THE
ENVIRONMENTAL COUNSELOR

OCTOBER 2010 | NUMBER 266

THE BIG (DATA) SPILL—PRINTOUTS OF DIGITAL FILES COULD BLANKET... WELL, THE GULF OF MEXICO**

By William W. Belt, Jr., Esq

William W. Belt Jr., is a shareholder in LeClairRyan and leader of the law firm's Richmond, Virginia-based discovery solutions practice. He has worked on major e-discovery projects as part of numerous mass tort and commercial litigation cases.

Nearly two decades ago, as a young lawyer working on the Exxon Valdez case, I walked into a warehouse filled with documents and sat at a table. A box of papers was placed in front of me, and it was

continued on page 2

LETTER FROM THE EDITOR

Dear Subscribers,

The October issue of *The Environmental Counselor* continues to include a special Updates section covering litigation news and proposed legislation related to the expansive oil spill in the Gulf of Mexico. The number of lawsuits filed against BP and Transocean has the potential for unprecedented quantities of discovery documents. William W. Belt, Jr., from LeClairRyan discusses discovery in the digital age and its application to the gulf oil spill lawsuits.

Beyond the oil spill, this month's issue includes an article by Jessica K. Ferrell of Marten Law on the Ninth Circuit's recent opinion on injunctive relief for environmental harms. Daphne W. Trotter and Brandon H. Barnes of McDermott Will & Emery address potential legislative changes to the Toxic Substances Control Act.

We thank the authors for continuing to provide our readers with the latest developments in environmental law.

Very truly yours,

Rowan C. Seidel

Attorney Editor

40818238

IN THIS ISSUE:

Letter from the Editor 1

The Big (Data) Spill—Printouts of Digital Files Could Blanket... Well, The Gulf of Mexico 1**

A "Mountain Range" of Data 2

Discovery in the Digital Age 3

A Complicated Disaster 3

Uncharted Waters 4

Ninth Circuit Reasserts Sliding Scale Injunction Standard, Gives Great Weight to Environmental Harms** 4

Legal Background 5

Factual Background 5

Analysis 5

Application of the "Sliding Scale" ... 6

Conclusion 6

TSCA Reform in The House & Senate: Extending EPA's REACH 7**

The Proposed Reforms.................... 8

Exceptions to Safety Standard Requirement 8

Conditions on Manufacture or Processing....................................... 8

Broad Data Gathering Authority 8

Availability of Administrative and Judicial Review 9

Public Availability of Information/Protection of Confidential Business Information 9

Open Issues 9

Gulf Oil Spill Updates 9

Updates 13

WEST®

my job to sift through that box in search of discoverable documents that could help my firm's client, a navigation and steering manufacturer, fend off accusations that the ship's steering mechanism had somehow caused the disastrous oil spill in Prince William Sound.

When I finished with that box, I knew there was a warehouse full of others ready to take its place. For a moment, I thought of Sisyphus, the figure from Greek mythology who was condemned to the endless loop of pushing a boulder up a mountain, only to watch it roll down again—over and over, for all eternity.

The Exxon Valdez disaster, which unfolded in a matter of hours March 24, 1989, was at the time the largest oil spill ever to occur in U.S. waters. Images of dead and dying salmon, otters, and seabirds outraged the nation, especially the thousands of Alaskans whose livelihoods were potentially threatened by the heavy sheen of oozing crude. Eventually, the pollutants fouled hundreds of miles of coastline and thousands of square miles of ocean. Like the 11 million gallons of oil that spewed from the Exxon Valdez itself, the volume of paperwork in the case was truly daunting in scope and scale.

Difficult as it might be to fathom, however, the discovery challenges in the Exxon Valdez litigation, which literally involved multiple warehouses full of documents, will look like child's play when weighed against what is sure to come in the lawsuits over the BP-Deepwater Horizon catastrophe. The BP case is more complex, yes. However, the real reason this case will involve such a massive amount of information boils down to two words: electronic discovery.

In the Exxon Valdez case, Captain Joseph Hazelwood never sent a text message about whether or how much he had been drinking prior to the disaster. There was no instant-messaging back and forth between Exxon executives expressing concern about the ship's sonar navigation system, or an e-mail trail related to the overall safety of the iceberg-choked route. The third mate in charge of the Exxon Valdez's wheelhouse never "tweeted" his friends to complain of fatigue and excessive workload. No camera webcast the oil spilling from the tanker.

In the Deepwater Horizon case, however, the potential for such digital smoking guns looms large. More to the point, the imperative to preserve and produce potentially relevant documents, whether they exist as ones and zeros on a server or as printed words on a page, is now the indisputable law of the land. And that means dealing with volumes of data so large that even conceiving of them can be difficult.

A "MOUNTAIN RANGE" OF DATA

For some perspective, a gigabyte of data amounts to roughly a pickup truck full of books. Imagine sorting through 1,000 pickup trucks full of books. That is a terabyte. Now imagine a vast expanse, perhaps somewhere out in the Mojave Desert, in which a million pickup trucks full of books cover a parking lot that stretches as far as the eye can see in all directions. That would be a petabyte of data.

In speaking with colleagues from across the country on matters related to electronic discovery, I periodically hear of cases that actually approach this mountainous—a mountain range is more like it—volume of information. The four major lawsuits related to the Enron debacle, for example, are said to have involved 250 terabytes of data. By comparison, the entire print collection at the Library of Congress, the federal institution charged with sustaining and preserving "a universal collection of knowledge and creativity for future generations," stands at about 19 terabytes.

Exactly how massive the discovery challenges will be in litigation sparked by the BP disaster is anyone's guess, of course. However, given the complexities, including the magnitude and duration of the spill, the regulatory and criminal questions, the finger-pointing and recriminations already occurring between the companies and shareholders involved, and the number and kind of potential plaintiffs from across the Gulf Coast, it would not be surprising if the volume of data in this case reached the mind-bending petabyte threshold.

Of course, reviewing this many files and documents one by one would be impossible. Attorneys working on the BP case will be forced to rely on methodologies typically associated more with government antiterror and counterintelligence efforts than with mass torts or commercial litigation. Sophisticated data-mining technologies will enable them to search not just for keywords, but for relevant concepts and patterns, in much the same way the CIA and FBI now use database dragnets to ferret

© 2010 Thomson Reuters. All rights reserved.

The Environmental Counselor (ISSN 1041-3863) is published monthly by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Subscription price $663.00 annually. POSTMASTER: Send address changes to The Environmental Counselor, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

For authorization to photocopy, please contact the Copyright Clearance Center at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400; fax (978) 646-8600 or West's Copyright Services at 610 Opperman Drive, Eagan, MN 55123, fax (651)687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

out potential spies and terror suspects. Leveraging this technology will significantly narrow the scope of what attorneys and criminal investigators will have to actually read and study as they pursue their cases.

However, the effort will also require a level of discernment that only human intelligence can provide. People, not machines, will have to narrow the search parameters by identifying key players involved in all the relevant or potentially relevant events that occurred before, during and after the April 20 explosion of the Deepwater Horizon oil rig. That explosion killed 11 platform workers and injured 17 others, and the subsequent leak of BP's Macondo well gushed 4.9 million barrels of oil into the Gulf of Mexico before BP was successful in plugging the well August 6.

DISCOVERY IN THE DIGITAL AGE

In theory, no attorney would consciously overlook a potential smoking gun just because the document in question happened to be on a hard drive. Faced with the prospect of sifting through an avalanche of e-mails, spreadsheets, text messages, and other electronic files, however, many lawyers tried at first to pretend their profession could remain a proverbial "paper chase." Often they would talk to each other at the beginning of a case and agree to keep electronic discovery off the table. There was a huge problem with this strategy: 95% of the information involved in a case today will likely exist in a digital format. E-mail alone is virtually omnipresent in the American workforce. Evidence, in other words, is electronic. Also, ignoring evidence—whatever its form—is nothing short of professional misconduct.

Naturally, it has taken some time for legislatures and courts to adjust to the new demands of the digital age. Many states have moved to explicitly eliminate the false "option" of ignoring electronically stored information. For example, California's Civil Discovery Act, which Governor Arnold Schwarzenegger signed into law in June 2009, requires attorneys to pay full attention to the digital dimensions of the cases they try.

At the federal level, meanwhile, a number of key decisions have reinforced the imperative to preserve and produce digital documents. The groundbreaking e-discovery case *Zubulake v. UBS Warburg*, which was heard between 2003 and 2005 in the U.S. District Court for the Southern District of New York, established definitive requirements for the way attorneys must handle electronic files. *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212 (S.D. N.Y. 2003); *Zubulake v. UBS Warburg LLC,* 229 F.R.D. 422 (S.D. N.Y. 2004). Judge Shira Scheindlin presided over the now-famous case, a discrimination lawsuit in which the defendant essentially sought to avoid producing relevant e-mails.

In the wake of that decision, several amendments to the Federal Rules of Civil Procedure went into effect that further cemented the place of electronic discovery in American jurisprudence. These guidelines have heavily influenced state measures like California's Civil Discovery Act.

More recently, Judge Scheindlin issued a lengthy decision detailing, among other things, the necessity of issuing written "hold" notices to employees whenever a company becomes involved in litigation or has reason to believe a claim will be brought. *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities,* LLC, 685 F. Supp. 2d 456 (S.D. N.Y. 2010). The intent of such notices is to make sure relevant documents, including e-mail and other digital data, are preserved.

The basic message of these cases is that electronic discovery (e-discovery) is part of litigation and cannot be ignored. By now, this should be clear enough to everyone. However, exactly how litigants should handle potentially discoverable electronic documents is by no means black and white. In recent decisions, both Judge Scheindlin and Judge Lee H. Rosenthal (of the Southern District of Texas) have wrestled with some of the thorny questions related to proper behavior on e-discovery. Many other important questions have yet to be definitively answered. This legal uncertainty is likely to complicate the BP case in manifold ways.

A COMPLICATED DISASTER

Devastating as the Exxon Valdez disaster was, the basic facts of the accident itself were relatively straightforward: The ship ran aground on Bligh Reef, and its hull was torn open in an ill-fated attempt to back up and return to open sea. The Valdez spill was a one-time event that unfolded in a matter of hours, whereas the BP disaster dragged on for months.

In working on the Exxon case, attorneys were essentially dealing with the past tense. With the exception of damages, it was a backward-looking exercise. In the BP case, the possibility that key players might have gone "offline" in order to hide information that threatened to expose the company or themselves to civil or criminal liability will be far greater.

After all, real-time communications during the agonizingly long spill event were constant and ongoing. They involved a stunning array of public and private officials, experts, and stakeholders. A vast amount of this information will clearly be deemed potentially relevant to any ensuing investigation and/or litigation. Of critical importance, moreover, is the tragic fact that 11 people lost their lives in the explosion. The stakes in the BP case are simply higher.

Given all of this, the extent to which officials at BP and rig owner Transocean took immediate steps to preserve digital information will be under a microscope as the investigations and lawsuits commence. It is a safe bet that BP executives listened carefully to litigation experts in their in-house legal department. They know full well that their electronic communications will be under close scrutiny. These days, in fact, employees at nearly every level have a decent grasp of what data will be stored on company servers and desktop hard drives. Many know how to use software settings to get around these protocols.

Did company officials, during the three-plus months that oil was spewing into the Gulf, check the "turn journaling off" option on their instant messaging software? Did an official who, prior to the accident, sent and received an average of, say, 65 text messages per week suddenly stop sending and receiving texts once the accident occurred? These kinds of questions will preoccupy investigators and attorneys, but the implications of such behavior would be unclear. Under current e-discovery guidelines, there is an explicit responsibility to preserve information that is under the company's custody and control. However, is "going dark" with electronic communications the same as actively shredding printed documents? Such issues could well be front and center in this case.

UNCHARTED WATERS

Indeed, even the limits of "custody and control" are unclear. In the case of BP, how far does this responsibility extend? While digital messages and documents exchanged between BP and one of its subsidiaries would clearly be included, Transocean—a major player in the event—was, in fact, a contractor. The exact terms of the contractual relationship between these parties could play a role in determining the limits of e-discovery in the case. Another gray area is just how far companies must go in preserving information that tends to exist only temporarily.

When an employee uses a company-owned computer to visit a Web site, that unique address will be stored in random access memory that can be erased, either by the employee or someone in the IT department. Employee Internet searches could be relevant to a case, but judges are only now beginning to examine what information falls under a court's jurisdiction. After all, there is no requirement that each of us, upon walking into our cubes or offices, turn on an audio recorder to preserve all our oral communications with coworkers. There are limits to what constitutes discoverable information. Where those limits reside is of major concern to corporations and their lawyers.

When it comes to preservation of data, absolute positions, such as asking an IT department to stop overwriting all backup tapes and to cancel all automatic data-deletion protocols for e-mail, might actually be technically impossible. In some cases, it could clog servers and overwhelm the system.

Also, there are content-related questions. Given the rise of social networking for both personal and business uses, the line between public and private communication is becoming blurrier by the day. Employees' "personal" posts on Facebook, Twitter, or Web sites like YouTube are sometimes carried out using company-owned equipment, leaving a data footprint on the company's servers and desktop hard drives. Should this information be included in a metadata search conducted during the course of litigation?

While the Federal Rules of Civil Procedure now provide some guidance on electronic discovery, the very first one of those rules is the directive to resolve cases in a timely fashion. These potentially conflicting imperatives will force attorneys working on the BP case to make some exceedingly difficult decisions. They must expedite the process by narrowing the volume of information to be reviewed, but in so doing they might well miss critical information that could have been important to the case. If they were to err too far on the side of caution, however, the litigation and appeals could drag on for an eternity. (Sisyphus, anyone?)

The last appeals in the Exxon Valdez case—litigation set in motion by an accident that occurred a full 21 years ago—were finally settled in 2009. Let's say Twitter (or some rough equivalent) still exists 40 years from now. It makes me wonder whether a future attorney will send her friends the following tweet: "OMG! They just settled the BP case—and it's 2050!"

ENDNOTE

** This article appeared in the August 18, 2010, Westlaw Journal Environmental, 31 No. 2 Westlaw Journal Environmental 1. Copyright © 2010 Thomson Reuters.

NINTH CIRCUIT REASSERTS SLIDING SCALE INJUNCTION STANDARD, GIVES GREAT WEIGHT TO ENVIRONMENTAL HARMS**

By Jessica K. Ferrell

Jessica K. Ferrell practices environmental and natural resource litigation at Marten Law Group. She can be contacted by telephone at 206-292-2636, or by e-mail at jferrell@martenlaw.com.

A Ninth Circuit panel has reasserted the viability of a "sliding scale" approach to injunctive relief, even though the Circuit had appeared to discard that test following the Supreme Court's 2008 ruling in *Winter v. Natural Resources Defense Council*.[1] The *Winter* decision, which reversed a Ninth Circuit ruling that applied principles of the sliding scale approach,[2] reaffirmed a four-part test for injunctive relief, including a demonstrated likelihood of success on the merits. However, in *Alliance for the Wild Rockies v. Cottrell*,[3] the Ninth Circuit concluded last month that the Supreme Court had not addressed the question of whether various flexible approaches to injunctive relief survived *Winter*. The panel held that preliminary injunctive relief is still allowed on a weaker showing on the merits, so long as the balance of hardships imposed by an injunction "tips sharply" toward the plaintiffs. The court also put great weight on what some courts might consider relatively modest claims of environmental harm, suggesting an ongoing sympathy to preliminary injunctive relief in environmental cases.

LEGAL BACKGROUND

In 2008 and 2010, the United States Supreme Court reiterated its four-part test for injunctive relief in environmental cases in *Winter and Monsanto Co. v. Geertson Seed Farms* (addressing permanent injunctive relief).[4] The standard requires a showing of: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities between the parties favors the movant; and (4) that the public interest would not be disserved.[5] In both opinions, the Court reversed holdings by the Ninth Circuit, which had applied standards that the Court found overly lenient (i.e., requiring only a possibility rather than a likelihood of irreparable harm). See S. Brandt-Erichsen, Supreme Court Rules on Preliminary Injunction Standard in Environmental Cases, Marten Law News (Nov. 13, 2008); S. Jones, Supreme Court Reasserts Standard for Injunctive Relief in NEPA Cases, Marten Law News (June 28, 2010).

In *Alliance*, the Ninth Circuit applied an arguably different and lower standard, holding that the sliding-scale "serious questions" test still applies. Under this approach, a court may issue a preliminary injunction by balancing the four *Winter* factors, such that "a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits … where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor.'"[6] The court seems to equate raising "serious questions" with demonstrating probability of success on the merits—even though in the pre-*Winter* formulation of the test, "serious questions" equated to the lesser standard of "possibility of success on the merits." In fact, it was issuance of an injunction on the basis of only a possibility of success that was the basis for the Supreme Court's reversal in *Winter*. Under *Alliance*, the bar for irreparable injury also appears lower than that set forth by the Supreme Court, and courts in the Ninth Circuit can grant the extraordinary remedy of injunctive relief should they decide that one factor in the test outweighs another and equity favors the plaintiffs. If the opinion stands, injunctive relief will (continue to) be an easier remedy for environmental plaintiffs to obtain in the Ninth Circuit than in some other circuits.

FACTUAL BACKGROUND

In 2007, the Rat Creek Wildfire burned about 27,000 acres in the Beaverhead-Deerlodge National Forest in Montana. In 2009, the Forest Service made an "Emergency Situation Determination for the Rat Creek Salvage Project" (the "emergency determination") under which salvage logging of between 1,600 and 27,000 acres of burned trees was allowed, without being subject to the Forest Service's administrative appeals process. According to the Forest Service, the purpose of the logging is to recover and use timber from trees that are dead or dying as a result of the fire, reforest the harvested areas with healthy trees, supply wood to the forest products industry, and prevent transmission of dwarf mistletoe by cutting those trees infested with it.[7] The Forest Service determined that the logging project would not significantly affect the quality of the human environment within the meaning of the National Environmental Protection Act, so an Environmental Impact Statement (an "EIS") was not required.

Plaintiffs, a coalition of environmental advocacy groups, filed suit in federal district court, alleging that the Forest Service's emergency determination violated the Appeals Reform Act (the "ARA"), the National Forest Management Act, and NEPA. Plaintiffs sought a preliminary injunction. The district court, applying *Winter*, found that plaintiffs did "not show a likelihood of success on the merits, nor that irreparable injury is likely in the absence of an injunction," so denied the request. Plaintiffs filed an interlocutory appeal.

ANALYSIS

VIABILITY OF "SLIDING SCALE" INJUNCTIVE RELIEF TEST AFTER *WINTER*

Considering plaintiffs' appeal in *Alliance*, the Ninth Circuit acknowledged the test for injunctive relief that the Supreme Court reiterated in *Winter*. It also acknowl-

© 2010 Thomson Reuters

edged that *Winter* requires plaintiffs to "establish that irreparable harm is *likely*, not just possible"—which is all the Ninth Circuit required before *Winter*—"in order to obtain a preliminary injunction."[8] Yet it held that the sliding scale approach, under which a court can grant a request for injunctive relief if a strong showing of likely success on the merits outweighs a weak showing of irreparable harm, still applies.

First, the court noted that the majority in *Winter* did not "explicitly discuss the continuing validity of the 'sliding scale' approach to preliminary injunctions employed by th[e Ninth Circuit] and others." Judge William Fletcher also noted that Justice Ginsberg mentioned in her dissent to *Winter* that the "Court has never rejected [the sliding scale] formulation and I do not believe it does so today."[9]

Judge Fletcher acknowledged that, although the Ninth Circuit had not addressed the viability of the sliding scale approach after *Winter*, it has acknowledged in other opinions that, "[t]o the extent that our cases have suggested a lesser standard [than that articulated in *Winter*], they are no longer controlling, or even viable."[10] Three other circuits have addressed the question of whether their versions of the sliding scale test survived *Winter*. The Fourth Circuit held that it did not.[11] According to the Ninth Circuit's interpretation, the Seventh and Second Circuits held that it did.

In 2009, the Seventh Circuit acknowledged that, while irreparable injury alone is not sufficient to support equitable relief ("there also must be a plausible claim on the merits, and the injunction must do more good than harm"), "[h]ow strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief."[12] In an opinion containing a more explicit retention of the sliding scale test, the Second Circuit wrote that *Winter* and related jurisprudence "have not undermined [the Supreme Court's] approval of the more flexible approach …. None of the … cases comments at all, much less negatively, upon the application of a preliminary injunction standard that softens a strict 'likelihood' [of success] requirement in cases that warrant it."[13]

In the Ninth Circuit, plaintiffs must still satisfy the *Winter* test, but "a preliminary injunction is appropriate when a plaintiff demonstrates… that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor."[14]

APPLICATION OF THE "SLIDING SCALE"

Applying the *Winter* factors in combination with the sliding scale approach, the Ninth Circuit found that injunctive relief was appropriate in *Alliance*. First, it considered whether the environmental groups' members would suffer irreparable harm if prevented from using and enjoying 1,652 acres of forest. The Forest Service noted that the logged areas covered only about 6% of the acreage damage by fire.[15] The Ninth Circuit found plaintiffs' showing sufficient to establish likely irreparable harm, emphasizing that "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."[16]

With respect to plaintiffs' likelihood of success on the merits, the Ninth Circuit determined that, because the Forest Service considered the local economy in making its emergency designation for logging—a factor that the ARA does not allow it to consider in that context—plaintiffs raised "serious questions on the merits of its claim" regarding the validity of the emergency determination.

Balancing the hardships, the Ninth Circuit found that plaintiffs would suffer more harm than defendants, as logging will result in "work and recreational opportunities [being] … irreparably lost," and plaintiffs were denied their right to seek an administrative remedy through the Forest Service process due to the emergency determination. The Ninth Circuit found that the Forest Service's potential loss of between $16,000 and $70,000 in revenue, as well as its potential inability to mitigate the mistletoe infestation, did not weigh as heavily.

Finally, the Ninth Circuit weighed the public interest in (a) between 18 and 26 temporary jobs for one year and associated benefits to the local economy against (b) "preserving nature and avoiding irreparable environmental injury."[17] The court determined that the scales tipped sharply toward the latter interest.

Accordingly, the Ninth Circuit reversed the district court and remanded the case with direction to enjoin the logging project.

CONCLUSION

In *Winter* and related cases, the Supreme Court explicitly rejected the Ninth Circuit's lower standards for finding irreparable harm in the context of injunctive relief requests, requiring that harm to be likely, not just possible. In *Alliance*, the Ninth Circuit purports to follow Winter. Whether it actually does is arguable. Regardless, the court has set a low bar to establish irreparable harm, possibly improving plaintiffs' prospects for obtaining injunctive relief in environmental cases.

ENDNOTES

** © 2009 Marten Law Group. All rights reserved. Reprinted with permission. Marten Law Group pro-

vides the material and information contained in this article for informational purposes only. This article is not a substitute for legal advice. Please contact your legal counsel for specific advice and/or information.

1. *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 380-82 172 L. Ed. 2d 249 (2008).
2. See *Natural Resources Defense Council, Inc. v. Winter,* 518 F.3d 658, 677 (9th Cir. 2008), cert. granted, 128 S. Ct. 2964, 171 L. Ed. 2d 883 (2008) and rev'd, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) ("A district court may grant a preliminary injunction if one of two sets of criteria are met. Under the 'traditional' criteria, a plaintiff must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). Alternatively, a court may grant the injunction if the plaintiff demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.") (internal citations, quotations omitted).
3. No. 9-35756, *Alliance for Wild Rockies v. Cottrell,* 2010 WL 2926463 (9th Cir. 2010).
4. *Monsanto Co. v. Geertson Seed Farms,* 130 S. Ct. 2743 (2010).
5. *Winter*, 129 S.Ct. at 380-82.
6. *Alliance*, 2010 WL 2926463 at *4 (quoting *Clear Channel Outdoor Inc., a Delaware Corp. v. City of Los Angeles,* 340 F.3d 810, 813 (9th Cir. 2003)).
7. *Alliance*, 2010 WL 2926463 at *1.
8. *Alliance*, 2010 WL 2926463 at *3 (emphasis in original, citing *Winter*, 129 S.Ct. at 374).
9. *Alliance*, 2010 WL 2926463 at *4 (quoting *Winter*, 129 S.Ct. at 392 (Ginsberg, J., dissenting).
10. *Alliance*, 2010 WL 2926463 at *4 (quoting *American Trucking Associations, Inc. v. City of Los Angeles,* 559 F.3d 1046, 1052 (9th Cir. 2009), rev'd in part on other grounds, *American Trucking Ass'ns, Inc. v. City of Los Angeles,* 596 F.3d 602 (9th Cir. 2010)).
11. *Real Truth About Obama, Inc. v. Federal Election Com'n*, 575 F.3d 342, 347 (4th Cir. 2009), cert. granted, judgment vacated, 130 S. Ct. 2371, 176 L. Ed. 2d 764 (2010) and adhered to in part, 607 F.3d 355 (4th Cir. 2010) (holding that the circuit's prior test, which permitted "flexible interplay" among the elements, "may no longer be applied" after *Winter*), vacated on other grounds, 130 S. Ct. 2371 (2010).
12. *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.,* 582 F.3d 721, 725 (7th Cir. 2009) (internal citations omitted).
13. *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.,* 598 F.3d 30, 35 (2d Cir. 2010).
14. *Alliance*, 2010 WL 2926463 at *7 (internal citations omitted).
15. The Beaverhead-Deerlodge National Forest, the largest of the national forests in Montana, covers 3.35 million acres; thus, the burned area that Plaintiffs would be prevented from enjoying covers less than 0.05% of that forest. See USFS, Beaverhead-Deerlodge National Forest (visited August 4, 2010).
16. *Alliance*, 2010 WL 2926463 at *10 (citing *The Lands Council v. McNair,* 537 F.3d 981 (9th Cir. 2008) at 1004).
17. *Alliance*, 2010 WL 2926463 at *11.

TSCA REFORM IN THE HOUSE & SENATE: EXTENDING EPA'S REACH**

By Daphne W. Trotter and Brandon H. Barnes

Daphne W. Trotter is a partner at the Washington, D.C., office of McDermott Will & Emery. She may be reached at dtrotter@mwe.com. Brandon H. Barnes is an associate at the firm's Washington, D.C., office. He may be reached at bbarnes@mwe.com.

The Toxic Substances Control Act (TSCA), which authorizes the U.S. Environmental Protection Agency (EPA) to regulate the safety of chemicals distributed in commerce, is the only major environmental statute that has not been reauthorized since original enactment in 1976—but change may be coming. Bills recently introduced in Congress to amend TSCA could have far-reaching effects on the chemical industry, potentially subjecting a broad range of substances manufactured or processed in or imported into, the United States to a program like REACH (Registration, Evaluation, Authorisation, and Restriction of Chemicals), instituted in the European Union.

On July 22, 2010, Representatives Rush (D-IL), Waxman (D-CA), Castor (D-FL), DeGette (D-CO), Schakowsky (D-IL), and Sarbanes (D-MD) introduced the Toxic Chemicals Safety Act of 2010. In many respects it resembles the bill introduced by Senator Lautenberg (D-NJ) as the Safe Chemicals Act of 2010 on April 15, 2010. Both bills would significantly change chemical regulation in the United States.

Regulators and certain members of industry appear to agree that amendment of the statute may be desirable, given the evolution of both the chemical industry and public awareness of health and safety issues, over the last 30+ years. Under the Obama administration, EPA has identified assuring the safety of chemicals as one of its top four priorities. Federal legislation appears possible in 2011 or 2012.

THE PROPOSED REFORMS

SAFETY DETERMINATIONS

The centerpiece of the proposed legislation in both houses of Congress is an EPA determination that every chemical substance (possibly including those in mixtures and articles) allowed in commerce meets an established safety standard. TSCA broadly defines "chemical substance" as any "organic or inorganic substance of a particular molecular identity." Thus substances such as metals and metal alloys can be viewed as "chemical substances" under its provisions. In what would be a significant shift in the law, the bills place the burden on industry to show that the chemical substances they manufacture, process and/or import meet such a safety standard. Under this approach, the manufacturing, processing, and importation of chemicals that do not meet the safety standard would be prohibited.

While the parameters of the final "safety standard" are not clearly identified, EPA would appear to have broad authority in formulating the standard. Both bills suggest that the regulated industry would have to establish a reasonable certainty that no harm will result to the general population or to vulnerable populations such as children, pregnant women, the elderly, and those who work with chemical substances, as a result of aggregate exposures to the substance in question.

The bills treat safety determinations for "existing" chemicals (e.g., chemicals that are on the TSCA inventory already) and "new" chemicals (and new uses of existing chemicals) differently. For existing chemicals, EPA would establish a priority list of 300 "existing" chemical substances for which safety determinations must be made. EPA must supplement the list with additional existing chemicals as others are removed until all chemical substances in commerce have been subject to a safety determination.

Under the Senate bill, this list must be established within 18 months of enactment. The House bill establishes a priority list of 19 chemicals including Bisphenol A, formaldehyde, n-hexane, hexavalent chromium, methylene chloride, trichloroethylene, and vinyl chloride, among others, and would require EPA to establish a complete list of 300 within 12 months.

The Senate bill generally would require manufacturers to make an initial safety determination submission within 30 months after a chemical is placed on the priority list, and for EPA to make a safety determination within 180 days of that submission. The House bill generally would require EPA to make a safety determination within 30 months of a chemical's placement on the list. However, it would require a safety determination for those substances on the list at the time of enactment within 18 months thereafter.

EXCEPTIONS TO SAFETY STANDARD REQUIREMENT

Both bills would prohibit manufacture or processing of a new chemical unless a premanufacture notice and other supporting information, including certain health and safety data, is submitted. With certain exceptions, it would also be necessary for EPA to determine that the substance has met the safety standard. The Senate bill generally would require EPA to make a safety determination within 180 days of submittal of the premanufacture notice, whereas the House bill would give EPA up to nine months to make such a determination.

Both bills contain EPA authority to grant exceptions to the premanufacturing notice procedure, and to manufacturing prohibitions or conditions that have been placed on production as described below. Potential bases for granting exceptions include, among others, specific exceptions based on national security interests, the potential that a substance's unavailability would significantly disrupt the national economy, and critical or essential uses.

CONDITIONS ON MANUFACTURE OR PROCESSING

The bills would provide EPA with broad authority to impose conditions through its safety determination on manufacturing and processing in order to ensure a chemical meets the safety standard. The bills would expressly authorize EPA to impose the following:

- Limits on quantity manufactured, processed, or distributed in commerce;
- Limits on concentration for a particular use;
- Limits on quantity distributed in commerce for particular use;
- Warning requirements;
- Record-keeping requirements;
- Conditions on manner of commercial use;
- Requirements regulating disposal; and
- Mandate to develop risk reduction plan

BROAD DATA GATHERING AUTHORITY

Both bills would require the submittal of significant information to EPA and provide EPA with additional data gathering authority and responsibility. They provide that:

- EPA must define a "minimum data set" that industry has to submit for each chemical, including a broad range of information on substance characteristics, hazard, exposure, and use of chemical substances and mixtures.

© 2010 Thomson Reuters

- EPA has broader authority to require, by rule or order, additional testing of chemicals necessary to implement the law.
- Manufacturers must identify the chemicals that they manufacture or process, as well as their manufacturing facilities, known health and safety studies associated with each chemical, and other information relating to health and safety effects.

AVAILABILITY OF ADMINISTRATIVE AND JUDICIAL REVIEW

The bills provide broad opportunities for seeking review of EPA safety determinations and other EPA decisions. Any person can petition the EPA for a redetermination of whether a chemical meets the safety standard. If new information raises a credible question as to whether the chemical substance continues to meet the safety standard, EPA will have to make a redetermination of compliance.

The Senate bill would also limit the opportunity for judicial review of some EPA decisions. The bill specifically precludes judicial review of (1) EPA decisions to place a chemical substance on the priority list; and (2) an EPA determination that a manufacturer or processor has not met the burden of proof that a chemical substance meets the safety standard.

PUBLIC AVAILABILITY OF INFORMATION/PROTECTION OF CONFIDENTIAL BUSINESS INFORMATION

Under the proposed bills, health, and safety information submitted to EPA will be made available on the internet. EPA must establish an electronic database and make available "significant information" that it receives. Industry will still be able to claim protection for Confidential Business Information (CBI). Although health and safety information is not necessarily protected from disclosure under the current law, the bills shift the emphasis of the law's data disclosure provisions to make more clear the preference to make health and safety studies available to the public. Furthermore, the House bill gives EPA the authority to impose penalties on manufacturers who improperly designate information as CBI.

OPEN ISSUES

The end product of these TSCA reform efforts remains uncertain. It is clear, however, that the House and Senate bills raise important issues that could have significant consequences for industry if the legislation ultimately passes. Such issues include:

- What is the appropriate safety standard;
- Who should have the burden of proving a chemical is safe or unsafe;
- To what extent do obligations imposed under the safety standard extend down the manufacturing and processing chain;
- To what extent should EPA be able to regulate the manufacture and processing of chemical substances through a safety determination;
- Which EPA decisions will be subject to judicial or administrative review;
- To what extent can manufacturers/processors work together to develop data, share data or use the data of others, and to what extent would shared efforts raise antitrust concerns;
- Will trade secrets and confidential information be compromised; and
- How will the program be funded.

ENDNOTE

** © 2010 McDermott Will & Emery. All rights reserved. Reprinted with permission.

GULF OIL SPILL UPDATES

ALABAMA SUES BP, TRANSOCEAN OVER GULF OIL SPILL

State v. BP

Note: The following appeared in the August 25 2010, Westlaw Journal Express Environmental, 2010 WL 3307504. Copyright © 2010 Thomson Reuters.

Alabama is the first state to file environmental lawsuits against BP and several other companies over this summer's oil spill, asserting the defendants' "negligence" and "reckless behavior" caused the disaster. *State ex rel. King v. BP PLC,* No. 2:10-690, *complaint filed* (M.D. Ala. Aug. 12, 2010)*; State ex rel. King v. Transocean Ltd. et al*., No. 2:10-691, *complaint filed* (M.D. Ala. Aug. 12, 2010).

Attorney General Troy King filed two lawsuits in the U.S. District Court for the Middle District of Alabama, alleging the defendants are liable under the Oil Pollution Act, 33 U.S.C.A. § 2701, for damages to the state's natural resources and to real and personal property owned by the state and its citizens.

The suits seek unspecified economic, compensatory, and punitive damages.

One of the complaints names BP and its affiliates as defendants. The other names several companies involved in the well or drilling process: Transocean Ltd., Halliburton Energy Services, Anadarko Petroleum Corp., Mitsui & Co., and Cameron International Corp.

The suits claim the defendants' actions, including the following, led to the spill:

- Refusing to install an acoustically activated, remote-control shutoff valve.
- Using defective materials.
- Failing to note or fix "dangerous and recurring problems" or to institute protective measures.
- Accelerating drilling operations to improve revenue streams.
- Using dangerous substances in the oil cleanup.

In an August 13 statement King said he disagrees with those who say the suits are premature.

"As an Alabama lawyer, I say that, if anything, based on BP's broken promises, their history of saying one thing and doing another—and now, new information that they have been secretly working to gain a legal advantage–further delay can only further damage our people," the statement said.

According to King, BP is retaining all the best expert witnesses so they will be unable to testify against the company. Further, the company is selling assets, perhaps to divest itself of assets that American courts could reach to satisfy a judgment.

Additionally, BP is developing a report to assist in its argument that the company was not "grossly negligent," which would limit its liability, King said.

OIL SPILL MDL JUDGE ISSUES PRETRIAL ORDER, SETS HEARING

In re Oil Spill by the Oil Rig Deepwater Horizon

Note: The following appeared in the August 20 2010, Westlaw Journal Express Environmental, 2010 WL 3258658. Copyright © 2010 Thomson Reuters.

The New Orleans federal judge overseeing pretrial discovery in the litigation stemming from the Deepwater Horizon oil disaster will hold a conference set September 17 to set proposed trial dates and discuss other "housekeeping" duties. *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, No. 10-02179, *pretrial order entered* (E.D. La. Aug. 10, 2010).

U.S. District Judge Carl Barbier of the Eastern District of Louisiana said on August 10 that, until he names liaison counsel for the consolidated actions, he is appointing James Roy of Domengeaux Wright Roy & Edwards in Lafayette, Louisiana, and Stephen Herman of Herman Herman Katz & Cotlar in New Orleans interim liaison counsel for the plaintiffs.

Don Haycraft of Liskow & Lewis in New Orleans, one of the attorneys representing BP in the litigation, will serve as interim liaison counsel for the defendants.

More than 300 lawsuits have been filed since the April 20 BP oil well explosion and resulting spill. Most of the cases were filed in federal courts in Texas, Florida, Louisiana, Mississippi, and Alabama, the states whose shorelines were closest to the spill and where the fishing and tourism industries are suffering.

On August 10, the Judicial Panel on Multidistrict Litigation transferred 77 spill-related lawsuits from five states to Judge Barbier's court. More than 200 potential tag-along cases could follow.

BP, which leased the Deepwater Horizon rig from Transocean Ltd., is one of the companies being sued, but the list of the defendants is growing

Judge Barbier also named additional interim liaison counsel for the defense August 12:

- Kerry Miller of Frilot LLC in New Orleans, counsel for Transocean.
- Donald Godwin of Godwin Ronquillo PC in Dallas, counsel for Halliburton Energy Services Inc., which did cement work on the well and well cap.
- Phil Wittmann of Stone Pigman Walther Wittmann LLC, counsel for Cameron International Corp., which supplied the device that was designed to prevent a blowout at the well site.
- Deborah Kuchler of Kuchler Polk Schell Weiner & Richeson in New Orleans, counsel for Anadarko Petroleum, which owned a 25% interest in the BP well, and MOEX Offshore 2007 LLC, which owned a 10% interest.

Judge Barbier said he intends to appoint a plaintiffs steering committee to conduct and coordinate the discovery stage of the litigation. Applications must be filed with the Eastern District of Louisiana clerk's office by September 27.

The judge will also consider defense recommendations for membership on the defendants steering committee.

OTHER PROVISIONS OF THE ORDER

Judge Barbier said he expects counsel to familiarize themselves with the Manual for Complex Litigation (Fourth) before the September 17 conference.

A Web site will be created for the oil spill MDL and will be accessible by going to the Eastern District of Louisiana's Web site and clicking on the link for MDL cases.

 © 2010 Thomson Reuters

Finally, Judge Barbier stressed that all parties and their counsel have a duty to preserve evidence that may be relevant to the litigation. The duty extends to documents and data, including calendars, diaries, electronic messages, voice mail, e-mail, hard drives, films, and charts.

FIFTH CIRCUIT WILL NOT BAR JUDGE FROM HEARING OIL SPILL SUITS

In re Cameron Int'l Corp.

Note: The following appeared in the August 18, 2010, Westlaw Journal Environmental, 31 No. 2 Westlaw Journal Environmental 2. Copyright © 2010 Thomson Reuters.

The Fifth U.S. Circuit Court of Appeals has refused to order a federal judge to recuse himself from hearing dozens of lawsuits over the BP oil disaster even though he owned debt instruments issued by two of the defendant companies. *In re Cameron Intern. Corp.*, 2010 WL 2930736 (5th Cir. 2010).

The panel agreed with U.S. District Judge Carl Barbier of the Eastern District of Louisiana, who said ownership of debt instruments is different than ownership of corporate stock because the debt instruments do not equate to an ownership interest in the company itself.

After the April 20 explosion of the Deepwater Horizon rig and resulting oil leak in the Gulf of Mexico, hundreds of lawsuits were filed alleging personal injury and environmental and economic damages in various jurisdictions, including the Eastern District of Louisiana.

Nearly all the cases name BP, rig owner Transocean, Cameron International Corp., which manufactured the oil well blowout preventer, and cement contractor Halliburton Energy Services Inc. as defendants.

Dozens of the cases were assigned to Judge Barbier in April and May. At the time, he owned corporate bonds issued by Halliburton International Co. and Transocean.

The judge said he was not aware the bonds were in his portfolio and instructed his broker to sell them on June 2.

He said that even though he was not required to do so by law, divestment was best to avoid any appearance of bias.

After he sold the debt instruments, the defendants argued he still should recuse himself since they were "financial instruments" under the terms of the recusal statute, 28 U.S.C.A. § 455 (b).

Judge Barbier denied the defendants' motion in an oral opinion.

Citing the Code of Conduct for U.S. Judges, he reasoned that bond ownership does not imply any ownership interest in the company issuing them.

The defendants petitioned the Fifth Circuit for a writ of *mandamus* to direct Judge Barbier to recuse himself from any cases related to the oil spill.

The appeals panel, however, determined the judge did not err in concluding the bonds did not qualify as financial interests under the federal recusal statute.

On August 10, the Judicial Panel on Multidistrict Litigation centralized 77 lawsuits in Judge Barbier's court. More than 200 potential tag-along cases could follow.

GULF FISHERMAN SUES BP OVER HEALTH EFFECTS FROM OIL LEAK

Carlisle v. BP

Note: The following appeared in the August 18, 2010, Westlaw Journal Environmental, 31 No. 2 Westlaw Journal Environmental 3. Copyright © 2010 Thomson Reuters.

An Alabama recreational fisherman is charging in a state court lawsuit that he suffered serious personal injuries from exposure to waters polluted by the Deepwater Horizon oil spill. *Carlisle v. BP P.L.C. et al.*, No. 10-0943, *complaint filed* (Ala. Cir. Ct., Madison County June 30, 2010).

Obie Carlisle filed the lawsuit June 30 in the Mobile County Circuit Court against BP and 15 other defendants involved in the oil disaster.

The lawsuit is noteworthy because it involves a private citizen engaged in recreational activity rather than occupational exposure, according a statement released by the law firm representing Carlisle, Motley Rice in Mt. Pleasant, South Carolina.

The complaint says Carlisle was flounder fishing by wading in the waters of Mobile Bay, Alabama, May 28 and 29, more than a month after the BP spill began. There were no signs posted warning of the dangers of exposure from oil and toxins contained in the water, the suit says.

Afterward, Carlisle experienced painful rashes, nosebleeds, and shortness of breath, according to the complaint.

"For Obie Carlisle, BP not only damaged his health, causing serious injury; it took away his greatest joy, which was to fish in the gulf's once-fertile waters," Attorney Ron Motley said in the statement.

The defendants "cut corners on safety, ignored federal and state laws and regulations, failed to prepare for the disaster, and then, after the explosion, tried to cover up the severity of the spill and downplay its catastrophic impact," the lawsuit says.

The complaint says that since the BP well's blowout preventer failed and the wellhead pipe ruptured April 20, unprecedented amounts of raw crude oil and chemical dispersants have contaminated the waters of the Gulf of Mexico and the state of Alabama.

The oil contains benzene, toluene, and polyaromatic hydrocarbons, all of which are known carcinogens, the plaintiff says.

The complaint cites the June 15 congressional testimony of Dr. Lisa Kaplowitz of the U.S. Department of Health and Human Services concerning possible health problems after the BP oil disaster.

Kaplowitz said exposure to crude oil and dispersants may cause health problems for many years to come as oil can remain toxic in the environment.

The complaint includes claims of negligence, strict liability for abnormally dangerous and ultra-hazardous activities, and strict liability for product defect.

The lawsuit is seeking compensatory and punitive damages.

HOUSE PASSES BILL OVERHAULING OFFSHORE DRILLING

Note: The following appeared in the August 18, 2010, Westlaw Journal Environmental, 31 No. 2 Westlaw Journal Environmental 9. Copyright © 2010 Thomson Reuters.

The House of Representatives passed omnibus legislation July 30 in response to the BP oil disaster that would eliminate the current $75 million cap on liability related to oil spills.

The so-called CLEAR bill—the Consolidated Land, Energy and Aquatic Resources Act of 2010, H.R. 3534—passed by a vote of 209-193.

The legislation incorporates some provisions of two other House bills involving the Deepwater Horizon spill, the Blowout Prevention Act, H.R. 5626, and the Oil Spill Accountability and Environmental Protection Act of 2010, H.R. 5629.

The key elements of the Blowout Prevention Act that have been incorporated into the 222-page bill include a provision ensuring that oil companies would be held to a higher level of accountability after a spill.

To get a drilling permit, an oil company CEO would have to certify that the well design is safe, that the blowout preventer has redundant systems for all scenarios and failure modes, and that the company can promptly control and stop a blowout if the preventer and other control measures fail.

OTHER PROVISIONS OF THE CLEAR BILL

The provisions from the Oil Spill Accountability and Environmental Protection Act incorporated into the CLEAR bill include the amendment of the Oil Pollution Act, 33 U.S.C.A. § 2701, to eliminate the $75 million liability cap for offshore facilities.

This provision would apply to Deepwater Horizon oil spill claims brought before the date of the bill's enactment so that all liable parties, including BP, will be responsible for 100% of the cleanup costs and damages to third parties.

Another provision would require that all vessels engaged in drilling activities in the U.S. exclusive economic zone (up to 220 miles from the coast) be U.S.-flagged vessels owned by American citizens. All offshore facilities must be built in the U.S., the legislation says.

This would ensure that the vessel would be subject to federal safety regulations, U.S. citizens would be employed on the vessel, and U.S. taxes would be paid on the operations of the vessel and by the personnel on the ship.

Under the CLEAR bill, the presidential commission reviewing the BP oil spill would have subpoena power to call witnesses and gather information. The House passed similar legislation, H.R. 5481, June 23.

The bill would also revamp federal regulation of oil and gas operations by creating three agencies that would split the responsibilities of granting leases, collecting royalty fees, and overseeing operations.

The Environmental Protection Agency would be required to establish new procedures for the use of chemical oil dispersants to ensure their safety in the environment.

The legislation as passed also includes an amendment by U.S. Representative Charlie Melancon, D-La., to lift the current moratorium on deepwater drilling in the Gulf of Mexico. The amendment would only lift the drilling ban for companies that meet the new safety requirements set by the Interior Department July 12.

Commenting on the legislation, Florida Republican John Mica, the ranking minority leader on the Transportation and Infrastructure Committee, said in a statement that the bill "overtaxes, over-regulates and costs American jobs."

SENATE BILL WOULD REQUIRE TESTING OF DISPERSANTS

Note: The following appeared in the August 18, 2010, Westlaw Journal Environmental, 31 No. 2 Westlaw Journal Environmental 10. Copyright © 2010 Thomson Reuters.

 © 2010 Thomson Reuters

A bill that would amend the Clean Water Act to require testing of chemical dispersants used in oil spills was introduced July 28 by U.S. Senator Frank Lautenberg, D-N.J.

The Safe Dispersants Act, § 3661, cosponsored by Maryland Democrats Benjamin Cardin and Barbara Mikulski, would require better testing, approval and disclosure of the health effects of dispersants.

The bill would also require the Environmental Protection Agency to conduct a study to determine whether additional regulations are needed.

"In the past three months, BP has dumped more than 1 million gallons of chemical dispersants into the Gulf," Lautenberg said in a statement. "Because these chemicals have not been fully tested, relief workers, families and wildlife up and down the coastline have been put in the middle of a dangerous science experiment."

Chemical dispersants applied in the Gulf were not required to undergo long-term health or environmental testing, Lautenberg said.

Also, the exact ingredient concentrations of the dispersants have not been made available to the public.

The bill was written to address the limitations of existing law, according to Lautenberg.

Current law allows the EPA to approve dispersants without receiving any specific safety data.

The use of dispersants has been the subject of lawsuits filed in the aftermath of the BP oil leak in the Gulf.

Some have been filed by environmental groups under the Freedom of Information Act, 5 U.S.C.A. § 552, seeking to discover the ingredients in the dispersants used by BP and any studies that measure health effects on wildlife.

Other lawsuits have been filed by cleanup workers who say they are suffering health problems from being exposed to dispersants.

NOAA REOPENS 5,000 SQUARE MILES OF GULF FISHING AREA

Note: The following appeared in the August 18 2010, Westlaw Journal Express Environmental, 2010 WL 3220330. Copyright © 2010 Thomson Reuters.

The National Oceanic and Atmospheric Administration (NOAA) announced on August 10 that it has reopened 5,144 square miles of the Gulf of Mexico to commercial and recreational fishing.

However, more than 52,000 square miles of Gulf waters remain closed to fishing.

The area to be reopened is off the Florida Panhandle and, at its closest point, is about 115 miles northeast of the site of the BP well that began gushing oil April 20. Although the company said on August 5 that it is cementing operations on the well are complete, the drilling of a relief well to seal it off completely is still underway.

NOAA said data has shown no oil in the reopened area since July 3, and fish caught in the area and tested have shown no signs of contamination.

The reopening was announced after consultation with the Food and Drug Administration (FDA).

"Consumer safety is NOAA's primary concern, which is why we developed rigorous safety standards in conjunction with the FDA and the Gulf states to ensure that seafood is safe in the reopened area," NOAA administrator Jane Lubchenco said in a statement.

The agency will continue to take samples for testing from the newly reopened area. Additionally, it has begun dockside sampling to test fish caught throughout the Gulf by commercial fishermen.

WHERE'S THE OIL NOW

NOAA released its estimates of what has happened to the 4.9 million barrels of spilled oil on August 4.

It said the vast majority of the oil has evaporated or been burned, skimmed, recovered from the wellhead, or dispersed.

The agency said a third of the oil was captured or mitigated through response operations such as skimming and burning.

Twenty-five percent of the oil naturally evaporated or dissolved, and 16% was dispersed naturally into microscopic droplets.

The remainder, about 26%, is on or just below the surface as residue and weathered tarballs; has washed ashore or been collected from the shore; or is buried in sand and sediments.

"The estimates do not make conclusions about the long-term impacts of oil on the Gulf," the agency's statement said.

UPDATES

OIL DRILLING

JUDGE HALTS OIL LEASE WORK IN CHUKCHI SEA

Native Vill. of Point Hope v. Salazar

Note: The following appeared in the August 18, 2010, Westlaw Journal Environmental, 31 No. 2 Westlaw Journal Environmental 4. Copyright © 2010 Thomson Reuters.

An Alaska federal judge has halted all activity under an oil-and-gas lease the U.S. government granted to Shell and others in the Chukchi Sea, ruling the Interior Department failed to study the environmental impacts of drilling before awarding the leases. *Native Village of Point Hope v. Salazar,* 2010 WL 2943120 (D. Alaska 2010), order clarified, 2010 WL 3025163 (D. Alaska 2010).

Judge Ralph Beistline of the U.S. District Court for the District of Alaska did not vacate the leases but ordered the Interior Department and the Bureau of Ocean Energy Management, Regulation and Enforcement (formerly the Minerals Management Service (MMS)) to analyze the environmental impact of natural-gas development in the Chukchi Sea.

The leases allow the development of natural gas, but that operation was omitted from the environmental impact statement.

The judge found MMS also violated the National Environmental Policy Act, 42 U.S.C.A. § 4321, by failing to determine whether missing information in the EIS was relevant or essential.

"Many of the statements [in the EIS] acknowledge missing information about the Chukchi Sea environment and the potential effects of the lease sale on wildlife and subsistence," Judge Beistline said.

The statements reflect a lack of information about the species and habitat in the Chukchi Sea, and that arbitrary failure by MMS warranted remand, he said.

In 2008, the Native Village of Point Hope, an Inupiat Eskimo whaling community, teamed with several environmental groups in challenging the lease sale in federal court.

The groups alleged the final environmental impact statement violated NEPA and the Administrative Procedure Act, 5 U.S.C.A. § 706.

According to the legal group Earthjustice, which represented the plaintiffs, MMS approved the leases without adequately analyzing the potential impacts of the sale.

The Chukchi Sea is home to endangered polar bears, bowhead whales, and other species of fish and wildlife, the group says.

Any oil spill in the area would have a devastating impact since no technology exists to clean up an oil spill in the Arctic waters, according to Earthjustice.

"The past few months have taught us all a painful lesson about the risks of offshore drilling," Sierra Club Executive Director Michael Brune said in a statement.

"A spill would be the nail in the coffin for arctic communities and wildlife like polar bears, which are already struggling to survive," he said.

MICHIGAN OIL SPILL

FAMILIES AFFECTED BY MICHIGAN OIL SPILL FILE CLASS ACTION

Watts v. Enbridge Inc.

Note: The following appeared in the August 25 2010, Westlaw Journal Express Environmental, 2010 WL 3307506. Copyright © 2010 Thomson Reuters.

Three families living in close proximity to bodies of water polluted by a leaking oil pipe have filed a class-action lawsuit against the pipe's owner, Enbridge Inc. of Canada. *Watts et al. v. Enbridge Inc. et al.*, No. 1:10-753, *complaint filed* (W.D. Mich. Aug. 2, 2010).

The suit filed in the U.S. District Court for the Western District of Michigan names as defendants Enbridge and subsidiaries Enbridge U.S., Enbridge Energy Co., Enbridge Energy L.P., Enbridge Pipelines Lakehead L.L.C., and Enbridge Energy Management L.L.C.

The plaintiffs are Cheryl and Darwin Watts, Rhonda and Gerald Stepp, and Ginny and Steven Lewis. They allege trespass, nuisance, negligence, violations of Michigan's Natural Resources Act and Environmental Protection Act, and strict liability for abnormally dangerous activity.

According to the suits, Enbridge owns and maintains a 30-inch oil pipeline that since July 25 has leaked crude oil into Talmadge Creek, which flows directly into the Kalamazoo River in southern Michigan.

The plaintiffs estimate more than 800,000 gallons of oil have escaped so far, "contaminating the waters, coating and killing wildlife, and creating a toxic stench in an area spreading over the more than 30 miles."

The plaintiffs all own creek or riverfront property that has been contaminated with oil stemming from recent flooding of Talmadge Creek and the Kalamazoo River. This has affected their quality of life and, in some cases, business operations, the suits say.

The plaintiffs cite "news reports" that say the Department of Transportation, which oversees the pipeline, repeatedly warned the Enbridge defendants to address issues regarding the pipeline's safety and performance. Further, the Environmental Protection Agency reportedly has called Enbridge's long-term cleanup strategy "deficient."

Finally, the spillage could spur the release of contained contaminants that existed on or near the riverbed due to prior pollutant releases, the plaintiffs say.

They note many residents already have relocated.

The proposed class includes "all persons impacted by the oil spill who have suffered damage to property, loss of

enjoyment of their property, damage to business, or loss of the use of their property and homes."

The district court has subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C.A. § 1332, because diversity of citizenship exists and class members' claims in the aggregate exceed $5 million, the plaintiffs assert.

CLEAN AIR ACT

$10 BILLION LAWSUIT FILED OVER BP'S TEXAS CITY REFINERY

Fontenot v. BP Prods. N. Am.

Note: The following appeared in the August 20 2010, Westlaw Journal Express Environmental, 2010 WL 3258660. Copyright © 2010 Thomson Reuters.

BP is facing a class-action lawsuit over an equipment malfunction at its Texas City refinery that allegedly released 500,000 pounds of pollutants into the air between April 6 and May 15. *Fontenot et al. v. BP Products North America Inc.*, No. 10-00295, *complaint filed* (S.D. Tex. Aug. 3, 2010).

The suit, filed on August 3 in the U.S. District Court for the Southern District of Texas, charges BP Products North America did not inform Texas City officials of the scale of the release until it was over.

Hamilton Fontenot and other named plaintiffs representing the class are seeking compensatory damages, as well as punitive damages in excess of $10 billion.

The complaint estimates the proposed class will number in the tens of thousands.

The class will consist of a subclass of people who worked at the refinery between April 6 and May 16 and a subclass of people who lived or worked within the Texas City limits during the release.

The named plaintiffs allege the release occurred because of a failure in the refinery's "ultra-cracker" unit, which converts petroleum products into high-octane gasoline. The hydrogen compressor in the unit is responsible for trapping noxious chemicals. When it went offline, BP sent the gases to a flare, the suit alleges.

The pollutants released from the refinery include benzene, carbon monoxide, propane, and other toxic chemicals, according to the complaint.

The Texas City refinery, capable of producing more than 460,000 barrels per day, is the third largest petroleum refinery in the U.S. and the "largest single polluter" in the country, the complaint says.

"The refinery has a long history of violations that have resulted in nearly 20 deaths since 2005, hundreds of injuries, hundreds of toxic releases, and numerous environmental and safety violations," the plaintiffs say.

In March 2005, a series of fires and explosions killed 15 workers and injured more than 1,000 people.

Investigators found the explosion was caused by organizational and safety deficiencies at all levels, the suit says.

Since the 2005 explosion, four more people have died at the refinery, the suit says.

Also, in a four-year period, there were more than 500 leaks, spills, and releases at the refinery, especially benzene releases, according to the complaint.

In late 2009 the Occupational Safety and Health Administration (OSHA) cited BP for more than 700 issues, many of which had been outstanding for more than four years, the suit says.

Last year OSHA levied a fine of more than $87 million based on BP's conduct, the largest in the agency's history.

As for the recent discharge of pollutants, the complaint says, tens of thousands were injured and their long-term health was jeopardized after they were exposed to pollutants while working at the refinery or simply by living or working in Texas City.

The suit alleges negligence, common-law assault and battery, and private nuisance.

AIR POLLUTION (PUBLIC NUISANCE)

TVA WINS IN APPEAL OF $1 BILLION AIR POLLUTION RULING

North Carolina v. TVA

Note: The following appeared in the August 18, 2010, Westlaw Journal Environmental, 31 No. 2 Westlaw Journal Environmental 5. Copyright © 2010 Thomson Reuters.

The Fourth U.S. Circuit Court of Appeals has ruled a lower court's reasoning was flawed in determining Tennessee Valley Authority (TVA) power plant emissions in two other states constituted a public nuisance in North Carolina. *North Carolina, ex rel. Cooper v. Tennessee Valley Authority,* 2010 WL 2891572 (4th Cir. 2010).

Reversing an injunction, the panel said that if the ruling by U.S. District Judge Lacy Thornburg of the Western District of North Carolina were to stand, it would result in a "balkanization of clean-air regulations and a confused patchwork of standards to the determent of industry and the environment alike."

North Carolina sued the TVA in 2006, claiming air pollution emitted by the utility's plants crossed the state's

border in unreasonable amounts, creating a public nuisance. The complaint said the facilities harmed human health and the state's ecosystem and increased financial burdens on North Carolina.

Western North Carolina is home to multiple parks, including Great Smoky Mountains National Park and Chimney Rock State Park, plus attractions such as the Appalachian Trail, Blue Ridge Parkway, and Biltmore Estate.

The state sought an injunction requiring the TVA to install air-pollution-control equipment and to remedy the current harm to public health and the environment.

The TVA said it had already begun to reduce the emissions from its facilities and denied that particles enter North Carolina in unreasonable amounts.

Judge Thornburg granted the state's injunction request concerning four power plants located within 100 miles of North Carolina: John Sevier, Bull Run and Kingston in Tennessee, and Widows Creek in Alabama.

She ordered the plants to install and maintain scrubbers and "selective catalytic reduction" devices, or SCRs.

Scrubbers use a chemical process to remove sulfur dioxide from the flue gas in electricity-generating units. SCRs convert nitrogen oxide in the flue gas into molecular nitrogen and water.

Both scrubbers and SCRs also remove a significant amount of mercury from a smokestack plume, the judge said.

Judge Thornburg said the TVA must install all remaining equipment by the end of 2013 and maintain and operate the SCRs and scrubbers year-round. She estimated the installations will cost the utility just more than $1 billion.

Finally, the judge established caps for nitrogen oxide and sulfur dioxide emissions from each electricity-generating unit once all SCRs and scrubbers are in place.

TVA appealed, and the Fourth Circuit reversed.

The panel said Judge Thornburg's ruling compromised principles of federalism by applying North Carolina law to TVA plants located in Alabama and Tennessee.

North Carolina's seeking a public nuisance injunction was not an appropriate course to guarantee clean air for its citizens, the appeals court held.

The state could sue the TVA under the Clean Air Act, 42 U.S.C.A. § 740, if it believes the utility is not complying with its permits under the statute, the panel noted.

The Fourth Circuit directed Judge Thornburg on remand to dismiss the lawsuit against the TVA.

SUPERFUND

"OWNER/OPERATOR" STATUS UNDER CERCLA ATTACHES WITH CLEANUP, NINTH CIRCUIT SAYS

Cal. Dep't of Toxic Substances Control v. Hearthside Residential Corp.

Note: The following appeared in the August 18, 2010, Westlaw Journal Environmental, 31 No. 2 Westlaw Journal Environmental 6. Copyright © 2010 Thomson Reuters.

In a case of first impression, the Ninth U.S. Circuit Court of Appeals has ruled that "owner and operator" status under the Superfund law is determined at the time that cleanup costs are incurred, not at a later date when a government agency sues to recoup those costs. *California Dept. of Toxic Substances Control v. Hearthside Residential Corp.*, 2010 WL 2853762 (9th Cir. 2010).

Plaintiff Hearthside Residential Corp. had argued that it was not the "owner and operator" of a contaminated property under the law at the time the state of California filed a lawsuit seeking reimbursement.

Under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9601, the "owner and operator" is primarily responsible for cleanup of contaminated sites.

According to the opinion, Hearthside bought an undeveloped tract of wetlands known as the Fieldstone property in Huntington Beach, California, in 1999. The property was adjacent to several residential parcels that Hearthside did not own.

When the company purchased the Fieldstone property, it knew it was contaminated with PCBs, the opinion says.

In 2002 Hearthside entered into a consent order with the California Department of Toxic Substances Control in which it agreed to clean up the PCB contamination on the property.

At the same time, the state determined that an adjacent residential site also was contaminated with PCBs, which it alleged had come from the Fieldstone property.

Although the state considered Hearthside responsible for investigating and cleaning up the residential site in addition to the Fieldstone property, Hearthside disagreed and limited its cleanup to its own property. The state then undertook the residential site cleanup, completing it in 2003.

In 2005, shortly after the state certified that the Fieldstone property cleanup was complete, Hearthside sold it to the California State Lands Commission.

In 2006, the state sued Hearthside in the U.S. District Court for the Central District of California, seeking reim-

 © 2010 Thomson Reuters

bursement for the residential site cleanup. It asserted that Hearthside was responsible because the company owned the Fieldstone property, which was the source of the residential site contamination, at the time the state cleaned up the residential site.

Hearthside responded that "owner" status was determined at the time the recovery suit was filed—not at the time cleanup costs were incurred—and that the company was not responsible for the residential site cleanup costs because it sold the Fieldstone property before the state filed suit.

The court found that Hearthside was an "owner and operator" of the Fieldstone property, but noted the "dearth of meaningful or controlling case law" on the question of when "owner and operator" status attached.

The parties jointly requested that the question be certified for immediate appeal to the Ninth Circuit.

The three-judge panel agreed with the lower court that the purposes of CERCLA support a holding that "owner" status is determined at the time a response-recovery claim accrues, not at the time the lawsuit is initiated.

CLEAN WATER ACT

MARYLAND FEDERAL JUDGE ALLOWS CWA CLAIMS AGAINST PERDUE

Assateague Coastkeeper v. Hudson Farm

Note: The following appeared in the August 18, 2010, Westlaw Journal Environmental, 31 No. 2 Westlaw Journal Environmental 8. Copyright © 2010 Thomson Reuters.

A federal judge in Maryland has ruled that an environmental group may proceed with allegations that Perdue Farms contributed to Clean Water Act violations at a poultry farm. *Assateague Coastkeeper v. Alan and Kristin Hudson Farm,* 2010 WL 2924661 (D. Md. 2010).

Perdue and the farm's owners failed to convince Senior U.S. District Judge William M. Nickerson of the District of Maryland to dismiss the suit for failure to provide sufficient notice and specify necessary facts to state a claim.

The judge denied the defendants' motion to dismiss on those grounds but agreed to dismiss three plaintiffs from the case, leaving Waterkeeper Alliance as the only plaintiff.

According to the memorandum opinion, the plaintiffs sent a notice letter to Hudson Farm and Perdue last December that said Plaintiff Kathy Phillips had sampled water flowing from the farm on five separate occasions. The samples purportedly indicated that the water contained pollutants, including fecal coliform and E. coli bacteria, that discharged into the Pocomoke River.

The letter specified the dates of the alleged discharges and informed Perdue and the Hudson Farm of the groups' intent to sue under provisions of the Clean Water Act, 33 U.S.C.A. § 1251, if the violations were not corrected.

Phillips, Waterkeeper Alliance, Assateague Coastkeeper, and the Assateague Coastal Trust filed suit March 1 after Phillips tested the water several times in January and February and again found high levels of pollutants, the opinion says.

According to the complaint, Hudson Farm and Perdue violated § 1311(a) of the Clean Water Act, which prohibits pollutant discharges from a "point source" into navigable waters of the United States in the absence of a National Pollution Discharge Elimination System (NPDES) permit issued by the Environmental Protection Agency.

Under the NPDES program, Hudson and other farms that are "concentrated animal feeding operations" are point sources under the CWA, the opinion says.

The lawsuit contends that Perdue is liable for the pollution because it owns Hudson Farm's chickens and controls many aspects of its production, including supplying feed and equipment.

Perdue and Hudson Farm filed a motion to dismiss the suit March 29, arguing that the plaintiffs did not meet notice requirements for citizen suits brought under the Clean Water Act (CWA) because they identified only one source of the pollution and otherwise made "broad" allegations of discharges from unspecified locations at the farm.

The defendants also alleged that the environmental groups failed to state a claim on which relief can be granted under Federal Rule of Civil Procedure 12(b) and did not prove the existence of an "ongoing violation" at the farm.

Judge Nickerson disagreed, finding the plaintiffs' notice met the statutory obligation to identify the point source and the dates of the alleged illegal discharges.

"Here, plaintiffs' notice identified the point source as the Hudson Farm, which defendants do not dispute is a concentrated animal feeding operation under the CWA. Thus, no further description of the location of the violation in the notice is necessary," he said.

However, he granted the defendants' request to remove Assateague Coastkeeper, Assateague Coastal Trust and Phillips from the suit because they were not properly identified in the notice letter.

Judge Nickerson also rejected Perdue's contention that it should be dismissed from the suit because it is an "integrator" at the farm and not required to obtain

an NPDES discharge permit. Integrators are large processing and wholesaling companies, like Perdue, that contract with many small farmers to raise food products under their specifications and control.

Numerous federal courts have previously held that the Clean Water Act imposes liability on both the party that actually performed the work and the party that exercised control over performance of the work, the judge said.

Noting that an integrator's liability is determined by its level of control over its contractors' chicken operations, the judge said Waterkeeper Alliance's lawsuit makes a plausible claim that Perdue may be responsible for the alleged pollution.

RCRA

ENGINE PARTS MAKER'S SALE OF USED SOLVENT VIOLATED RCRA

Howmet Corp. v. EPA

Note: The following appeared in the August 25 2010, Westlaw Journal Express Environmental, 2010 WL 3307505. Copyright © 2010 Thomson Reuters.

With one dissent, a panel of the District of Columbia U.S. Circuit Court of Appeals has ruled that a manufacturer of turbine engine parts violated the Resource Conservation and Recovery Act (RCRA) when it shipped used solvent to a fertilizer maker without first obtaining a permit. *Howmet Corp. v. E.P.A.*, 2010 WL 3063262 (D.C. Cir. 2010).

Howmet Corp. filed suit under the Administrative Procedure Act, challenging penalties levied against it by the Environmental Protection Agency under RCRA, 42 U.S.C.A. § 321.

According to the opinion, Howmet, which manufactured casings for aircraft turbines, used liquid potassium hydroxide as a cleaning agent. It then shipped the used solvent to Royster-Clark Inc., a fertilizer manufacturer, for use in its products.

The EPA learned of the sales and fined Howmet, saying the solvent qualified as "spent material" under RCRA and was subject to hazardous-waste regulations.

U.S. District Judge Emmet G. Sullivan of the District of Columbia granted summary judgment to the EPA.

Howmet appealed, arguing that the solvent did not have a single "purpose" as defined by RCRA and so could be used as both a solvent and a fertilizer ingredient without qualifying as a spent material.

The appeals court rejected that argument and affirmed the lower court's ruling.

Judge Janice Rogers Brown, writing for the one majority, held that even though the word "purpose" as used in RCRA was ambiguous, the law included the phrase "purpose for which it was produced" in its definition of "spent material."

A solvent used to make fertilizer after it had been used to clean metal castings was exactly the type of product that the EPA sought to regulate as "spent material," she wrote. Furthermore, Howmet had fair notice of the way in which the EPA was interpreting the phrase "spent material" because it was described in the agency's guidance manual, the judge said.

Judge Brett Kavanaugh dissented, finding that the EPA's interpretation of "purpose" as only the purpose for which it was produced was "flatly inconsistent" with the law.

"As a matter of plain English, the purposes for which a material is produced are not limited to how the material is initially used by a purchaser," he said.

ECONOMIC-LOSS DOCTRINE

ECONOMIC-LOSS DOCTRINE BARS GAS STATION'S RECOVERY OF CLEANUP COSTS

GCM Air Group v. Chevron USA

Note: The following appeared in the August 11 2010, Westlaw Journal Express Environmental, 2010 WL 3119617. Copyright © 2010 Thomson Reuters.

The economic-loss doctrine bars economic recovery for a property owner whose land was contaminated through its use as a Chevron USA service station, the Ninth U.S. Circuit Court of Appeals has determined. *GCM Air Group, LLC v. Chevron U.S.A., Inc.*, 2010 WL 2781874 (9th Cir. 2010).

Property owner GCM Air Group argued Chevron USA failed to meet its contractual obligations to clean up the Lake Tahoe site after its underground storage tanks leaked gasoline into the surrounding soil.

GCM said it was unable to sell or rent the property because of environmental concerns.

According to the opinion, GCM first filed suit against Chevron in the U.S. District Court for the District of Nevada, alleging negligence and trespass. The company claimed Chevron was negligent because it improperly installed monitoring equipment, failed to create a cost-effective and comprehensive cleanup plan, and never obtained a "no further action" letter from environmental regulators.

In the separate trespass claim, GCM contended leaked gasoline contaminated a neighboring property it owned upon which a restaurant was situated.

The district court awarded summary judgment to Chevron on all claims, including its request for attorneys' fees.

GCM appealed to the Ninth Circuit, which agreed with the district court that the economic-loss doctrine applies. The doctrine can be invoked to bar tort claims that amount to contract failures, the panel said.

Chevron's cleanup efforts met the terms of its leasing and other contractual agreements with GCM, the court explained.

Citing *Terracon Consultants Western, Inc. v. Mandalay Resort Group,* 206 P.3d 81 (Nev. 2009), Ninth Circuit noted the Nevada Supreme Court has sharply delineated the boundary between contract law and tort law in applying the economic-loss doctrine.

The appeals court also cited *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865 (9th Cir. 2007), in which it held the economic-loss doctrine bars tort claims amounting to "nothing more than a failure to perform a promise contained in a contract."

However, the panel resurrected GMC's trespass claim, finding fact issues as to whether a trespass occurred under state law. Because it overruled the district court on this issue, it also said the award of attorney fees to Chevron must be reconsidered.

The court remanded the case for further proceedings.

© 2010 Thomson Reuters