

2011-2012 ENVIRONMENTAL LAW SURVEY

FREEDOM S.N. SMITH^{*}
JENNIFER ANDRES^{**}
SARAH MURRAY^{***}
SETH M. THOMAS^{****}

INTRODUCTION^{*****}

This Environmental Law Survey Article reviews and summarizes the federal and Indiana court decisions decided between October 1, 2011 and September 30, 2012 most likely to affect the Indiana environmental law practitioner.¹

^{*} Associate, Ice Miller LLP, Indianapolis, Indiana. B.A., 2001, *cum laude*, DePauw University; J.D., 2004, *cum laude*, Indiana University Maurer School of Law.

^{**} Associate, Ice Miller LLP, Indianapolis, Indiana. B.S., 1996, Indiana University; J.D., 2003, Indiana University Robert H. McKinney School of Law.

^{***} Associate, Ice Miller LLP, Indianapolis, Indiana. B.A., 2008, Indiana University; J.D., 2011, Washington University—St. Louis School of Law.

^{****} Associate, Ice Miller LLP, Indianapolis, Indiana. B.S., 2001, *summa cum laude*, Indiana University; J.D., 2005, *summa cum laude*, Indiana University Robert H. McKinney School of Law.

^{*****} All opinions expressed in this Article are solely those of its authors and should not be construed as opinions of Ice Miller LLP or any other person or entity. The authors would also like to thank Victoria Calhoon for assistance provided with this Article.

1. Additional decisions that, because of space constraints or falling outside the time limit, could not be addressed here but that may nonetheless be of interest include: *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1264, 1269 (2012) (worker's asbestos claims preempted by the Locomotive Inspection Act); *Scottsdale Indem. Co. v. Vill. of Crestwood*, 673 F.3d 715, 720-21 (7th Cir. 2012) (applying pollution exclusion to Illinois tort suits for continuing use of a known contaminated city well); *Ark. Game & Fish Comm'n v. United States*, 637 F.3d 1366, 1372 (Fed. Cir. 2011) (whether flooding was a taking), *rev'd*, 133 S. Ct. 511 (2012); *Natural Res. Def. Council, Inc. v. Cnty. of L.A.*, 673 F.3d 880, 885, 891 (9th Cir. 2011) (whether the flow of water out of a concrete channel within a river ranks as a "[d]ischarge of a pollutant"), *rev'd sub nom.* *L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710 (2013); *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1066-67 (9th Cir. 2011) (whether runoff from logging roads required a permit), *rev'd sub nom.* *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013); *Forest Park Nat'l Bank & Trust v. Ditchfield*, 881 F. Supp. 2d 949, 977-78 (N.D. Ill. 2012) (dry cleaner liable under CERCLA for contamination of neighboring property despite issues of fact for other claims); *United States v. Metro. Water Reclamation Dist.*, No. 11 C 8859, 2012 WL 3260427, *2-6 (N.D. Ill. Aug. 7, 2012) (discussing third-party rights to intervene in Consent Decree); *Appleton Papers Inc. v. George A. Whiting Paper Co.*, No. 08-C-16, 2012 WL 2704920, *8-10, *20 (E.D. Wis. July 3, 2012) (entity that sold waste without knowledge or intent to dispose did not qualify as a CERCLA arranger); *Wis. Res. Prot. Council v. Flambeau Mining Co.*, 903 F. Supp. 2d 690, 693-94, 722-23 (W.D. Wis. 2012) (whether mine discharges were pollutants discharged to a regulated wetland), *rev'd*, Nos. 12-2969, 12-3434, 2013 WL 4106403 (7th Cir. Aug. 15, 2013); *United States v. Egan Marine Corp.*, No. 08 C 3160, 2011 WL 8144393, *4 (N.D. Ill. Oct. 13, 2011) (defendant liable for costs and damages under the Oil Pollution Act of 1990 after explosion discharged oil into canal);

In Part I, we survey issues surrounding the Clean Air Act (“CAA”). In Part II, we discuss federal cases involving the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”). Part III examines cases involving water rights. In Part IV, we address other recent federal cases. Part V considers recent environmental case law arising under state law. Finally, Part VI examines opinions that may influence environmental insurance coverage in Indiana.

I. DEVELOPMENTS IN CLEAN AIR ACT CASES

In Part I, we survey issues surrounding the CAA,² including suits related to greenhouse gas emissions and regulations pertaining to cross-boundary air pollution.

A. EPA Improperly Implemented Cross-Boundary Air Pollution Regulations

Cross-boundary air pollution continues to be a challenging regulatory area for the United States Environmental Protection Agency (“EPA”). EPA first attempted to tackle this issue in 2005 by promulgating the Clean Air Interstate Rule (“CAIR”).³ Various parties challenged CAIR in *North Carolina v. EPA*,⁴ which led to CAIR being remanded to EPA to “determine what level of emissions constitutes an upwind state’s significant contribution to a downwind nonattainment area.”⁵ In 2011 EPA promulgated CAIR again, referring to it as the Transport Rule.⁶ The Transport Rule addresses states’ good neighbor obligations⁷ with respect to three national ambient air quality standards (“NAAQS”)—the 1997 annual PM_{2.5}, the 1997 ozone, and the 2006 24-hour PM_{2.5} standards—by defining each state’s emissions reduction obligations under the CAA and prescribing Federal Implementation Plans (“FIPs”) to implement

United States v. City of Evansville, No. 3:09-cv-128-WTL-WGH, 2011 WL 5386731, *1-3 (S.D. Ind. Nov. 4, 2011) (indemnification claim against the former operator of the city’s wastewater plant sufficient to withstand dismissal); *Valbruna Slater Steel Corp. v. Joslyn Mfg. Co.*, 804 F. Supp. 2d 877, 882-83, 886 (N.D. Ind. 2011) (revising order granting summary judgment on claim preclusion).

2. 42 U.S.C. §§ 7401-31 (2006 & Supp. V 2011).

3. See Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005) (to be codified at 40 C.F.R. pts. 51, 72-74, 77-78, and 96).

4. 531 F.3d 896, 906-07 (D.C. Cir. 2008) (per curiam).

5. *Id.* at 913.

6. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 51-52, 72, 78, and 97); 42 U.S.C. § 7410(a)(2)(D) (2006).

7. The CAA has a “good neighbor” provision, which requires upwind states to “atone” for the pollution they contribute to downwind states. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 13-14 (D.C. Cir. 2012), cert. granted in part, *Am. Lung Ass’n v. EME Homer City Generation, L.P.*, 131 S. Ct. 2857 (2013). See also 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2006).

those obligations at the state level.⁸

In *EME Homer City Generation, L.P. v. EPA*,⁹ various parties, including Indiana, challenged the Transport Rule, arguing that EPA exceeded its authority under the CAA.¹⁰ The court agreed, vacated the Transport Rule, and remanded to EPA with the requirement that EPA continue administering CAIR pending the promulgation of a valid replacement.¹¹ In reaching this conclusion, the court first tackled EPA's use of its statutory authority under the CAA's "good neighbor" provision to order upwind states to reduce "amounts which will . . . contribute significantly to nonattainment in" downwind states.¹² The court noted that although the CAA afforded EPA significant discretion to implement the good neighbor provision, it had limits.¹³

The court held that the Transport Rule violated the CAA because it made no attempt to calculate upwind states' required reductions on a basis that took into account: (1) other upwind states' contributions to the downwind states' nonattainment problems; or (2) "the downwind [s]tate's own fair share of the amount [an area] exceeds the NAAQS."¹⁴ As such, the Transport Rule imposed far greater emission reduction requirements than the contributions for which upwind states are responsible.¹⁵ EPA also failed to ensure that the Transport Rule did not inadvertently require upwind states to do more than necessary for the downwind states to achieve the NAAQS.¹⁶ Furthermore, the Transport Rule did not allow the states the "initial opportunity to implement" the required reductions with respect to sources within their borders, as required by the CAA, but rather circumvented that process by setting forth EPA-designed FIPs establishing the reductions that must be met within each respective state.¹⁷ "[B]y preemptively issuing FIPs, EPA denied the [s]tates that first opportunity to implement the reductions required under their good neighbor obligations."¹⁸ The court found

8. *EME Homer City Generation, L.P.*, 696 F.3d at 18-19. See also 42 U.S.C. § 7410(a)(2)(D)(i) (2006). To determine a state's obligations, EPA looked at whether a state emits amounts that "will 'contribute significantly' to a downwind State's 'nonattainment'" of any of the NAAQS. *EME Homer City Generation, L.P.*, 696 F.3d at 20. EPA also looked for links between each upwind State and specific downwind areas that modeling predicted would not attain or maintain the NAAQS. *Id.* A State was deemed a "significant contributor" to a downwind State if modeling showed the upwind state would contribute more than the air quality threshold established for each pollutant. *Id.* at 21-23.

9. *EME Homer City Generation, L.P.*, 696 F.3d at 7.

10. *Id.* at 11-12.

11. *Id.* at 37-38.

12. *Id.* at 31, 37. See also 42 U.S.C. § 7410(a)(2)(D)(i) (2006).

13. *EME Homer City Generation, L.P.*, 696 F.3d at 33-34.

14. *Id.* at 27, 33-35, 39-40, 56, 57.

15. *Id.* at 11, 25.

16. *Id.* at 28.

17. *Id.*

18. *Id.* at 28. EPA's quantifying "of [a] state's good neighbor obligation and setting of [a] state's emissions budget" sets in motion the requirement for a "[s]tate to make [its State

that a state's implementation plan could not be deficient for failing to implement the good neighbor obligation until after EPA had defined the state's good neighbor obligation, which is not a clear numerical target until defined by EPA.¹⁹

B. EPA Greenhouse Gas Regulations Held to Comply with Applicable Laws

In *Coalition for Responsible Regulation, Inc. v. EPA*,²⁰ petitioners sought review of EPA's greenhouse gas regulations promulgated in response to *Massachusetts v. EPA*,²¹ which clarified that greenhouse gases are air pollutants subject to CAA regulation.²² To begin the rulemaking process, EPA issued an Endangerment Finding, establishing that greenhouse gases from light trucks and cars may "reasonably be anticipated to endanger public health or welfare," as required under the CAA to establish the need for regulation.²³ EPA then began the process for setting emission standards for light truck and cars with the Tailpipe Rule.²⁴ EPA then tackled writing rules for major stationary sources of greenhouse gases, requiring them "to obtain construction and operating permits."²⁵ Recognizing the immediate regulation of all such sources would result in overwhelming permitting burdens on permitting authorities and sources, EPA issued the Timing and Tailoring Rules,²⁶ wherein "it determined that only

Implementation Plan ("SIP"),] a 'submission' implementing that obligation on sources within the [s]tate." *Id.* at 31.

19. *Id.* at 45.

20. 684 F.3d 102 (D.C. Cir. 2012) (per curiam).

21. 549 U.S. 497 (2007).

22. *Id.* at 504-06.

23. *Coalition for Responsible Regulation, Inc.*, 684 F.3d at 113 (citing 42 U.S.C. § 7521(a)(1) (2006 & Supp. V 2011)). See also Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act ("Endangerment Finding"), 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1). EPA issued its Endangerment Finding for greenhouse gases in 2009, establishing an aggregate group of six greenhouse gases as a single air pollutant that cause global climate change. *Coalition for Responsible Regulation, Inc.*, 684 F.3d at 114.

24. *Coalition for Responsible Regulation, Inc.*, 684 F.3d at 113. See also Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule ("Tailpipe Rule"), 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 531, 533, 536-38).

25. *Coalition for Responsible Regulation, Inc.*, 684 F.3d at 113.

26. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule ("Tailoring Rule"), 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51-52, 70-71). The Tailoring Rule recognized that greenhouse gases are emitted in greater volumes than other pollutants with millions of sources exceeding the tons per year ("tpy") statutory threshold for a "carbon dioxide equivalent" basis ("CO₂e"). *Id.* at 31, 516, 31,534-36. EPA was concerned that immediately adding these sources to the CAA's Prevention of Significant Deterioration of Air Quality ("PSD") and Title V regulatory programs would cause tremendous costs. See *Coalition for Responsible Regulation, Inc.*, 684 F.3d at 116. To relieve these burdens, EPA departed from

the largest stationary sources would initially be subject to permitting requirements.”²⁷ Petitioners challenged all these rules, arguing that they were arbitrary and capricious and based on improper constructions of the CAA.

After reviewing the arguments, the court disagreed with the Petitioners, upholding EPA’s rules and finding: (1) the Endangerment Finding and Tailpipe Rule were not arbitrary or capricious; (2) “EPA’s interpretation of the governing CAA provisions [was] unambiguously correct;” and (3) no plaintiff had “standing to challenge the Timing and Tailoring Rules.”²⁸ In reaching this conclusion, the court noted that EPA had addressed the CAA’s review and permitting requirements for major stationary sources of greenhouse gas emissions under two separate sections of the Act.²⁹ The first section, the PSD program, requires state-issued construction permits for certain types of stationary sources . . . if they have the potential to emit over 100 [tpy]” or 250 tpy (depending on the source type) “of ‘any air pollutant.’”³⁰ The second permit scheme, “Title V, requires state-issued operating permits for stationary sources [with] the potential to emit at least 100 tpy of ‘any air pollutant.’”³¹ “Any air pollutant” in both these permit sections means any air pollutant regulated under the CAA.³²

For the Endangerment Finding, the court found that section § 202(a)(1) of the CAA only required EPA to consider whether greenhouse gases “may reasonably be anticipated to endanger public health or welfare, and whether motor-vehicle emissions cause or contribute to that endangerment.”³³ The court further noted that the CAA left EPA no room to consider non-scientific factors as part of the endangerment inquiry.³⁴ Finally, the court found that EPA’s reliance on “peer-reviewed assessments” for this rule was reasonable.³⁵ The court stressed that EPA must pass emission standards if the air pollution at issue “may reasonably be anticipated to endanger public health or welfare.”³⁶ “EPA may make an endangerment finding despite lingering scientific uncertainty.”³⁷

Finding justification for the Endangerment Finding, the court next turned to the Tailpipe Rule. In regards to the Tailpipe Rule, the court stated that EPA’s

the CAA’s 100/250 tpy emissions threshold, initially having only the largest sources being subject to permitting. Tailoring Rule, 75 Fed. Reg. at 31,523.

27. *Coalition for Responsible Regulation, Inc.*, 684 F.3d at 113-14. See also Tailoring Rule, 75 Fed. Reg. 31,514; Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs (“Timing Rule”), 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50-51, 70-71).

28. See *Coalition for Responsible Regulation, Inc.*, 684 F.3d at 113.

29. *Id.* at 115.

30. *Id.* (quoting 42 U.S.C. §§ 7475; 7479(1) (2006)).

31. *Id.* (quoting 42 U.S.C. § 7602(j) (2006)).

32. *Id.* Greenhouse gases became regulated with the Tailpipe Rule.

33. *Id.* at 117 (quoting CAA § 202(a)(2)) (internal quotation marks omitted).

34. *Id.* at 119.

35. *Id.* at 119-20.

36. *Id.* at 121-22 (quoting 42 U.S.C. § 7521(a)(1) (2006 & Supp. V 2011)).

37. *Id.* at 122.

interpretation of CAA section 202(a)(1) was correct in that, once EPA made the Endangerment Finding, the agency “lacked discretion to defer promulgation of the Tailpipe Rule.”³⁸ Furthermore, “EPA’s authority to regulate was [not] conditioned on evidence of a particular level of mitigation” but only required “a showing of significant *contribution*.”³⁹ As EPA properly concluded in the Endangerment Finding “that vehicle emissions are a significant contributor to domestic greenhouse gas emissions[,]” the court held it was proper for EPA to establish the regulatory standards in the Tailpipe Rule.⁴⁰

In regards to PSD and Title V permitting requirements, petitioners challenged EPA’s interpretation regarding the permitting triggers in the CAA.⁴¹ The court summarized the crux of petitioners’ argument as concerning the scope of the PSD program in regards to “which stationary sources count as ‘major emitting facilities’ subject to regulation.”⁴² The court found that for the purposes of the PSD program a “major emitting facility” was defined “as a stationary source ‘which emit[s], or [has] the potential to emit’ either 100 . . . tpy or 250 tpy of ‘any air pollutant,’” depending on the source type.”⁴³ The court went on to note that any regulated pollutant, if emitted above the established thresholds, subjects a facility to PSD permitting requirements.⁴⁴ The court also reasoned that there was nothing in the definition of “major emitting facility” that allowed EPA to adopt a NAAQS pollutant-specific reading of that phrase.⁴⁵ Consequently, the court upheld EPA’s interpretation that the PSD triggers required a permit if a source emits major amounts of regulated pollutants and is in an area in attainment or unclassifiable for any NAAQS pollutant.⁴⁶

With regard to the Tailoring and Timing Rules, the court found that plaintiffs could not demonstrate any injury in fact, dismissing the claims for lack of jurisdiction.⁴⁷

II. DEVELOPMENTS IN FEDERAL REGULATION OF CERCLA

This year, several key opinions involved CERCLA,⁴⁸ including: CERCLA’s “consumer product in consumer use” exemption from the definition of “facility,” fees and costs available to recyclers defending against CERCLA contribution actions, and apportionment of costs.

38. *Id.* at 126.

39. *Id.* at 128.

40. *See id.* at 128-29. *See, e.g.*, Endangerment Finding, 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

41. *Id.* at 129.

42. *Id.* at 133.

43. *Id.* at 131-33 (quoting 42 U.S.C. § 7479(1) (2006)).

44. *Id.* at 133-35.

45. *Id.* at 141.

46. *Id.* at 143.

47. *Id.* at 146-48.

48. 42 U.S.C. §§ 9601-75 (2006).

A. Motor Vehicles for Personal Use Fall Under the “Consumer Product in Consumer Use” Exception to “Facility” Under CERCLA

In *Emergency Services Billing Corp. v. Allstate Insurance Co.*,⁴⁹ the Seventh Circuit examined the scope of CERCLA’s “facility” definition.⁵⁰ In this case, Emergency Services Billing Corporation (“ESBC”), as the billing agent for a fire department, brought a declaratory action against individuals involved in motor vehicle accidents and their insurance companies, requesting confirmation from the court that the defendants were liable under CERCLA.⁵¹ The case turned on whether the defendants’ motor vehicles fell within CERCLA’s definition of a “facility.”⁵²

CERCLA expressly indicates that motor vehicles are facilities,⁵³ but Section B of the statute also excludes “consumer products in consumer use” from this definition.⁵⁴ ESBC argued that the phrase “‘consumer product’ is ambiguous.”⁵⁵ ESBC cited the Consumer Product Safety Act (“CPSA”) and the Magnuson-Moss Warranty Act (“Magnuson-Moss Act”), claiming that these statutes defined “consumer product” in two mutually exclusive ways, rendering the term ambiguous.⁵⁶ ESBC particularly noted that motor vehicles were expressly excluded from the definition of “consumer product” in the CPSA.⁵⁷ The defendants insisted that the “consumer product” phrase was unambiguous and included personal motor vehicles.⁵⁸ Defendants also argued that even if outside sources were considered, those sources supported the inclusion of personal motor vehicles.⁵⁹

Undertaking a *Chevron*⁶⁰ analysis, the court analyzed “consumer product” to determine whether it was ambiguous.⁶¹ The court noted that “consumer product” is not defined anywhere in CERCLA, but did not consider its absence dispositive.⁶² Rather, it cited the *Black’s Law Dictionary* definition for “‘consumer product’ as ‘[a]n item of personal property that is distributed in

49. 668 F.3d 459 (7th Cir. 2012).

50. *Id.* at 462.

51. *Id.* at 463.

52. *Id.* at 463-64.

53. *Id.* at 464.

54. *Id.*

55. *Id.*

56. *Id.* at 466-67 (citing 15 U.S.C. §§ 2051-89, 2301-12 (2006 & Supp. V 2011)).

57. *Id.* at 467.

58. *Id.* at 466-67.

59. *Id.*

60. *Id.* at 465-66 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (two-step framework established for interpreting statutes administered by an agency)).

61. *Id.*

62. *Id.* at 466.

commerce and is normally used for personal, family, or household purposes.”⁶³ The court further noted that the exclusion of motor vehicles in the CPSA worked against ESBC, as “[t]he need to exclude motor vehicles from the definition illustrates the fact that under normal circumstances, motor vehicles for personal use constitute consumer products.”⁶⁴ Thus, the court determined that the term “consumer product” was not ambiguous, as used in CERCLA, and that it clearly includes motor vehicles.⁶⁵

The court went further, noting that even if “consumer product” was ambiguous, outside sources confirmed that motor vehicles for personal use belong in the “consumer product” exemption in CERCLA’s “facilities” definition.⁶⁶ The court ultimately found that the purpose of the “consumer product” exclusion is “to prevent consumers—all consumers—from being held liable under CERCLA.”⁶⁷ Thus, the court affirmed the dismissal of ESBC’s suit.⁶⁸

The Southern District of Indiana faced a similar question in *Emergency Services Billing Corp. v. Vitran Express, Inc.*⁶⁹ In this case, the defendants, the operator and owner of a tractor-trailer, moved to dismiss the plaintiff’s complaint for failure to state a claim upon which relief could be granted.⁷⁰ The defendant operator drove to a high school to deliver textbooks, while simultaneously carrying a container with “approximately 300 gallons of a hazardous substance” that leaked when the truck was parked at the school.⁷¹ A concerned citizen noticed that the trailer leaking what appeared to be a potentially hazardous substance.⁷² After confirming that the substance was hazardous, the local fire department undertook clean-up efforts.⁷³ The plaintiff, as the billing agent of the responding fire department, sent the defendants an invoice for the clean-up costs incurred by the department.⁷⁴ When the invoice went unpaid, the plaintiff filed a complaint alleging that the defendants were liable under CERCLA.⁷⁵

In their motion to dismiss, the defendants challenged whether the truck was a “facility” under CERCLA and argued that the tractor-trailer was a “consumer product in consumer use.”⁷⁶ The court, acknowledging that the tractor-trailer was described in the plaintiff’s complaint as “a commercial vehicle that was

63. *Id.* (alteration in original) (quoting BLACK’S LAW DICTIONARY 359 (9th ed. 2009)).

64. *Id.* at 467.

65. *Id.* at 468.

66. *Id.*

67. *Id.* at 470.

68. *Id.*

69. No. 1:11-cv-0492-RLY-TAB, 2011 WL 6092232 (S.D. Ind. Dec. 7, 2011).

70. *Id.* at *1.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at *2.

transporting a 300-gallon container of UN 1903, a Class 8 corrosive liquid disinfectant[.]” held that the tractor-trailer was indeed a facility for purposes of CERCLA because it did not meet the statutory definition of “consumer product in consumer use.”⁷⁷

B. Recycler Entitled to Costs and Fees from Improper Contribution Action

In *Evansville Greenway & Remediation Trust v. Southern Indiana Gas & Electric Co.*,⁷⁸ third party plaintiff Evansville Greenway PRP Group (“Group”) sued third-party defendant Solar Sources (“Solar”) for CERCLA liability.⁷⁹ In a prior proceeding, the court determined that Solar was a recycler under the Superfund Recycling Equity Act (“SREA”),⁸⁰ an amendment to CERCLA exempting certain recyclers from liability⁸¹ and allowing costs and fees for recyclers forced to defend against an improper CERCLA action.⁸² Solar sought costs and fees from the Group.⁸³

The Group argued that Solar should not be awarded fees for multiple reasons; the court rejected each in turn.⁸⁴ The court stated that the Group essentially asked the court to reconsider its prior order without filing such a motion, which the court refused to do.⁸⁵ The Group next argued that Solar’s payment of its attorney’s fees was not sufficient evidence to prove the fees were reasonable.⁸⁶ The court disagreed and stated that “the best evidence of whether attorney’s fees are reasonable is whether a party has paid them.”⁸⁷ When the Group claimed that Solar was not entitled to fees incurred prior to raising the SREA defense, the court looked to the plain language of the statute and determined that Solar was “entitled to all reasonable costs of defending that action.”⁸⁸ The court also held that fees to recover fees are available, so long as they are “otherwise reasonable”;⁸⁹ redactions in Solar’s fee request, while more difficult to review, did not inherently make the fee request unreasonable;⁹⁰ Solar’s “switch to a contingency fee arrangement” also did not prevent it from recovering fees after that point;⁹¹ and that, because the CERCLA claim and the Indiana state law claim

77. *Id.*

78. No. 3:07-cv-66-SEB-WGH, 2012 WL 602638 (S.D. Ind. Feb. 23, 2012).

79. *Id.* at *1.

80. *Id.* (citing 42 U.S.C. § 9627 (2006)).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at *1-4.

85. *Id.* at *1.

86. *Id.* at *2.

87. *Id.* (quoting *Cintas Corp. v. Perry*, 517 F.3d 459, 469 (7th Cir. 2008)).

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

89. *Id.* at *3.

90. *Id.*

91. *Id.*

arose from “a common core of facts” and Solar was free of liability, Solar was entitled to fees for both claims.⁹²

Finally, the court was faced with whether the fees sought by Solar were reasonable.⁹³ Undertaking a two-step analysis, the court looked at (1) whether the hourly rates charged were reasonable and “in line with rates charged by lawyers of similar experience and expertise”; and (2) whether the number of hours billed reasonable.⁹⁴ The court found that the rates, while on the higher end for Indianapolis, were well within the acceptable range.⁹⁵ The court also determined that generally there were not excessive “duplications of effort.”⁹⁶ The court reduced the fees by 15% to offset perceived inefficiencies and awarded Solar over \$360,000.⁹⁷

*C. Apportionment Under CERCLA Not Required Where Multiple Parties’
Contributions Are Sufficient to Require Remediation*

During the Survey Period, no less than seven reported opinions were issued in one case involving a PCB clean-up of the Lower Fox River in Wisconsin—*United States v. NCR Corp.*⁹⁸ For the sake of brevity, this Survey Article will discuss the most prominent of those opinions, the Seventh Circuit’s opinion affirming the preliminary injunction, but our readers are directed to review the other opinions for further insight into this litigation. The Seventh Circuit’s decision highlights a critical issue for environmental lawyers: When is a district court required to apportion damages in CERCLA claims?

EPA worked for years to devise a remedial plan for the Fox River, where various defendants had dumped polychlorinated biphenyls (“PCBs”). One of those companies, NCR Corporation (“NCR”), was performing clean-up activities pursuant to administrative consent orders it entered into with the government. In 2011, NCR determined “that it had done enough and announced that it was no longer going to comply with the [administrative] order.”⁹⁹ The government obtained a preliminary injunction against NCR,¹⁰⁰ which NCR appealed to the

92. *Id.* at *4.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at *5.

97. *Id.*

98. No. 10-C-910, 2012 WL 3778950, at *5-6 (E.D. Wis. Aug. 30, 2012) (denying defendants’ motion for summary judgment based on allegedly incomplete administrative record); No. 10-C-910, 2012 WL 1490200, at *1, *8 (E.D. Wis. Apr. 27, 2012) (granting preliminary injunction); No. 10-C-910, 2012 WL 6042222, at *1-2 (E.D. Wis. Jan. 25, 2012) (holding bankruptcy stay does not preclude government’s CERCLA action); 840 F. Supp. 2d 1093, 1101 (E.D. Wis. 2011) (denying government’s summary judgment motion on liability, granting motion for reconsideration, and dismissing claims against “successor” defendant).

99. *United States v. NCR Corp. (NCR Corp. II)*, 688 F.3d 833, 835 (7th Cir. 2012).

100. 2012 WL 1490200, at *1, *8.

Seventh Circuit.¹⁰¹

NCR argued that the District Court erred in granting the injunction because the clean-up costs at Fox River were capable of apportionment. In other words, NCR argued that the injunction was inappropriate because it had “already performed more than its share of the work.”¹⁰² NCR’s expert argued that NCR was responsible for contributing only 9% or 6% (depending on the location in Fox River) of the PCB contamination at issue.¹⁰³ Thus, relying on the decision in *Burlington Northern and Santa Fe Railway Co. v. United States*,¹⁰⁴ NCR argued that it should only pay the same proportion of the clean-up costs.

In evaluating NCR’s appeal, the Seventh Circuit first evaluated whether NCR had demonstrated that the harm at issue was divisible.¹⁰⁵ The court noted that the burden is on the party seeking apportionment to “prov[e] that a reasonable basis for apportionment exists.”¹⁰⁶ The Seventh Circuit found that NCR had contributed contamination to Fox River that required the river be “dredged and capped.”¹⁰⁷ The Government’s expert testified “that [e]ven in the absence of [contamination from other PRPs], remediation would likely still be required.”¹⁰⁸ Thus, the court found that NCR had failed to refute the argument that “approximately the same remedial measures” would be required even if NCR’s contribution was assumed to be the only contamination.¹⁰⁹ Because “the expense of cleaning up the Lower Fox River [was] only weakly correlated with the mass of PCBs discharged by the parties[,]” clean-up would be required even if NCR’s contamination was assumed to be the only contamination.¹¹⁰ Thus, the court held that NCR had failed to demonstrate that the environmental harm was “capable of apportionment.”¹¹¹

III. DEVELOPMENTS IN THE LAW RELATED TO WATER RIGHTS

During the Survey Period, several federal and state courts decided cases related to the ability to challenge an agency’s compliance order under the Clean Water Act (“CWA”),¹¹² property rights, and the federal agency authority regarding certain permits.

101. *NCR Corp. II*, 688 F.3d at 833.

102. *Id.* at 835.

103. *Burlington N. & Santa Fe Rwy. Co. v. United States*, 556 U.S. 599, 615-16 (2009).

104. *Id.* at 599.

105. *Id.* at 608 (citing RESTATEMENT (SECOND) OF TORTS § 433A)).

106. *Id.* at 614.

107. *NCR Corp. II*, 688 F.3d at 839.

108. *Id.* (first alteration in original).

109. *Id.*

110. *Id.* at 840.

111. *Id.* at 839.

112. 33 U.S.C. §§ 1251-1387 (2006 & Supp. V 2011).

A. Property Owners Have the Right to Challenge Wetlands Determinations

In last year's Survey Article, we discussed the Ninth Circuit's decision in *Sackett v. EPA*,¹¹³ involving whether a property owner can obtain judicial review of an EPA wetlands order even when the EPA has not brought its own lawsuit.¹¹⁴ After the Survey Period, the Supreme Court issued its opinion reversing the Ninth Circuit.¹¹⁵ The Court found that a CWA Administrative Compliance Order ("ACO") is a final agency action for which the only adequate remedy is judicial review, allowing pre-enforcement review of an ACO.¹¹⁶

In reaching this conclusion, the Court noted that the ACO determined "rights or obligations" by requiring the restoration of wetlands.¹¹⁷ Legal consequences flowed from the order because it exposed the Sacketts to non-compliance penalties and "severely limit[ed]" their ability to obtain a CWA Section 404 permit Army Corps of Engineers ("Corps").¹¹⁸ The Court rejected the claim that the ACO was not final because it invited the Sacketts to "engage in informal discussion" regarding the order's terms and requirements and inform EPA "of any allegations [t]herein which [they] believe[d] to be inaccurate."¹¹⁹ Instead, the "mere possibility" the ACO might be reconsidered was insufficient "to make an otherwise final agency action nonfinal."¹²⁰

Next, the Court pointed out that the CWA did not expressly bar pre-enforcement review.¹²¹ The Court explained that while ACOs are a valuable enforcement tool, "[i]t is entirely consistent with this function to allow judicial review when the recipient does not choose 'voluntary compliance.'"¹²² Moreover, the Court noted that "it is hard for the Government to defend its claim that the issuance of the compliance order was just 'a step in the deliberative process' when the agency rejected the Sacketts' attempt to obtain a hearing and when the next step will either be taken by the Sacketts (if they comply with the order) or will involve judicial, not administrative, deliberation (if the EPA brings an enforcement action)."¹²³ Finally, the Court noted that although pre-enforcement review might make EPA less willing to use ACOs, the same could be said "for all agency actions subjected to judicial review."¹²⁴ The Court remanded for

113. 622 F.3d 1139 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1367 (2012).

114. *Id.* at 1141. For a discussion of the Ninth Circuit's opinion, see Freedom S.N. Smith, et al., *2010-2011 Environmental Law Survey*, 45 IND. L. REV. 1101, 1118-19 (2012).

115. *Sackett*, 132 S. Ct. at 1367.

116. *Id.* at 1371-74.

117. *Id.* at 1371.

118. *Id.* at 1371-72.

119. *Id.* at 1372 (alterations in original) (internal quotation marks omitted).

120. *Id.*

121. *Id.*

122. *Id.* at 1373.

123. *Id.*

124. *Id.* at 1374.

further proceedings.¹²⁵

*B. Construction of Wastewater Plant not Precluded by
Anti-Degradation Requirements*

In *City of Gary v. Indiana Department of Environmental Management*,¹²⁶ the Indiana Court of Appeals upheld a National Pollutant Discharge Elimination System Permit (“NPDES”) issued to the City of Hobart (“Hobart”) for the operation of a new wastewater treatment plant over the objections of the City of Gary and the Gary Sanitation District (collectively, “Gary”).¹²⁷ Hobart sought to construct a new plant so it could shut down its old wastewater facility, which had insufficient capacity, and discontinue simultaneously treating its wastewater at Gary’s wastewater facility.¹²⁸ The NPDES permit issued to Hobart contained mercury limits less than those contained in Gary’s permit.¹²⁹ Gary challenged the permit, arguing that the permit did not comply with Indiana’s anti-degradation requirement for outstanding state resource waters (“OSRWs”) in 327 Indiana Administrative Code section 5-2-11.7(a)(2), applicable to Lake Michigan.¹³⁰ In particular, Gary argued that subsections 11.7(a)(2)(A), (B), and (C) had to be read in the conjunctive.¹³¹ However, IDEM and Hobart argued that a permit could be properly issued if Hobart met subsections 11.7(a)(2)(A) and (B), that subsection 11.7(a)(2)(C) need not be applied in that case, and that clause (C) should be read independently of clauses 2(A) and (B).¹³²

In upholding the permit,¹³³ the court stated that IDEM’s interpretation was reasonable and consistent with the plain language of the regulation.¹³⁴

125. *Id.* at 1372-74.

126. 967 N.E.2d 1053 (Ind. Ct. App. 2012).

127. *Id.* at 1054.

128. *Id.*

129. *Id.* at 1054-55.

130. *Id.* at 1054-57, 1062.

131. *Id.* at 1055-56.

132. *Id.* at 1056-59.

133. In upholding the permit, the trial court noted that 327 Indiana Administrative Code section 5-2-11.7(a)(2) is written to ensure that the water quality of an OSRW is maintained and protected by applying certain requirements on new or increased discharges into the tributary of the OSRW. *Id.* at 1056. This provision states that for such discharges for which a new or increased permit limit would be required, clauses (A) and (B) will apply. *Id.* The trial court further stated that “[t]he ‘and’ between (A) and (B) clearly reflects that for such discharges for which a new permit limit would be required both (A) and (B) will apply.” *Id.* The court noted, however, that there was “no ‘and’ connecting clauses (C) and (D) to clauses (A) and (B).” *Id.* Thus, “clauses (C) and (D) must be read independently of (A) and (B).” *Id.* Furthermore, 327 Indiana Administrative Code section 5-2-11.7(a)(2)(C), did not refer to 327 Indiana Administrative Code section 5-2-11.7(a)(2)(B), but simply referred generally to 327 Indiana Administrative Code section 5-2-11.7(a)(2). *Id.* As such, Hobart’s permit met applicable anti-degradation requirements. *Id.*

134. *Id.* at 1058-59.

Furthermore, “the antidegradation factors cited in clause (C) [did] not apply to the Hobart Permit’s mercury discharges” because Hobart would not be discharging into a “high quality water,” the only type of water to which the anti-degradation factors in clause (C) applied.¹³⁵ IDEM’s decision was also consistent with EPA’s guidance.¹³⁶

*C. Tiered Permitting Structure for Interstate 69 Construction
Complies with CWA*

In *Hoosier Environmental Council v. United States Army Corps of Engineers*,¹³⁷ the Corps granted “a dredge and fill permit” for construction of an extension of Interstate 69 (“I-69”).¹³⁸ “The corridor [or route] selection process [for I-69] was tiered[.]”¹³⁹ whereby the Corps did not issue a single CWA Section 404 permit for the entire portion of I-69 between Indianapolis to Evansville, but rather considered an “application for each segment of [I-69] that ha[d] independent utility.”¹⁴⁰ To obtain a permit, the project had to, among other things, “be the least environmentally damaging practicable alternative.”¹⁴¹ The Corps issued a Section 404 permit to the State for the portion of I-69 stretching from Washington, Indiana to Scotland, Indiana, known as Section 3, allowing the discharge of dredge and fill material.¹⁴² “The permit included both general conditions and several special conditions.”¹⁴³

Plaintiffs challenged the Corps’s permit for Section 3,¹⁴⁴ claiming “that the Corps violated . . . the CWA by issuing the . . . permit without fulfilling Section 404’s requirements.”¹⁴⁵ Plaintiffs claimed that the Corps was required “to undertake an analysis of whether there [was] a less damaging practicable alternative for the entire I-69 project[.]” not just the section at issue, and that the tiering process allowed the State to improperly circumvent the CWA.¹⁴⁶

The court rejected the plaintiffs’ arguments,¹⁴⁷ noting the lack of case law in

135. *Id.*

136. *Id.* at 1060-63.

137. No. 1:11-cv-0202-LJM-DML, 2012 WL 3028014 (S.D. Ind. July 24, 2012).

138. *Id.* at *1.

139. *Id.* “Tiering is the coverage of general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses (such as . . . ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.” *Id.* (quoting 40 C.F.R. § 1502.20 (alterations in original)).

140. *Id.* at *1-2.

141. *Id.* at *2 (internal quotation marks omitted).

142. *Id.* at *3-4.

143. *Id.* at *4 (internal quotation marks omitted).

144. *Id.* at *9.

145. *Id.* at *7.

146. *Id.* at *8-10.

147. *Id.* at *10.

“support [of] the proposition that the Corps [had to] evaluate alternatives for the entire project when” a permit was only being sought for one sub-section.¹⁴⁸ The court also held “that the Corps was not unreasonable in determining that Section 3 ha[d] independent utility and [in] containing its analysis to the alternatives that would be practicable with respect to that utility.”¹⁴⁹ Finally, the court noted that the Corps public interest review was not “contrary to the substantial weight of the evidence.”¹⁵⁰

*D. EPA’s Enhanced Coordinated Review Process for Section 404
Permits Is Improper*

In *National Mining Association v. Jackson*,¹⁵¹ the court held that EPA overstepped its authority under the CWA by creating new assessment requirements and an enhanced coordinated review process with the Corps for the issuance of permits under CWA Section 404.¹⁵² “EPA and the Corps promulgated . . . guidelines . . . to guide the Corps’ review of the environmental effects of proposed disposal sites.”¹⁵³ The Corps and EPA also signed a Memorandum of Agreement (“MOA”) clarifying “that the Corps [was] responsible for reviewing and evaluating information concerning all permit applications[,]” and that EPA would provide any comments on concerns to the Corps.¹⁵⁴ The EPA subsequently issued two memoranda outlining the formal details of their Enhanced Coordination process (“EC Process”) for Section 404 permits.¹⁵⁵ The EC Process began with EPA’s Multi-Criteria Integrated Resource Assessment (“MCIR”),¹⁵⁶ followed by a separate coordination process between the Corps and EPA.¹⁵⁷ The MCIR involved the application of CWA Section 404(b)(1) guidelines by EPA with the EPA then “directing the Corps on which permit applications must go through the EC Process for further review and coordination.”¹⁵⁸

148. *Id.*

149. *Id.* at *11.

150. *Id.* at *13.

151. 816 F. Supp. 2d 37 (D.D.C. 2011).

152. *Id.* at 47-49. The Corps generally issues Section 404 permits “for the discharge of dredged and fill material into navigable waters at specific disposal sites.” *Id.* at 39 (quoting 33 U.S.C. §1344(a) (2006)).

153. *Id.* at 39-40. The regulations are codified at 40 C.F.R. Part 230.

154. *Nat’l Mining Ass’n*, 816 F. Supp. 2d at 40 (internal quotation marks omitted). The MOA also contained provisions regarding the elevation or additional review of a permit application, which was controlled by the Corps. *Id.* at 40-41.

155. *Id.* at 41.

156. *Id.* at 39 n.1, 41. The court used the MCIR term to describe the process used by the EPA to determine which of the pending permits would be subject to “the additional scrutiny of the EC Process.” *Id.* at 41, 49.

157. *Id.* at 41.

158. *Id.*

Plaintiffs challenged the EC Process, contending that it was “burdensome” and “wholly separate from the process outlined in Section 404, the Corps’ implementing regulations, and the [various existing agency memorandums].”¹⁵⁹ The plaintiffs also argued that EPA’s Section 404 role was limited,¹⁶⁰ and the CWA envisioned specific and limited coordination between the EPA and the Corps.¹⁶¹ On the other hand, EPA contended that the EC Process and the MCIR fell within its CWA authority and its “discretion to establish the procedures necessary to carry out [its] statutory functions.”¹⁶² EPA also argued that any modification was within the agencies’ discretion.¹⁶³

In holding that EPA overstepped its authority under the CWA, the court noted that the CWA expressly limited EPA’s authority with respect to Section 404 permits.¹⁶⁴ The court held that

Congress’ decision to adopt Section 404 . . . and specifically identify the Corps as the permitting authority, and then to denote specific instances in which the EPA and the Corps were to coordinate their efforts, and to assign the EPA discrete functions, preclude[d] the [c]ourt from accepting . . . that Congress simply intended to prescribe a statutory minimum in regard to the EPA.¹⁶⁵

As Congress intended the Corps to be the principal player in the Section 404 permitting process, the court found that EPA’s adoption of the EC Process exceeded the authority provided by the CWA by improperly expanding EPA’s role in the permit process.¹⁶⁶ Furthermore, the court held that the adoption of the MCIR and EC Process without notice and comment violated the Administrative Procedure Act because these processes altered rights and obligations under the CWA.¹⁶⁷

*E. Failure to Obtain Permit from State for Floodway Construction
Constitutes CWA Violation and Can Result in Personal Liability*

In *Stillwater of Crown Point Homeowner’s Ass’n v. Kovich*,¹⁶⁸ the plaintiffs, homeowners and a homeowner’s association, filed suit against the developers of two Crown Point, Indiana subdivisions, seeking injunctive relief and damages for flooding caused by the construction of three roadway crossings and related

159. *Id.*

160. *Id.* at 43.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 44 (citing 33 U.S.C. § 1344 (2006)).

165. *Id.* at 45.

166. *Id.*

167. *Id.* at 46-47, 49. See 5 U.S.C. § 702 (2006).

168. 820 F. Supp. 2d 859 (N.D. Ind. 2011).

culverts that spanned a nearby ditch.¹⁶⁹ The crossways were constructed by placing fill material in the same ditch and adjacent wetlands, along with two culverts being used to convey water in the ditch under the crossings.¹⁷⁰ The Indiana Department of Natural Resources (“DNR”) issued a Notice of Violation to the City of Crown Point for the crossings at issue for violating “the Indiana Flood Control Act because they [were] in a floodway but were not permitted.”¹⁷¹ Plaintiffs claimed that the developers were liable because they violated the CWA by improperly discharging “fill material to construct the crossings[.]”¹⁷² failed to obtain required permits, or violated permit requirements.¹⁷³ Plaintiffs also alleged that this same activity breached applicable implied warranties of habitability, constituted negligence, and was both a public and private nuisance.¹⁷⁴

Plaintiffs claimed that Hawk’s, the developer of the first subdivision,¹⁷⁵ failure to obtain a floodway construction permit from DNR constituted a violation of the CWA and state law.¹⁷⁶ Hawk claimed it did not do any construction in a floodway, and that the plaintiffs had designated no evidence that it had violated any CWA permits.¹⁷⁷ Hawk admitted that it placed fill in the ditch’s wetlands but provided evidence that the work complied with applicable permits.¹⁷⁸

The court acknowledged both plaintiffs and Hawk’s argument but found that neither party was entitled to resolution of the dispute via summary judgment because an issue of material fact existed as to whether Hawk’s construction actually occurred in a floodway.¹⁷⁹ In this regard, the court noted that even though Hawk obtained Section 401 and 404 permits,¹⁸⁰ Hawk never notified DNR

169. *Id.* at 863-64, 872-73.

170. *Id.* at 863.

171. *Id.* at 872. “The Flood Control Act and Flood Control Ordinance are intended to protect the citizens of Indiana and of the City of Crown Point (like Plaintiffs) from the hazards of development in floodways.” *Id.* at 878 (citing IND. CODE §§ 14-28-1-1, 14-28-1-22(e) (2013)).

172. *Id.* at 863-64.

173. *Id.* In particular, plaintiffs claimed that Kovich, Innovative Enterprises, Stiglich, Hawk Development Corporation (“Hawk”), and Stillwater Properties, LLC’s discharges violated the conditions set forth in IDEM’s CWA Section 401 water quality certification and the Corps’ CWA Section 404 permit. *Id.* Plaintiffs further claimed there were un-permitted discharges. *Id.* at 864, 874-78.

174. *Id.* at 864-66.

175. *Id.* at 864, 867, 871.

176. *Id.* at 871, 873-80. Plaintiffs’ “floodway” claims was based in part on a prior “DNR-issued floodway map[.]” the developers’ permits, and expert testimony. *Id.* “An unexcused violation of the Flood Act . . . constitutes negligence per se.” *Id.* at 876-78 (internal quotation marks omitted).

177. *Id.* at 873-80.

178. *Id.* at 874.

179. *Id.* at 878-80.

180. *Id.* at 874. The Section 404 permit required “among other things, that the discharge of fill . . . must not permanently restrict or impede the passage of normal or expected high flows in [the nearby] [d]itch.” *Id.* at 871.

of its final construction plans, and there was no evidence that Hawk ever sought a permit from DNR for possible construction in a floodway, which would have been required if the construction was actually in a floodway.¹⁸¹ As plaintiffs could potentially show that the areas were in a floodway, Hawk's actions could have been in violation of the law.¹⁸²

With regard to the developers of the second subdivision, including Jack Kovich ("Kovich") and Innovative Enterprises, Ltd. ("Innovative"),¹⁸³ plaintiffs claimed their discharges were in violation of the conditions in their Section 404 and 401 permits, and thus violated the CWA, state laws, and applicable warranties.¹⁸⁴ Plaintiffs further alleged that the unlawful discharges had not been removed.¹⁸⁵ Kovich and Innovative argued that all of plaintiffs' claims were time-barred,¹⁸⁶ and it was not clear whether wetlands subject to the CWA were at issue, but they offered no evidence that the areas at issue were not subject to the CWA.¹⁸⁷

In holding that the plaintiffs were entitled to summary judgment on several of its claims, the court first noted that the statute of limitations was not an issue because a continuing violation existed because discharge remained on site and because the statute of limitations did not begin to accrue until plaintiffs' homes were flooded.¹⁸⁸ The court further noted that the Section 404 permit, which named Kovich and Innovative as permittees, contained several conditions, including that any "discharges must not permanently restrict or impede the passage of normal or expected high flows or cause the relocation of water."¹⁸⁹ Construction was not done as described in the applicable permit applications, as defendants did not restore the hydrology levels.¹⁹⁰ Consequently, there was a

181. *Id.* at 870, 877-79.

182. *See id.*

183. Kovich was a managing member of Stillwater Properties, LLC and owned half of the company and its affiliate Stillwater Development, Inc., which developed the subdivision. *Id.* at 880-81. The actions of Stillwater Properties, LLC and Stillwater Development, Inc. were not in dispute. *See id.* at 880-906. The court held summary judgment was not appropriate as to defendant Stiglich because there was no proof he took individual action related to the development. *Id.* at 906.

184. *Id.* at 894, 896-905.

185. *Id.* at 894.

186. *Id.* at 896, 901. "The parties agree[d] that the six-year statute of limitations found at Indiana Code [section] 34-11-2-7(e) applie[d] to [p]laintiffs' claims" under state law. *Id.* at 901. The parties further "agree[d] that the two-year statute of limitations in Indiana Code [section] 34-11-2-4 applie[d] to [plaintiffs'] claims that the flood in September 2008 damaged their furniture and other personal property." *Id.*

187. *Id.* at 897.

188. *Id.* at 894, 901-02.

189. *Id.* at 883. The permit did not excuse obligations otherwise required by any other federal, state, and/or local authorization. *Id.*

190. *Id.* at 897.

violation of the permits, and the discharges were unlawful.¹⁹¹ The court held that Kovich and Innovative were “liable for the damages caused by the violation of the ‘floodway’ condition” of its permits.¹⁹² The court further found that Kovich was also personally liable pursuant to the responsible corporate officer doctrine for civil penalties since he was named on the permit.¹⁹³ Moreover, Kovich and Innovative were also liable for breach of warranty and negligence per se.¹⁹⁴ The court also noted that Kovich could potentially be liable under plaintiffs’ general negligence claim if plaintiffs could show that Kovich “participated in, authorized, or directed the [relevant tortious] activities.”¹⁹⁵ On the other hand, Innovative was not liable for any general negligence claim, nor was Innovative or Kovich liable for any restrictive covenant violations.¹⁹⁶ The court noted that summary judgment was not proper for the nuisance claims because of issues of fact.¹⁹⁷

IV. OTHER ENVIRONMENTAL CASES UNDER FEDERAL LAW

In *National Mining Association v. Jackson*,¹⁹⁸ the United States District Court for the District of Columbia evaluated whether pre- and post-guidance documents should be considered in a challenge to two guidance memoranda issued by the EPA.¹⁹⁹ The plaintiffs were required to rebut the presumption that the agency record designated by the agency was complete.²⁰⁰ “Supplementation of the record is appropriate in three circumstances: ‘(1) if the agency deliberately or negligently excluded documents that may have been adverse to its decision, (2) if background information was needed to determine whether the agency considered all the relevant factors, or (3) if the agency failed to explain administrative action so as to frustrate judicial review.’”²⁰¹ In order to “rebut the presumption of regularity, the party seeking supplementation must ‘put forth concrete evidence that the

191. *Id.* at 897-900.

192. *Id.* at 900-01.

193. *Id.* at 892. The CWA specifically provides for responsibility under the responsible corporate officer doctrine for criminal penalties. *Id.* at 890 (citing 33 U.S.C. § 1319(c) (2006) (“criminal penalties”)). In contrast, there is no such provision adding a “responsible corporate officer” as a person for purposes of “civil penalties,” addressed in subsection (d) of section 1319(d). *Id.* The court found, however, that this doctrine applied in the civil context and noted that several circuits have expressly found that the responsible corporate officer doctrine does apply in civil citizen suits brought under the CWA. *Id.* at 891-92.

194. *Id.* at 901-04.

195. *Id.* at 904-05.

196. *Id.* at 901-04.

197. *Id.* at 905-06.

198. 856 F. Supp. 2d 150 (D.D.C. 2012).

199. *Id.* at 153-154. For additional background on this case, see *National Mining Ass’n v. Jackson*, 816 F. Supp. 2d 37 (D.D.C. 2011); *National Mining Ass’n v. Jackson*, 768 F. Supp. 2d 34 (D.D.C. 2011).

200. *Nat’l Mining Ass’n*, 856 F. Supp. 2d at 155-56.

201. *Id.* at 156 (quoting *City of Dania Beach v. F.A.A.*, 628 F.3d 581, 590 (D.C. Cir. 2010)).

documents it seeks to ‘add’ to the record were actually before the decision makers.”²⁰² The Court rejected the plaintiffs’ attempt to add pre-guidance documents to the record because plaintiffs failed to demonstrate that the EPA actually considered the documents in drafting its guidance.²⁰³

The post-guidance documents were not part of the agency record, and, therefore, the plaintiffs had to demonstrate that the documents should be considered by the court as extra-record evidence. Extra-record evidence can be permitted in four limited circumstances: “(1) when the agency failed to examine all relevant factors; (2) when the agency failed to explain adequately its grounds for its decision; (3) when the agency acted in bad faith; or (4) when the agency engaged in improper behavior.”²⁰⁴ The plaintiffs asserted that the EPA was applying the guidance as a final rule, and these post-guidance documents were relevant to their claim that U.S. EPA was acting arbitrarily and capriciously. It was “not possible” to assess this claim based on the agency record as presented, and therefore the court decided that the post-guidance documents could be considered as extra-record evidence.²⁰⁵ After the court issued this ruling, it granted summary judgment in favor of the plaintiffs and held that the guidance was being implemented as a rule, as evidenced by post-guidance documents.²⁰⁶

V. ENVIRONMENTAL CASES UNDER STATE LAW

A. Lack of Compliance with Environmental Statutes Is Not a Permissible Basis to Challenge an Eminent Domain Proceeding

In *Knott v. State*,²⁰⁷ the Indiana Court of Appeals addressed whether an agency’s alleged failure to comply with federal environmental laws could prevent the exercise of eminent domain powers.²⁰⁸ This case involved a Complaint for Appropriation of Real Estate brought by the Indiana Department of Transportation (“INDOT”) to acquire land for the extension of I-69 from Indianapolis to Evansville.²⁰⁹ The property owners objected to the eminent domain proceedings on several grounds, including that: there was a “failure to prepare a supplemental [Environmental Impact Statement (“EIS”)]” required by

202. *Id.* (quoting *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C. 2010)).

203. *Id.* at 157. The court also declined to analyze whether the documents should be considered as extra-record evidence or take judicial notice of them because the plaintiffs failed to argue why those exceptions should apply: “If the plaintiffs do not take their argument seriously enough to do more than mention it in passing in a footnote, the Court will not on its own accord attempt to discern whether such unnamed and unargued exceptional circumstances do, in fact, exist.” *Id.* at 158.

204. *Id.* at 156-57 (citing *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997)).

205. *Id.* at 158-59.

206. *Nat’l Mining Ass’n v. Jackson*, 880 F. Supp. 2d 119, 142 (D.D.C. 2012).

207. 973 N.E.2d 1259 (Ind. Ct. App. 2012), *trans. denied*, 984 N.E.2d 1253 (Ind. 2013).

208. *Id.* at 1262.

209. *Id.* at 1260-61.

the National Environmental Policy Act (“NEPA”); the EIS was prepared in bad faith; the highway project violated Section 4(f) of the Transportation Act; and INDOT’s issuance of a CAA Conformity Determination and approval of this portion of the I-69 project violated the CAA.²¹⁰ The trial court ruled that the owner’s objections did not address INDOT’s authority to acquire the property at issue, and thus were legally deficient. The trial court held that INDOT could acquire the property and the owners appealed.²¹¹

The court of appeals agreed with the reasoning of the trial court because the focus of a review of an eminent domain proceeding is whether the “condemnation proceedings were legal, whether the condemning authority had authority to condemn the property in question, and whether the property was to be taken for a public purpose.”²¹² The court can also consider “whether the condemnation was fraudulent, capricious, or illegal” in regards “to the necessity of the taking.”²¹³ The owner’s objections based on compliance with environmental statutes could not be a basis for reversing an eminent domain proceeding because “Indiana’s eminent domain laws do not require the State to comply with these federal statutes prior to appropriating private property for a public purpose.”²¹⁴ The environmental statutes upon which the owners relied did not affect the acquisition of property, and therefore had “no bearing on the condemnation proceeding[s].”²¹⁵

*B. Community Officials Have the Authority to Regulate
Underground Aquifers*

In *Town of Avon v. West Central Conservancy District*,²¹⁶ the Indiana Supreme Court ruled that underground aquifers are “watercourses” as defined by state law and that community officials have the ability to reasonably regulate how that water is taken out and used by other local governments.²¹⁷ In that case, the White Lick Creek Aquifer (“Aquifer”) flowed under the Town of Avon (“Avon”).²¹⁸ Both Washington Township (the “Township”) and the West Central Conservancy District (“WCCD”) owned properties within the boundaries of Avon that overlay the Aquifer and wanted to drill wells and withdraw water from the

210. *Id.* at 1261-62. The property owners had also objected to the property description in the initial complaint because they incorrectly referred to land that would not be needed for the highway project. *Id.* at 1262. INDOT filed a motion to amend to fix this error, and the property owners did not raise any additional objections to the property description. *Id.*

211. *Id.*

212. *Id.* (citing *City of Evansville ex rel. Dep’t of Redevelopment v. Reising*, 547 N.E.2d 1106, 1111 (Ind. Ct. App. 1989); *State ex rel. Ind. Dep’t of Conservation v. Barber*, 200 N.E.2d 638, 640 (Ind. 1964)).

213. *Id.* (citing *Reising*, 547 N.E.2d at 1111; *Barber*, 200 N.E.2d at 640-41).

214. *Id.* at 1263.

215. *Id.* at 1265.

216. 957 N.E.2d 598 (Ind. 2011).

217. *Id.* at 601, 606.

218. *Id.* at 601.

Aquifer to sell to third parties.²¹⁹ Before this occurred, Avon passed an ordinance, relying on Indiana Code sections 36-9-2-8 to -13 (“Watercourse Statutes”), exercising its “power to establish, maintain, control, and regulate the taking of water, or causing or permitting water to escape, from a watercourse both inside and within ten (10) miles of the Town’s municipal limits.”²²⁰ “The ordinance prohibit[ed] taking water from a watercourse for ‘retail, wholesale, or other mass distribution’ unless done by or on behalf of Avon.”²²¹ The Township and WCCD disputed Avon’s right to regulate their access to the Aquifer.²²²

The major legal dispute between the parties was whether the aquifer was a “watercourse.”²²³ In particular, the Township and WCCD argued that Avon’s ordinance was invalid because it conflicted with state statutes that did not include aquifers in the definition of a “watercourse,” Indiana’s Home Rule Act,²²⁴ and other state regulations pre-empted the ordinance, and that they have the common law right to withdraw the groundwater from the Aquifer.²²⁵

The Indiana Supreme Court noted that the resolution of this issue was a fact-specific inquiry that required investigation into whether the aquifer had “definable boundaries[,]” “the age of the Aquifer,” and whether the water in the aquifer flowed.²²⁶ The Court concluded that the Aquifer was a watercourse under Indiana law.²²⁷ The Court noted that while it was not “declaring a bright-line rule that all aquifers are watercourses,” it had to “reject [any] demand for a bright-line rule to the contrary.”²²⁸ The Court’s determination that the Aquifer was a watercourse was that, pursuant to the Watercourse²²⁹ and the Park Resources

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 601-02.

223. *Id.* at 602. The definition of “watercourse ‘includes lakes, rivers, streams, and any other body of water.’” *Id.* (citing IND. CODE § 36-9-1-10 (2013)).

224. “Indiana’s Home Rule Act was a legislative decision to abrogate the old common-law rule that a local government could possess and exercise only those powers that had been “expressly granted by statute.”” *Id.* at 605 (quoting IND. CODE § 36-11-3-4(a) (2013)). Instead, a local governmental body has “all powers granted it by statute; and . . . all other powers necessary or desirable in the conduct of its affairs, even though not granted by statute.” IND. CODE § 36-1-3-4(b) (2013) (alteration in original). Any doubts about the existence of a particular power “shall be resolved in favor of its existence.” *Id.* § 36-1-3-3(b).

225. *Town of Avon*, 957 N.E.2d at 604-06.

226. *Id.* at 602-04. The court held that the phrase “any other body of water” in Indiana Code section 36-9-1-10 refers to any other body of water satisfying our common-law definition of a watercourse. *Id.* at 602. “[T]he common-law definition of watercourse presumptively excludes subterranean water.” *Id.* at 603.

227. *Id.* at 605.

228. *Id.*

229. IND. CODE §§ 36-9-2-8 to -13 (2013).

Statutes,²³⁰ Avon had authority to regulate the taking of water from the Aquifer.²³¹ Therefore, both the Township and WCCD no longer had a common-law right to use the groundwater in the Aquifer without interference.²³²

C. Higher Elevation Properties in a Watershed Can Benefit from an Improved Drain and Therefore Be Assessed a Fee under Indiana Drainage Law

In *Crowel v. Marshall County Drainage Board*,²³³ the Indiana Supreme Court tackled the intersection of water rights and the assessment of drain reconstruction fees as permitted by the Indiana Drainage Law (“IDL”).²³⁴ The IDL permits a county drainage “board[] to levy special assessments on properties benefited by drainage projects, provided that the assessments are apportioned to the benefits accruing to the particular parcel.”²³⁵ The petitioner owned agricultural land adjacent to a drain and claimed that, because his land currently drained adequately, he gained no benefit from the improved drain, and should therefore not be assessed a fee for its reconstruction.²³⁶ The county surveyor explained that the watershed served by the drain had been studied, and fees had been assessed according to the use of the property; agricultural land at higher elevations were assessed a smaller fee than residential properties located at the lower end of the watershed.²³⁷ Based on this information, the county drainage board found that the schedule of costs and expenses of the proposed drain reconstruction would be less than the benefit to the properties served by the drain and approved the project.²³⁸ The petitioner appealed the board’s decision by filing a petition for judicial review.²³⁹ The trial court upheld the board’s decision. The Indiana Court of Appeals reversed in a two-to-one decision,²⁴⁰ finding that the petitioner’s land was not benefitted from the project, and, therefore, an assessment should not have been levied.²⁴¹

230. *Id.* §§ 36-10-7.5-1 to -27.

231. *Town of Avon*, 957 N.E.2d at 606-07.

232. *Id.* at 608-09.

233. 971 N.E.2d 638 (Ind. 2012).

234. IND. CODE §§ 36-9-27-1 to 36-9-27-114 (2013).

235. *Crowel*, 971 N.E.2d at 640.

236. *Id.* at 641, 643.

237. *Id.* at 641.

238. *Id.* The IDL requires the county board to weigh the costs against the benefits in this fashion. IND. CODE § 36-9-27-52(h) (2013).

239. *See* IND. CODE § 36-9-27-106 (2013). The court explained in a later part of the opinion the statute provided two “tracks” for judicial review, one which allows “an as-applied challenge” in which the fact finder can consider evidence *de novo*, and another which allows a facial challenge that is limited to a review of the record of the county drainage board. *Crowel*, 971 N.E.2d at 652-54 (citing IND. CODE § 36-9-27-107(a)-(b) (2013)).

240. *Crowel v. Marshall Cnty. Drainage Bd.*, 951 N.E.2d 290 (Ind. Ct. App. 2011), *vacated*, 971 N.E.2d 638 (Ind. 2012).

241. *Id.* at 298-99.

The Indiana Supreme Court reversed based on the IDL and Indiana's modified version of the common-enemy rule regarding surface water. The IDL allowed the county drainage board to consider "the watershed affected by the drain"²⁴² because the "statute contemplates that a parcel of land at the high end of a watershed that has adequate drainage due to natural surface-water runoff can be benefited by the reconstruction of a regulated drain at the lower end of the watershed."²⁴³ The court recognized that some parcels would benefit greater than others would and that assessments should be made accordingly.²⁴⁴ The finding that the petitioner's land benefited from the drain was complemented by Indiana's version of the common-enemy rule, which allows a property owner to divert or wall out unwanted surface water, but not to "collect or concentrate surface water and cast it, in a body, upon his [or her] neighbor."²⁴⁵ The improved drain could prevent "a water war" with neighbors whose property is flooded by the petitioner's surface water drainage, who would be permitted to change the property grading to keep out petitioner's surface water.²⁴⁶ The court also agreed that the board's assessment structure, based on the lands' usage (which correlated to the lands' place in the watershed), was not erroneous.²⁴⁷

D. Waste Disposed at a Mine By a Preceding Owner Does Not Preclude Release of a Mining Reclamation Bond

In *Musgrave v. Squaw Creek Coal Co.*,²⁴⁸ the Indiana Court of Appeals addressed both administrative law issues and challenges to DNR's decision to release a reclamation bond on a company's surface mining permit. The Squaw Creek Coal Company ("SCCC") obtained a permit to mine a portion of the Squaw Creek Mine, and a bond secured successful reclamation of the mined land.²⁴⁹ Prior to SCCC's mining activities, Alcoa had used abandoned roads in the mine to dispose of waste from aluminum production.²⁵⁰ Twenty years after mining activities ceased, SCCC applied for release of a portion of the bond. Musgrave and other citizens testified at the hearing about the bond release, with the testimony primarily focusing on concerns about historic waste disposal at the

242. IND. CODE § 36-9-27-112(a)(1) (2013).

243. *Crowel*, 971 N.E.2d at 646.

244. *Id.* at 646-47.

245. *Id.* at 649 (alteration in original) (quoting *Argyelan v. Haviland*, 435 N.E.2d 973, 975 (Ind. 1982)). The court explained the common-enemy rule provides "that surface water which does not flow in defined channels is a common enemy and that each landowner may deal with it in such manner as best suits his [or her] own convenience. Such sanctioned dealings include walling it out, walling it in[,] and diverting or accelerating its flow by any means whatever." *Id.* at 649 (alterations in original) (emphasis added by *Crowel* court) (quoting *Argyelan*, 435 N.E.2d at 975).

246. *Id.* at 649-50.

247. *Id.* at 650-52 (citing IND. CODE § 36-9-27-112(a) (2013)).

248. 964 N.E.2d 891 (Ind. Ct. App.), *trans. denied*, 975 N.E.2d 360 (Ind. 2012).

249. *Id.* at 895.

250. *Id.* at 894.

mine impacts of that waste disposal.²⁵¹ The DNR investigated the area covered by the bond and approved the bond release.²⁵² Plaintiff sought administrative review before an administrative law judge (“ALJ”).²⁵³ The ALJ reversed a portion of DNR’s decision because while the waste disposal had not occurred on areas covered by the bond, some areas could be impacted by the migration of waste via an “unconfined aquifer.”²⁵⁴ In light of the ALJ’s partial reversal, SCCC appealed the decision to the Marion Superior Court.²⁵⁵ The trial court reversed the ALJ’s order and remanded for entry of judgment in favor of DNR and SCCC.²⁵⁶

Plaintiff argued to the Court of Appeals that the trial court lacked jurisdiction over the case because SCCC did not properly serve its petition for judicial review.²⁵⁷ The court determined that there was no requirement to serve a summons on DNR, but rather that service pursuant to Trial Rule 5 satisfied the requirements of Indiana Code section 4-21.5-5-8.²⁵⁸ There was also no requirement that a petitioner pay a filing fee in the Administrative Orders and Procedures Act (“AOPA”); thus, the trial court did not err in denying Musgrave’s motion to dismiss on this basis.²⁵⁹

After addressing these procedural matters, the court of appeals evaluated whether there was a genuine issue of material fact that SCCC met the phase III bond release requirements of the Indiana Surface Mining Control and Reclamation Act (“I-SMCRA”).²⁶⁰ I-SMCRA outlines the three phases of the mine reclamation process and the procedure for releasing a bond for performance as the phases of the reclamation are completed.²⁶¹ In evaluating whether a bond can be released, the DNR must examine several items thirty days after receipt of the bond release application, including “[w]hether pollution of surface and subsurface water is occurring.”²⁶² The final phase III portion of a bond may only

251. *Id.* at 895.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* See also IND. CODE §§ 4-21.5-1-1 to 4-21.5-7-9 (2013) (relevant to administrative appeals).

256. *Musgrave*, 964 N.E.2d at 896.

257. *Id.* DNR and SCCC argued that Musgrave was collaterally estopped from challenging the bond release because he had challenged another bond release at the mine under a different permit where he raised similar legal arguments and the ALJ in the other hearing had determined that DNR did not have the jurisdiction to grant the requested relief over waste was that was disposed. *Id.* at 898-99. However, the court determined that this jurisdictional decision was one of two separate and independent reasons for dismissal of Musgrave’s previous bond release challenged, and therefore could not “be the basis of issue preclusion.” *Id.* at 899.

258. *Id.* at 896-97.

259. *Id.* at 898.

260. IND. CODE § 14-34-1 (2013).

261. See *Musgrave*, 964 N.E.2d 900-01 (discussing the I-SMCRA).

262. IND. CODE § 14-34-6-9(2) (2013).

be released “[w]hen the [applicant] has successfully completed all surface coal mining and reclamation activities” and “all reclamation requirements of [the statute] are fully met.”²⁶³ The meaning of this provision was disputed, along with the meaning of “toxic materials” that had to be properly disposed by SCCC,²⁶⁴ and the “toxic mine drainage” that SCCC was required to avoid.²⁶⁵

Musgrave argued that there was no causal relationship required between the permittee and waste at the site, which was disposed by Alcoa. However, the court disagreed because IDEM, not the DNR, had the duty to regulate the hazardous waste. The court noted that Alcoa continued to work with IDEM on monitoring the hazardous waste at the mine. Therefore, the references in I-SMCRA regarding “pollution” and “toxic materials” referred “to those materials that result from surface mining.”²⁶⁶ By its definition “[t]oxic mine drainage”²⁶⁷ referred to “water discharged as a result of mining operations,” which did not include the waste from Alcoa.²⁶⁸ The DNR assessed whether pollution or toxic materials resulting from mining were occurring or would impact the mine in the future, as required by I-SMCRA, and there was no genuine issue of material fact that the reclamation requirements of I-SMCRA were “satisfied.”²⁶⁹ If mining spoil was found to be “causing the spread of groundwater containing waste constituents, it will be the responsibility of IDEM . . . to investigate and, if necessary, hold those responsible for remediation of damage.”²⁷⁰

E. Six-Year Statute of Limitations Applies to Some ELA Claims

In *Peniel Group, Inc. v. Bannon*,²⁷¹ the Indiana Court of Appeals confronted the question of whether the six-year statute of limitation provided by Indiana Code section 34-11-2-7 applied to “an environmental legal action” (“ELA”)²⁷² claim.²⁷³ In that case, the plaintiff, the current owner and manager of real property, brought a suit based on levels of contamination that exceeded limits set by the state, thus requiring a clean-up.²⁷⁴ The plaintiff sued the prior owners and tenants of the parcel under the ELA, seeking damages for the costs of investigating, assessing, and remediating the site.²⁷⁵ The defendants claimed that the plaintiff’s claim was barred by the statute of limitations because it was a claim

263. IND. CODE § 14-34-6-13(3) (2013).

264. *See id.* § 14-34-10-2(b)(17).

265. *See id.* § 14-34-10-2(b)(13)(A).

266. *Musgrave*, 964 N.E.2d at 902.

267. *See* 312 IAC § 25-1-155.

268. *Musgrave*, 964 N.E.2d at 902.

269. *Id.* at 903.

270. *Id.*

271. 973 N.E.2d 575 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 323 (Ind. 2012).

272. IND. CODE § 13-30-9-2 (2013).

273. *Peniel Group, Inc.*, 973 N.E.2d at 578.

274. *Id.* at 576-77.

275. *Id.* at 578.

for damages against property subject to a six-year statute of limitations.²⁷⁶ The defendants argued that prior environmental studies performed by plaintiff's predecessors in interest, triggered the statute of limitations before plaintiff owned the property.²⁷⁷ In contrast, plaintiff argued that its ELA claim was a contribution action subject to the ten-year statute described in Indiana Code section 34-11-1-2.²⁷⁸

On appeal, the court held that the plaintiff's claim was time-barred.²⁷⁹ The court first noted that the ELA had no express statute of limitations.²⁸⁰ It disagreed with the plaintiff's argument that its ELA claim was a claim for contribution, because the ELA allowed "'any person' to sue to 'recover the reasonable costs of a removal or remedial action'" and did not limit actions to liable parties.²⁸¹ Consequently, the court applied the six-year statute of limitations for "property damage" found in Indiana Code section 34-11-2-7.²⁸² Next, the court found that the limitations period began to run "when a claimant knows, or in the exercise of ordinary diligence should have known of the injury," but no earlier than the when the ELA became effective.²⁸³ Under Indiana law, a plaintiff is "accountable for the time which ha[d] run against their predecessors in interest."²⁸⁴ In this case, prior owners had provided the plaintiffs with environmental studies demonstrating contamination at the time the property was purchased.²⁸⁵ Thus, because the plaintiffs' predecessors in interest knew of contamination at least six years before the action was filed, the present action was barred.²⁸⁶

It is important to note that *Bannon* has some significant limitations. The court of appeals's opinion cites, but does not discuss, Indiana Code section 34-11-2-11.5.²⁸⁷ Under this new provision, ELA claims filed after May 10, 2011 are subject to an express ten-year statute of limitations.²⁸⁸ Practitioners are also well-advised to consider the recent *Bernstein v. Bankert*²⁸⁹ decision, which

276. *Id.*

277. *Id.* at 579.

278. *Id.* at 579-80.

279. *Id.* at 579, 583.

280. *Id.* at 581.

281. *Id.* at 581-82 (quoting *Taylor Farm Ltd. Liab. Co. v. Viacom, Inc.*, 234 F. Supp. 2d 950 (S.D. Ind. 2002)).

282. *Id.*

283. *Id.* at 582-83 (quoting *Martin Oil Mktg. Ltd. v. Katziaris*, 908 N.E.2d 1183, 1187 (Ind. Ct. App. 2009)).

284. *Id.*

285. *Id.* at 577.

286. *Id.* at 579, 583.

287. *Id.* at 580 & n.4.

288. *Id.*

289. *Bernstein v. Bankert*, 702 F.3d 964, 985-87 (7th Cir. 2012) (applying ten-year statute of limitations because trustee was not filing ELA claim based on "property damage," but rather was seeking to recover costs of clean-up), *amended and superseded on reh'g*, Nos. 11-1501, 11-1523, 2013 WL 3927712 (7th Cir. July 31, 2013).

distinguishes *Bannon* and applies a ten-year statute of limitations to a pre-May 2011 ELA claim because the nature of the claim was cost-recovery, not property damage.²⁹⁰

VI. DEVELOPMENTS IN ENVIRONMENTAL INSURANCE LAW

A. Pollution Exclusions Are Still Ambiguous under Indiana Law (For Now)

In last year's Survey Article, we discussed the Indiana Court of Appeals's decision in *State Automobile Mutual Insurance Co. v. Flexdar, Inc. (Flexdar I)*,²⁹¹ which was affirmed by the Indiana Supreme Court during this Survey Period, holding that the language of a pollution exclusion in a commercial general liability policy was ambiguous.²⁹² This case involved a rubber stamp manufacturer that used trichloroethylene ("TCE") in its operations and sought coverage from its insurer after IDEM informed the company that it would be liable for the costs of remediating TCE contamination discovered on its property.²⁹³ The insurance policy issued by State Automobile Mutual Insurance Company ("State Auto") included an absolute pollution exclusion that purported to bar coverage for property damage or bodily injury arising out of a claim to clean up or respond to the effects of "pollutants[.]" which was very broadly defined.²⁹⁴ Examining Indiana precedent, the court entered summary judgment for the insured and held that the absolute pollution exclusion was ambiguous, and therefore had to "be construed in favor of coverage."²⁹⁵ The Indiana Court of Appeals affirmed.²⁹⁶

The Indiana Supreme Court's analysis began with an overview of key decisions where similar pollution exclusions were found to be ambiguous, including *American States Insurance Co. v. Kiger*, *Seymour Manufacturing Co. v. Commercial Union Insurance Co.*, and *Freidline v. Shelby Insurance Co.*²⁹⁷ Next, the court examined the broad definition of "pollutants[.]" concluding that "practically every substance would qualify as a 'pollutant' under this definition, rendering the exclusion meaningless."²⁹⁸ The court then compared Indiana's approach to that of jurisdictions that take either "a literal . . . [or] a situational approach" to pollution exclusions, noting that Indiana's approach has been to

290. *Id.*

291. 937 N.E.2d 1203 (Ind. Ct. App. 2010), *vacated*, *State Auto. Mut. Ins. Co. v. Flexdar, Inc. (Flexdar II)*, 964 N.E.2d 845 (Ind. 2012). For a discussion of *Flexdar I*, see Freedom S.N. Smith et al., *2010-2011 Environmental Law Survey*, 45 IND. L. REV. 1101, 1144-46 (2012).

292. *Flexdar II*, 964 N.E.2d at 846, 851.

293. *Id.* at 847.

294. *Id.* at 850.

295. *Id.* at 848.

296. *Id.*

297. *Id.* at 848-49 (citing 662 N.E.2d 945, 948-49 (Ind. 1996); 665 N.E.2d 891 (Ind. 1996); 774 N.E.2d 37, 40 (Ind. 2002)).

298. *Id.* at 850 (citing *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1216 (Cal. 2003)).

apply “basic contract principles” and holding that “the insurer can (and should) specify what falls within its pollution exclusion.”²⁹⁹

The court’s opinion suggests that endorsements issued in subsequent policies may be used to argue an ambiguity exists in an earlier, litigated insurance policy.³⁰⁰ While the Indiana Court of Appeals decision agreed with the trial court and held that such references were impermissible,³⁰¹ the court made explicit reference to a 2005 State Auto endorsement that was not at issue in the case.³⁰² The court noted that “[b]y more careful drafting [the insurer had] the ability to resolve any question of ambiguity.”³⁰³ By doing so, the court implicitly approved the use by an insured of an endorsement that is not at issue in the case to demonstrate ambiguities in policy language. The court’s opinion also suggests that pollution exclusions could be drafted in such a way as to be found unambiguous in future coverage disputes.

*B. Measures Taken to Prevent Combined Sewer Overflows
Are Not “Occurrences”*

In *City of Evansville v. United States Fidelity and Guaranty Co.*,³⁰⁴ the Indiana Court of Appeals held that preventative measures taken by a city in response to a federal complaint regarding its combined sewer overflow (“CSO”) problems was not a covered “occurrence” under the city’s insurance policies.³⁰⁵ The State of Indiana and United States sued the City of Evansville (“City”) due to CSO discharges and sought injunctive relief requiring the City to comply with the terms of its permits for CSOs, stop “causing or contributing to pollution[,]” mitigate prior environmental harm caused by the CSOs, and civil penalties.³⁰⁶ In trial court proceedings, several of the City’s insurers moved for summary judgment claiming that the relief sought by the state and federal governments was to “prevent pollution,” and not to “remediate past pollution.”³⁰⁷ The insurers relied primarily on a series of decisions issued in a dispute between Cinergy Corporation and its insurers.³⁰⁸ In *Cinergy Corp. v. Associated Electric & Gas Insurance Services, Inc.*,³⁰⁹ the Indiana Supreme Court determined that

299. *Id.* at 850-51 (internal quotation marks omitted).

300. *Id.* at 851-52.

301. *Flexdar I*, 937 N.E.2d 1203, 1207-08 (Ind. Ct. App. 2010), *vacated*, *Flexdar II*, 964 N.E.2d at 845.

302. *Flexdar II*, 964 N.E.2d at 852.

303. *Id.*

304. 965 N.E.2d 92 (Ind. Ct. App.), *trans. denied*, 971 N.E.2d 1215 (Ind. 2012).

305. *Id.* at 99-100.

306. *Id.* at 95-96.

307. *Id.* at 101.

308. *See Cinergy Corp. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 865 N.E.2d 571 (Ind. 2007); *Cinergy Corp. v. St. Paul Surplus Lines Ins.*, 915 N.E.2d 524 (Ind. Ct. App. 2009); *Cinergy Corp. v. St. Paul Surplus Lines Ins. Co.*, 873 N.E.2d 105 (Ind. Ct. App. 2007).

309. 865 N.E.2d at 571.

preventative measures to address future pollution were not a covered occurrence under general liability policies.³¹⁰ The trial court awarded summary judgment to the City's insurers because the improvements for which the City sought coverage was done to address CSOs in the future, rather than remediating past overflows.³¹¹ Therefore, under *Cinergy*, there was no occurrence, and the insurers had no duty to defend.³¹²

The appellate court agreed with the trial court, finding that the federal suit and the work the City proposed to undertake did "not qualify as an occurrence."³¹³ The City had not designated any evidence showing it was ordered to remediate any previous contamination caused by the CSOs.³¹⁴ While the City introduced evidence about a wetlands project that would help capture overflow, it did not present evidence that this work was remedial in nature.³¹⁵ The appellate court noted that the federal suit against the City sought relief that included a request that CSO contamination be remediated.³¹⁶ However, applying the reasoning from *Cinergy*, the court found that "the 'primary thrust' of the [federal suit] was a reduction of future emissions and pollution."³¹⁷

CONCLUSION

Recent decisions indicate that environmental litigation will likely continue to increase. Several EPA regulations having national impact were challenged, and some were overruled. Furthermore, the United States Supreme Court affirmed a private party's right to judicial review of an EPA compliance order. Finally, Indiana reaffirmed its stance as a leader in insurance cost recovery for environmental matters.

310. *Id.* at 577-82.

311. *City of Evansville*, 965 N.E.2d at 93-94, 103.

312. *Id.* at 97.

313. *Id.* at 99-103.

314. *Id.* at 101-02.

315. *Id.* at 101.

316. *Id.* at 98, 102.

317. *Id.* at 102-103 (quoting *Cinergy Corp. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 865 N.E.2d 571, 579 (Ind. 2007)).