the evidence so requires. The court denied EPA's request for voluntary remand because the permission of voluntary remand will violate the Clean Air Act's statutory deadline.

As there is a possibility that EPA will be able to substantiate the relevant designations on remand, the court remanded the unlawful attainment designations to EPA, instead of vacating them.

*R.L. Vallee, Inc. v. Vt. Agency of Transportation*, No. 5:18-CV-104, 2020 WL 4689788, (D. Vt. July 8, 2020).

Three entities (collectively "Companies") sued Vermont Agency of Transportation ("VTrans") and Federal Highway Agency ("FHWA") challenging FHWA's approval of VTrans's highway redesign project ("Project"). Companies claimed VTrans failed to prepare an environmental impact statement before approval. VTrans and FHWA claimed an environmental impact statement was unnecessary because the proposed Project qualified for a categorical exclusion ("CE"). Both parties moved for summary judgment. In support of their motion, Companies argued Project did not qualify for CE and VTrans failed to include a nearby store's permit application to build a gas station in its assessment of foreseeable impacts. The court considered each argument to determine if FHWA's approval of Project was arbitrary or capricious. The court found FHWA's approval to be reasonable based on: (1) Project's impact on traffic flow is to be minimal, (2) revisions to regulations did not apply during approval because only regulations in effect apply at time of decision, (3) language in VTrans's application effectively met the requirement of ensuring no significant environmental effects will result, and (4) highway improvements



to improve safety and traffic flow were not automatically ineligible for CE. The court also found the store's application to build a gas station was not a foreseeable impact because Project was not a cause of store's application being approved, but a condition precedent. The court denied companies' motion for summary judgement and granted VTrans's and FHWA's motion for summary judgment, overall finding FHWA's approval was not arbitrary or capricious.

### *State*

*Crouzet v. First Baptist Church of Stonington*, 199 Conn. App. 532, 2020 WL 4743006 (Conn. App. Ct. Aug. 18, 2020).

Crouzet brought this action to recover damages for environmental contamination of certain real property against the First Baptist Church of Stonington. Crouzet is alleging (1) the ongoing contamination of the his soil, and the basement of his property, (2) liability pursuant to Connecticut General Statute 22a-16, (3) trespass, (4) private nuisance, (5) liability under Connecticut General Statute 22a-451, and (6) breach of contract. The trial court ruled in favor of the First Baptist Church of Stonington and the question on appeal was whether the trial court's factual findings that the Church's had shown the secondary contamination is clearly erroneous in light of expert testimony and the factual bases for such testimony.

The Appellate Court found that the only expert presented who had the opinion that there was the possibility of a secondary source of contamination was based on speculation. The Court proceeded to rule the expert's opinion as a non-supportive conclusion of a secondary source. Further, the Court found that even if there was some evidentiary basis for the secondary contamination, the findings do not support the conclusion that Crouzet failed to prove the Church caused the contamination beneath his house. The Court noted that the existence of a secondary source of contamination did not mean that Crouzet failed to provide evidence that the Church could be a source of contamination, but that it might impact the damages to which he may be awarded.

Finally, the Appellate Court found that the trial court's finding that the Church proved a secondary source of the pollution in Crouzet's basement has no bearing regarding the pollution that continues to exist outside of his basement. The Court of Appeals concluded that the trial court improperly rendered judgement in favor of the Church.

*S. D. Petroleum Release Compensation Fund v. BP plc*, 2020 SD 47, 2020 WL 4689455.

South Dakota Petroleum Release Compensation Fund (“FUND”) sought recovery payments from Energy Company for costs associated with cleaning up environmental contamination from underground petroleum storage tanks (“UST”). FUND also sought to recover payments made to third parties for cleanup costs of Energy Company’s other USTs. FUND alleged theories of (1) misrepresentation, (2) subrogation rights, (3) unjust enrichment, (4) fraudulent concealment and misrepresentation, (5) fraud, (6) strict liability, and (7) recovery of litigation costs. The circuit court granted Energy Company’s motion for summary judgment on all claims. FUND appealed, and the Supreme Court of South Dakota affirmed the circuit court’s decision. First, FUND failed to prove Energy Company had a right of recovery for cleanup costs from its insurers. FUND identified no policy indemnifying Energy Company for cleanup costs or covering cleanup costs at the UST sites at issue, therefore, FUND cannot recover payments based on fraud, unjust enrichment, or misrepresentation if it cannot establish damages. Second, all but one of the third-party payment claims were time barred by statute. FUND failed on the remaining third-party payment claim to establish Energy Company was responsible for cleanup costs. At the time of contamination, Energy Company did not own the UST site at issue and a federal agency determined Energy Company was not the responsible party for cleanup costs at said UST site. Therefore, Energy Company was not strictly liable for the cleanup of UST sites. Last, because FUND failed to recover on any of its claims, FUND could not recover litigation costs. The court affirmed circuit court’s order of summary judgment for Energy Company.

*2627 LLC v. The Valley’s Plan. Council, Inc.*, No. 1838, 2020 WL 4673887 (Md. Ct. Spec. App. Aug. 12, 2020).

(This case is likely procedural.)

Conservationists resisted Developer’s plan to build four homes in a historic district. Conservationists argued that Developer’s plan was like a denied plan in 2004 (not associated with Developer). The administrative law judge (“judge”) approved the plan, finding that *res judicata* did not apply because the two plans were sufficiently different. Additionally, judge found that he was legally unable to rule on the project’s impact on the historic district. The Board of Appeals approved the project, but the Circuit Court denied the application solely for collateral estoppel. Developer appealed. The court faced four issues. First, Developer’s plan was not

barred by res judicata or collateral estoppel because the plan was sufficiently distinct from the 2004 plan. Specifically, Developer's plan featured fewer houses on less land, included a different portion of the historic district and did not include the historic building, and the houses would be built on a less severe grade. Second, the judge improperly dismissed his ability to determine if Developer's plan would affect the historic district. The law still requires judges to determine potential impact even after some statutory protections were removed. Third, the judge made a reasonable determination of the stormwater management system's effectiveness based on the parties' expert witness. Fourth and finally, the judge improperly accepted the county's prima facie approval of the panhandle lots. Conservationists provided evidence and witnesses to question the lot's ability to meet all requirements; therefore, the county or Developer should have presented evidence on the lot's adequacy before they were approved. The circuit court's holding on collateral estoppel was vacated, and the case was remanded to determine the impact on the historic district & the adequacy of the panhandle plots. This case is an unpublished opinion, therefore state or federal rules should be consulted before citing it as precedent.