# 2018-2019 CERCLA UPDATE

Caleb Holmes | holmesc@gtlaw.com | 215.988.7877



## Topics

- EPA's Superfund Focus
- Taxes!
- Case Law Review

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## Update on Superfund Task Force Goals

- Expedite Cleanups
  - 21 Sites on the "Emphasis List"
  - Delisted 22 Sites from NPL
- Encourage private investment
  - Redevelopment Focus List: 31 Sites
  - New policy encourages Bona Fide Prospective Purchaser Agreements and Prospector Purchaser Agreements – BUILD ACT
- Set to "conclude implementing the Superfund Task Force recommendations in 2019"



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## Section 162(f) of the Internal Revenue Code

- 2017 Tax Cuts and Jobs Act ("TJCA") restricts scope of deductible payments for "fines and penalties" paid to the government for the violation of any law
  - Non-CERCLA context: must identify payments for "restitution" or "compliance payment" in relevant court order or settlement agreement
    - *US v. Columbian Chemical Company*
  - CERCLA context: EPA's stated position is that new law should not apply to the majority of CERCLA settlements because liability not dependent on violation of law

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## *Giovanni et al. v. U.S. Department of the Navy*, 906 F.3d 94 (3d Cir. 2018)

- Residents sue under HSCA to require health effects study and medical monitoring for PFCs in drinking water from Navy's facilities/CERCLA sites
- District Court: assessing public health is "integral part" of remedial action so Plaintiffs are preempted
- Section 113(h): Removes jurisdiction for challenges to a remedy—interferes with, calls into question, alter the terms of, or delays a CERCLA remedy
- Agency for Toxic Substances and Disease Registry ("ATSDR"): purpose is compile health effects info so its activities are response actions



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## *Giovanni et al. v. U.S. Department of the Navy*, 906 F.3d 94 (3d Cir. 2018)

- Private Party Medical Monitoring
  - Not a removal action: monitoring of individuals not included in definition
  - Not a remedial action: not taken to prevent or minimize release of hazardous substances
  - Order compelling Navy to pay for private party medical monitoring is not a "challenge"
- Government-led Health Assessment or Health Effects Study
  - Because ASTDR has authority to conduct health assessments, an order would inferfere with a CERCLA response action
- Sovereign Immunity
  - RCRA section 6001(a) waives state law claims for injunctive relief

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## *Atlantic Richfield v. Christian, 17-1498 (U.S.)*

- State law restoration claim at Anaconda Smelter Site
- District court: Dismissed MSJ that claim was barred by CERCLA
- Montana Supreme Court: claim doesn't conflict with CERCLA cleanup
- Restoration damages allow (if possible) property owner to restore property to non-contaminated state
- In May 2018, a petition for writ of certiori



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## *Atlantic Richfield v. Christian, 17-1498 (U.S.)*

(1) Whether common law claim for restoration seeking cleanup remedies that conflict with EPA-ordered cleanup is barred by section 113;

(2) Whether a landowner at a Superfund site is a PRP that must seek EPA approval under section 122(e)(6) before remediating, even absent an order;

(3) Whether CERCLA pre-empts common-law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies.

- The Supreme Court invited the Solicitor General to file a brief in October 2018

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## *Valbruna Slater Steel Corp. v. Joslyn Mfg. Co.*, 298 F. Supp. 3d 1194 (S.D. Ind. 2018)

- Phase I: § 107(a) claim: prior owner (Joslyn) liable for current owner's (Valbruna) cleanup costs
- Phase II: § 113(f) contribution counterclaim
  - Prior owner operated steel manufacturing facility
  - Current owner purchased at auction
- Gore Factors Analysis
  - Whose waste, amount, toxicity, involvement of the parties (in disposal etc), degree of care, degree of cooperation
  - Fact-intensive Inquiry



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## *Valbruna Slater Steel Corp. v. Joslyn Mfg. Co.*, 298 F. Supp. 3d 1194 (S.D. Ind. 2018)

- Valbruna knew of environmental issues prior to purchase
- Discounted sale price because of contamination?
- Full extent of contamination unknown
- 75% to Joslyn and 25% to Valbruna

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## *Mission Linen Supply Co. v. City of Visalia*, No. 1:15-CV-672 (E.D. Cal. Feb 5, 2019)

- Mission and prior owner used PCE in dry cleaning operations
- City operated faulty sewers and knew of PCE exceedances for years
- Allocation: 50/50 (and City must bear cost of replacing sewers)
  - Knowledge: Mission (and prior owner) were unaware that operations were causing significant PCE plume whereas City knew of PCE in sewers and didn't act
  - Fault:
    - Mission released PCE but used state-of-the-art equipment
    - City: leaky sewers, no maintenance, no action
- Evaluated all factors and decided that "geographic features of the PCE Plume generally provide an equitable basis for allocating responsibility"



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## *Wisconsin Central LTD. V. Soo Line R.R. Co.*, :16-cv-04271(N.D. Ill. Dec. 19, 2018)

- Breach of Contract case: Asset Purchase Agreement required WCL to indemnify Soo Line for defense and settlement of CERCLA claims brought by EPA against Soo Line
- WCL sought to have CERCLA-based allocation of settlement payments
  - Although both parties may be PRPs an allocation analysis is inconsistent with APA

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## *Trinity Industries v. Greenlease Holding Co.*, 903 F.3d 333 (3d Cir. 2018)

- Greenleaf and Trinity prior owners of railcar manufacturing facility
- District court determined allocation percentages based on a number of factors
- Third Circuit: district court abused its discretion
  - "speculative allocation methodology" used by district court – didn't execute the methodology it purported to use
  - Parties put district court in "unenviable position" with extreme positions
  - Mixed up units of measurement (treated data measured in square feet as equivalent to data measured in cubic yards)
  - Volumetric approach must track remediation costs



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## Liability for Costs of Investigation/Attorneys' Fees: *Pakootas v. Teck Cominco Metals*, 905 F.3d 565 (9th Cir. 2018)

- Liability for "all costs of removal or remedial action" under section 107(a)(4)(A)
- Tribe's costs of investigation, including activities supporting litigation efforts were recoverable—"low bar to satisfying these definitions of 'removal'"
- Tribes also could recover attorneys' fees, applying prior decision to all governmental entities listed in section 107(a)(4)(A)

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## *PADEP v. Trainer Custom Chem.*, 906 F.3d 85 (3d Cir. 2018)

- Trainer purchased property off of tax repository list after PADEP had incurred $818,000 in cleanup costs. Trainer demolished buildings, resulting in additional contamination
- District Court: Trainer not liable for response costs incurred before purchase
- Trainer liable for cleanup costs incurred prior to acquisition of property
- No "temporal limitation" to liability for "all costs" of removal and/or remedial actions



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## Questions?