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## BORDER INFRASTRUCTURE

## Trump border wall project survives California challenge

By Michael Nordskog

A San Diego federal judge criticized last year by President Donald Trump has tossed suits by the state of California and environmental groups challenging the government's construction of a border wall ordered by the president.

***In re Border Infrastructure Environmental Litigation, No. 17-cv-1215, 2018 WL 1071702 (S.D. Cal. Feb. 27, 2018).***

U.S. District Judge Gonzalo P. Curiel of the Southern District of California said the Illegal Immigration Reform and Immigrant Responsibility Act authorizes the government to bypass environmental laws that would be applied to other projects.

After Judge Curiel's ruling last year in an unrelated case involving Trump University, the president

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REUTERS/Mike Blake

One of President Donald Trump's eight border wall prototypes is pictured here along U.S.- Mexico border near San Diego, California.

## ENFORCEMENT

## Cracks in glassmaker's civil rights suit merit dismissal, Oregon says

By Meera Gajjar

State and county officials in Oregon say a \$30 million lawsuit filed by stained glass manufacturer Bullseye Glass Co. for alleged disparate enforcement of air pollution laws fails to show the government violated the company's right to due process.

***Bullseye Glass Co. v. Brown et al., No. 17-cv-1970, state defendants' motion to dismiss filed, 2018 WL 1046316 (D. Or. Feb. 16, 2018).***

***Bullseye Glass Co. v. Brown et al., No. 17-cv-1970, county defendant's motion to dismiss filed, 2018 WL 1046321 (D. Or. Feb. 16, 2018).***

In separate motions to dismiss filed in the U.S. District Court for the District of Oregon, the Multnomah County Health Department and

state officials, including Gov. Kate Brown, say the goodwill allegedly harmed by the government's enforcement action against Bullseye does not constitute a protected property interest under federal or state law.

Bullseye's Dec. 12 complaint alleges the government's "unprecedented" enforcement action amounted to a violation and conspiracy

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## Federal Circuit reinstates patent suit over coal emissions technology

By **Conor O'Brien**

An air protection technology company can pursue a lawsuit alleging a competitor and 21 coal refinery operators infringed a patent for a method to remove the toxic pollutant mercury from power plant emissions, a federal appeals court has ruled.

***Nalco Co. v. Chem-Mod LLC et al., No. 17-1036, 2018 WL 1055851 (Fed. Cir. Feb. 27, 2018).***

A three-judge panel of the U.S. Court of Appeals for the Federal Circuit overturned a district court's dismissal of claims that Chem-Mod LLC and the refinery operators infringed a patent licensed exclusively by the plaintiff, Nalco Co.

The panel's unanimous opinion said the defendants' arguments for dismissal in the U.S. District Court for the Northern District of Illinois relied on factual findings that could not be made at the pleading stage before discovery occurred.

Nalco licenses U.S. Patent No. 6,808,692, which covers a method of injecting a molecule known as a halide precursor into coal combustion flue gas, preferably while the gas is in the furnace.

The halide precursor reacts with heat to create halides, usually molecular chlorine or bromine. The halides in turn react with the mercury to form solid particles that can be filtered from the flue more easily, according to the opinion.

The halide precursors are necessary because halides are corrosive and cannot be injected into flue gas on their own, the opinion said.

### COMPLAINTS REJECTED

Nalco filed a complaint in the District Court against Chem-Mod in April 2014 and filed a first amended complaint that July.

The first amended complaint alleged Chem-Mod's process of removing mercury from coal plant emissions is virtually identical to Nalco's and infringes its patent directly and indirectly by inducing plant operators to use Chem-Mod's process.



REUTERS/Charles Platiau

Nalco said the processes' sole difference is the location where the halide precursors are injected. Whereas Nalco's method injects the precursors into the furnace, Chem-Mod's method mixes the chemical with coal on feed belts before combustion occurs, the complaint alleged.

The District Court granted Chem-Mod's motion to dismiss the first amended complaint without prejudice, saying the processes differ not only as to how to apply the halide precursors — by either mixing them with cold coal or injecting them into flue gas — but also as to when the application should occur, either before or after combustion.

Nalco amended its complaint three times in 2015.

The second and third amended complaints asserted that the '692 patent does not restrict when, where or how the "injecting" step is performed. Nalco added as defendants 21 coal refineries that license Chem-Mod's

process. Nalco made similar allegations in its fourth amended complaint.

The District Court dismissed the fourth amended complaint with prejudice in April 2016. The judge ruled that because Chem-Mod's process injects the halide precursor before combustion, the company does not infringe Nalco's patent.

Nalco filed a motion for reconsideration in May 2016, which the District Court rejected.

### REVERSED AND REMANDED

In its appeal, Nalco disputed the District Court's interpretation of the term "injection," arguing that although Chem-Mod's process adds a halide precursor to cold coal before combustion, injection occurs when the mixture of coal and halide precursors is injected into flue gas in the furnace.

The chemical reaction that creates solid mercury particles then occurs in the furnace, the company said.

In siding with Nalco, the Federal Circuit said that at the pleading stage, the company was entitled to “all inferences in its favor.”

The meaning of the term “injection” as used in the patent should be determined after discovery, the panel ruled.

It reversed and remanded, saying Nalco adequately stated a claim for infringement of the “injecting” claim element.

The panel also said Nalco plausibly stated that the defendants specifically intended their customers to infringe the ‘692 patent and knew the customers’ actions would constitute infringement. **WJ**

**Attorneys:**

*Plaintiff-appellant:* William B. Farney and Cassandra Klingman, Farney Daniels PC, Georgetown, TX

*Defendants-appellees:* Joseph Evall, Paul J. Kremer and Richard Mark, Gibson, Dunn & Crutcher, New York, NY; Steven E. Feldman and Sherry L. Rollo, Hahn Loeser & Parks, Chicago, IL

**Related Filings:**

Opinion: 2018 WL 1055851  
Nalco’s opening brief: 2016 WL 7321491  
Defendants’ brief: 2017 WL 449854  
District Court opinion: 2016 WL 1594966

## CLEAN WATER ACT

# Tyson Poultry to pay \$2 million fine for Clean Water Act violation

**By Carin Ford**

A federal court has ordered Tyson Poultry Inc. to pay a \$2 million fine for violating the Clean Water Act after discharges from the company’s Monett, Missouri, plant killed more than 100,000 fish, according to a U.S. Justice Department statement.

The nation’s largest chicken producer also will serve two years’ probation and pay \$500,000 to remedy the damages under the terms of a plea agreement in the U.S. District Court for the Western District of Missouri, the statement said.

A storage tank at the company’s feed mill in Aurora, Missouri, leaked a highly acidic chicken feed ingredient in May 2014, according to the DOJ.

The company transported the spilled material about 20 miles to its Monett plant, where it was discharged into the sewers and municipal wastewater treatment system, killing 108,000 fish, the statement said.

Tyson Poultry also agreed to have an outside auditor examine its environmental compliance, conduct environmental training at all its facilities and improve its operating procedures to prevent similar accidents in the future, according to the DOJ.

The company is a subsidiary of Tyson Foods Inc. and is headquartered in Springdale, Arkansas, the statement said. **WJ**

**Related Filings:**

News release: 2018 WL 1069492

## WESTLAW JOURNAL ASBESTOS



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## D.C. judge tosses challenge to Trump's '2 for 1' executive order

By Michael Nordskog

A consumer watchdog, an environmental group and a union lack standing to challenge President Donald Trump's executive order requiring federal agencies to rescind two regulations for every new one issued, a District of Columbia federal judge has ruled.

**Public Citizen Inc. et al. v. Trump et al., No. 17-cv-253, 2018 WL 1129663 (D.D.C. Feb. 26, 2018).**

U.S. District Judge Randolph D. Moss of the District of Columbia dismissed the suit filed by Public Citizen, the Natural Resources Defense Council and the Communications Workers of America. He said they failed to adequately plead injury either to themselves or their members that would be traceable to the order.

"This is not to say that a plaintiff — or, indeed, that the present plaintiffs — will never be able to establish standing to challenge the executive order," the judge said, inviting the parties to argue whether he should grant leave to amend the complaint.

After a status conference March 1, the judge gave the plaintiffs until April 2 to submit a motion for leave to file an amended complaint.

### TRUMP ORDERS

Trump issued the order, titled "Reducing Regulation and Controlling Regulatory Costs," soon after his January 2017 inauguration. Exec. Order No. 13771, 82 Fed. Reg. 9339.

In addition to the "two for one" provision, the order requires that new costs imposed by regulations be offset by eliminating existing regulatory costs, and it limits the annual net costs of private compliance with certain regulations.

The Office of Management and Budget later issued guidance documents to clarify that the order applies only to "significant" regulatory actions that are likely to cost the economy at least \$100 million.

Public Citizen, the NRDC and the union filed suit in February 2017, seeking an injunction against enforcement of the order and the OMB guidance.

The complaint said the president's order exceeded his constitutional authority, violated a constitutional duty and directed government agencies to act beyond their statutory authority, posing harm to "countless Americans."

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In addition to the "two for one" provision, the order requires that new costs imposed by regulations be offset by eliminating existing regulatory costs.

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The defendants, including Trump and more than a dozen federal officials, filed a motion to dismiss May 12, challenging the plaintiffs' standing. The plaintiffs filed a motion for summary judgment three days later.

### LACK OF JURISDICTION

Article III of the U.S. Constitution limits federal court jurisdiction to cases and controversies, meaning disputes can be heard only if the plaintiff has "a personal stake in the outcome of the controversy" to warrant invoking that jurisdiction, Judge Moss said, quoting *Chamber of Commerce v. Environmental Protection Agency*, 642 F.3d 192 (D.C. Cir. 2011).

The plaintiff must therefore allege an actual or imminent "injury in fact," allege a causal connection between the injury and the defendant's conduct, and show that the injury can be redressed by a favorable decision from the court, the judge said, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Groups like the plaintiffs here can assert either "associational" standing on behalf of members or "organizational" standing for the group to sue in its own right, he said.

The judge found no plausible basis for associational standing, noting that the plaintiffs did not plead actual injury to members but instead proceeded on the more difficult "increased risk of harm" theory. Such risks come from the inevitable delay in new regulatory actions the executive order will cause, the plaintiffs said.

But "opening the courthouse to these kinds of increased-risk claims would drain the 'actual or imminent' requirement of meaning," Judge Moss said, quoting *Public Citizen Inc. v. National Highway Traffic Safety Administration*, 489 F.3d 1279 (D.C. Cir. 2007).

The judge also rejected the plaintiffs' argument that the order will chill their advocacy activities because it forces them to make "a disturbing Sophie's choice" to advocate for a regulation to help one group of citizens, knowing it will cause the repeal of two regulations that benefit other citizens.

The plaintiffs failed to show a likelihood they will suffer such injury or that it would be traceable to the executive order, he concluded.

The judge declined to enter a final disposition in the case, however, saying he will allow the parties to address whether he should grant leave to amend the complaint. [WJ](#)

#### Attorneys:

**Plaintiffs:** Scott L. Nelson, Allison M. Zieve and Sean M. Sherman, Public Citizen Litigation Group, Washington, DC; Patti A. Goldman, Earthjustice, Seattle, WA

**Defendants:** Brett A. Shumate, Daniel E. Bensing and Michael L. Drezner, U.S. Justice Department, Washington, DC

#### Related Filings:

Opinion: 2018 WL 1129663

Plaintiffs' motion for summary judgment: 2017 WL 4508642

Defendants' motion to dismiss: 2017 WL 4508644

First amended complaint: 2017 WL 4508636

# Maryland's MTBE suit against oil companies moved to federal court

By Conor O'Brien

Atlantic Richfield Co. has removed to federal court Maryland's lawsuit alleging the oil giant and more than 40 other companies contaminated the state's groundwater with gasoline products containing the chemical additive MTBE.

***Maryland v. Exxon Mobil Corp. et al., No. 18-cv-459, notice of removal filed, 2018 WL 987402 (D. Md. Feb. 14, 2018).***

Arco filed a notice Feb. 14 moving the lawsuit to the U.S. District Court for the District of Maryland, saying claims related to MTBE contamination may be removed to federal court under the Energy Policy Act of 2005, 42 U.S.C.A. § 7545.

Maryland's attorney general originally filed the complaint Dec. 13 in the Baltimore City Circuit Court, alleging the companies used MTBE (methyl tertiary butyl ether) in their gasoline despite knowing the additive is dangerous and likely to contaminate groundwater.

The lawsuit calls MTBE a "probable human carcinogen" and "the most dangerous component of gasoline when released into the environment."

The additive dissolves easily, spreads rapidly, does not naturally degrade and resists removal treatments, the complaint says.

In addition to Arco, the defendants include BP America Inc., Chevron Corp., Exxon Mobil Corp., Kinder Morgan GP Inc., Lukoil North America LLC, Shell Oil Co., Texaco Inc. and Valero Energy Corp.

## MTBE CONTAMINATION

MTBE is an oxygenate — a chemical that reduces carbon monoxide tailpipe emissions when added to gasoline.

Congress mandated the sale of oxygenated gasoline in 1992 amendments to the Clean Air Act, 42 U.S.C.A § 7412, but the defendants had been using it as "a cheap and profitable" additive since the 1970s, the complaint says.

In amending the Clean Air Act, lawmakers were responding in part to the defendants' "deceptive promotion" of MTBE gasoline as clean and environmentally friendly, according to the complaint. The companies knowingly understated its risks and provided false statements to the U.S. Environmental Protection Agency during a 1987 industry study of the additive's health effects, the complaint says.

In 1992, when Congress required gasoline sold in certain metropolitan areas to include at least 2.7 percent oxygen by weight, the concentration of MTBE in Maryland's gasoline already far exceeded that requirement, according to the complaint.

Of the hundreds of sites where the defendants' allegedly released gasoline products into Maryland's waters, the suit provides a sample of 41 sites, including Baltimore, Silver Spring and Frederick.



REUTERS/Mike Blake

***Arco is defending itself against Maryland's lawsuit alleging the company and others used MTBE in their gasoline despite knowing the additive is likely to contaminate groundwater.***

The companies are liable for the contamination as well as for failing to disclose MTBE's environmental hazards to regulators, the complaint says.

## STATE LAW CLAIMS

Maryland says the companies should be held strictly liable for defectively designing their products and marketing them without warning the public of MTBE's risks.

According to the complaint, certain defendants should also be held liable for engaging in an "abnormally dangerous" activity: storing MTBE gasoline in underground tanks.

The suit contains claims under theories of nuisance, negligence and trespass, and under Maryland's environmental statute, Md. Code Ann. Envir. § 4-401.

The state seeks to recover past and future costs to monitor and clean state waters, plus punitive damages, interest and attorney fees.

It also seeks an injunction requiring the companies to test for MTBE in all private and public wells, to remove any contamination they detect, and to investigate and clean plumes in the groundwater. **WJ**

### Related Filings:

Removal notice: 2018 WL 987402

Complaint: 2018 WL 987861

# New York power suppliers must face suits over Sandy fires, court rules

By Conor O'Brien

A lawsuit against two New York state entities and a utility alleging their responses to Superstorm Sandy caused fires and property destruction will proceed, despite the defendants' assertions that they are immune from liability, the state's high court has ruled.

**Connolly et al. v. Long Island Power Authority et al., Nos. 11, 12 and 13, 2018 WL 942321 (N.Y. Feb. 20, 2018).**

In a 5-0 decision, the New York Court of Appeals affirmed two lower courts' rulings denying the defendants' motions to dismiss, which argued that they are immune from suit because their actions before and during the storm were performed in a governmental capacity.

electricity to a service area, including the Rockaway Peninsula, powered by Long Island Lighting Co., which was then a privately owned utility, according to the high court's opinion.

LIPA acquired LILCO by legislative mandate and entered into a management services agreement with National Grid. The agreement requires the utility to operate electricity transmission facilities in the

panel of the New York Supreme Court Appellate Division, 2nd Department, with one judge dissenting.

In affirming, the majority opinion distinguished between "quintessential governmental functions," such as activities to protect the public under the state's general police powers, and "proprietary functions" that substitute or supplement traditionally private enterprises, such as road maintenance. *Heeran v. Long Island Power Auth.*, 141 A.D.3d 561 (N.Y. App. Div., 2d Dep't 2016).

The majority ruled the defendants were engaged not in governmental functions, but in an electric utility's "proprietary core functions" of providing electricity, and preparing electricity facilities for a hurricane.

The defendants filed another round of appeals, which the Court of Appeals consolidated.

## COURT OF APPEALS AFFIRMS

In affirming the lower courts' rulings, New York's high court noted that the doctrine

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The storm caused flood water to make contact with the defendants' electricity transmission facilities, causing short circuits, fires and property destruction, the plaintiffs claim.

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The Court of Appeals said it could not rule as a matter of law that the doctrine of governmental-function immunity applied because the defendants — Long Island Power Authority, Long Island Lighting Co. and National Grid Electric Services LLC — were likely providing a service that private entities traditionally provide.

In the aftermath of Sandy in 2012, dozens of business and property owners filed lawsuits in the Queens County Supreme Court. The suits alleged LIPA negligently failed to de-energize a section of southeastern New York City known as the Rockaway Peninsula before or after the storm made landfall.

The storm caused flood water to make contact with the defendants' electricity transmission facilities, causing short circuits, fires and property destruction, the plaintiffs claim.

They also say LIPA did not de-energize the area even after receiving notice of downed, live power lines.

## GOVERNMENTAL ACTIONS

New York lawmakers created LIPA in 1986 as a publicly owned power authority to supply

Rockaway Peninsula and elsewhere, the opinion said.

Arguing that their services fulfill a government function, the defendants filed motions to dismiss the property owners' lawsuits on the basis of governmental-function immunity.

The Supreme Court denied the motions in three orders. Each was affirmed by a divided



REUTERS/Stringer

Dozens of business and property owners alleged the defendants' failure to de-energize New York City's Rockaway Peninsula before or after Superstorm Sandy led to fires and property destruction. This photo shows one such fire that broke out in Breezy Point, Queens.

applies to bar claims against the state only if the state's actions alleged to have caused injury were government functions.

If the state's performance of a service traditionally performed by a private enterprise caused the injury, the entity may be subject to liability under ordinary tort law principals, the court said.

The Court of Appeals agreed with the lower courts that electricity transmission is a service traditionally provided by private entities in New York state, noting that the state created LIPA to replace an investor-owned utility.

The court rejected the defendants' argument that the doctrine bars the lawsuits because the claims relate to the traditional

government function of protecting the public from a natural disaster. [WJ](#)

**Related Filings:**

Court of Appeals opinion: 2018 WL 942321  
Appellate Division opinion: 141 A.D.3d 561  
Supreme Court opinion: 2014 WL 4092329

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## NATIONAL ENVIRONMENTAL POLICY ACT

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# Forest Service uprooted rules to limit review of logging plan, groups say

By Meera Gajjar

Environmentalists seeking an early resolution of their suit against the U.S. Forest Service over its failure to analyze the impacts of a logging project in California's Sequoia National Forest have filed a motion saying the agency violated federal law and departed from past practices.

***Earth Island Institute et al. v. Elliott et al., No. 17-cv-1320, plaintiffs' motion for summary judgment filed, 2018 WL 1046244 (E.D. Cal. Feb. 20, 2018).***

Earth Island Institute and Sequoia Forestkeeper moved for summary judgment Feb. 20, arguing that the USFS cannot justify its alleged violation of the National Environmental Policy Act, 42 U.S.C.A. § 4321, by shoe-horning the Bull Run timber salvage project into a "categorical exclusion" for road maintenance projects.

On Nov. 17, 2017, U.S. District Judge Lawrence J. O'Neill of the Eastern District of California declined to issue an injunction because the USFS said the project fell under a categorical exclusion for road maintenance. If that were true, the judge said, the 250-acre limit would not apply.

However, he declined to definitively identify the categorical exclusion applicable to the project because he could not determine whether the Bull Run project is a "true"

exclusion applied until after the plaintiffs filed this suit, the motion says.

Thus, the agency's application of the road maintenance exclusion reflects a "belated justification" for a previously approved salvage timber sale rather than a plan to perform road maintenance, according to the environmental groups.

### ALLEGED DEPARTURE FROM PRACTICE

The plaintiffs say the USFS has in the past applied the salvage project exclusion to roadside-hazard tree removal below the 250-acre cap and prepared environmental assessments for projects exceeding the cap.

The agency has unlawfully departed from its prior practice by relying on the road maintenance exclusion to avoid its NEPA duties, the motion says.

The environmental groups ask the court to vacate the agency's decision and require compliance with NEPA. [WJ](#)

**Attorneys:**

*Plaintiffs:* Rene P. Voss, Natural Resources Law, San Anselmo, CA; Matt Kenna, Public Interest Environmental Law, Durango, CO

**Related Filings:**

Summary judgment motion: 2018 WL 1046244

**See Document Section A (P. 17) for the motion.**

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The project aims to remove "hazard trees" damaged in the 2016 Cedar Fire from up to 3,500 acres along 50 miles of roadway outside the Giant Sequoia National Monument.

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The project aims to remove "hazard trees" damaged in the 2016 Cedar Fire from up to 3,500 acres along 50 miles of roadway outside the Giant Sequoia National Monument. It would also allow any commercially valuable logs to be sold as salvage wood.

In an earlier motion for a preliminary injunction, the plaintiffs argued that the agency needed to complete an environmental assessment or an environmental impact statement because the project exceeds the 250-acre limit prescribed by a categorical exclusion for salvage projects.

commercial salvage operation or a road maintenance project.

### SALVAGE LOGGING OR ROAD MAINTENANCE?

According to the plaintiffs, the USFS originally planned the Bull Run project as a commercial timber salvage sale that would require an environmental review under the National Environmental Policy Act.

Later the agency decided to use categorical exclusions to skirt the NEPA requirements, but it did not claim that the road maintenance

# New Mexico high court sheds light on when drilling operations ‘actually commence’

By Michael Nordskog

A dispute between oil and gas contractors over when drilling operations “actually commence” under their operating agreement can be resolved by using the date a drilling contract is signed, the New Mexico Supreme Court said in reversing a lower court’s summary judgment.

***Enduro Operating LLC v. Echo Production Inc. et al., No. S-1-SC-36225, 2018 WL 897360 (N.M. Feb. 15, 2018).***

The state high court said the defendant’s execution of a drilling contract before the operating agreement’s imposed deadline would establish “commencement” of the operation as a matter of law.

However, the plaintiff’s dispute of the drilling contract date created a genuine issue of material fact that could not be resolved through summary judgment, the court said.

## DEADLINE TO ‘ACTUALLY COMMENCE’ OPERATIONS

In 2006 Echo Production Inc. executed a joint operating agreement with other companies interested in participating in future oil and gas drilling projects. The agreement was adopted from a standard form provided by the American Association of Petroleum Landmen, according to the Supreme Court opinion.

Under the contract, Echo had to provide notice to the other parties before it commenced a new project, giving them 30 days to register their consent to participate and receive proceeds from the operation, or relinquish their interest in the well.

Echo then had another 90 days to “actually commence the proposed operation” under the terms of the operating agreement.

The total amount of time from notice to commencement of drilling was 120 days. Per the agreement, if a proposing party failed to “commence” the operation within that time, it had to resubmit its proposal and restart the time period.

On Dec. 1, 2010, Echo proposed to develop a new well in Eddy County, New Mexico. ConocoPhillips, a party to the joint operating agreement, opted out, and Enduro Operating LLC purchased Conoco’s nonconsenting interest in the well.

Echo did not start drilling within the 120-day limit, but it eventually tapped a producing well, the opinion said.

Enduro then sued Echo in the Eddy County District Court for breach of contract and violations of the state law governing payment of oil and gas proceeds.

The suit said Echo failed to timely commence operations and should have resubmitted the proposal. Enduro sought an opportunity to consent to the well and receive proceeds from it.

After the District Court granted summary judgment in favor of Echo, the New Mexico Court of Appeals reversed and remanded for entry of summary judgment in favor of Enduro based on Echo’s failure to secure a drilling permit by the deadline.

Echo petitioned for certiorari and the state Supreme Court agreed to review the decision.

## COMMENCEMENT BY DRILLING CONTRACT

The Supreme Court found the lower courts’ grants of summary judgment inappropriate, saying the suit presented a genuine issue of material fact as to whether Echo had commenced operations.

“A party has commenced operations if it engages in actions that demonstrate a present good-faith intent to diligently carry on drilling activities until completion,” the court said.

The court said actual drilling or obtaining a permit, while relevant to the determination, is not required.

A party can provide sufficient proof of commencement through drilling-site activities such as leveling the well location and off-site commitment of resources, including execution of an enforceable drilling contract, the court said.

The Supreme Court said Echo submitted evidence that it had surveyed the site, contracted with a drilling company, filed for a permit and consulted with a geologist about the well design, all of which would be relevant to a factual determination of the commencement date.

“If it is undisputed that Echo entered into a binding drilling contract before [the deadline], we would conclude as a matter of law that Echo actually commenced drilling operations,” the court said.

Noting Enduro’s contention that Echo’s signature on the drilling contract was not dated, the court said the issue must be resolved by a trier of fact. [WJ](#)

### Attorneys:

*Petitioners:* Edward R. Ricco, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, NM; Jared M. Moore and Terry W. Rhoads, Cotton, Bledsoe, Tighe & Dawson, Midland, TX; Cas. F. Tabor, McCormick, Caraway, Tabor & Byers, Albuquerque, NM

*Respondent:* Andrew J. Cloutier and Parker B. Folse, Hinkle Shanor LLP, Roswell, NM

### Related Filings:

Opinion: 2018 WL 897360

Court of Appeals opinion: 388 P.3d 990

**See Document Section B (P. 30) for the opinion.**

## Mountain Valley pipeline operator joins fight over project permit

By Conor O'Brien

A federal appeals court has allowed Mountain Valley Pipeline LLC to intervene in a new proceeding environmental groups filed against a federal agency that approved the company's proposed 300-mile natural gas pipeline through Virginia and West Virginia.

***Sierra Club et al. v. U.S. Army Corps of Engineers et al., No. 18-1173, order issued (4th Cir. Feb. 16, 2018).***

The 4th U.S. Circuit Court of Appeals granted Mountain Valley's unopposed request to intervene in the petition for review challenging a permit the U.S. Army Corps of Engineers issued to the company for the project.

Three of the petitioners — environmental groups Appalachian Voices, Chesapeake Climate Action Network and the Sierra Club — have already filed a number of petitions in the Court of Appeals, challenging various state and federal agencies' decisions to authorize the pipeline.

The Indian Creek Watershed Association and West Virginia Rivers Coalition also joined the groups in this petition disputing the Army Corps' permit, which authorizes Mountain Valley to discharge dredged or fill material into U.S. waters and wetlands.

The permit was issued under Section 404 of the Clean Water Act, 33 U.S.C.A. § 1344, and Section 10 of the Rivers and Harbors Act, 33 U.S.C.A. § 403.

The petition does not discuss the substance of the challenges but says it is filed under Section 19(d)(1) of the Natural Gas Act, 15 U.S.C.A. § 717r(d)(1), which grants circuit courts of appeal original and exclusive jurisdiction to review a federal agency's permitting decision.

The challengers' opening brief is due March 27, and the Army Corps and Mountain Valley must file response briefs by April 26, according to the 4th Circuit's briefing order.

### 4TH CIRCUIT CHALLENGES

One of the challenges to the pipeline that Appalachian Voices, Chesapeake Climate Action and the Sierra Club have filed seeks to vacate a decision by Virginia's Department of Environmental Quality to issue the company



REUTERS/Esam Omran Al-Fetori

**The petitioners are challenging various state and federal agencies' decisions to authorize a proposed 300-mile natural gas pipeline through Virginia and West Virginia.**

a water quality certification. *Sierra Club v. State Water Control Bd.*, Nos. 17-2406 and 17-2433, *opening brief filed*, 2018 WL 834332 (4th Cir. Feb. 12, 2018).

That challenge, which is also backed by conservationists, landowners and Virginia House of Delegates member Sam Rasoul, says the agency issued the certificate despite evidence that the pipeline will lead to "significant water-quality impacts."

Another challenge the Sierra Club and other environmental groups have filed asks the 4th Circuit to review the U.S. Bureau of Land Management's decision to grant Mountain Valley a permit and right of way to use federal lands in four Virginia and West Virginia counties. *Sierra Club Inc. v. U.S. Bureau of Land Mgmt.*, No. 18-1019, *petition filed* (4th Cir. Jan 4, 2018).

Appalachian Voices and the Sierra Club also filed a petition Dec. 6 seeking review of the U.S. Forest Service's decision to amend the forest plan for Jefferson National Forest

in Monroe County, West Virginia, to allow the pipeline to run through it. *Sierra Club v. U.S. Forest Serv.*, No. 17-2399, *petition filed* (4th Cir. Dec. 6, 2017).

The petitioners in these actions raise a number of claims, including that the Forest Service and the BLM relied on an environmental analysis that omitted vital data, in violation of the National Environmental Policy Act, 42 U.S.C.A. § 4321.

Mountain Valley has intervened in each of these petitions. **WJ**

**Attorneys:**

*Petitioners:* Joseph M. Lovett and Derek O. Teaney, Appalachian Mountain Advocates, Lewisburg, WV

*Intervenor:* Douglas J. Crouse and Robert G. McLusky, Jackson Kelly PLLC, Charleston, WV; Deirdre G. Duncan, Kevin S. Elliker and George P. Sibley III, Hunton & Williams, Richmond, VA

**Related Filings:**

Petition for review: 2018 WL 987404  
Motion to intervene: 2018 WL 987419

# Michigan property owners lose challenge to Park Service trail plan

By Michael Nordskog

Landowners who did not register their opposition with the National Park Service to a proposed trailway through Sleeping Bear Dunes National Lakeshore in Leelanau County, Michigan, cannot challenge the plan in federal court, a federal appeals court has ruled.

***Little Traverse Lake Property Owners Association et al. v. National Park Service, No. 17-1064, 2018 WL 1023018 (6th Cir. Feb. 23, 2018).***

The landowners failed to preserve their legal claims under the National Environmental Policy Act by falling silent after the Park Service revised its original plan to address their concerns, the 6th U.S. Circuit Court of Appeals said.

## PROPOSED TRAIL SYSTEM

In 2008 the NPS proposed a paved, nonmotorized trailway through the Sleeping Bear Dunes National Lakeshore on the shore of Lake Michigan.

Private landowners along one side of Traverse Lake Road, which borders the park, opposed the stretch of the proposed trail that ran along the road. Among their objections were expected increased road traffic and possible harm to nearby wetlands.

The NPS revised its plan for that portion of the proposed trail in 2009 to address the landowners' concerns by rerouting the trail from the road and using a boardwalk to protect wetland habitat.

The agency approved the route based on a finding of no significant impact after no objections were lodged, according to the 6th Circuit opinion.

## NEPA CHALLENGE

In 2015 the Little Traverse Lake Property Owners Association and individual landowners sued the NPS in the U.S. District

Court for the Western District of Michigan under the National Environmental Policy Act, 42 U.S.C.A. § 4321, and related federal regulations.

The plaintiffs said the agency's finding of no significant impact depended on an inadequate environmental assessment and the agency failed to consider available alternatives, among other arguments.

The District Court dismissed most of the suit on the basis that the plaintiffs forfeited their claims by failing to participate in the planning process to alert the Park Service of their objections to the 2009 plan. *Little Traverse Lake Prop. Owners Ass'n v. Nat'l Park Serv.*, 223 F. Supp. 3d 691 (W.D. Mich. 2016).

The court also dismissed the complaint's single preserved claim of failure to consider reasonable alternatives, finding it lacked merit.

The plaintiffs appealed.

## FAILURE TO PRESERVE CHALLENGES

A three-judge 6th Circuit panel agreed with the District Court that the plaintiffs failed to preserve most of their claims.

"To preserve a challenge to an agency action under NEPA, parties must timely speak up during the administrative planning process," the panel said.

Such participation alerts the agency to parties' positions and arguments to enable meaningful consideration, the opinion said, citing *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

"Plaintiffs' silence during the 2009 comment period did nothing to alert the Park Service to these concerns with respect to the 2009 trail plan," the panel said.

## ALTERNATIVE ROUTE CONSIDERATION

The 6th Circuit explained that the suit's claim of failure to consider reasonable alternatives was not forfeited because the Park Service's 2009 plan did not address the alternative route proposed by the landowners in response to the 2008 plan.

The District Court correctly determined that this claim nonetheless lacked merit, the panel said.

It noted that the plaintiffs' proposed trail terminated before it reached Traverse Lake Road and thus did not accomplish the plan's stated purpose of serving the last stretch of the national lakeshore in that area.

"Therefore plaintiffs' proposal was not a reasonable alternative that would require a detailed study and response by the Park Service," the opinion said, citing *Webster v. U.S. Department of Agriculture*, 685 F.3d 411 (4th Cir. 2012). [WJ](#)

### Attorneys:

*Appellants:* Graham K. Crabtree and Thaddeus E. Morgan, Fraser Trebilcock Davis & Dunlap, Lansing, MI

*Appellants:* Kevin W. McArdle, U.S. Justice Department, Washington, DC

### Related Filings:

6th Circuit opinion: 2018 WL 1023018  
District Court opinion: 223 F. Supp. 3d 691

# Monsanto seeks dismissal of Oregon's PCB suit

By Michael Nordskog

Monsanto Co. and its affiliates have asked an Oregon federal judge to dismiss the state's \$100 million suit over PCB pollution, saying the complaint fails to state a basis for relief and does not meet federal pleading standards.

***Oregon v. Monsanto Co. et al., No. 18-cv-238, memo supporting dismissal filed, 2018 WL 833101 (D. Or. Feb. 12, 2018).***

Monsanto, Solutia Inc. and Pharmacia LLC also say in papers filed in the U.S. District Court for the District of Oregon that the state's common law claims against the companies are thinly disguised product liability claims that are barred by the state's two-year statute of limitations.

The defendants removed the suit Feb. 5 from state to federal court under 28 U.S.C. § 1442(a)(1), which allows for removal of a civil action against a person or entity acting under "color" of an office or agency of the United States.

Monsanto says its predecessor company was acting under the direction of federal officers and agencies when it manufactured PCBs that were used in military equipment.

## STATE FILES \$100 MILLION SUIT

Oregon's attorney general filed the complaint in the Multnomah County Circuit Court in January, saying Monsanto is responsible for PCB pollution as it was the sole manufacturer of the substance from 1929 to 1977. The Toxic Substances Control Act banned PCB manufacturing as of 1979.

Solutia and Pharmacia took over Monsanto's chemical and pharmaceutical businesses in the late 1990s.

PCBs were widely used in commercial and industrial applications before 1979.

"Despite knowing as early as 1937 that PCBs were toxic to humans and animals and that PCBs could escape into and contaminate the environment, Monsanto manufactured and sold PCBs until they were finally banned under federal law," the complaint says.

The suit asserts five common law claims, including public nuisance, trespass and unjust enrichment.

Oregon seeks an order to abate the public nuisance, an order of restitution and at least \$100 million in damages.

Monsanto already faces PCB-contamination suits from the state of Washington and several West Coast municipalities, including Berkeley, Long Beach, Oakland, San Diego and San Jose in California; Portland, Oregon; and Seattle and Spokane in Washington.

The 1st U.S. Circuit Court of Appeals recently upheld the dismissal of a PCB-contamination suit a Massachusetts town filed under product liability law. *Town of Westport v. Monsanto Co.*, 877 F.3d 58 (1st Cir. 2017).

The appeals panel in that case said the company could not have reasonably foreseen the risks of using the chemical in construction materials.

## 'POORLY DISGUISED PRODUCT LIABILITY ACTION'

In their memo supporting dismissal, the defendants say the suit is fundamentally flawed.

"Oregon brings a poorly disguised product liability action against three alleged successors to a former U.S. manufacturer of [PCBs] that left the marketplace four decades ago and never manufactured or released the product within the state," the memo says.

The suit incorrectly assumes that all concentrations of PCBs in Oregon are actionable, according to the defendant, asserting that the U.S. Environmental Protection Agency, after rigorous assessment, has not ordered statewide remediation.

Moreover, the complaint makes a "sweeping false assumption" that Monsanto caused all PCB contamination in Oregon, the defendants say.

The suit also overstates Monsanto's knowledge of the hazards of PCBs and overreaches by claiming harm with respect to federal land, they say.

Finally, the complaint's assertion of common law claims seeks to skirt Oregon's statute of limitations regarding the state's product liability statute, the defendants say.

They point out that the suit disregards the fact that Monsanto is not a liable party in ongoing state and federal cleanup projects such as a Superfund site at Portland's harbor.

"The state seeks to upend Oregon law by radically expanding liability and circumventing existing product liability and cleanup regimes," the defendants say. [WJ](#)

### Attorneys:

Defendant: Richard K. Hansen, Schwabe Williamson & Wyatt, Portland, OR

### Related Filings:

Motion to dismiss: 2018 WL 833101

Notice of removal: 2018 WL 833467

## Border wall

CONTINUED FROM PAGE 1

said the judge was unfair and referred to him as a “Mexican.”

In his current 100-plus page opinion, the judge identified himself as a native of Indiana.

Emphasizing the limited role of federal courts in disputes over policy, he said judges are not entrusted with “protect[ing] the people from the consequences of their political choices,” quoting *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

### EXECUTIVE ACTION ON BORDER SECURITY

Trump issued an executive order shortly after his January 2017 inauguration, directing the U.S. Department of Homeland Security to allocate funds for a southern border wall, the centerpiece of his immigration policy.

Homeland Security announced in August that the first phase of construction will include replacement of 15 miles of fencing in San Diego County with a “prototype border wall.” 82 Fed. Reg. 35,984 (Aug. 2, 2017).

The agency asserted authority under Section 102(c) of IIRIRA, 8 U.S.C.A. § 1103, to waive dozens of federal laws, including the National Environmental Policy Act, Endangered Species Act, and the Comprehensive Environmental Response, Compensation and Liability Act, to ensure “expeditious construction” of barriers and roads.

### SUITS CHALLENGED WAIVER POWER

The Center for Biological Diversity filed the first of the three suits in June 2017 against the Homeland Security Department and U.S. Customs and Border Protection.

In September Defenders of Wildlife, the Animal Legal Defense Fund and the Sierra Club filed a second lawsuit, followed shortly by a suit from California and the state’s coastal commission.

The suits took issue with waivers that have allowed the government to circumvent public comments, interagency consultations and environmental impact statements for the project. They also challenged IIRIRA on separation-of-powers grounds.

Judge Curiel consolidated the litigation in October, and the parties all filed motions for summary judgment.

### ‘HEATED POLITICAL DEBATE’

“The subject of these lawsuits, border barriers, is currently the subject of heated political debate in and between the United States and the Republic of Mexico,” the judge said.

Courts are charged with interpreting the law and do not look to whether policy decisions are prudent or wise, the judge said.

“Our nation’s elected leaders ... can be thrown out of office if the people disagree with them,” he said.

### FEDS ACTING WITHIN DELEGATED POWERS UNDER IIRIRA

The plaintiffs failed to demonstrate that the government violated clear and mandatory statutory provisions by asserting IIRIRA’s

waiver provision, Judge Curiel said, noting the competing plausible interpretations of Section 102’s scope offered by the parties.

The judge also rejected the plaintiffs’ constitutional arguments, including their challenge to IIRIRA’s delegation of powers to the executive branch.

Congress can delegate powers if it provides an intelligible principal to guide affected agencies, he said, citing *Mistretta v. United States*, 488 U.S. 361 (1989).

IIRIRA clearly delineates a policy of deterring illegal crossings through additional physical barriers to improve U.S. border protection, the judge concluded.

Judge Curiel therefore granted summary judgment to the government on all claims aside from CBD’s assertion that the defendants violated the Freedom of Information Act, which was not subject to the competing motions. [WJ](#)

#### Attorneys:

*Plaintiffs (State of California):* Xavier Becerra, Robert W. Byrne, Michael Cayaban and Noah Golden Frasier, California Attorney General’s Office, San Diego, CA

*Plaintiffs (Environmental groups):* Gloria D. Smith, Sierra Club, Oakland, CA; Brett M. Paben, Defenders of Wildlife, Denver, CO; Anthony T. Eliseuson and Sarah K. Hanneken, Animal Legal Defense Fund, Portland, OR; Brian Segee, Brendan Cummings, Anchun Jean Su and John P. Rose, Center for Biological Diversity, Los Angeles, CA

*Federal defendants:* Galen N. Thorp, U.S. Justice Department, Washington, DC

#### Related Filings:

Opinion: 2018 WL 1071702

Green groups’ motion for summary judgment:

2017 WL 5760040

California motion for summary judgment:

2017 WL 5760186

## Glassmaker suit

CONTINUED FROM PAGE 1

to violate the company's civil rights under 42 U.S.C.A. §§ 1983 and 1985 by depriving it of its goodwill without due process.

Oregon's Department of Environmental Quality took action against Bullseye after a moss sample from trees near the company's facility revealed high levels of metals used in colored glass manufacturing such as arsenic and cadmium, the company says.

This discovery led the DEQ to warn the public not to consume produce grown near Bullseye's facility, recommend lead testing for children and impose stricter air quality standards on Bullseye through a memorandum of agreement, according to the complaint.

Bullseye claims its overall sales have decreased by 10 percent because the government portrayed it as a "reckless, renegade company" during the enforcement proceedings.

## DEFICIENCIES IN DUE PROCESS CLAIMS

Bullseye failed to state a claim for violation of due process under federal or state law because business goodwill is not a property right protected by due process, the state and county argue in their motions.

According to the state, the government's enforcement actions furthered its legitimate and compelling interest in protecting public health and the environment.

Thus, Bullseye cannot say state and county officials engaged in the type of egregious behavior that would "shock the contemporary conscience" and violate due process, the state says, citing *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

According to the state, Bullseye's claim that government officials conspired to violate its civil rights also fails because the company has not alleged that "racial or otherwise class-based, invidiously discriminatory animus" motivated the government to deprive Bullseye of its goodwill.

## RESPONSES TO 'RAMBLING' COMPLAINT

As an alternative to its motion to dismiss, the state moves for a more definite statement of Bullseye's due process claims, calling the company's 88-page pleading is too "vague" to enable the state to respond to it.

The county goes one step further, saying the court should dismiss Bullseye's suit because its "rambling" complaint violates Federal Rule of Civil Procedure 8, and additional pleading would not resolve the complaint's defects. **WJ**

### Attorneys:

*Plaintiff:* Allan M. Garten, Kent S. Robinson and Carrie Menikoff, GRM Law Group, Lake Oswego, OR

*Defendant (Oregon):* Carla Scott and Scott J. Kaplan, Oregon Department of Justice, Portland, OR

*Defendant (Multnomah County):* James G. Rice and Jacqueline S. Kamins, Multnomah County Attorney's Office, Portland, OR

### Related Filings:

State's motion to dismiss: 2018 WL 1046316

County's motion to dismiss: 2018 WL 1046321

Complaint: 2017 WL 6336820



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